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587

Selected master theses 2024

MarIus No. 587

Sjørettsfondet
Nordisk institutt for sjørett
Universitetet i Oslo

ISSN: 0332-7868

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Digital Publishing: Aksell AS

Content overview

Foreword

We are pleased to publish two selected high quality LLM-master theses among those submitted in the autumn of 2024, both in core areas of maritime law; the first on voyage chartering and the law of demurrage by Maeve Gjerde – the second on the regulatory scheme involving demolition of ships, co-authored by Maria Roxana Ciobanu and Katrine Bygholm Refsing.

Trond Solvang

Navigating Seaworthiness:

A Study of the CMA CGM Libra Judgment with Particular Focus on the UK Supreme Court's Interpretation of Seaworthiness and the Nautical Fault Exemption under the Hague Rules

Maeve Gjerde

Content

Foreword

This thesis was submitted in fulfilment of the requirements for the master's degree in **Maritime** Law (LL.M) at the Scandinavian Institute of Maritime Law, University of Oslo, in December 2024. It is published here with only minor orthographic corrections and adaptations.

The thesis explores the UK Supreme Court judgment in *Alize 1954 and another v Allianz Elementar Versicherungs AG and others* ("The CMA CGM Libra case"), which examined the evolving and complex concept of seaworthiness under the Hague Rules. Notably, the judgment confirmed that initial unseaworthiness prevails over the "error of navigation" defense, a ruling that has sparked significant discussion both before and after the decision — providing a rich subject for analysis, as undertaken in this thesis.

I would like to extend my gratitude to my supervisor, Trond Solvang, for his invaluable feedback, knowledge, and guidance throughout the writing process. I am also grateful for the opportunity to discuss the topic with practitioners, particularly my colleagues at Norwegian Hull Club, whose insights have been very helpful.

Maeve Gjerde

1 Abstract

On November 10th, 2021, the UK Supreme Court issued a ruling in *Alize 1954 and another v Allianz Elementar Versicherungs AG and others* (hereinafter "The *CMA CGM Libra* case").[1] Interestingly, the judgement confirmed that a defective passage plan constituted a failure to exercise due diligence to make the vessel seaworthy, amounting to a breach of Article III Rule 1 of the Hague Rules. Effectively, the judgement established that initial unseaworthiness overrides the "error of navigation" defense. The judgement provides a thorough analysis of the seaworthiness requirement under the Hague Rules and has been described as "essential reading for practitioners who have dealings with cargo claims and should now be the starting point in any case concerning seaworthiness under the Rules..."[2] However, the judgement has not been free of controversy and the legal implications of the ruling are debatable. Throughout this thesis, the Supreme Court judgement will be reviewed and analyzed, particularly focusing on how the Court addressed the seaworthiness obligation and its interplay with the nautical fault exemption. To inform this paper, caselaw, academic literature, national and international legislation and rules will be reviewed.

1 *Alize 1954 and another v Allianz Elementar Versicherungs AG and others* [2021] UKSC 51 (hereinafter: " *Libra* [2021]")

2 Russell (2021)

2 Introduction

Seaworthiness is a key doctrine integral to the legal framework governing the carriage of goods by sea. As well established through caselaw in various jurisdictions, and through the development of international and national rules, a carrier is under an obligation to provide a seaworthy ship. The undertaking to provide a seaworthy ship has been described as "one of the most complex of contractual undertakings. It embraces obligations with respect to every part of the hull and machinery, stores and equipment and the crew itself. It can be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in a total loss of the vessel".[3] Hence, whilst the doctrine of seaworthiness is fundamental to the law related to the carriage of goods by sea, the extent and meaning of seaworthiness is still a contentious topic.

The Hague Rules, as adopted in 1924, sought to provide a uniform international approach to the terms of contracts of carriage by sea.[4] In doing so, the Rules standardized the responsibilities and liabilities of a carrier, including the seaworthiness obligation. The Hague Rules were, however, a product of compromise, and the seaworthiness obligation under the Hague Rules reflects said compromise.[5] Therefore, whilst it is accepted that the carrier has a due diligence obligation to make the vessel seaworthy at the commencement of the voyage, it is also accepted that there are exemptions to a carrier's liability, including, the so-called "error of navigation" exemption. Effectively, a carrier will not be held liable for loss or damage resulting from an error in navigation.

The seaworthiness obligation under the Hague Rules is understood to be an overriding obligation, "so that if the unseaworthiness was a cause of cargo damage the shipowner is unable to rely upon an exception from liability unless it can point to a specific damage caused by the excepted cause and not by unseaworthiness."[6] Whilst this is well understood, an issue may present itself when the unseaworthiness in question is caused by an exemption, such as an error in navigation. The Hague Rules do not provide an obvious solution to such a scenario. Consequently, the interplay between the seaworthiness obligation and the error in navigation exemption has historically been somewhat contentious and not clearly defined.[7]

This very issue presented itself in the *CMA CGM Libra* case, where the courts were tasked with determining if a defective passage plan could render the vessel unseaworthy at the commencement of the voyage. The UK Supreme Court accepted that the preparation of a passage plan is a matter of navigation but nevertheless held that the relevant defective passage plan rendered the vessel unseaworthy. Accordingly, the Supreme Court decisively affirmed that if an error in navigation is the cause of initial unseaworthiness, then owners cannot avail of the error in navigation exemption.[8]

Whilst the judgement in *CMA CGM Libra* provided clarification with regards to the interplay between initial unseaworthiness and the error in navigation exemption, the judgement has not been free of controversy. The Supreme Court adopted a stringent approach to the seaworthiness obligation which arguably, in effect, limited the scope of the nautical fault exemption. This has prompted diverse reactions, some concerned that the judgement has distorted the compromise that was achieved through the Hague Rules with regards to the allocation of risk and

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3 Bennett (2017) at 3-081 referring to the passage of Diplock LJ in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*[1962] 2 QB 26 at 71

4 Rogers (2020) p. 389

5 Djadjev (2016), p. 32

6 Bennett (2017, at 3-103

7 Solvang (2020)

8 *Libra* [2021]

liability in the context of carriage contracts. The judgment thus provides an interesting basis for legal analysis.

This thesis seeks to provide a critical examination of the UK Supreme Court's decision in *CMA CGM Libra*, focusing on the Court`s interpretation of the Hague Rules' due diligence requirement to ensure seaworthiness and its interaction with the nautical fault exemption. To provide a thorough analysis, the judgments rendered at each judicial stage of the case—the Admiralty Court, the Court of Appeal, and the Supreme Court—will be examined. The Supreme Court's judgement will be analyzed in the context of relevant case law, legal literature, and the historical objectives underpinning the Hague Rules. Ultimately, the thesis aims to contribute to the ongoing discussion surrounding the legal treatment of seaworthiness and navigational errors in contemporary maritime law.

3 Seaworthiness

Before examining the *CMA CGM Libra* judgement, it is useful to provide some context regarding the carrier's legal obligation to provide a seaworthy ship. At common law, it is an implied term of a contract for the carriage of goods by sea that the carrier will ensure that the ship is seaworthy.[9] Initially, seaworthiness was understood as a duty to provide a vessel that was "tight and fit for the purpose or employment for which he (the shipowner) offers and holds it forth to the public".[10] The doctrine of seaworthiness has since developed and has proved itself difficult to define. As held by Cresswell J in the *Eurasian Dream*, "seaworthiness is not an absolute concept; it is relative to the nature of the ship, to the particular voyage and even to the particular stage of the voyage on which the ship is engaged…"[11] Caselaw reveals that seaworthiness may be concerned with trivial as well as serious failing, including for example a defective propeller, contaminated fuel or the incompetence of the crew.[12] Thus, there is no definitive definition of seaworthiness.

The common law undertaking of seaworthiness is understood as absolute: "it is not merely that they (the shipowner) should do their best to make the ship fit, but that the ship should really be fit"[13] During the first part of the 19th century, it became increasingly normal practice for the carrier, who enjoyed strong bargaining power and the freedom of contract, to include extensive exclusion clauses in bills of ladings, which effectively altered the carrier`s common law undertaking of seaworthiness.[14] This resulted in discontented shippers who expressed that the only freedom of contract they enjoyed was to ship on terms dictated by the carrier, or not ship at all.[15] Thus, the need for an international uniform regime to regulate maritime trade and to balance the significantly stronger bargaining power of carriers against that of shippers was recognized.

In 1921, representatives of leading shipowners, underwriters, shippers and bankers of the major maritime nations managed to agree on a set of rules, which were drafted by the Maritime Law Committee of the International Law Association at a meeting held at the Hague, which became known as the Hague Rules.[16] The rules were not immediately adopted, and were subject to subsequent amendments, before they were finally adopted by the most important trading nations, through signature of the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("Hague Rules")* in 1924.[17] The convention was successively amended by the Visby Protocol in 1968 and the SDR unit Protocol in 1979, collectively referred to as the Hague-Visby Rules.[18] The Hague-Visby Rules introduced slight changes but did not radically modify the compromise that had been reached between the interest of carriers and shippers in 1924.[19] The Hague/Hague-Visby Rules have since been ratified by more than 95 states globally and

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9 Rogers (2020), p. 72

10 Ping-Fat (2002) with reference to Lyon v Mells (1804) 5 East 428, 102 ER 1134 at 1137 per Lord Ellenborough

11 Rogers (2020), p. 73 with reference to *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream) [2002] 1 Lloyd's Rep 719,* para 126

12 Rogers, p. 74 with reference to *SNIA v Suzuki* (1924) 29 Com Cas 284, *The Makedonia* [1962] and the *Eurasian Dream*

13 Bennett (2017), at 3-074

14 Rogers (2020), p. 389

15 ibid

16 ibid

17 ibid

18 Djadjev (2017), p. 31

19 Rogers (2020), p. 390

where not compulsorily applicable, they are often incorporated by contract into bills of ladings, charterparties and other contracts of affreightment through a clause paramount.[20]

Importantly, the Hague Rules altered the "absolute" undertaking of seaworthiness under common law, replacing it with a duty to exercise due diligence before and at the beginning of the voyage to make the vessel seaworthy, per article III r.1.[21] In contrast to the common law undertaking of seaworthiness, the carrier cannot contract out of the Hague Rules duty to exercise due diligence to make the vessel seaworthy. It is hence held to be an "inescapable" duty. The very meaning of the seaworthiness obligation under the Hague Rules is a central issue analyzed in the *CMA CGM Libra* Judgement, as will be explored in the following chapters.

20 *Libra* [2021], 1

21 Hague Rules (1924), article III, r. 1

4 CMA CGM Libra: The Case

On May 18th, 2011, the post-Panamax container vessel, CMA CGM Libra grounded when leaving the port of Xiamen. Following the grounding, owners of CMA CGM Libra declared General Average for salvage costs. 92% percent of the cargo interests paid their contribution in GA. Approximately 8% of cargo interest refused to pay their share, claiming that the vessel was unseaworthy by reason of owner's actionable fault. This disagreement led to a legal dispute between the vessel's owners (the claimants) and the cargo interests (the defendants). The case was initially heard in the UK Admiralty Court, subsequently appealed to the Court of Appeal, and ultimately brought before the Supreme Court. This paper focuses on the Supreme Court's judgment, but to provide context, the decisions of both the Admiralty Court and the Court of Appeal will also be briefly reviewed.

4.1 Legal Context and Overview: General Average and The Hague Rules

Owners declared General Average ("GA") for the "extraordinary expenditure incurred for re-floating the vessel".[22] GA is a well-established principle of maritime law, outlined in the York Antwerp Rules, which stipulates that any extraordinary expenses that fall within the scope of GA "shall be borne by the different contributing interests" in the common maritime venture.[23] In this case, the expenditure incurred was, by all accounts, reasonably held to fall within the scope of GA. Hence, all contributing interests, including cargo interest, were obliged to contribute to the expenditure incurred for refloating the vessel. Importantly, however, there is an exception: the party whose "actionable fault" resulted in the GA event is not entitled to recover from the other contributing interests.[24]

"Actionable fault" involves any causative breach of the terms of the relevant contract of carriage.[25] In the current case, the relevant contract of carriage incorporated the Hague Rules. Article III r.1 (a) of the Hague Rules states that the "The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to... make the ship seaworthy».[26] Article IV prescribes the rights and immunities of the carrier, emphasizing that the seaworthiness obligation is one of due diligence, stipulating that "Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy... "[27] Article IV r. 2(a) further prescribes that, "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from... Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."[28]

Throughout this thesis, it will become clear that the primary task of the Courts in the case at hand was to interpret the scope of the seaworthiness obligation and nautical fault exemption as defined by the Hague Rules. This involves examining the owner's obligation to ensure the vessel is seaworthy as stated in Article III r. 1 (a), as well as understanding how this obligation interacts with the exemptions listed in Article IV r. 2 (a).

