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Foreword

This issue of MarIus contains three selected master theses written by our LLM students over the last couple of years. The theses cover a range of topics, comprising:

- Voyage chartering and the distinction between demurrage and damages for detention under English law, written by Stefania Nigro;
- EU-competition law and the general prohibition against anti-competitive cooperation in the liner trade, in light of certain practices of cooperation among the players in that trade, written by Asbjørn Østby;
- Demolition of ships and working environmental law, analysing whether family members of a deceased workman are covered by the English tort law criteria of duty of care when suing in damages against a former agent of the shipowner who sent the ship for demolition, written by Luna Linnemann

The topics illustrate the width of areas attracting our students' interest, while at the same time demonstrating important areas forming part of the Institute's portfolio of research and education. We congratulate the authors on their achievements!

At the same time this issue of MarIus forms a benchmark in that it is the first issue in our newly established platform of open access e-publications. Paper is in the past!

Trond Solvang

What does demurrage liquidate?

The recoverability of damages above demurrage in light of *the Eternal Bliss*

Stefania Nigro

Preface

The present thesis was written in completion of a Master in Maritime Law (LL.M.) at the Scandinavian Institute of Maritime Law, at the University of Oslo. The thesis is here published as it was submitted in December 2022, with only minor orthographic corrections and adaptations.

The dissertation deals with the interpretation of demurrage clauses in voyage charterparties under English law, and notably, whether demurrage clauses liquidate all or just some of the damages arising from a charterer's breach in failing to complete cargo operations within the laytime. This issue has divided practitioners and academics for decades and was recently put to the forefront of the legal debate by *the Eternal Bliss*, a case set to be decided by the UK Supreme Court later this year, but which was finally dismissed due to a settlement between the parties in May 2023. Nevertheless, the issue at stake in the case remains highly relevant for market actors, as delays in port are frequent and entail significant consequences for those operating in the shipping industry. Thus, the legal analysis performed by the Court of Appeal, which is the main object of analysis of the present thesis, should therefore remain of interest.

Throughout my work on the dissertation, I have been fortunate to discuss *the Eternal Bliss* with a number of practitioners and academics, all of whom have been of great help. Special thanks go to professor Trond Solvang, who has provided useful insights and remarks throughout the whole writing process. The present work would not have been the same without his invaluable guidance.

Stefania Nigro

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1 Introduction

Delays in ports have always constituted a common occurrence in the shipping business. Going back in time, one could mention that, during the 1970s, it could take up to six months to discharge cargo in certain Middle East ports. Similarly, during the coal boom in the 1980s, bulk carriers would wait multiple months before being able to load coal at Baltimore and Hampton Roads.[1]

In more recent times, the disruptive consequences of delays have come to the forefront during the Covid-19 pandemic. The pandemic – and specifically the various measures and quarantine procedures adopted by national governments to limit the spread of the virus – have significantly affected shipping services. Several ports worldwide have been closed, giving rise to delays in cargo operations, which in turn have impacted the performance of shipping contracts, increasing surcharges and port fees as well as demurrage and detention fees.[2]

For those operating in the shipping business, port delays are costly. To spread the risk of such delays, a functional shipping contract will require a precise risk allocation. This is where, in the context of voyage charterparties, the provisions of laytime and demurrage come into play.

In voyage charters, the parties frequently agree that loading and discharging are the charterer's responsibility[3] and that he shall have a certain amount of time at his disposal for completing such operations. This amount of time is known as "laytime". Laytime is commonly defined as *"the period of time agreed between the parties during which the owner will make and keep the Vessel available for loading or discharging without payment additional to the freight."*[4] In commercial terms, laytime may be considered the amount of "port time" for which the charterer has paid.

When laytime is exceeded, the contract normally stipulates that the charterer has to pay so-called "*demurrage*". Demurrage is generally defined as

> "*an agreed amount payable to the Owner in respect of delay to the vessel beyond the laytime for which the Owner is not responsible.* [...]"[5]

Simply put, demurrage is a sum of money paid by the charterer to compensate the owner of the vessel when the agreed laytime is exceeded.

In these terms, the concept appears easy to grasp. The issue, however, becomes more intricate when delays in cargo operations have further consequences, which are not strictly limited to the owner being prevented from using the vessel, but are nonetheless a result of the delay. A significant example of such a loss is the deterioration of the cargo on board of the vessel. It is such a loss that was at the origin of the recent English case of *the Eternal Bliss*.[6]

For such losses, it becomes essential to understand whether demurrage, i.e., the "agreed amount payable" in respect of a delay, merely remunerates the owner for the detention of the ship, leaving other damages to be assessed at large, or

1 This data is taken from Stopford M., p. 183.

2 For more details, see "Review of Maritime Transport 2021" published on 18 November 2021 (UNCTAD/RMT/2021).

3 It is assumed throughout this dissertation that the charterer is responsible for loading and discharging the cargo. See Tiberg, p. 34, para 1-03, where the author states that the charterer is usually considered the nearest party to bear the risks closely linked to the conditions of the ports.

4 See "Laytime Definitions for Charter Parties", 2013, clause no. 5, available at https://www.bimco.org/contracts-and-clauses/bimco-contracts/laytime-definitions-for-charter-parties-2013#.

5 *Ibidem*, clause no. 30.

6 [2020] EWHC 2373 (Comm); [2021] EWCA Civ 1712.

rather, whether it covers the entirety of the damages that arise from the delay. In the latter case, the owner would be precluded from claiming damages above demurrage regardless of his actual losses. To this day, these issues remain unclear under English law.

The present thesis aims at bringing clarity into the matter of how demurrage clauses should be construed under English law. The goal of the thesis is thus to answer the question of "*What does demurrage liquidate*?". This question was at the core of *the Eternal Bliss*. The case, which was decided differently by the High Court and the Court of Appeal, was originally granted permission to appeal to the English Supreme Court.[7] However, and to the disappointment of those hoping for a long-awaited legal clarification on the issue, the appeal was finally dismissed due to a commercial settlement between the parties in May 2023. Nonetheless, the decision of the Court of Appeal, which is the main object of analysis of this thesis, remains an important legal source when seeking to determine the ultimate nature of demurrage.

This thesis will focus on demurrage under the lens of English law. There are several reasons why the English law perspective is significant. Firstly, even though the shipping sector is highly international, English law decisions are read and taken into account in a high number of countries. In addition, there are several common law jurisdictions, such as Singapore, Australia, and Hong Kong, that rely on or follow the guidance of English law decisions.

Secondly, English arbitration has become a feature of many contracts of carriage. English law is therefore frequently adopted as the governing law in international commercial contracts. This may be seen as a natural consequence of the fact that shipping contracts are based on English standard models or, in any event, mainly are written in English. As a consequence, the contracts usually contain English terms that can only be fully understood on the background of the developments in English law.[8]

How demurrage clauses are understood under English law could therefore potentially impact not only common law jurisdictions relying on English law but, more generally, how demurrage clauses are written worldwide.

The thesis is composed of three parts: Chapter 2 will present a general overview of demurrage clauses in voyage charterparties governed by English law. The chapter will attempt to elucidate how these clauses fit into the broader context of a voyage charterparty. The last two parts are devoted to the above-listed objectives of the dissertation. Chapter 3 will analyse in detail the decisions in *the Eternal Bliss*, which has recently put the issue of demurrage to the forefront of the legal debate, as well as presenting the position of previous case law on the matter. The objective is to ascertain what is the common understanding of demurrage – if any – under English law. Lastly, Chapter 4 will attempt to present certain remarks regarding the commercial impact of the decision.

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7 See https://www.supremecourt.uk/news/permission-to-appeal-july-august-2022.html.

8 See Tiberg, p. 6; See also Cordero-Moss, i.a. p.141 and ff., for a discussion on the consequences of the use of English language and of models developed in English in international commercial contracts.

2 Demurrage in voyage charterparties

2.1 Introductory remarks

The significance and characteristics of the demurrage provision are first and foremost determined by the nature of the voyage charterparty itself. Before analysing the ultimate nature and function of a demurrage clause, it is therefore important to understand how this clause fits into the broader scheme of a voyage charterparty.

Certainly, one must bear in mind that the rights and obligations of the parties will ultimately rest on the construction of the particular contract they have entered into.[9] The contract will lay down the parties' risk allocation and it is this allocation, rather than any a priori classification of the contract as a voyage charterparty, that will be decisive. Nevertheless, a certain uniformity exists in the basic framework of a charterparty, and it may therefore be useful to identify its main elements.

2.2 The risk of delays under voyage charterparties

2.2.1 Basic features of a voyage charterparty

Chartering, in particular voyage chartering, is the most ancient way of employment of commercial ships. A *voyage charterparty* is a contract whereby the owner of a vessel provides a charterer with the services of a vessel (and crew) for the performance of a single voyage or a number of consecutive voyages, between designated places of loading and discharging.

Under a voyage charter, the owner undertakes payment of fuel and supply costs, the costs of operation and maintenance of the vessel, port and stevedoring charges (if the contract is on f.i.o. terms), and employment-related costs for the crew. In return, the charterer furnishes the agreed cargo and pays the stipulated freight.

Freight is generally calculated as a lump-sum or as a function of the weight, quantity, or volume of cargo. What is remarkable when investigating the risk allocation is that the owner is paid an agreed freight for the single voyage or for consecutive voyages regardless of the time it takes to perform them. This feature hints that, in principle, time is not a concern for the charterer in a voyage charterparty. Rather, it is the shipowner who bears the commercial risk of delays occurring during the voyage.

In the event of delays, the owner will receive the same amount of freight for the specific voyage while being prevented from using the vessel for ensuing voyages. For this reason, the owner wants to ensure that he only bears the risk for the average amount of time spent in transport, which is under his control. He does, however, not want the risk of the charterer being slow in completing cargo operations, when the latter are the charterer's responsibility, or the port being overcrowded. Allocating the risk of delays in port is thus of essence in voyage charterparties.

2.2.2 The allocation of risk during the four stages of a voyage charter

The allocation of risk for delay may be elucidated starting by identifying four essential stages of a voyage charter party, as Lord Diplock pointed out in *Johanna Oldendorff*:[10]

9 Bennet, H., p. 540.
10 [1974] A.C. 479 at 556.

1) *the loading voyage, viz. the voyage of the chartered vessel from whenever she is at the date of the charter party to the place specified in it as the place of loading.*
2) *the loading operation, viz. the delivery of the cargo to the vessel at the place of loading and its stowage on board.*
3) *the carrying voyage, viz. the voyage of the vessel to the place specified in the charterparty as the place of delivery.*
4) *the discharging operation, viz. the delivery of the cargo from the vessel at the place specified in the charterparty as the place of discharge and its receipt there by the charterer or other consignee.*

The conclusion of each of these stages determines the moment in which the risk is transferred from the owner to the charterer and vice versa.

Delays at sea, i.e., during the loading and carrying voyage (stages 1 and 3), are in essence a risk of the shipowner. The voyage is under the shipowners' control, and he will therefore generally bear the risk of any delay occurring during these voyages.

Unlike the loading and carrying voyages, loading and discharging operations (stages 2 and 4) will generally require cooperation from the charterer. Delays in port may be caused for instance by the charterer's failure to find an available berth or to provide the necessary documentation due, for instance, to documents getting caught in the banking chain. To avoid that such risks are completely allocated to the owner, the charterparty will normally contain a laytime-demurrage mechanism.[11]

Once laytime starts running, the risk of delay is shifted to the charterer. Further, if laytime is exceeded, demurrage intervenes and places on the charterer the risk of any delay beyond the stipulated lay days.

To encourage charterers to bring cargo operations to an end as quickly as possible, many charterparties establish that if cargo operations take less than agreed, the charterers are entitled to "*despatch*", i.e., a payment by the owner, usually set at half of the daily demurrage rate.

2.2.3 Comparison with time charterparties

The allocation of risk for delay is significantly different in time charterparties. In a time charter, the shipowner places his vessel at the charterer's disposal for the stipulated charter time. The charterer, thus, leases the vessel for a period of time and pays hire on an ongoing basis to the shipowner in return for the use of the vessel. The owner retains the technical management of the ship, while the commercial management of the vessel lies in the hands of the charterer.

The cost allocation between the owner and the charterer is different and somehow more balanced here – the owner pays for capital costs and operating expenses such as employment and insurance costs of the ship, while the charterer undertakes costs for bunkers, and usually port, canal dues and stevedoring, as well as other expenses connected with the operation of the vessel.[12] The reason for this different allocation of costs relies on the fact that the vessel is completely at the charterer's disposal.

In principle, the risk of delay (both at sea and in port) is thus clearly allocated to the charterer in a time charterparty. A delay in cargo operations will cause the charterer to enjoy a less efficient use of the vessel and to suffer increased operational costs (voyage costs, port fees, bunkers, etc.). Therefore, and once again to mitigate the allocation of risk which naturally follows from the structure of

[11] See the definitions of "laytime" and "demurrage" in the Introduction.

[12] For a more detailed description on how costs are divided between owner and charterer under voyage- and time charterparties, see Stopford, M., p. 182.

the contractual relationship, a time charterparty will normally contain an off-hire clause. When one of the events listed in off-hire clauses materialises, typically preventing the efficient and full working of the vessel, the charterer will be exempted from his obligation to pay hire. The risk of these events is thus shifted to the owner.

Protecting themselves against risks connected to delays is crucial for shipowners and charterers under voyage and time charters respectively. Since the parties enjoy freedom of contract, they may freely allocate the risk of delay between themselves. The objective of balancing or overcoming the risk of delay may be achieved through a demurrage clause in the voyage charterparty or with off-hire clauses in time charterparties.

2.3 Brief overview of demurrage standard clauses

Under English law, demurrage is always a contractual creation[13] and may, in practice, present various formulations.

As a starting point, the period for claiming demurrage therefore depends on what the parties have agreed in the contract. For instance, they may agree on a specific number of days to count as demurrage, i.e., "ten working days".[14] This wording has recently given way to a more open formulation which only provides for a rate for demurrage, leaving the period unspecified. This formulation is frequently encountered in standard forms used in the shipping business.

The use of standard forms carries the advantage of rendering commercial transactions faster and reducing costs. The parties will, therefore, unlikely modify substantially the formulation of the clauses as provided for in standard forms.

A relatively standard example of a demurrage clause can be found, for instance, in the tanker voyage charterparty Asbatankvoy – a standard charterparty for the gas tanker trade. Here, the demurrage clause is formulated as follows:

> "*Charterer shall pay demurrage per running hour and pro rata for a part thereof at the rate specified in Part I for* ***all time that loading and discharging and used laytime as elsewhere herein provided exceeds the allowed laytime*** *elsewhere herein specified*. [...]".[15] (emphasis added)

Similar clauses can be found e.g., in Gencon (2022), which is used in a variety of trades, and Shellvoy 5 (1996).

As it appears, demurrage clauses tend to define how demurrage is calculated — or its duration in case the parties agree on a limited number of days on demurrage. However, the wording will seldom provide direct guidance on what losses demurrage is supposed to cover. Thus, the demurrage clause quoted above does not clarify whether demurrage is an exclusive remedy for the entirety of the consequences arising from the detention of the vessel after laytime has expired, or whether additional damages can be claimed when delays in loading and/or discharging have caused further consequences.

As the parties do not usually modify the standard formulation, except by indicating the amount payable in the specific contract, reading demurrage clauses

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13 In other systems demurrage may be prescribed by law or customs. For further discussions, see Tiberg, p. 512 and ff.

14 This formulation can be found in Gencon 1976, where demurrage is defined in clause no. 7 as "*ten running days on demurrage at the rate stated in Box 18 per day or pro rata for any part of a day, payable day by day, to be allowed Merchants altogether at ports of loading and discharging*", see https://www.bimco.org/-/media/BIMCO/Contracts-and-Clauses/Contracts/Sample-copies/Sample-copy-GENCON-76.ashx. This wording has been abandoned in the revised version of Gencon 1994 and in the latest 2022 version.

15 See http://www.petrogas.es/transporteatk/pdf/asbatankvoy.pdf.

inserted in a particular charterparty may often be of little help in construing the provision. This aspect appears evident also in *the Eternal Bliss*, cf. Chapter 3 below.

To understand what demurrage indeed liquidates, it is therefore of the essence to supplement the demurrage clause on the basis of other sources of law, the broader risk allocation between the parties to the charterparty and the commercial understanding of demurrage.

2.4 Classification of demurrage as a contractual term under English law

2.4.1 Introduction

The nature of demurrage under English law has been the subject of discussion for decades. The definition of demurrage as "*an agreed amount payable to the Owner in respect of delay to the vessel beyond the laytime for which the Owner is not responsible*", as presented in the Introduction, does not indicate whether or not a failure to complete loading and discharging within the stipulated laytime in itself constitutes a breach of the charter, and this aspect has previously been unclear under English law.[16]

The way in which demurrage clauses are phrased goes hand in hand with how the understanding of demurrage as a contractual term has evolved over the years, going from being understood as "extended freight" to today's view of demurrage as "liquidated damages". This evolution provides useful background for the analysis of the issue presented by *the Eternal Bliss*.

2.4.2 The evolution from extended freight to liquidated damages

As anticipated above, there essentially exist two frequent formulations of demurrage: A fixed time on demurrage, on the one hand, and an agreed rate, without a definite period being specified, on the other.

In the earlier days, the parties used to indicate a fixed period on demurrage, i.e., "ten working days". The consequence of such wording was that, once the predetermined period had expired, the owner was prevented from claiming demurrage from then on. After the demurrage period had elapsed, the owner could only make a claim for the detention of the vessel.[17] This type of formulation suggests that demurrage is a payment for the use of the vessel for an extended period of laytime. It, therefore, reflects the understanding of demurrage as 'extended freight' rather than as damages for breach of the charterparty.

In this regard, the dictum of Lord Trayner in *Lilly v Stevenson* is significant. He states that

> "*days stipulated* [...] *on demurrage are just lay days, but lay days that have to be paid for. If a charterparty provides that the charterer shall have 10 days to load cargo, and 10 days further on demurrage at a certain rate per day, the shipper has 20 days to load, although he pays something extra for the last 10.* [...]"[18]

Eventually, the parties generally opted for not indicating a specific duration of demurrage but only an agreed rate, leaving the period unspecified. This formulation remains more common nowadays, as can be observed from the Asbatankvoy clause presented above.

16 Schofield, p. 439.

17 The claim for detention will follow the usual test. Damages will thus have to compensate the owner for his actual loss and will be subject to ordinary rules of remoteness and causation. The burden of proving the actual loss suffered lies on the owner. See J. Cooke et al., p. 448.

18 (1895) 22 R. 278.

In the early twentieth century, however, the view of demurrage as extended freight was eventually set aside under English law. In the first instance judgement in *Aktieselskabet Reidar v Arcos,*[19]Greer J indicated that the view expressed in the dictum of Lord Trayner in *Lilly v Stevenson* was no longer suitable. On the contrary, the failure to complete loading or discharging within the fixed time constituted a breach of contract by the charterer which entitled the owner only to claim damages.[20]

Demurrage then started to be conceived as "agreed damages" to be paid as a consequence of the delay in completing cargo operations beyond the predetermined period. The dictum of Lord Brandon in *The Lips* is authoritative in this context. Here, demurrage is described as follows:

> "I deal first with what demurrage is not. It is not money payable by a charterer as the consideration for the exercise by him of a right to detain a chartered ship beyond the stipulated lay days. If demurrage were that, it would be a liability sounding in debt. **I deal next with what demurrage is. It is a liability in damages to which a charterer becomes subject because, by detaining the chartered ship beyond the stipulated lay days, he is in breach of his contract**. Most, if not all, voyage charters contain a demurrage clause which prescribes a daily rate at which the damages for such detention are to be quantified. The effect of such a clause is to liquidate the damages payable: it does not alter the nature of the charterer's liability, which is and remains a liability for damages, albeit liquidated damages. In the absence of any provision to the contrary in the charter the charterer's liability for demurrage accrues de die in diem from the moment when, after the lay days have expired, the detention of the ship by him begins. These propositions of law are so well established that the citation of authority for them is perhaps unnecessary."[21] (emphasis added)

It is now almost undisputed that the charterer generally has no contractual right to delay the vessel beyond laytime and pay demurrage accordingly. If the charterer delays the vessel beyond lay days, he is in breach of contract[22] and, specifically, of the "laytime warranty".[23]

2.4.3 Is demurrage limited to a reasonable period of time?

An issue that may arise in the presence of an unlimited-days wording is where a limit is to be found after which demurrage can no longer be claimed. In the beginning, when moving from a clause stating limited days on demurrage to one contemplating an unlimited period of demurrage, only fixing an agreed rate, certain English authority affirmed that it was implied that demurrage runs for a "*reasonable*" period of time.[24]

This view has since been set aside. The current view is that the owner may claim demurrage until i) loading or discharging operations are ended, ii) the delay is so protracted as to frustrate the contract, or iii) the contract becomes repudiated by

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19 *[1926] 25 Ll L Rep 513, Vol. 25-31.*

20 *Ibidem,* at 31.

21 [1987] 2 Lloyd's Rep 311, at 315.

22 See e.g. [1962] 2 Lloyd's Rep 175; [1964] A.C. 868 at 191 and 899. See also Todd, p. 132 or Scrutton, para 15-004, p.382.

23 Under English law, the obligation to load and discharge within the laytime has been classified by the vast majority of English authors as a warranty, see e.g. Schofield, p. 447 para 6.31. Breach of a warranty is generally not repudiatory and does not give the right to the owner to terminate the contract or to affirm it. The only remedy available for the non-breaching party will be damages.

24 See (1895) 22 Rett 278.

one of the parties, with acceptance by the other party.[25] The owner will thus not be entitled to claim damages at large after a "reasonable" time on demurrage has expired.[26]

2.4.4 Practical implications of the legal classification of demurrage

The classification of demurrage in one way or another may seem more interesting from an academic point of view rather than from a commercial perspective. However, it could have several practical consequences.

On the one hand, if demurrage is conceived as "extended lay days", the sum agreed as demurrage aims at giving the charterer the contractual right to detain the vessel against the payment of a predefined sum, in this way compensating the owner for the amount of time he is prevented from exploiting the vessel's earning capacity. Such compensation is paid on a strict-liability basis and functions as an extension of the freight. In such a scenario, if additional and independent damages arise as a consequence of the delay, they will most likely be recoverable, as demurrage will be conceived, in essence, as a debt claim rather than a claim for damages for breach of contract.

If, on the other hand, demurrage is considered liquidated damages for breach of the charterparty, as ultimately affirmed under English law,[27] it will function as a pre-estimate of the loss the owner would suffer if the charterer breaches the laytime provision. In this case, one has to clarify what kind of losses are included in the pre-estimate that the parties agree on as demurrage. This understanding is essential in order to ascertain whether and to what extent damages over and above demurrage are potentially recoverable.

However, as it will appear from the following, even classifying demurrage as liquidated damages does not answer the question of whether other damages may be recovered in addition to demurrage when a single breach of the charterparty, namely the exceeding of laytime, causes further losses than the loss of time directly connected to the concept of demurrage. This was precisely the scenario presented in *the Eternal Bliss*.

Lastly, although highly relevant for understanding the nature and function of demurrage, these classifications may appear of limited significance if one looks at the issue from the point of view of the shipping business. The commercial understanding of the clause and the way in which demurrage is practically calculated play a fundamental role when trying to scrutinise its meaning and function.

It is noted here that even if the view of demurrage as a liquidated damages clause is now almost undisputed, some have expressed the view that seeing demurrage as payment of "additional freight" is "*sounder*" and "*more in tune with the way in which the market views demurrage*".[28]

To name some authors affirming this view, Bischoff in 1974 suggested in an article that demurrage provisions should be regarded as part of the consideration, meaning that detaining a ship beyond laytime was a part of the bargain of contract between the parties. He points out that the exceeding of laytime is more reasonably an exercise of an option, or an additional performance of the contract, rather than a breach of contract or warranty.[29]

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[25] Schofield, p. 9, para 1.41.

[26] Schofield, p. 445, para 6.22.

[27] Other jurisdictions express a different view on demurrage provisions. For a detailed overview of how demurrage clauses are classified in other legal systems, see Tiberg, 2013, pp. 511 and ff. See also Solvang, 2009, where the author examines the issue in light of English, American and Norwegian law.

[28] See [1990] 1 Lloyd's Rep 425, at 431 as per Steyn J.

[29] See further A.G. Bischoff, pp. 126 and ff.

Also Trappe, in 1986 when the view of demurrage as liquidated damages under English law had already been settled, held that it is "*doubtful*" whether the parties consider that keeping the vessel longer than the allowed laytime represents a breach of contract. In his view, "[p]*arties usually are, rather, in agreement that the charterer may keep the vessel longer against payment of extra compensation (called "demurrage")*", and that "[i]*n many cases, for instance, parties agree upon a low freight, upon a very short laytime, and upon a high demurrage rate, just to keep the freight rate low but to allow the carrier nevertheless to collect sufficient overall remuneration*."[30]

In more recent times, Tiberg has suggested that it is a question of construction of the particular contract which of the two meanings of demurrage is intended, since the expressions used in the contract "*may be such as to not justify the normal assumption that the charterer's use of the demurrage time is a breach*."[31]

Although these may be seen as isolated positions, they indeed show how important it is to consider the market's perception of demurrage, as the market operators may look at the issue from a slightly different perspective than the English legal doctrine.

2.4.5 Legal implications of demurrage as liquidated damages

2.4.5.1 General considerations on liquidated damages clauses under English law

As a matter of definition, a liquidated damages clause fixes a pre-determined sum to be paid by the breaching party to the innocent party upon a particular breach of contract. The clause thus functions as a pre-estimate of loss in situations where actual damages are difficult to ascertain. Such a representation of loss must have a compensatory rather than punitive nature, as damages with the nature of a punishment are non-enforceable under English law.[32]

Such pre-determined damages are of significant practical importance and carry numerous advantages for the parties to a commercial contract. First and foremost, they avoid costly litigation between the parties as to the quantum of damages. Secondly, they increase certainty, as both parties will know in advance where they stand and what to expect upon breach of a given obligation. Overall, liquidated damages clauses may therefore improve the efficiency and well-being of a commercial relationship.

From a practical point of view, when liquidated damages are agreed upon, the non-breaching party has no duty to prove its actual loss. This entails that the innocent party will save the efforts and costs of satisfying their burden of proof,[33] as opposed to damages at large. When claiming damages at large, the non-breaching party will have to prove their loss and establish that if the breach did not occur,

30 J. Trappe, p. 255.

31 Tiberg, 2013, p. 513, footnote 11.

32 The "penalty-test" is prescribed by the Supreme Court's judgement in [2015] UKSC 67, which replaced the previous test provided in *Dunlop*, [1915] AC 79. The Supreme Court in 2015 held that a liquidated damages clause will be enforceable even though it contains something more than a "genuine pre-estimate of the loss" and that, in assessing whether a liquidated damages clause is a penalty or not, it is important to consider the circumstances in which the contract is entered into and the parties' respective bargaining power. Some authors in legal theory pointed out that the new law will be more permissive in the commercial and maritime sphere than in other contexts, see Gerard McMeel in Soyer, B., & Tettenborn, A. (Eds.), Ch. 14, p. 285 and ff. The penalty test will, however, not be analysed further throughout the present dissertation as, in practice, it is far-fetched that a demurrage rate agreed by commercial parties is struck down as a penalty, as also suggested, for instance, by Carver, p. 913. Charterparties represent contracts between 'properly advised parties', therefore the Courts will generally avoid interfering with the contract's risk allocation.

33 Merkin QC, R. et al., p. 397.

it would have been possible for them to fulfil their obligations under the contract and obtain all the benefits arising from it.[34]

Moreover, by predetermining the damages, the non-breaching party will avoid the risk of being under-compensated. The general rules on remoteness and mitigation might indeed lead to establishing that lower damages may be recovered.[35] On the other hand, the sum agreed in a valid liquidated damages clause will fix the liability of the party in breach, meaning that the sum stipulated will be the sum that has to be paid irrespective of the loss actually suffered on the facts of the case.

Once liquidated damages are agreed on, a question arises as to whether such clauses represent an exclusive remedy to the innocent party upon a given breach.

As a matter of general English law, the nature of exclusive remedy of liquidated damages clauses will depend on the construction of the contract in question, the parties being free to expressly agree that a given liquidated damages clause will or will not constitute an exhaustive remedy for the relevant breach.

This issue has been thoroughly examined in construction contracts where liquidated damages clauses are frequent. In this context, it has been established that the starting point is that liquidated damages clauses operate as an exhaustive remedy for damages for late completion, in the absence of an express agreement to the contrary.[36]

2.4.5.2 Liquidated damages clauses in maritime contracts

In addition to what set out above, liquidated damages clauses have a significant, additional benefit in shipping contracts: While demurrage is usually paid at the time of the delay in port, claims for damages at large will generally lead to a much-delayed settlement.[37] This represents a clear practical advantage in shipping, an industry where time is of the essence. Shipowners will most likely not have any interest in engaging in complex arbitration or court proceedings, since this would entail an investment on their part of time, resources and legal expenses in proving their actual loss and wait a considerable amount of time before potentially being able to recover money for a loss.

34 *Ibidem*, p. 344.

35 Beale, H., p. 2199, para 29-205.

36 See *Cellulose Acetate v Widnes Foundry* [1933] AC 20 (HL), where the contract provided for damages for late performance to be paid at a rate of £20 per week. The actual loss caused by the delay of thirty weeks amounted to £5,850, due to the fact that the material the plaintiff used for their product was compromised by the delay. The House of Lords, however, held that the amount recoverable for the consequences of the delay was limited to the rate provided in the liquidated damages clause. See also *Temloc v Erill Properties* (1987) 39 BLR 30 (CA).

37 Todd, p. 133.

3 What does demurrage liquidate? An analysis of the issue in light of *the Eternal Bliss*

3.1 The judgement in *the Eternal Bliss*

3.1.1 Introduction

The preceding analysis shows that the question of which losses are liquidated by demurrage cannot be solved solely by attaching to demurrage the label of 'liquidated damages' under English law. It will still have to be clarified which losses are ultimately intended to be covered by the demurrage rate. This uncertainty is detrimental to the shipping market and, therefore, deserves to be resolved.

The Eternal Bliss proves to be a good point of departure for resolving the matter. As Andrew Baker J states in the introduction to the Commercial Court's decision, the "*case provides the opportunity to resolve a long-standing uncertainty on a point of law of significance*" within the shipping field.[38]

3.1.2 The background facts

The dispute of *the Eternal Bliss* originates from a voyage charter concluded between K Line Pte Ltd (hereinafter, "K-Line") – the owner of the vessel "*The Eternal Bliss*" – and Priminds Shipping (HK) Co Ltd (henceforth, "Priminds") – the charterer – for the carriage of 70,133 mt of soybeans from Tubarao, Brazil to Longkou, China. The contract, based on the Norgrain 1973 standard form, was one of a series of such charterparties between the same parties. In Clause 18 and 19, the charter stipulated the laytime allowed for cargo operations and the rate of demurrage to be paid where cargo operations were not completed within the agreed time.

After tendering notice of readiness at the discharge port in Longkou, *the Eternal Bliss* was kept at anchorage for 31 days as a result of port congestion and lack of storage space ashore. When Priminds eventually completed the discharge of the cargo, this occurred outside the agreed laytime. In addition, upon discharging, significant caking and moulding of the soybeans was observed.

The shipowner, K-Line, was eventually faced with a claim from the receiver of the goods. The causation between the detention of the cargo and its deterioration was not in dispute. The cargo receivers' claim and insurance were settled at a cost of US $1.1 million. K-line then brought a claim in arbitration against Priminds seeking i) demurrage from the charterer for having exceeded laytime by 31 days and ii) damages or an indemnity for the amount of the settlement costs paid to the receiver of the goods.

As it was undisputed that Priminds' only breach of the charterparty was their failure to discharge the cargo at the rate specified in the laytime clause, the charterer argued that the deterioration of the cargo was caused by the very same detention which entitled the owner to claim demurrage. As demurrage, in their view, was an exhaustive remedy for all consequences arising from such delay, no separate damages could be claimed. The owner, on the other hand, argued that damages for the deterioration of the cargo were recoverable above demurrage, as they represented a 'different type of loss' than the vessel's loss of time and earnings covered by the demurrage rate.

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38 [2020] EWHC 2373 (Comm), para 1.

