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Content overview

Preface

This year's issue of SIMPLY contains three articles, all written by professors at the Institute.

First, Trine-Lise Wilhelmsen, discussing the effect of co-insurance and its potential bar to claiming against the tortfeasor direct, based on the UK Supreme Court decision, the Ocean Victory, and with a comparative law analysis to Norwegian law.

Second, Alla Pozdnakova, giving an outline of the recently enacted international convention, The High Seas Treaty, regulating sustainable use of marine biological diversity beyond national territorial waters, and discussing the convention's impact on international shipping.

Third, Thor Falkanger, reviewing and discussing a Norwegian Appeals Court decision, the Harrier-case, imposing criminal liability on a person (employee of a Norwegian shipping company) for having violated regulations restricting export of waste, consisting in export of ship for demolition at a Turkish yard.

We thank the authors for valuable contributions and wish our readers happy reading.

Trond Solvang

Knock in or knock out?

Co-insurance, liability and subrogation in the light of the Ocean Victory case

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Content

1 Introduction

The topic of this article[1] is the concepts of co-insurance, liability and subrogation according to Norwegian law, in the light of a judgment from the UK Supreme Court 10 May 2017 concerning the vessel Ocean Victory (the Ocean Victory case).[2] The concept of co-insurance may refer to insurance contracted with several insurers[3] against the same perils by one person effecting the insurance,[4] or that an insurance contract between the person effecting the insurance and the insurer includes the insured interests of a third party.[5] The concept is here used in the latter meaning, i.e. where the interests of several persons or entities are protected under the same insurance contract. Practical examples are in shipping where insurance of the vessel covers both the interest of the owner and the interests of the managers and of the charterer of the vessel and in building projects where insurance covers both the interest of the builder and the contractors.[6]

Co-insurance is first and foremost effected to protect the economic interests of the co-insured when the insured vessel, project or enterprise is damaged or lost. If a building project is damaged by fire, the insurance will protect both the builder's and the contractor's economic interests in the building. However, co-insurance also includes so called indirect liability insurance. This effect is triggered where a co-insured party B is liable for damage to economic interests belonging to another assured party A. The starting point in this situation is that the insurer, I, will cover damage to A's interest according to the insurance contract, but that I afterwards may raise a subrogated claim against the liable party B. If B is not co-insured, he may have to cover I's payment to A. But if B is co-insured, he is protected against such liability claims to the extent he is not in breach of duties according to the insurance contract. This means that co-insurance bars the subrogation claim from the insurer against the liable party B.

A more complicated question is to what extent co-insurance also bars a claim from the injured party A against the liable party B, i.e. if A may either chose to claim B instead of the insurer, or to claim the insurer first and then claim B for any uncovered losses. In the Ocean Victory case, a majority of three judges concluded (obiter) that co-insurance also barred any claim between A and B. The case concerned co-insurance between the bareboat-charterer B and the owner A of the vessel Ocean Victory, which B in turn time-chartered to S, who sub-chartered the vessel to D. The vessel sunk on departure from a port, and the insurer I paid compensation to A for i.a. total loss. All the three charter parties contained a safe port warranty, and the insurer was assigned A's right to claim B, who then would raise a subrogated or indemnity claim against S, who would claim D as the party directly liable for the breach.

The consequences of the judgment were that as the owner A could not claim B, there was no liability or loss incurred by B to pursue further down the contrac-

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1 The article was written for Festskrift til Lasse Simonsen, being published by Gyldendal during the fall 2023.

2 (2017) UKSC 35

3 Insurance Contract Act (ICA) § 1-2 letter d.

4 ICA § 2-2 letter a. See further Trine-Lise Wilhelmsen and Hans Jacob Bull,*Handbook on Hull Insurance* (2017) (Wilhelmsen/Bull) pp. 40-43, Nordic Marine Insurance Plan 2013 (NP) Cl. 9-1 sub-clause 2.

5 See further ICA ch. 7, Wilhelmsen/Bull ch. 7, Nordic Marine Insurance Plan 2013 ch. 7 and 8.

6 For building projects based on the different Norsk Standard contracts, the mechanism to use the builders insurance may be different from co-insurance, cf. Ivar Alvik, Forsikringsselskapets regressrett ved følgeskader av mangel i entrepriseforhold – særlig om grensen mellom kontrakts- og deliktsansvar,*Tidsskrift for erstatningsrett, forsikringsrett og trygderett* 2020 no. 1 p. 7-38.

tual chain.[7] Thus, D was free from liability, even though neither S nor D were co-insured under the insurance. The effect can be compared to a knock for knock agreement[8] where the parties agree that damage to each party in a contractual arrangement shall stay with that party and each party shall procure a waiver of subrogation from its insurer. This allows losses to be financed though insurance even if caused by another party in the same contractual arrangement.[9] However, this principle is in Norwegian contractual practice normally carefully mapped out in the different contracts between the parties and not established merely by implication from co-insurance – hence the question "knock in or knock out" in the title.

The judgment in the Ocean Victory case came as a surprise to the shipping and marine insurance industry, who has or will change the relevant conditions.[10] However, the underlying questions are not much discussed in Norwegian theory and it is therefore interesting to see if the result in the Ocean Victory case is consistent with Norwegian law and to what extent the issue needs to be dealt with in the relevant contracts. This is directly relevant for charter-parties, but co-insurance schemes are also used in building projects and other projects involving several contractual partners.

In the following, an overview of the relevant Norwegian regulation is provided in section 2. Thereafter, the Ocean Victory case is presented in section 3 and discussed in light of the Norwegian regulation in section 4.

7 However, the judgment para 94 outlines three possible routes for the insurer to claim S and D and then states «For reasons which it is unnecessary to explore the insurers have confined their case to basis (1)». The insurer may therefore have other remedies available against S and D that is not barred by this decision, cf. para 144.

8 See on the knock for knock principle, Hans Jacob Bull,*Tredjemannsdekninger i forsikringsforhold*, Oslo 1988, Del IV, (Bull) Knut Kaasen,*Petroleumskontrakter*, 2018, Del VIII (Kaasen), Monika Zak,*Ansvarsregulering i borekontrakter –Gyldighetssensur i norsk, engelsk og amerikansk rett*, Master Paper 19.05.2012https://www.duo.uio.no/handle/10 852/35 075(Zak), Trine-Lise Wilhelmsen, Liability and insurance clauses in contracts for vessel services in the Norwegian offshore sector - the knock for knock principle,*MarIus* 2013 (419) pp. 81-111 (Wilhelmsen 2013).

9 Cf. for instance Supplytime or HeavyCon charters.

10 For instance Barecon 2017, Gard P&I rule 79 (5) and Nordic Marine Insurance Plan 2013 Cl. 8-2.

2 Overview of the regulation

2.1 The legal sources

Insurance contracts are governed by the Norwegian Insurance Contract Act 1989 (ICA).

Casualty insurance is regulated in ICA part 3. The rules are as a starting point mandatory, i.e. the provisions can not be deviated from to the detriment of the party deriving a claim against the company from the insurance contract.[11] The ICA may, however, be deviated from for insurance concerning substantial risks and for insurance of commercial activity mainly performed abroad.[12] The act does not define the concept of substantial risk, but this is mapped out in regulations.[13] For the purpose of this article the main point is that insurance for vessels[14] and for enterprises of a certain size[15] is outside the mandatory scope of the legislation. This means that for big companies, vessels and commercial activity mainly performed abroad, the ICA may be departed from.

Even if the ICA is not mandatory for these types of insurance, it will, however, function as background legislation for issues not regulated in the insurance contract between the parties. Commercial enterprises on land in Norway are normally insured based on ICA even in cases where the act may be deviated from. Rules on co-insurance is provided in ICA part 3 chapter 7.

Marine insurance on the other hand, are based on an agreed document, the Nordic Marine Insurance Plan 2013 (NP), that functions more like private legislation than a contractual document.[16] The NP is revised every third or fourth year and the current version is Version 2023.[17] However, this article is mainly based on Version 2019[18] being the version in use when the article was written. Version 2023 was amended to avoid the result in the Ocean Victory case, cf. section 5 below.

The relevant provisions NP includes most types of marine insurance, hereunder hull insurance which was the relevant insurance in the Ocean Victory case. NP includes provisions on co-insurance in chapters 7 (for mortgagees) and 8 (for other third parties).

2.2 Insurance company, policy-holder, and assured

The insurance contract is a three part relationship based on a distinction between the person effecting the insurance and the person that is entitled to compensation when the insured event occurs. The parties to the insurance contract is the policy-holder, which is the party who enters into the contract with the company,[19] and the company, which is the party who in the contract undertakes to provide insurance.[20] The party who according to the insurance contract will be entitled to indemnity or an insured amount is called the insured party or the assured.[21]

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11 ICA § 2-3 sub paragraph 1.

12 ICA § 2-3 sub paragraph 2 cf. § 1-3.

13 FOR-2022-03-04-323 § 1.

14 Regulation § 1 sub paragraph 1 letter a with reference to insurance class 6.

15 Regulation § 1 sub paragraph 1 letter c with reference to insurance class 3, 8, 9, 10, 13 and 16, but qualified to a certain size with regard to assets according to the latest balance sheet, sales according to the latest annual report and accounts and number of employees.

16 See on the NP, Wilhelmsen/Bull p. 26 ff.

17 Printed atThe Plan (nordicplan.org)

18 Printed atNordicPlan

19 ICA § 2-2 letter a, NP Cl. 1-1 letter b, Bull,*Forsikringsrett,* 2008 (Bull 2008), p. 91, Wilhelmsen/Bull p. 44. The Norwegian terminology is «the person effecting the insurance», but here «policy holder» is used because this is the UK terminology.

20 NP Cl. 1-1 letter a, Bull 2008 p. 91, Wilhelmsen/Bull p. 36.

21 ICA § 2-2 letter b, NP Cl. 1-1 letter c, Bull p. 91, Wilhelmsen/Bull p. 45.

In many cases, the policy-holder and the assured is the same person: the owner of a house or a car insures the object and will be entitled to compensation when the house or car is damaged. The distinction between the policy holder and the assured makes it, however, possible to let one insurance contract be issued to the benefit of more parties than the policy-holder. Typically, this will be the situation where the economic interest in the insured object is divided between several people, for instance several owners (spouses owning a house together or co-owners of a vessel) or an owner and mortgagee of a house or entity.[22] In such cases, both the policy holder, and the co-owner, mortgagee or a person in possession of another economic interest in the insured object, will be entitled to compensation according to their economic interest. The term "assured" thus comprises both the "assured" as the "principal" assured and the co-insured.[23]

2.3 Co-insurance for economic interest in insured goods

2.3.1 The regulation in ICA

Co-insurance is governed by ICA chapter 7 Rights of third parties according to the insurance contract. The rules are generally mandatory for small risks, but even so some of the rules may be deviated from.

According to ICA § 7-1, insurance of real property benefits the policyholder and the holder of the judicially registered right of ownership, charge or other judicially registered security. The same holds for the holder of security rights in movable property which can be separately registered in a systematic register.[24] These provisions may be deviated from, but if they are not, ICA § 7-3 provides for mandatory protection of the co-insured by stating that the co-insured is not identified with the policy-holder or the assured; i.e. if the policy-holder breaches the duty of disclosure or the assured breaches the duty of due care during the insurance period, this does not affect the position of the co-insured.[25] The relevant duties of due care is defined in ICA § 4-6/§ 4-7 on change of risk, § 4-8 on breach of safety regulations and § 4-9 on causing the insured event.

Further, according to ICA § 7-5, the parties may agree on co-insurance for other parties than the ones mentioned in ICA § 7-1 – for instance contractors with economic interests in a building project. In such cases, the protection in ICA § 7-3 will apply, i.e. there is no identification between the policy-holder/assured and the co-insured unless the contract states otherwise.[26]

On the other hand, if the co-insured himself breaches the provisions on change of risk, violation of safety regulations or deliberately or through gross negligence causes the insured event, he will be subject to the sanctions for such breaches. In regard to violation of safety regulation or causing the insured event, the sanction is that the compensation will be reduced depending on i.a. the degree of fault and causation.[27] This reduction will then apply to the cover for the co-insureds economic interest in the insured object.

22 Bull 2008 p. 92.

23 See Bull 2008 s. 92, Commentary NP 2019 to Chapter 8 Co-insurance of third Parties, General,Chapter 8 - NordicPlan, stating that "The term 'the assured' is defined in Cl. 1-1 litra (c) to make room for others than the 'principal assured' to be included as assureds under the insurance contract. This is done by making use of the concept of co-insurance", Wilhelmsen/Bull p. 45-46.

24 ICA § 7-1 sub paragraph 2 and 3, see further Bull 2008 pp. 507 ff.

25 See further Bull pp. 530 ff.

26 See further Bull p. 517.

27 ICA § 4-8 third sentence and § 4-9 second sub paragraph.

2.3.2 The Nordic Marine Insurance Plan

The Nordic Marine Insurance Plan 2013 version 2023 regulates co-insurance of mortgagees in chapter 7 and co-insurance of other parties in chapter 8. For the mortgagee the co-insurance is automatic, i.e. the mortgagee is co-insured even if the insurer has not been notified.[28] However, contrary to the regulation in the ICA, the starting point in the NP chapter 7 is that the co-insured is identified with the assured, which means that if the assured breaches the duty of care according to NP chapter 3 and thereby causes damage to the insured property, the co-insured will normally lose his cover.[29] Chapter 7 contains no provisions on the co-insured's own duties of due care, but it follows from his status as co-insured that the duties addressed to the assured applies similarly to him.[30] Thus, in the less likely situation that the co-insured mortgagee breaches his duties of due care and thereby causes damage to the insured property, he will lose cover for his own interest according to the regulation in NP chapter 3. Whether the main assured will be identified with the co-insured in this situation, will depend of the position of the co-insured in relation to the operation of the vessel.[31]

For other third parties with economic interests in the vessel, for instance co-owners or charterers, there is no automatic co-insurance. However, such co-insurance may be effected by expressly stating in the policy that it is effected for the benefit of a third party.[32] For such co-insureds, the duty of disclosure and due care and identification is expressly regulated.[33] The main rule is that the co-insured has the same duties as the person effecting the insurance and the assured, and that he will be identified with the assured. However, a co-insured according to chapter 8 may also effect so called independent co-insurance and thereby avoid identification with the person effecting the insurance and the assured.[34]

2.4 The co-insured's indirect liability insurance

The presentation in 2.3 shows that if the co-insured breaches his duties of due care and thereby causes damage to the insured object, he will lose cover for his own economic interest in the object. If the assured is identified with the co-insured and he also loses cover for his economic interest, the insurer is free from liability and any further claims must be settled between the assured and the co-insured. However, if the assured is not identified with the co-insured, the insurer will have to compensate the assured for his loss. The question then arise if the insurer may raise a subrogated claim against the co-insured being liable for the damage. This is the question of the co-insured's indirect liability insurance, i.e. if the co-insured is protected against this subrogated claim.