22 APL (2020)

23 York Antwerp Rules 2016, Rule A (1) (2)

24 Cornah (2018) at D.02

25 *Libra* [2021], 1.

26 Hague Rules (1924), Article III r. 1(a)

27 Ibid, Article IV r.1

28 Article IV, r. 2 (a)

4.2 The Dispute

The relevant dispute was first heard before Justice Teare of the UK Admiralty Court in early 2019. The Parties` claims, in broad terms, were as follows:

Cargo interest (the defendants) declined paying their contribution in GA on the basis that "the vessel was unseaworthy by reason of the fact that she had an inadequate passage plan, that that inadequacy was a cause of the casualty, and that due diligence was not exercised to make the vessel seaworthy. The casualty was thus caused by the Owners' actionable fault (a breach of Article III rule 1 of the Hague Rules) and so the cargo interests are not liable to contribute in GA pursuant to the York Antwerp Rule"[29]

Owners of the vessel (the claimants) argued that a vessel could not be deemed unseaworthy by reason of a defective passage plan.[30] Furthermore, they argued that the cause of grounding could be attributed to the master`s negligent navigation, effectively satisfying the so called, "error of navigation" exemption as set out Article IV r. 2 (a).[31] In any event, owners argued that due diligence had been exercised to make the vessel seaworthy, hence satisfying the provisions of the Hague Rules Article III r. 1.

4.3 The Facts of the Case

In addressing the pertinent issues raised, the UK Admiralty Court conducted a thorough examination of the case's facts, with particular emphasis on the passage plan and the surrounding navigational circumstances. The sequence of events leading to the grounding can be briefly summarized as follows:

Prior to departure from Xiamen, the second officer prepared a passage plan for the voyage from Xiamen to the port of Hong Kong.[32] The passage plan was expressed through two documents: a "passage plan document" and the vessel's working chart.[33] The relevant chart for the vessel's departure from Xiamen was British Admiralty chart no. 3449 ("BA 3449").[34]

Importantly, the vessel had onboard Notice to Mariners 6274(P)/10 ("NM 6274"), which included the following warning, "Numerous depths less than the charted exist within, and in the approaches to Xiamen Gang." Furthermore, NM 6274 also advised that the "least depth" within the buoyed fairway from the port to the open sea was 14 meters at low tide, ensuring sufficient depth for the vessel at all times.[35] The crew, however, neglected to annotate BA 3449 with a specific reference to the uncharted depths warning, and they also failed to include it in the passage plan document.[36]

The passage plan prepared for the vessel`s departure from Xiamen prescribed a course following the buoyed fairway. The master, however, decided to divert from the intended route, leaving the buoyed fairway. It was reported that, "the master's stated reason, on the very day of the grounding incident, for leaving buoy 14-1 to port was that he had in mind having been told by VTS on the inward passage that there was shallow water "ahead on the East of the channel".[37] The decision to divert

29 *Alize 1954 and another v Allianz Elementar Versicherungs AG and others* [2019] EWHC 481 (Admlty) (hereinafter: " *Libra* [2019] *",* 4

30 Ibid, 76

31 Ibid, 80

32 *Libra* [2019], 25

33 *Libra* [2021], 11

34 Ibid

35 Ibid, 13

36 Ibid

37 *Libra* [2019], 46

from the intended route ultimately resulted in the vessel running aground on an unchartered shoal about four cables west of the buoyed fairway.

4.4 Admiralty Court Judgement

The Admiralty Court carefully reviewed the parties' submissions and the facts of the case, identifying several key issues. These included whether the passage plan in question was defective, whether such a defect could render the vessel unseaworthy, whether causation was established, and finally, whether the owners had exercised due diligence to ensure the vessel's seaworthiness. The Admiralty Courts finding`s regarding the factual circumstances, such as the adequacy of the relevant passage plan and causation laid the groundwork for the Court of Appeal and Supreme Court rulings. Hence, it is of interest to view the Admiralty Courts` assessment of these matters, as will be examined in the following section. The issues relating to seaworthiness and due diligence were further addressed by the Court of Appeal and Supreme Court. Therefore, the Admiralty Court`s assessment of these issues will only be briefly reviewed, as primary focus is directed towards the Supreme Court Judgement.

4.4.1 The Passage Plan:

Teare J noted that it was undisputable that the relevant passage plan was “defective in at least some respects”.[38] However, the objective of reviewing the passage plan was to determine whether the passage plan was causative of the grounding incidence. Hence, the crucial point of contention was whether the crew`s failure to annotate to NM 6274 in the passage planning documents rendered the passage plan defective.

The court was aided by the expert opinion of two master mariners engaged by the parties, Captain Whyte for the Owners and Captain Hart for the Cargo Interests.[39] Captain Whyte made several points indicating that the passage plan was adequate, reporting that “the vessel had a passage plan of "sufficient standard" and that "any deficiency in making all of the pencil amendments regarding Preliminary NM 6274) P)/10 to Admiralty Chart 3449 did not contribute to the grounding”[40] further emphasizing that “there was sufficient water where the vessel wished to navigate”.[41] He went on to maintain that “it was sufficient that NM 6274(P)/10 was attached to the chart or adjacent to the chart".[42] Captain Hart, on the other hand, suggested that “that there ought to have been noted on the chart that any area outside the charted fairway was a "no go" area”[43] and "the absence of the identification of "no go areas" on the working chart meant that there was no pre-assessed visualisation of "safe" and "unsafe" waters on the working chart."[44]

The court assessed the expert opinions and further evaluated the passage plan in light of the IMO Guidelines for Passage Planning, as adopted in the IMO Resolution of 1999. Teare J noted that, “The IMO Guidelines state that the appraisal of the intended passage should include "all areas of danger" and that the passage plan should include "all areas of danger". The presence of numerous depths less than the charted depths in the approaches to Xiamen must be, it seems to me, a source of danger.”[45] In reviewing various submissions and the evidence presented,

38 *Libra* [2019], 60

39 Ibid, 6

40 Ibid, 63

41 Ibid, 64

42 *Libra* [2019], 72

43 Ibid, 62

44 Ibid, 65

45 Ibid, 64

Teare J ultimately found that, “In the present case neither the passage plan nor the chart contained the necessary warning. It was therefore defective or inadequate and imprudently so. A source of danger when leaving Xiamen was not clearly marked as it ought to have been.”[46] Accordingly, the Admiralty Court conclusively determined that the passage plan was defective. Thereupon, the court addressed the next issue, namely whether the defective passage plan rendered the vessel unseaworthy.

4.4.2 Seaworthiness:

In assessing the seaworthiness issue, Teare J applied the “prudent owner test” as first set out in *McFadden v Blue Star Line,* where the question to be put is “whether a prudent owner would have required the relevant defect, had he known of it, to be made good before sending his ship to sea”.[47] The question was, hence, whether a prudent owner would have required *the defect passage plan* to be made good before sending his ship to sea.

Counsel on behalf of owners made several arguments opposing the unseaworthiness assertion. In short, they contended that a defective passage plan does not make a vessel unseaworthy, distinguishing between errors in navigation and seaworthiness, arguing that passage planning is "part of navigation, albeit the planning takes place prior to the actual passage. Passage planning is not itself an aspect of seaworthiness."[48] Furthermore, they argued “that the production of a defective passage plan is an error of navigation, and it matters not that it occurred prior to the commencement of the voyage.”[49] Given the particular defect in question, Counsel also questioned the applicability of the “prudent owner test”, submitting that a, “"one-off defective passage plan" did not amount to unseaworthiness and that the traditional test of seaworthiness in *McFadden v Blue Star Line* was never intended to apply to such a matter”.[50]

The Admiralty Court ultimately rejected Owner’s arguments, confirming that that a defective passage plan could in fact render the vessel unseaworthy. In doing so, Teare J rejected the error of navigation defence stating that, “I am unable to accept this submission in the context of the Hague Rules. Article III r.1 places a seaworthiness obligation upon the carrier "before and at the beginning of the voyage". In this context the timing of the master's negligence therefore matters.”[51] Essentially, Teare J confirmed that “initial unseaworthiness” overrides the error of navigation defence. Justice Teare concluded as follows, “I am confident that by 2011 the prudent owner would have insisted on such a passage plan (adequate) before the voyage was commenced. The vessel was, in my judgment, unseaworthy at the beginning of the voyage.”[52]

4.4.3 Causation

Teare J went on to consider whether unseaworthiness was causative of the grounding, finding that, “it is more likely than not that the defect in the passage plan was causative of the master’s decision to leave buoy 14-1 to port.”[53] He decisively concluded that, “the defective passage plan and the master’s resulting negligence in deciding to navigate outside the buoyed fairway” was “a real and effective cause

46 Ibid, 73

47 Ibid, 75 with reference to *McFadden v Blue Star Line [1905] 1 KB 697, 706,*

48 *Libra* [2019], 76

49 Ibid, 80

50 Ibid, 86

51 Ibid, 80

52 Ibid, 87

53 Ibid, 89

of the grounding."[54] Effectively, Justice Teare established a causative relationship between the unseaworthy state of the vessel, due to the defective passage plan, and the grounding incidence.

4.4.4 Due Diligence

Counsel for owners argued that due diligence had been exercised to make the vessel seaworthy, referring to the vessels` adequate safety management system, explaining that it was "the well-established industry view that an owner/carrier has complied with its responsibilities if it establishes, implements and audits the SMS"[55] Furthermore, they argued that, "obligation to exercise due diligence to make the ship seaworthy only concerns things done (by Owners or their servants or agents) in the capacity of carrier"[56]and that " The actions of the master and second officer in preparing the passage plan were matters of navigation rather than matters for Owners as carrier"[57]

Justice Teare, however, rejected the owners' arguments, referring to the non-delegable nature of the due diligence obligation, concluding that "in order to comply with Article III r.1 it is not sufficient that the owner has itself exercised due diligence to make the ship seaworthy. It must be shown that those servants or agents relied upon by the owner to make the ship seaworthy before and at the beginning of the voyage have exercised due diligence. That is because the duty is non-delegable."[58] Accordingly, by reason of the crew`s failure to exercise sufficient due diligence when producing the passage plan, owners effectively failed to exercise due diligence, constituting a breach of the seaworthiness requirement under the Hague Rules, pursuant to Article III r. 1.

4.4.5 Admiralty Court: Conclusion

In reviewing abovementioned issues, Teare J ultimately delivered his judgment on the 8th of March 2019, deciding in favour of the defendants, concluding that, "The Cargo Interests have established causative unseaworthiness, and the Owners have failed to establish the exercise of due diligence to make the vessel seaworthy. That is the consequence of applying to the facts of this case established propositions of law, namely, the traditional test of seaworthiness, the principle that documentation is an aspect of seaworthiness and the non-delegable nature of the duty to exercise due diligence"[59] Effectively, the Admiralty Court found that Owners had breached the seaworthiness requirement under the Hague Rules, constituting an "actionable fault", allowing Cargo Interests to decline paying their contribution in GA.