3.1.3 The High Court decision

Although K-Line's claim was originally brought in arbitration, the parties agreed to bring the case before the High Court as a preliminary issue according to section 45 of the 1996 UK Arbitration Act.[39]

The dispute thus arrived before Andrew Baker J of the Commercial Court. The question was whether the charterer was liable to compensate the owner for the costs of settling the cargo claims with the receivers by way of i) damages for the charterer's breach of contract in delaying discharge; and/or ii) an indemnity in respect of the consequences of complying with the charterer's orders to load, carry and discharge the cargo.[40]

The main point of principle which ought to be answered was: *What does demurrage liquidate?* Upon conducting a detailed review of previous case law on the matter and examining the position in legal theory, Baker J held that

> "[a]*greeing a demurrage rate gives an agreed* ***quantification of the owner's loss of use of the ship to earn freight*** *by further employment in respect of delay to the ship after the expiry of laytime, nothing more"* and "[…]***it does not seek to measure or therefore touch any claim for different kinds of loss****, whatever the basis for any such claim*"[41] (emphasis added)

In other words, he held that the charterer had exceeded laytime and that this breach had resulted in losses to the owner which were separate from his loss of use of the vessel. Since the cargo damage was, therefore, '*a different kind of loss'*, i.e., different in nature from and additional to the detention of the ship, the shipowner was entitled to recover the sum paid to settle the receivers' claim as unliquidated damages falling outside the scope of the demurrage provision. These damages were, thus, held recoverable, in addition to the demurrage paid by the charterer at US$20,000 per day for the period of delay.

3.1.4 The Court of Appeal's decision

On 18 November 2021, the Court of Appeal, composed of Sir Geoffrey Vos, Newey and Males LJJ, overturned the High Court's judgement.[42] Given the inconclusiveness of previous case law and the lack of consensus in legal theory on the matter, the Court approached the issue as one of principle. According to the Court, demurrage liquidates

> "[…] ***the whole of the damages arising from a charterer's breach of contract in failing to complete cargo operations within the laytime*** *and not merely some of them. Accordingly, if a shipowner seeks to recover damages in addition to demurrage arising from delay, it must prove a breach of a separate obligation.*"[43] (emphasis added)

The Court presented several reasons for this conclusion:

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[39] Sec. 45 of the 1996 Arbitration Act allows the parties to an ongoing arbitration – either by agreement among themselves or with the permission of the tribunal – to apply to the English Courts to determine a preliminary point of law that "*substantially affects the rights of one or more of the Parties*". It is used where the relevant area of law is unsettled and the parties – or the party – deem that the courts are better suited to provide an answer to uncertain legal issues.

[40] The judge eventually determined that the charterer was liable by way of damages, therefore the viability of an indemnity claim was not examined.

[41] [2020] EWHC 2373 (Comm), para 61.

[42] [2021] EWCA Civ 1712.

[43] *Ibidem*, para 52.

I A liquidated damages clause covering only some of the damages arising from the delay would be an "*unusual and surprising*" agreement for commercial people to make.[44] If the parties wish to make such an arrangement, it must be clearly spelled out.
II Demurrage is a result of negotiations between the parties. The loss of freight is undoubtedly the primary loss which is contemplated, but nothing prevents the parties to include something more than this loss when agreeing on demurrage.
III The construction of demurrage presented by the High Court leaves disputes open as to what a different "*kind*" and "*type*" of loss is and when they are covered by demurrage rates.
IV Entitling shipowners to pass cargo claims on charterers will ultimately disturb "*the risk inherent in the parties' contract*".[45] A shipowner will typically take out insurance against cargo claims, while the same is not necessarily true for charterers.
V *The Bonde*, a first-instance decision stating that demurrage is the exclusive remedy in situations similar to the one at hand, has stood for 30 years without dissatisfying the market. In the Court's opinion, this was itself a "*powerful reason*" not to overturn it.[46]
VI Construing demurrage as an "all-damages clause" will improve certainty in commercial relationships. If the market is not satisfied with this view, then the parties are free to agree on a different wording of demurrage clauses.

Although the Court of Appeal did not grant permission to appeal to the Supreme Court, permission to appeal was, in August 2022, granted at the direct petition of the owners. Later in May 2023, following a commercial settlement between the parties, the appeal to the Supreme Court was, however, finally dismissed.

3.2 Premises for the analysis

3.2.1 Identification of the precise issue in *the Eternal Bliss*

To narrow down the specific scope of the issue in *the Eternal Bliss*, it is useful to introduce four separate legal scenarios which may occur due to delays in cargo operations:

a) The first situation that may arise is that the charterer delays the vessel beyond laytime with the only consequence that the owner is prevented from using the vessel as an income-generating asset. In this case, the only 'breach' of contract committed is a breach of laytime and the only 'loss' incurred is the detention of the vessel. In this situation, it is intuitive that demurrage will liquidate that loss as the only remedy available to the owner. Since there are neither separate breached obligations nor additional losses, no issue of further damages emerges.
b) A second situation is that where the charterer commits
   I a breach of the laytime provision and
   II a breach of a second, separate contractual obligation. From these two separate breaches, different heads of losses arise. This would happen, for instance, when the charterer breaches laytime, causing a loss in terms of detention of the vessel, and in addition, breaches the obligation to load a full and complete cargo, causing additional losses in terms of deadfreight.

[44] *Ibidem*, para 53.
[45] *Ibidem*, para56.
[46] *Ibidem*, para 57.

In this situation, there are two breaches of contract and two separate losses. Damages above demurrage will then generally be recoverable subject to ordinary rules on damages.

c) A third situation arises where the charterer commits a breach of several obligations under the charterparty, but the only consequence of these multiple breaches is that the vessel is detained. Here, there are two or more separate breaches, but only one loss. Demurrage will thus limit damages recoverable in relation to that loss which is identified with the inability to use the vessel during the detention, regardless of how many obligations under the contract have been breached.
d) The fourth and most complex scenario arises where there is i) a single breach, i.e., of laytime and ii) several different heads of losses. For instance, this is the situation where the charterer breaches no other provision than laytime, but where the delay causes additional losses that represent a different category of loss from the loss of the profit-earning use of the ship.

It is the fourth scenario that materialised in *the Eternal Bliss*: In addition to depriving the owner of the use of the vessel as an income-generating asset, the breach of laytime led to the deterioration of the soybeans aboard the ship. The question then is: Will this second category of loss be recoverable in the absence of a breach of a separate obligation of the charterparty, or is demurrage an all-damages clause which represents the sole remedy of the owner in case of delay?

3.2.2 The starting point: the wording of the contract

The solution of a dispute on the meaning of demurrage would, as a first step, always start by examining the contractual clause the parties have agreed upon. In *the Eternal Bliss,* the demurrage clause read as follows:

> "*Demurrage at loading and/or discharging ports, if incurred, to be paid at the rate of* ***declared by Owners upon vessel nomination but maximum USD 20,000 per day or pro rata/despatch half demurrage laytime saved at both ends*** *per day or for part of a day and shall be paid by Charterers in respect of loading port(s) and by Charterers/Receivers in respect of discharging port(s). Despatch money to be paid by Owners at half the demurrage rate for all laytime saved at loading and/or discharging ports. Any time lost for which Charterers/Receivers are responsible, which is not excepted under this Charter Party, shall count as laytime, until same has been expired, thence time on demurrage*".[47]

The clause, based on the Norgrain 1973 form, refers to the possibility to claim demurrage, if incurred, when laytime is exceeded and provides for the calculation of the same. Such wording does, however, not help in establishing which damages are ultimately covered by the clause itself. This point was emphasised in both the High Court and the Court of Appeal decisions in *the Eternal Bliss*.[48]

3.2.3 Interpretation in light of other sources

In the absence of a more articulate demurrage clause, help can be sought in previous English case law. An analysis of case law is of the essence when trying to bring clarity into the interpretation of demurrage clauses under English law.

However, when investigating how demurrage has been construed over case law in the last century, there is indeed the risk of losing sight of what demurrage

[47] [2020] EWHC 2372 (Comm), para 13.

[48] See respectively, [2020] EWHC 2373 (Comm), para 28 and [2021] EWCA Civ 1712, para 18.

represents in the understanding of the parties to the specific contract and in the shipping industry more generally.

This aspect cannot be overlooked. All the conclusions drawn by case law, and even the categorization of demurrage as 'liquidated damages', are of limited significance if they are not read in conjunction with the understanding of the concept as developed in the industry.

Therefore, together with case law, it will be submitted in section 3.4 below that it is vital to consider how demurrage is calculated and perceived by the actors of the shipping industry when seeking to delineate what losses it is intended to cover.

3.3 The position in case law before *the Eternal Bliss*

3.3.1 The Inverkip rule

One of the first judgements to touch upon the issue of damages above demurrage was the *Inverkip Steamship Co Ltd v Bunge & Co* (hereinafter, "*Inverkip*"), handed down by the Court of Appeal in 1917.[49] The judgement offers an interesting starting point in understanding how Courts have approached the nature of demurrage.

This judgement was referred to in both instances of *the Eternal Bliss*. Both found that the dicta in *Inverkip* were non-conclusive with respect to the issue at stake before them.[50] Nonetheless, it is submitted here that the judgement may be useful as it defines demurrage, in substance, as a claim for detention of the vessel.

In *Inverkip,* a voyage charterer had failed to provide its cargo and, consequently, delays in loading operations arose. The detention of the vessel was therefore not due to the delay in cargo operations but was rather caused by the charterer not having cargo ready for loading. The question, thus, was whether the owner was entitled to recover unliquidated damages, given that loading operations were not commenced because of the breach of the obligation to provide cargo, or whether only demurrage was payable for the breach at hand since the only loss suffered by the owner was the prolongation of the employment of the ship beyond laytime.

The judges decided that the failure to provide the cargo, even giving rise to a separate breach of contract from the breach of laytime, did not entitle the owner to claim damages beyond demurrage since the only consequence was the 'detention' of the vessel and its loss of ability to earn freight elsewhere. The judgement brought about "the Inverkip rule", which entails that in cases where the only consequence of a breach is detention of the vessel, demurrage will set the damages payable.

It is indeed true that in *Inverkip*, two separate breaches of contract occurred, while in *the Eternal Bliss* there was admittedly only one breach. The case is thus an example of scenario c) as described in section 3.2.1 above. However, it is interesting to observe that *Inverkip* seems to focus on the *type of loss* rather than on the existence of a separate breach of contract when assessing if damages above demurrage are recoverable. In fact, even in the presence of a separate breach of contract, namely failure to provide the cargo, damages at large were not held recoverable as the only deleterious consequence was the detention of the vessel covered by the demurrage rate.[51]

Warrington LJ, in limiting the owner's claim to demurrage, defines demurrage as "*compensation at a fixed rate in respect of the detention*".[52] Scrutton LJ refers to

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49 [1917] 2 KB 193.

50 [2021] EWCA Civ 1712, para 14.

51 This view is also expressed by the owner's defence in *the Eternal Bliss,* as referred to by Baker J in [2020] EWHC 2373 (Comm), para 55. He states that the only reason why the 'Inverkip rule' exists is that the number or nature of breaches is immaterial. Rather, what is significant is looking at the 'type of loss' arising out of whatever breach.

52 [1917] 2 KB 193, at 198.

demurrage as "*an additional payment* [...] *for detention beyond the agreed lay days*".[53] In the view of this writer, the detention has to be identified, in the context of the judgement at hand, with the owner's loss of opportunity to earn freight on future fixtures and the extra period of running costs incurred after lay days have expired. Demurrage is thus tightly linked to the loss of use of the ship. However, one could argue that what is meant by 'detention of the vessel' may be open to discussion, as 'detention' may be understood to cover also other losses arising while the ship is in port beyond lay days.

What the judges in *Inverkip* seem to establish is that demurrage represents a payment of damages for the extra time needed to complete cargo operations, given that the owner suffers a loss of profits during this time. Following this reasoning, it seems strained to conceive demurrage as covering other losses, albeit in the form of liquidated damages. Also in this case, where a separate breach occurred, the claim is still one for loss of use of the ship during that period, i.e., demurrage.

On the flip side, one could argue that the fact that demurrage covers loss of use of the vessel does not exclude other losses from being covered. The judges in *Inverkip* were looking at the particular facts of the case, where the only damage was indeed the loss of use of the ship. Therefore, they were tailoring their reasoning to the fact that in this case there was only one damage, i.e., detention, and that no issue of additional damages, such as loss of cargo, arose.

A similar issue arose in the first instance judgement in *Chandris v Isbrandtsen-Moller Co Inc* (hereinafter, "*Chandris*") of 1949 before Devlin J.[54] As in *Inverkip*, there had been two breaches of contract (in this case, loading of dangerous cargo and breach of laytime) and one single loss stemming from them – the vessel was detained beyond laytime due to the fact that she had to be moved out of the dock and complete discharge into the river because of the dangerous nature of the cargo. Also here, no damages above demurrage were held recoverable. In determining such an outcome, Devlin J relied on *Inverkip*, stating that the point of principle he had to consider was determined by it.[55]

While drawing his conclusion, Devlin J defines demurrage as:

> "[...] *merely a clause providing for liquidated damages for a certain type of breach. It is presumably the parties' estimate of the loss of prospective freight which the owner is likely to suffer if his ship is detained beyond the lay days*".[56]

Demurrage is here identified with the parties' estimate loss of future freight the owner will suffer if the vessel is detained beyond laytime. Devlin J does not seem to stretch the function and meaning of the clause any further than that.

To conclude, *Inverkip* and *Chandris* constitute relevant precedents for cases with several breaches of the charterparty, but where the only loss which arises from those breaches is embedded in the detention of the ship. Although the cases suggest that the focus in understanding the recoverability should be on the *nature of the loss*, rather than the number of contractual breaches, they do not provide clear authority as to the dispute in *the Eternal Bliss*.

53 *Ibidem*, at 200-201.

54 [1949] 83 Ll L Rep 385 (KBD); In this dissertation, only the High Court judgement will be considered. The judgement was brought before the Court of Appeal [1950] 84 Ll L Rep 347, but the appeal did not touch upon the point of interest here.

55 He also disregarded *Reidar v Arcos*, see section 3.3.2, as the point was not touched in the Court of Appeal's reasoning.

56 [1949] 83 Ll L Rep 38, at 395.

3.3.2 *Reidar v Arcos* – A case of one or two breaches?

3.3.2.1 Introduction

A major case on the issue is the Court of Appeal's decision *in Aktieselskabet Reidar v Arcos* (henceforth, "*Reidar v Arcos*").[57] Much of the judicial and academic debate has concentrated upon the interpretation of this decision.

Reidar v Arcos concerned the vessel *Sagatind* which was chartered to carry a cargo of timber from Archangel, Russia, to Manchester. According to the rules in the Merchant Shipping Act, the vessel would be allowed to carry a full summer deck load of 850 standards only if she arrived at the English port of discharge before 31 October. Otherwise, she could only load the winter deck load – which would mean, less cargo. Together with the obligation to load within the laytime, the charterparty stipulated that the charterers had to load a "full and complete cargo".

The vessel arrived at the port in Archangel in due time for loading a full and complete cargo of 850 standards. However, due to the charterer's delay in cargo operations, she missed the deadline of 31 October and was, therefore, forced to limit its cargo to 544 standards instead of 850. The owner thus claimed deadfreight for the loss of 306 standards which arose from the very same delay giving rise to a claim for demurrage for not having completed cargo operations in a timely fashion.

A question then arose: Must the demurrage clause be construed as exhaustive, meaning that no additional damages could be recovered at all, or should it be interpreted as applicable only to damages for detention, leaving damages as deadfreight to be assessed at large?

As in *the Eternal Bliss*, also in *Reidar v Arcos* it was the very same delay that gave rise to further losses than the mere detention. The case therefore constitutes a dominant part of both the Commercial Court and the Court of Appeal's analyses in *the Eternal Bliss*.

In *Reidar v Arcos*, the owner won through in both instances, but on the basis of different reasonings. In the first instance, Greer J held that the owner was entitled to recover both demurrage and deadfreight because the charterer had committed multiple breaches, namely of i) the obligation to load at the agreed rate and ii) the obligation to load a full and complete cargo which, in the judge's view, would have consisted in a complete summer cargo of 850 standards. These breaches gave rise to distinct losses and, therefore, were held to be separately recoverable.[58]

3.3.2.2 The Court of Appeal's decision – An obscure ratio decidendi

In the appeal case,[59] the Court reached the same conclusion, awarding damages in the form of deadfreight in addition to demurrage. However, it has been long debated whether the majority found that damages above demurrage were recoverable in the presence of only one breach, namely the failure to load the cargo within the laytime, or whether deadfreight was recoverable since it originated from a different breach of contract i.e., the failure to load a "full and complete" cargo.

The first judge, Bankes LJ, held that the facts disclosed only one breach of the charterparty, namely a breach of laytime. In his view, the obligation to load a "full and complete cargo" had to be assessed at the time in which the vessel sailed, when she could only lawfully have carried 544 standards. Despite recognising the existence of a single breach of contract, Bankes LJ held that two different claims were allowed since the breach gave rise to two separate heads of damages, one for

57 (1926) 25 Ll L Rep 513; [1927] KB 352.

58 (1926) 25 Ll L Rep 513.

59 [1927] KB 352.

the loss of use of the vessel and a separate one for the loss of 306 standards. The focus of his speech thus seems to be on the type of loss resulting from the single breach of contract. Of particular importance is a statement where he affirms that

> "*At one time I was inclined to think that where the parties had agreed a demurrage rate, the contract should be construed as one fixing the rate of damages for any breach of the obligation to load or discharge in a given time. On further consideration, I do not think that such a view is sound. I can find no authority on the point, and it is noticeable that in the Saxon Ship Co. case, sup., it was not suggested that the claim for demurrage excluded the additional claim for special damage arising from the detention of this vessel.*"[60]

Bankes LJ's approach is highly relevant in relation to *the Eternal Bliss*, where only one breach of contract occurred. However, as the following will show, it most likely represents a minority judgement, therefore not much weight can be placed on his words.

Another judge, Sargant LJ, held in fact that there clearly were two breaches of the charterparty, from which two separate losses arose. Even if Sargant LJ concluded differently from Bankes LJ on the number of breaches, it is interesting to consider what he says in relation to demurrage. He affirms that the demurrage clause "[…] *fixes the damages for the detention of the ship at £25 a day*" and then he goes on to ask himself:

> "*does the payment of a sum calculated on this basis form an agreed compensation for the loss which the owners have sustained in the circumstances of this case? I cannot think so. The loss inflicted on the owners and claimed by them is* ***loss of another character****, namely, loss of freight caused by the breach by the charterers of their contract to load a full and complete cargo as prescribed by Clause 1 of the charter-party.*
>
> […]
>
> *The object of the second sentence of Clause 3 is to provide compensation for a detention of the vessel in the course of fulfilling this primary obligation, not to give compensation for the breach of the primary obligation itself. No doubt the same delay in loading, which might give to a claim for detention, also resulted in a breach of the obligation to load a full cargo, but the* ***breach of this latter obligation caused a definite separate loss independent of and largely exceeding any loss arising from mere detention****;* […]"[61] (emphasis added)

Sargant J thus stresses that the breach of laytime caused a "*definite separate loss*" independent from the detention. In the view of this writer, the fact that the two judges reached the same conclusion, even if with different views on the number of breaches, indicates that what really matters for the recoverability of damages above demurrage is not the number of breaches; rather, what is decisive is whether there has incurred a separate *type of loss* from the one covered by the demurrage rate, which at its heart compensates the loss of fruitful use of the ship during its detention.

Nonetheless, the judgement of the third judge, Atkin LJ, has been the most controversial. Although he awards the owner damages for deadfreight in addition to demurrage, it is unclear whether, in his view, there was only one breach of the charterparty, whether two breaches happened or, indeed, if he considered it to be a breach of a composite obligation.

In his judgement, he affirms that

60 *Ibidem*, at 516.

61 *Ibidem*, at 518.

> "*The provisions as to demurrage quantify the damages not for the complete breach, but only such damages as arise from the detention of the vessel.*"[62]

In this statement it is not entirely clear what is meant by "*complete breach*" and "*only such damages as arise from the detention of the vessel*". However, if indeed Atkin LJ were to be interpreted as holding that only one breach had occurred, he would side with Bankes LJ and thus form a majority for the view that damages above demurrage can be recovered even when several heads of damages arise in the presence of a single breach of the charterparty, namely the breach of laytime.

This, in turn, would be conclusive in relation to the outcome of *the Eternal Bliss*. *Reidar v Arcos*, then, would constitute a binding precedent for the proposition that demurrage is not an exclusive remedy for all the damages arising out from the breach of the laytime provision and that additional damages may be recovered also in the absence of a separate breach of contract.

3.3.2.3 *Reidar v Arcos* as understood in later case law

Both later case law and legal literature have spilled a great deal of ink on Atkin's judgement. Nonetheless, the *ratio decidendi* of *Reidar v Arcos* remains unclear.

On the one hand, some authorities have held that *Reidar v Arcos* represents a precedent for the proposition that damages above demurrage may be claimed only in the presence of an additional breach of charterparty. This conclusion relies on the interpretation of the majority as if there were two breaches of the charterparty. One interpretation of the kind is to be found in *Suisse Atlantique*.[63] In dismissing the possibility to recover damages above demurrage, the judges in all three instances provided an analysis of *Reidar v Arcos*.

In the first instance of *Suisse Atlantique*, Mocatta J refers to *Reidar v Arcos*, without taking a clear position. It is submitted here that, in his view, Atkin LJ should be construed as seeing two breaches in the case at hand or, alternatively, a breach of a composite obligation. He indeed states that

> [...] *the difference between freight on 850 and 544 standards [...] can be concisely stated to have been held recoverable by Lord Justice Bankes as damages for failure to load in the agreed time;* ***by Lord Justice Atkin as damages for failure to load a full and complete cargo in the agreed time****; and by Lord Justice Sargant as damages for failure to load a full and complete cargo.*"[64]
> (emphasis added)

In the Court of Appeal decision, however, the majority of the judges interpret *Reidar v Arcos* as a precedent for the proposition that where several breaches of contract occur, giving rise to independent losses, then demurrage will not be an exclusive remedy. Sellers LJ states that "*the damages recovered for dead freight were for a separate breach of contract*" and thus were independent from the detention, although arising from the same delay. This separate breach of contract gave rise to deadfreight as "*an additional and independent loss unrelated to the loss of use*".[65] Consequently, he deems that the case is one of several breaches giving rise to independent losses (the second scenario described in section 3.2.1 above). Again, the focus appears to be on the type of loss rather than the number of breaches.

The view that the majority in *Reidar v Arcos* had held that there were two breaches is also expressed, somehow hesitantly, by Diplock LJ, which states that

62 *Ibidem*, at 516.

63 See section 3.3.3 below.

64 [1965] 1 Lloyd's Rep 166, at 176.

65 [1965] 1 Lloyd's Rep 533 at 539.

> "*Mr. Justice Greer, certainly Lord Justice Sargant, and, **I think**, Lord Justice Atkin, took the view that that constituted a breach of two obligations* [...]"[66] (emphasis added)

In the third instance of the *Suisse Atlantique*, the view that *Reidar v Arcos* represented a two-breach case is once again affirmed.[67] This interpretation has been adopted also in certain later judgements. In 1991, in *the Bonde*,[68] Potter J, whilst acknowledging the obscurity of the ratio decidendi of *Reidar v Arcos*, eventually concludes that Atkin LJ determined that there were two breaches.[69]

On the other hand, other judges have construed *Reidar v Arcos* differently, stating that Atkin LJ was to be understood as if there were only one breach of contract and that demurrage was not an exhaustive remedy for that single breach. According to this interpretation, the rationale behind *Reidar v Arcos* could be that separate damages are recoverable when they are of a different *nature* to the loss for detention.

In an *obiter dictum* in *Chandris*, discussed in section 3.3.1 above, Devlin J holds that the ratio decidendi of *Reidar v Arcos* is to be found in the speeches of Bankes *and* Atkin LJ.[70] In his opinion, demurrage was not considered an exhaustive remedy in *Reidar v Arcos*. Like Bankes LJ in *Reidar v Arcos*, he was then prepared to accept that damages could be recoverable in addition to demurrage where the owner can demonstrate a separate 'head of damages', irrespective of the existence of a breach of a separate obligation.[71] He points out that

> "*That case decided a point up to then left undetermined. Inverkip Steamship Company, Ltd. V. Bunge & Co., sup., had decided that damages for detention for breach of the obligation to provide a cargo were covered by the demurrage clause. **But supposing that the breach of such an obligation gave rise to damages of a different character, not for detention at all. The demurrage clause could not then provide the measure**. Ought the clause to be construed as exhaustive, so that no damages which could not be measured by it could be recovered at all, or ought it to be construed merely as applying to damages for detention, leaving damages of any other character to be assessed at large? The Court of Appeal decided the latter*."[72] (emphasis added)

What the authority seems to suggest is that demurrage covers the detention of the vessel in the form of inability to use it and this will entail that "*damages of a different character, not for detention at all",* as arguably is the case for cargo damages, are to be assessed at large.

Devlin J goes on to establish what is, in his view, the ratio decidendi of the Court of Appeal's decision in *Reidar v Arcos*. He states that

> "[...] *there has been a breach of contract causing dead freight as damage and that dead freight is not excluded by the demurrage clause, which is not exhaustive;* [...]"[73]

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66 *Ibidem*, at 541.

67 See [1966] 1 Lloyd's Rep 529 respectively at 549 and 555 (Upjohn LJ).

68 [1991] 1 Lloyd's Rep 136.

69 *Ibidem*, at 141.

70 [1949] 83 Ll L Rep 385, at 398.

71 This view is also observed by Schofield, 2021, at 453, para 6.52.

72 *Ibidem*, at 397-398.

73 *Ibidem*, at 398.

This construction of the judgement of Devlin J was, however, not embraced by Potter J in *the Bonde*. Here, Potter J held that the correct interpretation of Devlin J's view is that he deemed that the breach which *Reidar v Arcos* was concerned with was a breach of the obligation to provide a cargo, distinct from the obligation to load a cargo at the stipulated rate.[74]

In the first instance judgement in *the Altus,*[75] Webster J again suggested that Atkin LJ decided that damages above demurrage are recoverable even when they arise from the single breach of laytime.

In later case law, however, not much weight seems to be placed on Webster J's interpretation of *Reidar v Arcos*. In the Commercial Court's decision in *the Eternal Bliss*, at paras 117 and 119, Webster J was held to be unreliable on the basis that he, in the court's opinion, had relied on a faulty interpretation which he felt bound to follow. Scepticism towards the weight of his interpretation is also found in Potter J's judgement in *the Bonde*.[76] Therefore, not much weight seems to be placed on Webster J's interpretation.

3.3.2.4 *Reidar v Arcos* as understood in legal theory

The uncertainty as to the correct interpretation of the judgment is also apparent in legal theory.

In *Scrutton* on *Charterparties and Bills of Lading*, the authors refer to *Reidar v Arcos* as authority for the proposition that if there is more than one breach, damages above demurrage may be recovered. The authors further state that in cases where there is no further breach of the charter beyond failure to load/discharge within laytime, but there nonetheless are losses in addition to the detention of the vessel, "*the position is not clear*". However, they submit that "*the better interpretation of Aktieselskabet Reidar v Arcos is that these losses can be recovered in addition to demurrage*",[77] clearly indicating in footnote 27 that Atkin, together with Bankes, is authority for this proposition.

In *Voyage Charterers* the authors express the view that the reasoning of the members of the Court in *Reidar v Arcos* "*left in doubt*" whether both a separate breach and a separate loss are needed for additional damages to be recoverable.[78]

Carver on Charterparties refers to *Reidar v Arcos* (together with *Suisse Atlantique*) when stating that the demurrage clause benefits the charterer in the sense that he knows that he will not be exposed to greater liability in amount than the daily demurrage rate.[79] This in turn means that he interprets *Reidar v Arcos* as limiting the damages recoverable by the owner. He refers to *Reidar v Arcos* presenting the Court of Appeal's judgement with Bankes LJ on the one hand and Atkin and Sargant LJJ on the other hand, endorsing the view that there were two breaches in the case at hand.[80]

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74 [1991] 1 Lloyd's Rep 136, at 141.

75 [1985] 1 Lloyd's Rep 423 at 435 "[...] *I must treat the ratio decidendi of the case as being that where a charterer commits any breach, even if it is only one breach,* [...] *the owner is entitled not only to the liquidated damages directly recoverable for the breach of the obligation to load (dead freight) or for the breach of the obligation with regard to detention (demurrage), but also for, in the first case, to the damages flowing indirectly or consequentially from any failure to load a complete cargo if there is such a failure*."

76 [1991] 1 Lloyd's Rep 136, at 142.

77 Eder B. et al., (15-006), p. 383.

78 Cooke, Young et al., para 16.14, p. 450.

79 Bennet, H., para 9-175 p. 914, footnote 520.

80 *Ibidem*, para 12-171, p. 1342.

3.3.2.5 Conclusion

In conclusion, the ratio decidendi of *Reidar v Arcos* is obscure and does not give a clear answer to the question of what demurrage liquidates. This uncertainty was also observed in *the Eternal Bliss*.

In the first instance decision in *the Eternal Bliss,* Baker J affirms that the majority in *Reidar v Arcos* had decided that there were two breaches of the charterparty. However, he goes further and raises what, in the view of this writer, constitutes an important point about the judgement; Baker J states that the conclusion that there were in fact two breaches does not imply that *Reidar v Arcos* decided that

> "*an additional and different breach* [is] *in law required before damages for a separate and different head of loss may be recovered.*"[81]

In fact, he affirms that

> "[d]*isagreeing with Bankes LJ, as the majority did, that there was only one breach does not amount to or imply disagreement with his conclusion that the owner's claim was sound if there were only one breach.*"[82]

Reidar v Arcos does therefore, in his view, not entail that a separate breach is always required for recovering separate losses when the additional loss originates from the failure to complete cargo operations within the lay days.

Moreover, Baker J notes that the heated debate around *Reidar v Arcos,* although significant, has "*distracted from the underlying arguments of principle that ought to drive the answer*".[83]

Later on, the Court of Appeal in *the Eternal Bliss* case pointed out that, despite several attempts to discern it, "*the ratio of the case on this issue is obscure. It is better to recognise that fact than to continue to search for a clarity which does not exist."*[84]

Against this background, *Reidar v Arcos* does not represent clear authority for the proposition that a separate breach of the charterparty is always needed for recovering a separate loss. Even interpreting the judgement of Atkin LJ as taking the view that there were two breaches of contract giving rise to two separate losses, a conclusion on whether a separate breach is in each and every case needed in order to recover damages above demurrage cannot be derived from it.

What must be stressed is that even with different views on the number of breaches at least between Bankes LJ (one breach – two losses) and Sargant LJ (two breaches – two losses), all the judges arrive at the same conclusion that damages above demurrage were recoverable. This suggests, in the view of this writer, that what matters is the type of loss, rather than the number of breaches of contract.

The speeches of the different judges are, therefore, useful in understanding where the focus should be when investigating what demurrage covers and if damages above it may be recovered, namely on the *type of loss* rather than on other factors.

3.3.3 *Suisse Atlantique*

Later on, English Courts were once again confronted with the question of the exclusive nature of demurrage. An issue arose as to whether damages above demurrage are recoverable where the charterer has deliberately delayed the ship over laytime, causing losses to the owner in terms of rendering the vessel less profitable to him by consequent loss of voyages or loss of voyage time.

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81 [2020] EWHC 2373 (Comm.), para 125.

82 *Ibidem*, para 37.

83 *Ibidem*, para 5.

84 *[2021] EWCA Civ 1712 at para 30.*

In *Suisse Atlantique Société d'Armement Maritime SA v Rotterdamsche Kolen Centrale* (henceforth, "*Suisse Atlantique*"),[85] the only 'breach' of contract alleged was a breach of laytime. This single breach had caused loss of use of the vessel by its detention and loss of freight missed in some of the subsequent voyages which were not performed because of the delay. Were these losses separate or was the freight missed in subsequent voyages already covered by the detention and, in turn, by the demurrage rate? In other words, was demurrage an exhaustive remedy for the consequences of the delay or not?

It could be useful to analyse the *ratio decidendi* in *Suisse Atlantique* to ascertain whether it constitutes a relevant precedent for the proposition that demurrage is – or is not – an exhaustive remedy. The judgement indeed constitutes an important part of the analysis in both instances of *the Eternal Bliss*.

The case concerned the vessel *General Guisan* which had been chartered for carriage of coal on two years consecutive voyage charters terms. According to the facts established in arbitration, the vessel performed eight voyages under the agreement and the laytime was exceeded in each voyage, except for loading on the first voyage. Due to the delays, the vessel performed fewer voyages than would have been possible had cargo operations been completed within laytime. The owners were thus claiming damages for the freight they missed in six or nine voyages, in addition to demurrage.[86]

The issue presented in arbitration was whether demurrage provided an exhaustive cover for the delay's consequences. A consultative case for the Court was stated. All three instances decided against the owner, i.e., stating that damages above demurrage were not recoverable.