A similar question may arise for a third party with no economic interest in the insured object or enterprise, but who is in a position to cause damage to this enterprise. This is sometimes called "protective co-insurance", which refers to a situation where a third party is exposed to liability for loss of or damage to the

28 NP Cl. 7-1 sub-clause 1, Wilhelmsen/Bull p. 222.

29 NP Cl. 7-1 cf. Cl. 3-36 to Cl. 3-38. See further Wilhelmsen/Bull p. 224-225. The regulation is complicated, but the details are outside the scope of the topic here.

30 Wilhelmsen/Bull p. 223-224.

31 NP Cl. 3-37: "The insurer may not invoke against the assured faults or negligence committed by another assured or a co-owner of the insured vessel, or anyone with whom they may be identified under Cl. 3-36, sub-clause 2, unless the relevant assured or co-owner has overall decision-making authority for the operation of the vessel".

32 NP Cl. 8-1, see further Wilhelmsen/Bull p. 231.

33 NP Cl. 8-3, see further Wilhelmsen/Bull p. 233-235.

34 NP cl. 8-7, see further Wilhelmsen/Bull p. 236-237. A mortgagee may also effect such insurance to avoid being identified with the main assured.

insured object itself.[35] Such co-insurance may be effected according to ICA § 7-5 or NP Cl. 8-2.

The starting point is that the insurer has a right of subrogation against a third party causing damage to the insured object. The development of this rule is complicated, but today it appears to be an established rule on "legal cesjon" based on court practise.[36] The tort law contains a limitation to this rule for consumer-insurance where the loss is channelled to the injured party's casualty insurance and thus subrogation is barred,[37] but for insurance of commercial activity the right of subrogation is intact.[38] In a situation where for instance a contractor is liable for fire to the building project and the insurer pays compensation to the owner, the insurer may raise a subrogated claim against the contractor.

The same rule follows from NP § 5-13 for marine insurance:

> If the assured has a claim against a third party for compensation of a loss, the insurer is, upon payment of compensation to the assured for the loss, subrogated to the rights of the assured against the third party concerned.

This regulation may be seen as part of a general principle that a party who has covered another party's obligation normally and as a starting point has a valid recourse action. It is the limitation of any such recourse action that requires specific legal basis.[39]

If the liable party is co-insured, it is however stated in the preparatory documents to the ICA that co-insurance also contains a so-called indirect liability insurance, and that the co-insured is protected against a claim for recourse brought against him by the insurer to the same extent he is protected as an assured. This means that the ICA chapter 4 applies to the subrogated claim and that the insurer may only make a claim against him if he is in breach of rules of change of risk, violation of safety regulation or has damaged the insured object through gross negligence or deliberately.[40]

In the NP, this situation is expressly regulated:

> **Clause 8-2. Protection of third parties against subrogation claims from the insurer**
> The insurer does not have any right of subrogation against the co-insured third party unless and to the extent that such right is specified in the insurance contract or the co-insured third party has undertaken an express contractual obligation to an assured to remain liable for losses of the kind otherwise covered by the insurance.

The main rule here is similar to the "indirect liability insurance" which is described as an inherent element in co-insurance according to the ICA, but both the insurance contract and the contract that provides for co-insurance may depart from this starting point. Interestingly, the Commentary has the following example upon how the contractual obligation may reinstate the right of subrogation:[41]

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35 Commentary NP 2019 to chapter 8, General, Wilhelmsen/Bull p. 229, see also Bull p. 539.

36 Trine-Lise Wilhelmsen, Regress i skadeforsikring,*Tidsskrift for erstatningsrett, forsikringsrett og trygderett*, no. 1, 2019 pp. 7-32 (Wilhelmsen 2019) at p. 13, with reference to Rt. 1986 p. 381 and Rt. 1968 p. 48, Viggo Hagstrøm and Are Stenvik, Erstatningsrett, 2015 (Hagstrøm og Stenvik 2015), s. 539–540. See also Ot.prp. no. 60 (1980–1981) Om lov om endringer i erstatningslovgivningen for så vidt gjelder lemping av erstatningsansvar, forsikringsgivers regressrett m m, p. 43.

37 Tort act § 4-3 cf. § 4-2.

38 Tort act § 4-2 cf. § 4-2 no. 1 letter b.

39 Rt. 1997 p. 1029 at p. 1036.

40 NOU 1987:24, p. 145, with further reference to Selmer,*Forsikringsrett* (1982) (Selmer), p. 129-130, Bull 2008 p. 539.

41 Commentary NP 2019 to Cl. 8-2, printed atChapter 8 - NordicPlan

The second exception refers to a situation where the third party expressly has undertaken to remain liable for the relevant losses, even if he has been included as a co-insured party. … An example may illustrate how this can be done. If the standard charterparty between the assured owner of the ship and the charterer contains a "safe port" provision, the charterer will as a co-insured party be protected under the main rule of Cl. 8-2 against a subrogation claim from the insurer in case of damage caused by a breach of the provision. If the assured owner and/or the insurer requests a subrogation right for the insurer, he/they would have to secure that the charterer undertakes a specific contractual obligation to the assured owner. This can be done through a separate clause or rider in the contract with the owner, setting out that the charterer will remain liable for losses of the kind prescribed in the "safe port" provision despite the protection given to him by the co-insurance arrangement.

The principle of "indirect liability insurance" may also protect a third party A with no economic interest in the insured object or enterprise, but who is in a position to cause damage to this enterprise. This is sometimes called "protective co-insurance", which refers to a situation where a third party is exposed to liability for loss of or damage to the insured object itself.[42] Such co-insurance may be effected according to ICA § 7-5 or NP Cl. 8-2.

2.5 Indirect liability insurance and the relationship between the assured and the co-insured

The question here is what effect the indirect liability insurance has on the underlying liability claim between the assured and the co-insured. Liability insurance is a means to finance liability against a third party, but the concept of liability insurance does not enforce the liable party to use this insurance. Neither does the concept of co-insurance regulate the relationship between the co-insured and the assured. Except for cases regulated by the provision in the tort act on channelling of claims to the casualty insurer,[43] the injured party is free to raise the claim against the liable party instead of claiming his insurer. The starting point for liability in commercial activity is therefore that the injured party may claim the liable party and is not obliged to use his insurance.

The Commentary to the NP chapter 8 has the following remark on this issue under "General":[44]

> If the insurer has covered the loss to the assured, the status as co-insured would protect the third party against a possible subrogation claim from the insurer. Similarly, if the assured should elect to bring action against the third party instead of claiming under the insurance, the co-insured third party would be able to avail himself of the insurance cover. The central idea behind both situations is that the loss, damage or claim should rest with the insurer according to the insurance conditions, without him being able to seek recovery from or deny cover to the co-insured third party. In other words; the "protection" that is relevant differs from a co-insured's liability interest because it is protection as between co-insureds based on some form of underlying contractual relationship, which in turn is recognised and accepted by the insurer.

From this it can be deduced that i) the assured may elect to raise the claim against the co-insured third party and ii) if so, the co-insured "would be able to" avail

42 Commentary NP 2019 to chapter 8, General, Wilhelmsen/Bull p. 229, see also Bull p. 539.

43 Tort act § 4-2 does not apply to damage caused by professional tort feasors, cf. no 1 letter b.

44 Chapter 8 - NordicPlanto Cl. 8-2. See also Wilhelmsen/Bull p. 229, Bull 2008 p. 539, Bull p. 484, 487.

himself of the insurance cover. This means that neither of the parties must use the insurance cover. Normally, they will of course claim the damage from the insurer, but they are free to raise a claim against a party that is not co-insured, cf. below.

2.6 The position of a not co-insured liable third party in the project

It may be that the third party liable for the damage to the assured's economic interest is not part of the co-insurance arrangement. An example is the Ocean Victory case where the owner and bare-boat charterer were jointly assured, but where the directly liable party was a sub-charterer that was not co-insured. The bare-boat charterer was liable for the breach of the safe port warranty against the owner, the time charterer was liable against the bare-boat charterer and the sub-charterer was liable against the time-charterer. Similarly, in a building project the builder and main-contractor may be assured/co-insured, but fire is caused by a not co-insured sub-contractor. The sub-contractor is liable for breach of contract against the contractor, who is similarly liable against the owner. The question then is whether the fact that the insurers are prevented from claiming recourse against the assured(s) and the co-assured(s) will prevent them from pursuing a subrogated claim against this third party.

The starting point according to the tort act § 4-3 cf. § 4-2 for a professional tort feasor and NP § 5-13 is as mentioned that an insurer having paid compensation under a casualty insurance contract may claim subrogation from the liable third party. A complicating factor is however that the right of subrogation is tied to the relationship between the liable party and the injured party (tort act § 4-3 cf. § 4-2) or a claim from the "assured" against a third party (NP Cl. 5-13). In a case where the insurer has covered loss of the owner's economic interest, but the subrogation claim against the co-insured who is liable against the owner is barred, the subrogated claim must be raised against a not co-insured party further down the contractual chain who is liable for the damage against his contractual partner, but not against the owner.

However, the wording in NP Cl. 5-13 may be reconciled to this situation; It may be argued that the insurer in this case first has covered the assured's loss of his economic interest in the vessel, and thereafter compensated the co-insured bare-boat charter for his liability for this loss through waiver of subrogation. The insurer then is "subrogated to the rights of the assured against the third party concerned", i.e. subrogated to the co-insured's right against the third party concerned. It is clear that the co-insured qualifies as "assured" under the policy, and this assured "has a claim against a third party" – namely the charterer, who in turn may claim from the sub-charterer.[45]

It is less natural to say that a co-insured contractor who is protected against this liability against the builder gets the status as injured party according to tort act § 4-3 cf. § 4-2 and thereby opens the door for a subrogated claim against the not co-insured liable contractor. This requires a shift from being a liable party to an injured party due to the waiver of subrogation and is conceptually difficult.

On the other hand, the general principle according to the Norwegian Supreme Court is as mentioned that a party that has covered another's party's obligation, normally and as a starting point, has a valid recourse action, and that a limitation of such recourse action requires specific legal basis.[46] The Supreme Court here refers to court cases permitting recourse from insurer B against another insurer A being liable for loss paid by B,[47] and the recourse claim in the case where the statement is given concerned a payment from the insurer that the insurer denied

45 For UK marine insurance, this issue is governed by MIA sec. 79.

46 Rt. 1997 p. 1029 (at p. 1036).

47 Rt. 1986 p. 381and Rt. 1993 p. 1018.

liability for. These situations are therefore not directly comparable to the issue at hand, although it could be argued that the casualty insurer as indirect liability insurer for the co-insured liable party is covering the liability of the not co-insured sub-contractor. It could also be argued that it is a case of joint and several liability between the casualty insurer and the sub-contractor for the co-insured's liability, which should be solved through an analogy from the tort act § 5-3 regulating the situation when more than one party are liable for the same damage.[48] The rule here is that the liability between the jointly liable parties should be divided according to the degree of fault and other relevant circumstances, where i.a. causation is a relevant issue.[49] It appears to be an open question which of these legal routes one should apply as a legal basis for subrogation in such cases.

48 Wilhelmsen 2019 p. 19.

49 Wilhelmsen 2019 p. 19, Hagstrøm/Stenvik 2014, p. 537; Trine-Lise Wilhelmsen and Birgitte Hagland,*Om erstatningsrett*, 2017, p. 374.

3 The Ocean Victory case

3.1 The factual circumstances, the claim and the issue before the court

The Ocean Victory case concerned the grounding of the vessel Ocean Victory in the port of Kashima in Japan in October 2006. The vessel was owned by Ocean Victory Maritime Inc ("OVM", "the owners" or "A"), who chartered the vessel to Ocean Line Holdings Ltd ("OLH", "the bare-boat charterer" or "B"), which was a related company, on Barecon 89 as amended.[50] The significant feature of bareboat chartering, or chartering by demise, is that during the period of the charter "the vessel comes in the full possession, at the absolute disposal, and under the complete control of the bareboat charterers." Bareboat chartering is therefore entirely different from ordinary time chartering when it comes to the allocation of costs, liabilities and responsibilities.[51]

B time chartered the vessel to China National Chartering Co Ltd ("Sinochart" or "S"), who in turn sub-chartered the vessel to Daiichi Chuo Kisen Kaisha ("Daiichi", "D" or "the charterers") for a time charter trip.[52]

The demise charterparty and both time charterparties contained an undertaking (on materially identical terms) to trade the vessel between safe ports. On 12/13 September 2006, Daiichi (and thus Sinochart) gave the vessel instructions to load a cargo in South Africa and to discharge at Kashima. The vessel discharged the cargo at Kashima 20 October.[53]

Upon departure from the port of Kashima during a storm the vessel allided with the side of a specially constructed channel that connected Kashima to the sea and grounded. The vessel eventually broke in two and was lost.[54]

According to the bare-boat charter party cl. 12, the bare-boat charterer should effect i.a. hull insurance at their expense and for the benefit of both owners, charterers and mortgagees. The hull insurers compensated the owner for the loss of the vessel. One of the hull insurers, Gard Marine & Energy Ltd ("Gard"), thereafter took assignments of the rights of the owners A and the bare-boat charterer B in respect of the grounding and total loss of the vessel. In its capacity as assignee of those rights, Gard subsequently brought a claim against S (which S passed on to D) for damages for breach of the charterers' undertaking to trade only between safe ports.[55] Gard claimed that i) Kashima was not a safe port, ii) D breached the safe port undertaking in the time sub-charter between D and S, iii) S was in breach of the equivalent undertaking in the time charter between S and B, iv) B was in breach of clause 29 of the demise charter between B and the owners A.[56] Gard's case was that the breach of clause 29 caused the loss of the vessel; therefore B was liable to A for the vessel's value, and the fact that A was paid that amount by the insurers was "res inter alios acta" as between B and S.[57]

The issues for the Supreme Court was i.a.[58]

I whether there was a breach of the safe port undertaking and
II if there was a breach of the safe port undertaking, did the provisions for joint insurance in clause 12 of the Barecon 89 form preclude rights of subrogation

50 The judgment para 1.

51 Judgment para 133 referring BIMCO's explanatory notes to Barecon 89.

52 The judgment para 1.

53 The judgment para 2.

54 The judgment para 4.

55 The judgment para 5.

56 Para 137.

57 Para 138. "Res inter alios acta" means "none of their business".

58 Para 8.

of hull insurers and the right of owners to recover in respect of losses covered by hull insurers against the demise charterer for breach of an express safe port undertaking.