4.5 The Court of Appeal Judgement

The decision of the Admiralty Court was appealed by the vessel`s owner. The appeal was granted, and the UK Court of Appeal heard the case in February 2020 with Lord Justice Flaux, Lord Justice Haddon-Cave and Lord Justice Males presiding. The two permissible grounds of appeal were:

1) "That the judge wrongly held that a one-off defective passage plan rendered the vessel unseaworthy for the purposes of Article III rule 1 of the Hague Rules

54 Ibid, 92

55 *Libra* [2019], 110

56 Ibid, 102

57 Ibid

58 Ibid, 113

59 *Libra* [2019], 114

and, in particular, failed properly to distinguish between matters of navigation and aspects of unseaworthiness:"[60]

2) "The judge wrongly held that the actions of the vessel's master and crew which were carried out *qua* navigator could be treated as attempted performance by the carrier of its duty *qua* carrier to exercise due diligence to make the vessel seaworthy under Article III rule 1 of the Hague Rules."[61]

4.5.1 Court of Appeal: Conclusion

The appeal was unanimously dismissed on both grounds, with the Judges building on the rationale set out by Teare J in the Admiralty Court. Lord Justice Haddon-Cave conveniently summarised his view by simply referring to relevant provisions of the Hague Rules and their inception in 1924, stating that, "The signatories to the Convention agreed to divide the allocation of risk for maritime cargo adventures into two separate regimes. The first regime imposes a non-delegable duty on carriers to exercise due diligence to make the ship seaworthy "before and at the beginning of the voyage" (Article III rule 1). The second regime excuses carriers from liability for loss or damage caused by errors of crew or servants "in the navigation or in the management of the ship" thereafter, i.e., during the voyage (Article IV rule 2(a))."[62]

Thus, the Court of Appeal concluded in line with the Admiralty Court, affirming that the defective vessel plan rendered the vessel unseaworthy at the beginning of the voyage. Consequently, the defences under Article IV r. 2(a) were inapplicable, and the Owners were once again found to be in breach of the seaworthiness obligation pursuant to the Hague Rules.

4.6 The Supreme Court Judgement

The decision of the Court of Appeal was further appealed to the UK Supreme Court. The case was heard on the 7th and 8th of July 2021, before Lord Reed (President), Lord Briggs, Lady Arden, Lord Hamblen and Lord Leggat.

The first issue up for appeal concerned the scope of the seaworthiness obligation. Central to the appeal was whether the Hague Rules prescribed a "a category-based distinction between a vessel's quality of seaworthiness or navigability and the crew's act of navigating"[63] The crux of the question was whether there was a so-called "attribute threshold" for seaworthiness, where, as held by owners, seaworthiness is only concerned with the vessels` attributes and equipment, whereas navigation and management of the vessel concerns how the crew operates the vessel using those attributes and equipment.[64] Interlinked with this issue is whether negligent passage planning amounted to "negligent navigation", which seemingly would exempt the carrier from liability per Article IV r. 2 (a).

The second issue up for appeal concerned the scope of the due diligence obligation to make the vessel seaworthy per article III r. 1 (a). The question was whether Owners had exercised sufficient due diligence by equipping the vessel with all that is required for her to be safely navigated, including a competent crew.[65]

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60 *Alize 1954 and another v Allianz Elementar Versicherungs AG and others* [2020] EWCA Civ 293 (hereinafter: "*Libra* [2020]", 29

61 ibid

62 *Libra* [2020], 102

63 *Libra* [2021], 2

64 ibid, 2

65 *Libra* [2021], 2

4.6.1 Issue 1: Seaworthiness

Owners claimed that the lower courts were mistaken in their findings, maintaining that the defective passage plan did not amount to a breach of the seaworthiness obligation, per article III, r. 1 and that, in any event, the defective passage plan falls within the scope of the nautical fault exemption, per article IV rule 2 (a).[66] Owners organised their claim as follows: « (i) passage planning is navigating; (ii) a defective passage plan does not in and of itself render a vessel unseaworthy because (a) a navigational decision is not an attribute of the ship an d (b) a passage plan is a set of such navigational decisions and therefore also not an attribute of the ship; (iii) a defective passage plan does not render the underlying chart defective and a passage plan is not part of the "documentary outfit" of the vessel or a navigational tool.»[67]

In its assessment of the seaworthiness issue, the Court considered the Travaux Préparatoires of the Hague Rules,[68] the official record of negotiations prior to the inception of the Hague Rules. Owners emphasized the importance of the navigational fault exemption, referring to the words of Sir Norman Hill, who represented the British shipowners at the Hague Conference. Sir Norman Hill stressed that that article IV "is the shipowners' clause*"* whereas article III is "the cargo interests' clause" and "our big point is the navigation point, and what we have asked is that we should have the words which from time immemorial have certainly appeared in all British bills of lading"[69] The importance of distinguishing between the "shipowners clause" and the "cargo interests clause" was, as held by owners" related to the underlying objective of the Hague Rules to spread risk and allow appropriate allocation of insurance among the different interests of the maritime venture. Specifically, owners held that "the allocation of risk is that the carriers have to insure themselves against the risk of all damage to both their own ship and the property of third parties such as other vessels and the structure of ports, but cargo interests have to insure themselves against the risk of negligent navigation causing damage to their cargo.[70]

The Supreme Court rejected the owners' arguments, affirming that the obligation to make the vessel seaworthy at the beginning of the voyage, per article III r. 1 is an overriding obligation. The court relied on the authority of the Privy Council in *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd*[71], where Lord Somervell of Harrow firmly held that "Article III rule 1 is an overriding obligation. If it is not fulfilled and the non-fulfillment causes the damage the immunities of article IV cannot be relied on*".*[72] In applying the principles set out in *Maxine Footwear*, the Supreme Court held that "that where loss or damage is caused by a breach of the carrier's obligation to exercise due diligence to make the vessel seaworthy under article III rule 1, the article IV rule 2 exceptions cannot be relied upon, including where the excepted matter is the cause of the unseaworthiness"[73] Effectively, the Supreme Court rejected owners` contention that there is a category based distinction between seaworthiness and navigation of the ship, confirming that negligent navigation can amount to initial unseaworthiness.[74]

In addressing the insurance risk issue, the Supreme Court simply held that "shipowners and their insurers bear the risk of cargo damage or general average

66 Ibid, 59

67 Ibid, 58

68 Travaux Préparatoires of the Hague and Hague-Visby Rules

69 *Libra* [2021], 52

70 *Libra* [2021],53

71 *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589

72 *Libra* [2021], 68 referring to *Maxine Footwear* p. 115

73 Ibid, 70

74 Ibid, 71

expenses caused by a failure to exercise due diligence to make the vessel seaworthy. That remains the case where the unseaworthiness is caused by negligent management or navigation."[75]The Supreme Court did recognize the importance of the navigational fault exemption for owners, but pointed out that in most cases it will be errors in navigations during the voyage that will lead to loss or damage, and in which cases, the error in navigation exemption will apply.[76]

The Supreme Court further dismissed the suggestion that there is a "attribute" threshold for seaworthiness, citing various authorities that demonstrate that seaworthiness is concerned with not only physical defects in the vessel or her equipment, but also, for example the adequacy of the vessel's systems such as in relation to engine maintenance,[77] the mental abilities of the crew,[78] the adequacy of piping plans[79] and the trading history of the vessel.[80] The Supreme Court hence found that "if "attribute" is to have such a wide and extended meaning as to cover all these eventualities, it is unlikely to be of definitional assistance"[81] Accordingly, the Court concluded "that it is either correct or helpful to treat the concept of unseaworthiness as being subject to an attribute threshold" and that it is best treated as an "illustrative rather than a prescriptive requirement"[82]

The applicability of the "prudent owner" test for seaworthiness was upheld by the Supreme Court, whereby it was confirmed that the test endorsed in *McFadden v Blue Star Line* is an appropriate test for seaworthiness, except for in cases "at the boundaries of seaworthiness".[83] It was held that for cases at the boundaries of seaworthiness", it «may be necessary to address a prior question of whether the defect or state of affairs relied upon sufficiently affects the fitness of the vessel to carry the goods safely on the contractual voyage as to engage the doctrine of seaworthiness."[84] The *Aquarcharm* was described as a case "at the boundaries of seaworthiness". In this case, the vessel was negligently overloaded by the master at the commencement of the voyage, to the point that she was refused entry through the Panama Canal, resulting in part of the cargo having to be transshipped.[85] The Court of Appeal in this case found the vessel to be seaworthy. The Supreme Court in *CMA CGM Libra* explained that the *Aquacharm* was "at the boundaries of seaworthiness" because the sole consequence of the negligently overloaded vessel was to cause some delay and expense and no damage to the vessel.[86]*CMA CGM Libra*, on the other hand, was not at the boundaries of seaworthiness, the Supreme Court explaining that, "given the judge's findings as to the importance of passage planning to the safe navigation of the vessel there can be no doubt that this was an appropriate case for the judge to apply the prudent owner test of unseaworthiness".[87]

The Supreme Court then considered if the defect in question was "remediable", which may mean that the vessel was not unseaworthy. A defect is remediable if it

75 Ibid, 82

76 Ibid, 82

77 *Libra* [2021], 92 referring to *CHS Inc Iberia SL v Far East Marine SA (The Devon)* [2012] EWHC 3747 (Comm)

78 Ibid, referring to *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002] 1 Lloyd's Rep 719

79 Ibid, referring to *Owners of Cargo Lately Laden on Board the Makedonia v The Makedonia* [1962] P 190 and *Robin Hood Flour Mills Ltd v N M Paterson & Sons Ltd (The Farrandoc)* [1967] 2 Lloyd's Rep 276

80 Ibid, referring to *Ciampa v British India Steam Navigation Co* [1915] 2 KB 774

81 *Libra* [2021], 92

82 Ibid, 96 referring to quote from Carver on Charterparties, 2nd ed (2020), at 3.115

83 *Libra* [2021], 101

84 Ibid, 101

85 *Actis Co Ltd v Sanko Steamship Co Ltd (The Aquacharm)* [1982] 1 WLR 119

86 *Libra* [2021], 95

87 Ibid, 128

"would reasonably be expected to be put right before any danger to vessel or cargo arose".[88] The Court, however, found that the prudent owner could not reasonably expect the defects in the passage plan to be remedied before its use.[89] Hence, the defect in question was not remediable, and the Supreme Courts` conclusion remained that the vessel was unseaworthy at the commencement of the voyage, due to the defective passage plan.

Conclusively, the Supreme Court accepted that preparation of a passage plan is a matter of navigation.[90] However, with reference to *Maxine Footwear*, the Supreme Court decisively affirmed that navigational fault exemption cannot be relied on in the event of a causative breach of the carrier's obligation to exercise due diligence. Accordingly, the Supreme Court endorsed the finding of Justine Teare in the Admiralty Court, maintaining that CMA CGM Libra was unseaworthy; "His trenchant conclusion as to what the prudent owner would have done is unassailable, as is his consequent conclusion on unseaworthiness."[91]

4.6.2 Issue 2: Due diligence

The owners argued that the carrier had exercised sufficient due diligence by equipping the vessel with all that was necessary for her to be safely navigated. The crew`s failure to safely navigate the ship was, as held by owners, outside of the carrier`s orbit of responsibility.[92] Owners urged the court to take a similar approach to that of Cresswell J. in *The Eurasian Dream*, which would entail that the diligence required by the carrier should in the context of passage planning include "(i) employing competent navigating officers, (ii) ensuring that the navigating officers are properly instructed in respect of passage planning and (iii) auditing at regular intervals their performance to ensure that those instructions are being complied with."[93] Further reference was made to the words of Judge Kirkpatrick in *The Oritani, "*The theory of the law is that the owners are justified in committing all matters of navigation to skillful and experienced navigating officers"[94] Additionally, it was observed that "It would be invidious for an owner to have to second-guess the navigational decisions made by a master whenever the ship is about to leave port»,[95] given that "navigational decisions often involve judgments made at the time based on prevailing nautical and environmental local conditions»[96]

The Supreme Court rejected owners' contention that sufficient due diligence had been exercised by the carrier. Relying on the authority in *Muncaster Castle*, the Supreme Court affirmed the non-delegable nature of the due diligence obligation, stating that "The carrier is responsible for any failure to exercise due diligence by those to whom he has entrusted the task of making the vessel seaworthy. It is the carrier's contractual responsibility to ensure that due diligence is exercised in making the vessel seaworthy and he cannot contract out of that responsibility by delegation."[97] The Supreme Court did, however, confirm that the due diligence obligation does not apply when the owner has no responsibility for the vessel or

88 Ibid, 103

89 Ibid, 127

90 Ibid, 118

91 Ibid, 128

92 *Libra* [2021], 129

93 Ibid 130 with reference to *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd* (The Eurasian Dream) [2002] 1 Lloyd's Rep 719 at para 132

94 *Libra* [2021], 131 with reference to *The Oritani* (1929) 40 F 2d 522, 528.