3.3.3.1 The first instance – demurrage as exhaustive remedy

In the first instance, the owner argued both that a) the charterer had committed a separate breach and b) that the breach of laytime had caused the owner losses additional to the detention of the vessel and, consequently, demurrage did not provide the correct measure of the owner's damages.[87] In relation to the latter argument, the owner relied on Bankes LJ's judgement in *Reidar v Arcos* and argued that the loss of earnings on subsequent fixtures was equivalent to the deadfreight held recoverable in *Reidar v Arcos*.

Both arguments were rejected. As for the first one, Mocatta J held that there was no separate obligation that was breached. As for the second argument, i.e., the existence of a separate type of loss, Mocatta J concluded that the shipowner was prevented from establishing that their claim was other than one for 'detention'. He held that *Reidar v Arcos* had the special feature that the delay in cargo operations affected the quantity of the cargo which could have been carried on the very same voyage in which the delay arose. There, the claim was for "*loss of earnings under the charter*" and "*not for the detention*".[88] This feature was absent in *Suisse Atlantique*. Here, the loss suffered by the owner was indistinguishable, in principle, from the loss suffered by a shipowner under a single voyage charter when his ship is detained beyond laytime. The owner was thus not entitled to recover damages in addition to demurrage for the fact that the vessel was rendered less profitable to

85 [1965] 1 Lloyd's Rep 166; [1965] 1 Lloyd's Rep 533 (CA); [1966] 1 Lloyd's Rep 529.

86 The reason why the vessel was deliberately delayed by the charterers was that after the charterparty was entered into, the market fell. The agreed freight was much higher than the market rate, while the agreed demurrage was lower than the freight. Therefore, it was less costly for the charterer to delay the vessel and pay demurrage instead of having the vessel in operation and paying freight. The case poses further questions regarding the existence of a 'fundamental breach' by the charterer, entitling the owner to treat the contract as repudiated. This issue will, however, not be pursued here.

87 The owner's arguments are presented in [1965] 1 Lloyd's Rep 166, at 172.

88 Ibidem, at 176.

him as a consequence of the delay. The case is thus an example of scenario a) as described under section 3.2.1 above.

In Mocatta J's view, in the case at hand there only was one obligation, namely to complete cargo operations within laytime, and one loss, i.e., the loss of prospective freight.[89] He holds that "***for a claim for detention*** *by a shipowner due to the laytime provisions in a charter being exceeded, the demurrage provisions quantify the damages recoverable*".[90] (emphasis added)

In his judgement, Mocatta J is inevitably confronted with the nature of demurrage. In this respect, he refers to Devlin J in *Chandris* and, by quoting his definition of demurrage, seems to embrace the same view as to what demurrage represents, i.e., "*presumably the parties' estimate of the loss of prospective freight which the owner is likely to suffer if his ship is detained beyond the lay days*", focusing on the concepts of "*detention*" and "*loss of prospective freight*" as the decisive factors in determining what demurrage covers. Quoting Scrutton on Charterparties, for which Mocatta J himself was responsible, he then affirms that "*demurrage in its strict meaning is a sum agreed by the charterer to be paid as liquidated damages for delay beyond a stipulated time for loading or unloading*".[91]

In the first instance of *the Eternal Bliss*, Baker J argues that what is striking in the judgement is that Mocatta J's focus is on "*the type of loss for which the owner was claiming and on the demurrage rate being, and being only, a liquidation of an owner's loss of freight caused by delay to the ship after expiry of laytime*".[92]

3.3.3.2 The Court of Appeal – some important statements regarding the nature of demurrage

The appeal brought by the owner was unanimously dismissed by Sellers, Harman and Diplock LJJ.

Sellers LJ holds that, in the case at stake, the only breach of contract was a breach of laytime. As to the "type of loss", he further expresses agreement with the first-instance judge in finding that the owner could only put forward a claim for delay and detention of the vessel as no separate head of losses arose.

He states that demurrage represents the assessment

> "*of what was to be paid in the event of circumstances arising such as arose here*"[93]*, i.e., "an agreed sum to be paid for the* ***detention*** *of vessels over the lay days. No doubt demurrage is based on a rough and agreed estimation of the owner's loss through the vessel not being able to earn freight elsewhere*"[94] (emphasis added)

Once again, the focus is on the type of loss.

Harman LJ, on his part, argues that in the case at hand there was only one breach, namely a breach of the obligation to complete cargo operations in a fixed time, which is "*a breach of detention*"[95] and "*for breaches of that kind*" the parties have established demurrage to apply.

Lastly, Diplock LJ reaches the same conclusion, stating that the quantum the parties have estimated in the demurrage clause is that "*during the period of deten-*

89 *Ibidem*, at 173.

90 *Ibidem*, at 178.

91 *Ibidem*, at 175.

92 [2020] EWHC 2373 (Comm.), para 74.

93 *[1965] 1 Lloyd's Rep 533(CA) at 539.*

94 *Ibidem*.

95 *Ibidem*, at 540.

tion the vessel is unable to earn freight"[96] and since the claim in the case at hand is one for the inability to earn freight on subsequent fixtures, "***that** head of damages*" was covered by the demurrage rate (emphasis added).

In drawing their conclusions, the judges express valuable views on the nature of demurrages clauses. In their opinion, demurrage is strictly tied to the detention of the vessel and its inability to earn freight elsewhere while detained, and it is precisely that kind of loss that demurrage covers. Nothing more seems to be included in the concept of demurrage by the judges in the case at hand.

3.3.3.3 The House of Lords

Eventually, the case was brought before the then-House of Lords. The judges unanimously confirmed the conclusion reached in the previous instances. Although the focus in the House of Lords' judgement was shifted to the existence or not of a fundamental breach, the issue of the nature of demurrage was nonetheless touched upon.

Once again, demurrage is defined as the whole damages "*for the detention of the vessel*".[97] If a separate breach of a different obligation had been established, then *Reidar v Arcos* would have been authority for the proposition that damages were not limited to demurrage payments. In *Suisse Atlantique*, however, no separate breach was established, and *Reidar v Arcos* was thus not applicable.

3.3.3.4 Conclusion

In conclusion, *Suisse Atlantique* represents authority for the proposition that demurrage will be an exclusive remedy for the owner when there is neither a separate breach of charterparty nor a different kind of loss from the detention of the vessel and the consequent loss of earnings on future voyages.

The scenario is slightly different from the one in *the Eternal Bliss*: In the latter case, the cargo damage is clearly a different type of loss than the loss of earnings on future fixtures, which is intuitively the first loss that the owner anticipates and for what demurrage is agreed on. Therefore, the judgement cannot be seen as providing a clear answer to the issue of separate head of losses arising from a single breach of the charter.

Suisse Atlantique was referred to in both the High Court and the Court of Appeal in *the Eternal Bliss*. Baker J, upon conducting a detailed analysis of the three judgements, ultimately affirms that

> "*What was said about the nature of demurrage and what it covers does not amount to any conclusion, even obiter, that a separate and different breach of contract is required before unliquidated damages may be recovered for loss additional to and different in kind than the loss of the use of the ship for earning freight.*"[98]

This view is also supported by Evans J in *the Adelfa*, where it is stated that the view expressed in *Suisse Atlantique* does not preclude that a different head of damages may be recovered upon certain circumstances.[99]

The Court of Appeal in *the Eternal Bliss* finds that not much weight can be placed on *Suisse Atlantique* since the only damage considered was the loss of freight

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96 *Ibidem*.

97 [1966] 1 Lloyd's Rep 529, at 539 as per Lord Dilhorne.

98 [2020] EWHC 2373 (Comm.), para 85.

99 [1988] 2 Lloyd's Rep 466, at 472.

earnings and nothing more.[100] In that context, "[t]*here was* [...] *no need to consider what the position would have been if the delay had caused "a different kind" of loss*".[101]

It is difficult to conclude if the judges in the case at hand were referring to demurrage as covering the 'detention of the vessel' and her loss of profitability only because they were looking at demurrage through the lens of the facts of the specific case, in which no further losses arose, or whether they were trying to uncover the ultimate nature of demurrage giving a description which could apply in every single context. It is affirmed that demurrage is a sum paid for the detention of the vessel and her inability to earn freight while detained, but at any point it is stated that demurrage has *exclusively* this function and could not be doing something more.

Nonetheless, what is striking in the judgement is that all the speeches focus on the 'type of loss', as also stressed by Baker J in *the Eternal Bliss*, again suggesting that what is determinative in understanding whether a certain situation is covered or not by demurrage is the nature of the loss.

3.3.4 More recent authorities

The decisions presented so far leave us in the middle of 1960 with no firm answers as to the nature of demurrage. Later on, several first-instance decisions have touched upon the nature of demurrage clauses.

On the one hand, certain judges have supported the view that demurrage does not represent an exclusive remedy for delays.

In particular, in the late Eighties, two first-instance judgements approach the issue of the recoverability of damages above demurrage, namely *Total Transport Corporation v Amoco Trading Co* (henceforth, "*the Altus*")[102] and *Adelfamar SA v Silos E Mangimi Martini SpA* (hereinafter, "*the Adelfa*").[103]

In *the Altus*, Webster J relies on the interpretation of *Reidar v Arcos*, affirming that damages above demurrage[104] were recoverable in the presence of separate losses, even when a single breach of charterparty had occurred.

A similar case is *the Adelfa*. Here, Evans J states in an obiter that

> "***There must**, of course, **be a proved head of loss which is recoverable as damages for that breach and which is distinct from the loss of use of the vessel**, for which on any view of the matter demurrage is the agreed rate of liquidated damages. When such further loss does exist, then I am prepared to assume in the [owner's] favour that a damages claim may succeed.*"[105]
> (emphasis added)

Although the judge was "*prepared to assume*" that a separate damages claim may be made where a loss "*distinct from the loss of use of the vessel*", he does not elaborate on the circumstances where this, in his view, would be adequate.

Both the above-mentioned judgements were held to be inconclusive in relation to the issue of the recoverability of damages in addition to demurrage in the two instances of *the Eternal Bliss*.

[100] [2021] EWCA Civ 1712, para 38.

[101] *Ibidem*, para 35.

[102] [1985] 1 Lloyd's Rep 423 (QBD (Comm Ct)).

[103] [1988] 2 Lloyd's Rep 466.

[104] For the sake of completeness, it is noted here that the case concerned a deadfreight clause; However, Webster J structured his reasoning on the assumption that the deadfreight clause had to be treated as a liquidated damages clause. His reasoning could therefore be relevant when construing demurrage clauses.

[105] [1988] 2 Lloyd's Rep 466at472.

In the Court of Appeal, it was stated that the judgement was non-conclusive on the point of interest to *the Eternal Bliss*.[106] The same conclusion was drawn with regards to *the Adelfa*. The Court of Appeal found that "*these* dicta *provide no real support to the shipowner, based as they are on an assumption which did not arise*".[107]

3.3.4.1 Damages above demurrage not recoverable: *The Bonde*

The only judgement that specifically addresses the question of law presented in *the Eternal Bliss* is the 1991 first-instance decision known as *the Bonde*.[108]

The case concerned a sales contract on f.o.b. terms, which incorporated the terms of a charterparty concluded by the seller. An issue arose as to whether carrying charges, which had become payable by the buyer as a result of the seller's delay in cargo operations, could be recovered separately or whether the demurrage clause covered all the consequences of the delay, thus representing an exclusive remedy for the buyer.

As there were multiple losses arising out of the delay, the scenario is precisely the same that arose in *the Eternal Bliss*, cf. scenario d) in section 3.2.1 above.

Potter J examines most of the decisions considered above. By examining the decisions in *Reidar v Arcos* (Court of Appeal) and *Suisse Atlantique*, he draws the conclusion that the payment of demurrage precludes a claim for additional damages.

Potter J also analyses the decision in *the Adelfa* and holds that even though Evans J reached a different conclusion on this point, his view was an obiter. As such it did not change his view, which can be summarised as follows:

> "[...] *where a charter-party contains a demurrage clause, then in order to recover damages in addition to demurrage for breach of the charterers' obligation to complete loading within the lay days, it is a requirement that the plaintiff demonstrate that* ***such additional loss is not only different in character from loss of use but stems from breach of an additional and/or independent obligation****.".*[109](emphasis added)

In the opinion of this writer, neither *the Bonde* does, however, provide a conclusive answer on the issue.

Firstly, as a matter of the doctrine of precedent, the decision is a first-instance judgement, and as such non-binding on the Courts in *the Eternal Bliss*.[110]

Secondly, the Court of Appeal in *the Eternal Bliss,* while recognising that *the Bonde* was not binding on the Court, held that the decision had stood unchallenged for 30 years, and thus seemed to settle a position which market operators were satisfied with. This was seen as a "*powerful reason*" not to overturn it.

After *the Bonde*, there does not seem to exist further judicial comment on the issue, apart from a small commentary in *the Luxmar* in 2006.[111] This may lead to affirm that the position set out in *the Bonde* has stood unchanged since 1991 to this day, therefore representing the settled position in the view of shipping operators. This argument is highlighted in the Court of Appeal's decision on the matter, where the judges see this as a strong reason not to overturn the decision.

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[106] [2021] EWCA Civ 1712, para 40.

[107] *Ibidem*, para 41.

[108] [1991] 1 Lloyd's Rep 136.

[109] *Ibidem, at 142. He went on to conclude that the same conclusion applied to an f.o.b. contract in which laytime and demurrage provisions are incorporated.*

[110] See [2021] EWCA Civ 1712, para 23.

[111] [2006] Ll l Rep 543, vol.2, at 550 where Langley J, by limiting damages recoverable to demurrage, relied on *the Bonde,* stating that in order to recover additional damages there has to be a separate breach. The judgement, however, was deemed not persuasive by Baker J in the Commercial Court's judgement in *the Eternal Bliss,* see [2020] EWHC 2373 (Comm.), para 138.

However, in the view of this writer, the mere fact that the decision has not been challenged over the last thirty years does not amount to the conclusion that it was seen as the settled position. There may also be other reasons why there are no other commentaries. For instance, a potential reason is that cases like *the Eternal Bliss* and *the Bonde* are brought in arbitration and settled without being challenged before the Courts.

3.3.5 Conclusion – What can be derived from the analysis of previous case law?

As the foregoing shows, the position of case law on the precise question of what demurrage liquidates is unsettled. Previous authorities are mixed, and the precise question of *the Eternal Bliss* has not been considered in binding authority.

Nevertheless, the analysis of case law constituted a prominent part of the two instances in *the Eternal Bliss*, as it provides some insights into what demurrage indeed liquidates. In most of the cases, demurrage appears to be conceived as tied to the 'detention of the vessel' and to the loss of freight the owner will suffer while he is deprived of the use of the vessel, together with normal expenses incurred in waiting at port,[112] and does not generally seem to cover something more. However, the statements found in case law are not, in themselves, sufficiently persuasive to be relied upon when answering the question of *the Eternal Bliss*.

The inconclusiveness of case law on this renders even more significant to look at how demurrage is perceived by those involved in the shipping business. The commercial considerations presented in the following thus play a prominent role and should indicate the way for determining the correct outcome of this case and, generally, to clarify the nature of demurrage under English law.

3.4 *The Eternal Bliss* – certain critical remarks

3.4.1 The industry perspective

In *the Eternal Bliss*, the Court of Appeal concludes that demurrage covers all losses arising from a breach of laytime. In the view of this writer, however, it is not clear whether this conclusion represents the most coherent solution from the perspective of the market actors.

The judges in the Court of Appeal appear aware of the importance of the topic from a commercial perspective and are concerned with finding a solution in line with the needs of the industry. In para 17 of the judgement, it is thus affirmed that the issue "*depends on the meaning of the word "demurrage" as that would be understood by those involved in the shipping business*" and, thus, that it "*is not helpful to consider how liquidated damages clauses in other fields such as construction law have been construed*". However, what the Court of Appeal ultimately does is precisely treat demurrage as any other liquidated damages clause, which – in the absence of indication to the contrary – is generally construed as an all-damages clause. The premise of considering the industry perspective and the special features of demurrage clauses is then disregarded and gives place to a solution taken in the name of legal certainty.

3.4.2 How do market actors set the demurrage rate?

In the view of this writer, the Court of Appeal thus wounds up placing too little weight on elements suggesting how demurrage is considered by the actors of the

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[112] A more recent judgment specifying that demurrage also covers the running expenses incurred is to be found in [2003] 1 Lloyd's Rep 151 (*the Nikmary*), at 161, para 47, where Moore-Bick J clearly states that "[...] *demurrage, being liquidated damages for detention, notionally reflects the full cost to the owner of keeping his ship in port. As such it is deemed to cover all normal running expenses, including the cost of diesel oil required to run the ship's equipment*.".

shipping business. For instance, one question that should have been given consideration is "*how is demurrage calculated*"? This indeed represents a key question for anyone seeking to establish the business' view on this market-sensitive topic, which at its heart is one of interpretation of commercial contracts.

The determination of demurrage rates is generally highly based on freight. To this writer, it does not appear that there are frequently used approaches to calculating demurrage rates that deviate from this pattern. It is of course possible that demurrage is assessed in other ways, as for instance in *Suisse Atlantique* where the demurrage rate was the result of a settlement of a previous dispute between the parties and, therefore, was fixed at an artificially low rate. However, besides certain isolated cases, the determination of the demurrage rate is generally a market-based assessment where the owner's approach is to predict what they will lose in terms of freight by reference to the expected market rate for the vessel during the period of detention, together with additional daily running costs incurred in port if laytime is exceeded (such as bunker consumed in ports, daily port charges etc.).

When a broker negotiates a demurrage clause, his calculation will thus primarily be inspired by the fact that the vessel will be out of market for the period when the charterer exceeds laytime, and that the owner will be paying the running costs of the vessel. As for other losses, they may or may not occur, depending on the specific circumstances of each case, and are generally not considered when setting demurrage rates.

An interesting point made by the Court of Appeal deals with the difficulty to determine what other "*types*" and "*kinds*" of losses are in the absence of articulate demurrage clauses. The appellate court states that, following the High Court's construction of demurrage as only covering some losses, it is doubtful where to draw a line between what is covered and what is not covered by demurrage. This concern is legitimate in the absence of clear criteria or clear indications by the parties of what is covered and what falls outside the demurrage calculation.

Some authors, such as *Robert Gay*, suggest that a criterion which may guide in understanding what losses are covered by the demurrage rate should be to discern between "*normal*" consequences of the detention as such, and consequences that are influenced by external factors or depend on specifics such as the type of cargo or conditions of particular ports, with only the former losses being liquidated by demurrage.[113]

It is submitted here that applying this criterion in order to identify what losses demurrage is intended to cover would represent a solution more in tune with the reasoning made by commercial parties when negotiating demurrage clauses.

3.4.3 Insurance coverage

In para 56 of its decision, the Court of Appeal puts forward an argument related to insurance coverage. The Court affirms that while a shipowner will typically take out insurance against cargo claims, a charterer will generally not do so. In the Court's view, the charterer will generally protect himself only from liability for failing to complete cargo operations within lay days by agreeing to pay liquidated damages for that. However, he will generally not have insurance against liability for unliquidated damages resulting from the same delay.

In the view of the Court, letting the charterer bear the risk of cargo claims, will then "*transfer the risk of unliquidated liability for cargo claims from the shipowner who has insured against it to the charterer who has not*" and this is seen as disturbing "*the balance of risk inherent in the parties' contract.*".

In this respect, it is not evident that the reasoning of the Court is sound. First, although it is true that owners generally have P&I coverage for cargo claims,

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[113] See Gay, *Damages in addition to demurrage*, pp. 88 and ff.

nothing prevents charterers from taking out insurance against cargo claims.[114] Second, the fact that the owner has taken out insurance covering cargo claims does not equate to acceptance of responsibility for such. Even if the owner takes out insurance for this loss, he (or his insurer) may attempt to pass this claim on to the charterer, who in principle has caused the loss. Again, the decision of the Court of Appeal seems to oversimplify certain commercial aspects.

3.4.4 A questionable legal certainty?

In its decision, the Court of Appeal places much weight on the need for legal certainty. In para 59, it is stated that legal certainty would be favoured by seeing demurrage as an all-damages clause. In the view of this writer, this statement may be open to criticism.

A solution like the one suggested by the Court of Appeal will not completely eliminate the legal uncertainty in the field. The Court states in para 59 that the parties may contract around a certain wording offered by a given standard form if they wish to do so. The Court only reaffirms the right to the party to tailor the contract to their needs, a necessary corollary of the freedom of contract the parties benefit from under English law.

However, the parties must be assumed to be aware of their freedom to modify standard forms as they deem fit, but the general assumption that standard forms are self-sufficient indicates that parties usually will not contract around the wording provided in standard charterparties. To the knowledge of this writer, there is no evidence of an increased trend of demurrage clauses being rewritten after the Court of Appeal's decision.

Instead of reaffirming that the parties have the right to contract around the standard clauses, a better solution would have been to suggest an amendment of standard clauses for instance by specifying that demurrage covers "all damages" or, if the contrary view has to be preferred, that demurrage only covers loss of freight and normal running expenses for keeping the vessel in port.

In addition, under the assumption that market actors perceive demurrage as covering merely the loss of future freight, then it could be argued that a decision confirming this view would contribute to the 'certainty' of the industry.

Against this background, it is fair to say that the Court of Appeal's decision leaves many questions unanswered and that it appears doubtful whether it has found a solution in line with the market actors' perception of market actors. When interpreting commercial contracts, this should be an important guideline. A clarification from the English Supreme Court would thus have represented a welcome development on the issue.

3.4.5 A parallel to time charterparties?

In addition, when analysing the recoverability of damages under voyage charters, it could be of interest to look at how cargo claims are treated in time charterparties. In the recent decision in *Yangtze Xing Hua*, charterers were found liable for cargo claims originating from the delay at the discharge port.[115]

The case shares more than one similarity with the factual scenario of *the Eternal Bliss*; a cargo of soybeans was damaged due to overheating while the vessel was sitting at anchorage at the discharge port, following to the orders of the charterer.

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[114] On the contrary, prudent charterers frequently take out liability insurance both for time and voyage-chartered vessels, see Leighton J.

[115] [2018] 1 Lloyd's Rep 330.

The damage, thus, originated from the charterer's act and was ultimately held 100% responsible for the cargo damage under the Inter-Club Agreement.[116]

As discussed in section 2.2.3 above, it must be admitted that there are significant differences between time charterers and voyage charterers and there will be no Inter-Club Agreement between the insurers of the contractual parties. Nonetheless, one could have sympathy for the view that the charterer, as the party responsible for the conduct leading to the damage, should equally be held responsible under a voyage charter. In both charterparties, the loading and discharging operations are in the hands of the charterer and placing the responsibility with him may provide a further incentive for performing cargo operations within laytime.

116 In a time charterparty, the owner and the charterer will usually both take out insurance and their insurers would enter an inter-club agreement (ICA) where they apportion between themselves certain costs their assured may incur. The charterparty will generally incorporate such an Interclub agreement between the insurance of the owner and the insurance of the charterer, where there is an apportionment of the losses, for instance for cargo claims, between the insurances of the owner and the charterers.

4 Final remarks

The impact of *the Eternal Bliss* is primarily felt by the market actors, who has awaited clarity on whether cargo recourse claims can be brought against charterers under a voyage charterer where delays in discharge causes damage.

The decision directly impacts the dry bulk market, where cargo damages represent a regular occurrence, especially in agricultural trades or in case of soybeans. As for the latter, cargo claims are frequent due to their high moisture content and especially when transported the long way from the US and Brazil – which are important exporters – to China, the world's largest importer. Moreover, certain liquid cargoes can produce sediments over time, resulting in reduced cargo quality. This could for instance be an issue in the shipping market for oil and gas.

In practice, recourse cargo claims are generally brought by the owners' P&I insurer. The Court of Appeal's decision in *the Eternal Bliss* is therefore detrimental to owners and their P&I clubs. Generally, however, P&I clubs may insure both owners and charterers for cargo liability and each P&I club may therefore take a slightly different view on the case. While a decision like in the first instance will be popular with owners and P&I clubs whose membership is predominantly owner-based, charterers and any P&I insurer who primarily focuses on charterers, will take the opposite view. If the Supreme Court had overturned the appellate decision, the P&I clubs would, in a second instance, likely have charged higher premiums on insurance to charterers for cargo damage.

Moreover, it has been pointed out that the dispute could have been avoided if the parties had expressly defined "demurrage" in the charterparty.[117] A change in how standard clauses are worded, with specific indication of which losses are liquidated by demurrage, should ultimately benefit the industry. In commercial practice, the parties do not frequently modify the wording of demurrage clauses found in standard forms, cf. section 2.3 above.

If demurrage must be construed as an all-damages clause, as held by the Court of Appeal, then standard forms may favour other formulations to avoid uncertainties, as for instance:

> "*Demurrage ... has to be paid by charterers at the rate ...* ***and cover all the consequences of the delay***" or "[...] *The parties agree that demurrage shall be an* ***exclusive*** *remedy upon any breach of laytime*".

On the contrary, if demurrage were to be intended to cover only loss for detention, it could be specified that

> "*Demurrage ... has to be paid by charterers at the rate ... and cover the loss of use of the vessel and all the consequences of detention of the vessel in port*".

117 See [2020] EWHC 2373 (Comm), para 28; [2021] EWCA Civ 1712, para 18.

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Anti-competitive information exchange in liner shipping

Analysis under Article 101 TFEU

Asbjørn Østby

Preface

This issue of MarIus contains my master thesis, as it was delivered in December 2022, written as part of the LLM Maritime Law program at the University of Oslo. Addressing the general prohibition against anti-competitive cooperation in the European Union (Article 101 TFEU) applied to liner shipping, the topic is relevant both to legislators and companies when assessing the competitive situation of the sector.

Historically, the liner shipping companies have enjoyed atypical application of the EU competition rules, normalizing the exchange of various information between competitors. Simultaneously, the EU bodies continue to address sophisticated forms of information exchange as pursuing anti-competitive objectives or effects. These developments have resulted in practices and cooperation between liner shipping companies which may conflict with the interpretation of Article 101 TFEU.

Constructive criticism has been vital to my work, the most prominent from my academic supervisor, Alla Pozdnakova. Special gratitude is also due to the law firm Simonsen Vogt Wiig, offering me a vibrant working environment for discussions throughout the writing process, as well as invaluable feedback from partner Jan Magne Langseth. Finally, my family, friends, and colleagues have offered great support and insight. Thank you.

Asbjørn Østby, April 2023.

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1 Introduction

1.1 Research question and legal context

Liner shipping companies (hereinafter "carriers")[1] have historically enjoyed an atypical application of European Union (EU) competition law, where cartel-like agreements to fix prices and regulate capacities ("conferences") for long were exempted from the general rules.[2] Such was tolerated since it was claimed that shipping conferences were necessary to avoid aggressive price wars amongst carriers that would stem from the industry's fixed-cost nature and the existence of excess capacity.[3]

Today, competition law has changed the liner shipping industry, making carriers dependent on alliances and other capacity-sharing agreements, meanwhile freight rates may not be fixed. The industry continues to be characterised as capital-intensive with global concentration on the supply side, significant barriers of entry, and multiple links between competing carriers.[4] Consequently, competing carriers must be attentive to how information is exchanged amongst them to avoid infringements of Article 101 (Art. 101) of the Treaty on the Functioning of the European Union (TFEU). Art. 101 governs horizontal competition and prohibits "agreements, decisions by associations or concerted practices" (hereinafter "cooperation") between undertakings which have as their "object or effect" the prevention, restriction, or distortion of competition between Member States.[5] Generally, sharing of information between competing carriers may restrict competition by enabling them to coordinate prices, qualities, or quantities of their services, to the detriment of customers (hereinafter "shippers") and consumers.

This thesis examines *how various forms of information sharing between liner shipping companies potentially can be viewed as pursuing anti-competitive objects under Article 101 (1) TFEU*. Competition law within the maritime sector is no longer regulated specifically, and thus the general rules in principle apply in full.[6]

The question addressed is two-fold circulating Art. 101: when do exchanges of information constitute "agreements, decisions by associations, or concerted practices"? and furthermore, in which situations do such exchanges restrict competition "by object or effect"?

The topic's relevance was illustrated in the 2016 commitment decision by the European Commission (Commission) in case AT.39 850 (hereinafter "*Container Shipping*"), which concerned unilateral public announcements of future price increases by competing carriers.[7] The decision exemplifies and assists in answering when information exchanged between competing carriers can constitute a "concerted practice" restricting competition "by object."

Furthermore, the research question is highly relevant for several reasons. Firstly, digital development and modernization of communication allow for increased information shared through webpages, social media, digital clouds, and algorithms, potentially being deemed "concerted practices." For example, develop-

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1 Liner shipping companies operate scheduled international maritime transport services for carriage of cargo on pre-determined geographic routes, see Pozdnakova (2008) p.3.

2 OECD (2015a).

3 OECD (2015b) p.2.

4 *For capital-intensive container ships and barriers of entry*, see Harambles (2019) pp.18-19 and 48-49; *For market concentration*, see El Kalla et al. (2017) pp.128 and 133-134; Luo et al. (2014) pp.171-172; *For operational and structural links*, see Notice 2008/C245/02 para.49 and footnote 47; *Generally*, see Pozdnakova (2008) pp.70-71.

5 TFEU art. 101 (1).

6 Power (2019) p.603.

7 Case AT.39850 Container Shipping.

ments since the Covid-19 pandemic has seen container freight rates increase substantially, thus increasing the revenues for liner shipping companies to offset i.e. inflation and increased energy costs.[8] Rate increases are normally commented by carriers in their quarterly reports, for instance when Maersk after record results in Q3 of 2022 announced that "freight rates have peaked and started to normalize."[9] Such public announcements can be deemed "hints" which reduce competitors' uncertainty regarding Maersk's future rate settings, potentially falling under the scope of Art. 101.

Secondly, the Commission has drafted a set of New Horizontal Guidelines (2020) and launched a consultation in March 2022.[10] Although not formally adopted, the draft express how the Commission will enforce information exchange cases going forward, providing interpretive guidance to companies and competition authorities applying Art. 101. The updated guidelines explicitly address information exchanges and price signalling, confirming that the EU recognises this field as particularly challenging.

Thirdly, in 2020 the Commission extended the currently applicable block exemption regulation (BER) which provides a group exemption from Art. 101 for certain agreements on joint operation (Consortia BER) between competing carriers.[11] Upon its expiry in 2024, the Commission has initiated an evaluation and invited feedback from affected parties.[12] Several voices have pointed to the increasing margins of carriers, concentrated supply, and increased transport prices as reasons not to extend the Consortia BER beyond 2024.[13] Other parties point to improved predictability and transport frequency as reasons to prolong the exemption further.[14]

The liner shipping sector has been, and continues to be, characterised by extensive cooperation between competitors and non-competitors alike. Such cooperation assists in securing efficient import and export of necessary and desirable products from around the globe. Moreover, much industrial development and production is geographically specialised and rely on importing various components. Such considerations add more nuances to the complex choices behind international competition policies and highlight the importance of a balanced legal framework.

1.2 Legal framework

Historically, competition regulation in maritime transport has seen continuous evolvement. Until the implementation of the "1986 Package", the Commission lacked procedural tools to investigate any competition law concerns in the maritime industry.[15] With Regulation 4056/86, the EU competition rules were implemented in maritime transport. Further, through Regulation 1/2003, the procedural provisions of Reg 4056/86 were repealed, resulting in general application of Art. 101 to the sector.[16]

Art. 101 is structured by prohibiting cooperation which restricts competition under Art. 101 (1), by declaring such agreements or practices void under Art. 101 (2), and by exempting certain practices which produce efficiencies under Art.

8 Statistia (2022).
9 Maersk (2022).
10 Communication 2022/C164 (New Horizontal Guidelines Draft).
11 Regulation 2020/436 art. 1.
12 European Commission (2022a).
13 European Commission (2022b).
14 Ibid.
15 Van Bael & Bellis (2021) pp.1451-1452.
16 Regulation 1/2003 art.32, 38 and 43.

101 (3). Efficiencies in liner shipping, in addition to facilitating effective global trade, include improved stability, predictability and quality of transport services, benefitting not only shippers sending their cargo, but also individuals and businesses as consumers. These are some of the considerations justifying BERs in liner shipping, as EU regulators assume that certain forms of cooperation produce efficiencies outweighing their restriction on competition, in accordance with Art. 101 (3).

