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Content overview

Foreword

We are pleased to publish three selected LLM master theses written by our students during the year of 2023. Two of them concern time charter issues, written by Saoussane Tadrous and Asbjørn Nilsen, and one concerns law of the seas and the Northern Sea Route, written by Artjoms Daskevics. We congratulate the authors on their successful work.

Trond Solvang

Port safety warranties in Charterparties in the context of the Ukrainian-Russian War

Saoussane Tadrous

Content

Preface

This thesis, submitted for the fulfilment of the Master of Laws (LL.M.) in Maritime Law at the Scandinavian Institute of Maritime Law, University of Oslo, meticulously explores the evolving dynamics of port safety warranties within charterparties, against the backdrop of the Ukrainian-Russian conflict. The analysis presented herein, completed in November 2023, has undergone minor orthographic adjustments to ensure clarity in its publication.

At the heart of this dissertation is the aim to clarify the concept of port safety warranty in relation to political risks. The thesis explores its definitions, applications, and implications amidst the ongoing conflict between Ukraine and Russia, under English law. It extends to examine how EU sanctions on Russia could impact the safety of a port, contemplating various scenarios. The understanding of port safety warranty intricately ties to the degree of risk incurred, the specific terms of the charterparty, and the conduct of the owner/master of the ship, highlighting the complex interplay between legal principles and real-world maritime operations. Reflecting the situation as of Autumn 2023, this work also envisages possible future scenarios, underscoring the evolving nature of international conflicts and their impact on maritime operations.

I am deeply grateful to Professor Alla Pozdnakova for her invaluable insights and advice throughout the development of this thesis. Her expertise has significantly contributed to the depth and quality of my research. Special thanks are also due to Professor Trond Solvang for bringing to my attention the doctrine of indemnity, which has enriched my understanding and analysis of the subject matter. Lastly,I appreciate Sara Tesfai for her assistance and support during the LL.M. program, which made the academic journey smoother and more enjoyable.

This work is dedicated to all those who contributed their time, knowledge, and encouragement, and to anyone seeking to navigate the intricate waters of maritime law within the context of international conflicts.

Saoussane Tadrous

1 Introduction

1.1 Introduction to the Ukraine-Russia conflict and its implications for port safety in the maritime trade.

The escalation of the Russo-Ukrainian War, beginning with Russia's invasion of Ukraine on February 24, 2022, has profoundly impacted maritime trade, particularly challenging the legal understanding of safe port warranty in affreightment contracts. Ukraine plays a vital role as a major global supplier of agricultural commodities, such as sunflower oil, barley, corn, and wheat. Its substantial contributions to these crops have a profound impact on the global markets.[1]

The situation in the Black Sea remains highly dynamic, making it challenging to predict future developments. However, one undeniable fact is the compromised safety of ports in Ukraine and Russia. A survey by Interlegal shows that the outbreak of hostilities was not expected. Ports like Berdyansk, Mariupol, Skadovsk, and Kherson were officially shut down due to enemy control after the Ukrainian Ministry of Infrastructure's order on April 29, 2022. As a direct result, for example, no vessels have departed from Kherson since the conflict's start, due to war risks.[2]

A year into the blockade, insurers and P&I clubs scrutinised the situation to determine if the immobilised vessels qualified as losses under insurance terms. Shipowners declared abandonment due to prolonged immobility, invoking the blocking and trapping vessels clause.[3] Following this, a Grain Agreement was signed on July 2, 2022, which set up *sea corridors* for shipping grain out of Ukraine from the ports of Odesa, Chornomorsk, and Pivdenny.[4] The *MV Razoni* was the first ship to navigate under this agreement, departing from Ukraine on August 1, 2022.[5] Between August 2022 and June 2023, the grain agreement facilitated the export of around 30 million tons of Ukrainian grain. Nevertheless, this initiative came to an end on 17 July 2023. Moscow withdrew from the agreement after a year and reinstated the blockade due to claims of their demands being neglected.[6] On 9 August 2023, Ukraine established a temporary *humanitarian corridor* for cargo ships in response. Subsequently, several vessels have left Ukrainian Black Sea's ports via this corridor[7]. The *Joseph Schulte* was the first to leave a Ukrainian port post-agreement.[8] However, traders and farmers associations attribute reduced exports to the blockage of Ukrainian Black Sea ports and Russian attacks on Danube River ports.[9]

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1 Andrew Gray, *Unsafe port claims in the war in Ukraine,* Maritime risk International, published on mars 27, 2023, Llyods Intelligence, Liz Booth Ed. 2000-2023(i-law.com)

2 Arthur Nitsevych, *8 months of war in Ukraine: how the shipping industry is faring,* Maritime risk International, published on November 2, 2023, Llyods Intelligence, Liz Booth Ed. 2000-2023(i-law.com)

3 Ibid.

4 Ibid; this deal involved the collaboration of the United Nations, Turkey, Ukraine, and the Russian Federation

5 Nytsevich (2023)

6 Infographic - *Ukrainian grain exports explained* by Council of the European Union Retrived on November, 20, 2023,https://www.consilium.europa.eu/en/infographics/ukrainian-grain-exports-explained/

7 Tom Balmforth, *Ukraine expects 12 more cargo ships at its Black Sea ports,* Reuters Retrived on November, 20, 2023,https://www.reuters.com/world/europe/twelve-more-vessels-enter-black-sea-corridor-towards-ukrainian-ports-navy-2023-10-04/

8 Nitsevych (2023)

9 Balmforth (2023)

1.2 Safety of the ports in the Black Sea and Sea of Azov

The Joint War Committee added Ukrainian and Russian waters in the Black Sea and Sea of Azov to their list of high-risk areas for war, piracy, terrorism, and related perils on February 15, 2022, due to heightened risks from the conflict. Consequently, shipowners faced additional insurance premiums to sail into this area.[10] On April 4, 2022, Ukraine's inland waters and all Russian territories were in the high-risk zones due to the intensifying invasion.

European countries have leveraged economic sanctions as a strategic response to Russian military actions, choosing not to engage directly in the conflict. Sanctions have become a prevalent tool for nations to impose economic pressure over the last quarter-century. This resulted in significantly restricting trade of Russian goods and with Russian entities. Some players in the shipping industry resort to more inventive methods to evade sanctions, including conducting ship-to-ship transfers.[11]

By October 2023, the NSC (United Kingdom based NATO shipping center) has issued a warning, based on intelligence sources, that Russia might deploy sea mines in the Black Sea targeting civilian ships, possibly laying them near Ukrainian ports and in the war risk area of the Black Sea. Simultaneously, Ukraine's navy reported that 12 cargo vessels are prepared to enter a newly established Black Sea shipping corridor en route to Ukrainian ports, indicating a notable surge in maritime traffic to Ukraine despite Russia's de facto blockade of its seaports.[12]

In light of this context, it becomes clear that the hostilities in the region demonstrate that ports in the Black Sea/Azov Sea area pose risks for various actors in maritime trade. This includes ships visiting these ports, their crew and cargo, as well as risks for charterers in terms of liabilities linked to obligations undertaken under the voyage.

One common obligation usually imposed in Charterparties is the port safety warranty. This is often a promise given by charterers to guarantee the safety of the port they have the right to nominate under the charterparty. We will see that this warranty is in fact just a promise, constrained by the terms of its formulation. Sometimes it may be implied. Its interpretation will actually depend on the other provisions of the charterparty and the geopolitical context at the time the charterer exercises their right to order the shipowner to call at a port. These concepts will be explained in more detail in our study, as their meaning is at the heart of our research.

1.3 Research question and methodology

This thesis aims to provide a clarification of the notion of port safety warranty, and how it should be understood in a context such as the Ukraine-Russia war, including potential implications of European Union (EU) sanctions and port safety warranties. The purpose of the thesis is therefore to answer the question:

How is port safety warranty, in relation to political risks, defined and applied within Charterparties under English Law, and what are its implications in the specific context of the ongoing Ukraine-Russia conflict?

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10 Michael Biltoo, Ingrid Hu, *Ukraine, one year on: the impact on the marine market and a focus on sanctions,* published on Mars 27, 2023, Llyods Intelligence, Liz Booth Ed. 2000-2023(i-law.com)

11 Nigel Lowry, *Shipping struggles under burden of "confusing and disruptive" sanctions,* Maritime risk International, published on October 20, 2022, Llyods Intelligence, Liz Booth Ed. 2000-2023 (i-law.com)

12 Adam Corbett, *NATO warns Black Sea security threat to shipping remains high,* Tradewins. Retrieved, Novembre 19, 2023,https://www.tradewindsnews.com/casualties/nato-warns-black-sea-security-threat-to-shipping-remains-high/2-1-1321308

For the methodology of this study, the primary approach will be the contractual method, focusing on the English law method of contract interpretation. This involves an analysis of contractual provisions related to port safety, considering the context and the intent of the parties involved, as guided by principles and precedents established in English law.

The study focuses on English Law, particularly relevant, due to its common application in international commercial agreements and arbitration, and its influence in the drafting of shipping contracts. In addressing my research questions,I will use a descriptive method to examine criteria from previous case law on characterising port safety under a port safety warranty clause. This also extends to other contractual instruments like war warranty clauses. The analysis will involve juxtaposing factual scenarios against established precedents and the content of agreements in other political/war related conflicts. Building on this perspective, it is crucial to bear in mind that the situation in the Black region is constantly changing. What is applicable today may not hold the same relevance for past or future contexts. Furthermore, each case should be evaluated individually, with careful consideration of the unique circumstances and specific agreements involved. Following this line of thought, the primary focus of this examination will be the current situation as of Autumn 2023. Thus, it has been essential to explore information sourced from international media. This approach ensures that the analysis reflects the contemporary realities of the Black Sea region's conflict, thereby providing a relevant perspective on the issues at hand.

This comprehensive approach includes a doctrinal legal approach, including recent doctrinal articles but also other sources such as international regulations and guidelines from BIMCO or insurers. The thesis considers the implications of EU sanctions on port safety warranties. The influence of EU restrictive measures is significant as they apply to all vessels trading in EU ports, affecting the rights and obligations of the parties involved, especially shipowners.

1.4 Structure of the thesis

This thesis delves into the traditional understanding of port safety warranties, structured across three sections:

Section 2 will analyse the traditional understanding of port safety warranties in the light of the Ukrainian/ Russian conflict. It covers the meaning of safety in the context of political risks and the implications of delays. The section also examines the impact of sanctions risks, the relevance of a ship's specific characteristics, and the source of the safety obligation, whether expressed or implied. Additionally, it discusses the nature of the obligation, differentiating between absolute warranties and due diligence clauses, and the criterias used in caselaw to characterise the danger encompassed within the port safety warranty. Finally, it explores alternatives to port safety warranties.

Section 3 deals with the consequences and implications of an unsafe port**.** This section addresses the repercussions of ordering a vessel to an unsafe port, i.e, the breach of the safety warranty. It delves into the charterers' secondary obligations when port unsafety arises after nomination and the implications of complying with orders to unsafe ports.

Section 4 intends to present our final remarks**.**

2. The traditional understanding of port safety warranties

2.1 Introductory remarks

In this section, as we dissect the concept of port safety warranties under English law, several key legal questions will guide our exploration:

How should the charterers' obligation to order a ship to a safe port be interpreted in light of the precedent set by *The Eastern City* case? (2.1)

In scenarios involving political risks, such as the ongoing conflict between Ukraine and Russia, how is the safety of a port defined (2.2)? Can a port be deemed unsafe due to the risk of sanctions? Does the specific nature or characteristics of a ship influence the determination of a port's safety?

Must the obligation for port safety necessary be expressed, or can it be implied? If implied, what is the extent and impact of its scope? (2.3)

What is the fundamental nature of the port safety obligation? Is it an absolute guarantee or merely a promise that the charterer will exercise due diligence to ensure the port's safety? (2.4)

How is danger, as covered under the warranty of port safety, characterised? (2.5)

Are there alternative legal mechanisms or warranties available that can protect shipowners against being ordered to an unsafe port? (2.6)

2.2 Safe port warranty definition

In our exploration of the safe port warranty, we will first delve into the classique definition of port safety (2.2.1), before entering into details related to political safety considerations (2.2.2), and the relevance of a port's safety for a particular ship (2.2.3).

2.2.1 Meaning of safety

The charterers' obligation is to order the ship to a safe port. It is well established that the definition of safety is found in the leading case known under the name *The Eastern City.*[13] The facts of the case are not especially relevant to our study, as it concerned a physical danger and not a war risk, unlike the scope of our study. However, we will see later in this study that this general definition also applies to our case. It was provided by Sellers L.J. in the following formulation:

> *A port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.* [14]

The main features of a safe port can therefore be more crudely translated as follows.

First, safety is to be assessed for a specific period and a for specific ship.

Second, the ship must able to "safely" reach it, use it and return from it.

Third, if the ship is being exposed to a danger due to some abnormal occurrence: i.e., a danger that is not characteristic of the port or a danger that could be avoided by good navigation and seamanship, the port will be deemed safe.

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13 Leeds Shipping Co. Ltd. V. Société française Bunge , *The Eastern City* [1958] 2 Llyod's Rep. 127, at 131

14 Ibid.

This definition of safety is unanimously agreed upon and will apply in the same way to time charterparties as it does to voyage charterparties[15]. Roskill, L.J, in *The Hermine case* [1979], asserted that it was redundant to refere to a plethora of cases, as the law regarding port/berth safety had been distinctly set out in *The Eastern City.*[16] Furthermore, a number of significant cases concerning safe port warranty have clarified that the definition given in *The Eastern City* has become the starting point for assessing whether a breach of the Charter can be observed or not. We refer, for instance, to *The Evia case* (1982) as well as the more recent case, *The Ocean Victory* (2017).[17] Additionally, in *The Saga Cob* [1992], another significant case involving a guerrilla attack in the Red Sea near the harbor entrance, Lord Justice Parker added that the definition stated by Lord Justice Sellers in The Eastern city has *"been well-settled for at least a quarter of a century."*[18]

Today, it can be asserted without any doubt that the definition highlighted above remains the classic definition of "safe port."[19] Additionally, this definition implies that the safety of the berth is also included within the scope of an express safe port obligation.[20]

2.2.2 Political safety

Most of the cases addressing unsafe ports focus primarily on a port's marine attributes that can result in physical damage to, or loss of, the vessel. This might include unmarked areas in the waterway, malfunctioning navigational aids, or inclement weather,[21] swell and ice or not having sufficient tugs[22] for example. Our study focuses specifically on port safety within the context of the Ukraine/Russia conflict. The risks associated with this conflict pertain to the ongoing war and the dangers faced by vessels operating in the regions of the Black Sea and the Sea of Azov. The physical dangers of a port will not be examined in the scope of this study. However, there is a consensus that the definition of "safe port" encompasses risks broader than just the physical condition of the port or damage to the vessel.[23]

2.2.2.1 Meaning of political safety

It is unanimously agreed that a safe port clause encompasses both physical and "political" unsafety.[24] In an insightful article, Baker and David, attempt to compile a non-exhaustive list of political risks that can affect a port an "*include outright warfare, blockade, civil unrest, politically inspired retaliation against vessels of a specific*

15 Terence Coghlin et al., *Time Charters,* 7th edn, [2014] (Informa), Para 10 seq. and Julian Cooke et al., *Voyage Charters,* 4th ed., [2014], para 5.30 et seq.

16 Unitramp v Garnac Grain Co Inc, *The Hermine* [1979] 1 Lloyd's Rep 212 (CA), at 214 to 215; see details about case below para 2.2.2.2, this study.

17 Kodros Shipping Corporation *v* Empresa Cubana de Fletes *The Evia* 2 [1982] 2 Lloyd's Rep. 307, at p. 310 concerning a ship trapped in Al Basrah due to the break out of the Iran/Irak war; Gard Marine & Energy Ltd v China National Chartering Co Ltd *The Ocean Victory* [2017] 1 Lloyd's Rep. 521 - London Arbitration 14/23, addressing the issue of inadequate space at sea for safely maneuvering a capesize ship under specific weather conditions.

18 K/S Penta Shipping A/S V. Ethiopian Shipping Lines Corporation, *The Saga Cob* [1992] 2 Lloyd's Rep. 545 at 547

19 See in that sens, Coghlin et al. (2014), para 10.3

20 Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc., *The Reborn* [2009] 2 Lloyd's Rep. 639 CA (Civ Div) at [33]

21 Coghlin et al. (2014), at 10.17; Charles GCH Baker and Paul David, *The politically unsafe port* [1986] LMCLQ 112

22 For some examples of dangers due to a physical characteristic of the port, see Tage Berlund v Montoro Shipping Corp Ltd., *The Dagmar,* [1968] 2 Lloyd's Rep. 563 (QB); Palm Shipping Inc v Kuwait Petroleum Corp, *The Sea Queen,* [1988] 1 Lloyd's Rep. 500

23 Coghlin et al. (2014), at 10.17

24 *The Saga Cob* [1992] at 548

flag such as embargo and terrorism." However, it is worth to note that this article was penned in 1986, and other risks may be added to the list. For instance, the risk of a pandemic comes to mind when thinking of the COVID-19 pandemic in 2020.[25] Moreover, the two authors, have also mentioned the situation of an *"outbreak of plague in the area of the port",* which could likewise fit the definition of a political risk affecting a port.[26]

Nevertheless, the conflict that is the focus of our study is clearly a war conflict. It is a consistent jurisprudence that an existing state of war falls within the definition of political safety.[27] Additionally, the safety of the port should extend not just to the vessel itself but also to its cargo[28] and to its crew. If there are potential health or security hazards, then the port might be deemed unsafe.[29] Thus, as a starting point, we can affirm without a doubt that the question of political safety arises when a vessel is set to trade with Russia or Ukraine.

In the current context, vessels are harassed, delayed and arrested in the black sea.[30] This holds specially for those flying the Ukrainian flag and some crew have been arrested and generally concerned for their safety. Is it the responsibility of the Charterers to bear the consequences of the resulting delays? In other words, do delays caused by political reasons render the port unsafe?

2.2.2.2 Can conflict-related delay make a port unsafe?

As per today (November 19, 2023), Russia aims to disturb the sea supplies to Ukraine. Security experts have informed Lloyd's List that there exists a substantial threat to vessels entering the Black Sea, with expected scenarios including harassment, detentions, seizures, and other forms of interference.[31] In 2023, disputes often arose from the detainment or release of small ships at Danube ports like Izmail and Reni. Moreover, a spike in collisions at Danube ports has led to significant maritime traffic congestion.[32] These situations might have caused some serious delays.[33]

The main question is then to determine who bears the liability for such delays resulting from arrests, seizures, and detentions. If such a delay arises, does it render the port unsafe?

To study this question, it is first important to highlight the difference in risk allocation for delay between time charters and voyage charters.

Risk allocation for delay in Time Charters and Voyage Charters

In a time charter, the ship is chartered for a specified period. The charterers must pay hire during the whole period, regardless of delays. The latter have a great freedom in deciding the ports the ship will go to. In other words, the charterers bear the risk of delay. If the ship is delayed, the charterer still has to pay the daily

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25 Bennett and Girvin et al., *Carver on Charterparties,*1st ed., [2017], Sweet & Maxwell, at 4-037

26 Baker and David [1986]

27 Coghlin et al. (2014), para 10.17; Ciampa v. British India S.N . [1915] 2 K.B 774, cited *in* Cooke et al. (2014), para 5.66; Ogden v. Graham (1861) 1 B. & S. 773. (QB); Duncan v Koster, *The Teutonia* (1872) L.R. 4 P.C 171; *The Evaggelos Th* [1971] 2 Llyod's Rep 200; *The Lucille* [1984] 1 Llyod's Rep. 244; *The Evia* 2 [1982]; *The Saga Cob* [1992], Pearl Carriers v. Japan Line, *The chemical Venture* [1993] 1 Llyod's Rep. 508; *The Greek Fighter* [2006] 1 Llyod's Rep. Plus 99

28 For an example, Hall v. Paul (1914) 19 Com. Cas. 384, *The Alhambra* (1881) 6 P.D. 68

29 Rhidian Thomas, *The Safe Port Promise of Charterers from the Perspective of the English Common Law,* [2006], Singapore Academy of Law Journal 597, at 608

30 Richard Meade, *Shipping faces intimidation, harassment and credible threat of attack in Black Sea,* 27 july 2023. Retrieved November 18, 2023,https://lloydslist.com/LL1146051/Shipping-faces-intimidation-harassment-and-credible-threat-of-attack-in-Black-Sea

31 Ibid.

32 Nytsevich (2023)

33 Paul Todd, *Laytime, demurrage and implied safety obligations* [2012] 8 Journal of Business Law 668-682

hire. This means that the safety warranty does not really add anything in terms of risk distribution.[34]

In a voyage charter, the shipowner agrees to transport a specified cargo from one port to another for an agreed freight rate, within a specified time. If the vessel is delayed, the charterer may be entitled to claim a compensation from the shipowner for the delay. It will depend on when the delay occurred as the "demurrage" system[35] might interfere with a claim based on the breach of an independent term. If there is a breach of the safe port obligation, and the charterer have ordered the ship to an unsafe port, and, this results in a delay or other loss, the shipowner may claim damages from the charterer for the losses incurred.

In essence, the risk of delay in a time charterparty is fundamentally different than in a voyage charter, and the safety obligation does not alter the charterer's existing responsibility related to delays. However, when a delay arises due to political risks, a number of questions have arisen.

What is the extent of delay that renders a port unsafe? Does the delay need to have a specific duration to deem the port unsafe, or does it simply need to be a foreseeable delay?

Insights from *The Hermine* Case

In *Ogden v. Graham* [1861],[36] the defendants chartered a vessel to sail from England to a safe port in Chile. The charterer designated Carrisal Bajo as the discharge port and instructed the vessel to proceed there. However, because of a rebellion, the Chilian government had already closed the port at the time of nomination. The Queen's Bench Division asserted that if a vessel risks to be detained or cannot enter a port without being confiscated, the owners may claim damages in respect of the delay suffered by the detention. The Queen's Bench Division found that such a port is not safe.[37] Nevertheless, it remains uncertain where the boundaries of this principle should be defined.[38]

In the 1908, the case of *Knutsford v. Tillmanns* will bring some precisions concerning the extent of the delay that render a port unsafe. The judge used a logic that weighs the duration of delay against the contract period and considered that for a danger to render a port unsafe, it must cause an "*inordinate delay."*[39] The meaning of what constitutes an *"inordinate delay"* has been clarified in subsequent case *"The Hermine."*[40] In this case, the delay began before the laytime was triggered[41]. The main issue revolved around the definition of a *"safe port"* in the context of vessels suffering a delay, when accessing or egressing from a port. The facts were as follows. The vessel *"Hermine"* was chartered to load a cargo at the port of Destrehan, located on the Mississippi River, some 140 miles from the open sea. After the cargo had been loaded, the vessel faced a delay in her voyage due to siltation in the Mississippi River. This delay, which lasted several weeks, prevented the ship from reaching the open sea. The owners argued that the port of Destrehan was "unsafe", as the vessel was unable to proceed to sea after loading its cargo. The warranty of safety, an express term in the charterparty, was considered not just for the port itself, but also for the access to and egress from it.

The Court of Appeal's decision provided clarity on the concept of *"safety"* in the context of vessels suffering a delay when accessing or egressing from a port. The

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34 Ibid.

35 See. below under para 3.1

36 Ogden V Graham (1861)

37 Ibid.

38 Cooke et al. (2014), para 5.66

39 Knutsford v. Tillmanns [1908] A. C. 406 (H.L.), cited in Coghlin et al. (2014), at 10.14

40 *The Hermine* [1979]

41 For a deeper analyse, see Paul Todd, [2012]

court held that a port is not deemed unsafe merely because a vessel is delayed in leaving it, even if the delay is of several weeks. To address the main issue here, the Court of Appeal made a ruling in *The Hermine* case, clarifying that for a delay to render a port unsafe, it must be significant enough to frustrate the charterparty. A *"commercially unreasonable"* delay is also not sufficient.

Frustration in English law is rather a complex notion that will not be the subject of our study. Additionally, Todd explains that it is not clear whether the frustrating delay test[42] is the one that should be adopted to allow the shipowner to terminate the charterparty. However, put simply, the courts will assess the duration of the contract and a delay will be deemed "frustrating" when it is so extensive that it substantially undermines what the parties expected to receive from the contract.

Ultimately, one thing is clear; based on *The Hermine* ruling, minor delays have to be excluded, and only exceptional delays would render the port unsafe. Although it was determined that the delay was not due to an abnormal occurrence, Geoffrey Lane L.J. stated, *"if the hazard is merely temporary, it will neither constitute a lack of safety nor render the port unsafe."*[43] This last point will be developed at the end of this section after considering other aspects of the extent of the delay rendering a port unsafe.

Prospective delay

One of the conditions for establishing unsafety, involves assessing the port's safety at the time of its nomination; it is the concept of “propective safety”.[44] Todd points out that following *The Hermine* case, *The Evia 2* set a precedent that the determination of safety should be conducted prospectively at the point of nomination.[45] He uses *The count* case to illustrate the implications of an unsafe port where the only consequence is delay. In this case, the delay occurred after discharge, outside of laytime.[46] The port was considered unsafe due to the delay caused by another vessel that grounded as a result of the port's permanent physical characteristics. The shipowner was able to successfully claim damages for the losses incurred due to this delay. Contrary to *The Hermine*, the port was deemed unsafe, which allowed for a claim for damages resulting from the breach of the safety obligation. However, in *The Evia,* the decision did not differentiate between temporary and frustrating delays. Thus, it must be believed that if a port is unsafe and the sole consequence is delay, the shipowner could potentially claim for the entirety of the loss caused by the delay. As to whether the delay must be frustrating or not to deem the port unsafe, Todd concluded that, the finding in The Hermine [only serious delay could be taken into acoount] aligns with *The Eastern City* decision, as the obstruction encountred should not be a temporary one.[47] The concept of a temporary obstacle, in our view, differs from the duration of the delay but rather depends on the probability of the risk associated with the delay. This concept will be further examined later in our study.[48] In our opinion, the question, is more related to the gravity of the risk required.[49]

On the other hand, regarding delays triggered by another vessel, Todd notes that the judge added a condition that the danger must exist not just for the ship that caused the delay, but also for the vessel that suffered from it. He argues that this

42 Ibid.

43 *The Hermine* [1979] at 220; Paul Todd [2012]

44 See below, under section 2.5.1

45 Paul Todd [2012]

46 See below, under section 3.1 regarding liability of the charterers depending on when unsafety of the port arises.

47 Paul Todd, [2012]

48 See below, section 2.5

49 See below, at the end of this section.

distinction seems superficial and suggests a more meaningful approach would be to consider the extent of the delay, similar to that in *The Hermine* case. According to him, the court would be better to *assess* "*if there is a prospective risk of a serious delay (the test in The Hermine being of course frustrating delay), and such a delay occurs, that amounts to a breach, but less serious delays do not, on their own, trigger breach of a safety obligation."* Teare J. confirmed in the *The Vine* case that the application of the safe port warranty also extends to delays triggered in relation to another vessel.[50]

From our standpoint, this concept becomes even more plausible when the risk is politically driven, as it encompasses a broader maritime region and impacts a greater number of vessels. For example, we can consider the risk of mine explosions or the potential of being hit by a missile. In the context of the Ukrainian/Russian conflict, let us envision a scenario where, upon departing from a port, a mine detonates near another vessel, causing the delayed ship to wait for clearance of the area before it can continue its voyage. Although the physical damage is suffured by another vessel, the delay incurred is directly caused by the political risks associated with the region. Therefore, considering delays triggered by another vessel as part of the safe port warranty appears logical. Based on *The Evia,* the risk of delay must exist prospectively. Based on *The Hermine,* the delay should also be frustrating in nature, meaning that it must be prospectively frustrating. To classify a frustrating delay as *"prospective,"* it must have been reasonably foreseeable at the time the ship was nominated[51]. Realistically, the detonation of a mine affecting another vessel, depending on the duration and nature of the charterparties, is unlikely to lead to a frustrating delay, in our view. In such case, it will not qualify for a prospectively frustrating delay. However, the pertinent question remains: is the appropriate test indeed one of a frustrating delay? As noted earlier, any delay caused is directly linked to the political risks associated with the region. The real question, therefore, is whether the definition of a safe port, as established in caselaw, requires a delay of significant severity. Indeed, the vessel, crew, or cargo must be exposed to a *"danger,"* as established in *The Eastern City* [1958]. Therefore, we believe that the test should be whether a delay is so significant that it poses a danger to the crew, cargo, or vessel itself. In conclusion, for a delay to be compensated due to a breach of port safety, it must be of a certain severity relative to the contract period, as established in *Knutsford v. Tillmann* [1908], and also in relation to the nature of the cargo being transported.

Finally, to determine if there is a risk of delay that could prospectively render a port unsafe, it is crucial to consider the duration of the delay. Additionally, it is essential for this risk to be linked to the characteristics of the port and specifically applicable to the vessel experiencing the delay.[52] For instance, if a shipowner dispatches a vessel to the Black Sea without any connection to Ukraine -be it through crew, flag, or trading intentions with Ukrainian ports- the risk of delay triggered by an arrest of the vessel by the Russian forces may seem remote and unforeseeable. Conversely, the risk of a mine detonation affecting a vessel and subsequently causing a delay to another vessel dispatched to the Black Sea may be considered prospectively plausible.

On the other hand, delays can also result from EU sanctions against Russia. Additionally, these sanctions may lead to additional consequences. Does the risk of exposure to sanctions render the port unsafe?

2.2.2.3 Can a port be unsafe because of sanctions risks?

Sanctions commonly involve trade limitations on specified goods and services and restrictions on interactions with certain Russian individuals and corporations. Key

50 *The Vine* [2011] 1 Lloyd's Rep. 301 at 85

51 See below 2.5.1

52 Ibid.

financial institutions in Russia have also been targeted, and the country's access to the SWIFT international payment system has been significantly curtailed, disrupting Russia's financial transaction capabilities.[53] Further restrictions have been introduced to undermine the Russian economy, specifically targeting the energy sector and goods that could bolster military and technological development. The EU banned the purchase, import, or transfer of Russian seaborne crude oil and specific petroleum products. Starting on December 5, 2022, the EU also implemented a price cap on oil transported by sea from Russia to third countries, aiming to limit the profits that Russia can earn from its oil exports[54]. Indeed, sanctions can prohibit certain vessels, those with Russian flags or those that changed their registration after February 24, 2022, potentially preventing these ships from reaching their destination. In more severe cases, the vessel may be confiscated under Council Regulation 269/2014[55], facing the risk of detention or asset freezing. These risks may make a port unsafe for certain vessels or cargo operations. However, the determination of whether a port is unsafe due to sanctions will depend on the terms agreed in the charterparty.

The fundamental principle is that the port must be safe for the vessel to use it, load or discharge her cargo.[56] It is also presented that if a vessel's call at a port could result in it being blacklisted, detained, or impounded at a subsequent port, then that port should be categorised as unsafe. Eventhough, uncertainty remains regarding the limits of this principle, it is suggested that the mere threat to the vessel owner's proprietary interest may be sufficient to deem the port unsafe.[57] In our context, the primary focus of sanctions is on Russian entities or unlawful cargoes destined for Russia or loaded from Russia. Logically, we assume that if the vessel is clearly owned or partially owned by a Russian entity, the charterers will avoid sending it to an EU port. However, it might be that the charterers wishes to circumvent the sanctions in some cases. The may hide the real nature of a cargo, or proceed with ship-to-ship operations, loading for example, Russian crude oil, and then call at an EU port afterward.[58]

The Greek Fighter [2006] case can serve as an illustration, where it was held that charterers have an absolute warranty to load or discharge lawfull goods at the nominated ports.[59] In this case, the coastguard enforced UN sanctions against Iraq and detained the vessel due to a suspected unlawful cargo loaded on board. The detention was caused by a justified suspicion that the cargo being transferred was of Iraqi origin. Indeed, the cargo had come from a vessel suspected of carrying contraband. Therefore, this amounted to a breach by the charterers of the clause prescribing to only load lawful merchandise. However, if the vessel detention was arbitrary and could not be anticipated, the proviso would not apply.[60] Additionally, the judge found an express safe port warranty in the Charterparty. He held that

53 On this topic, Biltoo, Hu, (2023)

54 Council Regulation (EU) 2022/1904 of 6 October 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (2022) *OJ L 259 I/3.*

55 Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (2014) *OJ L 78.*

56 Reardon Smith Line Ltd. V. Australian Wheat Board, *The Houston city* [1954] A.C, 2 Lloyd's Rep 148; Cooke et al. (2014), para 5.80

57 In that sens, Cooke et al. (2014), para 5.66

58 See COUNCIL REGULATION (EU) 2022/1904, note 54, at Art. 14 ; The EU has implemented further restrictions on vessels suspected of circumventing the prohibitions and engaging in ship-to-ship transfers of Russian crude oil, the vessels suspected of engaging in such operations are denied access to EU ports; see the EU's 11th package of sanctions against Russia- Official Journal of the European Union (2023) OJ L 159I.

59 *The Greek Fighter* [2006 *], per* Colman, J., at [283]; Coghlin et al. (2014), para 9.1

60 Coghlin et al. (2014), at 37.110

the risk of unjustified confiscation faced by a vessel could amount to an unsafe port. This was compounded by the absence of an effective political and legal system to prevent such actions or provide remedies for unlawful seizure. Nonetheless, the fact of the case did not allow for a breach of safe port obligation as the port was not prospectively unsafe at the time of nomination.[61] *A contrario,* it appears that if a vessel encounters an unjustified detention or seizure in the Black Sea, this could constitute an unsafe port situation. We can think of the intimidations and detentions currently carried out by Russian authorities on vessels flying the Ukrainian flag or with Ukrainian crews, or simply heading towards Ukraine.

Similar to the situation with *The Greek Fighter,* in a scenario where charterers load crude oil from Russia or prohibited cutting-edge technology products, for example, they would be responsible for the repercussions arising from sanctions due to the breach of the warranty to load a lawful cargo (even if not explicitly stated in the agreement). However, would this render the port unsafe? It seems likely, in the case where the vessel is predictably at risk of being detained and perhaps even blacklisted.

2.2.3 Safe for a particular ship

In *The Eastern City,* the safety of the specific port is to be assessed for a specific ship at a specific time,[62] the particularity of the ship is usually relevant for physical damages, each port possesses distinct attributes related to the physical condition of its structures (water depth for example). For that reason, a particular port may be entirely safe for one ship and presents a dangerous risk to another,[63] depending of the size of the vessel, if it is laden or in ballast for example[64]. In the context our study, unless to consider some war ships more equipped against war risks[65], this condition is not particularly relevant our research. Nonetheless, between February 2022 and April 2023, approximately 30 ships sustained severe damage as a result of the war, and one-third of these ships was registered under the Ukrainian flag.[66] It is also reported that ships with Ukrainian crews are more susceptible to attacks or arrests.[67] Thus, to some extent, these characteristics may come into play when assessing the risk of a ship venturing into the Black Sea, although they are not purely physical attributes per se.

2.3 The source of the obligation

The port safety warranty within charterparties can take two forms: expressed obligations, explicitly outlined in the contract (2.3.1), or implied obligations (2.3.2), which courts interpret in the absence of explicit terms.