95 Ibid, 132

96 ibid

97 Ibid, 134

the cargo, i.e., when the vessel or cargo is not in the "orbit" of the carrier.[98] In the case at hand, "the vessel was at all times under the carrier's control and the failure to exercise due diligence was that of the carrier's servants in the preparation of the vessel for her voyage."[99] The Court further rejected the owners' assertions related to the special nature of navigation, holding that the carrier remains responsible for any lack of due diligence in the performance of the task of navigation.

To conclude, the Supreme Court upheld the trial judges` and the Court of Appeals finding on the issue of due diligence, confirming that "The carrier cannot escape from its responsibilities under article III rule 1 of the Hague Rules by delegating them to its servants or agents qua navigators, or qua managers, or qua engineers or qua ship repairers."[100] The Supreme Court confirmed that the master and crew had failed to exercise due diligence when producing a passage plan, effectively amounting to a failure by the carrier to exercise due diligence to make the vessel seaworthy.

4.6.3 Supreme Court: Conclusion

The Supreme Court conclusively affirmed that owners had breached their seaworthiness obligation under the Hague Rules, Article III, r. 1(a). As a result, due to the overriding nature of the seaworthiness obligation at the beginning of the voyage, owners could not avail of the error in navigation exemption in Article IV, r. 2(a). To support this conclusion, the Supreme Court highlighted the main legal principles relevant to the case, as outlined in paragraph 145 of the judgment. For the purpose of this thesis, it is of particular interest to note that the Supreme Court confirmed (1) "if the vessel is unseaworthy, it makes no difference whether negligent navigation or management is the cause of the unseaworthiness or is itself the unseaworthiness"[101] (2) the carrier is liable for a failure to exercise due diligence by the master and deck officers of his vessel in the preparation of a passage plan for the vessel's voyage"[102] and (3) "Save for exceptional cases at the boundaries of seaworthiness, the well-established prudent owner test, namely whether a prudent owner would have required the relevant defect to be made good before sending the vessel to sea had he known of it, is an appropriate test of seaworthiness, well suited to adapt to differing and changing standards."[103]

Ultimately, the Supreme Court dismissed the owners appeal, upholding the decision of Justice Teare, concluding that, "the judge directed himself properly in law and the findings he made amply support the conclusion he reached that the defective passage plan involved a want of due diligence to make the vessel seaworthy".[104] The owners were hence found to be in breach of the terms of the contract of carriage, by way of a breach of the Hague Rules Article III, r. 1(a), and cargo interests could rightfully deny paying their contribution in GA.

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98 Ibid, 137 with reference to *W Angliss & Co (Australia) Pty Ltd v P&O Steam Navigation Co* [1927] 2 KB 456 & *Northern Shipping Co v Deutsche Seereederei GmbH (The Kapitan Sakharov)* [2000] 2 Lloyd's Rep 586

99 *Libra* [2021], 138

100 Ibid, 144

101 Ibid [2021], 145 (ii)

102 Ibid (x)

103 *Libra* [2021], 145 (iv)

104 ibid 146

5 Dissecting the Supreme Court Judgement

The Supreme Court judgement confirmed that a defective passage plan, as prepared by the second officer and master, can render a vessel unseaworthy. As acknowledged by Justice Teare in the Admiralty Court, "there was no previous case in which it had been held that a defective passage plan renders a vessel unseaworthy."[105] This suggests that the judgment represents new precedent. On the other hand, as implied by the Supreme Court, the judgment simply confirmed well established principles of the law related to the seaworthiness obligation under the Hague Rules.

The judgement notably clarified the interaction between the seaworthiness requirement and the nautical fault exemption under the Hague Rules. It determined that if a nautical fault renders a vessel unseaworthy, the owner cannot invoke the nautical fault exemption. Accordingly, the Supreme Courts` interpretation of the Hague Rules imposes stringent temporality, whereby a nautical error occurring prior to the commencement of the voyage cannot be exempted, whereas the same error made during the voyage can be. The Supreme Court held that this is the "natural construction" of the Hague Rules.[106] It is however noteworthy that the case found its way to the Supreme Court, which suggests that the outcome was not necessarily obvious. Moreover, in this authors opinion, it is not entirely convincing that the Supreme Court`s finding with regards to the relationship between the seaworthiness obligation and the nautical fault exemption is the only plausible "natural construction" of the Hague Rules.[107]

On the issue of due diligence, the Supreme Court found that by way of the master's failure to exercise due diligence in matters of navigation, owners effectively failed to exercise due diligence to make the vessel seaworthy. Accordingly, the Supreme Court affirmed that the due diligence obligation is not satisfied by simply equipping the vessel with all that is needed for the vessel to be safely navigated: the due diligence obligation extends to matters of actual navigation. In concluding on the nature and scope of the due diligence aspect of the seaworthiness obligation, the Supreme Court relied on the authority in *Muncaster Castle*. Whilst *Muncaster Castle* is considered leading authority in the matter, it is questionable if the principles derived from this judgement are appropriate to apply in a case such as the one at hand.

The Supreme Court delivered a clear and definitive judgment on the proper interpretation of the seaworthiness obligation under the Hague Rules, seemingly leaving little room for ambiguity. Nevertheless, as indicated above, there are aspects of the judgement that are somewhat questionable. In particular, one might question if the Supreme Court were correct in treating the master's failure to exercise due diligence in matters of navigation as initial unseaworthiness. Inherent to this question is whether the Hague Rules were interpreted in a manner that is in line with the objectives and intent underlying the Rules. In the following chapter of this thesis, the Supreme Court judgement will be analyzed, particularly focusing on the court's interpretation of the relationship between the due diligence obligation to provide a seaworthy ship at the commencement of the voyage and the nautical fault exemption. This analysis will involve a thorough review of the Supreme Court's reasoning, exploring and dissecting the legal arguments and rationales that ultimately led to the final ruling in *CMA CGM Libra*.

105 *Libra* [2019], 87

106 *Libra* [2021], 76

107 Solvang (2020), p. 55

5.1 Review of the Supreme Court's Ruling on Seaworthiness

When deciding on the issue of seaworthiness, the Supreme Court heavily relied on the authority in *Maxine Footwear,* holding that the seaworthiness obligation under the Hague Rules is an overriding obligation, which necessarily means that it makes no difference if the reason for unseaworthiness is exempted under Article IV. Accordingly, the Supreme Court confirmed that Article III r.1 imposes temporality, whereby the obligation to exercise due diligence to make the vessel seaworthy is absolute at the commencement of the voyage, and that the exemptions under Article IV can only apply so long as the obligation under Article III r. 1 have been fulfilled. On the issue of whether the vessel was unseaworthy at the commencement of the voyage, the Supreme Court applied the "prudent owner" test and decisively found the vessel to be unseaworthy.

5.1.1 Regarding Maxine Footwear

Heavy reliance was placed on the Privy Council decision in *Maxine Footwear* as it provided authority for the major point in the *CMA CGM Libra* judgement, "where loss or damage is caused by a breach of the carrier's obligation to exercise due diligence to make the vessel seaworthy under article III rule 1, the article IV rule 2 exceptions cannot be relied upon, including where the excepted matter is the cause of the unseaworthiness"[108] In light of this, it is useful to consider the circumstances of *Maxine Footwear*.[109] In this case, after loading was completed, a deck officer instructed an employee of an independent contractor to use an oxygen-acetylene lamp to clear ice from the scupper pipes. This action caused a fire, ultimately necessitating the scuttling of the vessel.[110] Accordingly, the vessel was unable to proceed on the intended voyage.

In *Maxine Footwear,* the Lordships made it clear that "from the time when the ship caught fire, she was unseaworthy".[111] As quoted by the Supreme court in *CMA CGM Libra,* Lord Somervell of Harrow held that "Art. III, Rule 1, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of Art. IV cannot be relied on. »[112] Whilst the latter statement has been construed to have wide reaching applicability, it is important to note that the unseaworthiness in question in *Maxine Footwear* is distinguishable to the unseaworthiness in question in *CMA CGM Libra*. In *Maxine Footwear,* the vessel caught on fire prior to departure and hence, the "casualty" happened prior to departure. In *CMA CGM Libra* the vessel grounded whilst on its voyage and accordingly, the "casualty" occurred subsequent to departure.

Furthermore, it follows that a vessel on fire is unfit to proceed on a voyage, let alone carry cargo, and hence it seems quite self-explanatory that said vessel would be unseaworthy before and at the beginning of the voyage. As held by Phillips LJ in *Apostolis,* a case concerning the seaworthiness of a vessel where sparks from welding work being carried out on deck fell on to cargo of flammable cotton causing it to be damaged by fire, " I have always found that a difficult decision (Maxine Footwear), but it is plainly distinguishable from the present case, for in *Maxine* the structure of the ship was on fire, which made it necessary to scuttle the ship. In those circumstances it is not surprising that it was conceded that the ship was rendered unseaworthy by the fire."[113] It is also worth noting that the ***Maxine Footwear*** judgment was relatively brief and lacked detailed reasoning. Consequently, it is

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108 *Libra* [2021], 70

109 *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589.

110 Wilson (2001) p. 266

111 *Maxine Footwear*, p. 113

112 *Maxine Footwear*, p. 113

113 A Meredith Jones & Co Ltd v Vangemar Shipping Co Ltd (The Apostolis) [1997] 2 Lloyd's Rep 241, p 257

not certain that Lord Somervell of Harrow intended his statement to have such broad applicability as to extend the scope of seaworthiness to concern matters of navigation.

It could, hence, be argued that the reliance placed on *Maxine Footwear* was somewhat inappropriate, particularly given that the unseaworthiness in question in *CMA CGM Libra* was due to an error in navigation, and the actual casualty did not culminate until the vessel had proceeded on its voyage. The Supreme Court did, however, refer to other authority where a vessel was held to be "unseaworthy by negligent management of the vessel, despite the nautical fault exception in article IV rule 2(a)",[114]as will be examined in the following chapter.

5.1.2 Caselaw Demonstrating Unseaworthiness by Negligent Management and Navigation

The Supreme Court cited *Steel v State Line Steamship Co*, *Gilroy Sons & Co v W R Price & Co, G E Dobell & Co v Steamship Rossmore Co Ltd* and *The Friso,* as authority that demonstrated that negligent management could render a vessel unseaworthy[115]. It is noteworthy that three of the four cases referred to by the Supreme Court concerned contracts of carriage prior to the inception of the Hague Rules. For example, in *Gilroy Sons*, the bill of lading exempted the shipowner from "any act, neglect, or default whatsoever of pilot, master, or crew in the navigation of the ship in the ordinary course of the voyage".[116] Clearly, the relevant exemption clause can be distinguished from Article IV of the Hague Rules in that "management of the ship" was not included and it clearly expressed that the exemption can only apply "in the ordinary course of the voyage". Furthermore, the common law undertaking of absolute seaworthiness applied at the time. Accordingly, the effects of the relevant contract of carriage cannot be the same to that of a contract of carriage pursuant to the Hague Rules. Hence, one may question the pertinence of the authority in *Steel v State Line Steamship*, *Gilroy Sons* and *G E Dobell* to the case at hand.

The *Friso* judgment concerned a contract of carriage pursuant to the Hague rules. However, the facts of the case are clearly distinguishable to that of *CMA CGM Libra.* In *Friso*, the vessel was found to be unseaworthy, either by reason of the crew's failure to adequately lash the cargo or, as the trial judge Sheen J found more probable, "*Friso* was unseaworthy because she lacked adequate stability".[117] The Supreme Court in *CMA CGM Libra* referred to the *Friso* as an example of a case where negligence in the management of the ship rendered the vessel unseaworthy, holding that it was the master's failure "before the voyage to press up three double bottom tanks so that the vessel was unstable" which made the vessel unseaworthy.[118] However, the *Friso* judgement does not once refer to "negligence in management of the ship" as the reason for unseaworthiness, nor did the defendant owners even attempt to invoke the "negligence in management" defense. The vessel was rendered unseaworthy on the grounds that "*Friso* was not fit in condition or equipment to encounter the ordinary perils of the voyage".[119] Accordingly, it does seem to be a slight stretch to refer to *Friso* as authority for unseaworthiness on grounds of negligence in management of the ship at the commencement of the voyage.