The liner shipping sector has seen two BERs. The first of 1986 (Conference BER) provided the option for carriers to engage in so-called "conference" agreements, fixing freight rates and other conditions of carriage.[17] The regulation reduced competition particularly on prices, and allowed, under certain conditions, competing carriers to allocate cargo and coordinate shipping timetables, carrying capacities, and sailing frequencies.[18]

Liner conferences were exempted under the notion that they have a stabilizing effect on the market and thus assure shippers of reliable services. Furthermore, they contribute to efficient scheduled transport services, in the interests of consumers.[19] The Conference BER enabled cooperation on central parameters of competition and was in 2006 repealed with effect from 2008,[20] only to be replaced by the Consortia BER.[21] The current legal framework consists of Art. 101 applying in full, accompanied by the Consortia BER.[22] Accordingly, case law from all industries is relevant when interpreting Art. 101.

Consortia BER exempts sets of agreements having the object of cooperating in joint operations of liner services, provided they improve the services offered and rationalise the operations through technical, operational, or commercial arrangements.[23] Central activities include the joint operation of sailing timetables and port terminals, as well as slot-exchanges between vessels and pooling of vessels. Additionally, capacity adjustments in response to fluctuations in supply and demand are allowed, in addition to other ancillary activities necessary for implementing the joint operations, for instance the use of a computerised data exchange system.[24]

The broad definition of "consortia" in article 2, and the various activities explicitly exempted in article 3, intend to cover a wide range of cooperative arrangements in the sector.[25] The Consortia BER is justified by pointing to improved productivity and quality of liner services, rationalisation of activities, economies of scale, and better utilisation of containers.[26] Upon its date of expiry, the liner consortia BER was extended first in 2014,[27] and again in 2020, making it applicable until 2024.[28]

Despite the Consortia BER, traditional and recent forms of cooperation in liner shipping may be at conflict with EU competition rules. One main objective of the EU is to establish an internal market and ensure a highly competitive social market

17 Regulation 4056/86 see particularly art.1 and 3.

18 Ibid. art.3.

19 Ibid. p.1.

20 Regulation 1419/2006 art.1.

21 Regulation 906/2009 para.15.

22 Van Bael & Bellis (2021) p.1453.

23 Regulation 906/2009 art.2 No 1.

24 Ibid. art.3.

25 Van Bael & Bellis (2021) p.1454.

26 Regulation 936/2009 para.5.

27 Regulation 697/2014 art.1

28 Regulation 2020/436 art.1

economy.[29] Within this lies the aim of protecting the competitive structures of the market and competition in general.[30] Additionally, competition rules aim at protecting consumer welfare.[31] In liner shipping, these objectives should ideally ensure a market where different carriers genuinely compete to offer shippers the best terms on price, quality and quantity of their services. Extensive sharing of information between competitors may, however, allow carriers to reduce competition on these parameters, potentially requiring customers, and ultimately consumers, to pay a higher price for a reduced supply of maritime transport services.

1.3 Sources and methodology

To conduct a proper analysis, this thesis applies EU legal method.[32] The wording of Art. 101 (1) is supplemented by case law of the Court of Justice of the European Union (CJEU), being the main interpretive instrument of the legal text. The case law is comprised by decisions of the General Court (GC), previously the Court of First Instance (CFI), and the European Court of Justice ("CJEU" or "the Court").[33]

Additionally, the Commission has taken an active role in competition law issues and offers important interpretive assistance. The Commission conducts investigations and resolves cases as "decisions", "commitment decisions", and "settlement cases."[34] Also, it publishes guidelines for the application of Art. 101, such as the Horizontal Guidelines (2011) and New Horizontal Guidelines.[35] The practice and guidelines are not legally binding but illustrate how the Commission interprets the law and assess cases. Finally, the Commission also adopts regulations such the Consortia BER, directly regulating competition law issues.[36]

Articles 101 and 102 correspond to Article 53 and 54 of the EEA agreement.[37] These rules are subject to the EFTA Court and EFTA Surveillance Authority (ESA) unless they fall under the EU Courts and Commission.[38] Thus, Article 53 and 54 shall be interpreted in line with EU law and are relevant to the discussion, although majority of case law stems from the EU. Moreover, the application of Art. 101 by national courts and competition authorities supplements the discussions by illustrating how the law is interpreted in different jurisdictions.

Finally, legal and economic literature contribute to the thesis by taking into account different analyses of Art. 101 and related practice. Literature also systemizes these decisions in light of economic theories, which complement the legal dogmatic method, creating a more holistic understanding of the competition rules. Since the nature of competition law is so heavily linked with economic theories of market structures, the insight provided by literature is decisive when understanding Art. 101. Also the independent opinions of the Court's Advocate Generals (AG) provide valuable insight to the possible reasoning behind the assessments. The variety of sources will be applied throughout the discussions in chapters 2 and 3, securing broad analyses. However, case law concerning the specific

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29 TEU art.3.

30 Cases C-501/06 P GlaxoSmithKline Services Unlimited and Others v Commission (GlaxoSmithKline)para.63.

31 Case 6/72 Europemballage and Continental Can v Commission para.26.

32 There exists substantial discussion concerning e.g. the scope and impact of internationalisation of legal method, see for instance Arnesen & Stenvik (2015). The topic falls outside the scope of this thesis.

33 Eurofound (2017).

34 See Whish & Bailey (2021) pp.54 and 264-277.

35 See Communication 2011/C11/01 (Horizontal Guidelines) and Communication 2022/C164.

36 Regulation 936/2009.

37 EEA Agreement art. 53 and 54.

38 Sejersted et al. (2011) pp.569-570; See also Whish & Bailey (2021) pp.58-59.

research question is scarce. The analysis thus relies on cases concerning the same fundamental questions, applied on different sectors, which can, challenge the validity of the conclusions.

By artificially increasing transparency between competing carriers, the exchange of commercially sensitive information can facilitate coordination of undertakings' competitive behaviour also referred to as "collusion."[39] Potentially resulting in restrictions of competition, information exchanges may enable undertakings to achieve collusive outcome, and to increase the internal stability of collusive outcome already present on the market.[40] The sources are applied to examine how these potentially harmful exchanges affect the current liner shipping market.

1.4 Further discussion and delimitations

This thesis examines complex legal issues being subject to comprehensive debate and uncertainty. Its objective is to review the existing materials on information exchanges in different sectors and apply them to liner shipping. It contributes to the academic debate by uncovering that many forms of cooperation and information sharing in liner shipping arguably restrict competition by object, requiring a regulatory review to ensure real competition in the industry and legal predictability in application.

Several relatable issues will not be discussed. Firstly, Art. 101's conditions that the legal person is an "undertaking" and that the conduct must "affect trade between Member States" are normally unproblematic in liner shipping and are thus presumed to be fulfilled. Secondly, neither the comprehensive 'by effect'-assessment nor the conditions of the exemption rule in Art. 101 (3) are problematised. Lastly, parallel conduct in concentrated markets such as liner shipping may raise issues of collective dominance, regulated by Article 102. Although information exchanges can be subject to both Articles 101 and 102, only the first will be addressed.

The thesis is structured as follows. Chapter 2 analyses the condition of cooperation, examining when information exchanges constitute "agreements, decisions by associations or concerted practices." It commences by introducing the condition, before presenting different forms of cooperation in liner shipping. Because much of the cooperation is based on formal agreements, Section 2.3 discusses when information exchanges constitute "concerted practices."

Chapter 3 analyses when cooperation in liner shipping may restrict competition "by object." After introducing the alternative conditions and dichotomy of Art. 101, the 'object'-alternative is examined. After providing the legal starting points, Section 3.2 delves into the literature and presents different methodical approaches to the assessment. Presuming the existence of a concerted practice, Section 3.3 addresses when concerted practices in liner shipping restrict competition by object. Pure information exchanges and their characteristics are addressed first, before another layer is added when examining the exchanges within agreements in Section 3.4. Finally, Chapter 4 summarises the findings of the thesis and provides answer to the research question.

39 Kühn (2001) p.173.

40 Communication 2022/C164 paras.416-418.

2 Information exchanges as agreements, decisions by associations of undertakings, or concerted practices

2.1 Introduction

Many different forms of commercial conduct by companies may be harmful to competition. However, *independent* harmful conduct is not covered by Art. 101, as the provision only regulates different types of cooperation: agreements, decisions by associations, or concerted practices.[41] The objective of the provision is thus to prevent *collusive outcome* between competitors, a distinction which has proven to be challenging. Chapter 2 aims to uncover under which circumstances interactions between competing carriers, as well as unilateral conduct on the liner shipping market, may constitute "agreements" or "concerted practices." The liner shipping industry has traditionally been characterised by multiple links between competitors, which arguably are necessary to ensure safe and efficient maritime transport. Regardless, such links result in many potential cases of "cooperation" falling under the scope of Art. 101.

EU competition law operates with a wide concept of an "agreement." The fundamental condition was specified in the case *Bayer* as a "concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market."[42] The decisive is not the form of the agreement, but rather its content, illustrated by cases where oral agreements,[43] and "gentleman's agreements"[44] are covered.

However, many forms of cooperation are not captured by the concept of an agreement, and undertakings may easily circumvent it.[45] Thus, to further widen the scope of Art. 101, the concept of "concerted practice" aims at prohibiting

> "a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition."[46]

The criterion of "knowingly substituting" practical cooperation excludes mere "accidental" coordination, where competing carriers independently pursue similar conduct on the market. It requires reciprocal cooperation, a meeting of minds, or a joint intention by the undertakings to conduct themselves in a specific way.[47] Moreover, the condition requires causation between the contact in question and the parties' conduct, and the Court has taken the stance that undertakings are *presumed* to take account of the information exchanged with their competitors.[48]

With complex forms of cooperation developing, the lines between agreements and concerted practices are blurred. This may hold especially true for information

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41 TFEU art. 101 (1) covers: "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market."

42 Case T-41/96 Bayer AG v Commission para.173.

43 Case 28/77 Tepea BV v Commission para.41.

44 Case T-53/03 BPB plc v Commission para.82.

45 Albors-Llorens (2006) p.840.

46 Case 48-69 Imperial Chemical Industries v Commission (ICI) para.64.

47 Dunne et al. (2019) p.177.

48 Case C-8/08 T-Mobile Netherlands BV and Others v Raad van bestuur (T-Mobile) paras.52-53.

exchanged in increasingly concentrated markets, such as the liner shipping market. Although the alternative nature of the condition may imply that regulators must place the relevant cooperation within a "box", the CJEU has rejected such an approach. The case *Anic* concerned a practice of regular meetings between competing producers of polypropylene. The Court confirmed that "a single and complex infringement, corresponding partly to an agreement and partly to a concerted practice"[49] falls under the scope of Art. 101 (1). The decisive question is therefore not whether the information exchange constitutes an "agreement" or "concerted practice", but rather whether the *lower threshold* of "concerted practices" is reached. Thus, it is an "unimportant" classification to define the exact point at which an agreement ends, and concerted practice begins.[50]

Put simply, one can distinguish between "pure" information exchanges, where the main economic function lies in the exchange itself,[51] and "ancillary" information exchanges, where the information is but a part of a wider arrangement such as an agreement.[52] The former should be analysed concretely, taking into account all its characteristics to determine whether it constitutes a concerted practice. The latter should be analysed in the context of its "channel", for instance a vessel-sharing agreement.[53]

Having in mind the legal concepts of agreements and concerted practices, Section 2.2 introduces different forms of cooperation relevant to liner shipping, before moving on to when information exchanges can constitute concerted practices in Section 2.3.

2.2 Different forms of cooperation in liner shipping

2.2.1 Introduction

Different forms of cooperation and variations of interactions can give rise to several platforms for sharing information between liner shipping companies. Since an exchange is either considered isolated (pure) or in the context of its agreement (ancillary), the type of cooperation is important for the further assessment. Consequently, to effectively assess whether information exchanges between competing carriers restrict competition by object, the features of the different cooperation must first be established.

2.2.2 Liner conferences

Liner conference was defined in Regulation 4056/86 as an agreement or arrangement between two or more vessel-operating carriers in liner shipping which "operate under uniform or common freight rates and any other agreed conditions" relating to international liner services.[54] One condition is thus that the agreement sets a common rate charged for the transport services offered, hereunder fixing prices. The *East Asia Trades Agreement (EATA) decision* exemplifies that the conditions are to be interpreted strictly. That agreement's express purpose was to allow the parties to increase their freight rates.[55] However, the Commission found it to fall outside the "liner conference" definition in the BER, as it had "no direct

49 Case C-49/92 P Commission v Anic Partecipazioni para.114.

50 Opinion of AG Reischl in Case C-209/78 Van Landewyck v Commission p.3310.

51 Camesasca and Schmidt (2011) pp.227-228.

52 Bennett & Collins (2010) p.328.

53 Communication 2011/C11/01 para.56.

54 Regulation 4056/86 art.1 (3)b).

55 Case 1999/485/EC Europe Asia Trades Agreement (EATA) para.9.

mechanism for agreeing on the implementation of freight-rate increases."[56] Arguably, members of liner conferences must explicitly set one common freight rate, obligating the parties to adhere to it. Regardless of whether they are deemed "conferences" such agreements fulfil the "cooperation" condition in Art. 101.

2.2.3 Liner consortia

Unlike conferences, a liner consortium encapsulates agreements between two or more vessel-operating carriers in international liner shipping having the objective of joint operations "in order to rationalise their operations by means of technical, operational and/or commercial arrangements."[57] One simplified distinction between conferences and consortia is that the prior agreements concern prices, while the latter concern capacities.[58] Consortia enable operational cooperation such as joint operation centres and slot-sharing between ships. However, the content and extent of different consortia varies according to their degree of integration.[59] Such agreements remove the competition between participants with regard to offering their capacities to shippers which is generally regarded as anti-competitive "control" of the service production in a market. However, they also increase the capacity-utilisation of each ship, improving the transport services offered in the market.

2.2.4 Shipping pools

Shipping pools are in essence operational agreements creating one common fleet of ships under different ownerships.[60] Pooling is particularly normal on the tramp shipping market, where vessels operate on the spot market, namely through contracts on irregular schedule and over varying routes.[61] However, pooling also occurs in liner shipping, for instance by pooling cargo, revenues or losses between the participants.[62] One consideration is that a larger fleet can serve larger regular shipments on each route, enabling companies to offer transport to demands exceeding the individual carrier's capacity. Additionally, pooling of cargo may decrease issues of excess capacity in the market, since coordination is expected to improve the utilisation of the ships carrying capacities.

Shipping pools are traditionally organised in different ways. However, as a starting point, pooling agreements will include clauses on rights and obligations of the parties and of one designated pool manager. The pool manager will often be responsible for collecting and redistributing revenues achieved in the pool, as well as keeping financial records and continuously inform pool participants of developments. Normally, the participants are bound to place all or some of its ships under the commercial control of the pool, serving the contracts entered into by the pool. Consequently, each participant has right to a proportionate share of the pool's revenues, as well as right to compensation in different scenarios. Such clauses often include the right of each party to review and control the correctness of the participants' results and their underlying documentation (full disclosure). Pooling agreements can, subject to its conditions, enjoy the exemption in the Consortia BER, but they can also remove the incentive to compete on prices and capacity between the members, resulting in a decreased supply for shippers.

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56 Ibid. para.82.

57 Regulation 906/2009 art.2 nb.1.

58 Case 1999/485/EC EATA para.132.

59 Regulation 906/2009 para.3

60 Wen et al. (2019) p.737.

61 Power (2019) p.686.

62 Pozdnakova (2008) pp.63-67.

2.2.5 Liner shipping alliances

The formation of alliances between competing carriers is a more extensive form of horizontal cooperation in liner shipping. The "strategic alliance" for instance, provides a framework for different agreements and governs coordination of the service capabilities of the participants.[63] An alliance may regulate the terms of container utilization for several routes and often exceeds the scope of a single vessel-sharing agreement optimising capacities on one particular route.[64]

Three liner shipping alliances define the current global market: 2M (Maersk Line, MSC, and Hyundai), The Alliance (ONE, Hapag, and Yang Ming) and OCEAN ALLIANCE (CMA-CGM, COSCO/CSCL, Evergreen, and OOCL).[65] The combined global market share of these 10 currently exceed 80 %.[66] Although their geographic coverage varies in different regions, the alliances undoubtedly have significant impact on competition in liner shipping markets.

The strategic alliance is distinct from pooling agreements, as the former aims at co-operation in the employment and utilization of ships, including e.g. sailing schedules, itineraries (route programmes) and container co-ordination.[67] Also, alliances may consist of a combination of vessel sharing, slot exchange and slot chartering.[68] Put simply, one may regard a strategic alliance as a vessel-sharing agreement covering many services and routes.[69] Accordingly, alliances can in principle be exempted via the Consortia BER, provided that the agreements within the alliance fulfil its conditions. Due to the alliances' sizes, however, they may exceed the market share thresholds in the Consortia BER, making the exemption inapplicable. The extensive framework for cooperation supplied through alliances, combined with their substantial market coverage, makes them particularly suited to potentially restrict competition.

The agreement types evaluated involve some degree of ancillary information exchanged, for instance related to the competing vessel's capacity and cargo management. Since they constitute "agreements" within Art. 101 (1), they will not be discussed further in this chapter. The final form of cooperation concerns pure information exchanges, which potentially fall under the scope of "concerted practices."

2.2.6 Cooperation through pure information exchanges

Information shared outside the forum of for instance a pooling agreement or shipping association will not be addressed under Art. 101 unless it is deemed a "concerted practice." Simply put, a concerted practice is a common understanding between competitors to act in a certain manner, without formalising the mutual understanding as an agreement or decision.[70] In liner shipping, information can for instance be exchanged orally in a meeting,[71] via messages,[72] in databases

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63 Slack et al. (2011) pp.65-66.

64 Panayides & Wiedmer (2011) p.26.

65 Ghorbani et al. (2022) p.449 Fig 4.

66 Alphaliner (16. November 2022).

67 Panayides & Wiedmer (2011) p.26.

68 Van Bael & Bellis (2021) p.1458.

69 OECD (2015b) p.3.

70 See e.g. Case 48-69 ICI para.64.

71 Case T-279/02 Degussa v Commission (Degussa).

72 Cases C-40/73 Suiker Unie and Others v Commission (Suiker Unie).

or algorithms[73], or through public announcements.[74] The question is when such sharing of information amounts to a "concerted practice" under Art. 101 (1).

Container Shipping provides but one example of how public unilateral announcements from independent competitors can constitute a concerted practice.[75] In that case, 14 competing carriers had developed a common practice of publishing their respective intentions of future price increases. Such General Rate Increases ("GRI's") were published several times each year through different medias such as websites and press-releases. The Commission's investigations caused the preliminary concern that the carriers were able to coordinate their prices, constituting a concerted practice restricting competition by object.[76]

Accordingly, much cooperation between liner shipping companies has traditionally taken the form of agreements, either regarding prices (conferences), capacities (consortia), or pooling of ships and revenues, or as larger structures of alliances. Information exchanged within these agreements is to be assessed within the context of the agreement. Next section analyses the legal borders between independent conduct and concerted practices in relation to information exchanges on their own, i.e. not as part of an agreement.

2.3 Information exchanges between liner shipping companies as concerted practices

2.3.1 Introduction

Determining when information exchanges reach the lower threshold of a concerted practice raises complicated issues. Naturally, not all types of information are suited to take part of a collusion, nor is information announced autonomically regarded as *exchanged*. Furthermore, the extent of exchanges necessary to constitute a concerted *practice* is not obvious. The concept of a concerted practice requires a concrete assessment of the information exchange, where these factors are highly relevant.

A concerted practice essentially marks the distinction between independent conduct, which is not captured by Art. 101 (1), and collusive conduct, which is. Since information can be disclosed in a variety of forums and manners, a broad approach is required to uncover the legal test. Principles from fundamental case law provide some starting points.

The existence of an "exchange" has been heavily discussed since the case *Suiker Unie* (1975), which concerned the exchange of information between sugar producers via letters and messages. Although not amounting to an agreement, it was deemed a concerted practice. The Court specified that the condition extends to any "direct or indirect *contact*" having the object or effect

> "to *influence the conduct* on the market of an actual or potential competitor or to *disclose* to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market"[77] (emphasis added).

Although the case is old, the principle has been consistently affirmed and remains fundamental to the assessment. The broad definition requires only that the exchange consists of "direct or indirect contact." Regarding what kind of informa-

73 Communication 2022/C164 para.435.

74 Cases T-191/98 Atlantic Container Line and others v Commission para.1154.

75 The case is also referred to by the Commission in Communication 2022/C164 in relation to public announcements, see para.434 footnote 236.

76 Case AT.39850 Container Shipping.

77 Cases C-40/73 Suiker Unie para.174.

tion may be captured, the standard is broad, requiring only to "influence the conduct on the market" of one's competitor or to disclose information regarding its conduct. Information regarding commercial operations is thus relevant, and exchanges regarding competitors' freight rates, capacities, or strategies in different regions and routes may be adequate to influence the conduct of competing carriers.

In the same case, the critical distinction between independent conduct and collusive conduct was set out. The Court ruled the principle as "inherent" that "each economic operator must determine independently the policy which he intends to adopt."[78]

The principle of independence was an important precedent in *Suiker Unie*. However, the Court added an important nuance that complicates the assessment further, namely the right for undertakings to adapt to the changing nature of the market. Should for instance one liner carrier suddenly change its pricing strategy, the competitors may suffer losses of customers or revenue if they do not alter their own strategies. Therefore, the provision "does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors."[79] The aligned conduct of competitors is thus only prohibited if it stems for "direct or indirect contact."[80]

In summary, the way liner shipping companies receive and send information is important. Since the provision's objective is to restrict collusive outcomes, the decisive assessment concerns the border between independent adaptation to competitors' conduct and indirect contact having the object or effect to influence a competitor. Where that line is drawn is not self-evident.

2.3.2 The borderline between independent conduct and collusion

The borderline between independent conduct and collusion is generally unclear, also in the liner shipping services market. For instance, a concentrated market where the carriers operate on several of the same trading routes, uses the same ports, and are part of the same trade associations, can arguably facilitate more "points of contact" than would be the case in a highly fragmented and diversified market. It may also be easier to coordinate conduct according to competing carriers' public announcements if competitors are few and each hold a substantial market share.[81] The liner shipping market may therefore facilitate "contact", due to its concentration on the supply side, significant barriers of entry and homogeneous services offered. Different understandings of the scope of "contact" are evident also in national cases.

The combined cases of *Replica Kit & Toys and Games* before the British Court of Appeal illustrate the complex 'contact'-consideration. Addressing indirect information exchanges via third parties, the court's reasoning was based on the fact that if retailer A disclosed information to supplier B and was "taken to intend" that B would pass that information to another retailer C, then all three parties would be regarded as parties to a concerted practice.[82]

In the case *Esso and Others* before the Paris Court of Appeal, the court found that competing motorway service stations' exchange of fuel prices did *not* amount to cooperation, assuming that the exchange was deemed not to affect the companies' individual pricing decisions.[83]

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78 Ibid. para.173.

79 Ibid. para.174.

80 Ibid.

81 Case C-455/11 P Solvay v Commission para.39.

82 Case No: 2005/1071, 1074 and 1623 Argos and Littlewood v OFT & JJB Sports v OFT para.141.

83 Case BOCCRF 2004-02 Esso and Others (Summary).

The European Courts have been somewhat more general when interpreting the scope of "contact." Although each information exchange case is assessed concretely, it is, as a starting point

> "sufficient that, through its declaration of intention, the competitor has eliminated or, at the very least, substantially *reduced the uncertainty as to the conduct to be expected* from it on the market"[84] (emphasis added).

Consequently, there is no requirement that the competing carrier has undertaken, nor planned to adopt, a particular course of conduct. The decisive is whether the information reduces competing carriers' uncertainty.

Having in mind that undertakings remaining active on the market are presumed to make use of the information disclosed by competitors, the Court has chosen a standard where the competitor must actively distance itself from the information disclosed.[85] Accordingly, a "clear and express objection" may be capable of rebutting the presumption.[86] However, this must be considered in light of the Court's threshold for reciprocal contact being "met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it."[87] This solution arguably blurs the lines further and places considerable responsibility on undertakings, somewhat shifting the burden of proof to undertakings required to show that they do not "accept" the information announced by competitors.

The theoretical starting points can be summarised as requiring three criteria. First, a form of contact must be established, separating the practice from independent conduct. Secondly, the information exchanged must result in subsequent conduct. Thirdly, causation must exist between the information exchanged and the subsequent conduct.[88]

2.3.3 Public announcements as concerted practices in *Container Shipping*

Container Shipping provides an example of how seemingly independent announcements, which when "genuinely public" typically do not constitute concerted practices,[89] falls under the scope of Art. 101 (1). A genuinely public announcement is presumed to be equally accessible to all customers and competitors in terms of costs of access.[90] Arguably, there is also a requirement of genuine relevance for customers, as it is held that announcements "directed at users" usually evade Art 101.[91] Figure 1 presented in *Container Shipping* is illustrative. It shows that the parties announced their respective GRIs within a short period, with similar amounts of increase, intended for the exact same implementation date.[92]

84 Case T-279/02 Degussa para.133.

85 Ibid. para.134.

86 Case C-74/14 Eturas and Others para.48.

87 Joined Cases T-25/95 Cimenteries CBR v Commission (Cimenteries) para.1849.

88 Whish & Bailey (2021) pp.118-119.

89 Communication 2011/C11/01 para.63.

90 Communication 2022/C164 para.425.

91 Case C-89/85 Ahlström Osakeyhtiö and Others v Commission para.64

92 Case AT.39850 Container Shipping para.28.

Figure 1

Party	Announcement date	Implementation date	The Announced amount of the increase (in USD)
OOCL	26.9.2012	1.11.2012	525
UASC	26.9.2012	1.11.2012	505
CSCL	27.9.2012	1.11.2012	525
ZIM	27.9.2012	1.11.2012	500
Coscon	28.9.2012	1.11.2012	550
Hapag	28.9.2012	1.11.2012	500
MSC	29.9.2012	1.11.2012	500
NYK	1.10.2012	1.11.2012	550
Evergreen	2.10.2012	1.11.2012	525
HMM	2.10.2012	1.11.2012	500
Maersk	2.10.2012	1.11.2012	500
CMA CGM	10.10.2012	1.11.2012	500
Hanjin	12.10.2012	1.11.2012	500
MOL	25.10.2012	1.11.2012	500

Although the GRIs were unilateral, the condition of reciprocal contact was deemed fulfilled as the competitors "responded" to each other's announcements.[93] Such practice falls under the scope of requesting or, at the very least, accepting the information disclosed.[94]

Regarding the content of the information, this is clearly relevant when assessing whether a carrier has eliminated or substantially reduced the uncertainty of its future conduct. This requires a concrete assessment,[95] where relevant factors include whether the exchange is "likely to influence the commercial strategy of competitors"[96] and whether it "reduces or removes the degree of uncertainty as to the operation of the market in question."[97]

Announcing one's intended future price increase, as in *Container Shipping*, falls directly under the scope of eliminating or reducing the uncertainty regarding future conduct. The Commission briefly held that an information exchange can constitute a concerted practice if it "reduces strategic uncertainty in the market thereby facilitating collusion - that is to say, if the data exchanged is strategic" and further, that future pricing information constitutes "the most sensitive commercial information."[98]

The importance of "strategic data" has been apparent in the practice of the Commission. In the Horizontal Guidelines (2011) the Commission presumed that sharing

93 Ibid. para.38.

94 Joined Cases T-25/95 Cimenteries para.1849.

95 Case T-279/02 Degussa paras.133-135.

96 Communication 2022/C164 para.423.

97 Case T-588/08 Dole Food and Dole Germany v Commission (Dole (GC)) para. 62; See also Case C-7/95 P John Deere v Commission para.90.

98 Case AT.39850 Container Shipping para.35.

> "strategic data between competitors amounts to concertation, because it reduces the independence of competitors' conduct on the market and diminishes their incentives to compete."[99]

Agreements or practices involving information exchanged regarding capacity-sharing, and cargo-sharing may diminish competing carriers' incentive to compete when offering shippers liner shipping transport.

In the New Horizontal Guidelines, the Commission somewhat shifts its focus, and does not repeat the notion that exchange of strategic data facilitates collusion. Rather, the Commission points to the concern that the exchange of "commercially sensitive information" can create mutually consistent expectations, thus resulting in a collusive outcome.[100]

Within the liner shipping sector, the difference between "sensitive" and "strategic" data is arguably modest. Information concerning each company's fleet capacity, operational costs, performance, and pricing policies are likely to fall within both categories. However, the category "strategic data" may be interpreted more widely, as most information concerning a carrier's operations, to some extent, can be deemed strategic. Consequently, the shift towards focusing on commercially *sensitive* information may imply a somewhat stricter approach.

Conversely, the new guidelines leave little room for the condition of reciprocal contact or coordination between the parties. The guidelines clearly state that when only one undertaking unilaterally discloses commercially sensitive information, such as its future pricing policies, this will constitute a concerted practice. Since competitors are presumed to take account of information disclosed unilaterally, competitors must actively report the disclosure to the authorities or respond with a clear statement that it does not wish to receive such information.

The statements above indicate a modest threshold for information exchanges to amount to concerted practices, particularly in liner shipping, as several parameters concerning e.g. capacities, vessel performances, and sailing routes can be deemed "strategic" or "commercially sensitive." Even though the practice in *Container Shipping* resembled "responses" between the competitors, statements in case law may imply that also "purely" unilateral announcements, depending on its degree of sensitivity, are likely to constitute concerted practices when another requests or accepts it. This choice of interpretation may be justified as a way of capturing the increasingly complex forms of information exchanges, but it simultaneously reduces legal predictability since the lines between independent conduct and collusion are increasingly blurred.

Chapter 2 has examined when information exchanges between competing carriers amount to agreements, decisions by associations or concerted practices under Art. 101 (1). The analysis has uncovered that much cooperation in liner shipping is based on formal written agreements such as pooling agreements, consortia, and alliances. However, information exchanged outside of such forums can amount to concerted practices, as in *Container Shipping*.

Although the lines between independent conduct and collusion remain blurred, the existence of a concerted practice presumes contact between competing carriers, subsequent conduct by the carriers on the relevant market, and causation between the two. Interpretations by the enforcers have resulted in a situation where undertakings are presumed to make use of information announced by competitors, and even public announcements are included should they reduce the strategic uncertainty in the market. Exchanges of information, either privately or publicly, concerning strategic parameters such as freight rates, carrying capacities, and vessel performances, may therefore be deemed concerted practices,

99 Communication 2011/C11/01 para.61.

100 Communication 2022/C164 para.417.

should the competing carriers remain active on the market and not distance themselves from the information. The next chapter presumes the existence of a concerted practice and addresses the condition requiring the cooperation to restrict competition "by object or effect."

3 Information exchanges between liner shipping companies restricting competition by object

3.1 Introduction

3.1.1 The alternatives object v effect

No cooperation between liner shipping companies, neither as agreements, decisions of associations, nor concerted practices, are deemed contrary to Art. 101 unless they cause the prevention, restriction, or distortion of competition.[101] One may either establish anti-competitive conduct based on the cooperation itself, or by examining its actual effects on the liner shipping market. This chapter introduces both alternatives and their relationship, before examining when information exchanges between competing carriers can restrict competition by object.

Information may be shared "purely" through direct exchanges, or "ancillary" via an agreement or a third-party. *Container Shipping* provides an example of the former, while consortia, pools, and alliances exemplify the latter. The information exchanged ancillary should be assessed in the context of its "channel."[102] This adds another nuance, namely whether the cooperation, and the information exchanged accordingly, restrict competition by object or effect.

Art. 101 (1)'s wording reveals that these are alternative conditions. However, they are not mutually exclusive.[103] The CJEU has consistently held that 'object or effect' implies it necessary to consider the effects *only* if one cannot establish an anti-competitive object. In the case *S.T.M.* (1966), the Court determined "first the need to consider the precise purpose of the agreement" (its object) and further, where that analysis "does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement" should be considered (its effects).[104] This approach has been continuously affirmed, also in *Container Shipping*.[105]

Although these procedural steps seem straight-forward in theory, the interpretations remain inconsistent, and legal scholars continue to debate the distinction between the concepts.[106]*Container Shipping*, for instance, illustrates how this division may allow competition authorities to "avoid" the normally complex assessment of showing anti-competitive effects by prematurely conclude on the existence of a restriction by object. Consequently, one may risk that excessively wide interpretation of the object-alternative can intercept cooperation with potentially pro-competitive *effects*.[107] Such a practice has been rejected by the Court, emphasising that there is nothing preventing the competent authority from examining the effects where it is considered appropriate.[108] The development of how widely the 'object'-alternative has been interpreted is further commented under Section 3.1.2 *infra*.