2.3.1 Expressed

Port safety warranty is typically explicitly addressed in the charterparty to counterbalance the charterer's right to nominate ports. In Thor Falkanger's work, clause 3 from Intertankvoy 76 is cited as an example of redundancy in charterparties:

> *Charters shall exercise due diligence to ascertain that any places to which they order the vessel are safe for the vessel and that it will lie there always afloat.*

61 Ibid.

62 *The Eastern City* [1958] at 131

63 Cooke et al. (2014), at 10.20

64 For more details, see Cooke et al. (2014),. at 5.71

65 See below 2.5.4 *Dangers avoidable by good navigation and seamanship*

66 Nytsevich (2023)

67 Meade [2023]

> *Charterer shall, however, not be deemed to warrant the safety of any place and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid.* [68]

When the port is not nominated by the charterer, but instead, it has been previously specified in the charterparty, the court will still give effect to an express safe warranty clause. This warranty may as well be extended to berths within the port by implication[69]. The express warranty might not apply if another provision has already addressed the occurrence of an unsafe port. This is often the case with war risk clauses that comprehensively outline the allocation of risks.[70]

It is common to impose on charterers the obligation to exercise due diligence in the nomination of a port or berth and to allow them to free themselves from this responsibility when the damages incurred are not related to their failure to exercise *"reasonable care"*. A detailed discussion will be explained below regarding the nature of the obligation undertaking by the charterers under a safe port warranty.[71]

2.3.2 Implied

In the context of implied terms, Todd references Lord Diplock's perspective in *The Johanna,* highlighting the intricate nature of modern charterparties. Lord Diplock observes that these agreements, despite their complexity, do not explicitly outline the allocation of responsibilities between charterers and shipowners for the successful execution of the venture. Instead, they implicitly rely on established commercial practices, which have gained legal recognition through court decisions.[72]

Courts traditionally imply terms when it *"goes without saying"* or when it is *"necessary to give business efficacy of the contract"*.[73] Todd has observed that while courts may occasionally imply a warranty of safe port in charterparties, such agreements are typically crafted by experts, and therefore the implication of such a warranty is only legitimate in exceptional circumstances.[74]

The issue of port safety linked to contracts of affreightment is dealt with differently depending on the agreement signed between owners and charterers. One of the particularities of a voyage charter is that the owners undertake to carry a cargo from a specific loading port/berth to another designated discharging port/berth. Time charters and some voyage charters will give the right to the charterer to nominate a port from a wide range of ports agreed upon in the agreement.[75] Hence, a charterer may select a port/berth that exposes the shipowner to a risk unforeseen at the time the agreement and that he had not consented to assume. The right given to the charterer to nominate a port of loading is therefore balanced by the fact that the charterer will assume the risk associated with damage in connection with its call at a specific port. After all, the charterer who nominates the port is expected to have conducted some investigations and assessed the risk before making a decision on the chosen location. If the charterer fails in this

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68 Thor Falkanger, Lasse Brautaset, and Hans Jacob Bull. Scandinavian Maritime Law - The Norwegian Perspective. 4th ed. Universitetsforlaget, 2017 at 464

69 See Baughen, Simon, Shipping Law, 8th Edition 2023, Routledge, at 221

70 The Evia 2 [1982]

71 See below 2.4

72 E.L. Oldendorff & Co GMBH v Tradax Export SA, *The Johanna Oldendorff* [1974] A.C. 479 HL , *The Johanna Oldendorff* [1974] A.C. 479 at 554, cited in Paul Todd, [2012]

73 We will not enter into details but instead, for a detailed explanation regarding frustration doctrine, see Poole's Textbook on Contract Law, 15th Ed. 2021, at 12.3

74 Paul Todd, [2012]

75 For a detailed presentation of these contracts, Thor Falkanger, [2017], at 462 et seq. for voyage charters; 500 et seq. for time charters.

duty, it is generally accepted that they assume the risk[76] unless it could have been avoided through the use of good navigation/seaman practices[77]. In England, the charterer is presumed responsible for the safety of the port they themselves have nominated unless there is a contrary clause.[78]

An interesting decision is the case of Vardinoyannis v The Egyptian General Petroleum Corporation, known as *The Evaggelos Th*[79]. The fact occurred in the context of the Arab-Israeli conflict. In this case, a ship was chartered to trade in a war zone, no express safe port warranty was included in the agreement, and this obligation was considered implied. The vessel was headed to Suez during a ceasefire in the conflict. However, after her arrival, hostilities resumed, resulting in significant damage to the vessel, ultimately leading to a constructive total loss. The court implied a condition that the nominated discharge port should remain safe throughout the vessel's stay. Furthermore, a port is considered unsafe if the ship faces risks when departing from it. Therefore, the charterers will still be liable if the vessel faces risks when departing from the port.[80]

However, courts are generally hesitant to imply terms in voyage charterparties[81]. One reason may be that a voyage charterer usually has fewer options to nominate a port compared to those available in a time charter. It may also be that, what was warranted in the charter was the safety of the berth, but not of the port. In such a case, it was determined that where all the berths are affected by the same unsafety, the charterers will not be in breach. In *The AJP Priti*[82], there was no automatic implication of a port safety warranty. It was argued that if the parties did not specify the warranty specially for the port in the charter, it might have been a deliberate omission[83]. Thus, the risk should lie where it falls.[84] In fact, the parties had expressly included a clause for safety of the berth but not for the port. Additionally, the state of war was known at the time of contract formation, and all the berths named in the charterparty were subject to hostilities. It was held that, in situations where either every berth or the entire port is anticipated to be unsafe, the owners should not have accepted to call at this place. However, in *The Greek Fighter* case, J. Colman, in an *obiter dictum*, rejected the notion that, by analogy, owners could not claim compensation for political unsafety in breach of an express safe port commitment if the unsafety was a common condition across all ports in a country.[85] The decision is justified by the fact that in *The Greek Fighter,* only one location was named, and the unsafety of the other ports was therefore not relevant.

In the context of the Ukrainian/Russian conflict, much will depend on when the charterparty entered into the agreement and the terms agreed on. Bearing the aforementioned points in mind, today, the state of war is established, and it will be difficult for a shipowner to argue that a port safety warranty is implied in the conclusion of a voyage charterparty. This is especially true if the charterparty only mentions specific safe berths to load or discharge at in the Black Sea. If the whole port is deemed unsafe, which is likely to be knowing the current situation, the owners will not be able to imply a port safety obligation relying on an express safe

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76 Thor Falkanger, 2017, at 463

77 Ibid.

78 Ibid.

79 *The Evaggelos Th.* (1971)

80 Gray (2023)

81 Ibid.

82 Atkins International HA v Islamic Republic of Iran Shipping Lines, *The AJP Priti,* (1987) 2 Lloyd's Rep 37

83 Ibid.

84 Attorney General of Belize v Belize Telecom Ltd, *Belize* [2009] 1 W.L.R. 1988 PC, at [17] (Lord Hoffmann)

85 *The Greek Fighter* [2006] at [320]- [323]

berth warranty. Nonetheless, if the charter includes an express safe port warranty, the owners might be able to rely upon it.

In a time charterparty, with the state of war being clear and current, it can be argued that the owners could have refused this trade and excluded Russia/Ukraine from the areas to be served, or, at the very least, allocated the responsibility for any potential consequences on the charterers. The whole Black Sea is affected by dangers such as mines or danger to bit hit by a missile. However, if we consider the precedent set in *The Evaggelos Th,* which also involved a vessel trading in a war zone under a time charter party, the obligation of safety will be implied. In such a scenario, the charterers would be liable if the losses incurred are a result of compliance with the charterers' orders.

Adittionally, courts will not imply a safe port/berth warranty when it is not compatible with the contract's construction. For example, consider the case of *Reborn,* where the parties had struck the world “safety” from the Gencon Voyage Party upon which their agreement was based, and no express safety obligation was present. The judges then decided that the risk should lie where it falls.[86]

To conclude, it appears that case law suggests the court's reluctance to employ such implications in voyage charterparties. It should also be noted that it was established that the words *“Always lie afloat”* refers to the safety of the vessel when in port. However, in the case of *The Evaggelos,* it was established that the words *"Always lie afloat"* are exclusively concerned with the marine characteristics of a port, indicating it refers to maritime dangers but excludes war risks. Consequently, a charterparty that includes a clause with this wording would not safeguard against war risks for a vessel trading in the Black Sea.[87]

2.4 The content of the obligation

The nature of the obligation- Safe port clauses: warranty or due diligence
The central issue at hand is determining the nature of the obligation under a safe port/berth clause in a charterparty agreement. Specifically, the question is whether this clause imposes an absolute warranty[88] on the charterer, i.e, for any damage incurred by the vessel while it is in the nominated port (2.4.1), or whether the charterer's responsibility is limited to exercising due diligence (2.4.2). This inquiry involves examining the legal implications of such a clause, considering whether the charterer is accountable for all risks associated with the port's safety, or if their obligation is confined to taking reasonable care in the selection and nomination of the port.

2.4.1 Absolute obligation

The commitment to designate a safe port is often referred to as the "primary obligation" and the *“charterers warranty is of safety not reasonable safety.”* This distinction implies an absolute obligation, whether it is implied or explicitly stated in the contract. *The Ocean Victory* [2014] notably diverged from Lord Denning's perspective of “reasonably safe,” as expressed in the *Evia 2*.[89] It clarified that charterers would be in breach of the warranty even if they were unaware of the unsafety of the port and despite having exercised reasonable care.

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86 *The Reborn* [2009] at [18], quoting Sir Thomas Bingham M.R. in Philips Electronique Grand Public SA v British Sky Broadcasting Ltd [1995] E.M.L.R. 472 CA (Civ Div), cited in Paul Todd, [2012] at 681

87 *The Evaggelos Th* [1971]

88 The term is defined in the introduction as being a mere promise and not in the mean of a warranty in inusrance terms.

89 *The Evia* 2 [1982] ; Gard Marine & Energy Ltd v China National Chartering Co Ltd, *The Ocean Victory* [2014] 1 Lyod’s Rep. 59, at 100-101

Furthermore, in The *Greek Fighter* [2006], J. Colman, in an obiter comment, proposed a test for determining the safety of a port. He suggested assessing whether *"an objective observer could be expected to perceive the risk."*[90] However, it is argued that this view does not accurately represent the law and should not be followed.[91]

2.4.2 Due diligence clauses

If there is an express clause in a charterparty agreement that is specifically prescribing "due diligence," then a breach occurs only if the charterer fails to employ reasonable care to ensure the port is safe.[92] In *The Evia 2 [*1982], the vessel was ordered by the charterer to Basrah, a safe port at the time of the agreement. However, after the vessel reached the port and discharged its cargo, it became unable to leave due to the outbreak of *"large scale hostilities"* between Iraq and Iran. The safe port clause in this instance was different, stating: *"Vessel to be employed… only between good and safe ports or places where she can lie always afloat."* This implies a higher obligation than what was found in the *Saga Cob,*[93] where the requirement was only a due diligence to ensure that the vessel is employed between safe ports, highlighting the importance of specific wording in these agreements.

In Saga Cob, "due diligence" is defined as "reasonable care."[94] Furthermore, when evaluating political danger, it is crucial to note that what needs to be assessed is subjective. The judge emphasises that the required level of due diligence is distinct from that in the context of physical danger. The test applied is as follows: "*if a reasonably careful charterer, based on the available facts, would have concluded that the port was prospectively unsafe."*[95] The test, therefore, is to determine whether the charterer has exercised due diligence in ascertaining whether the port is prospectively safe or not. A discussion on this last point will be elaborated below.

2.5 The characterisation of a port's danger

The issue of prospective safety is a central concern when characterising the hazards associated with a port (2.5.1). This concept was introduced by the case of *The Evia* 2 in July 1982[96]. Understanding this notion can be challenging, and specific criterias to consider have been established through case law (2.5.2). Moreover, a distinction must be made between the inherent dangers of a port and abnormal events, which, in themselves, do not qualify a port as unsafe (2.5.3). Finally, danger avoidable by good navigation and seamanship do not render a port unsafe (2.5.4).

2.5.1 Prospective safety: the time of assessment

The leading case is *The Evia 2*. The term *"prospective"* safety was first introduced in this case. The port must be safe at the time of nomination by the charterers. Lord Roskill stated that:

The charterer's contractual promise must,I think, relate to the characteristics of the port or place in question and in my view means that when the order is given that port or place is prospectively safe for the ship to get to, stay at, so far as necessary, and in due course, leave. [97]

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90 Coghlin et al. [2014]., at 10.53

91 Ibid.

92 This concept is illustrated in *The Greek Fighter* [2006]; see Coghlin et al [2014] at. 10.55

93 *The Saga Cob* [1992] at 547

94 *The Evia* 2 [1982] at 757

95 *The Saga Cob* [1992] at 551

96 *The Evia* 2 [1982]

97 Ibid.

It is not necessary for the port to be safe at the time of the order. If it is foreseeable that obstacles would be eliminated, then the port should be considered prospectively safe. In essence, it was held that if it is reasonably foreseeable that the conditions of unsafety will be resolved or no longer present by the time the chartered ship is required to arrive at, remain in, and depart from the port, then the port is deemed prospectively safe at the time of its nomination.[98]

In *The Saga Cob* [1992], a case that will be studied in detail below, the court addressed the issue of whether a specific source of danger could legitimately be considered a characteristic of the port and, consequently, if this danger made the port prospectively unsafe. The test set forth by the court was:

> *"It is accepted that is unsafe unless shown absolutely safe. It will not, in circumstances such as the present, be regarded as unsafe unless "the political" risk is sufficient to a reasonable shipowner or master to decline to send or sail there."* [99]

Several criterias were proposed tin this case to prospectively determine if a port is safe.

2.5.2 The criterias to be taken in accoount when assessing the prospective safety of the port

In *The Saga Cob*, the concept of a port being prospectively safe was examined, particularly in the context of whether Massawa port was safe when the order to proceed there was issued on August 26th.

As of August 26, 1988, hostilities had been ongoing for many years between the Ethiopian government and forces from the Eritrean government. While there were a few attacks inland in March 1988, only one notable attack had occurred at Massawa port in 1986.[100]

Sporadic attacks were made in the town of Massawa from April to august 1988.[101] One attack was registered in April 1988 on oil refinery. In May 31, 1988, a convoy system is established for certain vessels departing or heading towards Assab to counter small boats operating for EPLF forces and hiding in the coastline (the same boats used in the attack on the oil refinery). On this day, the vessel *Omo Wonz* was attacked by a guerrilla force, 65 nautical miles from Massawa. Immediately after this attack, *Saga Cob* was ordered to proceed in convoy. However, by June 14, the escort was considered unnecessary (according to the Minister of Transport), and the Ethiopian navy would provide an escort if the situation changes. Vessels were instructed to maintain a minimum distance of five miles from the coast while proceeding between Assab and Massawa. Escorts were provided sporadically to *Saga Cob*.

In May 1988, government declared a state of emergency establishing prohibited areas. Notably, Massawa was not listed among these prohibited areas. Reflecting on this, L.J Parker inferred that Massawa was not unsafe at that time. Therefore, it appears that the instructions from the concerned government are also considered in assessing a port's safety. Nonetheless, it is highlighted at [550] that the responsibility for taking adequate precautions, once a risk is identified, rests with the charterers. The charterers bear the duty of ensuring the safety of the vessel entering a port.

Additionally, Parker L.J. stated at [549]: *"There are in essence only a very few incidents from which it could be concluded that on Aug. 26, the port was prospectively*

98 David Chong Gek Sian, "Revisiting the safe port" (1992) Singapore Journal of Legal Studies 79, at 82; Baker and David [1986]

99 *The Saga Cob* [1992] at 549

100 Ibid.

101 Ibid.

unsafe". The frequency of incidents is thus also an important factor to consider when assessing the safety of a port.

Moreover, it was noted that from May 31 to August 26, 1988, there were no other attacks or incidents, and similarly, none occurred after August 26 (when the order to call at the port was given) until the attack on September 7. Additionally, there were no further attacks until January/February 1990. The judge outlined that it was not until January 1990 that war risk underwriters demanded additional premiums for vessels traveling along the coast. Thus, the event following the attack and the requirement of additional premiums are also regarded as a relevant factor in assessing the safety of a port.

Additionnaly, an old case of 1916 appears to take into account the degree of risk in assessing if the port is prospectively safe or not at the time of the nomination.[102] The German Government's announced that they intend to destroy hostile merchant ships near Great Britain and Ireland. The charterers ordered the vessel to go to Newcastle from Le Havre. The owners argued that Newcastle was not a safe port due to the German government's threat, and they wanted to withdraw their vessel from the time charter. Sankey J concluded that despite potential dangers, the German government's threat did not materialise, deeming Newcastle a safe port. The court assessed the intensity of German hostilities and upheld the principle that a shipowner must accept some degree of risk. In this context, the breach was found in the order because the owners sought to withdraw their vessel.

The outcome of the prospective safety test appears to be determined by a range of factors. These include the situation at the time the charterers issued their orders, the number of past and anticipated incidents, and directives from the relevant government (excluding precautions taken by the coastal state). Additionally, the decision takes into account whether insurers have imposed extra premiums. It is worth noting that future events have also been considered relevant in determining whether the charterers exercised due diligence or not. For instance, the absence of an attack for one and a half years following the incident in *The Saga Cob* worked in favor of the charterers in deciding that they had indeed exercised their due diligence while assessing if the port was safe. However, this reasoning may appear somewhat lacking some logic. Charterers should demonstrate reasonable care in determining subjectively whether the port is safe or not, based on objective elements. Due diligence is carried out prospectively, not retrospectively. The crucial condition is to send a vessel to a port considered safe at the time of the charterers' orders. If events during the journey alter the situation, charterers must adjust their judgment and consequently their orders.[103] However, events following the port visit are beyond their control and are unknown at the time of assessment. Unforeseeable, post hoc events at the time of the orders should in no way come into play when assessing retroprospectively if charterers exercised due diligence. They can only reflect a change in the port's status from safe to unsafe when the conditions required to deem it unsafe are met. Furthermore, in our view, it cannot be said that the port should be considered prospectively unsafe on a particular date when this event merely represents the first in a series of incidents that will start to determine the port's status as unsafe, especially when this event was unpredictable at the time of the charterers' orders. As said above, it may reflect a change in the port's status from safe to unsafe. In a volatile context, situation can change rapidly from safe to unsafe and vice-versa. Therefore, in our view, when determining the issue of due diligence, such post hoc events should not be taken into account by the judges.

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102 Palace Shipping company Ltd. V Gans Steamship Line [1916] 1 K.B 138, cited in Cooke et al. (2014), para note 133 para 5.74

103 This will be discussed in the implications of an unsafe port and refered to as « secondary obligation », see below para 3.2

Finally, it is worth to note that when assessing the prospective safety, it is essential to assess it for the time the ship will call at the port, use it and also depart from it.[104]

Additionally, the risk or danger must be inherent to the port to which the charterers directed the vessel.

2.5.3 The distinction between abnormal events and inherent dangers of a port

For a port to be considered unsafe, the risk must be an inherent characteristic of the port.

In *The Saga Cob,* it is determined that a vessel is only considered to be proceeding to an unsafe port if *any vessel* heading to that port is at risk of danger. If this is not the case, the situation is regarded as an abnormal and unexpected event. In this instance, the observed attacks were deemed sporadic, marking the first occurrences in a lengthy period, which indicated their scattered or isolated nature. However, if the port is the focal point of hostilities, as it was observed in *The Lucille,* this would be considered an inherent characteristic of the port.[105]

In *The Saga* Cob, it was noted that along the coast from Assab to Massawa, a guerrilla attack could occur, and there were indeed sporadic guerrilla attacks in the coastal waters. However, even though an attack was foreseeable, it was not considered a characteristic of the port. The judge opined that if the attacks were isolated incidents and not a defining feature of the port, they were insufficient to establish that it is a normal characteristic of every port in the country for a guerrilla attack to occur during arrivals or departures. However, if there is an escalation or increase in the same risk, such as heightened hostilities, this can render the port unsafe. This escalation would create a new obligation for the charterers, particularly if the port becomes unsafe but the danger is still avoidable[106]. We can discern a requirement for a certain continuity of hazardous events, a necessity for a sequence of events, taken collectively, that render the port unsafe. This involves the concept of a danger present for a sufficient duration to become a characteristic of the port. Such a requirement implies that sporadic or isolated incidents may not be enough to classify a port as inherently unsafe; rather, there needs to be an ongoing or consistent pattern of danger that establishes it as a defining feature of the port.[107]

In the Black Sea, the situation is volatile and unstable. There have been periods of strike attacks followed by intervals with no incidents, and then a resurgence of attacks. Additionally, there is the possibility of encountering mines.

During the mirror agreements from August 2022 to June 2023, there were no attacks. However, this initiative concluded on July 17, 2023, and attacks resumed thereafter. This raises a question: if peace is negotiated or the mirror agreements are reinstated and charterparties proceed, but there is a sudden new attack, for example, by the Russian State, how should it be interpreted? Would such an attack be considered a "sudden attack," an isolated incident after a long period of calm. Would the historical context and the declared state of war weigh instead, in favor of deeming the port or the entire Black Sea leading to Russian or Ukrainian ports unsafe? This scenario would require careful consideration of both the recent and historical patterns of conflict in the area to assess the safety of ports in the Black Sea region at the time of the attack.

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104 *The Eastern City* [1958]; The *Archidimis* [2007] 2 Llyod's Rep 597 (C.A)

105 *The Lucille* [1984]

106 Coghlin et al. [2014] at 10.44 ; *The Lucille* [1984]; see below 3.2 "Secondary Obligation"

107 See. *The Saga Cob* [1992].; *Houston City* [1954]

Currently, media outlets suggest that *any vessel* proceeding to or departing from Ukraine is a potential target[108]. This scenario mirrors Lord Justice Parker's observation in *Saga Cob,* where he stated that a hazard should be *considered "an abnormal and unexpected event unless it is to be said that..., any vessel proceeding from Assab or Massawa was proceeding to an unsafe port"*[109] (in our case, any vessel proceeding to ports in the Black Sea). However, the situation in *The Saga Cob* also highlighted that any vessel traveling the route from Assab to Massawa was a target for guerrilla/terrorist attacks; this raises the question: is there a difference? Why was the guerrilla attack in *The Saga Cob* deemed "an abnormal and unexpected event" despite the existing risk?

It appears that in *The Saga Cob,* the risk encompassed the entire coastal route rather than just the port itself. Similarly, in the current situation, the entire Black Sea region is riddled with dangers such as mines and missile attacks. The distinction, in our opinion, may stem from the ongoing war's more permanent and less sporadic nature compared to guerrilla or terrorist attacks. Furthermore, there are additional factors indicating that Ukrainian ports are specific targets.[110] However, this assertion cannot be confidently made for Russian ports. Nonetheless, the whole Black Sea region leading to these ports remains politically dangerous due to the ongoing war. If we apply the findings in *The Lucille* above, if the port is the focal point of hostilities, this would be considered an inherent characteristic of the port[111]. By analogy, accessing a Russian port, by an area that is the center of hostilities, would render Russian ports unsafe in our view, as the warranty also applies to access to and egress from the port.

Moreover, if a hazard could be avoided but persists due to an external factor (like a power supply cut by the Russian state, akin to a power cut caused by guerrilla action mentioned in Saga Cob), it is not deemed a characteristic of the port. Thus, in the context of the Russian/ Ukrainian war, if a mine is floating and can be avoided through proper implementation of the lookout rule, and this mine persists due to an external factor, it may not be considered a characteristic of the port.

Additionally, if the mine or the hazard encountred on the way to the port is deemed avoidable, this latter will be deemed safe.

2.5.4 Dangers avoidable by good navigation and seamanship

Dangers that can be avoided through competent navigation and seamanship do not make a port unsafe. As noted in *The Eastern City*, such avoidance is *"expected of the ordinary prudent and skillful master."*[112] It is important to note that even if a ship sustains damage in a port while the master demonstrates the requisite degree of care and skill, this alone does not necessarily mean that the port was unsafe, nor does it automatically imply a breach of the safe port warranty by the charterer.[113]

As for the hazards encountered en route to a port, the warranty of a safe port/ berth includes access to the port, meaning that the channels and surroundings must be safe to reach the port. This was judged in the cases of *Palace Shipping Company Ltd. v Gans Steamship Line* [1916] concerning the presence of enemy

108 Llyod's list, *Russia warns that ships heading to Ukraine are now a military target,* retrieved on November 20, 2023,https://lloydslist.com/LL1145965/Russia-warns-that-ships-heading-to-Ukraine-are-now-a-military-target

109 *Saga Cob* [1992] at 550

110 Llyod's list, note 108

111 *The Lucille* [1984]

112 *The Eastern City* [1958] at 131

113 Transoceanic Petroleum Carriers v. Cook Industries Inc. *The Mary Lou* [1981] 2 Lloyd's Rep. 272 at 279

submarines,[114] and *The Mary Lou.*[115] In this case, it was decided that the route a ship must take to access the port/berth is included in the safe warranty without limitation regarding the distance of the encountered danger from the berth, unless there was an alternative safe route that could have been taken to reach the port/berth.[116]

Aditionnally, the guarantee from the charterer that a berth will be *"always accessible," "always available,"* or *"reachable on arrival"* constitutes an absolute warranty that the vessel will be able to enter the specified berth without any delay or danger right upon arrival, regardless of whether any obstacle is temporary or avoidable by simply waiting.[117] This promise, however, is limited solely to the ship's entry to the berth and does not extend to the loading of cargo or the vessel's departure from the berth.[118]

Concerning the risks encountered on the way to a port, the issue of mines is currently a relevant concern in the context of trading in the Black Sea. It represents a significant risk to vessels entering the area. If we apply the findings above, the presence of mines in or near a ship's path may render a port unsafe under the warranty of safe port/berth. However, no alternative safe route should be available and the mine must be unavoidable. Although mines are designed to be difficult to detect, modern technology such as sonar and radar systems can sometimes identify them. The detection and avoidance of mines often require the use of specialised technologies and demining procedures carried out by naval forces. Civilian ships in the balck sea will be particularly vulnerable as they lack the necessary equipment to detect mines. Hence, whether mines are considered avoidable obstacles can depend on the vessel and the systems in place. For instance, if a safe corridor, like the one established for accessing Ukraine today, is not utilised despite leading safely to the berth, then the mine might be deemed an avoidable hazard. Therefore, in our view, mines in the Black Sea would generally be considered an unavoidable danger unless there is an established safe passage corridor which the vessel fails to utilise. Between August 2022 and June 2023, the grain agreement facilitated the export of around 30 million tons of Ukrainian grain. Nevertheless, this initiative came to an end on 17 July 2023. A directive was then issued on 9 August 2023 to create temporary pathways for ships to and from Ukrainian ports. The *Joseph Schulte* was the first to leave a Ukrainian port post-agreement.[119] In a scenario where these pathways are in place, and a vessel chooses a different route where a mine subsequently explodes, that mine would likely be deemed avoidable due to the existence of the safe corridor which was not utilized.

In light of our study on port safety warranty, it is pertinent to acknowledge that there are other measures available when dealing with unsafe ports.

2.6 Alternatives to port safety warranty

Among these alternatives, the doctrine of Indemnity stands out. When there is no express clause related to port safety, this provides a separate basis for a shipowner to seek indemnification for the consequences stemming from their compliance with the charterer's orders. This doctrine is only relevant when the owner complied with the charterers' orders and there is no express clause governing port

114 Palace Shipping company Ltd. V Gans Steamship Line [1916]; See also *The Teutonia* (1872)

115 *The Mary Lou* [1981] at 272

116 Ibid.

117 Shipping developments Corp. V V/O Sojuzneftexport, *The delian Spirit* [1972] 1 Q.B 103

118 Lond. Arb. 3/06 (2006) 685 L.M.L.N 1 (2), and (1997) 463 L.M.L.N 11/97 cited in, Cooke et al. (2014), para 5.70

119 Nytsevich (2023)

safety in the charterparty.[120] The application of the doctrine of Indemnity can be illustrated through an example, as seen in *The Evaggelos Th* case.[121] In this case, there was no express clause related to the port safety obligation and the jugde was prepared to imply a safe port warranty. However, the outbreak of hostilities was deemed to be sudden and not foreseeable at the time of the order. As a result, the port was not prospectively unsafe, and the charterers were not considered in breach. Thus, the judge intended to apply the doctrine of indemnity but came to the conclusion that the proximate cause of the vessel's damage was a gunfire and not the charterer's order. The damage suffered by the vessel could not be borne by the charterers as it was therefore not the consequences of their order. To effectively invoke the doctrine of Indemnity, several specific conditions need to be fulfilled. The risks should not be of a kind that is traditionally placed on the shipowner, such as perils of the sea and hazards related to navigation. It is essential to note that if there is express wording related to port safety obligations in the charterparty, the doctrine of Indemnity will be excluded for such consequences. In such cases, the express clause will take precedence over the doctrine of Indemnity.[122] There must be an unbroken chain of causation between the charterer's order and the occurrence of the loss. Furthermore, the foreseeability of the event is a key factor in determining whether the doctrine of indemnity applies. If a specific event is considered a too foreseeable consequence of a charterer's order, the shipowner may be deemed to have assumed the risk. On the other hand, if the event is too unforeseeable, it may break the chain of causation, and the doctrine may not apply in such a situation. In summary, the doctrine of indemnity is a legal principle that provides a shipowner with a basis for indemnification when they have incurred losses due to complying with charterer's orders, except in cases stated above. In our view, the doctrine of indemnity could be readily applicable in the context of the ongoing war between Russia and Ukraine, though its application would, of course, depend on the specific wording in the charterparty and the prevailing context at the time of an attack. For instance, if missile attacks suddenly become frequent in the region and the shipowner still proceeds to the area, they would likely be deemed to have accepted the risks. This interpretation hinges on the understanding that knowingly entering a high-risk zone, especially one experiencing escalating conflict, could be seen as an assumption of risk on the shipowner's part.

Another option available for a shipowner to be protected in this conflict is to consider adding war risks clauses. BIMCO, the Baltic and International Maritime Council, advises the inclusion of war risks clauses in maritime contracts. The latest versions, such as CONWARTIME 2013 for time charters and VOYWAR 2013 for voyage charters, are noteworthy. They define war risks in a broad manner, importantly noting that an official declaration of war by the state concerned is not necessary for the risks to be deemed in alignment with the definition of war risks. If there is no war clause in the charterparty, terminating a charterparty or voyage can be challenging. If a war clause is included in a charterparty, the only requirement for its activation is that the area is considered dangerous with a potentially high risk; a detailed assessment of the likelihood of the war risk to occur is not necessary.[123] This was established, regardless of whether the conflict has escalated since the charterparty was signed in *The Paiwan Wisdom*case.[124] Since then, an amendment to CONWARTIME's sub-clause (b) states that the clause

120 Solvang, Trond (2013), *The English doctrine of indemnity for compliance with time charterers´orders - does it exist under Norwegian law?* MarIus. ISSN 0332-7868. p. 11–28. At 18

121 *The Evaggelos Th* [1971]

122 Trond (2013)

123 Cf. below 3.3.1

124 Taokas Navigation SA v Komrowski Bulk Shipping KG (GMBH & Co), *The Paiwan Wisdom* (2012)

applies regardless of whether the war risk existed at the time of entering into the charterparty or occurred thereafter. Charterers are responsible for any losses or expenses resulting from their orders. Additionally, a new sub-clause (i) specifies that charterers bear any claims from third parties under a Bill of Lading or other documents evidencing a contract of carriage.

Furthermore, BIMCO also recommends the incorporation of trade zones exclusions and war cancellation clauses. These latters allow both parties to cancel the agreement if a conflict arises between specific countries named in the contract.

Additionally, as explained above,[125] the ship having to wait does not necessarly make a port unsafe. It might also be interesting to look at the Force Majeur clause and as we refered to earlier, the frustration doctrine when the port safety warranty is not operating. This becomes relevant in situations like vessels blocked in the Danube. The situation of vessels, highlighted in a Lloyd's article, presents unique challenges. Ships queued in the bosphorus, unable to secure passage authorisation, could lead to reevaluations of port safety warranties. The article indicates that these warranties might not apply for vessels arrived before the termination of the Black Grain Agreements (port not deemed prospectively unsafe), potentially allowing for the invocation of the doctrine of frustration due to these altered circumstances.[126]

Finally, sanctions clauses are designed to protect parties from fulfilling contractual obligations adversely affected by sanctions. It helps them mitigate risks associated with sanctions. Unlike anti-sanctions clauses that require parties to fulfill their contractual obligations even if sanctions are implemented, a sanctions clause often treats the imposition of sanctions as a force majeure event. It potentially excuses a party from performing their contractual duties under certain conditions.[127]

Shipowners willing to trade in the Black Sea region are advised make an assessment and consider the above in their charterparty.

In the next section, we will delve into the consequences and implications of ordering the vessel to an unsafe port.

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125 See below 2.2.2.2

126 Marie Kelly, *Black sea Grain initiative- will it restart and what are the implications for mariners,* Maritime risk International, published on September 20, 2023, Llyods Intelligence, Liz Booth Ed. 2000-2023(i-law.com)

127 For more details, see Tserakhau, K., and Struzkho, A. (2021, February 21). *(anti)sanctions clause: How to minimize sanction risks – contracts and commercial law – Belarus,*inhttps://www.mondaq.com/contracts-and-commercial-law/1033796/antisanctions-clause-how-to-minimize- sanction-risks

3 Consequences and implications of an unsafe port

This section will include an exploration of what happens when a vessel is ordered to an unsafe port and the the breach of the safety warranty is established (3.1). We will also discuss the responsibility of charterers when port unsafety arises after the nomination (3.2) and the scenarios where the owner and master of the vessel have the option to refuse the charterer's orders (3.3).

3.1 Ordering the vessel to an unsafe port: breach of the safety warranty

When an order directs the vessel to an unsafe port, constituting a breach of the safety warranty, two distinct scenarios requires attention: the consequences when this order results in vessel damage (3.1.2) and the implications when the only outcome is delay (3.1.2).

3.1.1 Consequences in case of a damage to the vessel

When charterers direct a vessel to a prospectively unsafe port, and they have promised to send it to a safe one, they are committing a breach. In such instances, the shipowner is entitled to damages, provided they reasonably obeyed the orders.[128] Furthermore, establishing a causal link between the damage and the risk is essential. This is illustrated in *The Lucille* where the port was acknowledged to be unsafe at the time of the order. The pivotal question was whether this unsafety caused the damage. This issue was addressed in light of standard principles of remoteness and causation.[129] If a claim for hire is made in such situations, it will be calculated based on the current market rate at the time the vessel performed the services.[130]

Aditionnally, there is an argument that charterers may be liable if the unsafety of a port necessitates the shipowner incurring unusual or excessive expenses to avoid obvious dangers. The principle here is that if a port becomes safe only through the exercise of exceptional seamanship, the shipowner has the right to claim damages for the costs of unusual measures required to ensure safety. In *The Archimidis,* as discussed by Gay in an article, this idea is further developed. It is suggested that such a situation aligns with *The Eastern City* definition of a "safe port."[131]

3.1.2 Implications when the only consequence is delay: Demurrage vs damages for breach of safe port warranty

Under English law, demurrage and damages for detention are distinct concepts. Demurrage is a compensation regime used to apportion the risk of delay during loading and discharge between owners and charterers. A specified duration is set aside for both loading and discharging, termed as "laytime" in voyage charterparties. This timeframe is agreed upon and incorporated into the negotiated freight cost. If the loading/discharging finishes within this timeframe, the charterer owes no extra charges. However, if the loading process extends beyond this set duration, the ship enters into "demurrage," mandating the charterer to

128 *The Stork* [1955] 1 Llyod's Rep 349; *The Houston City* [1954] ; *The Batis* [1990] 1 Llyod's Rep. 345; Coghlin et al. (2014), at 10.58

129 *The Lucille* [1984]; *The Saga Cob* [1992] at 551

130 *The Batis* [1990] ; Cooke et al. (2014), at 5.20

131 Robert Gay, *Safe port undertakings: named ports, agreed areas and avoiding obvious dangers,* [2010] LMCLQ 119.

provide compensation to the owner. The rate of this compensation is established in advance within the charter agreement. Depending on the specific terms of the agreement, laytime may commence at various points, typically when the ship is legally deemed "arrived".[132]

Herein lies the distinction: if the vessel experiences a delay due to a breach of port safety before it becomes “an arrived ship”, the breach of the safe port clause is activated. Conversely, if the ship has already “arrived”, charterers will utilise their laytime. Anything exceeding it will be paid in terms of demurrage. Essentially, the difference hinges on the fact that a safe port breach can prevent the laytime from starting, and the owner will be compensated in terms of a breach of the safe port warranty. This means, in our context, that owners may be reimbursed for actual losses or costs incurred, due to the delay imposed by potential arrests/ intimidation measures taken at the entry to the Black Sea. In contrast, if an arrest occurs after the laytime has begun (i.e., the vessel has reached the port/berth or has given its notice of readiness, depending on the agreed terms), the charterer will only be liable for the time that exceeds the laytime and the agreed amount for demurrage.[133] Depending on the terms of the agreements and the rates established for demurrage, the amount owed by the charterers can vary significantly.

In the *Delian Spirit* case for example, a “reachable on arrival case.”[134] Due to congestion, the ship was only able to berth after four and a half days. Once berthed, the loading process was swift, and the charterers would have barely surpassed the laytime. This means that if the demurrage system was applied, the charterers would have been responsible for a minor amount.

However, the shipowner successfully pleaded that the ship had not became an “arrived ship” and that the breach amounted to the breach of a “reachable on arrival” clause. The outcome was therefore that the charterers had to pay damages for detention for the entire period of the delay. The charterers were deprived of their laytime benefits. Similar facts and a comparable decision were observed in another case, *"The President Brand"*[135] which is often cited as a precedent. Note that if a shipowner agrees to an unfavourable demurrage rate, they might be better off claiming a breach of the safe port warranty rather than settling for the demurrage rate. To ascertain which claim basis is more advantageous, several factors must be considered. However, it is important to understand that the two systems cannot coexist; they are mutually exclusive. Once on laytime, damages based on the breach of an independent obligation will be precluded.

In a time charterparty, a similar reasoning applies. Consider the case of *The Mass Glory* as an illustrative example. In this instance, the notice of readiness was deemed invalid because the vessel was unable to berth due to a breach by the charterers. The ship was sub-chartered on a time basis. This breach caused a delay, culminating in a late redelivery. Consequently, the disponent owners were obligated to make additional hire payments under a detention claim. The determined amount was anchored to the original charterparty rate. Given the significant downturn in the market, this rate was markedly higher than the contemporary market rates.