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114 *Libra* [2021], 83

115 *Libra* [2021] , referring to *Steel v State Line Steamship Co* (1877) 3 App Cas 72, *Gilroy Sons & Co v W R Price & Co* [1893] AC 56, *G E Dobell & Co v Steamship Rossmore Co Ltd* [1895] 2 QB 408 and *The Friso* [1980] 1 Lloyd's Rep 469

116 Gilroy Sons, para 1.

117 *The Friso* [1980] p. 474

118 Libra [2021], 83

119 *The Friso* [1980] p. 476

The Supreme Court then went on to reference two cases where supposedly an act of navigation rendered a vessel unseaworthy, *The Thordoc* and *The Evje.*[120] In *The Thordoc,* the vessel was held to be unseaworthy on grounds that her compass was not properly adjusted by a compass adjuster at the commencement of the voyage.[121] There was, effectively, no negligence involved in the use of the navigational instrument such as in *CMA CGM Libra*. There was, however, a defect in the vessel's navigational equipment/instrument before and at the beginning of the voyage. This would naturally render the vessel unseaworthy as the vessel was not properly equipped, which is expressly defined as an aspect of seaworthiness per Hague Rules, Article III, r.1 (b). This is in contrast with *CMA CGM Libra* where the vessel was sufficiently equipped with adequate tools and equipment for safe navigation.

In *The Evje,* it was held that "the vessel was unseaworthy at the beginning of the voyage either because she had insufficient bunkers, or because they were of the wrong quality, or for both reasons."[122] The master's failure to bunker the ship in a sufficient manner for the intended voyage seems less related to negligence in matters of navigation and more related to a failure to properly "supply" the ship, as expressly referred to as an aspect of seaworthiness under the Hague Rules, Article III, r.1 (b). As held in *Carver on Charterparties* (1st edition), it is established that in relation to seaworthiness with regards to the ship`s structure including machinery and equipment, that "the ship is obliged to carry necessary supplies, such as bunkers, as well as spare parts that may be necessary, and their absence may constitute unseaworthiness"[123]

In reviewing above caselaw, it might be argued that the UK Supreme Court in *CMA CGM Libra* have, in their interpretation of the nautical fault exemption, failed to acknowledge that not all matters related to "management and navigation" of the vessel falls within the scope of the nautical fault exemption. As held by the US Supreme Court in *International Navigation*, a case that will be further reviewed in chapter 5.1.3, " the word "management" is not used without limitation and is not therefore applicable in a general sense as well before as after sailing."[124] Further, in the UK House of Lords Ruling in *Hill Harmony* it was held that "navigation" was limited to matters of "seamanship", Lord Hobhouse explaining "What is clear is that to use the word 'navigation' in this context as if it includes everything which involves the vessel proceeding through the water is both mistaken and unhelpful. As Lord Summer pointed out, 'where seamanship is in question, choices as to speed or steering of the vessel are matters of navigation, as will be the exercise of laying off a course on a chart."[125] Therefore, it might be argued that by referring to precedence which supposedly demonstrates that nautical faults at the commencement of the voyage have previously rendered a vessel unseaworthy, the Supreme Court have failed to consider that there are limits to the nautical fault exemption. In contrast to the caselaw reviewed above, the relevant fault in *CMA CGM Libra,* being the second officer and master's failure to produce an adequate passage plan, clearly falls within the scope of negligent navigation.

Furthermore, as argued by the owners', the above cases referred to by the Supreme Court "can be distinguished on the facts because they involved an act of navigation or management which caused the unseaworthiness, whereas in CMA CGM Libra the act of navigation is itself the unseaworthiness."[126] The Supreme

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120 Libra [2021], 84 with reference to *Paterson Steamships Ltd v Robin Hood Mills Ltd (The Thordoc)* (1937) 58 Ll L Rep 33 & *E B Aaby's Rederi A/S v Union of India (No 2) (The Evje)* [1978] 1 Lloyd's Rep 351

121 Ibid

122 *The Evje* [1978], p. 355

123 Bennett (2017), at 3-118

124 *International Navigation (*1901), p. 181 U. S. 226 (will be further reviewed in chapter 5.1.3)

125 Whistler International Ltd v Kawasaki Kisen Kaisha Ltd. («The Hill Harmony") [2001] 1 Lloyd's Rep. 147. House of Lords, p. 159

126 Libra [2021], 85

Court, however, held that "this is not a principled distinction. If the vessel is unseaworthy then it can make no difference whether negligent navigation or management is the cause of the unseaworthiness".[127] It could be argued that the approach taken by the Supreme Court in this regard is too simple as it seems to slightly overlook the point being made by Owners: seaworthiness has not been understood to extend to matters of navigation. The Owners attempted to further support their position by citing US case law that indicates that seaworthiness does not extend to matters of navigation.

5.1.3 US Caselaw Demonstrating that Seaworthiness Does Not Extend to Matters of Navigation

Owners referenced the decisions of the Federal District Court for the Eastern District of Pennsylvania in *The Oritani,*[128]the Court of Appeals (2nd Circuit) in the *The Iristo*[129] and the Court of Appeals (Fifth Circuit) in *The Jalavihar.*[130] The facts of these cases are similar to that of *CMA CGM Libra.* Hence, it is of interest to examine these cases, and consider the US Courts` reasoning and conclusions in cases considering the intersection between initial unseaworthiness and the error in navigation exemption. The three cases concerned either contracts of carriage pursuant to the Hague/Hague-Visby Rules or the American predecessor to the Hague Rules, The Harter Act, which more or less prescribed the same relevant obligations and immunities upon the carrier, including the due diligence obligation to make the vessel seaworthy and the nautical fault exemption.[131]

In the *Oritani*, District Judge Kirkpatrick considered if the master's failure to obtain the requisite compass data at the commencement of the voyage to enable correction of compass readings affected the seaworthiness of the vessel. The court concluded that the vessel was seaworthy, reasoning that "the obtaining of sufficient compass data, or rather the supplementing of an insufficient deviation record, is entirely a matter of navigation, not affecting the seaworthiness of the vessel".[132] Effectively, it was held that matters of navigation do not affect the seaworthiness of the vessel.

In the *Iristo*, the Master and the first and second mates negligently failed to bring the chart up to date by not adding to it information of a wreck which was available to them in the Notices to Mariners onboard the ship, resulting in the vessel deviating from its course and grounding on a reef.[133] The Circuit Judge, Augustus Hand, held that the vessel was seaworthy "because of the notices on board which disclosed the existence and location of the wreck and that the failure to bring the chart up to date, or otherwise to use the information available, when navigating in the vicinity of Bermuda, was a fault "in navigation or management."[134] The Judge further stated that, "I absolutely decline to hold that a ship is unseaworthy because there being the materials on board to be used for the purpose for which seaworthiness is required, the officers of the ship do not use the materials which are available."[135] Thus, the vessel was deemed seaworthy, as it was equipped with sufficient materials for safe navigation and the crew`s failure to utilize the materials could not amount to unseaworthiness.

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127 Ibid

128 *The Oritani (1929) 40 F 2d 522*

129 *Middleton & Co (Canada) Ltd v Ocean Dominion Steamship Corpn* (The Iristo) (1943) 137 F 2d 619

130 *Usinas Siderugicas de Minas Geras, Sa-Usimings v Scindia Steam Navigation Co (The Jalavihar)* (1997) 118 F 3d 328.

131 The Harter Act (1893) (27 Stat. 445, 46 U.S.C. § 192 [46 USCA § 192]

132 *The Oritani* (1929) at 528

133 *The Iristo* (1943) at 621

134 *The Iristo* (1943) at 622

135 Ibid, at 623

Finally, in the *Jalahaviar,* the circuit judges examined the seaworthiness of a vessel that grounded whilst unberthing due to miscommunication between the vessel`s pilot and the captain of the assisting tug. Cargo owners claimed that "any error in navigation that causes damage to a vessel prior to the commencement of a voyage should be considered a lack of due diligence".[136] The Circuit judges held that "We see no reason to restrict the navigational error exception to errors occurring after the commencement of a voyage. We therefore agree with Scindia (the Owners) that COGSA excepts navigational errors regardless of whether they occur before or after a voyage commences and do not reach the question of whether a voyage had commenced in this case».[137] Accordingly, the circuit judges declined the notion that the exemption for errors in navigation can only apply after commencement of the voyage.

It is evident from the US authorities cited by the Owners in *CMA CGM Libra* that navigational errors occurring "before and at the commencement of the voyage" can still qualify as "negligent navigation" for the purpose of the nautical fault exemption. However, the UK Supreme Court held that the US caselaw was not of assistance as the cases do not demonstrate a uniform approach,[138] the Court pointing at the US Supreme Court decision in *International Navigation.*[139] In this case, the vessel was found to be unseaworthy on grounds that the crew had failed to fasten the port covers at the commencement of the voyage, causing damage to the cargo, the US Supreme Court explaining that, "even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions. The word "management" is not used without limitation and is not therefore applicable in a general sense as well before as after sailing"[140]. The Supreme Court in *CMA CGM Libra* hence held that, "The *International Navigation* case is entirely consonant with the English law authorities which show that a vessel may be rendered unseaworthy by negligent management of the vessel, despite the nautical fault exception in article IV rule 2(a)»[141]

The Supreme Court`s reference to *International Navigation* as response to the US authorities presented by the owners seems to slightly overlook the fact that an error in management and an error in navigation have potentially different effects. In *International Navigation,* the crew failed to fasten the after port on the starboard side in compartment No. 3, where cargo was located, causing damage to the cargo. Hence, the error was less related to management of the vessel and was more clearly a failure by the crew to exercise due diligence to "make all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation», as explicitly expressed as an aspect of seaworthiness in the Hague Rules, Article III r. 1(c).

Errors in management are hence more capable of rendering the vessel unseaworthy, in the traditional sense, at the commencement of the voyage. To exemplify, *International Navigation* was not the first case where a vessel was found to be unseaworthy on grounds that parts of the ship in which goods are to be carried was not fit for their safe carriage. In contrast, *CMA CGM Libra* appears to be the first case where a defective passage plan has rendered a vessel unseaworthy. The consequences of a defective passage plan are not known at the commencement of

136 *The Jalavihar* (1997), at 331

137 Ibid, at 332

138 *Libra* [2021], 107

139 *International Navigation Co v Farr & Bailey Manufacturing Co* (1901) 181 US 218, 21 S Ct 591, 45 L ed 830

140 *International Navigation (*1901),p. 181 U. S. 226

141 *Libra* [2021], 109

the voyage whilst the consequence of an unfastened port is evident already at the commencement of the voyage.

Furthermore, as reflected upon in chapter 5.1.2, and as pointed out in the *International Navigation* case, "the word "management" is not used without limitation and is not therefore applicable in a general sense as well before as after sailing."[142] The word "navigation", on the other hand, is not nearly as broad and is clear in its meaning, suggesting that it is not necessary to limit its application in the same way at the commencement of the voyage. In *Jalahaviar,* the Circuit Court did consider the authority in *International Navigation*, but distinguished it from the case under consideration, as the *Jalahaviar* did not concern an error in management, but rather an error in navigation.[143]

5.1.4 Summarizing Remarks Regarding US Caselaw

The American approach seems to reflect the understanding that "owners are justified in committing all matters of navigation to skillful and experienced navigating officers"[144] and hence, matters of navigation cannot affect the seaworthiness of the vessel. The US authorities further indicate that there is no reason to apply a strict temporal limit to the application of the navigational fault exemption. Moreover, U.S. courts appear to differentiate between errors in management and errors in navigation based on their actual impact on the vessel at the commencement of the voyage. Consequently, it could be argued that the US authority invoked by the owners does indeed provide a uniform approach in matters concerning errors in navigation at the commencement of the voyage.

Conclusively, it seems the facts of the US cases cited by the owners align closely with the facts of the *CMA CGM Libra,* suggesting that the principles derived from these cases might be applicable to the matter at hand. After all, as accepted by the Supreme Court in *CMA CGM Libra*, "It is important to remember that the Act of 1924 was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation».[145]

Nevertheless, the Supreme Court ultimately rejected the U.S. case law cited by the owners, holding that under the correct interpretation of the Hague Rules, errors in navigation can constitute initial unseaworthiness. This necessarily excludes the application of the navigational fault exemption in such cases.