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[101] TFEU art. 101 (1). The provision lists certain conduct which "in particular" restricts competition, including, among others, direct or indirect price fixing (a), limiting or controlling production (b), sharing markets (c), discriminatory treatment (d) and excessive contractual obligations (e).

[102] Communication 2011/C11/01 para.56.

[103] Case C-228/18 Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others (Budapest bank) para.44.

[104] Case 56/65 Société Technique Minière v Maschinenbau Ulm p.249; See also Case C-67/13 P Groupement des cartes bancaires v Commission (CB) paras.49-52.

[105] Case AT.39850 Container Shipping para.48.

[106] Whish & Bailey (2021) pp.126-127.

[107] Hjelmeng & Østerud (2022) p.81.

[108] Case C-228/18 Budapest Bank para.40.

Recent case law offers some clarification of the required assessment of 'object' before 'effect.' In *Generics*, which concerned a settlement agreement in a patent dispute, the Court held that the existence of an infringement by object may be assumed if it is "plain from the analysis" of the conduct, that it "cannot have any explanation other than the commercial interests [... of the parties] to not engage in competition."[109] Thus, the analysis should stop at the object-alternative only when there is little doubt about the cooperation's anti-competitive object.

Besides the dichotomy, both alternatives have since the case *Völk* (1969) been interpreted to also require an appreciable impact on competition (*de minimis*). *Völk* concerned an agreement granting territorial exclusivity of sales, which normally falls under the 'object'-alternative. Cooperation evades the provision "when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question."[110] Following this, even the most serious anti-competitive conduct such as price-fixing falls short of Art. 101, provided it only has an insignificant impact on the market.[111]

Accordingly, minimal cooperation between competing carriers, such as a pools, conferences, or consortia consisting of only a few ships, may be perfectly legal. However, in the case *Expedia* (2012) the Court held that an infringement by object which may affect intra-Member State trade "constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition."[112] From this it seems only necessary to consider the appreciable impact in the case of infringements 'by effect.' Some scholars have contested that *Expedia* does not overturn *Völk*, continuously debating whether the *de minimis*-doctrine is appropriate for the 'object'-assessment.[113] When preparing *Expedia*, AG Kokott took the view that the *de minimis*-doctrine in principle is applicable both to 'object' and 'effect'-infringements, but the *required proof* of appreciable impact differs.[114] Such an approach may resonate with the fundamental idea that the more obvious restriction, the less rigorous assessment is required.

Arguably, such a reasoning provides a sufficient basis for examining the cooperation's impact on the market. However, the Commission's guide to how it will apply the doctrine (De Minimis Notice) does not apply to 'by object'-infringements,[115] and the Consortia BER does not exempt cooperation which has "as its object" the fixing of prices, limitation of capacity of allocation of markets.[116] Thus, depending on the *categorisation* of the cooperation, one may face different thresholds regarding its impact.

In sum, the 'object'-alternative should be reserved for the clearer infringements of competition where it is "plain from the analysis"[117] that there is little need for further examination of the information exchange's effects. This is likely to be the case where an agreement regarding sailing routes is followed by a practice where carriers share the relevant routes and ports between them. Another example is where competing carriers meet to discuss future freight rates, followed by stable rate levels across the market. Should the cooperation be more sophisticated and not resemble an apparent cartel, the decisive question under Art. 101 (1) becomes

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109 Case C-307/18 Generics (UK) and Others v Competition and Markets Authority (Generics) para.87.

110 Case 5/69 Völk v Vervaecke para.7 p.302.

111 Whish & Bailey (2021) p.145.

112 Case C-226/11 Expedia v Autorité de la concurrence and Others (Expedia) para.37.

113 King (2015) p.223.

114 Opinion of Advocate General Kokott in Case C-226/11 Expedia paras.47-48.

115 Communication 2014/C291/01 para.8.

116 Regulation 936/2009 art.4.

117 Case C-307/18 Generics para.87.

whether it has anti-competitive effects. The remainder of Chapter 3 analyses the 'object'-alternative and whether cooperation in liner shipping can constitute such infringements.

3.1.2 Restriction by object

Restrictions to competition by object are deemed the most explicit forms of anti-competitive conduct. The general perception has been that such types of coordination "can be regarded, by their very nature, as being harmful to the proper functioning of normal competition"[118] One may argue that such restrictions pose the most severe threat to normal competition in a market, and the CJEU has elaborated that

> "certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered *so likely to have negative effects*, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market"[119] (emphasis added).

For instance, competing carriers agreeing to set common sales prices of liner transport services may heavily distort or completely remove normal competition on prices. Such conduct poses, in itself, a risk to normal competition.

The Court's formulations suggest a substantial threshold to conclude on a restriction by object. This assumption has been challenged through gradually widening interpretations by the Court, criticised by authors as expanding the "object box."[120] Formulations in the case *T-Mobile* (2009) illustrate the "high tide,"[121] where the Court held that

> "it is sufficient that it has *the potential to have a negative impact* on competition. In other words, the concerted practice must *simply be capable* in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition"[122] (emphasis added).

This standard was repeated in the case *Allianz Hungaria* (2013).[123] However, the Court quickly corrected these statements in the case *CB* (2014). The Court recognized the limits to the scope of the 'object'-alternative, most prominent by holding that the GC (the judgement under appeal) *erred in law* when stating that "the concept of restriction of competition by object must not be interpreted restrictively."[124] Subsequent case law has explicitly required a restrictive interpretation of the 'object'-alternative, and the substantial threshold is now clearly confirmed. The case *Generics* is illustrative, as the Court held that "the concept of restriction of competition 'by object' must be interpreted strictly and can be applied only to some concerted practices."[125]

It remains debatable whether the 'object'-alternative requires documenting an appreciable negative impact on competition (see Section 3.1.1 *supra*). Regardless of

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[118] Case C-32/11 Allianz Hungária Biztosító and Others v Gazdasági Versenyhivatal (Allianz Hungária) para.35

[119] Case C-286/13 P Dole Food and Dole Fresh Fruit Europe v Commission (Dole (CJEU)) para.115.

[120] Whish & Bailey (2021) p.127; See also Jones, Sufrin and Dunne. (2019) pp.226-228.

[121] Hjelmeng & Østerud (2022) p.71.

[122] Case C-8/08 T-Mobile para.31.

[123] Case C-32/11 Allianz Hungária para.38.

[124] Case C-67/13 P CB para.58.

[125] Case C-307/18 Generics para.67.

views, it is arguably in practice easier to establish an appreciable impact having already confirmed that the conduct reaches the 'object'-threshold. This is because the alternative requires that the conduct, after a restrictive interpretation, by its very nature is harmful to normal competition.

Whether information exchanges restrict competition require a case-by-case approach.[126] The Court has stated that an exchange which is

> "*capable of removing uncertainty* between participants as regards the *timing, extent and details* of the *modifications to be adopted* by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object"[127] (emphasis added).

In sum, the 'object'-alternative must be interpreted strictly and is reserved to the most serious forms of anti-competitive cooperation between carriers. Information exchanges which facilitate price cartels, or sharing of liner shipping markets will normally be captured. Such cooperation will, in itself, be likely to have an appreciable adverse impact on competition in liner shipping.

However, case law has seen different formulations when conducting the 'by object'-assessment, leaving legal scholars debating whether the practice points toward a specific methodical approach. Analysing the legal application of the Courts can provide guidance to competition authorities and companies when evaluating potential infringements. However, analyses of different statements have given rise to particularly two different approaches.

3.2 Different theoretical approaches

3.2.1 Introduction

Establishing one common methodical approach can help liner shipping companies and authorities when considering new and complex ways to share information. It may also assist in harmonising the application throughout Member States and provide legal certainty. However, the existence of several approaches may contribute to unclarity and legal uncertainty. Different views on assessing infringements by object could affect the outcome of specific cases of information exchanges between competing carriers, making it a potentially essential division.

3.2.2 The orthodox approach

The first approach, referred to as the "orthodox approach",[128] separates obvious infringements from the complex, less obvious ones.[129] By categorizing certain forms of cooperation as infringements by object, one presumes that these practices are so likely to have negative impact on competition that further examination is unnecessary.[130] Practices evading this category must be examined in detail to uncover their effects. Whish & Bailey provides an example of how to categorise different types of agreements and place them outside or within the "object box."[131]

One starting point has ever since the case *Consten and Grundig* (1966) been to examine the conduct's "nature." Concerning supply contracts with exclusivity clauses, the Court held that

126 Capobianco (2004) p.1250.

127 Case C-286/13 P Dole (CJEU) para.122.

128 King (2015) pp.29-30.

129 Bergqvist (2020) pp.107-109.

130 Case C-286/13 P Dole (CJEU) para.115.

131 Whish & Bailey (2021) p.127.

> "Grundig undertook not to deliver even indirectly to third parties products intended for the area covered by the contract. *The restrictive nature* of that undertaking is obvious if it is considered in the light of the prohibition on exporting which was imposed"[132] (emphasis added).

The "nature" of agreements can illustrate if they "in themselves pursue an object restrictive of competition." If so, that object "cannot be justified by an analysis of the economic context."[133] The Commission arguably endorses this approach by categorising certain conduct at "hardcore restrictions" in guidelines and BERs,[134] in addition to stating that the CJEU and CFI have "always qualified agreements containing export bans dual-pricing systems or other limitations of parallel trade as restricting competition 'by object'."[135]

One case which clearly advocates the orthodox approach is *European Night Services*. The CFI stated that an agreement should be assessed by considering its actual conditions and economic context "unless it is an agreement containing *obvious restrictions* of competition such as price-fixing, market-sharing or the control of outlets"[136] (emphasis added). The CFI categorised price-fixing, market-sharing, and control of outlets as 'object'-infringements without having to place them within their context.

The three examples provided for in *European Night Services* are all relevant in liner shipping. Conference agreements which agree on common freight rates and pooling agreements concerning revenues, both have elements of price-fixing. Cargo pooling and liner consortia, due to coordination of sailing routes and operations, involve elements of market sharing. Large shipping alliances can resemble control of services, as large combined market shares on certain routes may allow the members to control and reduce the services offered. Following a strict orthodox approach, several such agreements may fall under the object-alternative if their restrictive nature is "obvious." Pure information exchanges may be more discrete, and public announcements are likely to escape the object-box, unless the exchange clearly aims at coordinating prices, allocating markets or reducing the transport services offered.

On one hand, the orthodox approach offers legal predictability, as one may examine the conduct and attain substantial guidance by asking how the Court previously has categorised this type of infringement. Moreover, it offers procedural predictability, as it will be sufficient for competition authorities to evaluate the cooperation and demonstrate that it "fits into the object category and hence breaches"[137] Art. 101 (1). If not, the competition authority must assess the cooperation's effects. On the other hand, the orthodox approach is arguably less suited to address modern and more sophisticated forms of cooperation. It can be criticised for over-simplifying the law and not taking into account the economic and legal context of the conduct.[138] Thus, one may argue that complex information sharing and operational agreements in liner shipping may be ineffectively assessed through such rigid categorisation.

[132] Cases C-56/64 Consten and Grundig v Commission p.343.

[133] Case C-403/04 P Sumitomo Metal Industries v Commission para.43.

[134] See Regulation 906/2009 art.4 and Communication 2004/C101/08 para.23.

[135] Cases 2001/791/EC Glaxo Wellcome and Others para.124.

[136] Joined cases T-374/94 European Night Services and Others v Commission (ENS) para.136.

[137] Bennett & Collins (2010) p.314.

[138] King (2015) pp.48-49.

3.2.3 The analytical approach

The second approach is based on a "two-step analysis"[139] of the specific case, also referred to as the "analytical approach."[140] The first step is to evaluate the content of the practice, asking what the conduct involve and if its harmful nature is commonly accepted and easily identifiable.[141] The second step is to place this content within the factual, economic, and legal context, thus widening the perspective and examining the cooperation in light of its circumstances.[142]

The two-step analysis may be derived from the Court referring to that "regard must be had inter alia to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part."[143] Also the EFTA Court has referred to the "specific legal and economic context" in its assessments.[144] Such formulations may point to a concluding contextual analysis, after considering the conduct isolated.[145] The approach is explicitly supported by AG Bobek when preparing the case *Budapest Bank* (2019).[146] Regarding the border between the second contextual step and a full effects-analysis, Bobek regards the difference more of degree than of kind. He argues that the second step requires competition authorities to check on a general level "whether there are any legal or factual circumstances that preclude the agreement or practice in question from restricting competition", thus carrying out a "basic reality check."[147]

If the content of the conduct reveals sufficient harm to competition, it may still be justifiable or proven to be pursuing pro-competitive objectives when placed within its context. Of particular relevance would be the parties' ability to refer to other, legitimate explanations for the cooperation.[148] Within liner shipping, this approach would first consider the actual information exchange between carriers, for instance to discuss coordination of transport on a specific route (potentially resembling market-sharing) before interpreting the exchange within the liner shipping market and competitive circumstances, e.g. examining how many ships are part of the coordination, the companies' market shares, and the saturation of the demand on that route.

Applying the analytical approach could lead to traditionally "clear"[149] infringements such as horizontal price fixing falling outside the object-alternative, while normally benign agreements being included.[150] Arguably, the conduct itself cannot be sufficiently analysed without regarding its circumstances. However, once the market characteristics are examined, the evaluation resembles a 'by effect'-assessment, and the analytical approach appears to operate with blurred lines. To consider the economic and legal context requires an examination of the services affected and the relevant market conditions, which in large amounts to an 'effects'-analysis.

139 Bergqvist (2020) pp.107-109.

140 King (2015) p.55.

141 Opinion of AG Wahl in Case C-67/13 P CB paras.55-56.

142 Bergqvist (2020) p.107.

143 Cases C-501/06 P GlaxoSmithKline para.58; See also Case C-67/13 P CB para.53.

144 Case E-3/16 Ski Taxi SA and Others v The Norwegian Government, paras.60 and 64-65.

145 Hjelmeng & Østerud (2022) p.76 footnote 43.

146 Opinion of AG Bobek in Case C-228/18 Budapest Bank paras.41-43.

147 Ibid. paras.49-50.

148 Case C-591/16 P Lundbeck v Commission paras.112-114.

149 See TFEU art. 101 (1) and footnote 99 *supra* for the list of particularly restrictive conduct, which can be permitted when applying the analytical approach.

150 Bergqvist (2020) p.107.

3.2.4 Main differences

In short, the orthodox approach considers "certain collusive behaviour",[151] for instance price fixing, as being so likely to have negative impact on competition that it is appropriate to place them within the "object box."[152] It offers predictability and bright lines between the object and effect assessments but may be insufficient to correctly categorise modern and complex infringements. The analytical approach considers the actual content of the cooperation, before placing it within its "economic and legal context."[153] This approach may provide accuracy, but also requires a circumstantial analysis which in principle has been reserved the 'by effect'-assessment. Theoretically, one may also regard this approach as "a way out" of the object box for cooperation types which traditionally are deemed obvious threats to competition, but which in the specific context of the market are less harmful or even justified.

It is not obvious which one of the two approaches, if any, is feasible. One may view the public policy choice being between administrative advantages of predictable bright lines, and legal accuracy capturing the underlying economic structures of the conduct.[154] When considering the legality of information exchanges within liner shipping, the chosen approach may affect the outcome. Having the legal starting points and theoretical approaches in mind, the paper now turns to discussing when information exchanges constitute restrictions by object.

3.3 Information exchanges as concerted practices restricting competition by object

3.3.1 Introduction

When assessing the information exchange, determining the *type* of exchange initially provides a framework for the evaluation. This section examines pure information exchanges, where the economic function lies in the exchange of information itself.[155] The question examined is under which circumstances pure information exchanges, as concerted practices, between liner shipping companies restrict competition by object.

Pure information exchanges can occur both directly between competitors, for instance through a meeting, and indirectly, through a third-party such as a trade association, or through public announcements ("signalling"). *Container Shipping* provides a recent example of pure information exchanges through signalling. All 14 liner shipping companies publicly announced their intended price increases.[156] The main economic function, and commercial value, was the announcements themselves.

The legal test when considering 'object-infringements' is whether the information exchange is "capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted" by competitors.[157] One may identify certain *characteristics* highly relevant to that assessment. Theoretically, these may be categorised in an "inner" and "outer" layer. The former relates to the internal "nature" of the information exchange such as its degree of commercial sensitivity, its level of detail, its age, and whether the data is private

151 Case C-286/13 P Dole (CJEU) para.115.

152 Whish & Bailey (2021) p.125.

153 Cases C-501/06 P GlaxoSmithKline para.58.

154 Smith, Ridyard & Petrescu (2015) p.35.

155 Camesasca and Schmidt (2011) pp.227-228.

156 Case AT.39850 Container Shipping paras.26-27.

157 Case C-286/13 P Dole (CJEU) para.122; See also Case AT.39850 Container Shipping para.50

or public. The latter concerns its external circumstances such as its frequency, public availability, and market coverage.[158] Since each exchange must be analysed concretely, the totality of these characteristics is decisive.

3.3.2 Characteristics of the exchange

Most of the characteristics' impact on competition depends to some extent on the market structure, which affects the premises for the functioning of competition.[159] For example, in oligopolistic markets one may expect that less frequent exchanges of less detailed information are required to facilitate collusion. Oligopolies are characterised by a small number of sellers and many buyers,[160] as well as homogenous products, transparent markets, significant barriers of entry, and interdependence between producers.[161] The liner shipping market has certain oligopolistic features such as concentration on the supply side, considerable barriers of entry, multiple links between competitors and homogenous services. Such markets, with few competing carriers in a transparent market, potentially facilitates relatively better use of competitors' information than in a fragmented and diversified market. Depending on the market structures, the difference between private and public exchanges can be critical.

3.3.2.1 Private communication

Generally, information exchanged privately is likely to pose greater risk than public exchanges. One obvious concern is that private exchanges between competitors may have the objective of colluding and restricting competition. Conversely, public exchanges tend to promote the interest of parties unaffiliated with the information exchange system, making them less alarming.[162]

Several cases finding a restriction by object concerned information exchanged privately. In the case *Tate & Lyle,* the GC assessed meetings between the competitors British Sugar and Tate & Lyle, where the former unilaterally disclosed its future prices on industrial sugar.[163] The GC concluded that the meetings' purpose to coordinate pricing policies, restricting competition by object.[164] A similar approach was taken in *T-Mobile,* which concerned one meeting between the only five operators in the Dutch mobile telecom market. The competitors discussed reduction in a standard commission and the Court stated that conduct "such as that in the present case" pursued an anti-competitive object.[165] The case *Bananas* concerned bilateral information exchanges via telephone between two large banana producers. The exchanges included "pre-fixing information" of future quotation prices and were deemed to restrict competition by object,[166] upheld on appeal by both the GC,[167] and the CJEU (referred to as "*Dole*").[168]

Points of private contact between liner shipping companies, via meetings or shipping associations, are thus likely to spark the interest of competition authorities. Depending on the exchange's context, authorities may be concerned that the

158 Gassler (2021) pp.11-14.

159 Communication 2022/C164 paras.443-446.

160 Van Gerven and Varona (1994) p.576 footnote 5.

161 Albors-Llorens (2006) p.852.

162 Camesasca, Schmidt and Clancy (2010) pp.412-413.

163 Case T-202/98 Tate & Lyle and Others v Commission (Tate & Lyle) paras.9-11.

164 Ibid. paras.53 and 72.

165 Case C-8/08 T-Mobile paras.10 and 41-42.

166 Summary of Case COMP/39.188 Bananas paras.7-9.

167 Case T-588/08 Dole (GC) paras.54 and 683.

168 Case C-286/13 P Dole (CJEU) para.160.

parties pursue an anti-competitive agenda. For instance, when competitors meet in relation to a pooling agreement, the expressed objective may be to discuss and evaluate the cargo-pooling, but the meeting does provide a forum for them to discuss and collude on other competitive issues. However, safeguards such as independent brokers or lawyers present in the meeting, or by isolating the parts of the business involved in the cooperation, can mitigate such risks.

3.3.2.2 Public signalling

Although public communication traditionally causes less competition concerns, recent development of signalling-cases illustrate that also unilateral announcements can be regarded as restrictions by object. Signalling on parameters of competition, be it prices, capacities, or operations, can inform both shippers and competing carriers. It may offer shippers predictability as to when, from where, and at what price they can send their cargo. Simultaneously, it enables competing carriers to track operations and developments of one's commercial strategies, potentially facilitating collusion in an increasingly transparent market.[169] In a competitive market, one may expect price transparency to increase the competition on prices.[170] However, the liner shipping market is far from perfectly competitive, so signalling must be examined with caution.

Commitment decisions such as the Dutch case *KPN*, the British case *Cement* and *Container Shipping* illustrate that also public announcements can restrict competition by object. *KPN* concerned three competing mobile operators' announcements and interviews introducing "connecting fees" and increased prices. The competition authority referred to the "anti-competitive risks" of such announcements, namely collusion on increased prices.[171]

Cement concerned open letters concerning future prices from cement producers to their customers. The British Competition Commission ordered the parties to refrain from the conduct, as the likely effects of the generic announcements were increased prices for cement.[172]

Thus, public announcements, particularly concerning prices, can restrict competition by object. *Container shipping* illustrates that the assessment depends on the other characteristics of the exchange. Of particular interest is the temporal aspect of the shared information.

3.3.2.3 Past, present, and future data

The most obvious way to reveal one's future commercial strategies is by exchanging data concerning future intentions. One may also assume that exchanges regarding future intentions are more likely to "by their very nature [...] being harmful to the proper functioning of normal competition"[173] than for instance information on current or historic strategies.

In *Container Shipping*, the liner shipping companies announced their respective GRIs, intended to be implemented within the next 3 to 5 weeks.[174] Similarly, *Tate & Lyle* concerned unilateral disclosure of *future* price intentions,[175]*T-Mobile* concerned *future* intentions to reduce a standard commission,[176] and *Dole* concerned

[169] Foros & Hjelmeng (2021) pp.186-188.

[170] Case C-238/05 Asnef-Equifax v Ausbanc (Asnef-Equifax) para.58.

[171] Case 13.0612.53 KPN paras.37-38 and 45.

[172] The Price Announcement Order 2016 paras.2 and 12.

[173] Case C-32/11 Allianz Hungária para.35.

[174] Case AT.39850 Container Shipping para.27.

[175] Case T-202/98 Tate & Lyle para.10.

[176] Case C-8/08 T-Mobile para.12.

pre-pricing information exchange regarding *future* quotations.[177] Additionally, the case *E-Books*, information exchanges between competing publishers of e-books was treated as an 'object'-infringement. The information involved the publishers' *future* conduct and was aimed at raising retail prices of e-books.[178]

Still, one cannot exclude that announcements of current and past conduct may fulfil the criterion, especially if the competing carriers can establish patterns or cycles at a competing carrier, which again can provide insight to its future conduct. Arguably, more recent information is more likely to reveal such future intentions. For example, a liner shipping company which announce its previous quarter's price increases and costs, may reduce competitors' uncertainty regarding its conduct in the next quarter.

One recent case, *Forex – Sterling Lads*, concerned a cartel of information exchanged in private and multilateral chatroom between 4 major banks which traded on the FX spot market. The information concerned the parties' trading activities, current positions, and future intentions, and was meant to affect the competitive parameters of price and expert risk management. The practice was labelled as a cartel, restricting competition by object, and the Commission held that the exchange of "sensitive current and forward-looking information" was used to coordinate the competing traders' conduct to their benefit.[179]

The decision's summary does not distinguish between past and future information exchanged, which can support that also past and present information may restrict competition by object. Similarly, in the recent case *Sony*, the GC stated that under those circumstances "knowledge of past results was highly relevant information for competitors, both for monitoring purposes and with a view to future contracts."[180] The New Horizontal Guidelines also acknowledge that whether information is considered "historic" and less likely to restrict competition

> "depends on the specific characteristics of the relevant market, the frequency of purchase and sales negotiations in the industry, and the age of the information typically relied on in the industry."[181]

Thus, one cannot exclude that the exchange of past and current information may, under specific circumstances, restrict competition by object.

However, one may argue that the reasoning in *Sony* and the guidelines often requires in-depth analyses of the effects to uncover whether the historic and current data reveals competitors' future conduct. Exchanges of current information is for instance recognised to potentially have restrictive effects on competition.[182] The system of Art. 101 captures such conduct in the 'by effect'-assessment, and when interpreting the 'object'-alternative restrictively, present and historic information is arguably not covered.

3.3.2.4 Strategic/sensitive data

Exchanging "strategic" information is essential to establish a concerted practice (see Section 2.3.3 *supra*). Naturally, these strategic aspects are relevant also when assessing whether the exchange restricts competition, as strategic and sensitive information is usually more "capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted"

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177 Case C-286/13 P - Dole (CJEU) para.14.

178 Case AT.39847 E-Books paras.77 and 92.

179 Summary of Case AT.40135 Forex – Sterling Lads paras.11-15.

180 Case T-762/15 Sony and Sony Electronics v Commission para.127.

181 Communication 2022/C164 paras.430-431.

182 Ibid. para.431.

by competitors on the market.[183] Although *Container Shipping* limited the discussion to price increases, Section 2.3.3 *supra* illustrated that information regarding a variety of parameters in liner shipping may be viewed as "strategic." Case law reveals that several of these parameters can restrict competition by object.

The case *Cobelpa* concerned information exchanges between competing manufacturers of printing paper and stationery. Involving mutual notification of price increases and reductions, discounts, rebates, and general terms of sales, supply and payment, the Commission held that

> "the only possible explanation for the exchange of this information is again the desire to coordinate market strategies and to create conditions of competition diverging from normal market conditions, by replacing the risks of pricing competition by practical cooperation."[184]

Cobelpa illustrates a broad approach to the price parameter, supporting that most aspects of the pricing policies can constitute an 'object'-infringement.

The case *Infineon Technologies* concerned a cartel between sellers of smart card chips based on the exchange of commercially sensitive information. The GC found that in light of

> "the economic factors characterising the market [the] exchange of sensitive information concerning their competitors' strategic policies in terms of prices, capacity and technological development" constituted an infringement by object.[185]

Accordingly, a variety of strategic parameters may restrict competition by object, particularly exchanges concerning "strategic policies."[186] For the services provided in liner shipping, pricing policies (both freight rates and operational prices), transport capacities, and vessel performances are relevant examples. Depending on the other characteristics of the exchange, these parameters may provide insight to competitors' future market conduct.

However, since the concept of "strategic policies" must be considered in light of "the economic factors characterising the market",[187] a contextual analysis is arguably required. Consequently, one must look to the liner shipping market for guidance, and it becomes essential how one defines the "relevant market" in each case. Arguably then, the analytical approach is necessary when considering cases of information exchanges. Although certain parameters such as sales prices and quality and quantity of services are generally deemed "strategic", other parameters are sector-specific and may fall outside the scope if applying the orthodox approach, even if the exchange, by its nature, is deemed harmful to normal competition.

3.3.2.5 Individualised v aggregated data

Generally, it is easier to reach a common understanding and to monitor the competitors' potential deviations from the cooperation when the information exchanged is individualised, namely when the prices, capacities and geographic coverage by each competitor is identified.[188] When data is sufficiently aggregated,

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183 Case C-286/13 P Dole (CJEU) para.122; See also Case AT.39850 Container Shipping para.50.

184 Case 77/592/EEC Cobelpa para.29.

185 Case T-758/14 Infineon Technologies v Commission (Infineon Technologies (GC)) paras.173-175. Upheld on appeal by the CJEU in Case C-99/17 P paras.157-158.

186 Case T-758/14 Infineon Technologies (GC) para.174.

187 Ibid. para.173.

188 Communication 2022/C164 para.429.

it may be less useful in collusion, even though it can provide insight to the market conditions.[189]

Arguably, the level of detail is a characteristic more relevant for the 'by effect'-assessments.[190] However, the level of detail has been a central element also in 'object'-infringements. *Forex – Sterling Lads* concerned individualised information as each trader's recent activities, current positions, and future intentions were revealed.[191] In the case *Fatty Acids* (see Section 3.4.1 *infra*), a key aspect to the information sharing agreement was the quarterly exchange of each competitors' respective quantities sold in the market.[192] Also in *Container Shipping*, each liner shipping company's GRIs provided individualised data of the intended price increases.[193]

The degree of aggregation required to restrict competition depends on the market structure. For instance, in a tight oligopoly, competitors may not need to know exactly which company deviated from the collusion in order to respond.[194] Although the liner shipping market in general cannot be categorised as an oligopoly, it has certain elements which lead to that even aggregated data under specific circumstances can be useful, particularly when only a few pools or alliances compete with each other on a route.

Although characteristics in the "inner layer" can provide substantial guidance as to whether the information is adequate to restrict competition by object, the external features of the exchange are equally important to facilitate collusion.

3.3.2.6 Frequency

More frequent exchanges of information can increase the risks of collusion, facilitating that competitors more easily reach collusive outcomes, and enable them to better monitor each other.[195] In *Container Shipping*, the Commission resonated that the concerted practice constitutes an object-infringement when it occurs "on a regular basis and over a long period."[196] The risk to competition must, however, be evaluated in light of the other characteristics and the structure of the market. In *T-Mobile*, for instance, the Court held that depending on the market structure, just one meeting exchanging information can be sufficient for competitors to align their conduct to the detriment of competition.[197]

Generally, less frequent exchanges are necessary to restrict competition in stable markets than in unstable markets.[198] Similarly, markets with oligopolistic features may require less frequent exchanges. The information exchanged in such environments may provide substantial insight to parameters of competition even if exchanged infrequently. The liner container market arguably has certain oligopolistic features, depending on the definition of the relevant market and the number of competitors on specific routes. For instance, markets where only two or three of the major liner alliances compete, likely require less frequent exchanges to attain collusion.

Thus, competing carriers arguably require less frequent exchanges of information to collude. The discussion highlights the importance of defining the relevant

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189 Ibid.

190 Gassler (2021) pp.205-206.

191 Summary of Case AT.40135 Forex – Sterling Lads paras.13-14.

192 Case IV/31.128 - Fatty Acids para.12.

193 Case AT.39850 Container Shipping para.51.

194 Communication 2022/C164 para.429.

195 Ibid. para.439.

196 Case AT.39850 Container Shipping paras.35-36.

197 Case C-8/08 T-Mobile para.59.

198 Communication 2022/C164 para.439.

market, which, if not obviously restrictive, presumes some contextual considerations in line with the analytical approach. Regardless, exchanges occurring on a regular basis over a long period of time are more likely to restrict competition by object, as seen in *Container Shipping*.

3.3.2.7 Lack of efficiencies produced

One final consideration is whether the information exchanges, considering all its characteristics, are likely to produce efficiencies externally, to the benefit of customers and consumers. Case law often considers the participants' (in)ability to show plausible efficiencies arising from the exchange. In *Generics*, it was held that the conduct "cannot have any explanation other than the commercial interests [... of the parties] to not engage in competition."[199]

In *Tate & Lyle* and *T-Mobile*, there were no apparent reasons for why future pricing information or production costs would increase effective production nor produce efficiencies. In *Dole*, it was unclear whether the exchange of price-related information would improve the competitors' predictions of future demand. In *E-Books*, negotiations between the publishers lead to a higher-price distribution model rather than a lower-price model, clearly not benefiting customers.[200]

Furthermore, the case *Asnef-Equifax* concerned an information exchange system on debtor information, meant to provide solvency and credit information relating to the risks of providing credit. Financial institutions would be provided with both negative and positive information regarding customers' history of credit balances, securities, and defaults. The Court emphasised that the exchanges could improve lenders' information, remove information asymmetry, and thus improve the functioning of the lending market. Consequently, the practice was found not to have by its nature, the object of restricting competition.[201]

Following this rationale, an exchange of information which is plausible to produce efficiency gains, such as improving the functioning of the market, is less likely to be categorised as an object-infringement.[202] Some plausible efficiencies are obvious when considering the cooperation, such as capacity cooperation between carriers resulting in more optimal usage of ships' cargo space. Others are less intuitive and require considerable analysis of the cooperation and its effect on the market. For instance, the pooling of ships, which in practice reduces the number of independent competitors, can actually increase competition on certain routes because the scale of the demand far exceeds most independent carriers, making them unable to bid individually. One may argue that the economic and legal context must be addressed to reveal the cooperation's actual effects, and that the analytical approach is required. However, the referred case law looks to the basic functions of the conduct to identify efficiencies, which supports that an orthodox approach is sufficient. Additionally, one may argue that if the efficiencies are not easily identifiable, the conduct is more suited for the 'by effect'-assessment, supporting the orthodox approach.