However, it is imperative to note that the aforementioned stands unless the parties have agreed on a distinct allocation of delay risk based on the specific stage

132 Thor Falkanger [2017] at 15.6

133 See for a detailed study, Paul Todd, [2012]; see also, Inca Compania Naviera SA v Mofinol Inc, *The President Brand* [1967] 2 Lloyds Rep. 338 QBD; Shipping Developments Corp v V/O Sojuzneftexport *The Delian Spirit* [1972]; Inverkip Steamship Co Ltd v Bunge & Co [1917] 2 K.B. 193 (CA); *The Johanna Oldendorff* [1974]

134 This term is often included in charterparties and stipulates that the berth must be available and accessible to the vessel upon its arrival, if not, charterers will be liable for the delay and the extra costs incurred.

135 Ibid. note

of the voyage undertaken.[136] Moving from the consequences of ordering a vessel to an unsafe port, let's now delve into the situation where port unsafety arises after the port nomination, leading to charterers' secondary obligations.

3.2 Port unsafety arises after nomination: charterers secondary obligation

The first obligation is to nominate a safe port. The second obligation arises if the initially nominated port becomes prospectively unsafe when the vessel is en route to it. Situations where there is an escalation or increase in the same risk, such as heightened hostilities, can render a port unsafe. Such an escalation imposes a new obligation on the charterers, especially if the port becomes unsafe but the danger is still avoidable. This is exemplified in *The Lucille case.*[137]

In such situations, the charterers are required to cancel the original order and issue fresh orders for an alternative port. If they persist in refusing to revise their orders despite the change in the port's safety status, this is considered a breach of the agreement, making them liable for damages[138]. An exception to this rule exists: if the shipowner's vessel is already in the nominated port and it is impossible to leave, the charterers are not required to renominate a port.[139]

Additionally, when charterers have the right to redirect the vessel, the safe port warranty imposes both primary and secondary obligations. However, when there is only one designated port in the charterparty, their obligation is confined to ensuring the prospective safety of that port at the time of nomination.[140] Gay, in his article dealing with *Safe ports undertaking,* points out however, that in both *The Greek Fighter* and *The Livanita* cases, despite the charterparty designating a single named port, a distinct safe port provision existed, and the judges concluded that the warranty continued to be applicable to the specified port. The judges in these instances did not exhibit any willingness to modify the safe port warranty based on the naming of a solitary port.[141]

3.3 Implications relating to the compliance to charterers' order

When a port is deemed unsafe by the owner or the master, can they refuse to comply with the charterers' orders (3.3.1), and what are the consequences if they choose to comply with the orders despite expressing their view that the port is unsafe (3.3.2)?

3.3.1 Possibility for the owner and the master to refuse charterers' orders

There is no general obligation for the shipowner or the master to verify the safety of a port they are ordered to visit. This approach is submitted in *The Kanchenjunga* case.[142] However, they are permitted to take reasonable time to consider the safety of the port. The delay associated with this consideration will only be deemed as a refusal to obey the orders if it extends beyond a reasonable duration.[143]

136 In that sens, Paul Todd, [2012]

137 Coghlin et al. (2014), at 10.44, *The Teutonia* (1872)

138 Ibid.

139 Lord Roskill in *The Evia* 2 [1982] at 315

140 Gay [2010] at 122

141 Ibid.

142 Coghlin et al. (2014), para 10.60; *Kanchenjunga* [1987] 2 Llyod's Rep. 509; See also below 3.3.3, this study

143 *The Houda* [1994] 2 Llyod's Rep. 541, at 555

Additionaly, the owners or the master have the right to refuse an order to an unsafe port because it is considered *"uncontractual,"* as stated by Lord Goff in *the Kanchenjunga* case,[144] or because proceeding to an unsafe port does not align with the terms of the contract.[145] However, the decision to refuse the orders must adhere to the definition of "unsafety," i.e, the vessel must be at risk of a danger inherent to the port itself, not due to abnormal occurrences, as exemplified in *The Mary Lou* case.[146]

Moreover, if the charterparty contains a war clause, drafted in the manner of CONWARTIME 2013 or VOYWAR 2013 BIMCO clauses, it will allow the owner to refuse compliance with the charterers' orders if, in the reasonable judgment of the master, the port is deemed unsafe. The Russian military intervention in Ukraine would fall under the definition of "war" as per these BIMCO clauses, thereby justifying a refusal. In the case of *"The Triton Lark",*[147] which dealt with the risk of pirate attacks in the Gulf of Aden, clarifications were made regarding the interpretation and understanding of the CONWARTIME 1993/2004 clause, which was later amended. It gives an indication for when shipowners are justified in exercising their right to refuse to call at a port due to the presence of such risks.

In this case, the charterers instructed the vessel to transport cargo from Hamburg to China via Suez and the Gulf of Aden. However, the disponent owners, invoking the war clause, declined this route due to the risk of pirate hijacking. This risk was estimated at approximately 1 in 300 transits. The charter contained a CONWARTIME clause. To rely on the clause, the master or owners must form a reasonable judgment to assess whether, on one hand, *"the vessel, her cargo, or crew may be, or are likely to be, exposed to acts of piracy"* (war in the context of our study), and on the other hand, *"if such acts of piracy may be dangerous or are likely to be or become dangerous"* (in our case, war attacks such as mines or striking). The primary question revolved around the interpretation of the phrase *"may be, or are likely to be, exposed to War Risks."* The judge highlighted the difference between a wording that implies that the vessel may be or is likely to be *"attacked"* by pirates (war acts in this case) and the wording that the vessel may be or is likely to be *"exposed to"* those acts. The latter formulation requires only *"a single degree of possibility or probability."* The vessel is exposed to the risk, not to an actual attack. If there is any risk, the clause should, according to this decision, in principle operate without an issue. The risk must then be likely to be or become dangerous to the vessel, her cargo, crew, or other persons on board the vessel. It requires a risk that is sufficiently grave and serious.

The risk of a mine explosion or striking is undoubtedly serious and widely recognized as a war risk. It is the *"risk that a serious event"* will occur, and not *"a serious risk that an event will occur,"* that is required by the CONWARTIME clause. Therefore, the precise wording of the clause becomes critical. Given the current situation and the aforementioned hostilities, it is highly probable that a serious risk of a mine or striking event occurring against ships entering the Black Sea will be acknowledged. Owners may invoke war risk clauses to decline visiting such ports. Additionally, BIMCO states in their website, that *"under the current circumstances, we believe that owners should have the right to refuse to transit Ukrainian/Russian Black Sea and Sea of Azov waters or call at ports in that region."*[148]

If the situation in the region stabilises or grain trade resumes, the question arises whether shipowners can still rely on war risk clauses. The continued hostilities between the two countries and ongoing strikes offer no assurance that mines

144 *Kanchenjunga* [1987]

145 Lensen Shipping v. Anglo-Soviet Shipping [1935] 52 Llyod's Rep. 141 ; Coghlin et al. (2014), at 10.61

146 Coghlin et al. (2014), at 10.43

147 Pacific Basin IHX Limited v Bulkhandling Handymax AS, *The Triton Lark* [2012] 2 Lloyd's Rep. 151

148 https://www.bimco.org/Insights-and-information/Contracts/20220224-Ukraine-situation

have been cleared. Even with a stabilisation of the situation, the lingering risk of hostilities resuming would be sufficient grounds for owners to refuse charterers' orders to call at a port in the Black Sea based on a war risk clause in the charter.

In summary, while shipowners and masters are not generally obliged to verify the safety of a port they are ordered to visit, they do have the right, and in cases where the risk is obvious, the obligation, to refuse such orders[149]. Moreover, under war clauses like CONWARTIME 2013 or VOYWAR 2013, the mere existence of a serious risk is sufficient for shipowners to refuse visiting a port deemed unsafe, without needing to prove a high probability of that risk.

In situations where a port is unsafe, the owner could, in certain cases, face criticism for complying with the orders of the charterers.

3.3.2 Complying with calls to unsafe ports: potential repercussions for Owners

The issue in this section is to examine what are the potential consequences for shipowners if they deem a port unsafe but still choose to comply with the charterers' orders and proceed to that port[150].

In *The Saga Cob* judgement, it is contemplated that a port should be considered unsafe unless proven to be absolutely safe. L.J Parker stated at p. 551:

> *"It will not, in circumstances such as the present, be regarded as unsafe unless "the political" risk is sufficient to a reasonable shipowner or master to decline to send or sail there".* [151]

Reading this *a contrario* implies that if the political risk is sufficient to justify refusal by a reasonable shipowner, then the port should indeed be considered unsafe. Does it mean that if the owners or master do not decline to approach the port, the port is deemed safe? Does it imply that the owners have accepted the risks associated with the port?

In *The Saga Cob,* a letter was sent immediately after a guerrilla attack on the vessel *Omo Wonz,* expressing the master's concerns about calling at the Massawa port and regarding it as potentially dangerous. However, in this case, the charterparty contained a clause allowing them to refuse to visit the port. Despite this, the judge noted that after this incident, the master visited the Massawa port multiple times and did not exercise their right to refuse. The judge draws the conclusion that the owners, not only accepted the risks, but also, that the master considered the port safe by visiting it several times after the attack. This situation raises the following questions:

Does proceeding to a port, despite having the entitlement to refuse due to unsafety, constitute a waiver of the right to rely on the safe port warranty? Would it be considered a waiver of their right to refuse to comply with the order?

As we have seen,[152] there is no general obligation for the shipowner or the master to verify the safety of a port they are ordered to visit. If the charterparty contains a safe port obligation, the owner must be able to rely on the charterers' undertaking. Additionally, it was decided that the owners' compliance with the order does not necessarily imply a waiver of claims related to the port safety

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149 See below 3.3.3

150 Note as well that the question of whether owners can exercise the right to reroute becomes relevant when considering port safety concerns. However, given the present circumstances, attempting to reroute vessels to avoid Russian or Ukrainian ports is not a feasible option, as these ports necessitate passage through the Black Sea, which is currently the epicenter of hostilities.

151 *The Saga Cob* [1992], at 551

152 Below 3.1

warranty; it merely signifies a forfeiture of the right to object to the order itself.[153] Thus, they might be able to claim compensation for any losses incurred due to calling at the unsafe port.

However, if the unsafety of the port is obvious, the owners are expected to act reasonably, either by not entering the port or by minimising any damage incurred. This approach to port safety is demonstrated in *The Kanchenjunga*.[154] Should the owners or the master undertake appropriate measures to mitigate the impact of a port's unsafety, they can seek compensation for these actions.[155] Nonetheless, in cases where owners knowingly enter an unsafe port and treat the charterers' orders as valid, they may be deemed to have waived their right to claim a breach of contract and any resultant damages. In *The Chemical venture* case, the owners made a clear and unequivocal statement of their intention not to consider the order to proceed to the unsafe port as a breach of the safe port warranty. In that case, they waived their right to seek compensation for a subsequent damage.[156] Additionally, it was held that if the owners clearly indicate their acceptance of the order, in some circumstances, it could be interpreted as a waiver of their right to seek compensation. This principle is further illustrated in *The Product Star* (N°2).[157] The Court of Appeal examined whether owners could justifiably refuse to send their vessel, on a voyage in the Arabian Gulf during the Iran-Iraq war, under a war risks clause in a charterparty. Notably, the owner had already completed four voyages to the Gulf without incident and no change in circumstances was evident. Despite this, the owners refused orders for a fifth voyage. The court ruled that such discretion to refuse must be exercised reasonably.

Gay notes that even though *The Product Star* deals with a war risks clause rather than safe port warranty, the terms «safe» and «dangerous» are closely interconnected. Gay implies that the way «dangerous» is understood within the specific context of a charterparty could likewise influence the meaning of «*safe*» in maritime contracts.[158]

Considering the findings above, a key question emerges in our study: should the owner proceed to Russian or Ukrainian port if called there? The answer is rather complex.

As seen, if the unsafety is too obvious, the charterers' safety promise (explicit or implied) might be challenged, and it is possible that losses should be shared, particularly if the master is seen as negligent for obeying orders in a clearly unsafe situation. This was the perspective *The Houston,*[159] where it was submitted that the master's actions were the cause of the damage, not the charterers' orders. It can be legitimate to wonder whether the unsafety of ports in the Black Sea is obvious. One thing is clear: if a Ukrainian-flagged or crewed vessel enters a Russian port, the unsafety is obvious. But the dynamic nature of the whole Black Sea region requires specific timing assessments for safety. However, the view in *The Houston* case, is not universally accepted among jurists. Some argue that even if the master's negligence is presumed, it does not break the causation chain, leaving charterers liable. With a safe port clause, charterers undertake a commitment and should assume responsibility for calling a vessel to an unsafe port. Therefore, if owners, aware of the war risks, still proceed to Ukrainian or Russian ports,

153 The Kanchenjuga [1987] 2 Llyod's Rep. 509, [1989] 1 Llyod's Rep. 354 (C.A.), [1990] 1 Llyod's Rep. 391 (H.L.)

154 Ibid, [1990] 1 Llyod's Rep. 391 (H.L.) at 401 ; Coghlin et al. [2014] at 10.58 and Seq.

155 The Kanchenjuga [1987], at 401 ; Coghlin et al. [2014] at 10.62

156 *The Chemical Venture* [1993]

157 Abu Dhabi National Tanker Co v. Product Star Shipping Ltd., *The Product Star (N° 2),* [1993] 1 Lloyd's Rep 397

158 Gay [2010] at 122; See also this view Johnston Brothers v. Saxon Queen Steamship Co (1913) 108 LT 564 at 565

159 *The Houston City* [1954] at 15; [1956] A.C. 266

it might only be seen as waiving their refusal right, but they remain entitled to compensation for damages arising from the port's prospective unsafety. This holds unless they have clearly accepted the risks and, by their words or conduct, showed that they will not threat the order as a breach. Owners should be cautious; if they express skepticism about calling at a Ukrainian/Russian port but still proceed anyway, they may be seen as accepting the risks if the clearly aknowlegde that the order was not a breach, losing their right to compensation.

Additionally, if owners have been regularly visiting the area and then suddenly refuse a call to a Ukrainian/Russian port, they must reasonably justify this refusal. A change in circumstances might legitimise such a refusal, but this needs to be substantiated.

4. Final Remarks

In conclusion, the concept of port safety warranties in the context of war and political conflicts, such as the Ukrainian/Russian conflict, is a complex area of maritime law. When characterising prospectively port dangers, it is important to distinguish between inherent dangers of a port and abnormal events or avoidable hazards that do not render a port unsafe. The complexity, as we see it, arises from the need to evaluate the port's prospective unsafety when charterers make their port nomination, and this assessment involves considering the evolving situation. Recent events highlight the unpredictability of the region. For instance, two grain-trading vessels departed from a port near Odesa on September 17, 2023, without incident.[160] However, just four days later, Ukraine carried out a missile strike targeting the headquarters of Russia's Black Sea fleet in occupied Crimea.[161] Subsequently, on the 25th, an attack occurred on the port of Odesa in Ukraine.[162] However, these events underscore the ever-present risk to maritime vessels in the region.

Additionally, determining when a port can be considered unsafe due to conflict-related delays is challenging. Legal precedents vary, with the Hermine case emphasizing frustrating delays as a requirement for a breach of port safety warranties, while the Eva 2 case does not. In our view, it may be more appropriate to focus on whether the delay poses a danger to the vessel, crew, or cargo. Furthermore, provisions for delays due to minor delays should be considered, as they may not typically fall under port safety obligations.

Moreover, sanctions risks can also impact port safety, and charterers may be liable if they order the vessel to a port where it can be in risk of being detained or blacklisted due to EU sanctions imposed on Russia.

In terms of alternatives to port safety warranties, shipowners can consider seeking damages on the base of the doctrine of indemnity if no express port safety clause is found. Owners should consider adding war risk clauses, trade zone exclusions, and war cancellation clauses to charterparties to safeguard their interests when called into a Black Sea port. While the warranty ensures prospective safety at the time of nomination, it may not account for evolving risks if hostilities diminish in the Black Sea and sporadic attacks occur. Additionally, force majeure and frustration doctrines may come into play when port safety warranties are not applicable.

Finally, the consequences and implications of an unsafe port vary depending on the situation. First, shipowners may be entitled to damages for breach of the safety warranty if they reasonably obeyed charterers' orders. Furthermore, owners and masters have the right to refuse charterers' orders and the obligation if the risk is obvious, but compliance with such orders does not necessarily waive claims for breach of the port safety warranties. However, they may be deemed negligent and lose their right to compensation in a situation such as the Ukraine-Russian war. This holds particularly valid if the owner has made prior visits to the area, and the unsafety is obvious. Indeed, security analysts are increasingly concerned about ships being targeted under suspicion of transporting Ukrainian military cargo, as well as the risk of vessels encountering mines.[163] The Joint War Committee in London has included Ukrainian and Russian sea waters in its listed area, signifying heightened risk and unsafety. Some insurers have excluded these zones or imposed additional premiums. Given these hostilities, it is prudent to consider the

160 https://www.rferl.org/a/ukraine-two-grain-ships-odesa-corridor-russia/32574447.html

161 https://www.theguardian.com/world/2023/sep/22/ukraine-mounts-missile-strike-on-russian-black-sea-fleet-hq-in-crimea

162 https://www.nrk.no/nyheter/guvernor_-en-skadet-i-angrep-mot-odesa-1.16570015

163 Meade [2023]

entire Black Sea as an obvious hazardous zone and clearly allocate the risks in the agreements when trading in this area.

In conclusion, the determination of port safety in conflict zones requires a careful analysis of the specific circumstances and legal agreements involved. The assessment of whether to proceed to a potentially unsafe port in a conflict zone is a complex decision that depends on various factors, including the degree of risk, the terms of the charterparty, and the ship's previous voyage in the area.

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When the time charterer redelivers on short notice

Asbjørn Nilsen

Content

Preface

This thesis concerns the approach to the owner's damages when his time-chartered vessel is redelivered on unlawfully short notice. The original version of this thesis was submitted in December 2023 as part of the LL.M. program in Maritime Law at the University of Oslo.

For the version presented here, I have reviewed some of the language for clarity, corrected errors and added English translations of Norwegian quotes. In addition, I have added the 'petit' paragraph at the end of chapter 4.2.

I would like to sincerely thank my supervisor Professor Kristina Siig for her incisive guidance and warm encouragement. I also thank the Nordic Institute of Maritime Law and its extended family for providing us with a rewarding graduate program, as well as my fellow students for making it a memorable experience. Finally, a big thank you to friends and family.

Asbjørn Nilsen,

February 2024.

1 Introduction

1.1 Statement of problem

This thesis adopts as its point of departure the time charterer's redelivery on short notice in contravention of the terms of the charter. Specifically, it engages with a known controversy regarding the correct perspective on the owner's losses in an ensuing claim for damages.

Consider a time charter that requires 15 days' notice of redelivery. Instead, the charterer redelivers on a short 3-day notice. The owner cannot refuse redelivery for that reason alone i.e., proper notice is not a condition precedent to redelivery.[1] The owner must accept redelivery and bring a claim for damages. Damages ought to place the owner as if he had received proper notice. However, scholars and practitioners disagree on whether proper notice would have entailed *earlier notice* or *later redelivery*. Carver on Charterparties:

> However, where a vessel is redelivered on short notice, it is a nice question whether the gravamen of the breach lies in the charterer's failure to give a longer notice and thus to redeliver at a later date, or in its having failed to give notice at an earlier date.[2]

The aim of this thesis is to bring clarity to this question from a Norwegian law perspective.

The question is of practical note, most of all because it implicates the quantum of damages. We can illustrate this with an example. Assume that market rates at redelivery are up compared to the charter rate. Further assume that the owner's follow on-fixture becomes delayed as many days as notice was late for reason of the late notice. Under those assumptions, the late notice-perspective yields the greater losses (figures 1 and 2 below). The question does not only concern the quantum, but also the nature of the owner's losses. It is more intricate to prove a disposition loss from not having been given notice at an earlier time, compared to would-be extended charter hire inter partes in the missing days of the notice time. Owners might therefore generally favour the early redelivery-perspective.[3] In a specific litigation, however, an owner may still prefer to recover losses from not having been given earlier notice if the market conditions favour that approach, as in our example.[4]

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1 Jantzen (1938), p. 411. ND 1952 p. 104. Gram (1967), p. 178. For English law see Coghlin et al (2014), ch. 15.14 and Carver (2021), 7–397. Note that the owner is required to accept redelivery even if it is premature in relation to the *charter period* itself, cf. NOU 1993: 36, p. 91.

2 Carver (2021), 7–400.

3 Another reason to think so is that the charterer will be incentivized to redeliver on short notice when the market rate is down and the charter is expensive i.e., when the owner prefers to extend the period of hire. This point of view cannot be taken too far, however, as short notice redeliveries often occur due to a lack of time for the charterer to order the vessel on a commercially sensible last voyage, which may happen independently of the market conditions.

4 See also [2015] Lloyd's rep 315 and 1955 AMC 875.

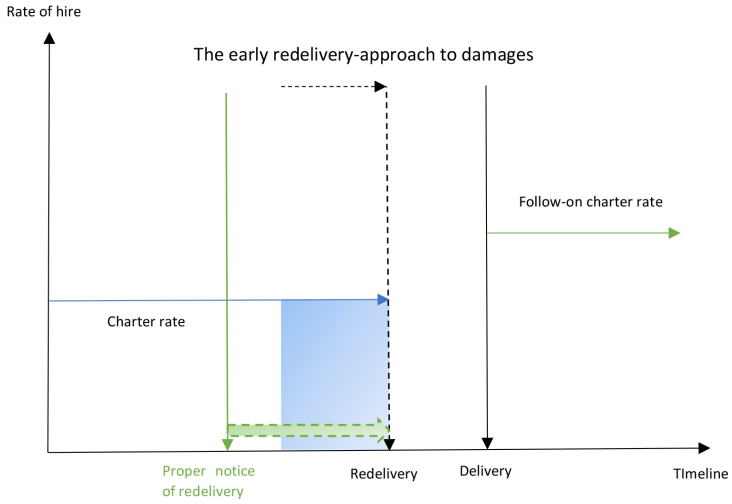

Figure 1. The illustration shows a hypothetical in which the charterer redelivers later in proper relation to the time of notice as it were. The dotted arrows indicate that a parameter has been altered, and the blue area represents lost charter hire as yielded by this perspective. For simplicity, the owner's claim for bunker consumption is not shown in figures 1 and 2.

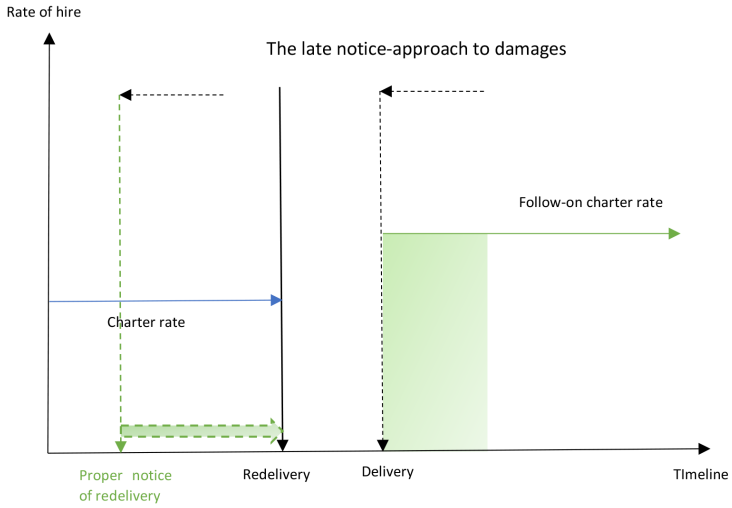

Figure 2. The illustration shows a hypothetical in which the charterer issues earlier notice in proper relation to the redelivery as it were. It is here assumed that the owner would be able to use that earlier notice to push forward the vessel's following employment. The loss as yielded by this perspective is represented by the green area.

1.2 Scope of research

1.2.1 Introduction

There is more than one way in which short notice – and notice irregularities more generally – may occur. As provided below, the category may implicate the analysis. To explain how this is accounted for, we will first explain the typology used in this thesis, and then how our main and secondary research questions track that typology.

1.2.2 Typology

We draw a typology utilizing two plausible criteria of proper notice.[5] In the first dimension, there is notice time. Here we define notice time as the time between receipt of notice and redelivery. In the other dimension, there is compliance with notice. The second dimension indicates whether redelivery occurs in contravention of what the charterer positively communicates to the owner by way of notice.

Table 1. The two principal short notice scenarios are indicated.

		Notice time		
Compliance with notice		**1) Short**	**2) Contractual**	**3) Long**
	A) Early	1A	2A	3A
	B) On time	1B	2B	3B
	C) Late	1C	2C	3C

If the charter demands 15 days' notice and the charterer issues a 3-day notice which he subsequently observes, there is a 1B situation. On the other hand, if he issues a 15-day notice but subsequently redelivers after 5 days, there is a 1A situation.

From time to time a charterer intending to redeliver on short notice may go through the motions of issuing notices that purport to be contractual, but that nonetheless are understood to be proforma i.e., not genuine by both parties.[6] This will be described as a 1B situation, as there can be no justified expectation that the charterer will comply with a proforma notice.

Table 2

Notice requirement	**Communicated date of redelivery**	**Redelivery after**	**Situation**
15 days	3 days	3 days	1B
ditto	15 days	5 days	1A
ditto	20 days	15 days	2A
ditto	15 days	25 days	3C
ditto	'15 days' proforma	3 days	1B

1.2.3 Main and secondary research questions

We will distinguish analytically between the two short notice situations 1B and 1A. 1B is characterized by notice being short, but not misleading, whereas the 1A situation invites us to grapple with the significance of redelivery occurring not only on short notice, but also in contravention of what was positively communicated to the owner.

The 1B situation will be treated as the main research question, and the analysis will be geared towards that situation through chapters 3–4. In chapter 5, the thesis will analyse the 1A situation and thereby discuss the properties of the notice itself as a binding communication.[7]

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5 The typology itself is not intended to be more than a descriptive tool.

6 E.g., [2015] Lloyd's rep 315.

7 In that regard, while beyond the strict scope of this thesis, it will be natural to comment shortly on overstay of a given notice (3C).

When tasked with finding the applicable loss perspective in a 1A situation, we need to ascertain the legal effects of the issued notice, in particular whether it amounts to a promise to redeliver on or around the communicated date. If so, one concludes that the owner *may* claim damages premised on that promise, thus yielding a later redelivery perspective on losses incurred. In respect of the 1A situation, one observes that there are a priori two potential bases for the owner's claim, one arising from the fact of the short notice time per se and another from violation of the specifically given notice.

The second basis is not available for the 1B situation. The analysis must centre on how the notice provision itself works and how it interoperates with measurement principles in damages. The benefit of giving primacy to the 1B situation is that it serves to focus the initial analysis, which can then later be expanded upon.

Another justification is that the 1B scenario appears most practically relevant. Of the five short notice cases and arbitrations touched upon in this thesis, four involve 1B situations, see table 3 below. A possible explanation for this trend is that a 1B scenario can arise whenever an unexpected change of circumstances leaves the option to keep the vessel on hire commercially untenable for the charterer e.g., a delay at port or at sea closing the window thought available for another voyage. Plausibly, such occurrences are not exceedingly rare. A 1A situation requires on the other hand, that the charterer first issues a notice in good faith and then proceeds to upend that estimate in such a way that time is gained. That path is plausibly somewhat narrower.

1.2.4 Limitations

1.2.4.1 Charter forms

The standard redelivery notice-clauses used in today's trade can likely trace their origin to the first Baltime 1909 form.[8] Such clauses are found across the board of modern standard forms from NYPE to Linertime and Supplytime. The formulations vary somewhat but broadly follow the same template. These can thus be regarded as a 'family' of standard redelivery notice rules. The discussion in this thesis aims at this set of clauses with an emphasis on the Baltime and NYPE formulations.

In contrast, the bespoke BIMCO Redelivery Clause for Time Charter Parties 2017 falls outside the scope of study. The clause offers a comprehensive regulation of all aspects of redelivery, including notices, and it is designed to remove interpretive doubt. This entails choice-making. The clause provides inter alia, that the owner *can* refuse redelivery prior to expiry of the definite 2-day notice. To manage the scope and remain in the framework of existing research and case law, the thesis will not engage in separate analysis of the bespoke clause.

1.2.4.2 Subject matter

The core subject matter of this thesis is the applicable loss perspective in the owner's claim for damages. This means that application of other rules in damages such as basis of liability, mitigation, foreseeability and so on are not independent subjects of study, but they will at times naturally form part of the core discussion, and it will at other times be natural to extend discussion to these issues in order to draw a more complete picture.

8 This proposition may be gleaned from Jantzen's 1909 book on time charters *Maanedsbefragtning*. While Jantzen attached the Baltime 1909 form in the appendix on pages 99–103, it was too recent for commentary, cf. Jantzen (1909), preface (VI). Given the forms prevailing at the time of writing, Jantzen contends there is no independent obligation to notify ahead of redelivery, cf. Jantzen (1909), p. 33. As such, it seems that the notice obligation as contained in Cl. 7 Baltime 1909 marks a watershed.

1.3 State of research and case law

1.3.1 Norwegian law

Johs. Jantzen's position is clear – a redelivery on short notice can only give rise to a claim for damages premised on a right to *earlier given notice*.[9] In the only known Norwegian arbitration to date implicating the research question, ND 1952 p.104 *Mimona* cited Jantzen's view. Mid-century one could therefore discern the contours of a Norwegian maritime law position.

A half-century later Hans Peter Michelet questions the propriety of the earlier held view, citing inter alia concerns that the owner would struggle to prove a disposition loss and that any such loss might face foreseeability-issues.[10] Citing American arbitrations, Michelet suggests to instead apply the *early redelivery*-perspective. It bears mentioning that one of his cited cases, *Loreto Compania vs. Crescent Metals,* does not address a short notice situation; the sole irregularity was that the charterer redelivered too early in relation to the communicated date of redelivery, a 2A situation.[11]*Transocean Shipping v. Western Shipping* does on the other hand operate on a view that the owner is entitled to damages premised on later redelivery following short notice.[12]

It is less easy to say whether Per Gram endorses one perspective over the other. In the earlier editions of his treatise, Gram emphasizes the owner's *lost opportunity* and thus seems to concur with Jantzen that damages ought to be premised on a right to earlier notice.[13] The revised language of the 1977 edition could be taken to indicate a change of mind, Gram now emphasizing that if the owner redelivers prior to the expiry of the required notice time, it constitutes *early redelivery*.[14]

Neither of the above-mentioned authors purport to provide a comprehensive in-depth analysis of the subject matter. For both Jantzen and Gram, it is most essential to refute the spurious notion that an owner can refuse redelivery for reason of short notice alone. It is first in Michelet's treatment, that the issue is explicitly framed as a tension between alternative loss perspectives in damages. While there is no doubt that Jantzen describes damages as premised on a right to correct earlier notice, rather than 'correct later redelivery', it is perhaps less easy to know if he would be as adamant that other loss perspectives must be wrong, as he is that redelivery cannot be denied. One may further observe that the authors do not entertain the potential for differential analysis on account of the type of short notice irregularity. Due to the above as well as more recent international developments, one may conclude that the subject matter has ample research potential.

1.3.2 English court cases

When the *Liepaya* was redelivered on a short one day's notice, the Commercial Court awarded damages premised on placing the owner as if notice had been given at a correct earlier time corresponding with the Jantzen approach.[15]*The Liepaya* remained the sole authority until *The Great Creation* appeared in 2015. Since the market rate was higher than the charter rate, the *Great Creation's* owner stood to benefit from having their loss viewed as a lost opportunity to fix the vessel earlier. The owner therefore wanted to follow *The Liepaya*. The Commercial Court did not agree. Proposing first that whether one or the other perspective is

9 Jantzen (1919), p. 240. Jantzen (1938), pp. 411–412.

10 Michelet (1997), pp. 201–202.

11 1970 AMC 1966.

12 1955 AMC 875.

13 Gram (1948), p. 113.

14 Gram (1977), p. 178.

15 [1999] Lloyd's rep 649 (672).

correct may turn on the facts of each case,[16] the Judge concluded that it would be "wrongful" and "contrary to principle" to posit a non-breach scenario in which the charterer was to issue notice at a time they had no rational basis to notify of the redelivery that eventually occurred.[17] The owner's damages therefore built on a later redelivery pursuant to proper observation of notice time following the notice that was given.

Table 3. An overview of cases and arbitrations.

Case	**Notice requirement**	**Communicated notice time**	**Redelivery after (actual notice time)**	**Situation**	**Loss perspective**
Loreto Compania (US)	15 days	22 days	16 days	2A	Early redelivery
Transocean Shipping (US)	30 days	9 days	8 days	~1B	Early redelivery
Mimona DS (N)	10 days	~1 day	~1 day	1B	Late notice
The Liepaya (UK)	15 days	1 day	1 day	1B	Late notice
The Great Creation (UK)	20 days	Proforma	6 days	1B	Early redelivery (variable)

16 [2015] Lloyd's rep. 315 (322, para 40).

17 [2015] Lloyd's rep. 315 (321, para 30).

2 Methodology

2.1 Initial remarks

In the absence of directly relevant rules in the Maritime Code, the time charters themselves form the central source of law. The charter law is further illuminated through case law and the maritime law literature. We have already seen positions taken by the Norwegian maritime law authors. The idea here is to approach the issue with a blank slate and revisit the Norwegian maritime literature at the end to review our findings.

The Norwegian case material is sparse. Besides customary principles of interpretation, analogies and contract law concepts will be used as tools to illuminate and substantiate the charter construction. Since we are at times entering somewhat unchartered territory under Norwegian law, the discussion may be seen as having a de sententia ferenda-character. But the perspective is in principle the law as it is.

In addition to charter construction, the research question involves general principles on the measure of damages. On that point, the exposition will rely on these principles especially as illuminated by the Norwegian and Scandinavian contract law literature. When we later in the discussion focus on the 1A scenario and the potential binding effect of notice, we rely as well on principles applicable to the formation of legal dispositions.

When the perspective is Norwegian law, it will for most practical purposes entail that the parties opt for Norwegian law to adjudicate disputes arising within an international standard form. A recurring methodical issue in that context is the relevance and weight of foreign, primarily English, legal opinions on the charter construction. It is therefore necessary to anchor and explain how the thesis approaches foreign source material, see 2.2 below. Thereafter, the overall conceptualization of the research problem will be explained followed by a layout of the remaining thesis structure.

2.2 Norwegian law interpretation of agreed documents formed within an English legal tradition

2.2.1 Introduction

Owing to the historically dominant position of London as a centre for maritime arbitration with English as governing law, time charters on international standard forms are not only drafted in the English language, but within an English legal tradition and typically with English choice of law-clauses. Even American forms such as NYPE will typically provide for English law as an option on an equal footing with US maritime law. Consequently, it becomes a methodical point of interest to assess the relevance of English sources of law when the parties elect to have their dispute governed by Norwegian law. A point of departure is that use of international standard forms represents no *formal* derogation from Norwegian law when it follows from the parties' choice of law that Norwegian law applies. The propriety of leaning on foreign law must therefore first be justified internally.[18]

2.2.2 Some general remarks

English and Norwegian construction of contract do not always follow the same principles. For example, Norwegian law does not operate with a clear functional distinction between interpretation and implication,[19] whereas English law pro-

18 Haaskjold (2013), p. 421. Selvig (1986), p. 4.

19 Tørum (2019), p. 104 (3-205 and 3-206).

vides stringent criteria for the implication of terms.[20] In a similar vein, Norwegian law of contract contains more background material to provide for gap-filling or 'implication of terms in law'.

Accordingly, charter disputes may occasionally turn on how tensions between the two legal systems are resolved. The decision in ND 1952 p. 442 *Hakefjord* provides an example.[21] The vessel was found to be off-hire on subjective grounds pursuant to Norwegian background law going beyond and notwithstanding the exhaustive off-hire regulation found in the charter itself. An example of the English view prevailing is provided by ND 1983 p. 309 *Arica*. It too concerning off-hire, the issue was whether to calculate time lost on a gross basis adhering strictly to the wording as one would under English law, or to imply a limiting net principle as one would under Norwegian law pursuant to rt. 1915 p. 881 and then MC 1893 § 144 (2). Norwegian law recognizes agreed standard documents as a form of 'private legislation'. Accordingly, account is taken of what one may through permissible means i.e., preparatory works, history and other context, discern to be the drafters' intended design.[22] The charter in question was drafted with a view to English law, and the arbitrators found that the drafters made a clear and conscious choice to integrate the rule contained within the prior English precedent of *The Westphalia* (House of Lords, 1891). Unlike in *Hakefjord*, the issue was thus not *formally* solved on background law:[23]

> Godtar man at et standardformular efter norsk rett må tolkes i overensstemmelse med konsipistenes klare forutsetninger, gir en fortolkning av off hire klausulen løsningen, uten at det er nødvendig å trekke inn bakgrunnsretten, det være seg engelsk eller norsk rett.[24]

When *Arica* referred to the drafters' clear preconditions, the decision invoked an *interpretive result* and not *the interpretive method*. Accordingly, *Arica* did not resolve that one more generally ought to apply the foreseen English method of interpretation. Such a view would represent a radical break with Norwegian tradition. Selvig rejects that reference to the drafters' preconditions can lead to general incorporation of English principles of interpretation.[25] The parties may of course agree on the English method as the interpretive rule, but this point of view will have limited reach when the parties have elected for Norwegian law to govern the dispute and the charter is otherwise silent on interpretive rules. This is not to say that the interpretive style is blind to the contract's origin. Given the exhaustive and detailed English style, one may by way of ordinary criteria and common sense find cause to apply a more objectivized and system-oriented style of interpretation.[26]

So far, the conclusion is that English law enters the picture primarily via its case law as seen in *Arica*. There, the question presented itself neatly. *The Westphalia* was antecedent to the drafting; it was unequivocal, and the disputed clause was nearly identical to the one in *The Westphalia*.[27] More difficult questions arise when the line of authorities is posterior to the drafting, as in the case at hand with

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20 Tørum (2019), p. 111 (3-222).