5.1.5 Review of the Wording of the Hague Rules

Considering the insights offered by the US caselaw and the alternative approaches it proposes, it is of interest to conduct a deeper examination of the relevant provisions in the Hague Rules. Article III r. 1(a) of the Hague Rules clearly stipulates that the due diligence obligation to make the vessel seaworthy applies *before and at the beginning of the voyage*. The nautical fault exemption in article IV r.2, on the other hand, does not expressly stipulate a temporal limit for its application. Hence, a simple interpretation of the wording of Article IV r. 2 indicates that the nautical fault exemption can just as well apply at the commencement of the voyage, as during the voyage.

142 *International Navigation (*1901), p. 181 U. S. 226

143 *The Jalavihar* (1997), p. 332

144 *The Oritani* (1929) at 528

145 [34] with reference to the passage of Lord Macmillan at p. 350 in *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328

However, the Supreme Court asserted that "the scheme of the relevant Rules is clear"[146] in that "article IV rule 1 sets out the relevant right and immunity for the carrier's responsibilities and liabilities under article III rule 1, and article IV rule 2 sets out the relevant rights and immunities for the carrier's responsibilities and liabilities under article III rule 2".[147] The Court further clarified that the correct interpretation of the Hague Rules aligns with the Privy Council's decision in *Maxine Footwear* where it was established that "Article III, rule 1, is an overriding obligation. If it is not fulfilled and the nonfulfillment causes the damage, the immunities of Article IV cannot be relied upon."[148] However, as discussed in Chapter 5.1.1, the factual circumstances of *Maxine Footwear* differ from those in *CMA CGM Libra,* raising doubts about the direct applicability of the principles from *Maxine Footwear* to the latter case.

The Supreme Court further emphasized that, even if some ambiguity remained regarding the correct interpretation of the Hague Rules, there is no evidence in the *travaux préparatoires* to suggest an alternative understanding.[149] The Court stated that there is neither a "clear, pertinent, and consensual resolution of the issue" nor a definitive "bull's eye" in the preparatory works to contradict this interpretation.[150] But, considering the caselaw discussed in Chapters 5.1.1 through 5.1.4, it remains worthwhile to explore whether the *travaux préparatoires* might suggest alternative interpretations of the Hague Rules beyond the Supreme Court's view.

5.1.6 Seaworthiness and the Nautical Fault Exemption in Preparatory Works of the Hague Rules

The *Travaux Préparatoires* of the Hague Rules ("the travaux") refer to the preparatory materials, documents, and discussions created during the drafting process of the Hague Rules.[151] The Supreme Court recognized that when interpreting the Hague Rules, regard may be had to the travaux "as a supplementary means of interpretation of the Hague Rules".[152] Hence, the Supreme Court did consider the travaux when examining the relationship between initial unseaworthiness and the nautical fault exemption.

The Court concluded that "there is nothing in the travaux which shows that the nautical fault exception was meant to limit the shipowners' obligation to make the vessel seaworthy before the commencement of the voyage or that they were to be mutually exclusive."[153] This statement does seem to slightly overlook the fact that drafters of the Hague Rules could likely not envisage an instance where an error of navigation could also amount to initial unseaworthiness. Accordingly, such a scenario was, naturally, not addressed. The drafters did however emphasize, in a clear manner, the importance of the error in navigation exemption.

5.1.6.1 Excerpts from the Travaux

Sir Norman Hill who represented English shipowners at the Hague Conference, provided his view on the seaworthiness undertaking and nautical fault exemption under the Hague Rules, firstly explaining how the seaworthiness obligation is one of due diligence, limited to "before and at the beginning" of the voyage and then going on to explain that "If you go further than that, and you say that there is an absolute obligation on the part of the shipowner to keep the ship seaworthy

146 *Libra* [2021], 61

147 Ibid

148 *Libra* [2021], 68 with reference to *Maxine Footwear [1959] AC 589,* at pp 602-603

149 Ibid, 77

150 ibid

151 The Travaux Préparatoires of the Hague Rules and the Hague-Visby Rules (hereinafter, "Travaux")

152 *Libra* [2021], 37

153 Ibid, 78

throughout the voyage, then, of course, you render quite valueless most of your exceptions. For instance, if, through the negligent navigation of the pilot, the ship is run on the rocks and holed, she ceases to be seaworthy. There cannot be an overriding obligation on the shipowner to keep the ship seaworthy throughout the voyage: he is excused, and we all agree, as I understand, that he should be excused, because the damage has been done through negligence in the navigation."[154]

Above statement, as set out by Sir Norman Hill, appears to support the Supreme Court's position that seaworthiness constitutes an overriding obligation at the voyage's outset. However, it also seems to presuppose that negligent navigation is invariably exempted, implying that seaworthiness does not encompass issues related to navigation.

Sir Norman Hill, when advocating that "management of the ship" should be included in article IV r. 2, submitted that the words should be included "because of the limited meaning which has been attached in our Courts to the words "in the navigation". There are operations that are performed in port which, if they had been performed at sea, would be, beyond all question, navigation; and it may be just an accident that they are performed in port"[155] Furthermore, he held that "we are accepting, as we understand it, full responsibility for the stowage, but we are not to be held liable for the default of the crew in the actual navigation of the ship - it is not in the voyage; it is in the navigation of the ship - and exactly what the navigation of a great modern cargo carrier is I do not know, Sir."[156]

Mr. McConechy, who represented Manchester Chamber of Commerce and the Manchester Association of Importers and Exporters was initially reluctant to including "management" in article IV r.2, but accepted that "in reading over this again I think it is not so very much against the cargo owners' interests as I first thought, with this addition that Sir Norman Hill has added: "Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship" - adding in these words, "master, mariner", and so on, which all means that this management is in connection with the navigation; so I am quite willing to leave it as it is".[157]

The discussion surrounding the nautical fault exemption suggest a prevailing view that all issues related to navigation should qualify for exemption, irrespective of their timing. This is particularly pertinent when considering that Sir Norman Hill indicates that operations that are in the sphere of navigation which are performed at port should be exempted by way of the "management of the ship" exemption. It appears this was accepted by Mr McConechy, who seemed satisfied that so long as "management of the ship" is understood as related to the navigation of the ship, cargo owners would be satisfied.

Mr. McConechy's remark regarding the scope of the "management of the ship" exemption is noteworthy, especially in light of the caselaw referenced by the Supreme Court which was intended to demonstrate that management errors could render a vessel unseaworthy at the commencement of the voyage. It appears, however, with Mr. McConechy`s comments in mind, that the Supreme Court's interpretation of the "errors in management" exemption is overly broad. If this is indeed the case, it would follow that the application of the relevant "error in management" caselaw to the present matter, as discussed in sections 5.1.2 and 5.1.3, is inappropriate. This goes back to the point made in chapter 5.1.2 and 5.1.3. that the word "management" is not to be used without limitations at the commencement

154 Travaux, p. 146

155 Ibid, p. 392

156 Travaux p. 392

157 Ibid, p. 393

of the voyage, whilst the word "navigation" is not necessarily subject to the same limitations given its narrow meaning.

5.1.6.2 Reflecting upon Travaux Excerpts

The Travaux does indicate that the seaworthiness obligation was intended to be overriding, as held by the Supreme Court in *CMA CGM Libra.* However, the Travaux also indicates that the drafters of the Hague Rules intended that "shipowner should be exempted from liability for everything which comes under the head of "accidents of navigation"[158] This understanding appears to have been widely accepted by all parties at the Hague Conference, with minimal discussion or disagreement on the matter. This suggests that seaworthiness was not intended to be concerned with matters of navigation.

Considering that the exemption for errors in navigation was subject to little discourse, and seemed to be a matter of course, it is worth reflecting on the underlying reason as to why carriers were to be exempted from errors in navigation. The pragmatic reasoning relates to insurance. A maritime venture comes with huge risk. It is only reasonable that the risk be distributed between the parties benefiting from the voyage, including cargo owners. As held by Sir Norman Hill when discussing the Hague Conference, " Now our British Dominions have followed on the lines of the Harter Act, and they have all inserted negligence navigation clauses, and now when meeting this new agitation we find that the cargo interests have practically all come round to our view and they are all now maintaining that they can effect their insurances against negligent navigation far more cheaply with the underwriters than if that responsibility is put upon shipowners.».[159] Accordingly, the negligent navigation exemption was a pragmatic means of distributing the risk involved in a maritime venture.

Moreover, as explained by Ilian Djadjev, author of *The Obligations of the Carrier Regarding the Cargo,* "The main argument upholding the temporal limit of the duty to provide a seaworthy vessel, as laid down by Sir Norman Hill, is that a carrier can no longer influence the condition of the vessel once she has set sail."[160] The same might be said for navigational decision making. As reflected upon by Trond Solvang in his article titled, *The relationship between nautical fault and initial unseaworthiness under the Hague-Visby Rule*s, "If one accepts as a premise for the risk allocation of the Hague Visby Rules that decision making involving navigation (in its narrow sense…) forms part of the master's prerogative and thus falls outside of the shipowner's "direct control", it does not make good sense to let a mere temporal demarcation line decide whether or not the shipowner becomes liable."[161] The point regarding the shipowners "sphere of control" will be further addressed in the following chapters.

While it is accepted that the standard of seaworthiness should develop in commensurate with advancements in the maritime sector, the Travaux implies that matters of navigation were in a "special position" with the understanding that shipowners should be exempt from liability for all errors in the sphere of navigation. This raises the question: has the Supreme Court, in its judgement in *CMA CGM Libra,* gone too far in their interpretation of "seaworthiness" by holding that errors of navigation at the commencement of voyage can amount to initial unseaworthiness?

158 Travaux, p. 16

159 ibid, p. 34

160 Djadjev (2017), p. 46

161 Solvang (2020) p. 65

5.1.7 Does the Judgement Impose an "Extended or Unnatural Meaning" to Seaworthiness?

Owners, when making their arguments in favor of an "attribute threshold" referred to the authority in *The Aquacharm.*[162] In this case, the vessel was overloaded at departure by fault of the master, so she was prevented by her draught from transiting the Panama Canal as intended. The question was whether the overloaded state of the vessel rendered her unseaworthy at the commencement of the voyage. The UK Court of Appeal found that the vessel was seaworthy at the commencement of the voyage, Lord Denning stating that *"*I think the word "seaworthy" in The Hague Rules is used in its ordinary meaning, and not in any extended or unnatural meaning. It means that the vessel - with her master and crew - is herself fit to encounter the perils of the voyage and also that she is fit to carry the cargo safely on that voyage."[163]

Although the facts of the *Aquacharm* case can be distinguished from the *CMA CGM Libra* case, so the principles derived from the judgement are not directly applicable, it is nevertheless worth reflecting on Lord Denning's view on the term "seaworthiness" under the Hague Rules. With the Travaux in mind, one might question whether in finding that an error in navigation resulted in unseaworthiness, the Supreme Court have imposed "an extended and unnatural" meaning to seaworthiness.

When determining how to interpret the Hague Rules, The Supreme Court made reference to *Nautical Challenge Ltd v Evergreen Marine,*[164] where guidance on interpretation was found in Article 31.1 of the Vienna Convention on the Law of Treaties 1969 which stipulates that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The word "seaworthy" is vague, and likely purposefully so, to allow its meaning to develop with time. However, for the sake of legal predictability and particularly with insurance in mind, there must, arguably, be limits to what encompasses as "unseaworthy". As submitted by Owners in *CMA CGM Libra,* the "object and purpose of the Hague Rules is to spread risk and allocate the cost of insurance" and in relation to navigation, it is understood that "cargo interests have to insure themselves against the risk of negligent navigation causing damage to their cargo."[165] Considering the Travaux, US caselaw and the apparent absence of English case law treating errors in navigation as initial unseaworthiness, it could be argued that the "ordinary meaning" of seaworthiness has not been considered to encompass errors in navigation.