Liner Shipping companies will argue that most public announcements and agreements, as pooling or consortia, produce efficiencies to the benefit of shippers and consumers. Cooperating on joint operations, sailing schedules and capacity utilisation may enable faster and more efficient transport of cargo, tailored to the concrete demands on different routes. It may also support sustainability, as better cargo and space utilisation reduces the number of voyages and thus decreases the negative impact on the environment. Signalling of prices may inform shippers and easier allow them to choose the best option. These factors arguably signal that

199 Case C-307/18 Generics para.87.

200 Gassler (2021) p.200.

201 Case C-238/05 Asnef-Equifax paras.46-48.

202 Ibáñez Colomo & Lamadrid (2016) p.26.

cooperation in liner shipping primarily should be assessed under the 'effect'-alternative.

However, simply pointing to such transporting efficiencies provides no safe harbour for liner shipping companies. Should the exchange of information exceed what is necessary to achieve the efficiencies, it may, depending on the circumstances, be categorised as an 'object'-infringement.[203] Should the excess information enable price-fixing, that restriction is not justified by improved cargo-utilisation. For pure information exchanges, *Container Shipping* shows how also signalling can have little value for customers, depending on its characteristics. The Commission emphasises the unbinding character of GRIs and that customers are unable to compare prices with certainty.[204] If the public information is less available or less relevant for customers than for competitors, it can be considered as lacking efficiencies.

Pure information exchanges thus require complex assessments of the relevant characteristics. The evaluation assists in answering the research question, as one may, by identifying these characteristics, attain substantial guidance to whether the exchange in question is contrary to Art. 101 (1). *Container Shipping* exemplifies how to conduct that assessment in liner shipping.

3.3.3 Public announcements restricting competition in *Container Shipping*

Considering whether the information exchange restricts competition by object requires a case-by-case approach.[205] The starting point is whether the exchange is "capable of removing uncertainty between participants as regards the timing, extent and details" of their future modifications of conduct.[206]

On the one hand, the wording "capable of removing uncertainty" implies a lower threshold than the restrictive interpretation currently established. On the other hand, detailed and specific information may be required in order to remove uncertainty regarding "timing, extent and details" of competitors' future modifications of conduct. Arguably, the threshold can be deducted to require concrete facts to reveal future conduct, but not evidence of the exact restriction.

The remaining assessment depends on the concrete characteristics of the exchange and the methodical approach applied. Although private communication may cause more significant concern for collusion, also public announcements can fulfil the criteria.

In *Container Shipping*, the Commission first restated the general condition that the cooperation must reveal a sufficient degree of harm to competition. If so, it is not necessary to consider the effects. Even though the required threshold was not commented, three relevant points of consideration were presented and analysed, in that order:

1) The content (and nature) of the concerted practice,
2) The objectives behind the practice, and
3) Its economic and legal context.[207]

Regarding its content and nature, it was held that future pricing constitutes the most sensitive commercial information. Additionally, GRIs were announcements of future intentions rather than of actual and current prices. Moreover, GRIs included the intended implementation date and the geographic area concerned.

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[203] Communication 2022/C164 para.409.

[204] Case AT.39850 Container Shipping paras.43-44.

[205] Capobianco (2004) p.1250.

[206] Case C-286/13 P Dole (CJEU) para.122.

[207] Case AT.39850 Container Shipping para.48.

Finally, the GRIs were individualised as each company's intentions were identifiable.[208]

As with public announcements generally, the GRIs may have had the objective of informing customers and increasing their predictability when planning future shipments of cargo. However, the Commission pointed to GRIs' potentially limited value for shippers and raised the concern that the objective possibly were to communicate pricing intentions "to competitors rather than informing customers."[209]

The economic and legal context revealed that a large number of GRI rounds had taken place. That regular practice may have allowed the carriers to "develop a climate of mutual certainty" regarding each other's prices. Additionally, the GRIs were announced regardless of high or low prices and may have had "limited connection to real market conditions." Due to these factors, the announcements possibly allowed liner shipping companies to coordinate their prices.[210]

By preliminarily finding an 'object-infringement', the Commission seemingly distinguished concerted practices from restrictions by object only by taking into account the frequency and duration of the exchange. It argued that competing carriers are presumed to use the information announced when determining their own conduct, and "even more so when the concertation occurs on a regular basis and over a long period."[211]

Nevertheless, the concrete assessment shows that the Commission considered, or at least pointed to, several other factors, namely that the GRIs

1) concerned *future* intentions,
2) provided *individualised* data,
3) were *commercially strategic and sensitive*, and
4) had *limited value* for customers.[212]

The characteristics applied in *Container Shipping* largely correspond to the case law discussed above. The finding of an 'object'-infringement may therefore be contingent on identifying several of these characteristics. Identifying more of them arguably increases the likelihood of finding an 'object-infringement.' Similarly, the more sensitive information exchanged, or the more explicit a company's future intentions are expressed, the more likely it is to remove uncertainty regarding competitors' future modifications of commercial conduct.

Container Shipping exemplifies how to apply the analytical approach in liner shipping cases. The structure clearly follows a two-step analysis, as the Commission initially evaluated the content and nature of the GRI-practice, before placing it in the economic and legal context.

Applying the orthodox approach, the liner shipping companies would likely evade the categorisation of an 'object'-infringement. Although the GRIs concerned highly sensitive information (future prices) the practice was based on unilateral announcement of each carrier. Unilateral public announcements fall outside the typical restrictions by object. Applying a restrictive interpretation of the 'object'-alternative, the GRIs are likely placed outside of the "object box." The question would therefore become whether the practice had anti-competitive effects, in which the economic and legal context would be a central consideration.

Simultaneously, the Commission's regard to the context of the exchange was scarce. One may argue that identifying a large number of GRIs over a long period of time does not require any considerable analysis of the context nor market structures. In that sense, the GRIs were not placed within the functioning of the market, at least not explicitly. This may support that the distinction between the

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208 Ibid. paras.35 and 50-51.

209 Ibid. para.52.

210 Ibid. paras.49 and 53-54.

211 Ibid. paras.35-36.

212 Ibid. paras.35 and 49-54.

orthodox and analytical approach remains theoretical and is not appropriate in all cases of information exchange.

This section has uncovered important characteristics when assessing pure information exchanges, and an example of the assessment has been illustrated in *Container Shipping*. Since the question is whether the exchange removes uncertainty regarding competitors' modifications of future conduct, the totality of the exchange must be considered. Defining the relevant market seems decisive, as its definition affects the exchange's context, such as the degree of concentration and transparency the market. To deem pure information exchanges as restrictions by object, the removal of uncertainty should be easily identifiable within the economic and legal context of the liner shipping market. Consequently, in terms of the research question, liner shipping companies may reduce the chances of having their public announcements pursued by competition authorities by infrequently announcing only highly aggregated data and refrain from speculating on future developments of competitive parameters.

Many of the observations regarding the exchange's characteristics and market conditions are relevant also in the next section, which addresses information being exchanged ancillary to a formal agreement.

3.4 Information exchanges as agreements restricting competition by object

3.4.1 Introduction

Ancillary information exchanges occur as part of a wider arrangement and is ancillary to that scheme.[213] Cooperation between competing carriers, for instance regarding capacity utilisation, often requires some exchange of commercially sensitive information. The question becomes whether that exchange can give rise to collusive outcome regarding the participants' activities within and outside the cooperation.[214] Relevant case law is reviewed to uncover the legal requirements for ancillary information exchange to restrict competition by object. After identifying certain key features, the discussion addresses whether the different forms of cooperation in liner shipping can restrict competition by object.

In liner shipping, information can be exchanged ancillary to a pooling, alliance, conference, or consortium agreement. Most of these agreements can be claimed to pursue efficiencies in terms of stabilising supply, optimising capacity-usage, or improving competition. However, analysing the information exchanges may uncover an objective to restrict competition and increase the profits of the currently operating carriers.

That was the rationale in *Fatty Acids*, which illustrates the delicate borders between pure and ancillary information exchanges.[215] Concerning an information-sharing agreement between competing producers of oleochemicals, the participants exchanged historic information every quarter regarding their respective quantities sold in the market.[216] The Commission held that it "bears a strong resemblance" to an outright quota-fixing agreement, restricting competition by object.[217] The information exchange agreement enabled and facilitated the objective of quota-fixing, and was in that sense ancillary. One may argue that the underlying quota-fixing agreement was disguised as an information-sharing agreement.

213 Bennett & Collins (2010) p.328.

214 Communication 2022/C164 para.409.

215 Case IV/31.128 - Fatty Acids.

216 Case IV/31.128 - Fatty Acids paras.1 and 12-13.

217 Ibid. paras.39 and 44.

Especially complex cooperation blurs the lines between ancillary and pure information exchanges. *Fatty Acids* illustrates the importance of assessing such exchanges in the context of its agreement, and that the totality of the agreement and information exchanged must be assessed. Depending on the complexity, the spill-overs of commercially sensitive information can be minimised through safeguarding measures.[218] Such measures are also relevant to the assessment, for instance if obvious measures are not in place. Case law has seen that ancillary exchanges can constitute restrictions by object.

For statistical data exchanged ancillary to market-sharing and price-fixing, the exchange will often be considered a restriction by object, as in the case *Vegetable Parchment*.[219] The Commission noted that the exchange of statistical data must be analysed, since the sharing of especially specific statistics between competitors may exist for the tacit sharing of markets or fixing prices.[220] Similar exchanges in *Cobelpa* were found to have "crossed the threshold which separates a lawful information agreement from a practice intended to restrict and distort competition."[221] Finally, the case *Benelux Flat-glass* illustrates how the exchange of sale figures allowed competitors from the Benelux countries to monitor closely the sales of their main rivals, enabling them to control or modify the trade flows between the states.[222]

Arguably, the exchange of information must thus be central to the anti-competitive nature of the agreement, both in the sense of enabling the cooperation and to retain it through monitoring. The cases confirm that the characteristics discussed above remain equally important for ancillary exchanges. The totality of shared information between competing carriers must be assessed, where particularly frequent flow of individualised and commercially sensitive information may enable collusion of future conduct, constituting an 'object'-infringement. Thus, liner shipping companies engaged in cooperative agreements should strive to restrict the flow of information exchanges. Should competition authorities' investigations uncover exchanges of commercial information unrelated to for instance the cargo-sharing agreement, such as average freight rates for the routes in question, they may conclude on an anti-competitive object.

3.4.2 Liner conferences, consortia, and pools

EATA is illustrative for ancillary information exchanges in liner shipping. It concerned an agreement between competing liner shipping companies to establish a capacity management programme for their common trade routes. The express purpose was to allow the parties to stabilise and increase their freight rates through e.g. controlling the transport capacity supplied by each participant. The agreement also contained provisions regarding the exchange of information.[223]

The parties would exchange information as frequently as every month concerning their maximum declared capacities, their percentage utilisation and total of actual filled shots, their forecasted capacity for the following two months, and their estimated monthly total for the next four months. The information was individualised to each member and would ensure their compliance with any collective decision on non-capacity utilisation.[224]

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218 See Communication 2022/C164 para.341 regarding joint purchasing agreements.

219 Case 78/252/EEC Vegetable Parchment para.69.

220 Ibid., paras.63-64.

221 Case 77/592/EEC Cobelpa para.27.

222 Case 84/388/EEC Benelux Flat-glass paras.45 and 47.

223 Case 1999/485/EC EATA paras.9-14.

224 Ibid. paras.154-155.

The Commission expressly recognised that information as commercially sensitive, and that these private and frequent exchanges of sensitive information confirmed the anti-competitive context of the exchange. Additionally, the exchange of information concerning the market conditions was one of the measures to give effect to the objectives of the EATA. Thus, the exchanges both confirmed the anti-competitive conduct (collusion) and maintained the collusion. The Commission conducted its analysis by explicitly evaluating the liner shipping market structure. It pointed to the very high combined market shares of the parties (up to 86 %), to the fact that most EATA-parties were members of the same association of shipping lines, and that many were parties to another agreement concerning tariff charges and sub charges. These links increased the total restrictions on competition and increased the flow of information between the participants.[225] Accordingly, the market conditions can be of decisive importance.

The case law concerning information exchanges illustrates certain competition law concerns in the liner shipping sector. Although one may argue that information within the shipping sector quickly becomes historic, *EATA* illustrates how information on past, current, and future capacities can all be deemed commercially sensitive, and that frequent exchanges of such information violate Art. 101 (1). Considering the case law examined in section 3.2.3 *supra* such an exchange may constitute a restriction by object, especially if applying an analytical approach where the liner shipping market structure is evaluated.

EATA also illustrates that even though the Conference BER was applicable, such group exemptions are interpreted narrowly. The Conference BER exempted agreements under a “liner conference” having as its objective the fixing of rates and conditions of carriage.[226] The condition of a “liner conference” required that the parties “operate under uniform or common freight rates” and other trading conditions.[227] Even though its objective was to fix the freight rates offered, *EATA* var considered not to fall under the scope of a conference agreement, as it had “no *direct mechanism* for agreeing on the implementation of freight-rate increases”[228] (emphasis added).

EATA thus confirms that although the current Consortia BER exempts a variety of operational agreements, these will not benefit from the exemption should they exceed the scope of the activities expressly mentioned in Article 3 or the market share limits in Article 5. Furthermore, agreements having the object of fixing prices, sharing markets or limit capacities outside the scope of Article 3 (hardcore restrictions) will not benefit from the exemption.[229]

Challenging nuances emerge when considering statements in *Budapest Bank*, where the Court confirmed that also cooperation which “indirectly determines” the prices offered constitutes restrictions by object.[230] The scope of “indirect” price fixing in relation to information exchanges is uncertain. However, one may argue that pooling agreements concerning capacities and revenues can fix prices indirectly, depending on the competitive situation on a given route.

Some authors have advocated that revenue-pooling is regarded as the most anti-competitive form of cartel in terms of competitive pricing.[231] Although current

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225 Ibid. paras.14, 66-71, 77-79 and 152-155.

226 Regulation 4056/86 art.4.

227 Regulation 4056/86 art.1 (3)b).

228 Case 1999/485/EC EATA para.82.

229 Regulation 906/2009 art.3-5.

230 Case C-228/18 Budapest Bank para.62. Indirect price fixing is recognised as pursuing anti-competitive object or effects in Art. 101 (1) *litra* a): "directly or indirectly fix purchase or selling prices or any other trading conditions." However, Budapest Bank explicitly recognises indirect pricing as an *object*-infringement.

231 Bennathan & Walters (1969) p.172.

practice of pools may be less strictly assessed, the pooling of revenues and information thereof can effectively reduce participants' incentive to compete on price and other parameters, especially in smaller pools facilitating monitoring. This may hold especially true in pools consisting of fewer participants, as each party more easily can monitor the developments of its competitors. Depending on the "relevant market" definition, the pooling agreement may thus indirectly fix prices on a route. Furthermore, should the pool exercise full disclosure between the participants, full information regarding competitors' vessel performance, hereunder average speed, fuel consumption, utilised space v available space, would be exchanged. Consequently, one may argue that pooling agreements "indirectly fix" the quality and quantity of the transport services offered, potentially constituting 'object'-infringements.

Information exchanged ancillary to e.g. a consortium may facilitate and enable cooperation exceeding the scope of the agreement and the conditions in the BER, potentially resulting in a restriction by object. Agreements regarding capacity adjustments, which are exempted only if "in response to fluctuations in supply and demand"[232] are likely be deemed capacity controls if the frequent exchange of individualised, sensitive information go beyond what is necessary to address the issue of fluctuating supply and demand. Liner shipping companies should therefore be observant not to exchange more information than necessary for the functioning of the joint operation agreement. The characteristics must be assessed in the context of the relevant liner shipping market, considering concentration, transparency, and barriers of entry. To categorise coordination of capacities as an object-infringement, the analytical approach is arguably required. The orthodox approach is likely to simplify the agreement and deem its nature not to restrict competition, thus referring it to a 'by effect'-assessment.

3.4.3 Strategic liner alliances

Also strategic alliances can restrict competition by object. Alliance agreements govern horizontal coordination of service capabilities of the participants,[233] and may regulate terms of container utilization on a large scale for several sailing routes.[234] Alliances may consist of a combination of vessel sharing, slot exchange and slot chartering,[235] providing for a potentially large degree of cooperation on commercially important parameters. Depending on the underlying agreements, alliances may fall under the definition of a consortium, and can, in principle, fulfil the conditions of the Consortia BER.[236] However, because of the current alliances' extensive scope and market shares, information exchanges within alliances may be so harmful to competition that they constitute 'object'-infringements

Neither the Courts nor the Commission have assessed liner alliances under Art. 101.[237] Generally though, cooperation and information exchanged within the major liner shipping alliances may violate Art. 101, and the Commission is expected to subject them to great scrutiny.[238] Some guidance can be found in case law from the aviation sector. Being part of the transport sector, central considerations are transferable to liner shipping. Depending on how the relevant market is

232 Regulation 906/2009 art.3 (2).

233 Slack et al. (2011) pp.65-66.

234 Panayides & Wiedmer (2011) p.26.

235 Van Bael & Bellis (2021) p.1458.

236 Ghorbani et al. (2022) p.440.

237 Van Bael & Bellis (2021) p.1458.

238 OECD (2015b) p.5.

defined, alliances often hold very large market shares on several routes,[239] both industries are capital-intensive, and there exists substantial barriers of entry.[240]

The case *British Airways* concerned extensive cooperation between three large airlines on certain transatlantic flights. The parties were members of the "One-world" alliance, and cooperating through a variety of agreements. After conducting its investigation, the Commission found that a revenue-sharing joint venture restricted competition by object on several routes. It was emphasised that the competitors cooperated in relation to "key parameters" of competition, namely fare prices, capacities, schedules, and sales and marketing. This extensive level of cooperation would practically "eliminate competition" on prices, capacities, and other parameters.[241]

In the case *Continental*, the parties were all members of the "Star Alliance" and enjoyed long-standing extensive cooperation on several transatlantic routes. The agreement primarily under scrutiny was a revenue-sharing joint venture ("A++ agreement"), expanding the scope of cooperation further and eliminating competition which "most likely could not be replaced."[242]

In the case *Air France* is the most recent of the three and concerned particularly a joint venture agreement ("TAJV") between members of the "Skyteam Alliance." The TAJV established profit- and loss-sharing between them on several transatlantic routes, and due to the comprehensive cooperation the parties were deemed to "fully coordinate their activities on capacity, schedule, pricing and revenue management" on these routes.[243]

Firstly, these cases confirm that, depending on the geographic coverage and operating routes in question, members of alliances are under competition rules fully regarded as competitors.[244] Secondly, alliances can involve cooperation in many aspects of the transport service. In *Continental*, the Commission found that the members' strategic network plans included capacity requirements, potential schedule patterns, pursuing joint revenue, inventory, and marketing management, combining their pricing functions, and aligning their pricing policies. Additionally, the A++ agreement included provisions concerning cooperation in relation to airport operations, quality management, IT and monitoring. Considering the case law reviewed in this thesis, there can be little doubt that coordination on all these commercial aspects necessarily includes a substantive degree of information exchanges which heavily increase market transparency. The creation of similar networks within liner shipping alliances will remove uncertainty regarding competitors' future conduct, thus restricting competition by object. The Commission's formulations that these agreements were "eliminating competition" on central parameters, and the parties "substituted competition with full cooperation" support this observation.[245]

Finally, the cases illustrate the challenge and importance of accurately identifying structures on the relevant market. One argument by the alliance members in *Air France* was that the Commission's assessment of the market failed to "fully capture the extent of competition that airlines experience from competing networks" notably from other alliances and coalitions.[246] Should the participants

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239 Case COMP/AT.39595 Continental/United/Lufthansa/Air Canada (Continental) para.43.

240 Case AT.39964 Air France/KLM/Alitalia/Delta (Air France) paras.59, 79 and 97.

241 Case COMP/39.596 British Airways/American Airlines/Iberia (British Airways) paras.2, 32-33 and 38.

242 Case COMP/AT.39595 Continental paras.2, 8, 34-36 and 54.

243 Case AT.39964 Air France paras.2, 10 and 38.

244 Case COMP/AT.39595 Continental paras.16 and footnote 14.

245 Ibid. paras.36-37.

246 Case AT.39964 Air France para.19.

of a pooling agreement face fierce competition from other pools, competition may be sufficiently ensured. However, by consolidating independent capacities, the number of competing carriers decreases, potentially increasing concentration and transparency, and thus facilitate collusion. Regardless, alliance members' ability to show potential enhanced competition between alliances and pools on the relevant market may ease competition authorities from finding an object-infringement.

As seen, the extensive cooperation within alliances may cause the concern of ancillary information exchanges in areas of capacities, geographic coverage, technical developments, and marketing. Even if the cooperation in itself would not amount to a restriction by object, the increased transparency and knowledge about competitors' operations resulting from shared information may result in competition authorities finding a restriction by object.

This analysis seemingly requires some consideration of the economic and legal context of the agreement and information exchanged. The analytical approach may, therefore, more effectively capture the restrictive nature of the agreements in liner shipping. The cases of smaller pools and consortia will likely evade the 'by object'-categorisation when applying an orthodox approach. However, because of the liner shipping alliances' size and scope, that cooperation may be captured also when applying an orthodox approach. In *British Airways*, for instance, the Commission preliminary determines that the agreements "by their very nature" aimed at and had the potential of restricting competition, thus constituting an object-infringement.[247] Moreover, should the competition authorities similarly find that liner shipping alliances "eliminate" competition on the relevant market,[248] the agreements and information exchanged are more appropriately treated as 'object'- rather than 'effect'-infringements.

This section has addressed the anti-competitive potential of ancillary information exchanges. Examining when sharing of information restricts competition 'by object', certain characteristics determine the categorisation. Case law has emphasised the strategic or sensitivity nature of the information, to what extent information is individualised, and whether the information concerns future intentions or current and past results. Moreover, the frequency of the exchange and whether the exchange produces any plausible efficiencies are relevant. Private exchanges may be deemed more likely to result in collusive outcome, although also public announcements can be deemed 'object'-infringements. The totality of the exchange is decisive and especially important for ancillary exchanges, where exchanges facilitating and enabling anti-competitive collusive outcome can be prohibited. Some traditional cooperation in liner shipping may be considered anti-competitive by object, should for instance the pooling or consortia agreement go further than what is necessary to improve capacity utilisation, or the cooperation within large alliances eliminates competition on certain parameters. Competing carriers should thus be aware of the information flows permitted in relation to their cooperative agreements, as the case law of Art. 101 illustrates how several such agreements can be deemed 'object'-infringements.

247 Ibid. para.33.

248 Case COMP/39.596 British Airways para.37.

4 Concluding remarks

Liner shipping companies face considerable challenges regarding how EU competition law governs horizontal information exchanges. Competing carriers have, and continue to, engage in various agreements which, in addition to the public announcements, create different platforms for sharing information. Multiple platforms for information exchanges increase the market's transparency. Since the global liner shipping market is characterised by few competing carriers holding significant market shares, such increased transparency arguably increases both the options to engage in collusive outcome, and to monitor and maintain existing collusion.

The thesis has examined *how various forms of information sharing between liner shipping companies potentially can be viewed as pursuing anti-competitive objects* of Article 101 TFEU, and has demonstrated that both traditional agreements and sophisticated forms of concerted practices can restrict competition by object. Additionally, several legal uncertainties when applying Art. 101 have been uncovered, potentially increasing the risks of cooperating for competing carriers. EU Courts and legislators need to address these unclarities to secure legal predictability for carriers and competition authorities.

Firstly, the concept of a "concerted practice" requires that exchanges of information reduce or remove "strategic uncertainty" in the liner shipping market. Due to the presumption that carriers remaining active on the market and not distancing themselves from information disclosed will make use of the information, many exchanges, both public and private, may be deemed concerted practices. EU legislators should arguably provide guidance on the degree of reduced strategic uncertainty required to fulfil the condition. Particularly public announcements are challenging, illustrated in *Container Shipping*, since predictions of future market developments concerning capacities, geographic coverage and freight rates may be found in quarterly reports or press releases directed at one's customers. These statements can, however, reduce the degree of strategic uncertainty of competing carriers, potentially being treated as concerted practices.

Secondly, the definition of the relevant market has arguably paramount importance when determining both whether the exchange constitutes a "concerted practice" and if so, whether that practice restricts competition "by object or effect." Case law reveals several relevant characteristics of the exchange, such as its frequency, age, level of aggregation, and degree of commercial sensitivity. These characteristics will, however, have different impact on competition depending on the relevant market and the number of competitors on that market. Although one can determine the major liner shipping companies' global market shares, these shares will vary according to the region or trade route in question. Clear guidelines when determining the relevant market will increase predictability for competing carriers, especially in the current situation where a few liner shipping alliances dominate the global market.

Thirdly, there is unclarity regarding the distinction between 'object' v 'effect' and the assessments required. Traditionally, the dichotomy has implied to first checking whether the cooperation in its nature poses obvious threats to competition, restricting competition "by object." If not, enforcers must fully analyse the conduct and its context within the market conditions to uncover whether it restricts competition 'by effect.' Particularly two methodical approaches are highlighted in theory. Applying an orthodox approach follows a strict categorisation of certain types of cooperation as 'object'-infringements and can increase predictability for both undertakings and competition authorities. However, much of the case law in information exchanges applies an analytical approach by pointing to some degree of contextual analysis already in the 'by object'-assessment, blurring the lines between the alternatives. Still, this can be deemed necessary to correctly

categorise the conduct. Sophisticated and complex information exchanges are, for instance, likely to evade a rigid categorisation of the orthodox approach, even if the exchange, after some analysis, is revealed to clearly pursue an anti-competitive object. It rests at the enforcers to strike a balance, but clarification is required to ensure harmonised and effective enforcement of the EU competition rules.

Finally, competing carriers should re-evaluate their cooperative engagement in relation to the competition rules. The discussion has uncovered potentially vast exchanges of information ancillary to agreements, such as the pooling of cargo or revenue, and other joint operations within consortia agreements. Without sufficient safeguards and isolation of the cooperative areas, excessive exchanges of information may give rise to collusive outcome on other competitive parameters. Similarly, extensive cooperation on several commercial aspects naturally increases the exchange of sensitive information, and that information can be particularly harmful to competition in transparent markets. Excessive sharing of information may remove uncertainty regarding competitors' future modifications of conduct, restricting competition "by object." The analysis conducted in Chapter 3 shows that cooperation, particularly within the liner shipping alliances, is at risk of being treated as 'object'-infringements. Because of the structural framework facilitating extensive cooperation on several commercial aspects, the agreements and information exchanged between alliance members can effectively reduce or eliminate competition in certain markets. The European enforcers should therefore provide more guidance on how Art. 101 will be applied to liner shipping alliances.

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Ship Recycling and Liability

The duty of care vis-à-vis shipyard workers

Luna Linnemann

Preface

The expansion of trade has led to increasing regulatory uncertainty, especially in the maritime field due to its international nature. Written as part of my LLM in Maritime Law at the University of Oslo in April 2022, my thesis addresses these uncertainties in the field of ship recycling and liability for former ship agents and owners towards shipyard workers.

Ship recycling has been regulated through various international instruments and national legislation, but without much actual effect as to limit the unsafe and non-environmentally friendly recycling practices. However, recent case law examines a former ship agents' responsibility for the death of a shipyard worker based on the knowledge the ship agent ought to have had about the danger created by selling the vessel for recycling. Thus, the tendency points towards the fact that increasing access to information may create a regime of liability under a duty of care not otherwise available through existing legislation.

I hereby extend my gratitude to my academic supervisor, Alla Pozdnakova, for dedicating her invaluable time and knowledge to my project. Special gratitude goes to my significant other, Niclas Kongstad, for always being you and putting your trust in me. Thank you, friends and family. Finally, I congratulate myself for reaching the honorable milestone of being published.

Abstract

The area of liability is facing new difficulties with globalisation and trade expanding. This has also become evident in the maritime industry. An industry, which due to its international nature, inevitably is involved in various parts of the world with endless possibilities for incurring liability both in contract and tort. Especially, the area of ship recycling has within the last decade been exposed to the medias' eyes and criticism. Even though the area is somewhat regulated, the cases highlighted by the media have shown how the regulatory framework has been unable to combat the issues involved. For this reason, the present thesis aims at assessing the extent to which the gaps in the legal regime of ship recycling are caught by other legal mechanisms, namely the English duty of care notion as applied by the courts.

The recycling of ships is regulated by various instruments at an international level. The thesis concludes that the regulatory regime contains three main gaps. These are the difficulties of proving subjective elements, as it is required that intent to recycle a vessel is present before the Basel Convention and EU Waste Shipment Regulation is applied. Furthermore, the same rules contain the gap that it is possible to argue that the decision was made outside the territory of a party to the rules. Lastly, for EU-flagged vessels, the main gap is that a ship can be reflagged.

Under English Tort law, a duty of care exists, when the relationship is one of proximity, it is foreseeable and fair and just and reasonable to impose such duty. In addition, there is a duty of care for someone who creates a danger exploited by a third party. These two grounds were used for asserting that a former ship agent was liable vis-à-vis a shipyard worker who fell to his death during the demolition of the vessel of the agent in *Hamida v Begum*. The Courts held that the Claimant had a real prospect of succeeding with the second ground and thus dismissed to strike it out. The thesis concludes that the case is a landmark case in the area of liability for shipowners, ship operators, etc. for their acts and omissions in relation to end-of-life vessels. Even though the case faces extensive hurdles, it is nevertheless arguable that the criteria for a duty of care can be met, because of the knowledge of the seller of the vessel, and thus the foreseeable and proximate conditions. The last requirements paired with the floodgate argument, may be an obstacle. However, the wider tendency to impose liability in similar areas of liability speaks in favour of stretching the duty of care to encompass the present.

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1 Introduction

1.1 Background and problem discussion

Shipping is a global business[1], and with globalisation having reached another level than ever before, new legal questions arise in the area of liability. The media has drawn more and more attention to business conduct and the consequences of outsourcing or selling off business and property as a way to avoid liability.[2] This includes the area of ship recycling.[3] An example hereof is found in a recent Norwegian appeal, which upheld the conviction of a Norwegian shipowner. He received a six months prison sentence over the attempted illegal export of the vessel "Harrier" from Norway to Pakistan for recycling.[4]

The ship recycling industry has been said to be not only the most dangerous job in the world,[5] but also the cause of severe environmental problems.[6] This has led to various international legal instruments.[7] However, the practice of unsafe and non-environmentally friendly recycling still continues. This is partly due to the gaps in the regulatory regimes, which make it easy to circumvent the legislation by arguing that a decision to recycle was made somewhere outside the scope of the regulation or reflagging the vessel prior to recycling. It is also partially due to the international nature of the maritime industry that makes it hard to codify and enforce one set of rules for the entire world. Whilst the immediate tortfeasor may be sued under national law and potentially found liable hereunder, their funds

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1 Falkanger, Brautaset, and Bull, Scandinavian Maritime Law - The Norwegian Perspective, 26.

2 This includes the many cases on parent companies' liability for its subsidiaries, such as in the infamous Rana Plaza building collapse, see *Das v. George Weston Limited* [2017] ONSC 4129.

3 The same issues are also seen in the earlier stages, namely the ship building. See for instance the Danish case where North Korean workers were exploited in a Polish Shipyard, where the work environment was considered unsafe, the workers were not paid and one worker ended up dying, cf. Krigslund, 'North Korean Laborers May Have Worked on Maersk Vessels'; 'Dansk krigsskib bygget med hjælp fra nordkoreanske tvangsarbejdere'; The Mediation and Complaints-Handling Institution for Responsible Business Conduct, 'Specific Instance on the Danish NCP's Own Instigation: The Due Diligence Process of the Danish Ministry of Defence in Regard to the Contracting and Building of the Inspection Vessel Lauge Koch'; Lillevang, 'Nordkoreanske tvangsarbejdere havde kontrakt på at bygge dansk inspektionsskib'.

4 19-183171MED-SUHO Notably, this case is one regarding the "old" rules on transport of waste, as the specific recycling rules for ships had not entered into force at the time of the incident. The case has been appealed and upheld at appeal, see Ismail and Klevstrand, 'Opprettholder Dom På Seks Måneders Fengsel for Skipsreder Georg Eide'. The final judgement has however not yet been released.

5 'The Toxic Tide'; The same has been said by The Global Trade Union IndustriAll, cf. Ship recycling: reducing human and environmental impacts, 'Science for Environment Policy (2016)', 3.