The second issue was limited to whether B had a liability to A, which in turn enabled B to claim damages down the line.[59] Other potential bases on which B might be in a position to claim damages from S or D was not an issue for the Supreme Court.[60]

The five Supreme Court judges agreed that there was no breach of the safe port undertaking. Even so, they discussed the question concerning the insurer's right of subrogation against the sub-charter D. A majority of three judges held that the insurer had no such right of subrogation, whereas two judges held that the insurer had such a right.

3.2 The clauses

The demise charter was on the Barecon 89 form, which is a commonly used form of bareboat charter world-wide. Under clause 9 of the form, the demise charterers have the obligation to maintain the vessel in good repair and efficient operating condition and to take immediate steps to have any necessary repairs carried out. The insurances are governed by either clause 12 or clause 13, one of which must be selected. Clause 12, which was selected in this case, provides (so far as relevant):[61]

> 12. lnsurance and Repairs
>
> (a) During the Charter period the Vessel shall be kept insured by the Charterers at their expense against marine, war and Protection and indemnity risks in such form as the Owners shall in writing approve, which approval shall not be unreasonably withheld. Such marine, war and P & I insurances shall be arranged by the Charterers to protect the interests of both the Owners and the Charterers and mortgagees (if any), and the Charterers shall be at liberty to protect under such insurances the interests of any managers they may appoint. All insurance policies shall be in the joint names of the Owners and the Charterers as their interests may appear.
>
> If the Charterers fail to arrange and keep any of the insurances provided for under the provisions of sub-clause (a) above in the manner described therein, the Owners shall notify the Charterers whereupon the Charterers shall rectify the position within seven running days, failing which Owners shall have the right to withdraw the Vessel from the service of the Charterers without prejudice to any claim the Owners may otherwise have against the Charterers.
>
> The Charterers shall, subject to the approval of the Owners and the Underwriters, effect all insured repairs and shall undertake settlement of all costs in connection with such repairs as well as insured charges, expenses and liabilities (reimbursement to be secured by the Charterers from the Underwriters) to the extent of coverage under the insurances herein provided for.
>
> The Charterers also to remain responsible for and to effect repairs and settlement of costs and expenses incurred thereby in respect of all other repairs not covered by the insurances and/or not exceeding any possible franchise(s) or deductibles provided for in the insurances.

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59 Para 124.

60 Para 94 cf. para 145: "It does not follow that the demise charterers (or their insurers in their shoes) necessarily had no available remedy against the time charterers".

61 Para 95.

> ...
> (b) If the conditions of the above insurances permit additional insurance to be placed by the parties, such cover shall be limited to the amount for each party set out in Box 28 Page 39 and Box 29, respectively. The Owners or the Charterers as the case may be shall immediately furnish the other party with particulars of any additional insurance effected, including copies of any cover notes or policies and the written consent of the insurers of any such required insurance in any case where the consent of such insurers is necessary.
> (c) Should the Vessel become an actual, constructive, compromised or agreed total loss under the insurances required under sub-clause (a) of clause 12, all insurance payments for such loss shall be paid to the Mortgagee, if any, in the manner described in the Deed(s) of Covenant, who shall distribute the moneys between themselves, the Owners and the Charterers according to their respective interests. The Charterers undertake to notify the Owners and the Mortgagee, if any, of any occurrences in consequence of which the Vessel is likely to become a Total Loss as defined in this clause.
> (d) If the Vessel becomes an actual, constructive, compromised or agreed total loss under the insurances arranged by the Charterers in accordance with subclause (a) of this Clause, this Charter shall terminate as of the date of such loss. (e) ... (f) For the purpose of insurance coverage against marine and war risks under the provisions of sub-clause (a) of this clause, the value of the vessel is the sum indicated in Box 27.

Clause 13 applies in place of clause 12 if the parties so choose in part I of the contract. The clause 13(a) puts the responsibility for maintaining marine and war risks clause on the owner:[62]

> During the Charter period the Vessel shall be kept insured by the Owners at their expense against marine and war risks under the form of policy or policies attached hereto. The Owners and/or insurers shall not have any right of recovery or subrogation against the Charterers on account of loss of or any damage to the Vessel or her machinery or appurtenances covered by such insurance, or on account of payments made to discharge claims against or liabilities of the Vessel or the Owners covered by such insurance. All insurance policies shall be in the joint names of the Owners and the Charterers as their interests may appear.

Further, the Barecon 89 form was amended by deleting the trading limits clause (clause 5) and adding at clause 29 a safe port warranty in the following terms:

> **29. Trading Exclusions**
> Vessel to be employed in lawful trades for the carriage of lawful merchandises only between good and safe berths, ports or are as where vessel can safely lie always afloat ...[63]

3.3 The majority's reasoning

The majority of three judges held that the co-insurance clause in Clause 12 barred a subrogated claim against the bare-boat charterer in case of total loss under the hull insurance. According to Lord Toulson, the critical question was

62 The judgment para 132.

63 Para 96.

> ... whether the contractual scheme between the owners and the demise charterer precluded any claim by the former against the latter for the insured loss of the vessel. This is a matter of construction. It has become a common practice in various industries for the parties to provide for specified loss or damage to be covered by insurance for their mutual benefit, whether caused by one party's fault or not, thus avoiding potential litigation between them. The question in each case is whether the parties are to be taken to have intended to create an insurance fund which would be the sole avenue for making good the relevant loss or damage, or whether the existence of the fund co-exists with an independent right of action for breach of a term of the contract which has caused that loss.[64]

The judge referred to previous cases concerning building contracts where the owner, contractors and sub-contractors were jointly assured, and when the electrical sub-contractor were liable for fire due to breach of a warranty in the contract with the owner, the co-insurance barred the owner from claiming the damage from the sub-contractor.[65] The main argument was that "it cannot have been the parties' intention that parties who were jointly insured under a contractors' all risks policy could make claims against one another in respect of damage covered by the insurance, or that the insurers could make a subrogated claim in the name of the owners against" the sub-contractor. This was an "implied term", presupposing that the party relying on it has not by his own conduct prevented recovery of the loss under the policy".[66]

In the present case, the Court of Appeal had followed the same reasoning in holding that the proper construction of clause 12 was that there was to be "an insurance funded result in the event of loss or damage to the vessel by marine risks" and that, if the demise charterers had been in breach of the safe port clause, they would have been under no liability to the owners for the amount of the insured loss because they had made provision for looking to the insurance proceeds for compensation. The court did not consider that the introduction of clause 29 on safe ports was intended to alter the way in which clause 12 was to operate.[67] Lord Toulson agreed with this and added:[68]

> The demise charter allowed for a subdemise with the owners' consent, which was not to be unreasonably withheld. The risk existed that the vessel might be directed to an unsafe port, not necessarily by negligence on anyone's part, so causing peril to the vessel, but the risk of consequential damage to the vessel was catered for by the insurance required to be maintained by the demise charterer in the joint names of itself and the owners. The commercial purpose of maintaining joint insurance in such circumstances is not only to provide a fund to make good the loss but to avoid litigation between them, or the bringing of a subrogation claim in

64 Para 139.

65 Para 139-140, with reference to Co-operative Retail Services Ltd v Taylor Young Partnership Ltd [2002] 1 WLR 1419 and Mr Recorder Jackson QC, as he then was, in Hopewell Project Management Ltd v Ewbank Preece Ltd [1998] 1 Lloyd's Rep 448, 458.

66 Para 140 with reference to Board of Trustees of the Tate Gallery v Duffy Construction Ltd [2007] BLR 216. See for a different result Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd and others [2018] EWHC 558 (TCC), where thejudge in the Technology and Construction Court (TCC) held that a requirement for a sub-contractor to maintain its own GBP 5 million insurance in its sub-contract prevented it from claiming protective cover under a project insurance policy in which it became co assured.

67 Para 141.

68 Para 142.

> the name of one against the other. I do not accept that by substituting clause 29 for clause 5 the parties intended to subvert that purpose.

Lord Toulson also stated that "insurance arrangements under clause 12 provided not only a fund but the avoidance of commercially unnecessary and undesirable disputes between the co-insured".[69]

Both lord Mance and lord Toulson commented for the majority upon the relationship between clauses 12 and 13. BIMCO had explained that the reason for the optional alternative of clause 13 was that when a vessel is bare-boat chartered for only a short period it may make sense for the owners to carry on with their own insurances. Clause 13 therefore provides that the vessel is to be kept insured by the owners against marine and war risks, and that the owners and their insurers are to have no right of recovery or subrogation against the charterers on account of loss or damage covered by such insurance. Lord Mance stated that:

> It would be unnecessary to include equivalent words in clause 12. It cannot have been the parties' intention that the charterer's exposure to liability should be greater under clause 13, where cover against marine and war risks was to be maintained at the owner's expense than under clause 12, where it was to be maintained at the charterer's expense. Longmore LJ put the point pithily when he described the exclusion of rights of recovery or subrogation in clause 13 as "a confirmation rather than a negation of such exclusion in the more usually adopted clause 12 for the longer term charters when it is the charterers who pay the premium" (para 88).[70]

Lord Toulson agreed and concluded

> ... that the express exclusion of a right of recovery or subrogation in clause 13 was simply belt and braces in the context of insurances taken out by owners, and that the reason why no such express term appears in clause 12 was that it never occurred that there could be such claims in the context of insurances arranged by charterers to cover their own as well as owners' interests. It is inconceivable that the parties intended fundamentally to alter the incidence of risk by permitting or excluding breach-based claims as between themselves in respect of a hull loss, depending upon whether it happened to be convenient to continue to use hull insurances taken out by owners or to rely on fresh insurances taken out by charterers.[71]

69 Para 144.

70 Para 135.

71 Para 117.

4 The Ocean Victory case and Norwegian law

4.1 Introduction and overview

It appears that the common starting point in Norwegian and UK law is that co-insurance protect the co-insured against a subrogated claim from the insurer if the co-insured is liable for damage to another assured's property, unless the co-insured has caused the damage through breach of provisions in the insurance contract.

The question is if this indirect liability protection also effects the underlying liability between the parties to the charterparty (or other contracts as the case may be) and thus bars a subrogated claim against a liable party that is not part of the co-insurance scheme. According to the Ocean Victory case para 139, "This is a matter of construction", but the core reasoning for the majority decision appears to be based upon general English law principles of co-insurance developed over several years.[72] This approach seems to be similar to the Norwegian approach. In the following, the majority's interpretation of cl. 12 is addressed in 4.2 and the relationship between cl. 12 and 13 in 4.3.

4.2 Clause 12

The charterparty cl. 12 contains a comprehensive regulation of "Insurance and repairs", and maps out i) that the charterer shall effect the insurance for their own expense, ii) that the insurance shall protect the interests of both the owners and charterers and be in the names of both according to their interest, iii) the situation if the charterer fails to effect the insurance and iv) the charters liability to effect insured repairs and how the insurance payment shall be distributed in case of a total loss. Both the heading and the text indicate that the clause regulates the bare-boat charterer's duty to effect insurance, the duty to repair the vessel and how the settlement shall be in case of total loss. This must be seen in the context of the characteristic feature of bare-boat chartering that the bare-boat charterer takes possession of the vessel with the corresponding duties connected to maintenance and insurance.

The wording on co-insurance is very limited:

> Such marine, war and P & I insurances shall be arranged by the Charterers to protect the interests of both the Owners and the Charterers and mortgagees (if any), and the Charterers shall be at liberty to protect under such insurances the interests of any managers they may appoint. All insurance policies shall be in the joint names of the Owners and the Charterers as their interests may appear.

The charterer has a duty "to protect the interests of both the Owners and the Charterers and mortgagees". According to Norwegian law, the concept of "interest" in relation to insurance is developed i.a. to explain that the object of insurance is not the physical object that is insured, but the economic interest in this object.[73] In this sense, the concept of interest is also used to explain that different persons can possess different economic interests in the same property, for instance the distinction between the mortgagees interest in the value of the loan and the owners interest in the rest of the value of the same property.[74] In relation to the charterer, the economic interest that is directly insured is his duty to effect

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72 See for instance para 55-57, 98-99, 114-115.

73 Trine-Lise Wilhelmsen, Forsikring og regress ved salg av bolig,*Tidsskrift for erstatningsrett, forsikringsrett og trygderett*, no. 2-3, 2018, pp. 108-137 at p. 122, Selmer, p. 74 f.; Bull, p. 433; NOU 1987: 24 Lov om avtaler om skadeforsikring, ch. 6.2.1.