This is further exemplified by reviewing the New Zealand Supreme Court case, *Tasman Pioneer*, where the Court reflected upon the meaning of seaworthiness under the Hague-Visby Rules, "The scheme of the Rules is clear. Carriers are responsible for loss or damage caused by matters within their direct control (sometimes called "commercial fault"), such as the seaworthiness and manning of the ship at the commencement of the voyage»[166] This understanding of the Rules indicates that matters of navigation are not to be considered aspects of seaworthiness, as navigation is not within owner's "direct control". As reflected upon by Solvang (2020), "nautical matters are within the prerogative of master and

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162 *Actis Co Ltd v Sanko Steamship Co Ltd (The Aquacharm) [1982] 1 WLR 119*

163 Ibid, p. 9

164 *Libra* [2021, 34, referring to *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd [2021] UKSC 6; [2021] 1 WLR 1436*

165 Ibid, 53

166 *Tasman Orient Line CV v New Zealand China Clays Ltd and Others (The "Tasman Pioneer")* [2010] 2 Lloyd's Rep. 13. Supreme Court of New Zealand, para. 8

crew, hence outside of the owner's "direct control", as that phrase was used in the *Tasman Pioneer*."[167]

Nevertheless, in applying the "prudent owner" test for seaworthiness, the Supreme Court found the vessel to be unseaworthy due to negligence in passage planning at the commencement of the voyage. As held by the trial Judge, "«the prudent owner would have required the defective passage plan to be made good before the vessel set to sea". Given that the "prudent owner" test was the primary tool for making a finding of unseaworthiness, it is of interest to examine this test.

5.1.8 Regarding the "Prudent Owner Test"

The "prudent owner" test derives from a passage in *Carver, A Treatise on the Law relating to the Carriage of Goods by Sea,* where it was stated that a seaworthy vessel "must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it. To that extent the shipowner... undertakes absolutely that she is fit; and ignorance is no excuse. If the defect existed, the question to be put is, would a prudent shipowner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking."[168] The passage was first approved in *McFadden v Blue Star*, and since in other ensuing caselaw.[169]

In analyzing the prudent owner test, it is first worth noting that the test derives from the common law warranty of seaworthiness. As established in Chapter 3 of this thesis, the common law undertaking of seaworthiness is absolute, which entails that "it is not merely that the shipowner should do their best to make the ship fit, but that the ship should really be fit"[170] With the Hague Rules, the absolute obligation of seaworthiness was reduced to one of due diligence.[171] It may therefore be argued that the prudent owner test is too colored by the common law doctrine of absolute seaworthiness, and hence, less suitable in cases concerning the due diligence obligation of seaworthiness under the Hague Rules. The common law doctrine of absolute seaworthiness was harsh on shipowners, likely with the intention to balance out the legal playing field between shipowners who enjoyed contractual freedom and strong bargaining power and shippers who had little choice but to accept excessive exemption clauses. With the Hague Rules, shipowners no longer enjoy contractual freedom, so it might be argued that a very harsh doctrine of seaworthiness is less necessary. The "prudent owner test", however, continues to promote an arguably harsh standard of seaworthiness.

As pointed out by David Richards of North Standard P&I in a webinar regarding the *CMA CGM Libra*, "the prudent owner test is only too capable of returning one answer from the position of hindsight when you know a serious loss had occurred."[172] Naturally, if a loss occurs, a "prudent shipowner" would in hindsight state that he would have required that the relevant defect be made good. Accordingly, the "prudent owner test" is not exactly constructive, as it does not set out what a prudent owner might have done differently to make the vessel seaworthy. It simply affirms that in the case of a causative defect at the commencement of the voyage, a vessel will always be unseaworthy, regardless of the circumstances surrounding the relevant defect.

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167 Solvang (2020), p 52.

168 Bennett (2017), at 3-075

169 Ibid, referring to *McFadden v Blue Star Line [1905]*1 K.B. 697 at 703

170 Ibid, at 3-074

171 Baatz (2018) p. 132

172 Quadrant Chambers (2022) at 35:15

It was held by Cresswell J in the *Eurasian Dream,* that "seaworthiness must be judged by the standards and practices of the industry at the relevant time, at least so long as those standards and practices are reasonable."[173] A passage from Steel J in *The Torepo* might provide some guidance as to what might be considered reasonable standards and practices of the industry at the relevant time with regards to passage planning.[174] In *The Torepo,* the Court considered the seaworthiness of a vessel that had grounded, whereby one of the allegations of unseaworthiness was that there was no proper passage plan. The relevant passage plan was found to be in order, but Steel J commented that, "But let me assume in the claimants' favour that the passage plan was defective in one or more of the respects suggested, it was not in the event contended that this flowed from any failure of the defendants to provide a proper system in the sense that the guidance and instructions furnished by the owners were in any sense inappropriate. Section 5 of the Navigational Procedures Manual was devoted to passage planning including the requirement that the planning should include any passage through pilotage waters (5.1.1 and 5.2.8). Those instructions (taken with the additional publications furnished on board such as the Bridge Procedures Guide) were agreed to be fully appropriate and sufficient."[175]

Steel J`s obiter statement regarding passage planning indicates that a prudent owner, with the standards and practices of the industry at the relevant time in mind, would be expected to provide a proper system for navigation and sufficient materials and tools to allow for adequate passage planning. There was nothing to indicate that owners of CMA CGM Libra had not acted accordingly. The Supreme Court, however, held that, "To the extent that the obiter passage at para 100 of David Steel J's judgment in *The Torepo* suggests that the carrier's seaworthiness obligation in relation to passage planning is limited to providing a proper system for such planning it is not a correct statement of the law».[176]

The Supreme Court further emphasized that in any event, the grounding of the Torepo occurred in 1997, which was before the adoption of the Guidelines for Voyage Planning.[177] The Supreme Court accordingly built on the opinion of Justice Teare in the Admiralty Court who held that "I am confident that by 2011 the prudent owner would have insisted on such a (adequate) passage plan before the voyage was commenced»[178] This appears to be an attempt to reconcile the prudent owner test with the idea that "seaworthiness must be judged by the standards and practices of the industry at the relevant time".

The IMO Guidelines on Passage Planning prescribe recommendations as to how to develop a sufficient passage plan, placing the responsibility of approval of said passage plan on the master.[179] Furthermore, the Guidelines emphasize the importance of close and continuous monitoring of the vessel's progress and position during the execution of such a plan. It is argued that owners of *CMA CGM Libra* had acted according to what could be reasonably expected in relation to passage planning, by equipping, employing and instructing the vessel with all that is needed for sufficient passage planning in accordance with the Guidelines. After all, as recognized in the Admiralty Court, "The Owners' own guidance to their masters emphasized that the information noted on the passage plan should include "the areas to be avoided" and "navigation dangers such as .... shallow waters".[180] More-

173 *Eurasian Dream* [2002] at para. 127

174 *Libra* [2021] 105 referring to The Torepo [2002] EWHC 1481 (Admlty); [2002] 2 Lloyd's Rep 535

175 *The Torepo* [2002] at 100

176 *Libra* [2021], 143

177 Ibid

178 *Libra* [2019], 87

179 Guideline for Voyage Planning (1999), article 3.4

180 Admiralty Court, 65

over, owners had a satisfactory Safety Management System pursuant to which the navigational practices of the crew were monitored and checked.[181] It could hence be argued that the owners had acted in accordance with standards and practices at the time, even in light of the Guidelines.

Errors in navigation at the commencement of the voyage are particularly difficult to reconcile with the "prudent owner test". Navigational decision making is trustingly left in the hands of skilled navigators. Accordingly, some navigational errors are latent for everyone but the navigator making said error, until the error materializes into a casualty. As argued by counsel for Owners in *CMA CGM Libra*, "It would be invidious for an owner to have to second-guess the navigational decisions made by a master whenever the ship is about to leave port».[182] Owners are unable to control navigational decision making, beyond employing skilled navigators, supplying the vessel with updated navigational equipment and documentation, and ensuring good systems for navigational decision making. Hence, if an owner has done all it can to facilitate for good navigational decision making, it is understood that the owner is exempted from the resultant liability of navigational errors.

Trond Solvang, in his article titled, *The relationship between nautical fault and initial unseaworthiness under the Hague-Visby Rules,* reflected upon the Court of Appeal`s decision in *CMA CGM Libra* where he articulated the complexity involved in applying the prudent owner test in matters of initial seaworthiness due to navigational errors, "it appears formalistic to say that the test of unseaworthiness (that a prudent shipowner would not have let the ship sail with knowledge of the relevant facts) automatically resolves the question of liability for such unseaworthiness, if/when the failing task of a navigational nature constitutes the unseaworthiness. "[183] The Supreme Court, nevertheless, upheld the applicability of the prudent owner test in *CMA CGM Libra*, which inevitably resulted in a finding of unseaworthiness.

5.1.8.1 Summarizing Remarks Regarding the "Prudent Owner Test"

In reviewing the "prudent owner test" for seaworthiness, it might be said that it appears to lack pragmatism. In the event of a casualty, the question of whether a prudent owner would have addressed the defect—viewed with the benefit of hindsight—inevitably leads to the answer "yes." The test does not account for what other reasonable or "prudent" shipowners might have done under similar circumstances at the time of the incident. It could further be argued that the "prudent owner" test neglects the principle of legal predictability as it essentially allows for any defect to amount to unseaworthiness, without much regard to the surrounding circumstances, and without prescribing any limits to an owner's responsibilities under the doctrine of seaworthiness.

As reflected upon above, the "prudent owner" test does not allow for much analysis of the surrounding circumstances of an error, even in the matters of navigation. So, even if the owner has been perfectly prudent in facilitating for adequate navigation, in the event of causative navigational negligence at the commencement of the voyage, the "prudent owner" test inevitably results in unseaworthiness. Considering that it might be argued that owners had done all they could do to ensure safe navigation, one might assume that the "due diligence" aspect of seaworthiness would assist owners. However, as the *CMA CGM Libra* judgement has demonstrated, the "non-delegable" nature of the due diligence obligation makes it difficult to prove exercise of due diligence in the event of causative negligence, as will be considered in the following chapter.

181 Teare (2023), p. 569

182 Libra [2021], 132

183 Solvang (2020) p. 72

5.2 Review of the Supreme Court's Ruling on Due Diligence

The Supreme Court, in addressing the issue of due diligence, relied on the precedent set in *Muncaster Castle*, affirming that the due diligence obligation under the Hague Rules is non-delegable. Effectively by reason of the second officer and master's negligence in relation to passage planning, the owner was held to have failed to exercise due diligence to make the vessel seaworthy. The court dismissed the argument that passage planning was outside of the carriers orbit of responsibility, holding that "At all material times the vessel was within the owners' "orbit"[184] and that the second officer and master were "implicated by the carriers in the work of keeping or making the vessel seaworthy" in relation to passage planning. As such, the owners "must answer for anything that has been done amiss in the work. »[185] The Supreme Court hence concluded that the carrier's duty to exercise due diligence in ensuring the vessel's seaworthiness extends to all aspects of the work required to achieve seaworthiness, regardless of who performs the task.[186]

5.2.1 Regarding *The Muncaster Castle*

Reliance was placed on the authority in *Muncaster Castle*[187] when deciding on the issue of due diligence. Therefore, it is of interest to review the circumstances of this case. In *Muncaster Castle*, cargo was damaged by water entering the hold via the inspection covers on the storm valves. Subsequent inspections revealed that the nuts holding the covers were loose due to the negligence of a reputable firm of ship repairers when inspecting the storm valves under the supervision of a Lloyds surveyor some months prior to the relevant voyage. The House of Lords found the carrier to be liable for the breach of the obligation to exercise due diligence, Viscount Simonds explaining that, "no other solution is possible than to say that the shipowner's obligation of due diligence demands due diligence in the work of repair by whomsoever it may be done."[188]

The Travaux Prepratoires reveal that *The Muncaster Castle* decision was subject to much discourse prior to the adoption of the Hague-Visby Rules.[189] The British delegation suggested a potential amendment to article IV (1) to alter the position at law created by *The Muncaster Castle* judgement, a suggestion that was well received by many representatives of the various nations.[190] The "anti-Muncaster clause" initiative was, however, eventually abandoned.[191] Nevertheless, the initiative prompted fruitful discussions regarding the Muncaster Castle judgement. The reflections of Mr. Mr. Podromidés of France are of particular interest:

Mr. Podromidés expressed his support for the *Muncaster Castle* judgement, holding that the decision of the House of Lords is "completely equitable, completely defensible, completely legal", further explaining that "In the case of the "Muncaster Castle", we are in presence of three persons: the shipper, the carrier and the shipyard. It is a question of damage sustained by the goods as a consequence of a defect in the ship which has not been properly repaired. It is not abnormal that the carrier be held liable for that damage. It is quite obvious that the shipyard be held responsible, but what is quite abnormal is that the shipper be the one who is held responsible."[192] Mr. Podromidés hence appealed to the equitable logic underlying

184 Libra [2021], 137

185 ibid

186 Ibid, 145 (viii)

187 Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle) [1961] AC 807

188 Muncaster Castle

189 Travaux, p. 148

190 Ibid, p. 148-179

191 Solvang (2021) p. 25

192 Travaux, p. 176

the *Muncaster Castle* judgement: The carrier has a contractual relationship with the shipyard and is hence in a better position to recover from the shipyard, than that of the shipper. As further elucidated by Mr. Podromidés, "One could say: but he (the shipper) shall always be entitled to bring an action against the shipyard on the ground of a fault in tort. Maybe, but this is not certain for all countries, and even as far as in a country the action of this said shipper against the shipyard, with which he has no contractual bond, would be considered as admissible, the shipyard would say: if you are entitled to sue me in tort, the basis of my obligation is the building contract"[193]

Based on Mr. Podromidés' reflections, the Muncaster Castle judgment appears reasonable and just. As held by Lord Radcliffe in *The Muncaster Castle*, "I should regard it as unsatisfactory, where a cargo owner has found his goods damaged through a defect in the seaworthiness of the vessel that his rights of recovering from the carrier should depend upon particular circumstances in the carrier`s situation and arrangements for which the cargo owner has nothing to do"[194] Accordingly, it appears that the House of Lords were also concerned with the practical realities of the relevant issued in *Muncaster Castle,* and in particular that it would be inequitable to hold cargo liable when a damage occurs to the ship, caused by the negligence of a third party repair firm.