21 See also ND 1950 p. 398.

22 Falkanger et al (2017), p. 35. Haaskjold (2013), p. 418. Rt. 1991 p. 719. *Arica:* "formularkonsipistenes aktuelle eller formodede mening", cf. ND 1983 p. 309 on p. 322.

23 *The Westphalia* was relevant as *interpretive data* per Haaskjold's (2013) terminology, cf. p. 424.

24 ND 1983 p. 309 on p. 323. Translated to english: "If one accepts that a standard form pursuant to Norwegian law must be construed in acccordance with the drafters' clear preconditions, an interpretation of the off-hire clause provides the solution, without it being necessary to rely on background law, be it English or Norwegian."

25 Selvig (1986), p. 24.

26 As observed by Haaskjold (2013) on p. 423 with respect to modern arbitrational practice.

27 ND 1983 p. 309 *Arica* on p. 322.

The Liepaya and *The Great Creation*. The justification can no longer be tied to the drafters' specific idea.

As a general matter, posterior case law on standard forms clarify the meaning of its terms – it becomes part of the charter law relied upon by the parties.[28] But the extent to which one ought to adopt *English* case law has to be regarded as uncertain.[29] Krüger goes far in advocating for incorporation, whereas Solvang along with Selvig advise a degree of caution.[30] The difficulty of a partial approach is its vulnerability to internal inconsistencies.[31] *Hakefjord* and *Arica* seen together provide an example, where the grounds for off-hire are drawn pursuant to the expansive Norwegian view, while the duration of off-hire is drawn pursuant to the expansive English view, thereby skewing the risk allocation between the parties. But the answer cannot be unlimited incorporation either, as this would be alien to the system and undermine the parties' choice of law. No more can the answer be to ignore the form's English law background and international use. It is unlikely that one can avoid difficult line drawing altogether. English cases may both be relevant and carry weight but cannot be relied upon blindly. Below we will attempt to draw the line as it relates to the subject matter and case law relevant for this thesis, but not more broadly or precisely than necessary for the analysis herein.

2.2.3 The thesis' use of foreign case law

It seems a requirement that the English cases are sufficiently clear and consistent for Norwegian arbiters of law to precondition an outcome on them. It is not for Norwegian law to settle doubtful questions of English law. It is questionable whether there is an undisputed English rule contained within the English line of authorities. *The Great Creation* undermined *The Liepaya* and is currently precedence, but the issue has not been subject to Court of Appeals-review. Moreover, *The Great Creation*'s ratio invokes principles for drawing non-breach scenarios, rather than a particular charter construction. The argument on which the outcome relies therefore sorts under the law on remedies. Absent specific agreement, Norwegian law governs the parties' remedies irrespective of the contract's origin.[32] *The Great Creation* will therefore not be considered authoritative in a Norwegian law perspective.[33]

When the thesis later on discusses the binding effect of notice, similar reservations apply to giving effect to English decisions insofar as they turn on English doctrines on formation of legal dispositions. Due to the requirement of consideration, English law will not consider a redelivery notice a contractual promise but may ascribe to it the effect of promissory estoppel on the criteria of that doctrine. For this and other reasons, the relevant English authority *The Zenovia* is not considered instructive.[34]

Harmony between different jurisdictions and other equitable concerns offer a more flexible justification for paying attention to international legal opinions. Kurt Grönfors proposes to give effect to this concern by employing a retrospective international adjustment of the domestic interpretive result.[35] In context of this

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28 Haaskjold (2013), p. 417. The standard form's 'trykknappseffekter' per Krüger (1989), p. 519.

29 Haaskjold (2013), p. 423. Krüger (1989) on pp. 886–887

30 Krüger (1989), pp. 886–887. Solvang (2007), p.151. Selvig (1986), pp. 24–25. Krüger contends that it is unfortunate if an English law standard form is subject to differential interpretation depending merely on the happenstance of where a dispute arises. But the issue of *governing law* will typically not turn on passive forum selection rules. Since the charter's default law is English, for Norwegian law to govern usually entails an active choice.

31 Selvig (1986), p. 24.

32 Selvig (1986), p. 26.

33 Whether its argument nonetheless is persuasive under Norwegian law will be discussed in ch. 4.3.

34 See ch. 5.2.2.

35 Grönfors (1989), p. 52.

thesis, it justifies having an eye towards *common* points of construction among international authorities. In that regard, English court cases carry more weight than American arbitrations.[36] Occasionally, the idea of harmony is stronger than its reality. As Solvang points out, there are also differences between American and English maritime law.[37] Bearing that in mind, one ought perhaps not worry too much about certain distinct Norwegian/Scandinavian rules in the charter law. There may as well be equity in giving parties a meaningful choice of law.

Looking beyond doctrine, foreign cases provide illustration material and lines of reasoning that are useful food for thought and analysis. This becomes especially valuable when the Norwegian case material is as sparse as it is. To that end, the thesis relies substantially on foreign case material. This international outlook is in line with tradition in Scandinavian maritime law.

2.3 Why loss perspective?

The issue at hand is whether the owner's relevant losses are those caused by notice arriving X days late, or those caused by redelivery occurring X days early. We refer to these as alternative loss perspectives because they determine the direction to look for potential losses. Unlike a *causal chain*, a loss perspective does not set out to describe reality; it is a normative device that provides a setup for the causal inquiry. Loss perspective is therefore conceptually equivalent with *causal perspective*.[38] It is thought beneficial to frame the research question in this way because it puts the disputed matter into its appropriate context i.e., measurement of damages. Secondly, it provides a neutral framework for analysis i.e., it does not presume or tend towards any outcome. *Any* measure of damages operates with a loss perspective.

Alternatively, one could treat it as a matter of understanding where the 'gravamen of the breach lies', as it is said in e.g., Carver on Charterparties.[39] It is certainly not incorrect to ask the question in this way, but it is not preferred here. While the relevant losses are those *caused by the breach* – meaning a breach analysis and a loss perspective analysis is closely related – to identify the breach is not always sufficient to identify the correct loss perspective.

Even when one has fully understood the breach, the contractual norm may be of such a character that it does not follow logically what ought to be considered correct performance for the purpose of measuring damages. This may be the case when the contractual norm has still unresolved freedom degrees, a wiggle room. A classic example is where a party to a sales contract may choose the final quantum to be delivered within a range and default occurs prior to the exercise of said option. To determine the applicable loss perspective then requires the application of norms in addition to interpretation of the primary contractual rule. The bigger point is that legal controversies may arise in the process of defining 'correct performance' for the purpose of measuring damages.[40] Another reason to

36 There are concerns with giving weight to American arbitrations, see Solvang (2009), p. 120. The available decisions are many, but often divergent and lack instruction from above as parties are effectively barred from appealing.

37 Solvang (2009), pp. 96–101.

38 The term loss perspective is preferred to avoid invoking the dichotomy between the two causal perspectives that may generally be applied in the measure of damages i.e., the positive and negative interest of contract. The discussion here is narrower and occurs within the framework of the positive interest.

39 *Supra* note 2.

40 Falkanger (1965), p. 173: "Both scenarios can be difficult to ascertain in context of damages, not only because of evidentiary issues, but also because difficult legal questions may arise" (translated).

extend analysis to include measurement principles is the existing discourse on the research problem, which relies in part on the application of such principles.[41]

2.4 Remaining layout

The main body of the thesis consists of three chapters. Chapters 3–4 seek together to answer the research question as it pertains to the 1B short notice situation, whereas Chapter 5 centres on the 1A scenario where the charterer redelivers in contravention of that which was positively communicated by way of notice.

Chapter 3 interprets the redelivery notice obligation i.e., what is required of a redelivery notice and what a notice *does* within the normative framework of the time charter. Building on the previous conclusions, chapter 4 discusses and puts forth the thesis position on the correct loss perspective in context of damages. Chapter 3's perspective can be said to be negative in the sense that it is tailored for the effect of a 1B short or missing notice i.e., when notice transparently is insufficient.

In contrast, chapter 5 is based on a positive perspective in the sense that it examines whether the charterer is in some way bound by that which is positively communicated in a notice. There is a functional comparison between the perspectives applied in chapters 3 and 5 and the contract law concepts of *failure to inform* (*misligholdt opplysningsplikt*) and *information risk* (*opplysningsrisiko*), respectively. It can be regarded as a question of its own – even if the obligation to notify is merely an obligation to inform with no pre-defined pull on other contractual rules – whether one is still bound in some way by the information that one does give. There is of course an element in charter construction in this exercise as well, since any such binding effect can only be understood in light of the contractual obligation to which a notice responds.

41 I.e., *The Great Creation*.

3 Time charter construction

3.1 Introduction

In this chapter, we will construe the redelivery notice obligation with emphasis on what is required of notification (3.2.), what a notice does in the normative framework of the charter (3.3) and whether the obligation requires a result or merely an effort of some standard (3.4).

3.2 Proper notice's criteria

3.2.1 Introduction

The English noun notice was borrowed from Old French and derives originally from the latin verb *gnoscere* meaning "come to know, to get to know".[42] According to the Oxford English Dictionary, a notice is a "notification or warning of something, especially to allow preparations to be made." The term notice may refer to both concrete and abstract concepts. On one hand, it may reference the specific message. On the other hand, notice may invoke the amount of time from notification until the event i.e., notice time. The phrase *on short notice* is an example of such use, conveying that something occurred with little time to prepare.

From a drafting point of view, the terminological ambiguity may present a challenge, as one may want to have requirements that pertain to the specific communication, for instance that it be written and what information it must and may contain, but also requirements that pertain to abstract notice time. In the following, we will attempt to show how the various formulations achieve these effects.

3.2.2 The redelivery notice clauses

The modern rule on redelivery notices was originally introduced in Clause 7 Baltime 1909.[43] In the latest Baltime edition, it reads as follows:

> the Charterers shall give the Owners not less than ten days' notice at which port and on about which day the Vessel will be redelivered.[44]

The scope of information to be provided is defined with reference to both the place and time of redelivery. There is an 'about' qualifier concerning the time of redelivery that may be understood as a permissive norm, allowing the charterer to qualify his communication with some flexibility. If one accepts that view, the effect of the about qualifier is to give the charterer some leeway as to how accurate notice must be. When the charterer is permitted to say that redelivery will occur on about 11 January and assuming the qualifier permits at minimum a 1-day margin of error, it makes it so that there is no mismatch between notice and redelivery if the latter occurs on 12 January. If, however, that same notice takes effect on 1 January and redelivery occurs on 10 January, while still within the margin of error, the charterer will technically be in breach having given only nine days' notice, whereas the clause requires not less than ten days' notice.[45] For error to occasionally be permitted in one direction only is perhaps an oddity, but the

42 Etymonline.com/word/notice

43 *Supra* note 8.

44 Clause 7 Baltime 1939 (2001 revision). The formulation is essentially identical to Baltime 1909 with the exception that the original version required written notice. It is otherwise common to ask for written notice, cf. e.g., clause 55 NYPE 2015.

45 Any such breach will likely be inconsequential.

drafters may have considered that the charterer had every opportunity to avoid that disparity by planning for longer notice e.g., 12 days rather than ten.

In NYPE 2015 the redelivery notice clause follows a slightly different tableau. Clause 4 (b) requires that the "Charterers serve the Owners with ___ days' approximate and ___ days' definite notices of the vessel's redelivery". Let us assume that two NYPE parties have agreed on ten days' approximate notice. Like in Baltime, there is flexibility here achieved with the term 'approximate'. Unlike in Baltime, the flexibility appears to extend not only to the accuracy of notice, but to the amount of notice time as well.[46] If the charterer issues an approximate notice on 1 January indicating redelivery on 11 January, following which the charterer redelivers on 10 January, the NYPE charterer is unlike the Baltime charterer not in breach.

It is common to refer to a redelivery notice requiring notice time, as we have done above.[47] We may define notice time as the amount of time that accrues between notice taking effect and until redelivery occurs. In the Baltime formulation, a notice time criterion emanates naturally from the text. The apostrophe linking the time parameter to the notice i.e., *ten days' notice* hints at an abstract and temporal quality. It is unnatural to say that the owners received ten days' notice only because the specific communication purported to be of that length, if the vessel was in fact redelivered on the day after receipt of the communication. The distinction drawn here is between 'ten days' notice', which by definition requires ten days of notice time, and *a ten-day notice*. The difference is that it is linguistically correct to refer to a tentative, purported, inaccurate or proforma ten-day notice as such even when it is not followed by ten days of notice time.

In some of the redelivery notice iterations, it is less easy to read into the wording a notice time criterion. One may observe that pursuant to NYPE 2015, the charterers are to *serve* the owners with approximate and final *notices.* The verb *serve* and the reference to notices in plural indicate that the clause describes the specific communications and what is required of them. The same can be said for when an amended clause requires a whole series of notices on the form "on redelivery charterer to tender 20/15/10/7 days approximate notice and 5/3/2/1 days definite notice".[48]

The question is whether this has material implications. It would be drastic to abandon the concept of notice time – or something that works essentially the same way – only because the clause describes the specific notices. Especially as the shift in formulation from Baltime is minor and follows naturally when the clause requires more than one notice. It is not a stretch to consider it inherent in a 20-day notice that it must – in order to be proper – be issued 20 days prior to redelivery. Alternatively, one can simply say that it is an implied requirement that a __-day notice is sufficiently accurate. The conclusion is therefore that it essentially does not matter whether the clause requires 15 days of notice time, or a 15-day notice.[49]

When, exactly, does notice time start to accrue? In this context, the notice functions as a *påbud* since it invokes the charterer's right to avoid breach through observation of notice time. Consequently, notice takes effect at the time it reaches the recipient, but it does not depend on the recipient's knowledge.[50] For non-

46 See also [2015] Lloyd's rep 315. Though Cooke J. ultimately disagreed on the loss perspective, he agreed with the arbitrators that 20 days' approximate notice was flexible enough to in effect require 18 days' notice time, cf. para 30 on p. 321.

47 See e.g., Michelet (1997), p. 201: 'notistiden'.

48 [2015] Lloyd's rep 315. When a provision requires more than one notice, the first notice will often be the most important.

49 Whilst keeping in mind that how the permitted flexibility is formulated may still cause minor material discrepancies as explained above with respect to the Baltime and NYPE formulations.

50 Pursuant to *den avtalerettslige påbudsregel,* cf. Hov and Høgberg (2009), p. 109. The rule is consistent with clause 55 NYPE 2015.

instantaneous communications such as mail and e-mail, this occurs when notice reaches the owner's mailbox or inbox without regard to the owner's knowledge of its content. Notice taking effect and commencement of 'notice time' need not occur simultaneously.Parties may for example agree that measure of time does not commence outside of the owner's business hours. In the absence of express regulation and considering the global nature of the shipping markets, the general rule is taken to be that commencement of notice time coincides with notice taking effect.

3.3 Redelivery notice – an obligation to inform, or a mechanism for redelivery?

3.3.1 Initial reflections

To understand the legal effect of a short notice, it is necessary to determine what a redelivery notice *does*. How does the rule of notice fit in the normative framework of the time charter? What is its role in the redelivery scheme?

Looking at the landscape of contractual notices, two main classes emerge. We can distinguish between rules that ask for notice for the sake of notice so that it operates as a standalone obligation, and rules pursuant to which notice has a pre-defined legal effect outside of itself. The Norwegian EPC standard NTK 15 provides a good example as it contains notice rules of both kinds. There are a number of events and conditions that are the company's risk, but upon discovery of which the contractor must notify the company, for example of an added regulatory burden pursuant to Art. 5.1 or intrusive behaviour from the company's representative pursuant to Art. 3.3. These notice duties have an effect beyond themselves, as the notification preserves the contractor's right to be indemnified through a variation order.[51] Differently put, absence of timely notice extinguishes that right. But the contractor also has a general duty pursuant to Art. 11.1 to notify the company whenever he has reason to believe that work will fail to progress as planned, whatever the reason for delay. A notice pursuant to Art 11.1 has no effect beyond fulfilment of that obligation to notify.[52] If the contractor does not comply, the company may under the circumstances claim damages for losses incurred due to the lack of notice i.e., similar to Jantzen's conception of a short redelivery notice, but it does not otherwise affect the contractor's primary rights and obligations.[53]

There is one duty to inform that is perhaps best understood as sui generis – the real debitor's pre-contractual duty of disclosure. When the real debitor neglects to give information about essential aspects of the performance that the creditor had good reason to expect, that neglect will transform the material requirements of performance so that it answers to the creditor's mistaken expectations.[54] Like in the short notice situation, the information is negatively flawed i.e., there is too little of it compared to what the norm requires. One could envision this rule as a solution model for the short notice situation, in the sense that the owner prior to receipt of short notice may have had an expectation for the vessel to be redelivered later pursuant to proper notice.[55] The pre-contractual duty of disclosure is, however, not a liable analogy. It is based on a standard of honesty and good faith, as these values are greatly at play in the exchange of information prior to property

51 Kaasen (2018), pp. 272–273.

52 Kaasen (2018), p. 272.

53 But may coincide with neglect of one of the particular notice duties.

54 See e.g., Sales of Goods Act § 19 (1) and Real Property Sale Act § 3-7. The duty is a general principle that also applies outside the statutory context, cf. Hagstrøm (2011), p. 148.

55 So that if there is a ~15-day notice requirement, the owner may prior to receipt of notice expect redelivery to occur at minimum ~15 days into the future.

changing hands.[56] A notice of redelivery occurs in contractu and is not subject to potential abuse in a comparable manner. While not a realistic fit for the short notice situation, the pre-contractual duty is mentioned here to round off a sketch of the various ways in which duties to inform work in contractual settings.

We proceed to characterize what a redelivery notice rule may look like depending on which of the two main classes of notice rules it belongs to. In the first alternative, the rule does nothing more than lay down a narrow obligation to inform ahead of redelivery. Understood in this limited way, the rule on notice does not regulate the lawful time of redelivery. It is a standalone obligation that asks for notice only for the sake of notice. While it is redelivery that lets us ascertain breach, it does so only because it provides us with the factual input to conclude that there was a prior information deficiency, and not because there was fault in the timing of the redelivery per se.

In the second alternative, notice acts as the key that eventually opens the window for lawful redelivery. The obvious analogy is to notices of terminations in e.g., tenancies and employment agreements, wherein to issue notice is the act that initiates cessation of contract pursuant to a pre-defined procedure. If a notice of redelivery is to be understood correspondingly, it regulates the lawful time of redelivery in a layer above the charter period regulation.

Were one to ascribe to a notice of redelivery the same effect as *notice* in e.g., tenancies, it would entail that redelivery could not – with respect to its timing – lawfully occur prior to the end of a notice period of pre-determined length commencing from the owner's receipt of notice, no matter what it ostensibly communicated. If so, one could confidently assert that any redelivery prior to the full observation of notice time would be a breach *in the timing of the redelivery*, thereby answering the research question pertaining to the correct measure of damages. It is therefore pivotal to examine whether the time charter notice provision regulates the lawful time of redelivery in a comparable fashion.

3.3.2 Finite versus non-finite contracts

Provisions for *notice* to initiate cessation are especially relevant in non-finite contracts, as tenancies and employment agreements often are. When the contract period is not set in advance, it is sensible to have a procedure that considers the other party's expectation of continued performance *as well as* interest in preparing for what lies ahead after cessation. Commonly, there will be a pre-defined notice period between the notice and lawful cessation defined by the terms of the agreement or by default or mandatory background law. The Norwegian Tenancy Act § 9-6 provides a default period of 3 months commencing on the 1st day of the month following notice. Similarly, the Working Environment Act § 15-3 provides various default and partially mandatory rules on the length of such periods. Outside of the statutory context, it is probably a general principle that *non-finite* service and lease agreements can be terminated, when they so can, only after a period of reasonable notice (absent agreement to the contrary).

Time charters are finite i.e., they regulate in advance the duration of the parties' obligations to perform, commencing with delivery and ceasing with redelivery. Whether the charter is *flat*, *about* or contains express wide margins, the parameter for redelivery is pre-agreed. There is therefore no inherent need to provide for another legal mechanism to regulate the lawful window of redelivery. The observation hints to a more limited role pertaining narrowly to an obligation to inform. Nevertheless, parties may of course agree on an additional rule layer, wherein notice takes part in addition to the charter period regulation. Whether that is the case, is a matter of construction.

56 In Norwegian jurisprudence, the understanding of the duty as a standard of honesty is underlined by its close association with the Formation of Agreements Act § 33.

3.3.3 The textual basis

It is said that one is to interpret commercial contracts objectively.[57] This essentially means that one looks to what a reasonable person would infer from the agreement in its relevant context.[58] In that regard, the letter of the relevant provision is a principal determinant.[59]

Neither Clause 7 Baltime nor its relatives describe in express terms that notice acts as a procedural key. It does not expressly regulate anything other than the giving of notice itself. Contrast with Supplytime's clause on the charterer's discretionary right to terminate early:[60]

> The Charterers may terminate this Charter Party at any time by giving the Owners written notice of termination as stated in Box 14, upon expiry of which this Charter Party will terminate.[61]

The desired legal effect is achieved only *through* issuing notice, and it does not materialize prior to the expiry of the pre-defined notice period. It lays down a procedure for cessation. Any redelivery prior to the end of the notice period would not merely violate a right to information, but the timing of the redelivery would itself be premature.

Compare with Supplytime's Clause 2 (d) on redelivery notices:

> Redelivery – (...) The Charterers shall give not less than the number of days' notice in writing of their intention to redeliver the Vessel, as stated in Box 8(ii).[62]

The provision straightforwardly asks for notice without describing it as a key to open a legal window. It appears to ask for notice for notice's sake.

A difference in wording is indicative of a difference in meaning. If one intended for a notice of redelivery to have a function comparable to a notice of termination, it would be straightforward to achieve that effect. The clause could have read: "To redeliver, the charterer must give the Owner ___ days' notice of redelivery, upon expiry of which this Charter Party will cease." Even without the last sub-clause, to pre-condition (lawful) redelivery on observation of notice would go some way in tying notice to the lawfulness of the timing of the redelivery.

The differential analysis given above is only valid for Supplytime, which is a relatively recent and specialized time charter. Outside that context, one cannot as easily draw negative inferences.

Maybe one simply did not think to or consider it necessary to spell out the link between notice and the lawful timing of redelivery. It is probably true as a general matter, that when contextual factors indicate as much, there is a case to be made for drawing analogy to notice as a procedural key, even if the text does not expressly provide for such a mechanism. It may therefore be regarded as unsatisfactory to rule out that alternative without considering other factors. In doing so, one ought to recognize, however, that a rule to that end would alter the de jure charter duration and thereby the extent of the main contractual obligations of the parties. An interpretation along those lines should therefore be well justified when the text does not speak in its favour.

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57 Unless there are grounds to use the 'inter-subjective' approach, but this is not relevant in a general exposition like here.

58 Tørum (2019), pp. 23–24.

59 See e.g., rt. 2002 p. 1155 *Hansa Borg*.

60 Offshore forms come with an option to provide the charterer with a discretionary right to terminate early, which otherwise tends not to be a feature of time charters.

61 Supplytime 2017 Cl. 34 (a).

62 Supplytime 2017 Cl. 2 (d).

3.3.4 The contractual scheme

The objective approach does not entail construing meaning narrowly from the wording alone.[63] It is a common-sense approach where one must pay regard to both textual and contextual factors. One such factor that is especially relevant here is the scheme of the contract i.e., its internal context. When there is a comprehensive agreed document, there is a strong common-sense presumption that the contract makes a coherent whole.[64]

In that regard, one may observe that a procedural interpretation does not easily fit with *flat* charters, wherein the pre-agreed cessation is in principle set to fall on a specific day. Outside the limited right to overlap, there is little space for an additional rule on the lawful time of redelivery. If the ship is redelivered on short notice prior to the day of expiry – so-called underlap –, a claim for missing charter hire will be based on the minimum charter period.[65] If the notice time extends beyond the day of expiry, one would be pressed for an answer. Under what circumstances, if any, can a short notice lead to an owner's claim for hire *beyond* the pre-agreed day of cessation?

When the notice obligation was introduced in Baltime 1909, flat forms were standard. The original Baltime was drafted through and through to operate as a flat charter.[66] It seems close to inconceivable that the drafters would intend for a notice rule comparable in function to notices in tenancies without regulating in detail how this rule interoperates with the charter's pre-agreed day of expiry. This can likely be ruled out.

The modern trade favours express wide margins for the legal certainty they offer. And when there is e.g., a two-month window of redelivery, the contractual scheme does not *stand in the way* for notice to function as a procedural mechanism. However, the express wide margin charter would face a contradiction of its own. When the formulation, as it typically does in its modern iteration, asks for e.g., 15 days' approximate notice, the period in-between notice and lawful redelivery is defined with reference to an *approximate* number of days. This imprecise measure of time precisely lends itself to the kind of legal uncertainty that express wide margins are designed to avoid. What is more, when a provision requires an approximate and a definite notice as is common in modern charters, one would expect specific rules on how the two notices interoperate if they did in fact take part in a procedure for cessation.

In any event, it would be unfortunate if similarly worded clauses could yield one interpretation for flat charters and another entirely when there are express wide margins. When a similarly worded clause is used in related agreed documents like time charters, business common sense suggests that one sticks to one interpretation.[67]

3.3.5 Summary

The textual and contextual factors point in the same direction. It appears, that the clause means what it says, and it asks for notice for the sake of notice. It is narrowly an obligation to inform. International opinion does little to challenge that conclusion. *The Liepaya* based damages on a right to earlier notice, congruent with a pure obligation to inform.[68] Not even *The Great Creation* offers support for

63 Rt. 2010 p. 961. para 44. Tørum (2019), p. 24: 2-029.

64 See especially HR-2016-1447-A paras 43-44 as regards agreed documents.

65 But note that unlike Norwegian and English law, American law recognizes the charterer's right (and duty) to redeliver early without liability if the last voyage's overlap exceeds the underlap, cf. Michelet (1997), p. 171.

66 See Clause 1 on the period and Clause 7's regulation of overlap rights. Jantzen (1909), p. 100.

67 Tørum (2019), p. 141 (4-042).

68 [1999] Lloyd's rep 649 (p. 672).

the mechanical interpretation. While the Judge did indeed hold that the owner in *some cases* were entitled to damages premised on a later redelivery, he would in other cases only have a right to damages based on earlier notice.[69] The procedural interpretation would not permit such variability, as the owner would always be entitled to redelivery at the end of the pre-defined notice period. What remains are the two American arbitrations *Transocean* and *Loreto Compania*. Absent persuasive value, they do not carry enough weight to alter our conclusion.[70]

Accordingly, we will prima facie infer that in case of short notice, the owner may only claim as damages his disposition losses from not having been given earlier notice – the Jantzen approach. When the breach lies in the information rather than the timing of the redelivery, damages rectify the owner's predicament by altering the information. One may perceive it as redelivery controlling when notice ought to have been given, rather than the other way around. In chapter 4 we will look closer at how measurement principles apply to this situation given our interpretation of the contract and examine whether there are viable counterarguments to our initial inference. But first, we will look at one more aspect of the content of the obligation to inform.

3.4 Content of the obligation – result or effort?

3.4.1 Introduction

When the charterer redelivers on short notice, he will often be able to say that the underlying reason for the shortcoming was an unforeseen event or delay necessitating a sudden change of plan i.e., there was no longer time to employ the ship – at least not desirably – on another voyage within the timeframe of the charter, as became the case for the charterer in *The Great Creation*.[71] On account of everything that can go wrong in unexpected ways either at sea or in and around ports,[72] the charterer may want to argue that it is unreasonable to require of him to predict the unpredictable. Is it not sufficient that he attempted to comply with all the diligence that can reasonably be expected?

The question is – does the obligation require a result or merely an effort of some quality?[73] If the charterer promised a result e.g., to issue notice approximately 15 days ahead of redelivery, it is sufficient to observe that he was not able to deliver on this promise to ascertain breach of contract i.e., the obligation is objective. On the other hand, if he only needed to apply an effort of some standard, he may be compliant if non-achievement was excusable under the relevant standard.[74] *Resultatforpliktelser* and *innsatsforpliktelser* as they are pronounced in Norwegian terminology are merely labels given to interpretive results. Whether the requirement is one or the other (or a combination) is informed by ordinary interpretation. There have, however, been attempts to develop guidelines to assist in doubtful cases.[75] In the question at hand, the relevant factors can be summarized as the wording of the provisions on the one hand and the risk and difficulty associated with the charterer's compliance on the other.

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69 [2015] Lloyd's rep 315.

70 The decisions do not discuss the issue in any detail.

71 Not to invoke associations to the doctrine of broken assumptions.

72 Pursuant to the off-hire rule, the charterer typically bears the remuneration risk for loading operations, piloting, tugging and bad weather during the voyage.

73 Hagstrøm (2011), pp, 126-130. Lilleholt (2017), p. 137. UNIDROIT principles, cf. art. 5.1.4.

74 I.e., excusable already at the breach of contract-stage of analysis. Whether there is basis for liability in damages is formally a separate question.

75 See UNIDROIT principles art. 5.1.5, cf. Hagstrøm (2011), pp. 128-129.

3.4.2 The obligation to inform is objective

When NYPE 2015 requires of the charterer to "serve '__ days' approximate notice", it describes a result and not merely an effort. The 'approximate' qualifier does not alter that impression. It merely helps to define the required result with some wiggle room. Baltime is even clearer in demanding "no less than ten days' notice". One can contrast these formulations with an indicated uncertainty as to whether the result should be achieved.[76] Textual principles therefore indicate that the charterer is obliged to achieve a positive result i.e., to give notice at the requisite time ahead of redelivery.

We may suspend our conclusion on account of the fact that notice duties universally *tend* to be obligations of effort. Consider for example NTK Article 6.3, which puts on the contractor a duty to examine and notify the company of errors and discrepancies in company supplied materials.[77] While he is required to notify of such errors actually discovered, he is not required to notify of errors that he did not discover and *should not* have discovered. Likewise, the realdebitor's pre-contractual duty of disclosure involves a standard of honesty and diligence.[78] The same holds true when loyalty in contract – inherently a subjective norm – requires notification.[79] This comports with an understanding that notice duties generally are duties of care – concerned with sanctioning and incentivizing a standard of behaviour inter partes. The legislative justification may be to promote honesty and fair practice, but it is also *efficient* for contracting parties to share at low-cost information that is valuable to the other. Both of these justifications fall short in rationalizing risk allocation on a strictly objective basis.

What is typical, however, carries less weight when specific indicators – the wording in particular – is clear. The parties are of course free to allocate risk in a way that deviates from the typical as part of the bargain struck.[80] The redelivery notice provision presents as a specific and positive regulation thus operating independently of the general duties. When the parties regulate redelivery notices, it entails a positive allocation of risk, and this allocation of risk may follow a different logic than the one that usually applies to notice duties. If the logic that follows from a literal interpretation is plausible and reasonable within the contractual scheme, there is little justification to depart from it.

For the owner, a redelivery notice is crucial. To negotiate follow-on charter terms is potentially complex and time consuming, and the alternative cost of idleness is substantial. As the operator of the ship, the owner will absent unforeseen circumstances often be in a fairly good position to deduce when redelivery will occur. From the owner's point of view, it may therefore be regarded as a regulatory aim of the clause to provide a recourse also when unforeseen events make notification difficult.

A comparison can be made to another risk allocation rule employed within time charters i.e., the off-hire rule. It is important to stress that the off-hire rule concerns the *remuneration risk* (i.e., is hire payment suspended or not) and not the *performance risk* (i.e., is there breach of contract or not), as we are discussing here.[81] The unforeseen events mentioned above may typically be bad weather causing delayed voyages, port side issues like strikes or queues, or problems in the charterer's commercial relations. These are typically all charterer risks pursuant

76 As in rt. 2011 p. 670: 'tar sikte på' (English: 'takes aim at').

77 Kaasen (2018), pp. 188-189.

78 Hagstrøm (2011), pp. 162-165 for a discussion of the level of diligence generally required.

79 E.g., notification of anticipatory breach, cf. Rt. 1938 p. 602; Rt. 1970 p. 1059. On duty of loyalty: Rt. 1988 p. 1078.

80 An example is the client who hires an attorney on outcome oriented 'no cure no pay'-terms, as opposed to the more common professional effort-requirement.

81 Hagstrøm (2011), p. 40 on the terminology.

to the off-hire rule i.e., the ship remains on-hire. While one cannot conflate one type of risk allocation with another, the observation in this regard must be that *it is not inconsistent* with the system of risk division in the contract, that the charterer bears the risk when such unforeseen events make it difficult to notify ahead of redelivery.

In assessing whether it is reasonable to assign to the charterer the objective performance risk, one must also consider the fact that the owner may not refuse redelivery and demand 'specific performance' of the notice obligation. The owner can only claim damages, with the rules and limitations that apply. All things considered, this seems a plausibly balanced arrangement. Consequently, there is insufficient reason to depart from the straightforward reading of the provision.

The charterer's obligation is objective, but it is not unlimited. It follows already from the formal definition of breach, that the debitor does not answer for irregular performances that can be traced to the creditor or circumstances for which he answers.[82] The latter criterion means that the doctrine extends beyond the classical instances of mora creditoris to define an owner's sphere of risk. Whether an event falls into that sphere turns on a concrete assessment–the owner does of course not automatically answer for any and all circumstances to which he is connected.[83] Most evidently, the owner answers for his own breaches of contract (e.g., issues with crewing, hull, and machinery) and it is otherwise often thought that risk follows function.[84]

Consider the following example. The window of redelivery is 1 January–31 January. The charterer plans to complete unloading in port on 14 January, complete loading for a final voyage on 16 January and redeliver on 29 January. After unloading on 14 January, the engine malfunctions and it takes 5 days to repair. There is no longer time to complete the final voyage, and the charterer redelivers on short notice. Since the charterer's predicament can be traced to the engine malfunction, a clear owner risk, it seems likely that the non-performance does not constitute breach and the owner may consequently not claim damages.[85]

82 Hagstrøm (2011), p. 327. Krüger (1989), p. 736: (3).

83 See especially Lilleholt (2017), p. 261.

84 Hagstrøm (2011), p. 333.

85 The answer is not obvious, as the charterer still makes a conscious choice to redeliver on short notice. One will likely have to determine whether it all in all is *reasonable* to ascribe the performance risk to the charterer in such instances, cf. also Lilleholt's (2017) remarks on p. 261. In construction law, creditor risks often yield deadline extensions. The instance here can be seen as the converse situation of a notice time reduction.

4 The applicable loss perspective in the short notice situation (1B)

4.1 Introduction

Consider a charterer that redelivers on a short 3-day notice on 25 January in contravention of a required 20 days' notice. Pursuant to our view of notice as a pure information obligation, we may simply deduce that the owner was objectively entitled to notice on 5 January, and that damages ought to be measured correspondingly as was our prima facie inference. But one may also observe that there are numerous ways in which the charterer could have complied with the notice obligation–he could have postponed redelivery to some future point that lets him notify properly.[86] That hypothetical will often be a more *realistic* scenario, since it does not presume that the charterer can know what may have been unknowable at the time. Why, then, premise damages on the former loss – or causal – perspective rather than the latter?

The question concerns how to conduct the causal inquiry. We are asking losses due to *what*? Since the answer is *breach,* one may think of that inquiry in terms of the economic difference between what actually occurred with a hypothetical *non-breach scenario*. Of course, there is much more to the measure of damages than a descriptive comparison of worlds. It involves numerous judgments and modifications based on rules on mitigation, remoteness and *compensatio*.[87] Due to these complexities, some authors have questioned the utility of a difference approach.[88] To measure damages remains, however, at its core a causal inquiry.[89] The purpose of damages is compensatory; it responds to a breach. To that end, the difference approach is intuitive and in cases of doubt, it provides a structure for the thought.

The critique is helpful in reminding us that a non-breach scenario is only a means to an end. We ought to be acutely aware that when we alter a parameter to create a non-breach scenario, we define and calibrate the setup of the causal inquiry, which is a highly norm bound exercise. If we are reckless, our method may turn into a source of error.

To avoid error, it is held that we must follow the normative reasoning as it flows from the purpose of damages i.e., to compensate for breach of a contractual norm. In other words, the basic premise is to give economic effect to the aggrieved party's contractual right. The non-breach scenario must therefore be set up to give effect to said right, whatever content it may have. If there are any subjective or other limitations that apply, they must follow from an analysis of the contractual right.