74 Selmer, p. 75; Bull, p. 433.

repairs of the vessel as part of the bare-boat charter. The clause letter c also states that in case of total loss the insurance shall be distributed between "the Owners and the Charters according to their respective interests". Such distribution of the insurance proceeds according to each co-insureds direct economic interest is according to Norwegian law principles for co-insurance.[75]

In addition to this, insurance/co-insurance means that the insurer may not raise a claim against an assured/co-insured for damage to the insured interest. In the Ocean Victory case, the bare-boat charterer B was the assured, and any wrongdoing on his part will be regulated by NP ch. 3. This means that his claim may be reduced if he caused the loss by gross negligence,[76] but there is no basis for subrogation against him as the "main" assured. This is similar to the principle on "indirect liability insurance" for the co-insured, but as the owner A in this case has the position of co-insured, he has no need for such cover. It is also clear as stated by the majority that the inclusion of a safe port warranty in itself would not provide the insurer with a wider right of subrogation. This is as mentioned above in 2.5 clearly stated in the Commentary for co-insurance and must be even clearer in the case of the bare-boat charterer being the main assured.

On the other hand, the clauses say nothing about the relationship between the charterer and the owner, and does not say that the loss is channeled to the insurance company in a way that precludes the owner from claiming the charterer instead of the insurance company.

Nor does it follow that the charterers, instead of availing himself of the insurance, are precluded from pursuing a claim against a third party. According to Norwegian law, in cases where the loss is not channelled to the insurer according to tort act § 4-2 cf. § 4-3, the insurer is as mentioned above in section 2.5 free to make a subrogated claim against the person causing the loss. If the bare-boat charterer in the position of policy-holder in the Ocean Victory case is seen as the "main assured", the insurer's right of subrogation will follow directly from the wording of NP cl. 5-13. If the owner is seen as the main assured because he is entitled to the insurance compensation for total loss, the situation is more complicated. Here, the insurer first covers the owner. This would as a starting point give him a subrogated claim against the bare-boat charterer, but this claim is barred when the bare-boat charterer is co-insured. This means that the insurer by covering the assured's loss, also covers the bare-boat charterer's liability as indirect liability insurer. He may then take over the bare-boat charterers claim against the charterer, the charterer will sue the sub-charterer D and the loss will rest with him as the liable party.

The majority's interpretation that co-insurance is meant to establish "an insurance funding" which prevents any claim between the parties appears to implicate a knock for knock agreement where all parties in the contractual chain are protected against a claim from any other contractual party. The bare-boat charter cl. 12 is interpreted to mean that the bare-boat charterer waive their liability against the owner. Since the owner has no claim against the bare-boat charterer, the bare-boat charterer will not have a claim against the time-charterer S, who in turn has no claim against the sub-charterer D who is directly liable for the loss. This means that both the bare-boat charterer's liability against the owner and the bare-boat-charterer's right to subrogation against the charterer is waived. The result is that cl. 12 also means a waiver of liability for the time-charterer S and the sub-charterer D, even if these parties are not parties to the bare-boat charterparty and not co-insured under the insurance scheme.

Such waiver of liability and right to subrogation is typical for a knock for knock agreement much used in the off-shore sector, but these agreements are carefully

75 Bull p. 520 ff, and for example NP Cl. 7-4 for co-insurance of mortgagees.

76 NP Cl. 3-33.

drafted to obtain the effect.[77] In particular, there is extensive regulation of liability between the parties to the contract, and to include other parties in the contractual structure, there is a complicated system of attribution of liability not only between the parties to the contract, but including parties to other contracts in the same projects. The court's interpretation of cl. 12 implies that this carefully drafted system of liability and insurance is unnecessary and that the same effect could be obtained using a co-insurance scheme.

It is interesting to note the court's reasoning that the co-insurance scheme "provide the fund for the cost of restoring and repairing the fire damage rather than … indulge in litigation with each other" (para 143). This is also a main reason for establishing a knock for knock system.[78] However, such argument has not been used to explain co-insurance of third parties. The rationale here is mainly that it is convenient that one insurance capture the different economic interests in the same asset or entity instead of each party having to insure their own economic interest. This is efficient from a transaction cost perspective, but is has never been implied that such an instrument will create a full liability regulation between the contractual parties.

A strong argument against the court's interpretation is also that it results in an unwarranted gain for the sub-charterer that is not co-insured. This sub-charterer has presumably not paid any part of the insurance premium for the co-insurance scheme and thus can have no legitimate expectation to be protected by the insurance. At the same time, the insurer will have to calculate the premium for such bare-boat arrangements to include protection of not co-insured sub-charterers. This means that the economic risk for the sub-charterer's contractual breach is attributed to the owner and bareboat charterer, which again can reduce the deterrence effect of the liability system. A main argument against the knock for knock principle is that it undermines the deterrence effect of liability. But with a full knock for knock regulation all parties are familiar with the regulation and it must be presumed that the contractual attribution of risk for damage is fairly attributed between the parties.[79] This was presumably not the situation in the Ocean Victory case.

4.3 The difference between cl. 12 and cl. 13

The court also refers to the difference between cl. 12 and cl. 13. Clause 13 is aimed at short term bare-boat charters where it may be natural for the owner to continue their insurance. In this case, the clause states that the "Owners and/or insurers shall not have any right of recovery or subrogation against the Charterers on account of loss of or any damage to the Vessel or her machinery or appurtenances covered by such insurance". The fact that this clause bars the owner's/insurer's right of subrogation whereas the same provision is not found in cl. 12 is disregarded by the majority in the case, who finds it inconceivable that the parties have meant that the clauses should provide for a different attribution of risk. For the court this appears to mean that cl. 12 implies the same rule on no right to recovery/subrogation.

Under cl. 13, the owner is the policy-holder and the charterer is co-insured. This means that the charterer as co-insured has indirect liability insurance for any damage he causes to the vessel. From a Norwegian law perspective it should

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77 See Wilhelmsen 2013 pp. 87-95 and as examples of knock for knock regulation, Supplytime 2017 Time Charter for Offshore Service Vessels (Supplytime), art. 14 and 15, OLF Proposal "New conditions of contract for drilling and well services" no. 8, "https://www.norskoljeoggass.no/contentassets/5cd867 185b5c47fc85 720d3d96a6f399/drilling-and-well-services.pdf, Norwegian Fabrication Contract 2015 (NF), art. 29-31, cf.https://www.norskindustri.no/dokumenter/leveringsbetingelser/nfntk-standardkontrakter/

78 Bull p. 353, Kaasen p. 766, Wilhelmsen 2013 pp. 95-96.

79 See on the deterrence effect and the knock for knock principle, Wilhelmsen 2013 pp. 98-101.

therefore be unnecessary to state that the insurer have no right to subrogation against the charterer as this is inherent in the co-insurance scheme. To this effect, cl. 12 and 13 appears to be similar, but according to Norwegian law, the insurer's waiver of subrogation does not mean that claims between the parties are barred.

The owner's waiver of recovery from the charterer is more difficult to explain in the context of co-insurance, but may be seen in the context of the charter-party clauses 9 and 12. According to cl. 9, the charterers have the obligation to maintain the vessel in good repair and efficient operating condition and to take immediate steps to have any necessary repairs carried out. Clause 12 states that the charterer "shall, subject to the approval of the Owners and the Underwriters, effect all insured repairs and shall undertake settlement of all costs in connection with such repairs as well as insured charges, expenses and liabilities (reimbursement to be secured by the Charterers from the Underwriters) to the extent of coverage under the insurances herein provided for." Clause 13 has no similar regulation of repairs, presumably because in this case the owner as policy-holder will organize repairs in cooperation with the insurer. The situation may then arise that the owner pays for repairs with compensation from the insurance, and thereafter claim recovery from the charterer based on cl. 9. This may put the charterer in a difficult position: the insurer has already paid the claim and thus the charterer may not claim the insurer even if he is co-insured. Even if the starting point naturally is that the owner may not claim the repair costs twice, the waiver of recovery can be explained to avoid this situation. A similar situation will not arise under cl. 12.

5 Some conclusions

The result and the reasoning in the Ocean Victory case is not convincing according to Norwegian law. This is true whether the judgment is based on interpretation of the charter-party or on general English law principles of co-insurance. The result appears contrary to considerations of deterrence, gives the wrongdoer a totally unwarranted gain and results in an unfair distribution of costs for the risk connected to unsafe ports (or other breaches as the case may be). However, the article has demonstrated that the concept of co-insurance may raise difficult problems in enterprises or projects involving several contractual parties where some parties but not all are covered under a co-insurance scheme. Neither the co-insured's direct liability insurance nor the relationship between the co-insured parties is regulated in the ICA, and the comments in the preparatory documents are limited. It is an open question if the rules on subrogation in the tort act or Norwegian contract law open for the insurer's subrogation against a liable party in a contractual chain who is not directly liable to the assured. In building projects and other projects based on ICA's co-insurance system the parties should be aware of these problems to avoid unwanted results.

Both indirect liability insurance and subrogation is better regulated in the NP with regard to these issues, but the questions discussed here were not directly addressed in Version 2019. However, to avoid the result in the Ocean Victory case, a new sub-clause was added to Cl. 8-2:

> The liability of the assured and co-insured third parties to each other shall not be excluded nor discharged by reason of co-insurance. Any payment to the assured or co-insured third party in respect of any liabilities, losses, costs and expenses shall operate only as satisfaction of the assured's claim against the insurer but not exclusion or discharge of the liability of such person to the assured or co-insured third party.

Further, the Commentary states that[80]

> As a starting point, this solution would follow from Norwegian background law, where co-insurance is meant to provide financial cover for any liability the co-insured might get against the assured, but not to effect the liability between the assured and the co-insured. This means that in cases with contractual chains, e.g. owner A charters a vessel to B, who sub-charters the vessel to C, where A and B are co-insured, the insurer has a right of subrogation against C, who is not co-insured. A waiver of liability between the parties therefore presumes explicit contractual regulation, for instance through a knock for knock agreement.
>
> However, the UK Supreme Court case (2017) UKSC 35 "Ocean Victory" may give grounds for an argument that creates uncertainty to this principle.... Even if this is contrary to the legal position in the Nordic countries, the Committee finds it necessary to state this expressly to avoid any uncertainty. Thus, the insurers payment of compensation to an assured will operate only as satisfaction of the insurance claim from the assured against the insurer but not as an exclusion or discharge of the underlying liability between the assureds. Sub-clause 2 therefore preserves the insurer's right to recover damages from any party external to the assured's insurance arrangements such as a time charterer, or shipper of dangerous goods.

80 Chapter 8 (nordicplan.org)

The High Seas Treaty and Shipping

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Content

1. Introduction

This article discusses the relevance and implications of the forthcoming international agreement on the conservation and sustainable use of marine biological diversity beyond national jurisdiction for international shipping (such new agreement hereinafter referred to as the 'Agreement' or 'The High Seas Treaty'[1]). The Agreement has been adopted under the auspices of the United Nations and the UN Convention on the Law of the Sea (UNCLOS).[2]

The living resources and biodiversity of the areas beyond national jurisdiction (ABNJ) are threatened by depletion due to overexploitation, pollution, and climate change. Maritime transport remains central for international trade, as over 80% of the total volume of international trade in goods is carried by sea.[3] In addition to traditional shipping activities, high seas areas are also used by fishing vessels, various special purpose vessels, and warships, as well as floating platforms and installations for research, energy production etc. Furthermore, exploitation of marine genetic resources (MGRs) of the ABNJ and bioprospecting will reportedly have intensified by 2025, as the global marine biotechnology industry pursues a broad range of commercial purposes for the pharmaceutical, biofuel, and chemical industries.[4] Thus, in addition to impact from traditional uses of the high seas for fishing and shipping, the high seas and deep seabed are subject to increasing pressures from novel industrial and economic activities. At the same time, significant gaps remain in the international legal framework applicable to the use and protection of the marine environment and biodiversity of the high seas.

In 2015, the UN General Assembly (UNGA) adopted a Resolution to develop an international legally binding instrument (ILBI) under UNCLOS and to that end to establish a preparatory committee. Following its recommendations, the UNGA decided to convene an intergovernmental conference on the ILBI.[5] The final text of the Agreement was negotiated on 5 March 2023 and adopted on 19 June 2023, to be ratified by States in due course.[6] The Agreement seeks to 'address, in a coherent and cooperative manner, biodiversity loss and degradation of ecosystems of the ocean' and the 'need for the comprehensive global regime to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction'.[7] Admittedly, shipping is not among those economic activities in the high seas raising the greatest concerns; for example, mining, energy exploitation, waste disposal and commercial fishing were mentioned expressly in the initial report on the need for the ILBI. Shipping may, however, have impacts on marine biodiversity which vary depending on the ecological sensitivity of the

1 The Agreement is also broadly referred to as BBNJ.

2 Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3.

3 UNCTAD, Review of Maritime Transport 2022: Navigating Stormy Waters, <Review of Maritime Transport 2022 | UNCTAD>.

4 See, e.g., Marta Abegon-Novella, 'Negotiating an International Legal Instrument on Biodiversity Beyond National Jurisdiction: A Look Ahead' (2022) 52*Environmental Policy and Law* 21–37;*Paul Oldham, Stephen Hall, Colin Barnes, Catherine Oldham, Mark Cutter, Natasha Burns, Leonie Kindness, Valuing the Deep: Marine Genetic Resources in Areas Beyond National Jurisdiction* (2014) published online (bookdown.org).

5 UNGA Resolution 72/249 of 24 December 2017, International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, <Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction | (un.org)>.

6 The negotiations of the Agreement have concluded with the adoption of the final draft agreement (5 March 2023) and the adoption of the Agreement by the UN on 19 June 2023. The Agreement and the Final Statement by the UN Secretary General are available at <Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction | (un.org)>.

7 Ibid., the Preamble and art 2.

area.[8] As discussed further in this article, the scope of the forthcoming instrument is broad and applies to all activities in the ABNJs, including shipping.