6 Falkanger, Brautaset, and Bull, above no 1, 136; Ship recycling: reducing human and environmental impacts, above no 5.

7 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; Regulation (EC) No 1013/2006 on shipments of waste; OECD, Decision of the Council on the Control of Transboundary Movements of Wastes Destined for Recovery Operations, OECD/LEGAL/0266; Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships; UNEP, Decision VII/26. Environmentally sound management of ship dismantling; Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/ECText with EEA relevance.

may be limited.[8] In addition, developing countries may often have weaker legal systems with limited law enforcement.[9]

Interestingly, a somewhat recent case[10] may pave the way for closing those very same regulatory gaps. The case involved a widow of a deceased shipyard worker who sued the operating agent *Maran* for owing the deceased an English law duty of care by selling the vessel, knowing the vessel would probably end up at a scrapyard with poor working conditions and lacking environmental standards. The High Court and Appellate Court held that the operating agent could owe a duty of care to the deceased worker in Bangladesh, even though the general rule under English law is that there must be a relationship of proximity, and that a party is not liable for harm done to another party by a third party. This was held to be the case even where there are multiple third parties involved in the transaction if the case is that the former operator created the danger. This poses an interesting question of how far the duty of care extends for agents, shipowners and other parties on the selling part of the transaction. The case is however not the final judgement but a mere allowance of letting the case proceed to trial. This will, albeit not lessen the importance of the judgements by the High Court and Appellate Court as the reasonings of the Courts have revealed the somewhat willingness to allow a duty of care to exist even though it would be *"an unusual extension of an existing principle"*[11]. This leads to the following research question.

1.1.1 Research question

To what extent are the liability gaps in the legal regime of ship recycling caught by the English duty of care notion as applied by the courts?

1.2 Purpose and delimitation

The purpose of this thesis is to briefly examine the rules governing ship recycling and hereby uncover some of the gaps in the legislature. This is to illustrate the difficulty of regulating this sector and thus identifying where courts may play a large role in ensuring the fulfilment of these regulations, and their underlying purpose, even though they are deemed inapplicable in certain cases. Thus, the aim becomes to map the law through precedent to identify and assess when and if legal liability may be imposed on shipowners or agents hereof, regardless of the gaps in the legislation concerned.

It is important to state that the thesis intends no blame on the parties involved in these cases but merely to objectively identify the law created via the courts and thus let the courts decide what is right and wrong when it comes to ship recycling. There will never be a one-sided story, and while companies may exploit the cheap labour in third-world countries, they are also generating work for the very same people and fostering the reuse of old steel.[12] That said, the choice of using yards with poor labour and environmental standards is not to be condoned. Hopefully, the courts' willingness to impose liability more often in the area of corporate

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8 The fact that the Deceased's employer in *Begum v Maran* was not known, speaks in favour of the assumption that it will be hard for the injured party to recover from the immediate tortfeasor, see *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) paragraph 11.

9 Millington, 'Responsibility in the Supply Chain', 363; Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains*, 80; Ulfbeck, Andhov, and Mitkidis, *Law and Responsible Supply Chain Management*, 9; Mitkidis, 'Enforcement of Sustainability Clauses', 68; Van Dam, 'Tort Law and Human Rights', 226, 228; Ulfbeck, 'Virksomhedens Privatretlige Erstatningsansvar for Overholdelse Af Menneskerettigheder i Udlandet', sec. 5.2.

10 *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB); *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326.

11 *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 paragraph 37.

12 Ship recycling: reducing human and environmental impacts, above no 5, 3.

liability for damage done to people and the environment by the exploitation of the companies' position in similar cases will lead to a better and more safe ship recycling industry.

Given the limited space, the present thesis will not include an examination of vicarious liability and whether the shipowner could possibly be vicariously liable for the acts and omissions of an operating agent.

Further excluded are the rules on product liability, and thus no examination of whether a shipowner could be liable based on the rules of product liability.

Whether the expansion of liability via case law is the appropriate way to deal with a potentially incomplete legal body is not within the scope of the present thesis, which merely tries to set out the legal sphere of liability drawn by expansion.

1.3 Methodology

The present thesis uses the doctrinal legal method, where legal arguments are taken into consideration and weighed against each other.[13] This includes weighing all relevant legal sources, such as the law, international regulation, case law, legal considerations of justice and soft law. Even though no formal hierarchy exists between these legal sources, formalised sources attach a higher degree of legal value.[14] Thus, the regulations and case law are given priority over soft law instruments such as maritime companies' own ship recycling policies.

The thesis will primarily be centred around tort law liability, especially English Tort Law. The reason being that a claim from shipyard workers would be non-contractual towards any other party than that of their immediate employer, i.e. the shipyard.

The reason for especially focusing on English law is first of all that the leading case at the moment (and to be finally decided later) is based upon an English law duty of care. Even where the case is not to be decided under English law, but Bangladeshi law, it is suggested that the duty of care is not materially different between the laws of those two systems.[15] Another example of English law's prevalence was also found in *Okpabi v Shell*[16],which held that the English decision *Chandler v Cape*[17] was applicable to the case, which was decided according to Nigerian law. Both of which were about the parent companies' liability for the conduct of a subsidiary in relation to personal injury and environmental damage respectively.

However, even where international private law points to the law of the land where the harmful event occurred, English law and precedent will still be of relevance. This is because many of the developing countries in which the harmful events are often taking place have developed their legal systems on the same foundations as those of their former colonials.[18] Thus, English law plays a significant role in many maritime disputes in regard to ship recycling, which is often conducted in former English colonies, but also shipping in general, where English law seems to be one of the primary and preferred choices of law. Some scholars even argue that tort law is universal in nature and thus that the choice of law

13 Blume, Retssystemet og juridisk metode, 106.

14 Ibid., 120.

15 *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 paragraph 123.

16 *Okpabi and others v. Royal Dutch Shell Plc and another*, [2018] EWCA Civ 191.

17 *Chandler v Cape Plc* [2012] EWCA Civ 525.

18 Van Dam, above no. 9, 237.

question is less dominating.[19] Secondly, the international nature of shipping[20] makes it natural to include international law, such as English law.[21]

1.4 Outline

This thesis starts by introducing the rules and regulations in the area of ship recycling. This includes mapping the rules as well as identifying any gaps in the regulatory regime.

Next, the thesis proceeds with identifying where the regulatory gaps might be "caught", which will include the examination of English law of negligence. Especially the duty of care is relevant to include and map the scope of. This will be done by both examining case law on liability for acts and omissions.

On the basis of the preceding examinations, the thesis will analyse the main case for the research topic, namely *Begum v Maran*. This will include laying out all the arguments used by the Courts in reaching their conclusion to assess whether the case may establish a duty of care for the former shipowner towards the workers at the shipyard.

Lastly, a conclusion will be drawn.

19 Ulfbeck, above no 9, sec. 5.2.

20 Falkanger, Brautaset, and Bull, above no 1, 27.

21 Ibid., 28.

2 Ship Recycling: Regulatory framework and gaps

To identify the main gaps in the legal regime of ship recycling, a short overview of the practice and the rules governing it is provided in the following paragraphs.

2.1 What is ship recycling?

Ships that have outdone their lifespan must be dismantled, after which their parts are treated as waste. This process is also known as *ship breaking* or *ship recycling*, and the ships in this life stage are often referred to as *end-of-life ships*. Ship recycling can occur in various ways. One is through dry docking and another by sailing the vessel onto the shore. The latter process is also known under the term *beaching*. Beaching has attracted a lot of criticism, as it is not regarded as safe for the people conducting the work or the environment suffering from various oils and other components and substances leaking into the soil, groundwater and ocean. More than 70 % of the ships that annually need to be demolished are done so in India, Pakistan and Bangladesh where the beaching method is used.[22] The World Labour Organisation has categorised the employment of ship dismantlers as the most dangerous in the world.[23] With that said, ship recycling is an important part of the circular economy as it allows for the reuse of steel and various other components, which reduces the need to use mining as a way of gaining new steel.[24] Thus, ship recycling also contributes positively by reducing the non-environmental friendly practice of mining. However, one may argue that ship recycling needs to be safe and environmentally friendly in order to properly reduce the negative effects of mining, as it would otherwise just equalise the absence of mining.

As with many things, profit is also a known decisive factor for shipowners to choose beaching over recycling at safe shipyards. It is estimated that the difference in profit by choosing the beaching method is US$ 3-7 million per recycled vessel.[25]

As a result of the impact of the ship recycling industry on human health and the environment, various legal instruments have been initiated to encounter the environmental, health and safety issues correlated with beaching (and ship recycling in general).

2.2 Regulatory framework of Ship Recycling

The following paragraphs present a short overview of the rules on ship recycling and introduces the main legal frameworks. It lies outside the scope to commence an in-depth analysis of each and every regulation presented. The main focus is to establish a basis of knowledge of the ship recycling regulation to identify and understand the gaps in the regulation to conduct the subsequent analysis of how case law has evolved in relation to these gaps. This leads to determining whether case law is in the midst of creating a new legal standard for liability for those responsible for end-of-life ships.

22 'The Problem - NGO Shipbreaking Platform'.

23 'The Toxic Tide'; The same has been said by The Global Trade Union IndustriAll, cf. Ship recycling: reducing human and environmental impacts, above no 5, 3.

24 Ship recycling: reducing human and environmental impacts, above no 5, 3.

25 'Shipbreaking Judgment'.

2.2.1 Basel Convention and EU Waste Shipment Regulation

Initially, the recycling of ships was not regulated under separate legislation but included under the rules on transboundary movement of waste. These rules have their outset in the 1989 Basel Convention[26], entering into force May 5th, 1992. It applies to all transboundary movement of hazardous waste between exporting and importing states. The Basel Convention is implemented in the EU by way of the European Waste Shipment Regulation[27].

The question is whether the end-of-life ships are included in the scope of the convention. At the Seventh Conference of the Parties to Basel Convention, the Parties recognised that ships are known to contain hazardous materials, and such materials may become hazardous waste, as listed in the annexes to the convention. Likewise, the decision taken at the Seventh Conference also recognised that a ship may become waste as defined in article 2 of the Basel Convention.[28] Thus, end-of-life ships can be rendered as hazardous waste under the Basel Convention.

An end-of-life ship on its way to a recycling facility will fall within the category of waste *"which are disposed of* ***or intended*** *to be disposed of"*[29] (author's own highlight), given that the ships are sold for demolition because they have served their purpose and no longer can be of use to the shipowner. This formulation of when waste falls within the scope forms a possibility to circumvent the legislation; the shipowners could argue that the intention was not present at the given time or the non-disclosure of any intention which may have been present regardless. Intent, as a subjective factor, can be very hard to establish solid evidence for a conviction. However, case law has seen instances where intent was present. The first such example was the *Seatrade* case, where the shipping operator and certain other executives were held criminally liable for intending to export ships in breach of the Waste Shipment Regulation.[30] Intent was found based on email correspondence before the ships were en route to the shipyards. More recently, a Norwegian shipowner was sentenced to six months imprisonment on the grounds of contribution to an attempt to scrap the vessel in contravention of the Basel Convention.[31] Here intent was found based on two insurance certificates, which were contradictory to the last destination of the vessel.

According to the Basel Convention, the import and export of hazardous waste to or from non-Parties are illegal.[32] Furthermore, according to the Basel Ban Amendment entering into force on December 5th, 2019, export from OECD[33], EC and Lichtenstein countries to other than those mentioned is not allowed.[34]

Essential to the Basel Convention is that all transboundary movement between parties as well as through non-parties is subject to the prior informed consent procedure.[35] An issue to be identified here is that if the end-of-life ship commences its

26 The Basel Conventions compatibility with UNCLOS lies outside the scope of this thesis.

27 Regulation (EC) No 1013/2006 on shipments of waste.

28 UNEP, Decision VII/26. Environmentally sound management of ship dismantling.

29 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, article 2(1).

30 Prosecutor v X (Seatrade); 'Ship Recycling', The case is however up for retrial, as the Defendant successfully appealed the case due to impartiality reasons.

31 19-183171MED-SUHO.

32 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, article 4(5).

33 Out of the main recycling countries (India, Bangladesh, Pakistan, China, China and Turkey) only Turkey is a member of OECD.

34 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, article 4A.

35 Ibid, articles 6, 7.

journey for recycling in a non-party state, the Basel Convention (or EU Regulation) will not apply.

The rules on prior informed consent entail that the exporter must inform the country of import and/or transit of the intended import/transit, and the importer/ transit country must give its consent to the requested import/transit. In the case of ship recycling, it is the shipowner, as the generator or exporter of the (hazardous) waste (end-of-life ship), who has the responsibility to notify the exporting and importing state. The export state is the state from which the vessel departs to the recycling facility or which it is planned to depart from.

To sum up, two main gaps appear when considering the scope and enforceability of the Basel Regime. Firstly, the hardship of proving intent means that shipowners can easily argue that they had no intention to recycle the ship or avoid disclosing any evidence hereof. Just as easily it can be argued by the shipowner that the decision to recycle was taken someplace not included in the scope of the Basel Convention, and also hereby circumvent its application. Secondly, the end-of-life vessel may commence its last journey from a state who is not a party to the Basel Convention. This will exclude the vessel from being regulated by the Basel Convention. These gaps led to increased pressure on the maritime industry to form more purposeful and effective regulation, which led to the Hong Kong Convention.

2.2.2 Hong Kong Convention and EU Ship Recycling Regulation

As a result of the issues of circumventing the Basel regime and the continued unsafe and unhealthy ship recycling practices seen in developing countries, the IMO was urged to draft a set of rules specifically designed for the recycling of ships. From this, the Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships[36] emerged. The convention has however not yet entered into force and will therefore not be further elaborated.

Instead, the focus will be on the EU Ship Recycling Regulation[37], which implements the Hong Kong Convention on a EU-level[38], albeit with higher standards for the inventory of hazardous materials and ship recycling facilities. The Regulation distinguishes itself from the Basel regime by solely regulating the recycling of ships. *"The purpose of this Regulation is to prevent, reduce, minimise and, to the extent practicable, eliminate accidents, injuries and other adverse effects on human health and the environment caused by ship recycling. The purpose of this Regulation is to enhance safety, the protection of human health and of the Union marine environment throughout a ship's life-cycle, in particular to ensure that hazardous waste from such ship recycling is subject to environmentally sound management."*[39].

The Recycling Regulation takes precedence over the Basel Regime for EU-flagged vessels.[40] Given that the Regulation only applies to EU-flagged vessels,[41] this poses yet another gap in the regulatory regime, whereby shipowners can circumvent the legislation by so-called *reflagging* prior to recycling. It is also known as

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36 Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships.

37 It is outside the scope of this thesis to asses the Ship Recycling Regulation's illegality in relation to circumventing the Basel Convention.

38 Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/ECText with EEA relevance, article 1(3).

39 Ibid, article 1(1).

40 That the Basel Convention does not allow for reservations, and that the EU Ship Recycling Regulation illegally creates an exemption to the Basel Convention is not addressed.

41 Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/ECText with EEA relevance, 2(1).

the term *flags of convenience*.[42] This means that the flag of the ship will be changed before recycling the ship and thereby exempting the ship from EU regulation. Shipowners will then instead be caught by the Basel regime and then fall back on where the decision to recycle was made, as this can make the export of the ship (as waste) illegal. However, as noted above, it will be difficult to establish intent to recycle the ship even though the flag is changed because reflagging also occurs on other occasions than prior to recycling and is somewhat common in the maritime industry. One could argue that reflagging prior to recycling and then selling to a so-called *cash buyer* (as is usually the case) highly indicates an intention to recycle.

Exempt from the Ship Recycling Regulation are warships, ships under 500 gross tonnage, and ships flying a member state flag but only operating in that same jurisdiction throughout its lifecycle.[43] The regulation further sets out the requirement that all new buildings shall have an inventory of hazardous materials.[44] Even ships flying the flag of a third country shall have such an inventory if they call at a member state port.[45]

Most importantly, in regards to the purpose of the Recycling Regulation, it requires that all end-of-life ships flying the flag of a member state must be recycled at a facility included in the European list.[46] This duty falls upon the shipowners. According to the definitions of the regulation, *"'ship owner' means the natural or legal person registered as the owner of the ship, including the natural or legal person owning the ship for a limited period pending its sale or handover to a ship recycling facility, or, in the absence of registration, the natural or legal person owning the ship or any other organisation or person, such as the manager or the bareboat charterer, who has assumed the responsibility for operation of the ship from the owner of the ship, and the legal person operating a state-owned ship*"[47]. Thus, it can be concluded that both the legal owner as well as i.e. managers of vessels flying the flag of a member state are under the obligation to only recycle at a yard included in the European List. Thus, the shipowner, as the legal owner, will not be able to circumvent the obligation to use European Listed facilities simply by outsourcing all operations to another entity or agency.

However, given the fact that shipowners are not bound by any rules on when and how many times they can change the flag of the vessel, this obligation seems rather illusory.

2.3 Sub-conclusion

To summarise, three main gaps are identified in the regulatory regime of ship recycling. First, the burden of proving intent seems almost impossible unless prima facie evidence is present. Secondly, the journey towards recycling can be made outside the territories of any parties to the Basel Convention, which will render the Convention inapplicable. Thirdly, the possibility of reflagging a vessel prior to recycling makes the EU Recycling Regulation's applicability almost negligible.

By this brief examination, it can therefore be concluded that the regulations aimed at preventing the adverse effects on human health and the environment resulting from the ship recycling industry are not properly embraced by the very

42 NGO Shipbreaking Platform, 'Flags of Convenience'; Falkanger, Brautaset, and Bull, above no 1, 58.

43 Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/ECText with EEA relevance, 2(2)(a-b).

44 Ibid, article 5(1).

45 Ibid, article 12.

46 Ibid, article 6(2)(a).

47 Ibid, article, 3(1)(14).

same regulatory regime. Unfortunately, this leads to a consistent use of recycling facilities with unsafe working practices, damaging the environment as profit most often outweighs these factors.

However, in recent case law, both in the area of ship recycling as well as in other areas facing the same kind of regulatory gaps due to the nature of the business' international character, courts are showing a willingness to impose liability regardless of lacking statutory duties. These cases especially evolve around the duty of care, an English tort law principle in relation to the rules on negligence. Thus, this area of law will be examined in the following chapter to analyse whether the regulatory gaps are filled by the dynamic nature of the Common Law Courts.

3 Tort law liability

As seen so far, the regulatory gaps doe not fulfil much of the aim initially sought by the Basel and Hong Kong Regimes. These gaps have however not withheld claimants from trying to establish grounds for liability for shipowners' recycling their vessels at facilities where human health and the environment are not of high importance. A particularly interesting case on the matter is *Begum v Maran*[48], where the wife of a former shipyard worker sued the former ship operating company for owing her late husband a duty of care. The legal grounds for the duty of care in the case were argued to be that the defendant owed such duty as the late shipyard worker was their neighbour or that the defendant owed the duty, because the defendant had created the danger exploited by a third party (the shipyard). The case was not determined on its merit but only a preliminary judgement, as the appellant had sought to strike out the case based on its fancifulness. This was however rejected by both the High Court and Appellate Court. The cases therefore pose an interesting contribution to the liability potentially facing shipowners and agents when recycling their vessels, which they will not be able to circumvent by making a decision someplace special or reflagging the vessels.

Before commencing the analysis of the grounds on which the decisions were made, a basic exploration and assessment of English tort law, hereunder especially the development of the duty of care, is laid out.

3.1 Tort law as a general liability rule

English tort law is one of the three main sources of liability in English law. The complete origin of the law of torts is out of the scope of this thesis, but in short: there are many torts under English law, and they have each developed certain requirements for certain factual situations.[49] Nowadays, a claimant can disclose certain facts for which there is a legal remedy, i.e. a cause of action. Thus, a tort law liability is based upon a duty owed to someone and arises from the breach of this duty.

Even though, and as mentioned above, there are many causes of action under English tort law, the tort of negligence eventually developed into a general liability rule.[50] This has led the courts to limit the scope of liability by imposing certain requirements of the tort of negligence.[51] These four requirements are firstly, the existence in law of a duty of care situation. Secondly, there has to be a breach of the duty of care by the defendant. Thirdly, there must be a causal connection between the defendant's careless conduct and the damage, and finally, that the particular kind of damage to the claimant is not so unforeseeable as to be too remote.

It is therefore necessary to further establish what a duty of care situation implies and when this arises in order to make the assessment of whether such a duty might be present for shipowners or others selling their vessels for scrap.

3.2 Duty of care

Under English Tort law, a great distinction is traditionally made between liability for acts on the one side and omissions on the other. The general rule for the latter is that no liability arises. However, this is different for acts, which will be explored in the following when analysing the concept of the duty of care under English law.

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48 *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB); Begum v Maran (UK) Ltd (Rev1) [2021] EWCA Civ 326.

49 Van Dam, *European Tort Law,* 101; Jones M A et al., *Clerk & Lindsell on Torts.,* paras 8–01.

50 Ibid, 103.

51 Jones M A et al., above no 49., paras 8–03.

3.2.1 Liability for acts

Liability based upon the duty of care will only arise where the duty can be said to exist. This means that even when acting intentionally and causing damage, this will not lead to liability if the person causing the damage does not owe a duty to be careful.[52] The duty is however a dynamic concept and thus developed over time constantly through the courts. Noticeably, not all notional duties create an actual duty, and the wider the scope of an alleged duty, the less likely it is to be regarded as a factual duty.[53] Thus, to assess the situations in which a notional duty arises, case law has to be examined. From this, it emerges that three requirements are laid down for a notional duty to exist, i.e. proximity, foreseeability, and fair, just and reasonable. The claimant must be in a class of persons foreseeably struck by the damage to which the duty relates.[54] This will be explored further in the following sections.

3.2.1.1 The Neighbour principle: Donoghue v Stevenson

A general principle of the duty of care was first created in *Donoghue v Stevenson*[55], where Lord Atkin gave his famous speech on the duty under tort of negligence[56]:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. ***You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.*** *Who, then, in law is my neighbour? The answer seems to be* ***persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.****"*[57](author's own highlight).

The case concerned a claimant having a bottle of ginger beer who claimed to have suffered illness from the snail later found in the beer. The claimant had no contractual relationship with the retailer or the manufacturer and thus sued the manufacturer in tort. The manufacturer was here found to owe a duty of care to the consumer (claimant) to take reasonable care to ensure the safety of the product (the ginger beer).

The case laid the initial grounds for the so-called neighbour principle, according to which you owe your neighbour a duty of care for foreseeable danger. Thus, it set the initial two requirements for the now applicable duty of care.

The speech was however not followed in later case law and thus not binding as such.[58]

A change came in *Home Office v Dorset Yacht*[59],where the court applied the Atkin principle of a notional duty of care laid down in *Donoghue v Stevenson*. In *Home Office v Dorset Yacht*, borstal boys were held on an island where they had some sense of freedom. However, they were still under the direct control of the prison officers who, in their capacity as officers, had a duty to supervise the prisoners. As a result hereof, the prison officers were found to owe a duty of care to the owners of a yacht, which was used and damaged by the borstal boys when they tried to escape the island. It was held *likely* that damage would occur because of the failure

52 Ibid., paras 8–05.

53 Ibid., paras 8–06.

54 Ibid,. paras 8–08.

55 *Donoghue v Stevenson* [1932] UKHL 100.

56 Van Dam, above no 49, 103–4; Jones M A et al., above no 49, paras 8–12.

57 *Donoghue v Stevenson* [1932] UKHL 100 paragraph 580.

58 Jones M A et al., above no 4., paras 8–14.

59 *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2.

of the officers to supervise, which the officers ought to have foreseen.[60] Lord Reid further argued that Lord Atkin's speech in *Donoghue v Stevenson "ought to apply unless there is some justification of valid explanation for its exclusion."*.[61]

3.2.1.2 Three-stage test: Caparo Plc v Dickmann

It wasn't until the *Caparo Plc v Dickmann*[62]case that a test for when a duty of care was owed was set in stone by Lord Bridge:

"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it ***fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other****."*[63] (author's own highlight). Thus, Lord Bridge added the third condition for the duty of care and defined the three criteria more specifically.

Accordingly, the *three-stage test* set out in *Caparo Plc v Dickmann* must be met before a duty of care can be invoked. This entails that firstly the relationship between the wrongdoer and the innocent party must be one of proximity or neighbourhood.[64] Secondly, the damage must be foreseeable, and thirdly it must be just, fair and reasonable to impose the duty of care.[65]

The requirement of **proximity** can come in different forms, such as physical, circumstantial, causal or assumed closeness between the defendant and claimant.[66]

The requirement of **foreseeability** focuses on the knowledge that the defendant ought to have. *"The greater the awareness of the potential for harm, the more likely it is that this criterion will be satisfied"*[67].

Lastly, the requirement of **fairness, justice and reasonableness** includes a wide variety of considerations, from the justice between the parties in the case to the broader justice of such duty from a judicial and societal perspective.[68] The test is thus a way to restrict a floodgate of liability cases to open and maintain some certainty for the law to remain effective.[69]

When considering the last requirement, fairness, justice and reasonableness, one must look to the fact that the harmed person must be unharmed or indemnified by the person having harmed the other against the proportionality of imposing this burden on the wrongdoer. This includes looking at protection via insur-

60 Ibid., paragraphs 1029, 1033.

61 Ibid., paragraph 1027.

62 *Caparo Industries Plc v Dickman* [1990] UKHL 2.

63 Ibid., paragraphs 617–618; The passage cited above and principle laid down herein has later been cited in numerous cases, see for instance *Chandler v Cape Plc* [2012] EWCA Civ 525 paragraph 32.

64 The neighbourhood criteria allows the circumvention of the privity of contract principle, according to which only parties to the contract can sue based on the contract and thus removes the possibilities for third parties to obtain legal rights from other parties contractual relationships, see Ulfbeck, 'Supply Chain Liability for Workers' Injuries – Lessons to Be Learned from Products Liability?', 280.

65 *Caparo Industries Plc v Dickman* [1990] UKHL 2 paragraph 618.

66 Jones M A et al., above no 4., paras 8–16.

67 Ibid., paras 8–16.

68 Ibid., paras 8–17.

69 Ibid., paras 8–19, 8–24; In relation to supply chain liability, the floodgate argument was the basis for rejecting the claim of the injured workers at the Rana Plaza factory in Bangladesh, see *Das v. George Weston Limited* 2017 ONSC 4129 paragraph 452; Ulfbeck, 'Supply Chain Liability for Workers' Injuries – Lessons to Be Learned from Products Liability?', 283; Policy considerations are arguably the main obstacles in supply chain liabiilty cases for imposing liability, see Ulfbeck and Ehlers, 'Direct and Vicarious Liability', 94–95, 97.

ance or contractually and the risk of exposure of the claimant and defendant.[70] The lack of protection of the consumer in *Donoghue v Stevenson* who didn't have a contractual remedy with the defendant, was therefore a crucial argument in imposing the duty of care upon the defendant.

Only in exceptional cases will the courts allow a significant extension of the duty of care. Usually, it is done in smaller steps, i.e. seeing whether allowing a duty to be found is merely an extension of a duty already recognised.[71]

In general, the three-stage test has been established in cases concerned with economic loss or public services. However, the test has also been applied to personal injury.[72]

To summarise, the duty of care is a constantly developing concept. However, three requirements to establish such a duty of care for acts have been set out, namely proximity, foreseeability, and fair, just and reasonable. When assessing these requirements, one must look to case law as well as broader judicial and societal principles.

As *Begum v Maran* is based on a mixture in arguments of liability based on acts and omissions, it is further relevant to lay the grounds for the duty of care requirements when it comes to omissions.

3.2.2 Liability for omissions

The following will shortly introduce and analyse the rules and principles developed through case law on the matter of liability for omissions under English tort law. This is done because *Begum v Maran* was argued to be an omission from the defendant to undertake and fulfil their duty of care in regard to damage caused by the intervention of third parties.

Under English tort law, there is no liability for *pure omissions*.[73] However, if the defendant has also created a danger, he may come under a consequential duty to take precautions to prevent injuries from occurring.[74]

Especially in novel situations, the duty of care will rarely extend to liability for omissions.[75]

3.2.2.1 Exceptions to the general rule of no liability for pure omissions

A duty to take action in the interest of another and thus become liable if failing to do so, will only be imposed in special cases. These special cases amount to three. The first is if there is a special relationship between the parties, which entitles one party to rely on affirmative action being taken by the other. Secondly, if there is a specific assumption of responsibility by one party to act affirmatively to benefit the

70 Jones M A et al., above no 4., paras 8–18.

71 Ibid., paras 8–22.

72 Ibid., paras 8–24ff.

73 *Maloco v Littlewoods Organisation Ltd* [1987] UKHL 3 paragraph 247; *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2 paragraph 1060; Van Dam, above no 49, 109; Jones M A et al., above no 49, paras 8–46.

74 Jones M A et al., above no 49, paras 8–46.

75 Ibid., paras 8–28.

other.[76] Thirdly, where one party must bear a specific responsibility for protecting the other from harm caused by third parties.[77] In regards to the third case, there is no general duty to prevent a third party from causing harm to another.[78] The reason being is that it would be too difficult (and onerous) to predict whether a third party would cause damage as a result of a defendant's failure to act.

However, Lord Goff in *Smith v Littlewoods* identified four exceptions to the main rule.[79] Thus, in the following four cases, liability for third parties' harm may be imposed on the defendant due to the defendant's failure to act.

Firstly, where there is a special relationship between the defendant and claimant based on an assumption of responsibility by the defendant.[80] Secondly, where there is a special relationship between the defendant and claimant based on control by the defendant. Thirdly, where the defendant is responsible for a state of danger, which may be exploited by a third party.[81] Finally, where the defendant is responsible for property which may be used by a third party to cause damage.[82]

In summary, there does exist a duty of care. Three requirements must be fulfilled, namely proximity, foreseeability and that it is fair, just and reasonable to impose the duty. In the area of omissions, only certain situations will create a duty of care. For the present case, especially the situation where a defendant creates a state of danger, which a third party exploits, is relevant. Thus, the thesis will move to analysing the relevant case, and in this regard assess whether the requirements laid out in the present chapter can be said to have created a duty of care and thus somewhat fill the regulatory gaps identified in chapter 2.

3.3 *Hamida Begum v Maran*

Hamida Begum v Maran[83] is a newly decided case by the English Courts which discusses some of the possible grounds for establishing a duty of care owed by a former ship agent vis-à-vis a shipyard worker.

The Claimants also included a claim for unjust enrichment available under English law. This claim was held unsustainable by the High Court[84] and will not be of further relevance to include in the analysis of the duty of care.

Another question for the courts was whether Bangladeshi law should apply, as this would entail a one-year limitation period, and thus the claim would be statute barred. This issue is solely included briefly to have the full picture of the case but

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76 This exception was the one, which was held to be the basis of a duty of care owed by the parent company towards its subsidiaries employees in *Chandler v Cape Plc* [2011] EWHC 951 (QB) paragraph 71; *Chandler v Cape Plc* [2012] EWCA Civ 525 paragraphs 63–64. The duty was reasoned with the omission from the parent company to properly advise its subsidiary on how to handle asbestos safely. The case was the landmark case setting forth four criteria for when a parent company will be liable for its subsidiary based on the duty of care assumption of responsibility. *Begum v Maran* falls without this category as the Defendant in the case was not a parent company. One could argue that the case would be applicable if the Claimant had sought damages against the registered owner or ship operator as the parent company based on a notion of control between the parties.

77 Jones M A et al., above no 49, paras 8–50.

78 *Maloco v Littlewoods Organisation Ltd* [1987] UKHL 3; Jones M A et al., above no 49, paras 8–54.

79 Lord Mackay and Lord Goff disagreed as to the reason and basis for the exceptions, but Clerk & Lindsell suggests that the four exceptions posed by Lord Goff are to be preferred, see Jones M A et al., above no 49, paras 8–54.

80 The first exception was stated by Lord Goff to be able to both in and outside contract.

81 *Maloco v Littlewoods Organisation Ltd* [1987] UKHL 3 paragraph 273

82 Ibid., paragraphs 271–277.

83 *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB); *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326.

84 *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraphs 73–74, 98. The decision that the claim of unjust enrichment would be unsustainable was not appealed.

is not part of the analysis as the present thesis aims at assessing the nature of the duty of care rather than the choice of jurisdiction.

3.3.1 Facts of the case

Mohammad Khalil Mollah (hereinafter referred to as "the Deceased") worked on the demolition of the oil tanker MARAN CENTAURUS (hereinafter referred to as "the Vessel") in the Zuma Enterprise Shipyard (hereinafter referred to as "the Yard").[85] On March 30th, 2018, he unfortunately fell to his death working on the Vessel. This led his wife, Hamida Begum (hereinafter referred to as "the Claimant"[86]), to claim damages for negligence against Maran UK Ltd (hereinafter referred to as "the Defendant"[87]). The Defendant was the former ship agent of the Vessel which the Deceased had been working on when he fell to his death. Thus, the Defendant was not the owner of the Vessel, but had an agency agreement with MTM, who had an operating agreement with CSME. CSME was the registered owner of the Vessel (see Figure 1 below). Interestingly, the case therefore also involves the question of whether the ship agent would not be liable, as they were not the actual owner of the Vessel.