Against that backdrop, the thesis will in the following first conclude that our initial inference finds solid ground. Thereafter, the thesis will address the argument put forth by *The Great Creation,* before it moves on to discuss some unusual characteristics of the causal inquiry. Having concluded on the main research question, we will round off by revisiting Michelet's critique.

When we speak of losses caused by breach, *cause* is not to be understood in its strictest sense. When the charterer fails to issue notice in time, the breach is an omission. The causal relationship therefore does not exist in the real world as a physical phenomenon, but rather in a thought experiment. The

86 Granted that there is enough time left on the charter.

87 Hagstrøm (2011), p. 538.

88 See e.g., Hellner (1995), pp. 358-359.

89 Simonsen (1997), p. 302.

legal relevance of that causal perspective is, however, not in doubt.[90] Omissions can be considered characteristic of breaches of contract since they often take the form of non-performance.[91]

4.2 Jantzen's approach has solid footing

Let us first create a context for the discussion by bringing attention to a classical situation known to raise questions of law concerning the calibration of the non-breach scenario: on what basis should we calculate damages, when one of the parties has a non-exercised right to choose the final quantum within a range? The optional range can be explicit, or implicit in language like *circa*. Let us first assume that the party at fault holds the option. Let this be a quarry that agrees to sell to a buyer 80–100 tons gravel, seller's option. What amount of gravel does one calculate damages on when the quarry cancels? Three solutions have been proposed 1) the minimum value as most favourable to the option holder 2) the mean value in the range or 3) the most likely lawful quantum.[92] There is consensus in case law and the literature that the first solution is correct.[93] The quarry only has to answer damages for 80 missing tons. The outcome seems just. The innocent party is, after all, not entitled to more than the minimum level of performance. Still, it is interesting to observe, that as no lawful choice was made by the party at fault, there is an inherent inexactness to the seller's would-be lawful performance.

This feature is noticeable also when we let the *innocent* party hold the non-exercised option. Consider a sales agreement for 1000 tons steel +/- 10% buyer's option, and that the seller unlawfully cancels the agreement prior to the final order. As the market for steel goes up, the buyer claims damages and would naturally want it measured on the high end of the range. Observe that the seller's obligation in this contract is conditional – the exact amount of performance is a function of the other party's choice – and the condition is irrevocably *unknown*. In that situation, it is not logically possible to define compliance in the specific. There is a space of normative inexactness. According to the consensus rule, the buyer does get the top of the range. But one could also defend a level based on what the buyer *most likely* would have opted for – that seems a sensible way to give effect to his *right* to choose, but it is a technically difficult rule and perhaps not as just. The point of all of this is to say that when the condition is unknown, there is at least a theoretical space for equitable arguments concerning the setup of the non-breach scenario.

The time charterer holds option rights concerning the duration of the charter within its lawful range.[94] He chooses when to redeliver within the window of redelivery. The content of the obligation to notify ahead then becomes conditional on the exercise of this option. Before this condition is known, one cannot know the specifics of the required notice performance. When redelivery occurs, however, the condition cements itself into the course of contract between the parties. Pursuant to our construction of the clause, a short notice does not have the gravitas to pull on the lawfulness of the timing of the redelivery. The *fact* of the timing of the redelivery therefore does not constitute breach, and there is no legal basis to alter that parameter in the non-breach scenario. It was the charterer's free choice. The specifics of the owner's right to information must therefore be construed in relation to the redelivery that actually occurred.

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90 Simonsen (1997), pp. 324-325.

91 Hagstrøm (2011), p. 468.

92 Iversen (2000), pp. 122–123.

93 Rt. 1913 p. 849. Rt. 1924 p. 91. Falkanger (1965), p 175 (see also note 13). Rodhe (1956), p. 481 note 3. Iversen (2000), p. 130. ND 1919 p. 88 NSC is often seen as an outlier in preferring the mean value. Its distinguishing feature seems to be that it did not consider the "circa" qualifier to have full normative bite, but viewed it as an evidentiary rule. The distinction thus lay in interpretation of contract.

94 Falkanger et al (2017), p. 512.

Consequently, if redelivery on short notice occurs on 25 January and the charter demands 20 days' notice, the owner's right under the contract was to be given notice on 5 January, and this must be the perspective that applies to the measure of damages. If we assume as will be most common that the charter demands only 20 days' *approximate* notice, a 20-day notice on 7 January would be sufficient when we accept that the qualifier permits a 10% margin of error. Since it is the charterer that is given leeway, we base damages on the option most favourable to him i.e., 7 January pursuant to the consensus rule.

Our conclusion is not swayed by the fact that once short notice has been issued, there is only one way for the charterer to comply with the notice obligation–by issuing new and proper notice and keeping the vessel on hire for redelivery to occur later. The charterer evidently cannot go back in time to issue proper notice. Indeed, if only the owner could refuse redelivery i.e., demand 'specific performance' of the notice obligation, there could be no other result than an extended period of charter hire.[95] As true as that statement is, it is merely descriptive. The owner is as we have ascertained not independently *obliged* to redeliver later; it just happens that extended employment is the only possible way to achieve compliance. It is precisely the real-world consequences of specific performance that explain why parties may at times only claim damages. When that is the case, as here, the owner may only claim losses *caused by the breach* itself, not losses caused by the *choice to not rectify the breach*. That there might be a differential economic effect between damages and would-be specific performance is a feature of the system.

The last point can be illustrated with an example from another area within the law of obligations. Consider a tenant who redelivers an apartment in a state of disrepair for which the tenant is liable. Consider that the owner either accepted redelivery, or that the law is such that the owner could not refuse redelivery. The owner may claim damages for the cost of repair and the loss of rent during the time allocated to such repair. Consider that the rent under the defaulted contract was much higher than the market rate at the time of redelivery. Will the owner be able to recover the higher rent of the contract during the time of repair since the only way in which the tenant could have complied with his obligations was to keep the apartment on hire and perform the reparations himself? The answer is quite clearly no. Loss of rent will have to be measured on market rates.[96] If not, the owner is compensated for more than the breach itself.

A debitor is to be compensated, but not beyond his losses. These two sentences correspond with a positive and negative aspect of causality as a measurement criterion.[97] There can be little doubt that the negative criterion is the more rigid of the two.[98] Were one to answer for more than losses caused by breach of a contractual norm, the measure of damages could be seen to interfere with the parties' autonomy and freedom to contract.[99] In contrast, the threshold is lower for interfering with the positive criterion. It is not always reasonable for the creditor to receive compensation in the full technical sense. The rules on mitigation and foreseeability operate to reduce the amount yielded by a pure causal assess-

95 *Supra* note 1.

96 Wyller (2023) note 751: "Det kan også være leietap ved at *ny utleie* forsinkes…" (emphasis mine). English translation: "there may as well be loss of rent due to delay of *new tenancies*…". Norsk Lovkommentar. Commentary to The Tenancy Act § 10-3.

97 Simonsen (1997), p. 299.

98 *Ibid.*

99 Presuming the parties have not specifically agreed on a remedy departing from background principles. The parties may of course agree on e.g., standardized penalties that potentially exceed actual losses.

ment.[100] If there is some qualified culpability on the debitor's hand, the creditor may stretch the foreseeability criterion, but he cannot claim more than his losses. To avoid overcompensation, it is necessary to align the measure of damages with the interpretation of the primary obligation. As such, there is little room for liberalism or flexibility in the *setup* of the causal inquiry beyond the flexibility that is embedded in the contractual norm itself. On that note, we concur with Jantzen.

This is not to say that there is an impenetrable wall between interpretation of primary obligations and the measure of damages. One may have a view towards available remedies in the process of interpretation both as an equitable concern and as revealing what the parties likely meant with a clause. Still, it is probably correct to uphold the distinction and rigorous method described above, so that these concerns can be properly weighed against the other interpretive factors. This way, one makes sure that the measure of damages is properly anchored in the bargain struck between the parties. In this thesis, we will address the equitable concerns raised by Michelet in ch. 4.5, rather than in ch. 3. This is for ease of presentation. If one is persuaded by Michelet's concerns, one will likely have to account for them in the construction of the primary norms of the charter.

4.3 Addressing *The Great Creation*

The Great Creation held that proper performance of the notice obligation may look different in one instance than another depending on the facts of each case. For the case before the court, it was held that damages ought to be premised on a later redelivery, rather than earlier notice. We will here examine whether the argument has merit when transferred to a Norwegian law context.

The short notice was precipitated by unforeseen delays and disrupted plans. At the time of proper notice in relation to the redelivery that occurred, the charterer had no intention of redelivering about 20 days later as required. Had they given notice at that time, the court reasoned, it would not be given bona fide and on reasonable grounds as required by implied terms.[101] Cooke J thus rejected that damages could be premised on such earlier given notice:

> To posit a "non-breach" situation on the basis that a notice should have been given at a time when it, in itself, would be wrongful and represent a breach or anticipatory breach, would appear contrary to principle.[102]

A first observation is that the good faith duty works in the interest of the owner,[103] yet in *The Great Creation* the charterer was able to rely on that duty as a shield against the owner's claim.[104] The effect of the argument is that the *owner's right* to have notices issued in good faith *limits* the owner's rights in damages. This is a paradox that invites us to question the validity of the argument.

As a point of departure, it is not so, that it can never be relevant whether a required act under the contract appeared reasonable for the debitor at the time. If the obligation in question is merely one of best effort, then the creditor's right is limited to that best effort, and he cannot claim more in damages. There is, however, not much to indicate that the *The Great Creation* construes the notice obligation as one of effort. And if it did, it seems the correct result would be to

100 Occasionally, a creditor can keep an advantage caused by breach without offsetting it against his losses, for example if the advantage was not adequately caused by the breach. One could argue that this gives the creditor a 'windfall'. But even in that case, the creditor cannot measure *losses* beyond that which is caused by breach. It is only a question of how to offset losses and advantages.

101 [2015] Lloyd's rep. 315 (321, para 29).

102 Ibid. (321, para 30).

103 In *The Zenovia*, it was invoked by the court as an effective bar against a hypothesized practice wherein an abusive charterer keeps issuing new notices only to keep their options open, cf. [2009] 2 Lloyd's rep 139 (para 22).

104 It was the owner that asked for damages to be premised on earlier notice.

excuse the charterer for the missing notice time prior to the time when he could reasonably be expected to notify.[105]

If the argument put forward by the Judge is correct in a Norwegian law context, it could cause issue *whenever* there is an outcome obligation, since the duty of loyalty is generally applicable in Norwegian law of contract. Occasionally, what was realistically required to avoid breach of an outcome obligation would have appeared irrational and irresponsible and therefore represent a breach or anticipatory breach of subjective obligations at the time. This is perhaps most poignant in the hidden defect-cases. Consider a vendor that realistically would have had to destroy the contracted goods to discover a hidden defect. An example is the famous bamboo stakes case, cf. rt. 2004 p. 675, wherein a vendor shipped fungus-infected bamboo stakes that ended up destroying a large number of cucumbers. The infection was not visible – it was a hidden defect, and its detection would have required costly and timely investigations. The vendor had no reason at the time to suspect infection. It could be argued, that to initiate investigations with risks of delays in their shipment would represent erratic behaviour absent a reasonable basis for suspicion. None of this can matter.[106] The buyer had a right to receive non-infected stakes, and the buyer was under no obligation to show in a claim for damages that there was a realistic, alternative path to compliance that did not subjectively appear erratic.

We can recall the rationale for using non-breach scenarios and the difference approach. We held in the introduction that their use must correspond with the purpose of damages, which is to provide compensation for breach of a contractual norm. In the short notice situation, there is an infringement of the owner's right to information prior to redelivery. The difference method's scope of inquiry is limited to exploring the consequences of that breach. If there are limitations in the range of contractual positions that the owner can recover, then those limitations must follow from an interpretation of the right. As the damages are not premised on breaches of good faith duties, those norms simply fall outside the scope of inquiry. For that reason, the argument brought forward in *The Great Creation* is not an example to follow for Norwegian arbiters.[107]

4.4 Unusual characteristics of the causal inquiry

4.4.1 Basis of liability

Detailed analysis of basis of liability-issues falls outside the scope of this thesis, but as we will soon see, the culpable act in short notice situations often occurs *after* the owner's *real injury* from the breach of contract.[108] That is peculiar enough to warrant a closer look at whether this implicates the validity of our causal inquiry.

Norwegian law of contract has traditionally held that for liability in damages to arise, there must be negligence or other culpability in addition to breach of contract, unless there are grounds to impose a stricter rule of liability.[109] Over the last 50 years, the landscape has changed. Through statutory enactments the so-called control sphere liability has been given a broad scope. And it is increasingly debated whether it offers a basis for liability outside the statutory context.[110]

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105 This is not a logical necessity. One could interpret the required effort to include keeping the vessel on hire only to comply with the obligation, but if one considers the obligation a subjective one, it would at least merit a discussion of when, if ever, the charterer may be excused.

106 That is, of course, not to say that it cannot matter in the basis of liability-stage of analysis.

107 *Internal critique* of The Great Creation is beyond the scope of this thesis.

108 This a translation of the Norwegian term *realskade* corresponding to the infringement of a protected real interest, whether in torts or contract, see Simonsen (1997), pp. 295–297.

109 Lilleholt (2017), p. 336. Hagstrøm (2011), p. 468. Strict liability with force majeure-exceptions typically applied to generic performances.

110 Lilleholt (2017), p. 347.

In the time charter setting, it is still prudent to assume no stricter liability than negligence, in large part because culpability is the liability model of choice in the Maritime Code.[111] Time charters being subject to freedom of contract, a possible line of argument is that standard forms written with a view to be applied mainly under English law silently incorporate a strict liability rule. That argument will likely not succeed. Any attempt to forego general rules on liability would need express basis.[112]

It will rarely present an issue to show culpability in short notice situations. If the charterer is not negligent by failing to issue notice when he objectively ought to, he will opt to redeliver on short notice in *conscious* breach of contract. The mere fact that the breach is conscious can likely not, however, be seen as constituting *qualified* culpability, in the sense of a gross disregard of the owner's more *central* interests.[113]

4.4.2 The place of culpability in the causal inquiry

When assessing losses in the short notice situation, the causal chain begins when proper notice objectively ought to have been issued, leading to the owner's real injury. The nature of the injury is the owner's lack of information from that time onward, causing his passivity that eventually leads to a financial disposition loss in the time after redelivery, when he could have obtained better employment for the vessel had it not been for the missing notice.

Then, let us incorporate the subjective basis of liability-norm in the analysis. Consider the following practical scenario. There is little over one month left of the charter and the vessel is unloading in port. The charterer plans to utilize the vessel for a month-long voyage after unloading. Then, through no fault of his own, the charterer's vessel becomes heavily delayed in port. So much so that there is not enough time to perform the planned voyage. He decides to redeliver on short notice since the alternative is to keep the vessel on hire without a satisfactory commercial purpose. The culpable act in that instance is that he *chooses* to redeliver on short notice. It therefore occurs sometime after he objectively ought to have sent notice.

As we can see, the owner's real injury transpires before the culpable act. Therefore, the injury and losses cannot be considered as caused by the culpable act. The situation evokes known past losses-problems from other areas of law. An example is when the innocent party wants to recover negotiation costs incurred prior to reaching an invalid agreement, wherein the other party acted culpably. Culpability in relation to invalid agreements sorts as a tort in Norwegian law.[114] In torts as in contract, there must be causality between the breach (*rettsbrudd*) and the losses, and in torts the breach and basis of liability is one and the same. The culpable act therefore constitutes a limiting causal criterion. Unless the culpable reason underlying the invalidity existed prior to the negotiation costs, they will fall outside the traditional scope of the innocent party's right to recover.

In contractual damages, it is breach of contract that constitutes the breach (*rettsbrudd)* and defines the causal perspective. The short notice situation therefore does not have to grapple with the culpable act as a limiting criterion in the causal inquiry. That said, the basis of liability must of course *cover* the breach in contractual damages. *That* criterion is fulfilled as there would have been no breach had the charterer not chosen to redeliver on short notice.

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111 E.g., MC §275 cf. §383 and §384.

112 Falkanger et al (2017), p. 195. Selvig (1986), p. 26. See also cl.12 Baltime 1939 (2001).

113 Hagstrøm (2011), pp. 479-481 on how criminal law's mens rea concepts do not translate directly to contract law.

114 Hov and Høgberg (2009), p. 312. Simonsen (1997), p. 306. It appears a typo when Simonsen writes "blitt båret frem av den alminnelige kontraktsretten". Elsewhere on the same page, he refers to rules in tort ('deliktsretten'), see also p. 332.

4.4.3 The objective norm – breach of contract

Not only does the owner's injury occur before the culpable act, but it is also antecedent to the act that lets us *ascertain* the breach–the redelivery. Rix J. observes that the short-given notice can be considered an anticipatory breach until redelivery occurs:

> If the charterers had relented and given proper notices, any actual breach would have been avoided.[115]

There appears at first sight to be a real problem with our causal inquiry. We have said that the causal inquiry is to be set up to examine the effects of breach of a contractual norm. And we have said that the real injury is the owner's state of information onwards from the time when he objectively ought to be given notice. If breach is to be assessed at redelivery, then how can the preceding injury be caused by it?

The contradiction is, however, only apparent. We must distinguish between the fact of breach itself i.e., missing notice and the fact that as a practical matter lets us determine the breach. The redelivery reveals the prior deficiency. What occurs is an ex-post assessment of breach. Such assessments are neither unknown nor problematic in contract law.[116] The parties are free to agree on a norm with a retroactive element. The short notice-situation illustrates that breach of contract may not always be accurately described as a *natural occurrence,* but it may always be described as a discrepancy between descriptive reality and a normative standard.

In *Transocean v Western Shipping* the arbitrators did not accept an ex-post assessment of breach. It is not clear from the ratio whether the arbitrators' decision follows from a particular construction of the charter norm, or the notion of a general principle concerning breach assessments. In any event, under our interpretation, the point of divergence is the objectively ascertained latest time of proper notice in relation to the redelivery that occurs. In that regard, it makes no difference that the specific short notice may be the first naturally occurring projection of a breach. The formal definition of breach is an objective deviation from fulfilment of a contractual obligation.[117] This is the understanding of breach that our causal inquiry must rely on, as it brings forward the content of the contractual right.

The quote from Rix J. above was made in context of deciding when the duty to mitigate begins, and he concluded that it does not begin prior to when breach becomes ex-post effective i.e., at the time of redelivery. It seems uncertain whether this view on the duty to mitigate can be upheld under Norwegian law. It is clear enough that the owner must or at least ought be aware of the breach, but it is likely sufficient for the breach to be anticipated, cf. Hagstrøm (2011), pp. 582–582. As argued below in chapter 5, a genuine notice will likely have to be considered at least to some extent binding under Norwegian law, so that the charterer cannot at will retract and issue new notices without the owner's approval. Taking that into consideration, the owner will be in a good position to mitigate following a genuine short notice.

4.5 Michelet's critique

4.5.1 Introduction

Having reached a conclusion, we can take a step back to review Michelet's two concerns on the viability of the owner's remedial position under the traditional Jantzen approach. One being that the owner would rarely be able to show a dispo-

115 [1999] Lloyd's rep. 649 (672).

116 Krüger (1989), p. 138. For English law, see [1996] 2 Lloyd's rep 66 (73) *The Nizuuru* concerning the converse situation of a laycan narrowing provision and notice of delivery. Note that the Judge's finding in this regard was entirely obiter, as he had already found that the charterer (unlike the owner in the redelivery situation) had a right of refusal. Quoted in *The Liepaya* [1999] Lloyd's rep 651 (672).

117 *…that cannot be traced to circumstances for which the creditor answers,* cf. Hagstrøm (2011), p. 327.

sition loss, and the other being that even if he did, one could easily claim that said loss would be unforeseeable.[118]

4.5.2 Proving a disposition loss

To be sure, if short notice had transformed into a redelivery obligation, it would be straightforward for the owner to make his case. There would likely also be fewer disagreements, so long as both parties accepted that interpretation. All the same, it may be that Michelet overemphasizes the owner's difficulties. The core challenge for the owner is to show that he would have employed the ship earlier (or otherwise more favourably) if he had received earlier notice. If one approaches that evidentiary question in the same manner as Rix J. did in *The Liepaya*, the difficulty disappears. He accepted without further ado, that the owner was entitled to say, absent evidence to the contrary, that he would use as much time to fix the vessel had he been given earlier notice as he ended up using. Let us consider an example. The owner receives short notice on 12 January prior to redelivery on 15 January. He was entitled to notice 11 days earlier on 1 January. After receiving notice, he starts to work on the next employment, being able to fix the vessel on 30 January, 18 days following notice. If we assume that he would have used the same amount of time to fix the vessel had he been given earlier notice, the vessel would have been fixed 11 days earlier on 19 January. The owner would be able to recover market hire for a duration corresponding to the missing days of notice. This will, however, not always be the case. If in the same example, the owner was able to re-employ the vessel on 23 January, there is only an 8-day window in which the owner could have made better dispositions. So, for the owner to recover all the lost notice time, there must be enough space of idleness following the redelivery.

The owner's disposition loss belongs to a category of losses that by their nature may be difficult to assess. This is because we are really asking what the owner would do, had he been in a different information state–a psychological evidentiary theme that is inherently unavailable. In such instances, one has in the Scandinavian literature proposed to let the causality assessment be informed by more rules-based criteria, rather than the pure descriptive exercise that normally informs a causality assessment.[119] Within this category, however, the short notice situation cannot be considered especially hard. This is because there really is not much one can expect the owner to do with a notice, other than using it to plan the vessel's future employment.

Any such rule of thumb as the one used by Rix J. must be used with caution. The evidentiary assessment is a concrete one, but it seems generally safe to assume that if a professional actor is given more time to take care of his interests, he will use that time productively.

4.5.3 The issue of foreseeability

A creditor cannot recover any and all losses caused by the breach. The causation must be sufficiently adequate. This means that the losses must *be reasonably proximate to the breach; the loss cannot be too remote, derivative, or unforeseeable*.[120] One may ask if the debitor could foresee the loss as reasonably probable on account of what he could be expected to know. One may apply a normalized assessment, asking whether the losses fall within the usual range of outcomes. One may think of it as the scope of the reasonable, commercial risk undertaken by the parties considering the contract's object and purpose.[121] Strict foreseeability is, however, just one element in a holistic assessment. Even a foreseeable loss can be disregar-

118 Michelet (1997), p. 202.

119 Simonsen (1997), p. 325 with further reference.

120 Rt. 1983 p. 205 (p. 212).

121 Hagstrøm (2011), p. 548.

ded if it is too distant and derived in such a way that it is not just and reasonable to ascribe that burden to the debitor.

Disposition losses are often subject to foreseeability-scrutiny. Since they are consequential and depend on the innocent party's *use*, the outcomes may greatly vary with the individual circumstances and opportunities.

As far as disposition losses go, the ones typically suffered by the short notice-owner does not appear to be among the most problematic. This is because the purpose of prior notice transparently and precisely is to give the owner time to prepare for the vessel's further employment. When the owner loses such time to prepare, it is a natural consequence that disposition losses may ensue in the form of a delayed fixture. This type of loss, where there is a delay in the fixture that the owner would otherwise be able to avoid, seems to be in the core of the owner's remedies.

Moving outside of that core, one may be closer to encountering a foreseeability issue. An example is when sudden and dramatic market movements occur in between the time of proper notice and the actual time of notice. Let us for example say, that rates in the long market are 15 000 USD/day at the time of proper notice, while they slump to 11 000 USD / day at the time of actual notice. If the owner fixes the vessel on a 12 month-long time charter on the lower rate, arguing he would have obtained the higher rate on an equally long charter, if only he had received earlier notice, the purported losses would amount to 30*12*4000 ~ 1 440 000 USD. These losses would have to be disregarded as too remote and distant. Market movements are foreseeable, but extreme market movements in a small frame of time present like a chance occurrence. The observation is, that while *fixture delay* is a natural and foreseeable consequence, the question of whether there is a difference in the conditions of trade at the real and hypothetical time is much more random. It must also be regarded as unreasonable to let the time charterer carry losses extending far into the future. The missing time of notice seems like a natural limiter in that regard. When the owner loses 15 days of notice time, he may claim disposition losses as they accrue at least up until the 15 days he has lost, but not much longer. In conclusion, it seems that Michelet's concerns are exaggerated.

5 When redelivery occurs in contravention of notice (1A)

5.1 Introduction

Table 4.

		Actual notice time		
Compli-ance with given notice		**1) Short**	**2) Contractual**	**3) Long**
	A) Early	1A	2A	3A
	B) On time	1B	2B	3B
	C) Late	1C	2C	3C

The issue to be considered in this chapter is *whether* the charterer's positively communicated notice has binding effect and if so, *how* it binds the charterer. When the obligation to notify is an independent obligation to inform as we found in chapter 3, it becomes a nuanced question whether and in what way the owner's reliance on the notice is legally protected.

Pursuant to the research question, the main purpose is to determine whether the 1A owner unlike the 1B owner has grounds to apply the early redelivery-perspective. It is natural to also comment shortly on the owner's remedies when the charterer overstays notice i.e., typically a 3C situation.

5.2 Redelivery notices as legal dispositions

5.2.1 Initial remarks

In one sense, there is no doubt that a redelivery notice has a legal effect i.e., to ensure that the charterer can redeliver in compliance with the notice obligation. What we are interested in here, however, is whether the notice also has promissory effects or is otherwise binding upon the charterer.

Since the notice is unilateral and responds to a contractual obligation to notify, it can only be understood through the lens of the charter. But the effect is not *explicitly* regulated therein.[122] It is therefore not unnatural to seek guidance in the general criteria for legal dispositions adjusted to this context.[123] Even if one considers it an *agreed matter* for notice to be binding, one will have to take account of the specific circumstances. An owner can likely not rely with legal effect on a notice understood to be proforma (i.e., not genuine) any more than a recipient of bad information can rely on it when he knew better.[124]

5.2.2 Is notice binding at all?

The theme underpinning the general criteria for legal dispositions is the recipient's *justified expectation* that the disposition is made with binding effect.[125] When the criteria is applied in its ordinary context i.e., formation of agreements, a central indicator is whether the owner could reasonably infer that the charterer intended for his statement to be binding. As the charterer would have little reason

122 Except NYPE 2015, see below.

123 *Disposisjonskriterier.*

124 Krüger (1989), p. 271: § 13.4 b.

125 See e.g., HR-2017-971-A. Hov and Høgberg (2009), pp. 85-86.

to *want* to bind himself, this approach is not instructive here. A party's justified expectations is a general principle in the Norwegian law of obligations, including in contractu.[126] In that regard, a better indicator is whether the owner has a justified expectation for notice to be binding in light of the contractual obligation from which it derives. The visible purpose of a notice of redelivery is to allow the owner to prepare for the ship's further employment. If notice is not binding, the owner cannot well rely on it without e.g., risking a costly conflict of engagements. The owner is justified in expecting otherwise.

In contrast, *The Zenovia* concluded, that under English law there is no implied term that a redelivery notice is binding on the charterer. The issue was whether the charterer was in his right to retract a 30-day approximate notice after 10 days and issue a new one only because he considered it opportune to squeeze in another voyage in a rising market.[127] When the charterer communicated his renewed intention, the owner had already arranged for the vessel's follow-on employment. The owner decided to withdraw the vessel from service at the conclusion of the original last voyage. For that he was made to pay damages to the charterer.

There are a few reasons why *The Zenovia* is not instructive in a Norwegian law context. First and foremost, it turned on stringent English doctrines on implication of terms and promissory estoppel. As held in the methodological discussion, a Norwegian arbiter of law would be amiss to import points of view that are at odds with – in the sense of being alien to – Norwegian jurisprudence. Secondly, the decision has faced internal criticism, not least from the authors of Time Charters:

> Pending further case law on the point, we respectfully adhere to the view that the gist of a redelivery notice is a statement or promise that there will be no further employment orders under the charter that are inconsistent, when given, with redelivery in accordance with the notice.[128]

The Judge sought to alleviate concerns about potential abuse by pointing out that there is a bona fide requirement to the issuance of notice. Yet, that requirement falls short in preventing a charterer from *subsequently* prioritizing his own interest in disregard of the owner's. When the charterer is permitted to do so, a redelivery notice may effectively become a trap for the owner. Alone the requirement of loyalty in Norwegian law of contract would likely preclude the charterer from such conduct.

It is a case-specific fact that the notice in question was qualified by no less than six reservations, having an impact on the Judge's ability to spell a promissory estoppel out of the notice that was in fact given. Accordingly, even if *The Zenovia* remains good English law, different facts may yield a different outcome.

5.2.3 A redelivery notice is not a promise to redeliver on or about a specific date.

Having concluded that under Norwegian law a redelivery notice is capable of binding the charterer, it remains to determine how. Is the redelivery notice to be treated akin to a promise to redeliver on or around the projected date, or does it have a more limited binding effect? We can observe from the outset that there is a tension between the charterer's employment rights in the charter period, and the owner's interest in building on the notice received. We have to balance both parties' justified expectations.

To illustrate the problem, one may consider a charterer that intends to redeliver when there is one month left of the window of redelivery. Since there will per

126 See e.g., Bjørge and Førland (2007).

127 [2009] 2 Lloyd's rep. 139 (p. 139)

128 Coghlin et al (2014), Ch. 15. 18. See also Semark and Andrews (2009).

notice be a month left of the maximum charter period following redelivery, the owner will presumably fix the vessel on a voyage or time charter *beginning in a timeframe in which the previous charterer by contract has employment rights*. Considering that the charterer has a legitimate interest as well, the proposal is that notice is binding upon the charterer to the extent necessary to secure its purpose, but not further.

If one compares the charterer's employment rights with the owner's justified interest in notice, one sees that the collision truly materializes when the charterer overstays notice. This is the period of time where the owner is justified in planning the vessel's next employment, and this is where the owner risks a potentially costly conflict of engagements. While it may be inconvenient for the owner if the charterer ends up redelivering *prior* to the announced date, it does not undermine the undertaken effort to re-employ the vessel.

The owner may want to say that if he had been given correct notice at an earlier time, he would have been able to re-fix the vessel sooner; that the gap in-between is wasteful, and that the charterer bears the risk. In that regard, the 1A owner may pursue damages to give effect to his *information rights*, similarly to the 1B owner. It is still a short notice situation. But the purpose of the notice clause does not justify treating the 1A owner preferentially by giving him a separate ground, which would effectively push the date of redelivery forward. The conclusion is that a redelivery notice does *not* amount to a promise to redeliver on or around that date. The proposal is that the obligation is negatively oriented and aims to prevent the charterer from overstaying notice.[129] A further question is whether this obligation is objective or subjective i.e., whether there is breach if the charterer overstays notice through no fault of his own such as an unexpected weather delay. Since the obligation is essentially borne by loyalty, it seems best viewed as a subjective obligation.[130]

We have held earlier, that there is a functional similarity between the 1B situation and a *failure to inform* and the 1A situation and *offering incorrect information*. When there is potential for liability in the latter situation, it is labelled *information risk* in Norwegian terminology.[131] In context of the 1A situation, the question would be if the charterer carries the risk for the information offered in the notice. The doctrine of information risk is mainly applied to information given about a performance *prior* to reaching agreement. Krüger goes far, however, in positing a more general information risk doctrine proposing that parties to a contract will often incur some legal risk when it provides information that it knows is valuable to the other party.[132] We will not consider the doctrine directly applicable, but can observe that it offers a better analogy here than the *failure to inform*-doctrine did in chapter 3.[133] This is because the information risk doctrine draws on a wider array of concerns, including risk allocation based on business common sense and pragmatism (i.e., control, prevention and reliance), rather than being narrowly tailored to a standard of honesty. If we explore the analogy, we may first note that there is differentiation in the legal effect of providing incorrect information.[134] The difference can be understood to lie in whether the norm violation was to fail to perform in accordance with the information given,[135] or whether it was to give the wrong information in the first place.[136] The point in this regard is to observe that while information may give rise to a binding legal effect, it does not necessarily entail treating the outlined information as if it also outlines a positive promise on part

129 A further possible support for this conclusion is the about/approximate qualifier typically permitted in a redelivery notice. When the communication is so qualified, it may appear less like a positively oriented promise. It is, however, not considered necessary to draw upon this point, and it is also questionable whether it is decisive, as many contractual promises do contain a wiggle room.

130 The question is probably not overly practical, as the charterer will typically be exempt from damages when there is no fault.

131 *Opplysningsrisiko*. Not to be confused with information liability (*informasjonsansvar*).

132 Krüger (1989), p. 268.

133 *Misligholdt opplysningsplikt.* See ch. 3.3.1.

134 Krüger (1989), p. 296.

135 Common in the sale of goods-context.

136 See e.g., rt. 1930 p. 1462 on wrongly stated size of an agrarian property. Gram (1977), pp. 212–213 for charter law examples.

of the debitor. The question will turn on the creditor's justified expectation and associated equitable concerns. In that regard, our conclusion above is consistent with the information risk doctrine.

5.3 Remedies

5.3.1 1A

Pursuant to our conclusion above, the 1A owner is in the same remedial position as the 1B owner. Consider a charterer that issues a 15-day approximate notice on 15 January only to redeliver on short notice on 20 January. The owner in that instance may claim compensation by way of damages premised on a correctly given earlier notice.

5.3.2 3C

The first question is whether the owner has a right to refuse an order that is incompatible with the already communicated date of redelivery. It is not difficult to agree that the owner is equally within his right to refuse as when the similar question arises in relation to the charter period.[137] This is an important remedy for the owner to ensure that he can rely on notice, as illustrated by the facts of *The Zenovia*. There are many nuances to the question of under what precise circumstances the owner is in his right to withdraw, with respect to the state of loading, where the vessel is and where it is on its way.[138] It is beyond the present scope to discuss these matters, but it seems appropriate to rely on already developed concepts akin to legitimate and illegitimate final voyage orders. This is also the solution in clause 4b NYPE 2015.[139] The clause obliges the charterer to refrain from giving orders incompatible with notice and is probably best understood as a response to *The Zenovia*.

Finally, it can probably be ruled out that the principle in MC § 389 second paragraph applies by analogy to overstays of notice, so that the owner in any case must base his *remuneration* on the charter rate until redelivery. MC § 389 second paragraph corresponds to the concept of additional performance under a contract,[140] where the debitor performs beyond the mutually pre-agreed boundaries. An overstay of notice does not call upon that principle so long as redelivery occurs within the lawful charter period.

137 Michelet (1997), p. 186 in relation to charter period extensions.

138 See in particular the discussion in Michelet (1997), pp. 186–191.

139 NYPE 2015 Explanatory notes, p. 6.

140 Alvik (2014), pp. 242–243.

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Rt. 1913 p. 849

Rt. 1915 p. 881 *Grev Wedel Jarlsberg*

ND 1919 p. 88

Rt. 1924 p. 91

Rt. 1930 p. 1462

Rt. 1938 p. 602

Rt. 1970 p. 1059

Rt. 1983 p. 205

Rt. 1988 p. 1078

Rt. 1991 p. 719

Rt. 2002 p. 1155 *Hansa Borg*

Rt. 2004 p. 675 *Agurkpinnedommen*

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Rt. 2011 p. 670

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Norwegian arbitrations:

ND 1950 p. 398

ND 1952 p. 104 *Mimona*

ND 1952 p. 442 *Hakefjord*

ND 1983 p. 309 *Arica*

Non-Norwegian cases and arbitrations:

[1996] Lloyd's rep vol 2 p. 66. *The Nizuuru*. English Commercial Court.

[1999] Lloyd's rep. p. 649. *The Liepaya.* English Commercial Court.

[2009] Lloyd's rep. vol. 2 p. 139. *The Zenovia.* English Commercial Court.

[2015] Lloyd's rep. p. 315. *The Great Creation.* English Commercial Court.

1970 AMC 1966. Westlaw: 1970 WL 203 697. *Loreto Compania vs Crescent Metals.* American arbitration.

1955 AMC 875. Westlaw: 1954 WL 76 159. *Transocean Shipping v. Western Shipping.* American arbitration.

The law of the sea challenges pertaining to the regulation of navigational rights and freedoms on the Northern Sea Route: Russia's excessive maritime claims

Artjoms Daskevics

Content

Preface

This master thesis marks the culmination of my academic journey in Maritime Law at the University of Oslo, presented in its entirety as it was submitted in December 2023. Current work explores the legal complexities surrounding the Northern Sea Route (NSR) against the backdrop of increased accessibility to Arctic regions, and the evolving dynamics of international shipping.

The NSR, positioned along the Russian Federation's coastline, is gradually becoming a focal point for maritime activities, presenting both opportunities and challenges. The region's changing ice conditions, particularly the substantial decline in sea ice, have transformed the NSR into a potentially viable year-round shipping route between major ports in Asia and Northern Europe. This evolving maritime landscape raises critical questions regarding the legal framework governing the NSR as a whole, and the navigational rights and freedoms of foreign merchant ships in particular, especially in the context of Russia's claims and regulatory practices.