While the Agreement has already been extensively discussed in the legal scholarly literature, there are gaps in the understanding of the specific legal implications of this international legal development for shipping. This article begins with a brief presentation of the existing international legal framework governing shipping on the high seas, including the jurisdiction and responsibilities of flag States, the role of the International Maritime Organisation (IMO) as the 'competent international organization' under UNCLOS and its central conventions regulating the environmental safety of ships on the high seas (Section 2). Section 3 presents and discusses selected provisions of the adopted draft Agreement, focusing on the scope of the Agreement and its relationship with the IMO, and on the provisions governing Area-Based Management Tools as defined therein. Section 4 concludes.

8 Working Group on Conservation of Arctic Flora and Fauna (CAFF), AS3: Reducing the effects of shipping on biodiversity (11 October 2018), <AS3: Reducing the effects of shipping on biodiversity - Arctic biodiversity, Conservation of Arctic Flora and Fauna (CAFF)>.

2. The international legal framework governing shipping on the high seas

2.1 The high seas freedoms

UNCLOS Part VII lays down provisions governing the use and protection of the high seas. Article 87(1) provides that '[t]he high seas are open to all States, whether coastal or land-locked' and that the '[f]reedom of the high seas is exercised under the conditions laid down by' UNCLOS and 'by other rules of international law'. The freedoms of the high seas include the freedom of navigation, of overflight, to lay submarine cables and pipelines, and to construct artificial islands and other installations, as well as freedom of fishing, and freedom of scientific research.[9]

The high seas freedoms are not absolute and unconditional. Article 87(2) provides that the high seas freedoms 'shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights' with respect to activities in the Area (Part XI). Seen in light of other UNCLOS provisions, notably Part XII Protection of the marine environment, it is obvious that States exercising freedoms of the high seas may be subject to existing rules of international law not expressly mentioned in Part VII. They may also be subject to post-UNCLOS legal developments, resulting in further conditions being imposed on the high seas' freedoms.

Living marine resources of the water column beyond the EEZ as well as sedentary species beyond the continental shelf or Extended Continental Shelf are regulated by the regime of the high seas.[10] While no State may claim sovereignty over the high seas[11] and the Area,[12] living marine resources of the high seas are considered by some States as being *res communis* (property of the community of States).[13] Since all States are granted equal access to the living resources of the high seas, fish stocks, especially low productivity species, are prone to depletion and the 'tragedy of the commons'.[14] However, by contrast to mineral resources of the Area governed by the principle of the Common Heritage of Mankind (Part XI UNCLOS), the high seas regime does not envisage equitable benefit sharing of marine resources and does not establish any institutional frameworks or bodies to govern the marine resources of the high seas as a common resource.[15]

UNCLOS grants a special role to the "competent international organization", through which States establish "international rules and standards to prevent, reduce and control pollution of the marine environment from vessels" that are necessary to fulfil States' obligations under UNCLOS.[16] The IMO performs these obligations by adopting international conventions and developing non-binding

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9 Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (4th edition, Manchester University Press 2022), 375, point out that freedoms of the high seas cannot be exhaustively listed, since States cannot control the activities of other States and their vessels on the high seas and new ocean technologies are constantly developing.

10 UNCLOS (n 2) Articles 87 and 116.

11 Ibid., Article 89.

12 Ibid., Article 137.

13 See Tore Henriksen, 'Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations' (2009) 40 *Ocean Development and International Law* 80-96, 86.

14 Margaret E Banyan, 'Tragedy of the Commons' (2020), Encyclopædia Britannica Online; FAO (2009), *Deep-sea Fisheries in the High Seas: Ensuring sustainable use of marine resources and the protection of vulnerable ecosystems*, <FAO Fisheries and Aquaculture Department - Deep-sea Fisheries in the High Seas: Ensuring sustainable use of marine resources and the protection of vulnerable marine ecosystems>.

15 UNCLOS Article 118 imposes a duty on States whose nationals are engaged in high seas fisheries to cooperate for the purposes of management and conservation of stocks.

16 UNCLOS (n 2) Article 211.

recommendations for States within maritime safety and environmental protection. As discussed further, flag States are given the principal responsibility for ensuring the safe conditions and environmentally responsible operation of vessels sailing under their flag.

2.2 Flag State jurisdiction and responsibilities

The flag State is the State which has granted to a ship the right to sail under its flag.[17] Each flag State is obliged to "take such measures for ships flying its flag as are necessary to ensure safety at sea".[18] These measures relate to the safety parameters of the vessel, its navigational systems and the proper qualifications and working conditions of the crew. The flag State is also obliged to conduct obligatory technical surveys of the ship, ensuring both the proper qualifications of the master and crew and the ability of the crew to communicate.[19]

Part XII of UNCLOS deals specifically with States' obligations with respect to the protection of the marine environment. Article 194 prescribes the obligations of all States (including flag States) to protect the marine environment. It says that States must take *all measures necessary to ensure* that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention. According to Article 194(3)(b), these measures must include ones designed to minimise to the fullest possible extent pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation, and manning of vessels.

Further provisions of Part XII lay down rules specifically addressing States' obligations to adopt legislative and enforcement measures to prevent and minimise vessel-source pollution. Article 211 requires States to adopt international measures to regulate and prevent pollution from ships, and flag States are required to adopt anti-pollution measures for ships under their flag which at least have the same effect as that of generally accepted international rules and standards. UNCLOS does not specify the actual discharge standards or other obligations with respect to safety to be observed by vessels, but merely refers to the obligation of flag States to comply with the "international rules and standards" adopted by the 'competent international organization' (IMO). Coastal States may also establish particularly sensitive sea areas in their EEZs for which they may adopt provisions to prevent ship-source pollution, subject to certain conditions and authorisation by the IMO.[20] However, the implementation and compliance responsibility within the designated areas lies with the flag State.

Flag States enjoy exclusive jurisdiction over their ships on the high seas.[21] A few narrow exceptions follow from UNCLOS and, as the case may be, other inter-

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17 Churchill, Lowe & Sander (n 9), 381.

18 UNCLOS (n 2) Art. 94(3).

19 Ibid., Art. 94(4).

20 UNCLOS (n 2) Article 211(6). Further conditions for such areas are provided in Article 211(6) and the IMO's Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas (Resolution A.982(24)): The Guidelines set out detailed criteria for the designation of such areas and envisage associated protective measures (APMs) and the procedure. The Guidelines item 6 mentions the following options: Designation of an area as a Special Area or the application of special discharge restrictions to vessels operating in PSSA; the adoption of ship routing and reporting systems near or in the area (including an area to be avoided); and other measures which have an identified legal basis. 'In some circumstances, a proposed PSSA may include a buffer zone, i.e. an area contiguous to the site-specific feature (core area).'

21 UNCLOS (n 2) Article 92(1).

national law.[22] The supremacy of a flag State jurisdiction on the high seas is based on the ancient principle of freedom of navigation, respect for state sovereignty, as well as on the trust that flag States are the best suited to control vessels flying their flag, due to the close link between them and these vessels. At the same time, flag States are required to exercise effective jurisdiction and control over their ships in administrative, technical and social matters. Article 217 requires flag States to take measures to ensure their ships' compliance with requirements for marine environmental protection, and to investigate violations of international shipping safety standards.[23]

Serious concerns about the effective and adequate protection of the high seas have been raised, due to irresponsible practices associated with so-called 'flags of convenience'. UNCLOS provides that flag States determine the conditions for granting their nationality to vessels and does not prescribe conditions for obtaining the flag State's nationality and ship registration requirements, except that "[t]here must exist a genuine link between the State and the ship."[24] In the absence of international obligations or harmonised registration requirements in force,[25] flag States enjoy a nearly unlimited discretion with respect to the conditions for registration of vessels in their domestic registries.[26] States' approaches to registration of ships as well as to the rigour of supervision and enforcement vary greatly. Relaxed registration conditions and supervision in States offering "flags of convenience" contribute to inadequate environmental protection in the international shipping.[27]

2.3 The role and competences of the IMO

The idea of establishing an international organisation to study and develop an international legal order for peaceful uses of the seas "in conformity with the common interests of the international collectivity" first emerged in the inter-war period.[28] The IMO (IMCO at the time) was established in 1948 in accordance with Articles 57 and 63 of the UN Charter of 1948.[29] Thus, the IMO is a UN specialised agency vested with responsibility for the safety and security of shipping and the prevention of marine and air pollution by ships.

The mandate of the IMO is set out in the IMO Convention.[30] One of the central tasks of the IMO is to enable cooperation between States 'in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade', and 'to encourage and facilitate the general adoption of the highest practicable standards in matters concerning

22 Port States and coastal States are granted certain prescriptive and enforcement jurisdiction with regard to foreign ships calling at ports and sailing through their territorial sea and EEZ (UNCLOS Articles 218-220).

23 See also Article 94.

24 Article 91(1). For a more detailed discussion of the genuine link see, e.g., Churchill, Lowe & Sander (n 9), 471.

25 UN Convention on Conditions for Registration of Ships (7 February 1986, 26 ILM 1229, not in force) seeks to ensure and strengthen the genuine link between the ship and its flag State so that the flag State can effectively exercise its jurisdiction and control, <United Nations Convention on Conditions for Registration of Ships 1986 (unctad.org)>.

26 This has been confirmed in international case law, e.g. Saiga (nr 2) (St.Vincent v. Guinea), 120 I.L.R. 143, International Tribunal for the Law of the Sea (ITLOS) 1999, para 82.

27 Churchill, Lowe & Sander (n 9), 471 et seq.; Alan Khee-Jin Tan,*Vessel-Source Marine Pollution. The Law and Politics of International Regulation*, Cambridge University Press, Cambridge, 2006, 47*et seq*.

28 Resolution by the Institute of International Law, Annuaire de l'Institut de Droit International, Vol. 39 (1934) 711-713, cited in Kenneth R. Simmonds,*The International Maritime Organization* (London: Simmonds & Hill Publishing Ltd, 1994), 1.

29 Simmonds, ibid.

30 Convention on the Intergovernmental Maritime Consultative Organization (hereinafter the IMO Convention), Geneva, 6 March 1948, in force 17 March 1958, 289 UNTS 3.

the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships.'[31] In addition, the IMO addresses 'any matters concerning shipping and the effect of shipping on the marine environment that may be referred to it by any organ or specialised agency of the United Nations.'[32] These tasks have to a significant extent been accomplished through multilateral instruments of a binding nature.[33]

The IMO's scope of work has evolved remarkably since its early years. After the Torrey Canyon disaster (1967), the task of adopting standards on the prevention and control of marine pollution from ships was expressly incorporated into the IMO's mandate.[34] Since then, the IMO has contributed to the development of general marine environmental protection law, exceeding its initial task of pollution control and encompassing a wider range of rights and duties relating to ocean environment and development activities.[35] The IMO's strategy has changed from reactive to proactive; the problems the IMO addresses today encompass environmental matters, climate change, maritime security, piracy, armed robbery, and ocean governance.[36] The Strategic Plan of the IMO confirms its mission to promote safe, secure, environmentally sound, efficient and sustainable shipping, through cooperation and in light of the 2030 Agenda for Sustainable Development.[37]

This evolution is hardly surprising: the IMO holds the responsibility of being the "competent international organization" under UNCLOS to adopt global shipping standards. As a dynamic, living instrument, UNCLOS also recognises that 'the problems of ocean space are closely interrelated and need to be considered as a whole'.[38] Since the IMO's mission has always been global in scope, it is pertinent for the IMO to adapt its law-developing activities to the dynamic context of the international legal order.

Article 2(b) of the IMO Convention envisages that, among other aspects, the IMO's function is to "[p]rovide for the drafting of conventions, agreements, or other suitable instruments, and recommend these to Governments and to intergovernmental organizations, and convene such conferences as may be neces-

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31 Ibid., Article 1(a).

32 The IMO Convention (n 30), Article 1(d).

33 Aldo Chircop, 'The International Maritime Organization' in Donald R Rothwell, Alex G Oude Elferink, Karen N Scott, Tim Stephens (eds),*The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press 2015), 421.

34 Amendments to the Convention on the Inter-Governmental Maritime Consultative Organization, London, 17 November 1977, in force 10 November 1984, UNTS 1984 p 269. See also Chircop (ibid.), 419.

35 Simmonds (n 28), 37; Obinna Okere, 'The Technique of International Maritime Legislation',*The International and Comparative Law Quarterly*, Jul., 1981, Vol. 30, No. 3 (Jul., 1981), 513-536, 524. Malgosia Fitzmaurice and Olufemi Elias,*Contemporary issues in the law of treaties* (Utrecht: Eleven International Publishing, 2005), 90; Julian Roberts, Aldo Chircop and Siân Prior, 'Area-Based Management on the High Seas: Possible Application of the IMO's Particularly Sensitive Sea Area Concept', (2010) 25*Int'l J. Marine & Coastal L.* 483.

36 OECD (2016),*International Regulatory Co-operation: The Role of International Organisations in Fostering Better Rules of Globalisation*, 44, <https://doi.org/10.1787/9 789 264 244 047-en>, <Microsoft Word - IO-CRC.docx (oecd-ilibrary.org)>; Ilker Basaran, 'The Evolution of the International Maritime Organization's Role in Shipping' (2016) 47 J. *Mar.L. & Com.* 101.

37 IMO Resolution A.1149(32), Revised Strategic Plan for the Organization for the Six-Year Period 2018 to 2023, available at <Strategic Plan for the Organization (imo.org)>. On the influence of Sustainable Development Goals on the IMO's agenda see also Rosalie P. Balkin, 'The IMO and Global Ocean Governance: Past, Present, and Future' in David Joseph Attard, Rosalie P. Balkin and Donald W. Greig (eds),*The IMLI Treatise on Global Ocean Governance: Volume III: The IMO and Global Ocean Governance* (Oxford: Oxford University Press, 2018), 2.