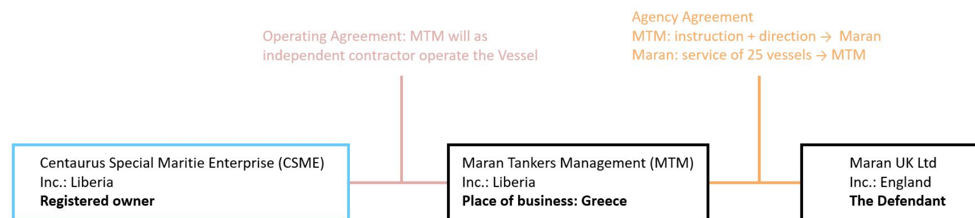

Figure 1

A full overview of all known parties involved is presented in Annex A under paragraph 6.

The Claimant claimed damages against the Defendant based on two "routes", creating an alleged duty of care owed by the Defendant vis-à-vis the Claimant. The first being that the Defendant owed a duty of care based on the basic duty of care notion established in *Donoghue v Stevenson*.[88] The second route was that the Defendant owed a duty of care towards the Claimant because the Defendant had created a state of danger which a third party exploited.[89]

On February 28th, 2020, the Defendant filed an application notice to strike out the claim and alternatively for a summary judgement. Both are English law remedies, where the court is able to "throw out" the case. If the court renders that there are no reasonable grounds for bringing the claim, the court can thus decide to strike it out. The summary judgement remedy will allow the court to find in favour of the Defendant based on the limited facts presented if it finds that the claimant has no real prospect of succeeding on the claim, i.e. that the claim is bound to fail.[90]

85 The Deceased's employer was not known, cf. *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 11.

86 "the Respondent" when referring to the appealed case.

87 "the Appellant" when referring to the appealed case.

88 The first route relates to the neighbourhood principle as laid down under paragraph 3.2.1.1 above.

89 The second route is thus one related to liability for omissions as laid down on paragraph 3.2.2 above.

90 *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 5; *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 20.

A *realistic claim* entails that the claim is not fanciful and carries some degree of conviction. This includes a test of whether the claim is bound to fail.[91]

Justice Jay in the High Court held that the Claimant had a real prospect of succeeding in relation to her claim in negligence and thus dismissed the application for summary judgement as well as to strike out the claim.[92] Even though the judge held that Bangladeshi law would apply and thus that the claim would be statute barred, the Claimant had a prospect of arguing the application of Articles 7 and 26 of the Rome II convention, which would circumvent the one-year limitation period under Bangladeshi law, which had not been complied with.

The Defendant appealed the decision by the High Court. On March 20th, 2021, the Appellate Court upheld the High Court's decision to dismiss the application for summary judgement as well as to strike out the claim.[93] The Appellate Court reiterated the conclusions made by the High Court and well-established principles that in novel and fast developing areas of the law, a decision should not be made upon hypothetical (and possibly wrong) assumptions but on actual findings of facts. The reluctance to strike out cases in these areas are argued also to be because of the European Court of Human Rights' criticism of the procedure.[94]

Thus, the case is now awaiting trial, but it is relevant and interesting to examine the grounds on which the courts decided to dismiss the motion to strike out the claim and/or give a summary judgement. Even though these grounds and findings may be disputed at trial, one can argue that the court may be somewhat inclined to at least take the considerations made by the High Court and Appellate Court into consideration, as they are more than simple findings in one ship recycling case. They are another indication of the tendency in the courts to allow liability for companies where their acts and omissions contribute to or engage in unsafe and non-environmentally friendly practices. There is a tendency to impose liability on the ultimately stronger party because of their ability to carry this liability and perhaps also their knowledge, which they can no longer claim to be unaware of, given technological developments.[95] One may find support in the business literature for this position, i.e. that corporations' economic and political power *"increasingly makes them subject to expectations to assume social responsibility or legal liability"*[96].

With a summary judgement as the one in the present case, no mini-trial is conducted, and thus the courts are bound to make certain assumptions of the facts based on the parties' submissions. These assumptions will thus be examined in the following paragraph.

3.3.1.1 Factual assumptions

Given that the case was an interim decision, not all factual findings and discovery were made at trial. Thus, the Courts had to make factual assumptions, on which to base their conclusions. When deciding the case in this regard, the Courts had

91 *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 22.

92 *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraphs 98–99.

93 *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraphs 72, 116.

94 Van Dam, above no 49, 84.

95 Even states are imposed liability in this regard. See for instance the Dutch case, where the Dutch state was held accountable and imposed a duty to take action to reduce the green house gas emissions, ECLI:NL:GHDHA:2018:2610 C/09/456689 / HA ZA 13-1396 (English translation); This can be compared to the argument in supply chain liability cases, where the parent company is found to have superior knowledge and thus better suited to carry the liability, see Rott and Ulfbeck, 'Supply Chain Liability of Multinational Corporations?', 234.

96 Buhmann and Wettstein, 'Business and Human Rights', 5.

to do so on the basis of the Claimant's best case on the law.[97] This also meant that the Courts would not conduct a mini-trial, but accepted the Claimant's arguments unless its factual assertions were demonstrably unsupportable. This included considering that further facts would appear at trial.[98]

The Appellate Court decided it was instructive to summarise the factual assumptions into eight assumptions instead of having them throughout the judgement as done by the High Court.[99] Thus, the following section will present the assumptions, as done by the Appellate Court, with inclusion and reference to the remarks of the High Court.

Firstly, it was evident that the Vessel needed to be scrapped and that oil tankers of the size of the Vessel are hard to dispose of safely.[100]

Secondly, the Defendant had a choice as to whether it would sell the Vessel to a party ensuring a safe disposal or not.[101]

Thirdly, the Defendant had complete autonomy over the sale of the Vessel. Justice Jay found that the position of the Defendant was probably legally indistinguishable from that of MTM (the operating agent) as well as CSME (the registered owner). The Defendant agreed to view control at its highest and thus assume that the Defendant had autonomy over the sale and therefore also accepted that *"the commercial realities went further than the four corners of the contract"*[102]. In addition, Justice Jay found that there was *"a real prospect that an examination of the complete evidential picture at any trial would support the high watermark of the claimant's case on control"*[103].

Fourthly, the Defendant knew that the Vessel would be broken up in Bangladesh due to two main facts. The first being the high price, and secondly the low amount of fuel left. The Defendant accepted that it *"was aware of the ultimate destination of the vessel"*[104]. Assessing the amount of fuel left is relevant in regards to assessing the Defendant's knowledge of where the Vessel would be broken up as the amount taken together with the position at the time of the sale (Singapore) and the size of the Vessel only left one other safe option possible, namely in China. However, due to the high price of the Vessel, the costs of breaking the Vessel up would entail that China could not be viewed as possible anyway.[105] Thus, the inference that an amount of low fuel left and a high price would create the necessary grounds to establish knowledge of the end destination for recycling by the Defendant seems justified. In the absence of any evidence to the contrary, Justice Jay agreed to the inference that the high price and low amount of fuel would mean that the Defendant knew that the Vessel was to be broken up in Bangladesh.[106] According

97 *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) paragraph 36; *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 36.

98 *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 paragraph 22.

99 Ibid., paragraph 21.

100 *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 30; *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 27.

101 *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 30; *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 28; Thus, by taking the supply chain liability considerations into account, one may argue that the choice of a shipyard with low environmental and safety standards the seller 'outsources' and thus have a superior knowledge, see Rott and Ulfbeck, 'Supply Chain Liability of Multinational Corporations?'

102 *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 19.

103 Ibid., paragraph 19.

104 Ibid., paragraph 14.

105 As noted by Justice Jay, only 80,000 tonnnes out of the nearly 11 million tonnes broken up in 2018 where broken up in Chinese and Turkish yards, cf. *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 15.

106 Ibid., paragraphs 14, 30.

to Lord Justice Males, the price and fuel showed knowledge of and intent to send the Vessel to Bangladesh, which was equal to the same control as if the Vessel had been sold directly to the shipyard.[107]

Fifthly, the Defendant accepted (for the application only) that beaching is *"an inherently dangerous working practice"*[108].

Sixthly, since the Defendant chose to sell the Vessel to a buyer who would not meet safe demolishing practices, it exposed workers like the Deceased to *"a real risk of death or personal injury"*[109].[110]

Seventhly, in regard to the risk, Justice Jay held that it was only foreseeable that the Deceased would sustain a serious accident even though the exposure to the risk of personal injury was inevitable. However, he then went on to assume that the Deceased's accident was probable and thus a foreseeable risk.[111] As stated under paragraph 3.2.2 with reference to *Smith v Littlewoods*[112], probability is enough to meet the foreseeability requirement.[113] As put in *Home Office v Dorset Yacht*[114], it would be *likely*[115] that the Deceased would be exposed to the fatal injury, which would be enough for foreseeability to be met. Lord Justice Males in the Appellate Court characterised the damage as *"entirely foreseeable"*[116] and that it was a *certainty*.[117]

Eighthly, the intervention by Hsjear (the cash buyer) did not alter the Vessel in any way.[118] Without too much reiteration, the same argument cannot be said to be found in Lord Justice Males' argument under the fourth assumption.[119] Thus, one may not regard the selling to a cash buyer as a *novus actus* which would otherwise break the chain of causation.

3.3.2 Decision by the Courts

The following section will introduce and analyse the findings of the High Court and Appellate Court (hereinafter referred to as "the Courts") based on the assumptions set out above. It will do so by firstly looking at the first route claimed to have created a duty of care owed by the Defendant towards the Claimant, namely the one established in *Donoghue v Stevenson*[120]. Hereafter, the second route argued by the Claimant will be examined. Here, the Claimant argued that the Defendant

[107] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 127.

[108] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraphs 13, 30; That the practice used for ship recycling is of low human and environmental standard also appear from the EU Ship Recycling Regulation, according to which the purpose of the regulation was (and is) to redirect the practice from the substandard sites which is currently the practice, see Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/ECText with EEA relevance, 7 preamble.

[109] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 32.

[110] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 56.

[111] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraphs 42–43; *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 33.

[112] *Maloco v Littlewoods Organisation Ltd* [1987] UKHL 3.

[113] Ibid.; Jones M A et al., Ibid., paras 8–55.

[114] *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2.

[115] Ibid., paragraphs 1029, 1033.

[116] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 122.

[117] Ibid., paragraph 124.

[118] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 37; *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 34.

[119] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 127.

[120] *Donoghue v Stevenson* [1932] UKHL 100.

owed a duty of care based on the principle that the Defendant was responsible for a state of danger that was exploited by a third party.[121]

3.3.2.1 Duty of care (Route 1)

When assessing whether the Defendant owed the Claimant a duty of care based on *Donoghue v Stevenson*[122], the Courts assessed whether the Defendant could reasonably foresee if their act or omission would be likely to injure the Claimant as their neighbour. As recalled from paragraph 3.2.1.1, this requires two elements, namely a special relationship between the Claimant and Defendant and as that the likely damage was foreseeable.[123]

Justice Jay did not see the case as a classic *Donoghue v Stevenson*. The main reason being the intervention of the Yard or the Deceased's employer, which was in contrast to *Donoghue v Stevenson*, where no intervening act(s) by any third party in the chain of contractual relationships occurred.[124]

In the Appellate Court's review, they commented on the fact that the Respondent[125] put great weight on the requirement of foreseeability as if this would be able to create the duty of care alone.[126] However, the fulfilment of this requirement would not be enough, as especially for novel areas of the law, the full three-stage test[127] must be applied.[128] Even though the tendency towards imposing liability in these novel areas of law, where companies outsource their business or similar on the grounds of the fairness criteria, the same criteria is the one being used for dismissing such liability. In particular, the floodgate argument is here being used to create some barrier from liability to be imposed.[129] One may consider whether this is truly fair. With the ability to outsource or choose a cheaper contractor someplace else, where legal justice and law enforcement may not provide the same protection, one could argue comes a responsibility not to take advantage of this gap. A gap, which by some scholars is described as an imbalance in trade and human rights created because of the very same freedom of trade.[130] The floodgate argument can also be used in support of the proximity criteria as a condition, as the absence of such a relationship would indeed create an enormous amount of claims of which at least some would also be unforeseeable.

In addition, the Appellate Court, with all fairness, posed the question of whether a shipbroker in London ought to regard a worker in a Bangladeshi shipyard as their neighbour, for which an affirmative answer would entail the neighbour criteria to be met.[131]In answering this, one may look to the speech of Lord Atkin in *Donoughue v Stevenson*, where he said that *"The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in*

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[121] This exception was stated to only be applied in very rare situations, cf. *Maloco v Littlewoods Organisation Ltd* [1987] UKHL 3 paragraph 273

[122] *Donoghue v Stevenson* [1932] UKHL 100.

[123] Even though, the case was argued on the *Donoghue v Stevensen* principles, the third criteria of that it must be fair, just and reasonable will apply to any duty of care.

[124] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 37.

[125] As the Claimant in the High Court did not appeal the decision, they are the Respondent, where the Defendant is the Appellant in the Appellate Court's decision.

[126] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraphs 40–41.

[127] *Caparo Industries Plc v Dickman* [1990] UKHL 2.

[128] Jones M A et al., above no 49., paragraph 8–25.

[129] The floodgate argument was the basis for rejecting the claim of the injured workers at the Rana Plaza factory incident in Bangladesh, see *Das v. George Weston Limited* 2017 ONSC 4129 paragraph 452.

[130] Van Dam, above no 9, 226.

[131] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 41.

contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."[132]

Thus, one may argue that even though there is quite some (physical) distance between a shipbroker in London and a worker in Bangladesh, the high price and low amount of fuel indicated that the Defendant would have known whereto the Vessel would be sent in the end. Knowing this destination, the Defendant would also know the risks associated herewith as the reputation of the shipyards in the third-world countries are no secret. It is, and especially for a shipowner[133], reasonably known that vessels are dismantled in a non-environmentally friendly and unsafe way in these places. Thus the Defendant ought reasonably to have had in contemplation the shipyard workers when choosing to sell the Vessel at the given price and fuel level left. Arguably, it will be hard to establish that the Defendant knew nothing of the recycling destination and practice and thus the inference that the Yard workers would be neighbours of the Defendant would be met.

The Respondent argued that the requirement of proximity between the parties ought to be answered by way of two questions. The first being that if the Appellant had sold a dangerous product to the yard with full knowledge of the yard's dangerous practices, would the relationship between the Deceased and Appellant then be sufficiently approximate? The Respondent answered this affirmatively. The second question was then whether such duty could be negated as a result of the intervention of a third party, which was answered negatively.[134] Thus, according to the Respondent, the requirement of proximity would be met.

However, one may argue that in *Donoghue v Stevenson* the product, a ginger beer with a rotten snail, was a dangerous product in itself, which the Vessel wasn't. Thus, when the Respondent argued that it was the dismantling, which was dangerous, the Appellate Court argued that this would take the case outside the scope of *Donoghue v Stevenson*, because it then did not concern an inherently dangerous product as such.[135] Against this argument, one may recall the Basel Convention, which includes end-of-life ships as hazardous waste under paragraph 2.2.1.[136] Thus, one may argue that since ships are considered hazardous waste under the legal regime, ships are also inherently dangerous and thus a dangerous product in itself, which could render *Donoghue v Stevenson* applicable to some extent.

Even though the case was held not to fit comfortably within the principles laid down in *Donoghue v Stevenson*, the Appellate Court agreed with the High Court that it was not so fanciful that it should be struck out, and the second route of arguments strengthened the Appellate Court's view in this regard.[137] The second route relating to a duty of care for omissions will therefore be analysed in the below paragraph.

3.3.2.2 Duty of care (Route 2)

The following section will introduce and assess the Courts' findings in regard to the Claimant's second route, namely that the Defendant owed a duty of care toward the Claimant because it had created a state of danger, which a third party exploited. This is therefore an argument that the Defendant is liable for its omis-

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132 *Donoghue v Stevenson* [1932] UKHL 100 paragraph 580.

133 It is argued by some scholars that this knowledge is known to all parties in the business, including the insurance companies, etc. and thus they ought also to take a responsibility to ensure the unsafe and non-environmentally safe practices of ship recycling be stopped, see Klevstrand, 'Jusprofessor Om «Harrier»-Saken'.

134 *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 42.

135 Ibid., paragraph 43.

136 UNEP, Decision VII/26. Environmentally sound management of ship dismantling.

137 *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraphs 49–50.

sion to act to avoid such harm, and thus one of the exceptions to the general rule that no liability is imposed for omissions. That is for in cases where one party must bear a specific responsibility for protecting the other from harm caused by third parties. This is however not a general rule and can only be said to happen in rare circumstances such as the four listed above in paragraph 3.2.2.

In assessing the applicability of the exceptions to the general rule that there is no liability for omissions, both the High Court and Appellate Court[138] had some difficulties. This was because the exceptions are only relevant to so-called pure omissions, and *Begum v Maran* could be identified as a mix of acts and omissions. Justice Jay proceeded on the basis that the case ought to be viewed as a hybrid and made notice of the fact that the case distinguishes itself from other omission cases where liability has been assessed when damage has been caused by third parties. Namely, in *Begum v Maran,* the immediate lack of proximity between the Defendant and the Yard/employer as there was no control over or responsibility for the potentially dangerous situation from the Defendant.[139] Thus, one may argue that the control exercised by the Defendant over the cash buyer, which went beyond the four corners of the contract[140], would be hard to argue to have created control over the Yard also. Even though the Defendant knew where the Vessel would be destined and that the practices here would be unsafe, the only control it would have would be not to sell the Vessel at the given price or make sure that safe recycling practices in the sales contract would be followed by the cash buyer. Thus, this control would hardly be categorised as control over the Yard's working conditions, which was prima facie the reason for the accident that led to the death of the Claimant's late husband. Given the rapid developments in the courts in this area of law, one could perhaps cautiously argue that the choice of not selling it to the given buyer, a lower price, or similar, would also be some kind of control because this would entail that the Yard's with lowest safety measures would gain less and less work. Thus, this would maybe force them to actually improve their sites, and ultimately this could perhaps be some sort of indirect control. Only time can tell.

The Appellate Court seems to have found a more elegant route by way of highlighting that *pure omissions* may be regarded as a somewhat outdated term. Even though this was the case in *Smith v Littlewoods*[141], in which the principle of no liability for omission was set out, later authorities imply that liability arising from the intervention of third parties may be conferred differently nowadays. Here, the Appellate Court referred to Lord Reed's distinction in *Poole,* where Lord Reed made a distinction between *causing harm (making things worse)* and *to confer a benefit (not making things better)*.[142] It is in the latter situations that the courts are reluctant to impose a duty. Additionally, the Appellate Court highlighted a line of authorities to the general rule that there is no liability for harm caused by the intervention of third parties and emphasised that these authorities show the rapid speed with which the area of law develops as well as it being one of the most developing ones.[143]

Returning to the High Court's decision, Justice Jay had, as above stated, come to the conclusion that the case may be assessed as a hybrid of acts and omissions, and he proceeded to discuss the situations in which a Defendant may be liable for

138 The Appellate Court further noticed that the analysis by Justice Jay in the High Court was somewhat hard to follow, partly also because the case does not easily fit within a recognised liability category, see *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 paragraph 17.

139 *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 45.

140 *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 19.

141 *Maloco v Littlewoods Organisation Ltd* [1987] UKHL 3.

142 *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 60.

143 Ibid., paragraph 61.

omissions.[144] Justice Jay dismissed the first, i.e. that there was no assumption of responsibility between the parties. In this regard, he commented that this kind of liability relies on the *antecedent* relationship between the parties, which was not present between the Defendant and the Yard/employer.

The second exception that control can amount to a duty of care was also not found present. As opposed to *Home Office v Dorset Yacht*[145], Justice Jay held that the Defendant had no control over the Yard/employer because there was no physical connection between the defendant and Bangladesh, nor could the Yard be regarded as part of the shipping group, who owned and sold the Vessel (the Angelicoussis Group). The latter could also not be established by way of tacit understandings between the Defendant and the Yard/employer. Lastly, the Justice held that control could not be inferred from the fact that the Defendant knew that the vessel had to be disposed of safely.[146] For a discussion on control, reference is made to the second paragraph under paragraph 3.3.2.1.

However, the third exception was analysed more in depth by Justice Jay, as the question of whether the Defendant could be argued to have created a state of danger exploited by a third party was arguable. In this regard, the Justice dismissed the Defendant's argument that the Vessel itself was inherently unsafe, but rather it was the working conditions of the Yard which were unsafe. Justice Jay did so by inference that if the Defendant would be liable if the Deceased had died from asbestos, then you could not separate the safety of the vessel from that of the working conditions, and inter alia would liability for asbestos also mean that of the unsafe working conditions. In other words, the danger created by the asbestos would be equal to those of the dismantling of the ship. Thus, the ship could not be regarded as safe in one way and then unsafe if not dismantled safely.[147] The manager and operator of an oil tanker would therefore be regarded as having created the source of danger.[148] In addition, Justice Jay stated that it would be artificial to conclude that the danger was created by the Yard/employer solely. It was a danger inherent in the vessel once broken up. This conclusion also aligns with the previous argument that end-of-life vessels are considered hazardous waste according to the Basel Convention[149] as stated under paragraph 2.2.1., and therefore ought also to be considered inherently dangerous.

In assessing the requirement of fairness, justice and reasonableness, Justice Jay even added that the balancing of the arguments in this regard possibly ought to be done in a way *"slightly stretching the boundaries of established norms"*.[150] Thus, this arguably represents the tendency seen in relation to the duty of care in general. Indeed, it would not be appropriate to assess this in a simple summary judgement. One may argue that the mentioning by the High Court in this paragraph as well as by the Appellate Court, of all the factors regarding safety, health and environmental issues in relation to the practice of ship recycling, greater weight must be put to those who suffer from others' exploitation of their stronger position. Here, the Appellate Court made a note of the evidence *"that, despite international concern registered in many ways over many years, the dangerous working practices in the Bangladesh shipbreaking yards inevitably cause shockingly high rates of death and serious injuries"*.[151] This is also what has been confirmed by various international

[144] As recalled these exceptions are three, see paragraph 3.2.2.1.

[145] *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2.

[146] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 48.

[147] Ibid., paragraph 57.

[148] Ibid., paragraph 60.

[149] UNEP, Decision VII/26. Environmentally sound management of ship dismantling.

[150] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 63.

[151] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 12.

organisations, such as the World Labour Organisation and the Global Trade Union IndustriAll amongst others.[152]

Lastly, the Justice referred to the fact that in novel areas of the law and where it is not possible to give a certain answer, it is not appropriate to strike out the claim. Instead, the claim must be decided on its facts.[153] The same was also relied upon in *Vedanta Resources PLC & Another v Lungowe & Others*[154], which evolved around the parent company's duty of care towards the mineworkers rather than the company responsible for the day-to-day activities.[155] Again, the reluctance may also be due to the criticism of the procedure brought forward by the European Courts of Human Rights.[156]

Thus, the Claimant was held to have *"a real prospect of succeeding in relation to her claim in negligence"*[157], and the application for summary judgement and to strike out the claim was dismissed.

As to the standard of diligence of the Defendant, in relation also to commercial realities, the Justice held that fuel, as well as the purchase price, would be factors to ensure safe recycling, and that indeed a contractual structure could be built with liquidated damages to ensure the safe recycling. This was given further weight in the Appellate Courts decision, where it was stated that the Defendant *"could, and should, have insisted on the sale to a so-called 'green' yard"*[158]. This could have been done by the use of provisions in the sales agreement (MoA), where a tripartite agreement could have linked the inter-party payment to the delivery of the vessel to an approved yard. The contradictory part is here that a provision in the MoA (Clause 22) already stated that the buyer (Hsejar) had obligated itself to only sell to a shipbreaking yard which would perform the demolition *"in accordance with good health and safety working practices"*.[159] Unfortunately, as the Court also highlighted, such practices are entirely ignored in the shipbreaking industry, where *"everyone turns a blind eye to what they know will actually happen"*[160]. Thus, one may argue that the Courts indicated how the Defendant could have met their duty of care owed vis-à-vis the yard workers and thus perhaps that this is a slight indication towards a breach of the duty in case the duty would be found to exist. An interesting argument brought by the Defendant as support for not having breached the duty was that because nearly all vessels ended up in South Asia, then the Defendant was not deviating from standard practice. Here, Justice Jay was very firm in his conclusion that *"if standard practice is inherently dangerous, it cannot be condoned as sound and rational even though almost everybody does the same"*[161]. This argument is thus another indication that fulfilling a duty of care, if established, for a shipowner, operator or the like, will not be met just because they follow the same practice as everyone else in the industry. Unless the practice can be condoned as safe for human and environmental health, a satisfaction of a duty of care will require wider steps. Such steps may be to accept a lower sales price and thereby

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[152] 'The Toxic Tide'; Ship recycling: reducing human and environmental impacts, above no 5, 3; 'SPECIAL REPORT'.

[153] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 64; The Appellate Court agreed with Justice Jay in making this conclusion and the authorities used, see *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraphs 23, 71.

[154] *Lungowe & Ors v Vedanta Resources Plc & Anor* [2017] EWCA Civ 1528 (13 October 2017).

[155] *Vedanta Resources PLC & Anor v Lungowe & Ors* [2019] UKSC 20 paragraph 48.

[156] Van Dam, above no 49, 84.

[157] *Begum v Maran (UK) Ltd* (Rev 1) [2020] EWHC 1846 (QB) paragraph 98.

[158] *Begum v Maran (UK) Ltd* (Rev1) [2021] EWCA Civ 326 paragraph 67.

[159] Ibid., paragraph 68.

[160] Ibid., paragraph 69.

[161] Ibid., paragraph 15.

making sure that the sale of end-of-life vessels are recycled at safe shipyards. Another step could be to engage with the yards more directly to establish such safe practices for the long run. Some shipping companies[162] are very engaged in this but so far it has not resulted in any of the yards meeting the standards required to be accepted to the European List of Recycling Facilities[163].

As is evident, the Courts discussed a number of facts relating to whether the Defendant could be held liable for its omission, which led to a third party exploiting the danger created. To summarise the findings and analysis hereof, it seems that some of the hurdles will be to establish that the Vessel was inherently dangerous for the exception to apply. Ultimately, the three requirements for a duty of care must also be present, and here the proximity seems to be the one most in question.

3.3.2.3 Choice of law

In this regard, the High Court briefly examined the question, and in addition whether alternatives under articles 4[164], 7[165] and 26[166] under the Rome II Regulation[167] would mean that other laws than those of Bangladesh would apply. In brief, the High Court held that article 4 entailed that Bangladeshi law applied, and thus the claim would be statute barred. However, they also found that pursuant to articles 7 and 26 of the Rome II, the Claimant might be able to argue that English law could apply. However, the Appellate Court was not of the same opinion as regards article 7 under Rome II. In regards to article 26, the parties' had exchanged communication before the one-year limitation period had expired, which was evidence to the fact that the Respondent had had access to justice well before the expiration of the limitation date.[168] However, the High Court also held that wider policy arguments could be used in support of the public policy argument.[169] The Appellate Court did not find that the Respondent could meet the high hurdle of the public policy argument. Thus, only the argument of undue hardship would be left to state that English law should apply. On the basis of various evidence presented only before the Appellate Court, it held that the date of the Deceased's death had been wrongly identified to the Respondent's lawyers. This would perhaps entail undue hardship and could be decided by a preliminary hearing.

3.4 Sub-conclusion

Under English tort law, a remedy based on a duty of care exists. The duty requires a relationship of proximity, that the damage is reasonably foreseeable and that it is fair, just and reasonable to impose the duty. The general rule under English law is that no liability applies attached to omissions, except for certain situations, such

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[162] One example hereof is Maersk, see A.P. Moeller Maersk, 'Leading Change in Ship Recycling Industry'.

[163] European Commission, 'Commission Implementing Decision (EU) 2020/95 of 22 January 2020 Amending Implementing Decision (EU) 2016/2323 Establishing the European List of Ship Recycling Facilities Pursuant to Regulation (EU) No 1257/2013 of the European Parliament and of the Council (Text with EEA Relevance)'.

[164] Accordingly, the main rule is the place of the tort/delict is applicable. The exception is found in paragraph 3, where another law can be applied, if this the tort/delict is found to be more closely connected hereto.

[165] This rule determines that for environmental damage the claim may be brought elsewhere than the starting point laid out in article 4(1) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

[166] The article lays down the general public policy (ordre public) exception.

[167] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

[168] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 paragraph 99.

[169] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) paragraphs 85, 104.

as when there is a special relationship, control or a third party exploits the danger created.

The duty of care was used in *Hamida v Begum*. The case was only decided on factual assumptions, as the Defendant had filed a notice to strike out the claim. However, the Court held that the Claimants had a real prospect of succeeding with their claim and thus dismissed the notice. In doing so, the Courts held that the Claimants had a realistic claim as regards establishing that the Defendant owed a duty of care based on the danger it had created by knowingly selling the Vessel at the given price with a low amount of fuel which was exploited by a third party. Thus, the Defendant ought reasonably to have foreseen this risk of damage and thus owed a duty of care vis-à-vis the Deceased.

4 Conclusion

When analysing the regulatory regime of ship recycling, one finds that both on an international level as well as on an EU regulatory level, instruments have been implemented to ensure a safe recycling practice. The regulation is both aimed at the recycling of waste as well as specifically vis-à-vis end-of-life ships. The regulation however has three main gaps. For non-EU-flagged vessels, one must comply with the import and export rules laid down in the Basel Convention and EU Waste Shipment Regulation if one intends to dispose of the ship. Intent is however a subjective matter and thus hard to prove, which is one of the gaps in the regulatory framework. Another gap is that compliance is further based on the vessel being in the jurisdiction within the scope of the regulations. Thus, any decision to recycle an end-of-life ship can just be made outside the territories of parties to the regulations. Lastly, a gap for EU-flagged vessels is that the vessel can be reflagged prior to recycling which renders the EU Ship Recycling Regulation inapplicable. These gaps have led to the continued use of shipyards using unsafe and non-environmentally friendly practices where an increased profit may be a factor in the choice of the yard.

However, under English Law of Tort, a duty of care exists, which has been used to argue that shipowners (and the ones identified herewith) are under a duty vis-à-vis shipyard workers. Generally, three requirements must be met for a duty of care to exist, namely proximity, foreseeability, and it must be fair, just and reasonable to impose the duty. Additionally, there are three exceptions to the general rule that no liability attaches for omissions. Firstly, an exception exists where there is a special relationship. Secondly, there must be a specific assumption of responsibility which can lead to a duty. Finally, there must be a situation where one party must protect the other from harm caused by third parties. Especially for the third exception, there will however be no general rule to take action to avoid harm from third parties; that is except for in four circumstances. The first is when a special relationship creates an assumption of responsibility. The second is where there is a special relationship based on control. The third exception is when the defendant will be responsible for a state of danger exploited by a third party. Finally, the fourth is when the defendant is responsible for property which may be used by a third party to cause damage.

The duty of care was used in *Hamida v Begum* to argue that the former ship agent (the Defendant) was liable vis-à-vis a deceased shipyard worker, even though no direct relationship existed between the parties. Thus, it was argued that the Claimant was so closely and directly affected by the acts of the Defendant that the Defendant reasonably ought to have foreseen the damage inflicted upon the Claimant. The final decision in the case is yet to be decided as both the High Court and Appellate Court only decided the case on the notion to strike out the claim based on its fancifulness. However, the remarks made by the courts when deciding the case on its factual assumptions was that it was not so fanciful as to strike out the claim.

The Courts held that the case did not fit well within the principles laid down in *Donoghue v Stevenson*. However, the courts were more inclined to see that the Claimant had a real prospect of arguing that the Defendant owed a duty of care based on the harm it had created by selling the Vessel, knowing it would end at a shipyard with poor working end environmental standards, which a third party (the Yard) exploited. Even though this would be a duty of care for an omission and the case was a mixture of acts and omissions, one may argue that in such cases, the suggested approach of viewing omissions in a new way, ought to be the way to decide cases going forward. Thus, when dealing with a mixture of acts and omissions, one may query whether the act or omissions made the situation worse, and if answered affirmatively, this could speak in favour of imposing liability.

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Annexes

Annex A