The primary aim of this thesis is to dissect the intricate international and national legal dimensions surrounding the NSR, with a focus on the divergent perspectives presented in Russian and international academic literature. The pivotal issues examined include the interpretation of relevant provisions in the 1982 United Nations Convention on the Law of the Sea (UNCLOS) with a specific emphasis on Coastal State legislative and enforcement jurisdiction, Russia's legal justifications for its authority over the NSR, and the implications of its domestic legislation on international maritime law in general, and the navigational rights and freedoms of foreign merchant ships in particular.

As global shipping companies increasingly look to the NSR as a potentially cost-effective alternative to traditional routes, understanding the legal challenges and uncertainties becomes paramount. The thesis critically evaluates whether Russia's legal position can be justified within the framework of UNCLOS, addressing concerns of excessiveness, discrimination, and compatibility with the needs of international shipping.

I extend my heartfelt gratitude to the University of Oslo for providing the academic environment and resources essential for the successful completion of this thesis. Special acknowledgment is due to my academic supervisor, Alla Pozdnakova, for her invaluable guidance and insights that enriched the research and writing process.

Artjoms Daskevics, January 2024.

1 Introduction

In recent years, the phenomenon of climate change has resulted in increased accessibility to Arctic regions, hence facilitating a range of activities, including commercial shipping.[1] The Central Arctic has experienced lighter ice conditions, specifically due to the rapid decline of sea ice in the Arctic Ocean[2], thus opening the possibility of discussing previously inaccessible sea routes, such as the Northern Sea Route (hereinafter "NSR").

The NSR, situated along the Russian Federation's coastline, is the eastern segment of the Northeast Passage.[3] This maritime route links the European Union countries with the Far East, traversing the coastal regions of the Scandinavian Peninsula, as well as the European and Asian territories of Russia, extending further through the Bering Strait, ultimately reaching the Pacific Ocean.[4] Even though until recently the NSR for the best part of the year was characterised by harsh ice conditions, now it holds a significant potential for development and offers the prospect of year-round shipping between major ports in Asia and Northern Europe.[5]

It is asserted by the fact that in August 2021, the NSR saw its longest period of 88 consecutive days without ice, but the shipping season in 2023 is currently one of the longest on record, further highlighting the trend of prolonged navigability along the NSR.[6] Furthermore, it is worth noting that the NSR has a reduced distance of around 40% (10 instead of 19 days) when compared to the Suez Canal route and a 60% reduction when compared to the alternative route across the African Cape Horn.[7] Thus, the NSR has the potential to generate significant economic advantages for global shipping companies, as it is anticipated that the expenses associated with transporting containerized cargo via the NSR are either comparable to or lower than those incurred through the Suez Canal- reduction in travel time achieved by utilising the NSR can result in cost savings of up to $500,000 per individual voyage.[8]

The NSR's significance for international shipping is highlighted by a recent milestone event: in September 2023, bulk carrier Gingo became the first capsize

1 M. Jacobsson, "What Challenges Lie Ahead for Maritime Law?" in *Maritime Law in Motion* (Cham: Springer International Publishing, 2020), p. 267, accessed September 12, 2023,https://doi.org/10.1007/978-3-030-31749-2_13.

2 National Snow and Ice Data Centre. "Arctic Sea Ice News and Analysis," available on:https://nsidc.org/arcticseaicenews/. Accessed November 2, 2023.

3 T. Pastusiak, "Introduction," in *The Northern Sea Route as a Shipping Lane* (Cham: Springer International Publishing, 2016), pp. 14-19, accessed September 13, 2023,https://doi-org.ezproxy.uio.no/10.1007/978-3-319-41834-6_1.

4 *Ibid.*

5 Björn Gunnarsson and Arild Moe, "Ten Years of International Shipping on the Northern Sea Route: Trends and Challenges," *Arctic Review on Law and Politics* Vol. 12 (2021): pp. 5-6, accessed November 10, 2023,https://doi.org/10.23865/arctic.v12.2614.

6 Bojan Lepic, "Milestones Reached along the Increasingly Busy Northern Sea Route," *Splash247* (September 18, 2023), available on:https://splash247.com/milestones-reached-along-the-increasingly-busy-northern-sea-route/. Accessed October 15, 2023.

7 Jerome Verny and Christophe Grigentin, "Container shipping on the Northern Sea Route," *International Journal of Production Economics* 122 (2009): pp. 107-117, accessed October 16, 2023, https://doi.org/10.1016/j.ijpe.2009.03.018.

8 Den Norske Atlanterhavskomite. *The Northern Sea Route's Role in the System of International Transport Corridors*, p. 3. Available on:https://s3.eu-north-1.amazonaws.com/atlanterhavskomiteen/images/documents/FN-2-2008-The-Northern-Sea Route%E2%80%99s-Role-in-the-System-of-International-Transport-Corridors.pdf. Accessed October 10, 2023.

ship to sail the route.[9] It took the bulker 13 days from Murmansk to China to carry 164,600 tonnes of iron ore concentrate – the largest cargo to cross the NSR.[10]

Against this backdrop, it is crucial to comprehend the intricate international and national legal framework that regulates the NSR, given the diverse viewpoints and approaches in both Russian and international academic literature when it comes to various legal aspects related to the NSR that deserve careful analysis, as outlined below.

The major uncertainty pertaining to the NSR revolves around the divergent understanding of its legal standing within the framework of international maritime law as outlined in the 1982 United Nations Convention on the Law of the Sea[11] (hereinafter "UNCLOS"). In this context, the main focus is on both broad and narrow interpretations, as well as whether or not the relevant UNCLOS provisions apply fully or partially to the water areas of the NSR.

Thus, the primary concern pertains to the international legal perspective of the NSR, which encompasses marine zones with distinct legal statuses, including internal waters, territorial waters, and the exclusive economic zone (hereinafter "EEZ") of Russia as reflected in the relevant Russian legislation governing the NSR.[12] However, while UNCLOS preserves the right of innocent passage in the territorial waters[13] and freedom of navigation in the EEZ and high seas[14], as well as specifies Coastal State jurisdictional powers in each specific maritime zone, Russia considers the NSR as a unified/indivisible transportation route.[15] Irrespective of the maritime zones falling within Russia's sovereignty or jurisdiction, the legal framework governing navigation on the NSR remains consistent along its full extent, pertaining to the permitting process for vessel passage, irrespective of the flag under which they operate.[16]

The legal justification for Russia's authority in this matter is derived from UNCLOS Article 234[17], which grants Russia broader jurisdiction to adopt and enforce laws and regulations within the limits of the EEZ with the aim of environmental protection.[18] Consequently, the second concern pertains to Russia's recognition and execution of its expanded enforcement and legislative authority under Article 234, which surpasses the rights granted to other Coastal States in non-Arctic regions, allowing Russia unilaterally to implement more stringent shipping standards and regulations on the NSR.[19]

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9 Lepic, *supra* note 6.

10 *Ibid.*

11 UN General Assembly, *Convention on the Law of the Sea (UNCLOS)*, Montego Bay, 10 December 1982, *United Nations Treaty Series*, vol. 1833, No. 31363, available on:https://treaties.un.org/doc/Publication/UNTS/Volume%201833/volume-1833-A-31363-English.pdf. Accessed October 5, 2023.

12 FL No. 81-FZ "Merchant Shipping Code of the Russian Federation", dated 30 April 1999, as amended 21 April 2023. Article 5.1 (para. 1). Available on:https://www.consultant.ru/document/cons_doc_LAW_22916/6082a63e586c9895cba9c7b98c7541a106d93efd/.

13 UNCLOS, *supra* note 11, Article 17.

14 *Ibid.*, Article 58, 87.

15 Viatcheslav Gavrilov, "Legal Status of the Northern Sea Route and Legislation of the Russian Federation: A Note," *Ocean Development and International Law* 46 (3) (2015): pp. 256–263, accessed November 1, 2023,https://doi.org/10.1080/00908320.2015.1054746.

16 *Ibid.*

17 UNCLOS, *supra* note 11, Article 234.

18 Susanah Stoessel, Elizabeth Tedsen, Sandra Cavalieri, and Arne Riedel, "Environmental Governance in the Marine Arctic," in *Arctic Marine Governance* (Berlin, Heidelberg: Springer Berlin Heidelberg, 2014), pp. 49-51, accessed September 20, 2023,https://doi-org.ezproxy.uio.no/10.1007/978-3-642-38595-7_3.

19 E.J Molenaar, "Status and Reform of International Arctic Shipping Law," in *Arctic Marine Governance* (Berlin, Heidelberg: Springer Berlin Heidelberg, 2014), pp. 130, 137-140, accessed September 20, 2023, https://doi-org.ezproxy.uio.no/10.1007/978-3-642-38595-7_6.

The final issue to consider is that Russian legal doctrine recognises Russia to exercise authority over the NSR not solely based on international law but rather through a combination of treaty and customary rules of law, as well as the application of national legislation that reflects the intricate history of Arctic exploitation.[20] The Russian legislation demonstrates a form of "creative ambiguity" or "dualistic approach" in its treatment of the NSR, considering it as a historical route falling under complete Russian sovereignty, based on the doctrine of historical internal waters.[21]

The aforementioned issues have sparked discussions regarding the extent to which Russia's legal position concerning the NSR can be definitively considered justified in accordance with the principles of the law of the seas outlined in UNCLOS. Additionally, there are debates surrounding whether Russia's domestic legislation pertaining to the NSR conflicts with international maritime law and can be characterised as excessive, discriminatory, and not tailored to meet the needs of international shipping.

1.1 Research questions

Based on the observations outlined earlier, the master thesis will address the subsequent research questions to conduct a thorough and comprehensive analysis:

1) How does the UNCLOS legal framework address the status and legal regime of maritime zones, and what implications does this have for navigational rights and freedoms?
2) What is the significance and potential ramifications of UNCLOS Article 234 in the context of international maritime law and the regulation of navigational rights and freedoms?
3) Do the jurisdictional entitlements of Russia and the domestic legal framework of the NSR adhere to UNCLOS and Article 234, and does it impact navigational rights and freedoms?
4) To what extent does Russia's claim of historic waters over the NSR align with the criteria established in the South China Sea Arbitration, and what are the impacts of this assessment on Russia's legal standing on the NSR?

1.2 Methodology and Limitations

To examine the research questions, the basic methodological technique employed in this study is doctrinal legal research that involves the utilisation of textual analysis and statutory interpretation. Special attention is paid to general UNCLOS maritime zone delimitation and enforcement provisions, as well as Article 234. Additionally, it entails a focused examination of the Russian legal framework governing the NSR. The objective of this approach is to comprehend the purpose, scope, and significance of certain provisions, employing canons of statutory construction and legal principles as guiding tools for the process of interpretation. Specifically, in the interpretation of UNCLOS, the methodology involves utilizing

20 R. Douglas Brubaker, *The Russian Arctic Straits* (Leiden, The Netherlands: Brill | Nijhoff, 2005), pp. 28-31, accessed September 26, 2023,https://search-ebscohost-com.ezproxy.uio.no/login.aspx?direct=true&db=nlebk&AN=173750&site=ehost-live&scope=site.

21 Tatiana Sorokina and William G. Phalen, "Legal Problems of the Northern Sea Route Exploitation: Brief Analysis of the Legislation of the Russian Federation," in *International Marine Economy* (Leiden, The Netherlands: Brill | Nijhoff, 2017), pp. 104, 114-115, accessed September 24, 2023,https://doi-org.ezproxy.uio.no/10.1163/9789004323445_004.

canons like the "ordinary meaning of terms" rule, "contextual and teleological interpretation", "object and purpose" analysis, etc.[22]

In terms of the interpretational analysis of general maritime zone delimitation provisions, there exists a widespread agreement within the legal community concerning the distinct legislative and enforcement jurisdictional powers, rights, and obligations of Coastal States, as well as unambiguous allocation of navigational rights and freedoms within each particular maritime zone, as stipulated in UNCLOS. When it comes to the Arctic and the application of Article 234, it continues to present challenges in terms of interpretation and understanding. The intricate nature of the Article, the absence of legally binding court rulings that might provide necessary clarifications, and the differing practises among Arctic Coastal States further contribute to the complexity of studying this topic.

When concerning Russian law pertaining to the NSR, the methodology involves literal interpretation of the words in the relevant legal texts, teleological interpretation analysing laws based on their purpose and intent, as well as historical interpretation considering the evolution of certain legal acts.

In terms of Russian legislation regarding the NSR, it can be observed that Russian law is characterised by its "abundance": confusing "ladders of legal acts" that often refer to, elucidate, or modify one another, resulting in a complex framework that poses difficulties in identifying the starting and ending points. Furthermore, the NSR legislative framework can be categorised as an example of dualistic approaches, characterised by the presence of varying terminology in comparable legal acts that often seems to be used without an object or purpose but just for "cosmetic purposes", as well as a constant pattern of shifting perspectives among Russian/Soviet legislators in the course of history.

It is important to acknowledge that access to legal documents related to Russia's legislative framework for the NSR, especially historical data, as well as scholarly publications on this subject, particularly those written by Russian scholars and published in Russian sources, whether in physical or online databases, was found to be limited. The accessibility of a substantial fraction of the documents to the public may have potentially constrained the scope of the analysis.

Equally significant is the utilisation of comparative legal and legal harmony analysis that helps to examine the extent to which Russian domestic law pertaining to the NSR conforms, deviates, or requires alignment with UNCLOS legal framework, with particular focus on the analysis of Russia's jurisdictional powers and navigational rights/freedoms of foreign merchant ships in the Arctic. It is widely recognised that Russia is a signatory to the UNCLOS, so voluntarily consenting to the process of "internationalising" its domestic maritime legislation. The current trend in NSR legislation indicates a growing alignment with international maritime law, if not considering certain nationalistic postures and "creeping jurisdictional" tendencies, as witnessed in Russian legal doctrine. For this purpose, the research touches upon the discussion of how Russia incorporates and harmonises UNCLOS legal norms and principles, as well as how these are enforced within the Russian legal context.

Moreover, case law analysis and testing of legal precedents aim to examine *The Republic of Philippines v. The People's Republic of China* (hereinafter "South China Sea Arbitration")[23]for evaluating Russia's historic waters claim over the NSR. The legal significance of this specific case cannot be overstated, as it stands as the only case in the 21st century that pertains to the matter of historic waters and holds considerable importance in establishing a precedent for future court rulings or

22 United Nations, *Vienna Convention on the Law of Treaties (VCTL)*, Vienna, 23 May 1969, *United Nations Treaty Series*, vol. 1155, p. 331, Article 31, 32. Available on:https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

23 *The Republic of Philippines v. The People's Republic of China* (South China Sea Arbitration), Permanent Court of Arbitration, Award in Case No. 2013–19, 12 July 2016.

arbitration decisions. This is particularly relevant due to the anticipated effects of climate change in the Arctic region and the potential limitations on the applicability of Article 234 to Arctic spaces. In light of these circumstances, Russia may seek to employ the historic waters approach to justify and protect its complete sovereignty over the NSR. Therefore, considering the non-treaty basis of the historic waters doctrine and the lack of a universally accepted definition of historic waters in international law, it is crucial to utilise the standards and criteria specified in the South China Sea Arbitration. Nevertheless, it is important to acknowledge that the assessment of Russia's assertion of historical internal waters claim over the NSR required a considerable amount of subjective analysis and interpretation.

Finally, the theoretical framework of this study is established through a comprehensive review of relevant legal literature pertaining to the determination of the legal status and the analysis of regulation of navigation in the NSR waters. This literature includes works by prominent Russian scholars such as A.N. Vylegzhanin, V.V. Gavrilov, P.A. Gudev, and other authors, as well as contributions from international scholars such as Jan Jakub Solski, Erik Molenaar, Douglas Brubaker, and others. Examination of scholarly works, particularly those authored by scholars from Russia in comparison to their, for example, US or UK counterparts, revealed the presence of intrinsic biases and viewpoints. Evaluating these works for impartiality and independence posed a limitation. Furthermore, a notable lack of available resources pertaining to the topics under investigation, particularly a dearth of legal examination and evaluation of the regulatory framework for prior authorization regime in the NSR, posed a significant limitation as well.

The regulatory framework governing this work is based on international treaties such as UNCLOS, judicial decisions of the Permanent Court of Arbitration and International Court of Justice (hereinafter "ICJ") such as *United Kingdom v. Norway*[24] (hereinafter "Fisheries Case") and *Mauritius v. United Kingdom*[25] (hereinafter "Chagos Arbitration"), as well as Russian domestic legal acts such as 2020 NSR Navigational Rules[26]. Such a methodological approach serves to offer a more comprehensive framework and diverse viewpoints regarding the subjects being examined.

1.3 Thesis structure

The thesis commences by examining the legislative and enforcement jurisdictional powers possessed by Coastal States and proceeds to establish the navigational rights and freedoms assigned by UNCLOS in each specific maritime zone. Subsequently, the third Chapter delves into the interpretation of the specific provisions of UNCLOS Article 234 in relation to the research objectives and provides a comprehensive overview of the Russian legal framework for the NSR. Moreover, Chapter 4 provides an examination of whether additional enforcement and legislative powers are granted to Russia under Article 234, as well as whether the legal framework of the NSR in relation to navigation, particularly focusing on the prior authorization regime, complies with this provision. Additionally, the Chapter explores the possibility of the NSR's legal regime disregarding and not adhering to the navigational rights and freedoms protected by UNCLOS. Chapter 5 examines an alternate customary international law approach based on the doctrine of historic waters, that Russia employs to justify unilateral authority over the NSR and

24 *United Kingdom v. Norway* (Fisheries case), Merits, International Court of Justice Judgment, ICJ Rep 116, ICGJ 196, 18th December 1951.

25 *Mauritius v. United Kingdom* (Chagos Marine Protected Area Arbitration), Permanent Court of Arbitration, Award in Case No. 2011–03, 18 March 2015.

26 Decree of the Government of the Russian Federation No. 1487 "On approval of the Rules of navigation in the waters of the Northern Sea Route", dated 18 September 2020, as amended 1 September 2023. Available on:https://www.consultant.ru/document/cons_doc_LAW_362718/6801bb4b205f6a33dee02718211e57d1b8d3aaf5/#dst100008.

international navigation inside it. This Chapter offers a concise examination of the historical progression of doctrine, followed by an evaluation of Russia's historic waters claim in light of the pertinent criteria delineated in the South China Sea Arbitration. Finally, a conclusion is formulated in Chapter 6.

2 Coastal State jurisdiction as defined by UNCLOS: emphasis on navigational rights and freedoms

2.1 Introductory remarks

The maritime spaces of the World Ocean are conventionally divided into three classifications: maritime zones that are considered an inherent component of the Coastal State territory and fall under their sovereignty (internal waters and territorial sea), maritime zones that are not part of the Coastal State territory but are under their jurisdiction (contiguous zone, EEZ), and maritime zones that are not under the sovereignty or jurisdiction of any state (high seas).[27]

The classification of maritime zones as established by UNCLOS does not include any exceptions for specific regions, including the Arctic.[28] The Arctic Ocean encompasses various categories of maritime spaces, and as such, the Arctic Coastal States hold a substantial role in the regulation of shipping activities within this region.[29] However, these states do not possess a complete monopoly or exclusive rights over the entirety of the Arctic, as non-Arctic states also possess rights and responsibilities there.[30]

For this purpose, UNCLOS aims to establish a delicate equilibrium between the two fundamental principles of maritime law: navigational rights and freedoms and the jurisdiction of Coastal States.[31] However, as will be apparent in the subsequent sections, the establishment of this equilibrium in the Arctic is not as robust as it is in other geographical areas. The issue concerning the jurisdictional boundaries of Coastal States and their potential impact on the infringement of navigational rights and freedoms of other States has been a topic of increasing interest.

2.2 Coastal State jurisdiction in internal waters and navigational rights of foreign merchant ships

Internal waters are part of the water area on the landward side of the baseline of the territorial sea of the Coastal State.[32] As the name suggests, internal waters are waters enclosed within the territory of the Coastal States, where the Coastal States exercise their full sovereign rights as recognised by international law.[33] Full sovereignty implies the supreme power of the Coastal States – independence in external affairs and supremacy in internal affairs.[34]

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27 Brian J. Van Pay, "National Maritime Claims In The Arctic," in *Changes in the Arctic Environment and the Law of the Sea* (Leiden, The Netherlands: Brill | Nijhoff, 2010), pp. 62-65, accessed September 25, 2023,https://doi-org.ezproxy.uio.no/10.1163/ej.9789004177567.i-594.17.

28 Erik J. Molenaar, "The Arctic, the Arctic Council, and the Law of the Sea," in *Governance of Arctic Shipping* (Leiden, The Netherlands: Brill | Nijhoff, 2017), pp. 25, 34-35, accessed September 28, 2023,https://doi-org.ezproxy.uio.no/10.1163/9789004339385_003.

29 Marc Jacobsen and Jeppe Strandsbjerg, "Desecuritization As Displacement of Controversy: Geopolitics, Law and Sovereign Rights in the Arctic," *Politik* 20 (3) (2017): pp. 15-16, 22-23, accessed October 2, 2023,https://doi.org/10.7146/politik.v20i3.97151.

30 Ilulissat Declaration (2008). Arctic Ocean Conference, Ilulissat, Grønland. 27-29 May, available on:https://arcticportal.org/images/stories/pdf/Ilulissat-declaration.pdf. Accessed October 3, 2023.

31 Robert Beckman, "UNCLOS Dispute Settlement Regime and Arctic Legal Issues," in *Challenges of the Changing Arctic* (Leiden, The Netherlands: Brill | Nijhoff, 2016), pp. 583-586, accessed September 30, 2023,https://doi-org.ezproxy.uio.no/10.1163/9789004314252_026.

32 UNCLOS, *supra* note 11, Article 8.

33 E.K. Mbiah, "Coastal, Flag and Port State Jurisdictions: Powers and Other Considerations Under UNCLOS," in *Maritime Law in Motion* (Cham: Springer International Publishing, 2020), p. 497, accessed September 30, 2023,https://doi-org.ezproxy.uio.no/10.1007/978-3-030-31749-2_23.

34 Jacobsen, *supra* note 29, pp. 23-24.

Considering jurisdiction, under public international law it generally refers to the legal competence of Coastal States to affect the conduct of others through prescriptive (regulatory or "law-making") and enforcement measures.[35] Under the UNCLOS framework, prescriptive jurisdiction refers to the authority vested in Coastal States to prescribe laws and regulations pertaining to activities conducted within their marine zones.[36] Thus, Article 2(1) of UNCLOS acknowledges the Coastal State unrestricted legislative competence within internal waters[37] – each state possesses the power to establish conditions for navigation, pilotage, fishing, and other activities that are binding for all domestic and foreign vessels.[38] Respectively, there is no requirement to acknowledge the right of innocent passage of foreign ships and the subsequent navigational freedoms, unless there are specific circumstances that warrant an exception.[39] This implies that foreign vessels can only access the internal waters of the Coastal States upon obtaining their consent, and any state possesses the prerogative to entirely prohibit the entry of foreign vessels into its internal waters.[40]

Enforcement jurisdiction pertains to the power to enforce rules and initiate legal proceedings through adjudication in courts or by the competent administrative bodies of a State.[41] So, the Coastal States may not only prescribe laws but also enforce them by executive or adjudicative means against foreign merchant ships as well as the crew members, passengers, and goods aboard.[42] In instances of non-compliance, the Coastal States retain the prerogative to conduct inspections on vessels operating within their internal waters[43], as well as possess the authority to detain vessels that are found to be in contravention of said laws, and may impose penalties, fines, or sanctions upon the vessels or individuals involved.[44]

Nevertheless, the exercise of jurisdiction in internal waters is not unlimited and is subject to limitations imposed by international law. Coastal States as a corollary, also have a duty not to allow their internal waters to be used for acts impairing the rights of other States[45], as reinforced by the "checks and balances" framework outlined in Article 211(1,3).[46] This framework necessitates that the laws and regulations implemented by Coastal States to protect the environment and prevent pollution from vessels be communicated to competent international maritime organization (hereinafter "IMO") and should align with generally applicable international rules and standards (hereinafter "GAIRAS") enshrined in IMO conventions.[47]

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35 Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Berlin, Heidelberg: Springer Berlin Heidelberg, 2006), pp. 35-40, accessed September 29, 2023,https://doi.org/10.1007/3-540-33192-1.

36 *Ibid.*

37 UNCLOS, *supra* note 11, Article 2(1).

38 The Fridtjof Nansen Institute. *FNI Report 3/2006 on Coastal State Jurisdiction and Vessel Source Pollution*, pp. 15-18. Available on:https://www.fni.no/getfile.php/131705-1469868985/Filer/Publikasjoner/FNI-R0306.pdf. Accessed October 13, 2023.

39 James Kraska , "The Regimes of the Law of the Sea," in *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics (*Oxford Academic, 2011), p. 114, accessed October 1, 2023,https://doi.org/10.1093/acprof:oso/9780199773381.003.0003.

40 *Ibid.*

41 Yang, *supra* note 35.

42 Anne Bardin, "Coastal State's Jurisdiction over Foreign Vessels," *Pace International Law Review* 14 (1) (2002): pp. 30-31, accessed September 20, 2023,https://doi.org/10.58948/2331-3536.1188.

43 UNCLOS, *supra* note 11, Article 220(1), 226, 218.

44 *Ibid.*

45 Yang, *supra* note 35, pp. 47-48.

46 UNCLOS, *supra* note 11, Article 211(1,3).

47 Myron H. Nordquist, Satya N. Nandan, and James Kraska, eds, *UNCLOS 1982 Commentary* (Leiden, The Netherlands: Brill | Nijhoff, 2012), pp. 802, 806, 844-845, accessed October 2, 2023,https://doi-org.ezproxy.uio.no/10.1163/9789004215627.

2.3 Coastal State jurisdiction in territorial waters and navigational rights of foreign merchant ships

The Coastal State sovereignty extends to the territorial waters – the maritime zone beyond their land territory and internal waters to that adjacent belt of sea measured from the baselines to a maximum of 12 nautical miles.[48] Despite significant similarities, there exist notable distinctions between the legal framework governing territorial waters and that of internal waters. This disparity arises from the voluntary concession of sovereignty by Coastal States, who, in the pursuit of international cooperation and facilitation of merchant shipping, have acknowledged the entitlement of foreign vessels to engage in innocent passage through their territorial waters.[49] The legal framework governing the territorial waters is a result of reconciling two distinct principles: the sovereignty of the Coastal State and the navigational rights of all other States.[50] Thus, it would be inaccurate to assert that the Coastal States possess "full sovereignty" to the same extent as in internal waters, as the acknowledgment of the right of innocent passage imposes substantial limitations on the Coastal State jurisdiction over foreign vessels transiting through the territorial sea.[51]

Nevertheless, the right of innocent passage is, on no account, absolute. Rather than being a complete freedom, it can be seen as a residual aspect of the principle of freedom of navigation in the territorial sea.[52] This right must be exercised in accordance with the rules of international law, primarily outlined in UNCLOS, as well as any national laws and regulations established by the Coastal States.[53]

Under UNCLOS Article 18, foreign merchant ships in the territorial waters have a duty to passage "continuously and expeditiously", "without entering internal waters", or "external port facilities", except in the case of certain specified constellations.[54] In addition, foreign merchant ships have obligation when exercising the right of innocent passage, which entails their submission to the legal framework established by the Coastal State.[55] The "broadness of prescriptive jurisdiction" of Coastal States is evident in UNCLOS Article 21, which outlines a comprehensive set of points (a-h) that delineate the areas in which the Coastal States have the authority to establish laws and regulations pertaining to innocent passage.[56]

UNCLOS Articles 21(1)(f) and 211(4) grant the right to Coastal States to prescribe stricter national standards for "the prevention, reduction, and control of marine pollution from foreign vessels" in innocent passage.[57] However, the authority of Coastal States to establish laws and regulations pertaining to environmental protection is not without limitations.[58] UNCLOS provides for two restrictions in that regard: 1) Coastal States have a duty not to hamper the right of innocent passage

48 UNCLOS, *supra* note 11, Article 2,3.

49 UNCLOS, *supra* note 11, Article 17.Kraska, *supra* note 39, pp. 116-117.

50 Henrik Ringbom, eds, *Jurisdiction over Ships* (Leiden, The Netherlands: Brill | Nijhoff, 2015), pp. 174, 177-178, accessed September 4, 2023,https://doi-org.ezproxy.uio.no/10.1163/9789004303508.

51 Mbiah, *supra* note 33, pp. 498-499.

52 Manu Kumar, "Analysis of Innocent Passage in the Territorial Sea under the Law of the Sea Regime 1982," *European Environmental Law Review* 21 (6) (2012): pp. 306–315, accessed October 26, 2023,https://doi.org/10.54648/eelr2012024.

53 Rüdiger Wolfrum, "Freedom Of Navigation: New Challenges," in *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Leiden, The Netherlands: Brill | Nijhoff, 2009), pp. 82-84, accessed October 3, 2023,https://doi-org.ezproxy.uio.no/10.1163/ej.9789004173590.i-624.31.

54 UNCLOS, *supra* note 11, Article 18(1,2).

55 Yang, *supra* note 35, pp. 173-174.UNCLOS, *supra* note 11, Article 21(4).

56 UNCLOS, *supra* note 11, Article 21.

57 *Ibid.,* Article 21(1)(f), 211(4).

58 Wolfrum, *supra* note 53, p. 84.

of foreign ships;[59] 2) laws and regulations giving effect to stricter construction, design, equipment and manning (hereinafter "CDEM") standards are only permitted to the extent they give effect to GAIRAS;[60] The significance of the latter aspect cannot be overstated when it comes to the execution of IMO treaty instruments, and any national regulations that impose stricter prerequisites may potentially contravene the provisions governing innocent passage as stipulated by UNCLOS.[61]

In contrast to the legal framework governing internal waters, which requires the prescriptive jurisdiction of the Coastal State on the management of marine pollution to be subject to oversight by the IMO, such an obligation is absent within internal waters.[62] It seems to deviate from UNCLOS intended objective of granting the Coastal States varying (diminishing) degree of authority to govern navigation for the purpose of preventing ship-source pollution as the ship moves further away from the shore, contingent upon the specific maritime zone in question.[63] Nevertheless, the absence of this provision appears to be counterbalanced by the principle that Coastal State laws shall not impede the right of innocent passage.

For this purpose, UNCLOS offers a "test," which stipulates that hampering innocent passage in territorial waters is permissible only when the actions of the foreign ship align with activities that would render the passage non-innocent as outlined in paragraph 2 of Article 19[64], or when there is a severe violation of the Coastal State laws and regulations as stated in Article 21(1) (a-l)[65]. In practical terms, this suggests that the Coastal States do not possess the unilateral authority to determine whether to allow or deny passage in territorial waters, contrasting to, for example, the lawful implementation of an authorization and permit system that governs the entry of foreign vessels into internal waters.[66]

Speaking about Coastal State enforcement jurisdiction: firstly, if the passage is rendered non-innocent pursuant to one of the criteria outlined in UNCLOS Article 19(2), Coastal State authorities acknowledge their "full scale" enforcement jurisdiction with regard to ships in non-innocent passage[67], thus being empowered to "take the necessary steps", including the possibility to suspend or decline admission, or even exclude the vessel from their territorial waters.[68] For example, in the context of vessel-source pollution, enforcement is allowed only where the ship commits an "act of wilful and serious pollution".[69] The competence of enforcement is generally unrestricted if it adheres to international law and is subject to limitations of proportionality, necessity, prohibition of abuse of rights, and non-discrimination.[70] However, this example implies that the Coastal State's threshold for enforcement is relatively stringent.

Secondly, if the threshold is not met, Coastal State enforcement powers are restricted to conducting physical inspections, initiating legal actions and detaining

59 UNCLOS, *supra* note 11, Article 24(1).

60 Nordquist, eds., *supra* note 47, p. 814.

61 Fabio Spadi, "Navigation in Marine Protected Areas: National and International Law," *Ocean Development and International Law* 31 (3) (2000): pp. 289-291, accessed November 4, 2023, https://doi.org/10.1080/009083200413172.

62 UNCLOS, *supra* note 11, Article 211(4).

63 Nordquist, eds., *supra* note 47, p. 756.

64 UNCLOS, *supra* note 11, Article 19.

65 *Ibid.,* Article 21(1).

66 Spadi, *supra* note 61, pp. 290-291.

67 FNI, *supra* note 38, p. 25.

68 UNCLOS, *supra* note 11, Article 25(1).

69 *Ibid.,* Article 19(2)(h).

70 Yang, *supra* note 35, pp. 184, 196-198.

vessels only when there are "clear grounds of believing" that the vessel has contravened national or international standards on vessel-source pollution.[71]

2.4 Coastal State jurisdiction in EEZ and navigational freedoms of foreign merchant ships

The EEZ is an area beyond and adjacent to the territorial waters that shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial waters is measured.[72] The EEZ is distinct from both the notion of sovereignty prevailing in the territorial and internal waters and the principle of freedom that defines the high seas.[73] Rather, the legal framework governing the EEZ is established by the allocation and equitable distribution of rights between the Coastal State and other states, as outlined in UNCLOS.[74]

The key UNCLOS provisions regarding the sovereign rights, obligations, and jurisdiction of Coastal States in the EEZ are Articles 56 and 58.[75] The first paragraph of Article 56 provides that in the EEZ, the Coastal States have sovereign rights that are primarily aimed at ensuring conditions for conducting economic activities, such as the exploration and exploitation of marine resources (limitation *ratione materiae*).[76] In this context, it is important to differentiate the notion of sovereign rights from territorial sovereignty, which implies complete autonomy and independence. Jurisdictional powers of Coastal States are more limited within the EEZ, as they do not enjoy sovereignty but only certain sovereign rights.

It should be noted that, pursuant to UNCLOS Art. 56(1)(b)(iii), Coastal States have jurisdiction over "protection and preservation of the marine environment".[77] Nevertheless, their prescriptive jurisdiction is limited, as Coastal States are only permitted to enact laws and regulations that comply with GAIRAS and are subject to IMO oversight.[78] This provision guarantees that national legislation will not exceed or contradict international standards.

In line with UNCLOS Article 58 within the EEZ, other States possess freedoms akin to those of the high seas.[79] Nevertheless, free navigation in the EEZ is not a right that a state may exercise without considering the interests of other states (due regard obligation). In essence, it can be inferred that when a state exercises its right to free navigation, it incurs a responsibility towards other states that are also using this right or other lawful freedoms of the seas.[80] Thus, freedom of navigation can be classified as not an absolute under UNCLOS. It is broader in scope than the right of innocent passage in the territorial waters but deemed more conditional than the freedom of navigation in the high seas.[81] In contrast to the high seas, the freedom of navigation in the EEZ can be categorised as subject to the Coastal State jurisdiction.[82]

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71 UNCLOS, *supra* note 11, Article 220(2).

72 *Ibid.,* Article 55, 57.

73 Gemma Andreone, "The Exclusive Economic Zone," in *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press, 2015), pp. 162-166.

74 *Ibid.,* pp. 165-166.

75 UNCLOS, *supra* note 11, Article 56, 58.

76 *Ibid.,* Article 56 .

77 *Ibid.*

78 *Ibid.,* Article 211(5).Nordquist, eds., *supra* note 47, p. 814.

79 UNCLOS, *supra* note 11, Article 58.

80 Thuy Van Tran, *Freedom of Navigation in the Exclusive Economic Zone: An EU Approach* (Cambridge: Cambridge Scholars Publishing, 2022), pp. 2-3.

81 *Ibid.*

82 Yoshifumi Tanaka, "Navigational Rights and Freedoms," in *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press, 2015), p. 554.

In essence, it can be stated that when a merchant ship is lawfully traversing the EEZ and adhering to the laws established by the Coastal States in accordance with UNCLOS Article 56, such as those pertaining to the protection and preservation of the marine environment, it is expected that Coastal States should refrain from impeding or obstructing the exercise of freedom of navigation by requiring notification or seeking permission or consent from the Coastal State.[83] It is argued that the imposition of stringent regulations on navigation within the EEZ for environmental purposes is in direct violation of international law, unless the exception specified in UNCLOS Article 211(6) is applied.[84]

Moreover, Coastal State enforcement jurisdiction within the EEZ is limited. Coastal States are entitled to require information from ships only when "clear grounds"[85] indicate that international or national rules and standards for the prevention, reduction, and control of pollution from vessels have been violated.[86] Physical inspections are only permitted when "clear grounds" indicate that such violations resulted in "a substantial discharge" or threatened "significant pollution of the marine environment"[87], and when the vessel did not provide the Coastal State requested information or the information given "manifestly" differs.[88] Institution of proceedings or detention of vessels is only permitted if "clear objective evidence"[89] shows that such violations caused or threatened to cause "major damage to the coastline or related interests of the Coastal State".[90]

83 Pete Pedrozo, "Maintaining Freedom of Navigation and Overflight in the Exclusive Economic Zone and on the High Seas," *Indonesian Journal of International Law* 17 (4) (2020): pp. 479-480, accessed October 19, 2023,https://doi.org/10.17304/ijil.vol17.4.796.