38 The Preamble, UNCLOS (n 2); IMO,*Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization*, 31 January 2007, LEG/MISC.5. See also UNGA, A/Res/66/288, The future we want, <un.org>.

sary."[39] The wording of Article 2(b) indicates that the IMO may draft both binding and non-binding instruments to accomplish its tasks.[40] Other than the requirement that the instrument to be drafted should be 'suitable', the IMO Convention does not clarify the criteria for choosing a particular form for an instrument or for determining whether or not it should be binding. The IMO Convention should be understood in light of the UNCLOS requirement that States must take all *appropriate measures necessary* to prevent, reduce and control pollution of the marine environment and to endeavour to harmonize their policies.[41] In practice, the IMO contribution to the development of the international maritime law consists of 'hard' and 'soft' law norms, where non-binding provisions may eventually lead to the adoption of a binding instrument, the establishment of detailed technical rules and standards or the provision of authoritative interpretations of a convention.[42]

Binding multilateral instruments in the shape of conventions, agreements, protocols and codes have been central to the IMO's input in international maritime law-making. Since its establishment in 1958, the IMO has contributed to the adoption of over fifty treaties (and multiple non-mandatory instruments).[43] The proposing Member States first needs to demonstrate a 'compelling need for a new treaty' to the relevant IMO Committee.[44] The IMO practice indicates that serious matters pertaining to central areas of the IMO's competence will usually be addressed by treaties.

The key treaty regulating ship-source pollution is the International Convention for the prevention of pollution from ships of 1973, as amended in 1978 (hereafter referred to as MARPOL). Although closely linked to UNCLOS, Marpol performs a different function. Its objective is not to address jurisdictional issues, but is instead to specify *how* State jurisdiction should be exercised so as to ensure compliance with safety and anti-pollution regulations.[45] At the same time, obligations under MARPOL and other IMO conventions should be carried out in a manner consistent with UNCLOS.[46]

The IMO may adopt Special Areas under MARPOL Annexes I (oil), II (noxious liquid substances), V (garbage) and VI (SOx emission control areas), where discharges of the respective pollutants are limited or banned.[47] The special areas also extend to parts of the high seas (in the Mediterranean and Antarctica).[48] As

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39 Article 3(b) in the IMO Convention (n 30).

40 The IMO does not have competence to take formally binding decisions for its member States; the power to adopt IMO's instruments and the responsibility to implement and enforce them lies with the member States.

41 Articles 194 and 211.

42 Dorota Lost-Sieminska, 'The International Maritime Organization' in Michael J. Bowman and Dino Kritsiotis,*Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press, 2018).

43 Lost-Sieminska (ibid.). In addition, the IMO updates the major maritime safety conventions, which already existed when the IMO was created, such as SOLAS, OILPOL, Load Lines Convention and COLREG.

44 Dorota Lost-Sieminska, 'Implementation of IMO treaties in domestic legislation: Implementation and enforcement as the key to effectiveness of international treaties' in Justyna Nawrot and Zuzanna Pepłowska-Dąbrowska (eds),*Maritime Safety in Europe: A Comparative Approach* (1st ed., Informa Law from Routledge 2020), 7 <https://doi.org/10.4324/9 781 003 030 775>.

45 IMO (n 38), 8.

46 UNCLOS (n 2) Article 237. In its Article 9, MARPOL also took account of the work on the codification and development of the law of the sea carried out by the United Nations Conference on the Law of the Sea (UNCLOS) at the time of its adoption and it expressly says that it is without prejudice to this work and to "the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction."

47 See also 2013 Guidelines for the Designation of Special Areas under MARPOL, <imo.org>.

48 Jeff Ardron,*Overview of Existing High Seas Spatial Measures and Proposals with Relevance to High Seas Conservation,* as of August 2007, p 22, <ewsebm-01-ardron-en (cbd.int)>.

mentioned earlier, the IMO also approves coastal States' applications under Article 211(6) UNCLOS for the establishment of specially protected sea areas in their EEZs.

MARPOL requires States to give effect to its provisions and related Annexes in order to prevent pollution of the marine environment by the discharge of harmful substances or effluents containing such substances in contravention of the Convention. Like other IMO conventions, MARPOL is aimed principally at the flag State. Implementation of MARPOL standards is primarily the responsibility of the flag State. Flag States' duty to ensure compliance are generally aimed at technical surveys and issuing certificates,[49] and investigating violations. Persons and entities directly involved with the vessel, such as the shipping company, the master and crew, and classification societies, all play a crucial role in ensuring compliance with the Marpol obligations.

The way in which international treaties are implemented in the domestic legal systems varies from State to State. Universal and uniform acceptance and proper implementation by States of the IMO treaties is a necessary condition for the effectiveness of IMO measures.[50] The IMO itself does not have a mandate to examine the quality of national implementation and to take enforcement measures vis-à-vis its Member States.[51]

2.4 International law gaps in the regulation of shipping on the high seas

A persistent issue is the ineffective monitoring and implementation of IMO commitments by flag States, since implementation and compliance on the high seas is the responsibility of individual flag States. Insufficient implementation of the IMO instruments is mentioned as a serious hindrance to the effectiveness of the IMO's work.[52] In addition, there is reportedly very little information about vessel-source pollution and insufficient follow-up of high seas pollution incidents by flag or port States.[53]

Another continuing issue is the liability and compensation for marine environmental and biodiversity damage on the high seas. Notably, existing agreements on civil liability for vessel-source pollution do not apply to damage caused only on the high seas, where not affecting coastal waters (EEZs and territorial sea).[54]

Special areas under MARPOL are not envisaged for all sources of pollution, but only for oil, noxious liquid substances, sewage, garbage, and SOx emissions, and these cover only negligible sections of the high seas. An issue to which we return in the next section is the absence of marine protected areas and similar area-based management tools on the high seas which would be established on a global basis; preferably, through the IMO as the global shipping organization. Protection of particularly vulnerable marine ecosystems at the regional level (e.g., OSPAR[55]) does not ensure an effective protection from international shipping, due to freedom of navigation enjoyed by ships under the law of the sea.

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49 See Regs 4 and 5-8 of Annex I Marpol. See also Articles 94 and 217 of UNCLOS.

50 See, e.g., Lost-Sieminska (n 44).

51 Lost-Sieminska. However, IMO renders implementation support to member States through the Sub-Committee on Implementation of IMO instruments under the Maritime Safety Committee (MSC) and the Marine Environmental Protection Committee (MEPC).

52 See, e.g., Lost-Sieminska (n 44).

53 Robin M Warner, 'Marine biodiversity beyond national jurisdiction' in Rothwell, Elferink, Scott and Stephens (n 33) 763.

54 See generally, Robert C. Beckman, Millicent McCreath, J Ashley Roach, Zhen Sun,*High seas governance: gaps and challenges* (Brill Nijhoff, 2018).

55 OSPAR Commission – Marine Protected Areas <Marine Protected Areas | OSPAR Commission>.

3. The High Seas Treaty: implications for international shipping

3.1 Introduction

As noted earlier, the forthcoming international agreement on the conservation and sustainable use of marine biological diversity beyond national jurisdiction (hereinafter 'The High Seas Treaty' or 'Agreement') seeks 'to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term.'[56] This is to be accomplished 'through effective implementation of the relevant provisions of the [UNCLOS] and further international cooperation and coordination.'[57]

The High Seas Treaty contains 12 Parts: the Preamble and general provisions (Part I), marine genetic resources, including the fair and equitable sharing of benefits (II), measures such as area-based management tools, including marine protected areas (III), environmental impact assessments (IV), capacity-building and the transfer of marine technology (V). The High Seas Treaty also contains provisions on institutional arrangements (Part VI), financial resources and mechanism (Part VII), Implementation and compliance (VIII), Settlement of disputes (IX), a part on non-Parties (X), Good faith and abuse of rights (XI) and Final provisions (XII). Annex I contains indicative criteria for the identification of areas (for the purposes of ABMT provisions) and Annex II lists types of capacity-building and transfer of marine technology.

The High Seas Treaty may admittedly be criticized for leaving out some important issues pertaining to the protection of marine biodiversity and for relying too much on the existing and future cooperation frameworks. It does not generally seek to establish new substantive obligations for States, but rather strengthens and expands the duty of cooperation, while building on UNCLOS and international environmental law.[58] The adopted text articulates important principles and objectives of States' cooperation in the Preamble and general provisions (Part I), as well as throughout the text. Notably, Article 7 says that Parties 'shall be guided by' several principles and approaches: some of those listed in this provision are 'the polluter-pays principle', the principle of the common heritage of humankind as set out in UNCLOS, freedoms of the high seas, the principle of equity and the fair and equitable sharing of benefits, the precautionary principle or precautionary approach ('as appropriate'), and an ecosystem-based approach.[59]

Importantly, the High Seas Treaty spells out the duty to cooperate, including with regard to marine genetic resources, and exercise due regard to the rights and duties of other States. It contains a number of provisions requiring States Parties to ensure that activity under their jurisdiction or control is carried out in conformity with its provisions.[60]

The High Seas Treaty applies to 'areas beyond national jurisdiction', i.e. the High Seas and the Area.[61] According to UNCLOS Article 86, the High Seas are defined by

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56 Cited in n 6, Article 2.

57 Article 2.

58 However, Treaty also includes 'new' obligations for shipping: e.g., provisions on environmental impact assessment (EIA) may have an effect of expanding flag States' obligations with regard to EIAs. During negotiations, the IMO was critical of including such provisions without exceptions for shipping: see, e.g., <Presentation-informationsessionBBNJ-21-06-19.pptx (live.com)>.

59 The analysis of the legal nature and effect of the principles set out in the Treaty and their implications for shipping are outside the scope of this article.

60 The definition of an 'activity under jurisdiction or control' included in earlier versions (Article 1(2: 'an activity over which a State has effective control or exercises jurisdiction') was deleted from the final version adopted on 5 March 2023.

61 Article 1(2) and Article 3.

way of determining the scope of application of Part VII, which governs 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.'[62] The Area is defined as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction' (Article 1(1) UNCLOS). The Area regime set out in Part XI governs all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules (Article 133), while living resources of the seabed and subsoil beyond the limits of national jurisdiction and living resources of the water column are governed by the High Seas regime.[63]

Does the High Seas Treaty apply to shipping? It does not contain lists of activities to which it applies, so, in principle, it encompasses all activities which may affect marine biological diversity of ABNJs.[64] It was proposed during negotiations to exclude activities undertaken or permitted by States to occur within their national jurisdiction, unless they pose significant risks to the ABNJ. It was also proposed to exclude activities listed in Article 87(1) Freedom of the High Seas, which include navigation.[65] In the end, only a 'usual' exception was included in the Treaty (Article 4) which envisages that it "does not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service." This exception is supplemented by the requirement for States to adopt appropriate measures to ensure that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with the Agreement.[66]

The Treaty lays down procedural and institutional provisions which, in this author's view, may bring about important changes in the functioning and development of the international regime of the high seas. Notably, these provisions raise questions as to their relationship with well-established global frameworks, e.g., the IMO. As discussed further, the High Seas Treaty provisions are indeed relevant for the IMO competences and work. This article focuses on the provisions on area-based management tools (ABMTs) and examines the relationship with the competences vested into the IMO to adopt ABMTs for shipping.

3.2 The IMO and the High Seas Treaty

The Flag State of the vessel involved in shipping or other activities in ABNJ is logically a State holding jurisdiction or control over the (shipping) activity within the meaning of the High Seas Treaty.[67] The environmental safety (and other)

62 Article 86 UNCLOS.

63 It should be noted that States disagree on the legal regime governing the living resources of the Area. Developed countries strongly argue that MGRs are governed by the high seas regime, while developing countries consider that they are already included in the Common Heritage of Mankind principle: Vito De Lucia, 'The Question of the Common Heritage of Mankind and the Negotiations towards a Global Treaty on Marine Biodiversity in Areas beyond National Jurisdiction: No End in Sight?' [2020] 16*McGill J. Sust.Dev. L.* 141, 144-145.

64 However, a certain threshold is indicated with regard to the application of some obligations: see, e.g., Article 30 of Part IV (Environmental impact assessments) requires screening (only) when a planned activity may have more than a minor or transitory effect on the marine environment or the effects of the activity are unknown or poorly understood.

65 See proposal by the International Chamber of Shipping, Textual proposals submitted by delegations by 20 February 2020, for consideration at the fourth session of the Intergovernmental conference (A/CONF.232/2020/3) <textual_proposals_compilation_article-by-article_-_15_april_2020.pdf (un.org)>, 34.

66 This mirrors Article 236 UNCLOS.

67 See also Section 2.2 above.

standards applicable to these vessels may be already governed by the international instruments adopted by the IMO.[68]

Obligations under the High Seas Treaty are directly addressed to the States Parties and not the IMO or other international organizations. However, the Treaty contains provisions relevant to the IMO as the 'competent international organization' under UNCLOS. Some of the issues addressed by the Treaty also fall within the IMO's areas of work, notably with regard to ABMTs. Other issues appear to be in a 'grey zone' as they are regulated in UNCLOS and now also in the Treaty, but have only been addressed on a piecemeal basis in the IMO framework: this is the case with Environmental Impact Assessments (EIAs).[69] In any case, the role of the IMO in the international legal and governance framework to be established by the Treaty is crucial.

Generally, the High Seas Treaty is designed as a framework agreement, which is largely dependent on the existing international and sectoral frameworks and bodies for implementation. Starting from its general objective (Article 2), the Treaty emphasizes the need for the 'effective implementation of the relevant provisions of [UNCLOS]' and to ensure coherence with other existing frameworks through international cooperation and coordination.

During negotiations, it was proposed not to apply the High Seas Treaty to activities "subject to the regulation or supervision of specialized agencies of the United Nations or the programs instituted thereby" and "subject to the regulation or supervision by, or under the jurisdiction of, recognised global, regional, sub-regional or sectoral bodies, agreements, treaties or other binding agreements among States."[70] The proposal was not incorporated into the negotiated text, but shows stakeholders' concern with possible conflicts between the framework (to be) established by the Treaty and the existing organizations.

To resolve possible tensions or conflicts between the measures to be adopted under the Treaty and the existing frameworks and bodies, Article 5 contains provisions on the relationship between the Treaty and UNCLOS, relevant legal instruments and frameworks, and relevant global, regional, sub-regional and sectoral bodies. Firstly, Article 5(1) states that "[t]his Agreement shall be interpreted and applied in the context of and in a manner consistent with the [UNCLOS]". It also adds that 'Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the [UNCLOS], including in respect of the [EEZ] and the continental shelf within and beyond 200 nautical miles.' Thus, shipping on the high seas remains generally governed by the provisions of UNCLOS, including provisions on the freedoms of the high seas set out in Article 87 of UNCLOS. However, as explained earlier, Article 87 envisages that the freedom of the high seas is to be exercised 'under the conditions laid down by [UNCLOS] and by other rules of international law'.[71] While the development of new rules to apply to the high seas is not incompatible as such with UNCLOS, it is important to avoid the adoption and application of provisions in a manner incompatible with globally accepted international frameworks, such as the IMO.

To tackle this issue, Article 5(2) envisages that the Treaty 'shall be interpreted and applied in a manner that *does not undermine* relevant legal instruments and

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68 Some conventions seek to include nearly all types of crafts within their scope, regardless of more specific uses, design and mobility features (eg art 2(7) of the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships), while others adopt a more restrictive definition. See also Vaughan Lowe 'Report on the interpretation of the term "ship" in the 1992 Civil Liability Convention (September 2011) written for the IOPC Funds, document IOPC/OCT11/4/4 <https://documentservices.iopcfunds.org/meeting-documents/>.

69 This article excludes analysis of some other IMO-relevant aspects of the High Seas Treaty, such as environmental impact assessments, clearing-house mechanisms, and capacity building and transfer.

70 See n 65 above.

71 UNCLOS (n 2) Article 87(1).

frameworks and relevant global, regional, subregional and sectoral bodies and *that promotes coherence and coordination with* those instruments, frameworks and bodies' (author's italics). This provision contains two important elements. Firstly, it seeks to preclude undermining the existing IMO's instruments.[72]

Secondly, it seeks to promote coherence and coordination with the IMO's instruments. Rather than being a self-standing provision containing substantive rules governing States Parties, Article 4 is, in this author's view, a provision which serves to clarify interpretation approaches of the High Seas Treaty and to prevent conflicts between the measures (to be adopted) under the Agreement and existing rules and principles under UNCLOS and IMO instruments. Thus, it is to be read in conjunction with other provisions of the Treaty, including those governing designation of the area-based management tools discussed further below.

3.3 Area-Based Management Tools and shipping

Part III of the High Seas Treaty is dedicated to area-based management tools (ABMT) for the high seas, including marine protected areas (MPAs). In general, area-based management contributes to implementing an ecosystem-based approach to the oceans by determining and applying feasible conservation and/or management tools in a spatially defined area. Some marine areas may be particularly vulnerable to ship-source pollution,[73] due to their special ecological and biological characteristics: for example, these areas may be habitats to endangered and rare species and may already be subject to pressures from shipping and other economic and recreational activities. Addressing the special needs of such vulnerable and sensitive sea areas both within and outside national jurisdiction is a crucial objective of the ecosystem-based approach to protecting the ocean.

Provisions on ABMT on the high seas are an important contribution by the forthcoming Treaty to the holistic, ecosystem-based approach to protection and use of the ABNJs. The Treaty itself does not establish any measures directly; it invites States Parties to submit proposals on ABMT and establishes decision-making procedures to consider the proposals. Several existing global and regional international legal frameworks already support the ecosystem-based approach by expressly envisaging various types of ABMT,[74] including those covering marine areas.[75] Regional cooperation frameworks (notably, the OSPAR) envisage both MPAs and networks of MPAs as also encompassing parts of the high seas.[76] However, all in all, only a marginal share of the high seas is as of today protected by ABMTs.

Due to the navigational freedoms enjoyed by flag States under the law of the sea, international shipping has always been in a special position compared to other, less mobile, sea-based activities. Regulating or limiting international shipping

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72 See generally Arne Langlet and Alice B.M. Vadrot, 'Not 'undermining' who? Unpacking the emerging BBNJ regime complex' 2023(147)*Marine Policy*, 105372 <https://doi.org/10.1016/j.marpol.2022.105372>.

73 Shipping can produce a number of negative impacts, in form of pollution by substances such as oil, garbage, soot and other atmospheric pollution as well as acoustic pollution (noise), introduction of invasive species with ballast water and bio-fouling, by ship strikes and other wildlife disturbance caused by ships: see n 8.

74 Thus, Convention on Biological Diversity (CBD),Rio de Janeiro, 5 June 1992, in force 29 December 1993, 1760 UNTS 69, Article 2 provides for protected areas as geographically defined areas designated or regulated and managed to achieve specific conservation objectives. International Union for Nature Conservation (IUCN) work to establish ABMTs including MPAs, Important Marine Mammal Areas (IMMAs) and Important Bird and Biodiversity Areas (IBAs).

75 Conference of Parties (COP) of CBD (ibid.) has adopted scientific guidance for ecologically and biologically sensitive sea areas (EBSA), as well as scientific guidance for designing representative networks of MPAs. See also Ingvild Ulrikke Jakobsen,*Marine Protected Areas in International Law: an Arctic Perspective* (Leiden: Brill, 2016), 202 < doi 10.1163/9789004324084_015>.

76 OSPAR Commission – Marine Protected Areas <Marine Protected Areas | OSPAR Commission>.

activities beyond the territorial sea limits, through the use of global or regional ABMTs outside the framework of the IMO (or in the absence of coordination with the IMO), is not realistic. As the competent organisation, the IMO may adopt Special Areas and approve coastal States' applications for PSSAs under UNCLOS.[77]

The IMO's competences with regard to ABMTs may, however, have some limitations. Firstly, the IMO's measures are based on a single-sector approach to those areas of the sea which need special protection from shipping impacts. By comparison, MPAs (and MPA networks) adopted under the auspices of OSPAR and other relevant bodies seek to address the full range of activities to be managed or even prohibited there.[78] Admittedly, despite this narrow sectoral approach, the IMO's contribution to the protection of ecologically sensitive sea areas is generally recognised.[79] However, the highest potential would probably be realised if PSSAs were designated together (combined) with more comprehensive ABMTs, in line with the ecosystem-based approach and other principles and approaches promoted by the High Seas Treaty.

Secondly, Article 211(6) and other provisions of UNCLOS are silent on the possibility of adopting specially protected areas beyond the EEZs. However, in the PSSA Guidelines, the IMO considers that it generally has competence to adopt PSSA on the high seas. It is also generally recognised in the literature that such measures would be within the IMO's mandate.[80]

Thirdly, significant gaps exist in the actually adopted IMO's measures for the high seas. Currently, the IMO has not established Particularly Sensitive Sea Areas (PSSAs) for the High Seas. In this author's view, the High Seas Treaty may encourage the further development of shipping-related ABMTs for the high seas under the auspices of the IMO, by promoting and enabling a more comprehensive approach based on the combination of sectoral and area-based measures. The Treaty also encourages individual States Parties to promote their objectives when participating in the decision-making in the IMO.[81] This may speed up the IMO's work on the designation of the ABMT for the high seas, especially due to the provisions requiring States Parties to the High Seas Treaty to promote the adoption of measures within the IMO to support the implementation of the decisions and recommendations made under the High Seas Treaty.[82] As the implementation responsibility within the designated ABMTs lies with the flag State, the Treaty may contribute to better implementation by flag States.[83]

Although it is obvious that the IMO will retain its crucial role in designating ABMT applicable to international shipping activities, several issues arise with regard to the Treaty's impact on IMO's competences and work. It is unclear to what extent the IMO's function of balancing international navigational rights with other interests (notably, marine environmental and biodiversity protection) will remain

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77 See 2.3 above.

78 Roberts, Chircop and Prior (n 35), 498.

79 In its statement at the second intergovernmental conference for negotiations of the High Seas Treaty, the IMO emphasised that the designation of special areas and PSSAshas not been developed or implemented in isolation. The PSSA process draws heavily on the EBSA process and criteria when identifying areas, and there are also strong links and continuous dialogue with the UNESCO World Heritage Centre Marine Programme. Available at<statements-second-session (un.org)>.

80 Roberts, Chircop and Prior (n 35).

81 E.g., Article 8(2) lays down that 'Parties shall endeavour to promote, as appropriate, the objectives of this Agreement when participating in decision-making under other relevant legal instruments, frameworks, or global, regional, subregional or sectoral bodies'.

82 Article 25(4) of Part III 'Measures such as Area-based Management Tools, including Marine Protected Areas'.

83 Article 25(1) requires Parties to 'ensure that activities under their jurisdiction or control that take place in areas beyond national jurisdiction are conducted consistently with the decisions adopted under this Part.'

unaffected by the Treaty's provisions. International trade and navigation are not among the interests explicitly protected under the ABMT goals set out in the High Seas Treaty.[84]

Furthermore, the High Seas Treaty does not expressly acknowledge the priority of the IMO as the main authority for the designation of ABMT concerning international shipping activities.[85] Proposals regarding ABMTs, including MPAs, are to be submitted by the States Parties, individually or collectively, to the secretariat to be established under the Treaty.[86] Proposals must, among other requirements, contain a description and limits of the area and measures proposed, as well as information on any consultations undertaken with relevant global, regional and sectoral bodies, and information on the already implemented ABMTs. The Scientific and Technical Body[87] reviews the proposals to be adopted by Conference of Parties (COP)[88] and will thus take account of the existing mandates and measures. The IMO (or other bodies) are not given any explicit priority in the submission of the proposals or decision-making. However, provisions on consultations and decision-making with regard to such proposals[89] ensure that the IMO may submit its views on the merits of the proposal before any decision is taken by the COP.

According to Article 22(1), the COP takes decisions on the establishment of the ABMTs, including MPAs, and related measures. It may also take decisions on measures compatible with those adopted by the IMO (or other bodies), acting in cooperation and coordination with it. If the proposed measure is within the competence of the IMO, the COP may recommend to the Parties and the IMO the promotion of the adoption of relevant measures in accordance with their respective mandates.[90] Read in light of Article 4 and 19(2), this means that the COP will seek to avoid encroaching upon the IMO's competences by adopting shipping-related ABMTs for the high seas. Indeed, measures adopted for shipping outside the IMO framework may arguably threaten to undermine the IMO's work.

At the same time, it is debatable to as whether this will be the case, so long as the high seas are not covered by ABMT adopted for shipping under the IMO. Article 19 also does not fully rule out the possibility that proposals on ABMTs applicable to international shipping on the high seas could be established by the COP under Part III of the High Seas Treaty, rather than under auspices of the IMO. All things considered, it would not be effective to open up the way for parallel forums to adopt ABMT for shipping on the high seas. However, the availability of such an option highlights the need for the IMO member States to work more actively towards the establishment of ABMT on the high seas.

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84 Article 17 and indicative criteria listed in Annex I. However, the Preamble of the High Seas Treaty acknowledges generally the importance of balancing the rights, obligations and interests set out in UNCLOS.

85 Articles 19-23.

86 Articles 19 and 50.

87 Articles 20 and 49.

88 Articles 22 and 47.

89 Article 19 and 21.

90 Article 22(1)(c).

4. Conclusions

The discussion in this article shows that the High Seas Treaty will apply to international shipping in the ABNJ. The shipping on the high seas continues to be governed by UNCLOS provisions on the high seas' freedoms and protection of the marine environment. Vessels on the high seas will remain under exclusive jurisdiction of flag States, as regulated by UNCLOS. However, the Treaty will have legal implications for flag States' obligations with regard to their ships, as flag States are those having jurisdiction or control over the activity, i.e. shipping. The Treaty's provisions on EIAs may apply to shipping in the ABNJ (but this has not been analysed in this article).

Further, all States joining the Treaty undertake an obligation to promote its objectives and to implement their obligations with regard to the protection of marine biodiversity of the ABNJ. Indeed, the effectiveness of the Treaty will depend on its effective implementation by flag States. This article shows the crucial role of the IMO as an international organisation for shipping to regulate and improve the high seas' governance. However, shipping cannot be regulated on a purely sectoral basis, i.e. in isolation from other sectors and societal problems and regulatory approaches. The adoption of the High Seas Treaty presents an opportunity for the IMO to contribute to the ocean governance in a fundamentally new way, engaging more actively with other ocean governance frameworks and law-developing bodies. The IMO has significant experience of cooperation with other international organisations with major ocean responsibilities. The IMO may strengthen its position as a pro-active, constructive actor in the ocean governance and support the collective effort of the international community to address concerns caused by depletion of marine biodiversity. This also supports the spirit of UNCLOS, which calls for cooperation between States as a positive duty.

The point at issue for this article is the need to establishing ABMTs applicable to shipping on the high seas, since currently there is a significant gap in IMO's input on ABMTs for the high seas. It is important for the IMO and its member States to strengthen their prospective contribution to ocean governance by moving ahead with high seas' PSSAs and cooperating with other bodies on relevant ABMT for shipping. The High Seas Treaty seeks to enable cooperation and coordination across global and regional bodies and economic sectors.

Scrapping of ships

– recirculation, welfare and environment – and criminal liability

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Content

1. Introduction

According to Norwegian law, it is forbidden to sail or tow a ship from Norway to another country for scrapping – unless official permission is given.

In 2021, the Court of Appeal[1] sentenced a Norwegian shipowner – Mr. A[2] - to six months imprisonment, for having participated in a plan to send a LASH-carrier from Norway for scrapping on a beach in Pakistan without the required permission. The primary party was the owner of the LASH-carrier, a company domiciled in Singapore. This company was given a fine of NOK 7 million – which the company accepted.

This case – popularly called the Harrier-case because that was the name finally given to the LASH-carrier – is the theme of this article, to the extent covered by the Court of Appeal's decision. The facts of the case, as well as those of the pertinent regulations, are somewhat complicated; accordingly some simplifications are made.