84 Spadi, *supra* note 61, pp. 296-297.

85 UNCLOS, *supra* note 11, Article 220(3).

86 Ringbom, *supra* note 50, pp. 222-224.

87 UNCLOS, *supra* note 11, Article 220(5).

88 Ringbom, *supra* note 50, pp. 222-224.

89 UNCLOS, *supra* note 11, Article 220(6).

90 Ringbom, *supra* note 50, pp. 222-224.

3 UNCLOS Article 234 as Arctic *lex-specialis*: still susceptible to interpretational complexities?

3.1 Introductory remarks

The Arctic Ocean represents a specific case with unique features from the point of view of legal regulation.[91] It is acknowledged by the fact that UNCLOS includes the only relevant provision, Article 234, specifically applicable to the Artic regions[92], granting the Arctic Coastal States (Russia, Norway, Denmark, USA and Canada[93]) an authority to adopt and enforce special laws and regulations for the prevention, reduction, and control of marine pollution from vessels in ice-covered areas.[94] This article holds significant importance as it serves as a fundamental pillar upon which Arctic Coastal States, such as Russia, rely to assert their jurisdiction and validate their sovereign control over Arctic maritime areas, specifically in the case of Russia's authority over the NSR.[95] Thus, to lay a solid groundwork for future research and gain a comprehensive understanding of the international legal framework pertaining to the NSR, it is imperative to comprehend the fundamental essence and extent of Article 234.

3.2 Scope of UNCLOS Article 234: Interpretation

3.2.1 Due regard to navigation

Article 234 grants Arctic Coastal States a distinctive advantage by conferring upon them the authority to unilaterally establish and enforce more stringent environmental regulations than those prescribed by internationally recognised norms; however, this prerogative is contingent upon the fulfilment of specific conditions.[96] One of such conditions is to have "due regard to navigation"[97], which appears to be one of the few explicit limits on the power granted to the Coastal States. However, what exactly this limitation implies is unclear and entails different interpretations.[98] The primary rationale for this is that Article 234 lacks reference to GAIRAS and IMO, which seems to undermine the crucial aspect of "checks and balances" in relation to Coastal State jurisdiction over navigation, among other matters.[99]

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91 C. Pelaudeix, C. Humrich, eds., "Global Conventions and Regional Cooperation: The Multifaceted Dynamics of Arctic Governance," in *Global Arctic* (Cham: Springer International Publishing, 2022), pp. 447-449, accessed October 5, 2023,https://doi-org.ezproxy.uio.no/10.1007/978-3-030-81253-9_23.

92 Armand de Mestral, "Article 234 of the United Nations Convention on the Law of the Sea: Its Origins and Its Future," in *International Law and Politics of the Arctic Ocean* (Leiden, The Netherlands: Brill | Nijhoff, 2015), pp. 111-113, accessed September 17, 2023,https://doi-org.ezproxy.uio.no/10.1163/9789004284593_006.

93 Ilulissat, *supra* note 30.

94 UNCLOS, *supra* note 11, Article 234.

95 Viatcheslav Gavrilov, Roman Dremliuga, and Rustambek Nurimbetov, "Article 234 of the 1982 United Nations Convention on the Law of the Sea and Reduction of Ice Cover in the Arctic Ocean," *Marine Policy* 106 (103518) (2019): pp. 1-4, accessed October 30, 2023, https://doi.org/10.1016/j.marpol.2019.103518.

96 Alexander Vylegzhanin, Ivan Bunik, Ekaterina Torkunova, and Elena Kienko, "Navigation in the Northern Sea Route: Interaction of Russian and International Applicable Law," *The Polar Journal* 10 (2) (2020): p. 294, accessed October 30, 2023,https://doi.org/10.1080/2154896x.2020.1844404.

97 UNCLOS, *supra* note 11, Article 234.

98 D. M. McRae, D. J. Goundrey, "Environmental Jurisdiction in Arctic Waters: The Extent of Article 234," *Univeristy of British Columbia Law Review* 16, no. 2 (1982): pp. 220-222, accessed October 30, 2023, available on: Hein Online.

99 UNCLOS, *supra* note 11, Article 234.

Interpreting the "due regard" notion literally- in good faith and according to its ordinary meaning[100], Black's Law Dictionary defines it as "just, proper, regular, lawful, sufficient, reasonable".[101] Understanding the implications of the term "reasonable" and the associated requirements of "reasonableness" can be a challenging task. Nevertheless, it can be argued that it necessitates Coastal States effectively address the dual objectives of safeguarding navigational rights and freedoms as well as ensuring the preservation of the marine environment while carefully striking a suitable equilibrium between these two.[102] According to Bartenstein's perspective, measures implemented by Coastal States in accordance with Article 234 should be reasonable to the needs (common good) of international shipping.[103]

Despite the lack of explicit clarification in Article 234 regarding the specific navigational regime it pertains to, whether it be internal waters, territorial waters, or EEZ, the prevailing consensus among legal scholars, including Jan Jakub Solski and Douglas Brubaker, is to interpret the phrase "due regard to navigation" as encompassing both the freedom of navigation protected in the EEZ and innocent passage protected in territorial seas.[104] (see the interpretation of the notion "within the EEZ" below).

Further support for the interpretation can be derived from the drafters' intentions during the formulation of Article 234 and the surrounding circumstances of its finalisation.[105] Notably, the "Memorandum to the President" dated 28 April 1976 holds significant relevance in this regard and clarifies that:

> *Freedom of navigation in the EEZ and innocent passage in the territorial sea would apply in the Arctic (...)*[106] and *(...) due regard clause does not provide specific objective protection for navigational interests in the Arctic (...) so an understanding must be obtained from the Arctic nations that "due regard to navigation" in fact will be applied in such a way as not to have the practical effect of impeding freedom of navigation.*[107]

Regrettably, it remains uncertain if such comprehension was ever achieved. However, it is evident that the objective was to protect the rights and freedoms of navigation "incorporated" in Article 234, in full conformity with the general navigational provisions of UNCLOS, against random and excessive control exerted by Coastal States.

3.2.2 Within the limits of the EEZ

Article 234 incorporates a notion of "within the limits of the EEZ" that serves as a territorial scope of application of the Article. Firstly, in terms of literary interpretation[108], the phrase "within a limit" can be seen as ascribing the conventional meaning of "to a certain or limited extent" and "only when talking about

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100 VCTL, *supra* note 22, Article 31(1).

101 Black's Law Dictionary, available on:https://thelawdictionary.org/. Accessed October 25, 2023.

102 Jan Jakub Solski, "The 'Due Regard' of Article 234 of UNCLOS: Lessons from Regulating Innocent Passage in the Territorial Sea," *Ocean Development and International Law* 52 (4) (2021): pp. 400-401, accessed October 29, 2023,https://doi.org/10.1080/00908320.2021.1991866.

103 Kristin Bartenstein, "The 'Arctic Exception' in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage?" *Ocean Development and International Law* 42 (1–2) (2011): pp. 41-42, accessed November 1, 2023,https://doi.org/10.1080/00908320.2011.542104.

104 Brubaker, *supra* note 20, pp. 55-57.Solski, *supra* note 102, pp. 403-404.

105 VCTL, *supra* note 22, Article 32.

106 Department of State Washington. *Law Of The Sea—Request For Instructions On An Article On Vessel Pollution Control In The Arctic (Secret Letter),* p. 4, para. A. Available on:https://www.cia.gov/readingroom/docs/CIA-RDP82S00697R000400170026-0.pdf. Accessed November 2, 2023.

107 *Ibid.,* p. 4, para. F.

108 VCTL, *supra* note 22, Article 31(1).

reasonable or normal situations"[109], as defined by Collins dictionary. Furthermore, according to Black's Law Dictionary, the term "limit" is defined as the "prescribed boundary of scope, be it authority, power, privilege, or right."[110] If the phrase "within the limits" is interpreted as meaning " to a limited extent or conventionally prescribed boundary of the EEZ," it can be stated that it pertains to the internal boundaries of the EEZ, excluding the territorial waters. This conclusion could be substantiated by examining the context of Article 55 of UNCLOS, which provides a clear definition of the EEZ as "a zone beyond and adjacent to the territorial sea."[111] The theory of "EEZ inner limits" is endorsed by various legal academics, including Goundrey and McRae, who argue that the scope of Article 234 is restricted to the EEZ and does not confer equal rights to Coastal States in the territorial waters.[112]

It is important to acknowledge that within the framework of UNCLOS, there is a lack of provisions that employ the phrase "within the limits" in a similar manner. Additionally, the terminology used to define the spatial extent of various provisions throughout UNCLOS is not entirely uniform. Considering the inherent qualities of ambiguity associated with the expression, it may be beneficial to consider additional methods of interpretation, such as examining the preparation work and the contextual factors surrounding UNCLOS finalisation.[113]

Even though the initial negotiations over Article 234 involving the USSR, US, and Canada throughout the 1970s and early 1980s, were conducted in a confidential manner[114], there are a few publicly accessible papers, such as the "Letter of Submittal to the US President" dated 23 September 1994, that might shed light on this matter. The letter provides endorsement for the theory of "EEZ outer limits," asserting that:

> *Pursuant to this article (234), a State may enact and enforce non-discriminatory laws and regulations to protect such ice-covered areas that are within 200 miles of its baselines established in accordance with the Convention.* [115]

This assertion is further corroborated by Oxman, who argues that the territorial application of Article 234 aligns with the territorial application of Article 66 which reads "(...) in all waters landward of the outer limits of its EEZ".[116] He further elaborates that this provision lends support to the theory regarding the determination of the outer limits of the EEZ, as negotiations for Article 66 involved the same three delegations, namely the USSR, Canada, and the US, who presumably had similar intentions regarding the territorial scope as those expressed in Article 234.[117]

Most relevant legal scholars, including Pharand and Brubaker, express confidence in the accuracy of this interpretation. They firmly believe that the language used in Article 234 is specifically aimed at confining its applicability to the outer

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109 Collins Dictionary, available on:https://www.collinsdictionary.com/dictionary/english/within-limits. Accessed October 25, 2023.

110 Black's Law Dictionary, *supra* note 101.

111 UNCLOS, *supra* note 11, Article 55.

112 McRae, *supra* note 98, pp. 219-223.

113 VCTL, *supra* note 22, Article 32.

114 Brubaker, *supra* note 20, p. 51.

115 Senate. *Message from the President of the US transmitting UNCLOS,* p. 40. Available on:https://www.foreign.senate.gov/imo/media/doc/treaty_103-39.pdf. Accessed November 2, 2023.

116 Bernard H. Oxman, "Observations on Vessel Release under the United Nations Convention on the Law of the Sea," *International Journal of Marine and Coastal Law* 11, no. 2 (1996): pp. 204-205, accessed November 1, 2023, available on: Hein Online.

117 *Ibid.*

limits of the EEZ, including territorial waters in the Article's scope.[118] This interpretation does not permit the deduction of the illogical conclusion that the jurisdiction of Coastal States in ice-covered regions is wider within the EEZ compared to the territorial waters.[119]

3.3 The legislative framework of Russia with regards to the NSR

To date, the implementation of legislation specifically grounded in UNCLOS Article 234 has been observed solely in Canada and Russia.[120] Based on the Russian legal doctrine and the perspectives of various Russian scholars, it can be observed that the historical Soviet and subsequent Russian approaches to legislation and enforcement pertaining to Arctic navigation, as well as its geographical extent, are presently consolidated within a comprehensive legal framework governing the NSR.[121]

At the time of the study, the NSR's legal framework is comprised of three fundamental components:

1) FL No. 155-FZ, "On Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation," dated 31 July 1998, as amended 05.12.2022.[122]
2) FL No. 81-FZ, "Merchant Shipping Code of the Russian Federation," dated 30 April 1999, as amended 21.05.2023.[123] (hereinafter "Merchant Shipping Code").
3) Decree of the Government of the Russian Federation No. 1487, "On approval of the Rules of navigation in the waters of the Northern Sea Route," dated 18 September 2020, as amended 01.09.2023.[124] (hereinafter "2020 Navigational Rules").

Article 14 of the FL No. 155-FZ stipulates that:

> *Navigation in the water areas of the NSR, the historically established national transport communication line of the Russian Federation shall be carried out according to generally recognised principles and norms of international law, international treaties of the Russian Federation, the present Federal Law, other federal laws and other normative legal acts issued in accordance with them.* [125]

118 Donat Pharand, "The Arctic Waters and the Northwest Passage: A Final Revisit," *Ocean Development and International Law* 38 (1–2) (2007): pp. 47-48, accessed September 15, 2023, https://doi.org/10.1080/00908320601071314. Douglas R. Brubaker, "Regulation of Navigation and Vessel-Source Pollution in the Northern Sea Route: Article 234 and State Practice," in *Protecting the Polar Marine Environment: Law and Policy for Pollution Prevention* (Cambridge: Cambridge University Press, 2000), p. 227, accessed October 13, 2023,doi:10.1017/CBO9780511494635.012.

119 Lilly Weidemann, "International Governance of the Arctic Marine Environment," in *International Governance of the Arctic Marine Environment* (Cham: Springer International Publishing, 2014), p. 80, accessed September 30, 2023,https://doi-org.ezproxy.uio.no/10.1007/978-3-319-04471-2_3.

120 Jacques Hartmann, "Regulating Shipping in the Arctic Ocean: An Analysis of State Practice," *Ocean Development and International Law* 49 (3) (2018): pp. 283–284, accessed November 5, 2023,https://doi.org/10.1080/00908320.2018.1479352.

121 Roman Dremliuga, Kristin Bartenstein, and Natalia Prisekina, "Regulation of Arctic Shipping in Canada and Russia," *Arctic review on law and politics* 13 (2022): pp. 338-346, accessed November 8, 2023, https://doi.org/10.23865/arctic.v13.3229.

122 FL No. 155-FZ, "On Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation," dated 31 July 1998, as amended 5 December 2022. Available on:https://www.consultant.ru/document/cons_doc_LAW_19643/.

123 FL No. 81-FZ, *supra* note 12.

124 Decree No. 1487, *supra* note 26.

125 FL No. 155-FZ, *supra* note 122, Article 14.

The rhetoric employed in this Federal Law and Russian legal doctrine as such, in addition to the reliance on UNCLOS as an international treaty to which Russia is a party, appears to make an ambiguous allusion to customary international law. Specifically, it references the notion of possessing a "historical title" to the NSR as a justification for ownership, as historical titles are recognised as one of the justifications for territorial rights.[126] The scholarly literature authored by Russian academics affirms that the NSR is considered an "indivisible, national transport route".[127] This legal approach is based on the principle of *uti possidetis* or *uti possidetis sic possidetis*, which can be understood: "As you possess, so shall you possess."[128] (See further discussion in Section 5)

The Article includes a mention of "other federal laws," with the most significant being the Merchant Shipping Code. According to Article 5.1, the geographical scope of NSR is established as:

> *The water area adjacent to the northern coast of the Russian Federation, covering internal sea waters, the territorial sea, the contiguous zone and the exclusive economic zone of the Russian Federation (…)* [129]

According to Dremliuga and Prisekina, it can be argued that Russia's alignment of the outer boundary of the NSR with that of the EEZ suggests that the country views Article 234 as the foundation for its domestic navigation rules.[130]

Furthermore, Article 5.1(2) makes a specific mention of the 2020 Navigational Rules.[131] The explanatory note accompanying the earlier 2012 Navigational Rules affirms that the rules specifically reference Article 234, thereby indicating:

> *The available Rules of Navigation on the Northern Sea Route (…) are consistent with the requirements of Clause 234 of the UNCLOS (…)* [132]

To facilitate the study endeavour, it is important to undertake an investigation pertaining to Section 2 of the 2020 Navigational Rules. The following provisions hold significant relevance:

1) The organization of navigation of vessels in the water areas of the NSR is carried out by the State Atomic Energy Corporation Rosatom (hereinafter "Rosatom");[133]
2) Foreign-flagged ships are subject to a mandatory system of prior notification and authorization before entering the water areas of the NSR. Vessels without a permit from Russian authorities have no right to enter the NSR;[134]
3) The permit is granted provided the vessel complies with the relevant requirements on safety of navigation and pollution prevention. Rosatom reserves the

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126 Damir K. Bekyashev, Kamil A. Bekyashev, "The Trends in the Development of the Legal Regime of the Northern Sea Route," *Vestnik of Saint Petersburg University Law* 12 (2) (2021): p. 279, accessed November 3, 2023,https://doi.org/10.21638/spbu14.2021.203.

127 Gavrilov, *supra* note 15, pp. 256-260.

128 Christopher R. Rossi, "The Northern Sea Route and the Seaward Extension of Uti Possidetis (Juris)," *Nordic Journal of International Law* 83, 4 (2014): pp. 487-489, accessed October 23, 2023,https://doi-org.ezproxy.uio.no/10.1163/15718107-08304004.

129 FL No. 81-FZ, *supra* note 12, Article 5.1.

130 Dremliuga, *supra* note 121, p. 342.

131 FL No. 81-FZ, *supra* note 12, Article 5.1(2).

132 Explanatory note to the draft federal law, *"On the introduction of changes in some legal acts of the Russian Federation in the area of state regulations of commercial shipping in the water areas of the Northern Sea Route,"* para. 1. Available on:https://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=PRJ&n=90009&dst=100001#mT1scwTxe8FUszi1.

133 Decree No. 1487, *supra* note 26, para. 2.

134 *Ibid.,* para. 3.

unilateral right to suspend or deny the issuance of the permit;[135] (This is not a mere formality, as applications were rejected in more than 100 cases between 2018 and 2023.)[136]

The review described above posits that Russia recognises its comprehensive authority and control over the NSR, particularly in terms of unilaterally regulating navigation. Despite the presence of considerable uncertainty regarding the extent to which Article 234 permits Coastal States to restrict the freedom of navigation and right of innocent passage[137], Russian NSR legislation suggests that Russia adopts a broad (*de-maximis)* interpretation of Article 234, which seems to grant Russia extensive authority to regulate shipping in a manner akin to the regulation of internal waters, thereby granting Russia full sovereignty over navigation and the unilateral discretion to permit or deny passage to vessels.[138] It can be asserted that the official stance of the Russian government under the 2020 Navigational Rules is that the "entire" NSR is subject to the same legal framework and same jurisdictional powers as in Russia's internal waters, regardless of the specific maritime zone in which a vessel is located on the NSR and regardless of the passage rights and freedoms it is entitled to exercise under the general navigational provisions of the UNCLOS.[139]

135 *Ibid.,* para. 10, 11.

136 Northern Sea Route Administration. "Urgent information: Non-compliant vessels," available on:http://www.nsra.ru/en/rassmotrenie_zayavleniy/otkazu.html?year=2013. Accessed November 1, 2023.

137 Hartmann, *supra* note 120, p. 282.

138 Donald McRae, "Arctic sovereignty? What is at stake?" *Behind the Headlines*, vol. 64, no. 1, (2007): pp. 17-19, accessed October 27, 2023, link.gale.com/apps/doc/A158959250/AONE?u=oslo&sid=bookmark-AONE&xid=62a23215.

139 Gavrilov, *supra* note 15.

4 Does Russia have enhanced jurisdictional authority under Article 234 to regulate navigation on the NSR? Examination of Russian legislation

4.1 Navigational rights and freedoms granted to the merchant ships on the NSR: Russia's abusive implementation of Article 234?

Russia has incorporated the provisions of maritime zone delimitation into its domestic maritime law, aligning them in full resemblance with UNCLOS. Russian legislation clearly defines the status and legal framework governing Russia's internal waters, territorial waters, and the EEZ, outlining the rights of Russia and other states[140], including the codification of the right of innocent passage[141] and freedom of navigation[142] within each specific maritime zone.

The regulation of Arctic waters, like other regions of the world's oceans, is undeniably governed by UNCLOS, consequently serving as the basis for the establishment of the legal framework pertaining to the NSR.[143] The primary inquiry at hand pertains to the unresolved matter of whether Article 234 permits Russia to surpass its jurisdictional powers as delineated by the UNCLOS within each distinct maritime zone, along the NSR.

Article 234 is commonly regarded as a provision focused on environmental protection, primarily due to its placement in Part 12 of UNCLOS, which pertains to the protection and preservation of the marine environment.[144] Given the fact that Article 234 stands out as the sole provision included in Section 8 of UNCLOS, it would be incorrect to consider it an entirely autonomous. Thus it shall be read in concert with other UNCLOS provisions, as asserted by the fact that: "States are then enjoined individually and collectively to take all measures consistent with this Convention that are necessary to prevent, reduce, and control pollution of the marine environment from any source (...)" and "(...) shall endeavour to harmonize their policies in this connection"[145], as well as States shall "(...) refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention"[146].

As it was established in Section 3.2.2, Russia is entitled to legislate within Article 234's scope, only in Russia's territorial waters and EEZ. The analysis of Coastal State jurisdictional powers within the EEZ and territorial waters outlined in Sections 2.3 and 2.4, is found to be in sharp contrast to the broad legislative powers outlined in Article 234. Within these zones encompassed by the NSR, Russia is empowered to unilaterally prescribe more stringent CDEM standards and granted unilateral legislative authority to address matters concerning the preservation of the marine environment and vessel-source pollution, containing more stringent

140 FL No. 191-FZ, "On the Exclusive Economic Zone of the Russian Federation", dated 17 December 1998. Available on: https://www.consultant.ru/document/cons_doc_LAW_21357/.FL No. 155-FZ, *supra* note 122.

141 FL No. 155-FZ, *supra* note 122, Article 10, 11.

142 FL No. 191-FZ, *supra* note 140, Article 6.

143 Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge: Cambridge University Press, 2012), pp. 305-306, accessed November 2, 2023, doi:10.1017/CBO9780511844478.

144 UNCLOS, *supra* note 11, Part 12.

145 *Ibid.,* Article 194(1).

146 *Ibid.,* Article 194(4).

standards than GAIRAS, and not being subject to pre-approval or review by the IMO.[147]

The lack of these safeguards and constraints on Russia's legislative jurisdiction opens a "pandora box", allowing Russia to "legitimately" expand its jurisdictional powers over all the marine zones covered by the NSR, which could be seen as a favourable outcome for Russia. It goes against the primary objective of the UNCLOS, that intends to settle the dispute of Coastal States over-extending maritime claims by granting them jurisdictional authority to legislate within the framework of GAIRAS.[148] Such a deficiency in Article 234 has led to Russia's practice of "creeping jurisdiction,"[149] with distinct features of "sovereignty", which extends beyond the territorial waters encompassed by the NSR to include the EEZ.

However, recently there has been an observable progression on this matter, specifically a transition from a unilateral to a more global approach, as well as a shift from a broad to a more limited interpretation of Article 234. In 2017, the IMO developed the International Code of Safety for Ships Operating in Polar Waters (hereinafter "Polar Code"), establishing obligatory regulations on the design, construction, equipment, and operations of ships navigating in the polar regions.[150] The primary rationale for this assertion is that the Polar Code can be seen as being a component of the GAIRAS framework.[151]

On the one hand, Russia continues to adhere to its "creeping jurisdiction" strategy, arguing that Article 234 remains crucial as it offers additional measures for Russian actions. Russia asserts that the Polar Code has limitations and is inadequate in ensuring the safety of navigation and protection of the marine environment[152], because it does not cover all vessels (only vessels under relevant conventions as SOLAS, MARPOL, STCW)[153] traversing the NSR, thus implementing specific regulations that apply to all vessels and the requirements necessary to obtain a navigation permit. (See discussion further).

On the other hand, certain Russian academics view the implementation of the Polar Code as a significant advancement in moving away from Russia's broad interpretation of Article 234, arguing that it is a great step towards reducing Russia's ability to unilaterally engage in environmental conservation efforts while subjecting Russia's legislation to GAIRAS and IMO supervision.[154]

The latter perspective is deemed more favourable due to its inclination towards interpreting Article 234 by Russia in a manner that prioritises the preservation of the "common good of international shipping", while aiming to enhance the safety, predictability, and efficiency of international shipping activities along the

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147 Myron H. Nordquist, Rosenne Shabtai, Alexander Yankov and Neal R. Grandy, *United Nations Convention on the Law of the Sea: 1982: A Commentary. Volume IV Articles 192 to 278 Final Act Annex Vi* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1991), pp. 395-397.

148 Aldo Chircop, "Jurisdiction over Ice-Covered Areas and the Polar Code: An Emerging Symbiotic Relationship?" *The Journal of International Maritime Law* 22 (2016): pp. 281-282, accessed October 20, 2023, available on: Academia.edu.

149 Ringbom, *supra* note 50, pp. 14, 249-250, 276-277.

150 IMO. *International Code for Ships Operating in Polar Waters (Polar Code).* Available on:https://www.imo.org/en/ourwork/safety/pages/polar-code.aspx. Accessed October 12, 2023.

151 Øystein Jensen, "The International Code for Ships Operating in Polar Waters: Finalization, Adoption and Law of the Sea Implications," *Arctic Review on Law and Politics* 7, no. 1 (2016): pp. 71–75, accessed October 17, 2023,https://www.jstor.org/stable/48710410.

152 Viktoriya Nikitina, "The Arctic, Russia and Coercion of Navigation," *Arctic Yearbook* (2021): p. 9, accessed October 27, 2023, available on:https://arcticyearbook.com/arctic-yearbook/2021/2021-scholarly-papers/376-the-arctic-russia-and-coercion-of-navigation.

153 IMO, *supra* note 150.

154 Anna Viktorovna Kotlova, *French international legal doctrine on the status of the Arctic (PHD),* Moscow, 2019: pp. 70-72, accessed October 12, 2023, available on MGIMO website:https://mgimo.ru/upload/diss/2019/ehac-ran-red-kotlova.pdf.

NSR while safeguarding the distinctive ecology of the polar region.[155] The implementation of a standardised worldwide framework is expected to facilitate the achievement of the objective to establish the NSR as a highly competitive global transportation market.[156]

Based on the analysis above, it appears that Article 234 has the potential to disrupt the equilibrium established by UNCLOS – between navigation and pollution prevention, potentially favouring the latter to a significant extent.[157] Nevertheless, there are legal scholars who contend that Russia, in accordance with Article 234, should confine its laws and regulations solely to addressing the prevention, reduction, and control of marine pollution, and Russia's jurisdiction should be limited to regulating solely vessel-source pollution[158], not extending to any additional rights in terms of navigation regulation.

This view is supported by the inclusion of the "due regard to navigation" provision that acts as a limitation to Russia's jurisdiction with respect to control over navigation on the NSR. (See discussion in Section 3.2.1). Not in vain Permanent Court of Arbitration in Chagos Arbitration interpreted "due regard" obligation as:

> *(…) the ordinary meaning of "due regard" calls for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights. (…) The Convention does not impose a uniform obligation to avoid any impairment of Mauritius' rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius, their importance (…)* [159]

It can be argued that the concept of "due regard" entails that Russia should demonstrate respect and preserve the rights of innocent passage in territorial waters and freedom of navigation in the EEZ contained by the NSR. In this context, it is imperative for Russia to adhere to the overarching navigational principles outlined in UNCLOS. (See Section 2.3 in respect to territorial waters and Section 2.4 in respect to the EEZ).

From this standpoint, the Russian legislation that allows for the adoption of the unified legal regime of the NSR in terms of navigation and imposes restrictions on navigation to ensure safety and environmental protection, triggering Article 234[160], is argued to be incongruous with UNCLOS. A similar argument can be made about the consolidation of various maritime zone regimes present on the NSR into a unified framework of internal waters, which entails Russia's exercise of extensive jurisdictional authority. (See discussion in Section 3.3). Russia's purported "creeping jurisdictional" or "sovereignty" ambitions under the guise of Article 234, appear to lack substantial support in UNCLOS.

In terms of Russia's jurisdiction for enforcement, Article 234 does not grant any supplementary enforcement powers pertaining to laws on environmental protection and vessel source pollution in ice-covered regions (NSR). Therefore, the enforcement powers of Russia are constrained to the requirements outlined in

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155 Jiayu Bai, "The IMO Polar Code: The Emerging Rules of Arctic Shipping Governance," *The International Journal of Marine and Coastal Law* 30, 4 (2015): pp. 680, accessed November 1, 2023,https://doi-org.ezproxy.uio.no/10.1163/15718085-12341376.

156 Anna Davis and Ryan Vest, "Foundations of the Russian Federation State Policy in the Arctic for the Period up to 2035," *RMSI Research* (5) (2020): pp. 4-8, 14, accessed November 3, 2023, available on:https://digital-commons.usnwc.edu/rmsi_research/5.

157 Chircop, *supra* note 148, pp. 278-281.

158 Peter Luttmann, "Ice-Covered Areas under the Law of the Sea Convention: How Extensive are Canada's Coastal State Powers in the Arctic?" *Ocean Yearbook Online* 29, 1 (2015): p. 96, accessed October 4, 2023,https://doi-org.ezproxy.uio.no/10.1163/22116001-02901006.

159 Chagos Marine Protected Area Arbitration, *supra* note 25, para. 519.

160 Nikitina, *supra* note 152, p. 9.

the general enforcement provisions of the UNCLOS. (See Section 2.3 in respect to Russia's enforcement powers in territorial waters and Section 2.4 in respect to the EEZ). It is well asserted by the Permanent Court of Arbitration in the *Kingdom of the Netherlands v. Russian Federation* (Arctic Sunrise Arbitration), concerning the Dutch vessel entered the EEZ of Russia encompassed in the NSR without permission.[161] Tribunal held that:

> *(…) it is not satisfied that the boarding, seizure, and detention of the Arctic Sunrise by Russia on 19 September 2013 constituted enforcement measures taken by Russia pursuant to its laws and regulations adopted in accordance with Article 234 of the Convention (…)*[162] and *(…) these measures did not constitute a lawful exercise of Russia's enforcement rights as a coastal State under Articles 220 or 234 of the Convention.*[163]

It is not feasible to express dissent with the statement made by the Dutch Minister in this regard: "Article 234 (…) is no license to inhibit the freedom of navigation without restrictions."[164]

In conclusion, there is a grain of truth in Huebert's and Lackenbauer's assertion regarding the evolving nature of international shipping and the potential impact of climate change on the NSR which states that the Arctic should not be regarded as an exceptional region but rather as one that is gradually aligning with other areas of the World Ocean.[165]

4.2 Does Article 234 allow NSR's prior authorisation regime?

According to Article 234, Russia has implemented the 2020 Navigational Rules. They, inter alia, subject navigation through the NSR to an obligatory prior notification and authorization system and require ships and their crews to adhere to specific requirements.[166] Rules are purportedly formulated with the intention of ensuring that vessels operating within this region adhere to safety and environmental standards.[167]

Although there are instances where the Coastal State prior authorization regime is legally recognized, such as entering a State's internal waters, UNCLOS does not provide an evaluation of the legality of Russia's implementation of a permitting regime for the passage of merchant vessels, either in the territorial sea or the EEZ.[168] There is a prevailing consensus among commentators that the imposition of prior authorization as a condition for the exercise of rights and freedoms of navigation is incongruent with the UNCLOS.[169] This perspective is substantiated by a joint statement issued by the US and the USSR, as well as resolutions put

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161 *Kingdom of the Netherlands v. Russian Federation* (Arctic Sunrise Arbitration), Permanent Court of Arbitration, Award in Case No. 2014–02, 10 July 2017.

162 *Ibid.,* para. 296.

163 *Ibid.,* para. 297.

164 Ringbom, *supra* note 50, pp. 209-210.

165 P.Whitney Lackenbauer and Rob Huebert, eds., "An Important International Crossroads," in *(Re)Conceptualizing Arctic Security* (Centre for Military, Security and Strategic Studies, University of Calgary, 2017), pp. iv-xii, available on: Academia.edu.

166 Decree No. 1487, *supra* note 26, Article 5.1.

167 *Ibid.*

168 Jan Jakub Solski, "Northern Sea Route Permit Scheme: Does Article 234 of UNCLOS Allow Prior Authorization?" *Ocean Yearbook Online* 35, 1 (2021): p. 443, accessed October 4, 2023,https://doi-org.ezproxy.uio.no/10.1163/22116001_03501014.

169 Kentaro Wani, "Navigational Rights and the Coastal State's Jurisdiction in the Northern Sea Route," in *Peaceful Maritime Engagement in East Asia and the Pacific Region* (Leiden, The Netherlands: Brill | Nijhoff, 2022), pp. 268-269, accessed September 14, 2023,https://doi-org.ezproxy.uio.no/10.1163/9789004518629_018.

forth by the Senate Foreign Relations Committee[170], which assert that according to UNCLOS:

> *All ships (...) enjoy the right of innocent passage in the territorial waters, for which neither prior notification nor authorization is required.* [171]

On signature and upon ratification of UNCLOS, Italy and Netherlands expressed the same opinion.[172]

Regarding the prior authorization procedure in the EEZ, Roach arrives at a singularly proposed result:

> *(...) as reflected in the UNCLOS, ships of all States, regardless of cargo, have the freedom to navigate in the EEZ of other states as well as on the high seas without prior permission or notification.* [173]

The requirement of obtaining prior authorization for ships entering the NSR by Russia can be attributed to Russia's belief that Article 234, as a *lex specialis*, allows it. The enduring inquiry is whether Article 234 confers authorization on Russia to arrive at such a determination.

According to American legal doctrine, the imposition of unilateral requirements by Coastal States for prior notification and authorization to pass territorial waters and the EEZ is deemed unjustified and fails to satisfy Article 234's "due regard to navigation" requirement.[174] It is further highlighted that he improper interpretation and implementation of Article 234 by Russia can be characterised as a deceptive practice, as its claims and asserted rights are not in accordance with UNCLOS and are used to justify "creeping jurisdictional behaviour".[175]

Fahey also asserts that Russia shall not necessitate prior authorization for accessing ice-covered regions of the NSR, and if foreign-flagged vessels are obligated to seek explicit permission from Rosatom by default, this requirement seems to resemble a *de facto* prohibition on navigation.[176] Nevertheless, Bartenstein states that prior authorization is a highly effective method of taking preventive action, thus contending that such a broad interpretation of Article 234 falls within the ambit of "due regard to navigation" obligation.[177]

Due to the varying perspectives offered by legal scholars on this matter, to gain insight into the objectives of the prior authorization regime implemented on the NSR and its compatibility with UNCLOS, particularly Article 234, it is instructive to examine the 2020 Navigational Rules.

Paragraph 5 of the Rules provides a comprehensive enumeration (a-k) of the specific documents that are required to be provided by the vessel to Rosatom to request permission for entry into the NSR.[178] Firstly, the issuance of a permit is contingent upon the formal submission of all requisite information regarding

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170 J. Ashley Roach, *Excessive Maritime Claims* (Leiden, The Netherlands: Brill | Nijhoff, 2021), pp. 240-243, accessed October 1, 2023,https://doi-org.ezproxy.uio.no/10.1163/9789004443532.

171 *Ibid.*

172 *Ibid.,* p. 263.

173 *Ibid.,* pp. 472-477.

174 *Ibid.,* pp. 596-598.

175 *Ibid.*

176 Sean Fahey, "Access Control: Freedom of the Seas in the Arctic and the Russian Northern Sea Route Regime," *Harvard National Security Journal* 9, no. 2 (2018): pp. 180-181, accessed November 24, 2023, available on: Hein Online.

177 Kristin Bartenstein, "Navigating the Arctic: The Canadian NORDREG, the International Polar Code and Regional Cooperation," *German Yearbook of International Law* 54 (2011): pp. 103-106.

178 Decree No. 1487, *supra* note 26, para. 5.

the vessel and voyage, as outlined in Appendix No. 1, which comprises 27 subpoints.[179] Several types of information need to be mentioned:

1) Port (place) of departure of the vessel;
2) Port (place) of destination of the vessel;
3) Planned number of crew members and passengers on board the ship, etc.[180]

It seems that the aforementioned information does not have a significant impact on the decision-making process for granting or rejecting permission to navigate in the NSR. Furthermore, it appears that Russia is not receiving any valuable information pertaining to the scope of Article 234, which specifically addresses marine preservation and the prevention of pollution caused by vessels. The legitimacy of Russia's ability to demand the provision of such formalistic rather than practical information within the scope of its prescriptive powers, as outlined in Article 234, is subject to scrutiny.

Secondly, the act of navigation, as an exercise of a right or freedom, is initially considered to be legitimate unless there exists substantiating evidence indicating otherwise.[181] Under the prior authorization regime, the burden of proof is shifted to the ship and consequently to the Flag State, as it requires the vessel to adhere to substantive standards and have the required certificates on board.[182] So, to say it another way, the Flag State must prove to Rosatom that the ship can lawfully enter the NSR. Paragraph 5 of the Rules stipulates that the vessel is obligated to provide the polar navigation vessel certificate (Polar Certificate) as well as the classification certificate, among other required certificates, amounting to a total of five.[183]

The requirement in question appears to be incongruous with the UNCLOS, as UNCLOS prohibits the practice of "pre-emptive" verification of whether vessels engaged in innocent passage within territorial waters, as well as those exercising the freedom of navigation within the EEZ, possess the requisite documentation on board.[184] The responsibility to ensure that a vessel carries relevant documents on board does not lie with Russia as a Coastal State, but rather with the Flag State.[185]

In relation to the authority of enforcement, it is exclusively the Flag State that guarantees the proper surveying and certification of vessels.[186] Moreover, within the framework of "checks and balances", it is the Port State Control that is acknowledged as having a crucial function in ensuring adherence to regulations pertaining to the surveying and certification of vessels.[187]Thus, Russia's purported authority to verify the presence of required documentation on a ship on an ordinary basis extends outside Russia's jurisdiction as per the general enforcement provisions of the UNCLOS. (See Section 2.3 in respect to Russia's enforcement powers in territorial waters and Section 2.4 in respect to the EEZ).