1 LG-2021-7308, an appeal to the Supreme Court was not allowed hearing, HR-2022-1147.

2 In the publically accessible report, a number of names are anonymised. In this article the shipowner is named Mr. A and his shipping company Company X.

2. Some general remarks on scrapping and recirculation

When a ship no longer is used for its intended purpose, it is of course beneficial that the materials are taken care of: recirculated. For quite some time scrapping and recirculation have to a great extent been taking place on beaches in Bangladesh, India and Pakistan – with substantial benefits to those countries. It suffices to mention that production of steel from old materials requires only one third of the energy necessary for production from raw materials, and that the scrapping provides work for thousands. However, there is a dark side: working and safety conditions on the beaches may – to put it mildly – be miserable. Furthermore, there are huge pollution problems, e.g. regarding oils and asbestos.

3. The international reaction to welfare and pollution regarding scrapping – some basics[3]

The problems relating to scrapping and more generally of waste and pollution have been discussed internationally over a long period. As regards the scrapping of ships, there are two conventions of particular interest:

(i) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, of 1989 (revised in 2019)
- with Technical Guidelines for Decommissioning of Ships (adopted by IMO, 2003); an d
(ii) the Hong Kong Convention for the safe and environmentally sound recirculation of ships, of 2009.

Of particular importance for Norway are the EU-rules that have been made part of our national law – in our con

(i) Waste Shipment Regulation (EU) No 1013/2006, based on the Basel Convention – often called the cross border regulation; and
(ii) Ship Recycling Regulation (EU) No 1257/2013, based on the Hong Kong Convention.

3 For an extensive overview, see Alla Pozdnakova:*Ship recycling regulation under international and EU law*, SIMPLY 2019 (= MarIus No. 535, 2020) pp. 53-79.

4. The Norwegian legal regime

The relevant Norwegian rules are in the Pollution Act (Act 6/1981). Mr. A was sentenced for breach of Section 79 Subsection 3:

> *"With fines or imprisonment up to 2 years is sentenced he who deliberately or negligently imports or exports waste contrary to the rules on cross border forwarding of waste in regulations based on Sections 31 to 32."*

Pursuant to Section 31 of the Pollution Act, we have Regulations on Waste (Regulation 930/2004), that in Section 13-1 – with the title "rules on cross border forwarding of waste – states in Subsections 1 and 3:

> *"The EØS-agreement Attachment XX No 32c (Regulation (EU) No 1013/2006 ... on shipments of waste is applicable as a [Norwegian] Regulation with amendments and supplements according to Attachment XX, Protocol I to the Agreement and the Agreement in other respects.*
>
> *...*
>
> *For shipments of waste according to Article 37 of (EC) No 1013/2006 to countries that do not follow OECD Decision C (9239) [as amended], Regulation (EU) No 1418/2007 [as amended] applies."*

5. The facts of the case against Mr. A

The facts necessary for understanding the legal issues are as follows.

An old family-owned shipping company in West Norway – Company X – with Mr. A as its central person – bought in 2007 a LASH-carrier, built in 1989. The carrier had a length of 263 meters, a breadth of 37 meters, and the steel weight was 21 000 tonnes. The acquisition was not a success. The vessel was laid up in a fjord in Western Norway from 2007 to February 2017. For the greater part of this period, it was in so-called "lay up class", but nevertheless with substantial yearly costs for its owner. There were, of course, a number of plans for the use of the vessel and solving the related financial problems. These efforts require no mention in the present context, until in 2014-2015 a contact was established with Wirana, a Singapore domiciled company dominant in the scrapping business: "one of the largest cash buyers". The outcome of this was that the vessel was sold in 2015 to a Wirana company: Julia Shipping. However, the vessel was not physically transferred; it remained in the Norwegian fjord with the obligation on the seller to maintain the vessel to the standard required for a sea test.

Eventually an agreement was made, obligating Company X to rebuy the vessel. When this obligation was not fulfilled by Company X, there then followed a period of discussions on possible solutions. Parallel to these discussions, Julia Shipping started preparations for physically taking over the vessel, and in this process Company X and Mr. A gave important assistance. The outcome was that the rebuying obligation was not pursued.

A sea test was satisfactory, and on February 20, 2017, the vessel sailed with a Julia Shipping crew – apparently bound for docking in Dubai. A month earlier, the vessel had been registered in Comoros and given the name Tide Carrier. Two days after departure, the vessel had broken down and was towed into the Norwegian port of Farsund. A number of difficulties arose during the stay in Farsund, but they are outside the scope of this article. It is sufficient to mention that the authorities declared that the vessel was not allowed to leave Norway without permission. Eventually such permission was granted; the vessel was renamed Harrier, towed to Turkey, and scrapped there.

6. The criminal law issues

6.1. Overview

The indictment was essentially based on this: Wirana/Julia Shipping had tried to give the impression that the vessel left Norway for docking and upgrading for commercial activities, while the intention was in fact to have the vessel scrapped in Pakistan. To this deception, Mr. A had contributed in an unacceptable manner, cf. the Penal Code (Act 28/2005) Section 15:[4]

> *"A penal provision also applies to any person who contributes to the violation, unless otherwise provided".*

The decision of the Court of Appeal has three parts:

(i) basic offence: the evidence and legal regime.
(ii) Mr. A's contribution: the evidence legal regime,
(iii) assessment of the punishment.

6.2. The main offence – the evidence

The main offender was Wirana, and as mentioned in the introduction, the company had accepted the imposed fine. Nevertheless, the Court then sought to determine whether the prerequisite existed for a conviction of Mr. A for contribution.[5]

On the question of Wirana's criminal liability, a comprehensive number of facts had been presented. The Court discussed the material in detail way and concluded that when the vessel sailed from Norway with a Julia Shipping crew on board, it had been decided by Wirana that the vessel's destination was "Gadani in Pakistan for scrapping on the beach there". In order to avoid the rules mentioned in no. 4 above, a cover story had been made up by Wirana.

6.3. The main offence – the legal regime

Mr. A presented three objections to the rules on which the prosecutor based his case. The first and second ones were that the vessel was not properly included in the restrictive waste regulations. The third objection was that if the intention of the lawmaker was as the prosecutor argued, the Norwegian rules did not comply with the general requirement for clarity and accessibility.

6.3.1. Was the Harrier "waste" in respect of the rules referred to by the prosecutor?

The Court stated that the Pollution Act Section 79 Subsection 3 is based upon (EU) No 1013/2006, a view which implies that we have an EU conformal waste concept. Consequently, it was necessary to decide whether the vessel was within the waste definition of the EU Regulation. If yes, the next step would be to determine whether it was included in the national rules. The Court concluded that, in view of the Preamble of the EU Regulation No 35 on "sound management of ship dismantling", as well as the reference in Article 2 No. 1 to two Directives, it found "without doubt that the vessel is included" as "waste".

Regarding incorporation, the Court stated that the definition of waste in the Pollution Act Section 27 was amended in 2016 and given a wording similar to the EU definition. Based on general linguistic interpretation of the text, the Court stated that it included ships due to be scrapped.

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4 An unofficial translation found on Lovdata.

5 At the end of the evidentiary discussion, the Court remarked, «It has also been taken into consideration that Wirana has accepted the fine."

The conclusion was that when the attempt was made to export the vessel from Norway, it was "waste", according to the Pollution Act Section 79 Subsection 3, because Wirana wanted to have it scrapped in Pakistan – a country outside the scope of the OECD decision.

6.3.2. Clarity and access

The general requirement for a guilty verdict is that the punishable offence is formulated in a sufficiently clear way and is reasonably accessible. Thus, the Supreme Court has stated that the requirement is that

> *"the relevant provision must be accessible to the public It has also to be so clearly formulated that in most instances there will be no doubt whether an act is a breach of the stipulation, and that it is possible to foresee that punishment may be a consequence of breaching the rule" (HR-2020-955, Section 22).*

In another case the Supreme Court said:

> *"The requirement of clearness implies that the courts when construing and applying punishment stipulations have to ensure that punishment is not decided outside the situations covered by wording" (HR-2020-2019, Section 16).*

The Court of Appeal stated that the starting point is that the possibility of punishment under the Pollution Act Section 79 Subsection 3, cf. Section 27 Subsection 1 must appear clearly to some degree. On this point, there is, in (the Norwegian) Regulations on Waste Section 13-1, reference to the EU Cross Border Regulation. The Court's comment is that the reference

> *"is considered possible to follow for every law seeking person, and quite unproblematic to follow for a business person engaged in a specific and special sector as handling of very big vessels as waste".*

However, the Court considered the EU Cross Border Regulation Sections 35, 36 and 37 to be complex and only accessible with difficulty, but this has to be considered

> *"in light of the fact that the law and the EU Regulation clearly state that export of waste may be prohibited and punishable, and that this is further regulated in the Regulation, that has been included in the Norwegian Regulation. The person engaged in waste handling of big vessels who finds that the legal regime is not easily accessible has a strong reason and ability to ask for legal assistance.*
>
> *If this is done, any person will be informed that it is beyond doubt that these provisions include the vessel as being waste and the planned export."*

The conclusion was that the requirements regarding clearness and accessibility had been met.

6.4. Mr. A's contribution

6.4.1. The factual contribution

The indictment was based upon the physical contribution to reactivation of the vessel of Mr. A and/or his inducement to others to participate in the process. In order to evaluate the facts, it was necessary to open with some introductory remarks on what punishable contribution is. The Court of Appeal quoted from the Supreme Court:

> *"Neither is it required that the acts of the contributor have been necessary for the result. It is sufficient that there is a contributory causal relation … Precisely what is required, may in some instances be doubtful. As in the general*

> *stipulation in the Penal Code of 2005 Section 15, the Penal Code of 1902 Section 162 Subsection 5, a precise lower limit for what can be accepted as an act of contribution is not expressed. In doubt it may be decisive whether the act in question is of such a character and have such dimensions that it is natural to attach penal liability thereto … " (HR.2020-1681 Section 14).*

In deciding whether Mr. A's acts came within the Penal Code Section 15, the Court of Appeal could not agree.

The majority (5 of 7) gave a detailed description of Mr. A's participation in preparing the vessel for the sea voyage and summed up in this way:

> *"The Court of Appeal's majority finds that the acts which it is proven that the defendant has performed and caused others to perform, are in a contributory causal relation to the attempt to export the vessel. They were not a necessary condition for the export of the vessel, but there is a near connection between the extensive support given and the attempt to export the vessel. The contributory acts caused in fact that the vessel was made ready considerably quicker and at a considerably lower price, compared to what would have been the situation if Wirana/Julia Shipping had had to perform all work using its own employees and external suppliers. The contributory acts are therefore at the outset, of such a character, extent and penal worthiness, that it is natural and necessary to apply penal sanction thereto. There is, however, a connection between this consideration and the general limitation on what is punishable [Norwegian: rettsstridsbegrensningen], to which the majority will revert."*

The minority (2 judges) meant that it had not been proven, "beyond reasonable doubt", that the contribution from the Norwegian side in preparing the unlawful export was given by Mr. A personally.

6.4.2. The requirement of "intention"

The Penal Code Section 21 says that the criminal legislation "only applies to intentional offences unless otherwise provided". Accordingly, the majority discussed whether this requirement was satisfied, and the conclusion was that the explanation given by Mr. A was not accepted. The majority concluded that Mr. A must have known that Wirana's intention was to have the vessel scrapped in a country outside the OECD regulation – most probably also with knowledge that such export was not allowed.

6.4.3. The reservation regarding "respectable and daily" acts of contribution

Mr. A also pleaded that his acts of contribution were so "respectable and daily" that they were not a punishable breach of law.

The Court explained that contributory acts often have a "more normal and innocent character" than the acts described in main penal stipulation, implying that such contributory acts are not punishable. The decision depends upon an evaluation of the degree of freedom that the contributor shall be allowed, without trespassing on other freedoms that the relevant punishment stipulation protects. The guideline is whether the act of contribution represents "an unacceptable risk and is qualified blameworthy".

In this case the acts of contribution were – when considered in isolation – ordinary and legal. But here Mr. A and his company had a

> *"long-lasting and close connection to the vessel, good knowledge of the concrete scrapping and the problems connected to such unlawful export of waste …Even though the contribution consists of isolate seen ordinary and lawful acts, they*

are, due to the character and closeness to the main offence, clearly blameworthy and punishable".

6.5. The assessment of the punishment

Until January 1, 2015, a fine was the only sanction available for breach of the Pollution Act Section 79 Subsection 3. However, the lawmaker held that cross border transport of waste was such a serious environmental problem, that imprisonment up to 2 years was introduced as an additional available sanction.

The Court's starting point was that the appropriate punishment for Mr. A's contribution was 9 months imprisonment, but because of extenuating circumstances (i.a., the time elapsed from 2016/2017 to the date of decision) the periodof imprisonment was set at 6 months.

7. Some concluding remarks

From the facts presented in the judgment, it is not difficult for the reader to follow the reasoning that led to Mr. A's imprisonment for his contribution to the unlawful export of the vessel for beaching in Pakistan. Obviously, the people involved were aware of the problems with scrapping there, and if they did not know the exact rules, they – including Mr. A – were clearly blameworthy for not clarifying whether the planned export was lawful.

The aspect that calls for some additional remarks concern the complexity of the rules that may give rise to problems for other people, without the same background to those involved in the *Harrier* case. It is sufficient to recall that the Pollution Act Section 79 refers to Section 31 and 32 of the same Act, and that Section 31 empowers further regulation, which at that time meant Regulation 930/2004. In that Regulation Section 13-1, we have a further reference to a number of EU documents. These EU documents are not easily "digested". The technique now indicated is not in line with the traditional Norwegian way of promulgating rules that are punishable if not followed. However, over recent years, this tradition has been deviated from at an increasing speed – in order to implement EU rules. Such implementation is challenging, but the present writer is of the opinion that "a fair balance" has not so far been struck.