It might also be argued that the efficacy or need for prior authorization in mitigating vessel-source pollution has diminished with the implementation of the Polar Code.[188] The compelling nature of the argument advocating for Russia's close control over vessel navigation in the NSR was persuasive prior to the adoption of

179 *Ibid.,* para. 5, "Appendix No. 1 to the Rules for Navigation in the Northern Sea Route."
180 *Ibid.*
181 Solski, *supra* note 168, pp. 464-465.
182 *Ibid.*
183 Decree No. 1487, *supra* note 26, para. 5.
184 Solski, *supra* note 168, pp. 464-465.
185 UNCLOS, *supra* note 11, Article 94.
186 *Ibid.,* Article 217(3).
187 *Ibid.,* Article 218.
188 Solski, *supra* note 168, p. 469.

enforceable international rules and standards.[189] Nevertheless, given the present circumstances, the requirement for the vessel to provide the Polar Certificate to Rosatom appears to be an outdated practice.

Finally, the fundamental inquiry revolves around whether the prior authorisation regime is primarily driven by a genuine commitment to safeguarding navigation safety and the Arctic environment as outlined in Article 234, or if it serves as a mere guise for Russia's nationalistic displays and geopolitical manoeuvring.[190] Currently, it seems that Russia perceives the requirement to grant foreign vessels the right of innocent passage in territorial sea and freedom of navigation in the EEZ contained by the NSR as a substantial constraint on its sovereignty[191] and a possible risk to its national security[192]. The reasoning is understandable: as the regulatory framework provided by UNCLOS is insufficient to effectively address the issue of prior authorization regime, due to the inherent ambiguity and flexibility of Article 234, Russia utilises it to advance its diverse constituencies and interests, thereby consolidating them in the translation of power to exert control over the NSR.[193]

The examination of Russia's pertinent practice does not support the assertion that prior authorization is adequately effective in achieving the goals of Article 234, hence negating the apparent conflict with navigational rights and freedoms. Neither Russia's stance is reconcilable with the applicable articles of UNCLOS, since it continues to put onerous requirements on commercial shipping that are increasingly counterproductive in terms of fostering the international viability of the NSR. Therefore, it might be argued that a mere notification scheme lacking authorization or other compliance mechanisms may present a more favourable alternative to the existing Russian approach.[194]

189 *Ibid.*

190 Michael A. Becker, "Russia and the Arctic: Opportunities for Engagement within the Existing Legal Framework," *American University International Law Review* 25, no. 2 (2010): pp. 242-243, accessed October 6, 2023, available on: Hein Online.

191 Nikitina, *supra* note 152, p. 11.

192 Elizabeth Buchanan, "The overhaul of Russian strategic planning for the Arctic Zone to 2035: Document Review," *Russian Studies Series 3/20* (2020), accessed October 30, 2023, available on Nato Defence College website:https://www.ndc.nato.int/research/research.php?icode=641#_edn1.

193 Timo Koivurova, "The Actions of the Arctic States Respecting the Continental Shelf: A Reflective Essay," *Ocean Development & International Law*, 42:3 (2011): pp. 221-222, accessed November 7, 2023, DOI:10.1080/00908320.2011.592470.

194 Solski, *supra* note 168, p. 472.

5 The South China Sea Arbitration: Stimulating a renewed concern over the legitimacy of Russia's historic internal waters claim?

5.1 Introductory remarks

The Russian legal doctrine regarding the legal status of the NSR can be seen as having two main aspects. First, it emphasizes the exercise of Russian jurisdiction over the NSR in accordance with Article 234. Second, it relies on customary international law, asserting Russia's sovereign jurisdiction over the NSR and treating it as historic waters (internal waters).[195] The latter alternative perspective could potentially serve as a "backbone" option, apart from UNCLOS Article 234[196], enabling Russia to lawfully assert control over international navigation through the imposition of a prior authorization regime and treat the NSR as an integral transportation route under Russian ownership, subject to a unified legal regime. The extent to which Russia's establishment of the legal framework for the NSR employs either the first approach, the second approach, or a combination of both remains unclear in practical terms.

However, this second perspective is extensively supported by Russian international law scholars, who present the NSR as a straightforward case of complete sovereignty.[197] Nevertheless, Russian law's NSR reference as a "historically developed national transport line of communication of the Russian Federation,"[198] makes it uncertain whether the aim of this clause is to invoke any additional sovereign rights over the NSR or just assuage nationalistic sentiments.[199]

Clarifying the validity of Russia's historic claim over the NSR would be highly beneficial, given the fact that Russia's claim might be used to support an alternative interpretation in the future, especially if the applicability of Article 234 is questioned because of climate change.[200]

5.2 Development of the historic waters doctrine

The doctrine of historic waters has its origins in the doctrine of historic bays, which emerged in the 19th century to safeguard large bays closely connected to a country's land area and considered part of their national territory.[201] As rules relating to the delimitation of maritime zones developed, the idea of claiming bays based on a historic title was extended to other areas of the sea adjacent to the coast.[202] However, the doctrine lacks a universally accepted definition in international law recognized by all states and is often referred to as "historic

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195 A. N. Vylegzhanin, V.P. Nazarov, and I.V. Bunik, "Northern Sea Route: towards solution of political and legal problems," *Vestnik Rossijskoj akademii nauk* 90 (12) (2020): pp. 1106, 1108-1109, accessed October 3, 2023, DOI: 10.31857/S0869587320120270.

196 Ringbom, *supra* note 50, p. 196.

197 P.A. Gudev, "The Northern Sea Route: problems of national status legitimization under international law. Part I," *Arktika i Sever [Arctic and North]* no. 40 (2020): p. 117, 127, accessed October 2, 2023,DOI: 10.37482/issn2221-2698.2020.40.

198 FL No. 155-FZ, *supra* note 122, Article 14.

199 Jan Jacub Solski, "The Northern Sea Route in the 2010s: Development and Implementation of Relevant Law," *Arctic Review on Law and Politics*, 11 (2020): p. 389, accessed on September 29, 2023,https://doi.org/10.23865/arctic.v11.2374.

200 Gavrilov, *supra* note 95, p. 5.

201 Donat Pharand, "The Basic Characteristics of Historic Waters," in *Canada's Arctic Waters in International Law* (Cambridge: Cambridge University Press, 1988), p. 91, accessed October 18, 2023, doi:10.1017/CBO9780511565458.010.

202 *Ibid.*

title," "historic rights," or "historic internal waters."[203] In the lack of a formally established definition of historic waters, it becomes imperative to depend on customary international law and the viewpoints of legal experts and judicial bodies.

In 1951, the ICJ in the Fisheries Case defined historic waters as those treated as internal waters but not having the same character without a historic title.[204] The ICJ observed that historical titles are established by prolonged and continuous usage, which is made feasible when other governments refrain from consistent objections regarding such titles.[205] The ICJ further stated that an essential prerequisite for a state to expand the jurisdiction of internal waters to historical maritime areas is the significant proximity of those maritime areas to the territory of the respective state.[206] Thus, the ICJ asserted that there is an equivalence between historic waters and internal waters. This discovery suggests that the designation of internal waters signifies the Coastal State full sovereignty, granting the maritime region referred to as "historic" the same legal standing as internal waters.It presupposes that the Coastal States are no longer obligated to acknowledge the innocent passage of foreign vessels within their historic internal waters.[207] While the Coastal States have the option to allow such innocent passage, they are not legally bound to do so.If this occurs, the foreign vessel is then engaging in a privilege bestowed by the Coastal States as opposed to a right acknowledged by the international community.[208]

In 1957, the UN Secretariat prepared a memorandum on "Historic Bays"[209], further clarifying the concept of historic waters. It stated that claims for historic rights/titles were not limited to bays but could also be applied to the various areas capable of being comprised in the maritime domain of the State.[210] This aligned with the ICJ ruling in the Fisheries Case that historic titles could apply to all forms of maritime territory- in the modern sense of understanding, including territorial waters and the EEZ.[211]

In 1962, the UN Secretariat prepared a memorandum on "Juridical Regime of Historic Waters"[212], deeming the term historic waters equivalent to historic titles.[213] The memorandum explained that historic waters would be considered internal waters or territorial waters if: "(...) the sovereignty exercised over them in the course of the development of the historic title was sovereignty as over internal waters or territorial waters."[214] The memorandum analysed the formation of

203 Clive R. Symmons, *Historic Waters in the Law of the Sea* (Leiden, The Netherlands: Brill | Nijhoff, 2008), pp. 1-5, accessed November 10, 2023,https://doi.org/10.1163/ej.9789004163508.i-322.6.

204 Fisheries case, *supra* note 24, p. 130.

205 *Ibid.,* pp. 130-131.

206 *Ibid.,* p. 133.

207 Symmons, *supra* note 203, pp. 39-41, 64.

208 *Ibid.*

209 United Nations, *Historic Bays: Memorandum by the Secretariat of the United Nations (Doc: A/CONF.13/1).* Geneva, Switzerland 24 February to 27 April 1958, *Extract from the Official Records of the United Nations Conference on the Law of the Sea, Volume I (Preparatory Documents)*. Available on:https://legal.un.org/diplomaticconferences/1958_los/docs/english/vol_1/a_conf13_1.pdf.

210 *Ibid.,* para. 8, 63, 104, 109.

211 Symmons, *supra* note 203, pp. 63-67.

212 United Nations, *Juridical Regime of Historic waters including historic bays - Study prepared by the Secretariat (Doc: A/CN.4/143).* 9 March 1962, *Extract from the Yearbook of the International Law Commission:- 1962 ,vol. II.* Available on:https://legal.un.org/ilc/documentation/english/a_cn4_143.pdf.

213 *Ibid.,* para. 33, 34, etc.

214 *Ibid.,* para. 167.

historic title as a process of acquiring a historic right[215] and provided a three-factor test to determine if a title to historic waters exists[216]:

1) The authority exercised over the area by the State claiming it as historic waters;
2) The continuity of such exercise of authority;
3) The attitude of foreign States.[217]

The test holds importance as it served as the foundation for the ruling issued by the Permanent Court of Arbitration (hereinafter "Tribunal") in the South China Sea Arbitration. The award pertained to the examination of historic rights and the origin of maritime entitlements in the South China Sea and the legality of certain actions taken by China in the South China Sea, which the Philippines claimed to be in breach of the UNCLOS.[218]

5.3 Russia's NSR historic waters claim's test against overarching criteria from the South China Sea Arbitration

The outcome of the South China Sea Arbitration directly pertains to a legal matter that holds importance for Russia's longstanding assertion of historic claim over the NSR, as both Russia, in the Arctic, and China, in the South China Sea, assert their claims of sovereignty over marine zones based on historic rights. This Section analyses Russia's historical assertion of title to the NSR in relation to the ruling, evaluating it based on three overarching criteria: effective exercise of jurisdiction, passage of time, an d acquiescence by foreign states.[219]

5.3.1 Russia's claim v. China's Claim: comparison

The Tribunal codified China's historic waters claim as follows:

> *China has indisputable sovereignty over the South China Sea Islands and the adjacent waters. China' s sovereignty and relevant rights in the South China Sea, formed in the long historical course, are upheld by successive Chinese governments, reaffirmed by China' s domestic laws on many occasions, and protected under international law including the UNCLOS.* [220]

It is noteworthy that by substituting the terms "China" with "Russia" and "South China Sea" with "NSR", one can observe a striking resemblance to Russia's historical assertion over the NSR, as articulated in Russian legal doctrine and scholarly literature.

Although court decisions have recognised the concept of historic waters, there is a lack of specific definition or reference to historic waters in any of the

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215 *Ibid.,* paras. 80-148.

216 Christopher Mirasola, "Historic Waters and Ancient Title: Outdated Doctrines for Establishing Maritime Sovereignty and Jurisdiction," *Journal of Maritime Law and Commerce* 47, no. 1 (2016): pp. 56-59, accessed November 13, 2023, available on: Hein Online.

217 Ted L.Mcdorman, eds., "Notes On The Historic Waters Regime And The Bay Of Fundy," in *The Future of Ocean Regime-Building* (Leiden, The Netherlands: Brill | Nijhoff, 2009), pp. 718-719, accessed October 29, 2023,https://doi-org.ezproxy.uio.no/10.1163/ej.9789004172678.i-786.173.

218 S. Jayakumar, Tommy Koh, Robert Beckman, Tara Davenport, and Hao Duy Phan, "The South China Sea Arbitration: laying the groundwork," in *The South China Sea Arbitration* (Edward Elgar Publishing, 2018), pp. 1-17, accessed November 7, 2023, https://doi-org.ezproxy.uio.no/10.4337/9781788116275.00008.

219 South China Sea Arbitration, *supra* note 23, para. 222.United Nations, *supra* note 212, paras. 80–148, 185.

220 South China Sea Arbitration, *supra* note 23, para. 61.

conventions, including UNCLOS.[221] Historic title claims are noteworthy due to their capacity to establish rights and duties that extend beyond the scope of the UNCLOS.[222] The assertion is made by a multitude of legal specialists[223], as well as the Tribunal itself[224].

During the analysis of China's historic claim, the Tribunal made a distinction between two concepts: "historic rights" and "historic title" claims. The phrase "historic title" is employed to clearly denote historical sovereignty over land or marine areas, whilst "historic rights" is a broader and more encompassing term.[225] The Tribunal's determination that China's rights over resources fell within the category of "historic rights falling short of sovereignty"[226] suggests that Russia's possible claim is unlikely to fit within the same category. Instead, Russia's claim appears to be more excessive and leans towards a historic title claim. From a rational perspective, one could make the argument that if China's assertion of historic rights, which does not amount to full sovereignty, were to be restricted according to specific criteria[227], then Russia's claim of historic title, which includes complete sovereignty, might require an even greater burden of proof than that of historic rights. Is Russia well equipped to effectively confront the challenge?

5.3.2 Effective exercise of jurisdiction

It is crucial to assess the extent to which Russia meets the criterion of "effective exercise of jurisdiction" over the NSR. The Tribunal asserted that the extent of a claim to historical rights or title is contingent upon the extent of the actions undertaken in the exercise of said claimed rights or title.[228] To establish its exclusive authority over the area in question, Russia is required to present compelling evidence that substantiates its historical record of activities in the NSR, thereby asserting exceptional rights over navigation.[229] Additionally, Russia must demonstrate that it has undertaken all requisite measures to establish and sustain its exclusive jurisdiction in the region.[230]

Firstly, insufficient will be the evidence that solely indicates extensive Russian navigation on the NSR.[231] Therefore, the swift conclusions made by Gudev, Melnikov, Morgunov and Zhuravleva regarding Russia's achievements in the Arctic, specifically in terms of the discovery and development of Arctic spaces, and the assertion that the right of discovery alone is enough to extend the sovereignty of the Russian State to these spaces[232], appear to lack validity. The assertion that the

221 Mirasola, *supra* note 216, pp. 49-51.

222 Wu Shicun, and Keyuan Zou, *Arbitration Concerning the South China Sea: Philippines versus China* (London, England: Routledge, 2016), pp. 138-143, accessed November 2, 2023,https://doi.org/10.4324/9781315567488.

223 Clive R. Symmons, *"Historic Rights and the 'Nine-Dash Line' in Relation to UNCLOS in the Light of the Award in the Philippines v. China Arbitration (2016) concerning the Supposed Historic Claims of China in the South China Sea: What now Remains of the Doctrine?",* p. 3, available on: https://cil.nus.edu.sg/wp-content/uploads/2017/01/Session-2-on-Historic-Rights-Clive-Symmons-Paper.pdf.Mirasola, *supra* note 216, p. 69.

224 South China Sea Arbitration, *supra* note 23, paras. 218-229.

225 *Ibid.,* para. 222.

226 *Ibid.,* para. 226.

227 *Ibid.,* para. 225, 265.

228 *Ibid.,* para. 226.

229 *Ibid.,* para. 268.

230 Krittika Singh, and Timo Koivurova, "The South China Sea Award: Prompting a Revived Interest in the Validity of Canada's Historic Internal Waters Claim?", *The Yearbook of Polar Law Online*10, 1 (2019): pp. 394-395, accessed November 10, 2023,https://doi.org/10.1163/22116427_010010017.

231 South China Sea Arbitration, *supra* note 23, para. 270.

232 Gudev, *supra* note 197, pp. 117-118.B. Morgunov, I. Zhuravleva, B. Melnikov, "The Prospects of Evolution of the Baseline Systems in the Arctic," *Water* 13, 1082 (2021): pp. 12-14, accessed November 6, 2023,https://doi.org/10.3390/w13081082.

historical origins of the NSR can be traced back to the initial expeditions of the Cossacks in the 16th – 17th centuries and its subsequent development throughout the periods of the Russian Empire and the Soviet Union,[233] appears to hold limited relevance in establishing the historical legitimacy of the NSR; mere assertions of sovereignty lack adequacy.[234]

Secondly, there is a requirement for Russia to consistently exert authority (sovereignty) over the NSR to legitimately assert it as historic waters. A jurisdiction that possesses a narrower range of powers than sovereignty is insufficient.[235] Moreover, actions through which Russia openly demonstrates its intention to exert power over NSR shall originate from the Russian State or its respective organs and be public in nature.[236] After conducting an analysis of the Soviet legislation, it might seem that the criteria cannot be met. The piecemeal nature of Russian/Soviet legislation on the NSR and the inconsistent comments made by the Soviet/Russian leadership contribute to the perceived "legal ambiguity" surrounding this matter,[237] as discussed below.

In the early 1960s, the Soviet authorities officially claimed ownership on historical grounds of several straits and seas on the NSR, including the Viklitsky, Shokalsky, Dmitry Laptev, and Sannikov straits, as well as the Kara, East Siberian, Chukchi, and Laptev seas.[238] Further, Article 6(4) of the Law "On the State Border of the USSR" defined Soviet internal waters as "the waters of bays, estuaries, seas, and straits that historically belonged to the USSR."[239] Thus, the Government supported the state's right under international law to classify not just particular bays but also other maritime spaces (seas and straits) in the Russian Arctic as historical (internal) waters. However, in 1984 and 1985, the Council of Ministers of the USSR adopted resolutions that declared the Kara Sea, Laptev Sea, and East Siberian Sea not internal waters of the USSR on historical grounds; only the White Sea, Czech, and Baydaratskaya Bays were considered USSR internal waters[240], contrary to the Soviet international legal doctrine of the time.[241] The Vilkitsky, Sannikov, Shokalsky Dmitry Laptev straits, which connect the Kara Sea to the Laptev Sea, also left the USSR's internal waters.[242]

Equally significant is the observation that the exercise of jurisdiction over the NSR by the Soviet/Russian government can be classified as *de-facto* before the implementation of Federal Law No. 155-FZ of July 31, 1998[243], as evidenced by an analysis of the historical evolution of NSR legal frameworks. In this normative legislative act, the legal regime of the "entire" NSR was *de jure* established for the first time in Soviet and Russian legislation, specifically addressing (encompassing)

233 Morgunov, *supra* note 232.

234 Yehuda Z. Blum, "The Requirements for the Formation of an Historic Title and Its Constituent Elements," in *Historic Titles in International Law* (Dordrecht: Springer Netherlands, 1965), pp. 117-118, accessed November 8, 2023, https://doi.org/10.1007/978-94-015-0699-1_4. United Nations, *supra* note 209, para. 167.

235 United Nations, *supra* note 212, paras. 85-87.

236 *Ibid.,* paras. 89–97.

237 Helge Blakkisrud, "Governing the Arctic: The Russian State Commission for Arctic Development and the Forging of a New Domestic Arctic Policy Agenda," *Arctic Review on Law and Politics*, Vol. 10 (2019): p. 195, accessed November 4, 2023,http://dx.doi.org/10.23865/arctic.v10.1929.

238 Rossi, *supra* note 128, pp. 481-482, 500-502.

239 USSR Law "On the State Border of the USSR", dated 24 November 1982, *Gazette of the USSR Armed Forces, No. 48*, Article 6. Available on:https://www.consultant.ru/cons/cgi/online.cgi req=doc&base=ESU&n=1534#HZ3MkwTCmRDymqCw.

240 Resolution of the Council of Ministers of the USSR, dated 7 February 1984, available on:https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1984_Declaration.pdf.

241 Gudev, *supra* note 197, pp. 122, 124, 126-127, 133.

242 Resolution of the Council of Ministers of the USSR, dated 15 January 1985. Available on:https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1985_Declaration.pdf.

243 FL No. 155-FZ, *supra* note 122, Article 14.

internal waters, territorial waters, and the EEZ of Russia, and for the first time, the official recognition of the "entire" NSR's historic title was documented by legislative means.[244] The absence of explicit recognition or emphasis on sovereignty over the NSR in Russian/Soviet legislation and statements made by Russian authorities before 1998 raises inquiries.[245] As an example, in 1966, the Ministry of Defence of the USSR released a publication titled "A Manual of International Maritime Law", asserting that the USSR's sovereign rights in the Arctic were derived from its highly productive economic, organisational, and scientific research endeavours in the development of the NSR, including historical discoveries and explorations of the polar seas and islands by Russian navigators.[246] Nevertheless, the document failed to provide a clear definition of the exact nature and scope of the sovereign rights being referred to.[247]

Thirdly, Russia's sovereignty must be effectively exercised and demonstrated through actions rather than mere declarations.[248] For instance, as proposed by Bouchez, one way to demonstrate the effectiveness of intentions would be to prevent foreign ships from entering the waters that Russia claims as historic waters.[249] It would be imperative to demonstrate that Russia has historically endeavoured to ban or limit the sailing of vessels from other nations and that these nations have consented to such limitations.[250]

The initiation of the opening of the NSR for international shipping was undertaken by the Ministry of Maritime Fleet in 1967.[251] Later, the concept of international shipping on the NSR was revitalised by the Murmansk efforts of 1987, and subsequently, the NSR was formally made accessible for international shipping in 1991.[252] These measures and policies by the Soviet/Russian governments, in their literal and logical interpretation, cannot be characterised as "preventing foreign vessels from accessing the NSR." Instead, their objective was to facilitate international shipping activities.

5.3.3 Passage of time

While examining Russia's historic claim through the lens of the "passage of time criteria," it becomes evident that reaching a definitive and unambiguous conclusion is exceedingly challenging. According to the Tribunal's ruling, it is necessary for Russia to have consistently exercised its sovereignty over the NSR for a considerable time.[253] What is the definition of "considerable time"? The specific duration required to achieve sufficiently extensive usage cannot be specified in a general or theoretical sense.[254] Determining the appropriate duration for the emergence of usage remains a subjective assessment, given the specific circumstances of

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244 Bekyashev, *supra* note 126, pp. 278-279.

245 Blakkisrud, *supra* note 237, pp. 195-196.

246 Military Publishing Home of the Ministry of Defence of the USSR. *Manual of International Maritime Law,* p. 273. Available on:https://apps.dtic.mil/sti/tr/pdf/AD0668381.pdf.

247 Willy Østreng, "The Northern Sea Route and Jurisdictional Controversy," *Ocean Futures* (2010), available on:http://www.arctis-search.com/tiki-index.php?page=Northern+Sea+Route+and+Jurisdictional+Controversy#32.

248 South China Sea Arbitration, *supra* note 23, para. 270.

249 Leo J. Bouchez, *The regime of bays in international law* (Leyden: A. W. Sythoff, 1963), p. 249.

250 South China Sea Arbitration, *supra* note 23, para. 270.

251 Irina Andreevna Akimova, *Environmental risks of transporting international transit cargo along the Northern Sea Route (Master Thesis),* Saint Petersburg, 2016: pp. 47-48, accessed November 24, 2023, available on:http://elib.rshu.ru/files_books/pdf/rid_44ae048fc0c34c899a0d1c8e1df0bbd6.pdf.

252 *Ibid.,* pp. 36-37.

253 South China Sea Arbitration, *supra* note 23, para. 275.

254 Donat Pharand, "Reqirements of Historic Waters," in *Canada's Arctic Waters in International Law* (Cambridge: Cambridge University Press, 1988), p. 98, accessed November 9, 2023,doi:10.1017/CBO9780511565458.011.

the case, of whether the passage of time has resulted in the establishment of a customary practise.[255]

In the case of Russia, it becomes challenging to determine the precise starting point for measuring the effectiveness of Russia's sovereignty over the NSR. From which point in time should the count begin, from early historical voyages in the 16-17th centuries, from the regular use of the NSR by the USSR/Russia since the early 1930s for transporting goods, supplies, fuel, and equipment to remote areas in the Russian Arctic mainland and islands[256] or from the opening of the NSR for international shipping in 1967/1991?

Nevertheless, according to scholarly sources that present a discussion on this matter, the historical claim becomes a reality, and the passage of time commences once the *de jure* exercise of sovereignty is established.[257] Consequently, it is plausible to propose that the commencement of the Russian historic claim may be traced back to the year 1998. (See Section 5.3.2 above). From this standpoint, it is improbable to assert that a time span slightly over 20 years is adequate to substantiate a historic claim, considering its relatively brief duration from the perspective of international law.

5.3.4 Acquiescence by foreign states

According to the UN Memorandum on "Historic Waters", to analyse the criteria of "acquiescence by foreign states" it should be understood:

1) what kind of opposition would prevent the historic title from emerging;
2) how widespread in terms of the number of opposing States must the opposition be;
3) when must the opposition occur;[258]

The Memorandum quotes Fitzmaurice:

> *Apart from the ordinary case of a diplomatic protest, or a proposal for reference to adjudication, the same effect could be achieved by a public statement denying the prescribing country's right, by resistance to the enforcement of the claim, or by counter-action of some kind.* [259]

In this regard, it is vital to highlight that the legal status of Arctic waters, and the NSR in particular, was a subject of active dispute between the US and the USSR. Worth highlighting is the incident that took place in the mid-twentieth century within the waters of the NSR that resulted in the exchange of diplomatic notes between the US and the USSR.[260] Specifically, in 1963, the American icebreaker "Northwind" conducted exploration activities in the Laptev Sea without obtaining prior permission from Soviet authorities, and in the subsequent summer, the ship "Burton Island" explored the East Siberian Sea.[261] In diplomatic notes sent to the USSR, the US expressed its position that there is no valid legal basis for treating

255 United Nations, *supra* note 212, paras. 101–105.

256 Gunnarsson, *supra* note 5, pp. 8-9.

257 Singh, *supra* note 230, p. 398.

258 United Nations, *supra* note 212, para. 112.

259 *Ibid.,* para. 114.

260 Vylegzhanin, *supra* note 195, p. 1112.

261 Andrey A. Todorov, "The Russia-USA legal dispute over the straits of the Northern Sea Route and similar case of the Northwest Passage," *Arktika i Sever [Arctic and North]* no. 29 (2017): pp. 75-76, accessed September 4, 2023,DOI:10.17238/issn2221-2698.2017.29.74.

a significant portion of the NSR maritime areas as internal waters on historic grounds.[262]

Additionally, it is worth mentioning an incident from 1967 when the US intended to navigate two icebreakers through the entire NSR, but the USSR denied permission.[263] This denial prompted a protest from the US, as it perceived the denial as a violation of the right of innocent passage through territorial seas.[264]

Thus, the opposition activities undertaken by the US counteract the criteria of "acquiescence or silent agreement by foreign states" in relation to the NSR historic claim. However, it remains challenging to definitively determine if the US opposition alone is sufficient to address the claim. Is there a necessity for a broader and more extensive resistance with a minimum of two or three additional states?[265] Has the objection to the NSR's legal framework been effectively expressed prior to the establishment of the NSR's historic title by Russia?[266] It remains unclear and is contingent upon the specific circumstances of the case and a thorough examination of the relevant evidence.

Upon careful analysis of the Russian historic internal waters claim using the criteria outlined by the Tribunal, it appears challenging for Russia to substantiate a strong case for the historic internal waters claim. The exercise of sovereignty over the NSR seems to lack effectiveness and substantial duration. Furthermore, the US has shown its opposition to Russia's claim, as evidenced by the occurrence of protests. From this perspective, the drawbacks associated with Russia's assertion of NSR as historic internal waterways exceed the beneficial actions taken in support of this claim.

5.4 Interplay between Russia's historic waters claim and UNCLOS

In conclusion, the Tribunal presented another compelling argument that lends further credence to the results presented above and offers elucidation on the legitimacy of Russia's historical entitlements over the NSR. Particularly noteworthy are the Tribunal's findings about the interdependence between historic waters claims and the UNCLOS.

Tribunal stated that:

> *(…) the system of maritime zones created by the Convention was intended to be comprehensive and to cover any area of sea (…) The same intention for the Convention to provide a complete basis for the rights and duties of the States Parties is apparent in the Preamble, which notes the intention to settle "all issues relating to the law of the sea" and emphasises the desirability of establishing "a legal order for the seas" (…) no reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.* [267]

Based on the aforementioned, it is probable that the Tribunal would arrive at a similar determination concerning Russia's claim as it did with China's claim. Russia's purported assertion of historic "sovereignty" and historic rights over nav-

262 Bureau of Oceans and International Environmental and Scientific Affairs. *Limits in the Seas: United States Responses to Excessive National Maritime Claims,* No. 112, (March 9, 1992): pp. 20-21, 71-73, available on:https://www.state.gov/wp-content/uploads/2019/12/LIS-112.pdf. Accessed November 2, 2023.

263 *Ibid.,* pp. 72-73.

264 *Ibid.*

265 United Nations, *supra* note 212, para. 118.

266 *Ibid.,* para. 121.

267 *Ibid.,* para. 245.

igation appears to be inconsistent with UNCLOS[268], as UNCLOS effectively and thoroughly covers the rights of other states (including navigational rights and freedoms) in relation to each maritime zone, hence eliminating any possibility of asserting historic rights.[269] It is noteworthy that Russia's claim potentially surpasses the boundaries of its maritime zones as defined by UNCLOS[270] and exceeds the geographic and substantive limits of Russia's maritime entitlements under the Convention. Russia's accession to the UNCLOS automatically "(...) reflected a commitment to bring incompatible historical claims into alignment with its provisions (...)".[271] It can be inferred that the legal framework governing the NSR should align with UNCLOS in its entirety.

Thus, the NSR cannot be considered a unified regime of the Russian internal waters, and the prior authorization regime, together with the claim of full control over international navigation on the NSR, justified as an act of "Russian sovereignty" under the notion of historic waters, is deemed to be not only unlawful but also inconsistent with UNCLOS.

This conclusion is substantiated by scholarly literature. According to Ingrid Handeland, "(...) the historic title-claim cannot be taken into consideration in the NSR (...)"[272], Jan Jacub Solski suggests that "(...) Russia's current historic waters claims within the NSR are relatively circumspect (...)"[273], Blum asserts that the doctrine of historic waters has been overtaken by the current international law of the sea regime, considering it "(...) as relics of an older and by now largely obsolete regime (...)".[274]

268 *Ibid.,* para. 262.

269 *Ibid.,* para. 246.

270 *Ibid.,* para. 246.

271 *Ibid.,* para. 262.

272 Ingrid Handeland, "Navigational Rights for Warships in the Northwest and Northeast Passages," *Arctic Review on Law and Politics,* Vol. 13 (2022): p. 151, accessed November 15, 2023,http://dx.doi.org/10.23865/arctic.v13.3383.

273 Solski, *supra* note 199, p. 389.

274 Yehuda Z. Blum, "The Gulf of Sidra Incident," in *Will "Justice" Bring Peace?* (Leiden, The Netherlands: Brill | Nijhoff, 2016): p. 383, accessed November 25, 2023, https://doi-org.ezproxy.uio.no/10.1163/9789004233959_025.

6 Conclusion

Based on the conducted research, it is possible to derive the following findings.

The analysis revealed that UNCLOS clearly codifies the legislative and enforcement powers of Coastal States within each specific maritime zone, with these powers diminishing proportionally as one moves further away from the coast. Furthermore, the convention grants foreign merchant ships the right of innocent passage within territorial waters and the freedom of navigation within the EEZ. The observation has been made that UNCLOS maintains an equilibrium between the rights and freedoms of navigation and the jurisdiction of Coastal States.

Nevertheless, in the Arctic, the equilibrium appeared to be increasingly tilted in favour of the Coastal State jurisdiction. The primary rationale for this is the absence of a consensus within the legal community over the appropriate way to interpret and apply Article 234. The study addressed this matter by conducting a comparative analysis of several interpretational methodologies and determining the "most accurate" one.

Firstly, it was determined that Article 234 cannot be regarded as an independent provision within UNCLOS framework. Instead, it should be read in conjunction with general maritime zone delimitation, navigational, and enforcement provisions. Secondly, it was established that the Article's territorial scope encompasses not only the EEZ but also the territorial waters. Thirdly, it was concluded that Article confers upon Coastal States the unilateral legislative jurisdiction in terms of environmental protection and vessel source pollution that does not encompass the authority to regulate navigational rights and freedoms. The concept of "due regard to navigation," which acts as the primary limitation on the legislative jurisdiction, has been determined to encompass both the duty to preserve the right of innocent passage in territorial waters and the freedom of navigation in the EEZ. The study revealed that this *de-minimis* interpretation was perceived as more advantageous in terms of emphasising the preservation of the "common good of international shipping."

Regarding Russia, it has been discovered that the country capitalises on the legal ambiguity resulting from the interpretation of Article 234. This allows Russia to "justify" its legislative framework for the NSR by employing the reading of the article that best serves its interests. In contrast to the suggested Article 234's *de-minimis* interpretation, it was seen that Russia employed its *de-maximis* interpretation. A comprehensive examination of the Russian NSR's legislation has revealed that Russia explicitly recognises its complete sovereignty over the NSR.

The present analysis determined that the way Russia interprets Article 234 can be deemed excessive. It was observed that Article 234 does not permit the conversion of unilateral legislative jurisdiction for environmental protection and vessel source pollution into complete sovereignty. Furthermore, both Article 234 and UNCLOS do not permit Russia to lawfully merge three distinct legal frameworks, namely those governing internal waters, territorial waters, and the EEZ, into a single framework governing internal waters. Finally, Russia's legislative actions, which unilaterally restrict the right of innocent passage and freedom of navigation in the territorial waters and EEZ encompassed within the NSR, were found incompatible with UNCLOS.

In order to provide a more comprehensive analysis on this matter, a thorough examination was conducted to analyse the prior authorisation regime placed on the NSR through the 2020 Navigational Rules. Initially, it has been determined that according to the UNCLOS, foreign merchant vessels are not required to get permission or consent from Coastal States to utilise their navigational rights and freedoms, both within territorial waters and the EEZ. Moreover, it has been concluded that the requirement for vessels to provide specific certificates and documentation to Russian authorities to obtain permission to enter the NSR poses significant

difficulties in aligning with Article 234's environmental protection objective. Furthermore, the aforementioned requirement, which places the burden of proof on the vessel (Flag State), was found to be inconsistent with the UNCLOS, as UNCLOS explicitly prohibits the practice of "pre-emptive" verification of whether vessels engaged in innocent passage or exercising the freedom of navigation have the necessary documentation on board. The importance of the NSR's prior authorization regime in attaining Article 234 goals has been shown to be limited, while continuing to impose burdensome constraints on commercial shipping that appeared to be counterproductive to the NSR's international viability.

Finally, the study clearly demonstrated the presence of dualistic approaches within the legislation pertaining to the NSR. It has been established that in addition to legislating based on Article 234, Russian legal doctrine seeks to apply customary international law, specifically the doctrine of historical waters, as a "backbone option" to substantiate Russia's claim of sovereignty over the NSR.

The existence of the institution of "historical waters" has been affirmed by the doctrine of international law. Despite the fact that the doctrine lacks a formal treaty basis, the classification of a water area (maritime zone) as internal waters of the Coastal State, the establishment of a historic title, and the right to assert sovereignty over such areas were found to require the presence of three essential criteria: the effective exercise of jurisdiction, the passage of time, and the acquiescence of foreign states.

The current research examined Russia's historic waters claim over the NSR in light of the aforementioned criteria as well as the Tribunal's reasoning in the South China Sea Arbitration. The findings indicated that Russia's claim is unlikely to meet any of the criteria. Even under optimal circumstances for Russia, the fulfilment of one or a few conditions will still be insufficient to substantiate the claim. Moreover, the Tribunal's observations led to the conclusion that Russia's historic waters claim over the NSR holds little relevance. This is due to the fact that Russia, by becoming a party to the UNCLOS, has effectively renounced any potential claims to historic waters, aligning itself with the provisions outlined in the UNCLOS.

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