Accordingly, it appears that the non-delegable nature of the due diligence obligation has its grounds in policy considerations. It is, however, argued that these policy considerations are not relevant in matters of initial unseaworthiness due to errors of navigation. Cargo interests should be well prepared to carry the consequential risk of errors of navigation. After all, the risk allocation system underlying the Hague Rules makes it clear that cargo interests should insure themselves in case of loss caused by negligent navigation. Hence, it might be argued that a more functional approach to the non-delegable nature of the due diligence obligation should be adopted in matters regarding errors due to negligent navigation.

As Solvang (2020) observes in his analysis of the reliance on *The Muncaster Castle* as a precedent in *CMA CGM Libra*, "Although the Muncaster Castle contains general statements as to non-delegable duties on the shipowner's part to exercise diligence to make the ship seaworthy, this does not, in the writer's view, answer the question at hand. Put differently, there is no basis in the wording of the HVR to say that a shipowner is responsible for servants back in time – or where such line is to be drawn. Hence, that type of arguments (including the English authorities on the point) cannot as a matter of analysis be said to resolve the interrelation and grey zones concerning the master's potential dual roles in connection with the vessel's unseaworthiness before departure. Put still differently, no one would doubt that the master is generally speaking a servant of the shipowner; he is a servant also during the voyage, but the question concerns the exception from liability for nautical faults, and that is a question clearly not applicable to the situation being decided in the Muncaster Castle, namely a shipowner's vicarious liability for the fault of a ship repair worker; a ship repair worker is not capable of committing a nautical fault. The English approach is therefore marked with an idiosyncratic narrow type of construction, not looking at the (clashing) policy considerations in play under the HVR."[195]

With the above in mind, it could be argued that the principles derived from *The Muncaster Castle* regarding the non-delegable nature of the due diligence obligation, are not applicable in matters regarding initial unseaworthiness due to negligent navigation. An alternative solution as suggested by owners in *CMA CGM Libra* might be to delimit the due diligence obligation in matters of navigation to mat-

193 Ibid, p. 176

194 *The Muncaster Castle*, at p.82

195 Solvang (2020), p. 73

ters within the carrier`s "orbit of responsibility" or under the shipowner's "direct control," as outlined in the New Zealand Supreme Court case *Tasman Pioneer*. However, the UK Supreme Court declined to differentiate between nautical matters and non-nautical matters in their interpretation of the due diligence obligation, hence maintaining the all-encompassing applicability of *The Muncaster Castle* authority and the stringent "non-delegable" nature of the due diligence obligation. As a result, the owners in *CMA CGM Libra* were deemed to have failed to exercise due diligence to make the vessel seaworthy.

5.3 Concluding Remarks Regarding the *CMA CGM Libra* Judgement

As reflected upon in chapter 5.1, it is questionable if the seaworthiness requirement was intended to extend to matters of navigation. It appears, when reviewing the preparatory works of the Hague Rules, that the shipowner was to be exempted from all matters of navigation. This was a result of a pragmatic compromise between shipowners and cargo owners at the Hague Conference, which was intended to standardize the risk allocation between the common parties to the maritime venture. It might therefore be argued that the Supreme Court have not sufficiently appreciated this aspect of the Hague Rules in their interpretation of the seaworthiness obligation and its relationship with the nautical fault exemption. Furthermore, as reflected upon in chapters 5.1.7 to 5.2.1, it could be argued that when addressing navigational errors at the commencement of the voyage, a more functional approach would be more appropriate than the formalistic, and rather simple approach imposed by the "prudent owner test", the "non-delegable" nature of the due diligence obligation.

In 2023, trial judge, Sir Nigel Teare, published an article titled, *Seaworthiness, negligent navigation and safer ships*, where he explained the rationales underlying his judgement. Interestingly, he reflected on the navigational fault exemption, to which he commented, "To the modern eye it seems curious that an employer can seek to avoid liability by proving that the cause of the damage was the negligence of his own employee»[196] Nevertheless, he clarifies that the error in navigation exception is explained "by the circumstance that when the vessel was at sea the shipowner was no longer in control of the vessel and communication with the master was not possible.»[197] However, Teare then goes on to indicate that the negligent navigation exception is less compatible with modern shipping, referring to the Hamburg Rules of 1978 and Rotterdam Rules of 2008 which sought to end the exception of negligent navigation. Reference is then made to the Hague/ Hague Visby Rules, Teare holding that "the reality is that the scope of the seaworthiness duty is not fixed in stone but is capable of adapting to and encompassing changes in the practice of shipping. Thus, a vessel which in 1924 was regarded as a seaworthy ship may in fact and in law be regarded as an unseaworthy ship in the twenty-first century. In this way, the reach of the negligent navigation exception can be progressively reduced as changes in the practices of shipowners increase the reach of the seaworthiness obligation.»[198]

The latter quote from Sir Nigel Teare potentially sheds light on the rationale underlying the *CMA CGM Libra* judgement. The judgement may have been an attempt to reconcile the Hague Rules with contemporary views on the nautical fault exemption. It could however be argued that it is not the prerogative of the courts to alter the meaning of the nautical fault exemption, for which the parties to the contract of carriage have relied on, particularly when structuring

196 Teare (2023), p. 566

197 Ibid, p. 567

198 ibid p. 568

their respective insurance arrangements. It may well be that the nautical fault exemption is outdated[199], but it is nevertheless a valid exemption under the Hague Rules, for which shipowners are entitled to rely on.

On the other hand, while it is not entirely convincing that the due diligence obligation to provide a seaworthy ship under the Hague Rules extends to matters of navigation, the shipowner is ultimately in the best position to ensure the vessel's safety, including in matters of navigation. Owners now know that a prudent owner is expected to follow up on matters related to navigation, even at the commencement of the voyage. This may result in inefficiencies, as it likely requires additional safety procedures onshore and offshore, but this is likely to benefit the safety of the vessel, its crew and cargo. So, whilst this author maintains that the *CMA CGM Libra* judgement is difficult to reconcile with the underlying rationales of the Hague Rules, it might be argued that the Supreme Court have extended the seaworthiness obligation in a constructive manner, that will contribute to the promotion of safer shipping. As held by Sir Nigel Teare, "Seaworthiness is the hand maiden of beneficial changes in ship management designed to promote safety at sea.»[200]

199 Ziya (2020)

200 Teare (2023), p. 574

6 Conclusion

The *CMA CGM Libra* judgment serves as a landmark case in maritime law, providing critical insights into the UK Supreme Court's interpretation of seaworthiness and its interplay with the nautical fault exemption under the Hague Rules. The judgement sheds light on the difficulty that arises when a nautical fault potentially renders a vessel unseaworthy. Importantly, the judgement confirmed that in the event of initial unseaworthiness due to an error in navigation, owners cannot avail of the nautical fault exemption. As has been explored throughout this thesis, it might be argued that the solution adopted in some respects is not sufficiently nuanced to appreciate the underlying rationales of the Hague Rules. Nevertheless, if anything, the judgement demonstrates that the doctrine of seaworthiness is very much relevant in contemporary maritime law, and that its relative nature allows it to continue to develop with time. As the maritime industry evolves, the development of the seaworthiness doctrine will undoubtedly remain a pivotal area to watch.

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The interplay between the Hong Kong Convention and the Basel Convention

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Content

Preface

This group master thesis was written as part of the LL.M. Maritime Program at the Scandinavian Institute of Maritime Law, University of Oslo. Apart from minor adjustments, this master's thesis is published as it was submitted at the University of Oslo on 2 December 2024.

In this master thesis, we have examined the relationship between the Hong Kong Convention and the Basel Convention, focusing on whether the Hong Kong Convention provides an equivalent level of control and enforcement as required by Article 11 of the Basel Convention. To be noted, the Conference of the Parties to Basel Convention have not yet decided whether the Hong Kong Convention provides an equivalent level of control and enforcement as required by Article 11 of the Basel Convention. With the Hong Kong Convention scheduled to enter into force on 26 June 2025, the interplay between the two conventions remains unsettled. The thesis aims at providing solutions and guidance for solving the interplay between the two conventions. However, the Conferences of the Parties of the Basel Convention are expected to decide on this matter during its 17th meeting, which is scheduled between the 28 April to 3 May 2025, after the publishing of this thesis, and just little over a month before the entering into force of the Hong Kong Convention. Nonetheless, the Conferences of the Parties of the Basel Convention, and in collaboration with the Marine Environment Protection Committee, might achieve a different result in their upcoming meeting in May.

We would like to extend our immense gratitude to our thesis supervisor, Kristina Siig, for her invaluable guidance, insightful advice, and meticulous critique. Moreover, we are deeply grateful to Sara Tesfai for her extensive support throughout the process and for the encouragement to write the thesis together. We are also immensely thankful to our families and friends for their unwavering support and encouragement throughout the entire process.

Lastly, the co-writing process has highlighted the importance of fostering collaboration, and that sharing knowledge is the right approach to tackling complex issues within the maritime field. We wholeheartedly recommend future students, who are interested in challenging themselves, to co-write a master thesis.

Oslo, 31 March 2025

Maria Roxana Ciobanu and Katrine Bygholm Refsing

Table of abbreviations

BC – The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989, or the "Basel Convention"
BIMCO – Baltic and International Maritime Council
COP of Basel – Conference of the Parties of the Basel Convention
DWM – Downstream Waste Management
ESM – Environmental Sound Management
HKC – Hong Kong International Convention for the Safe and Environmentally Sound Ship Recycling, 2009
ICJ – The International Court of Justice
ICS – The Industry Code of Practice on Ship Recycling
IHM – The Inventory of Hazardous Materials
ILO – The International Labour Organization, 1919
IMO – The International Maritime Organization, 1948
IRRC – International Ready for Recycling Certificate
MARPOL – The International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978, or "MARPOL 73/78"
MEPC – Marine Environment Protection Committee
OECD – The Organisation for Economic Co-operation and Development, 1961
OWEG – Open-Ended Working Group of the Basel Convention
PIC – Prior Consent Procedure
SBC – Secretariat of Basel Convention
SESSR – Safe and Environmentally Sound Ship Recycling
SOLAS – The International Convention for the Safety of Life at Sea, 1974
SRF/s – Ship Recycling Facility/s
SRFP – Ship Recycling Facility Plan
SRP – Ship Recycling Plan
TGB – Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships
VCLT – The Vienna Convention on the Law of Treaties, 1969

1. Introduction

Upcoming changes within the regulatory landscape of ship recycling show that the stakeholders in the industry are now changing their focus to a legal framework in particular, the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships ("HKC").

The ship recycling process is highly complex and poses significant risks and challenges for the workers and the environment.[1] These risks must be addressed and mitigated to ensure a safe and environmentally sound process. Given the suitability of vessels for recycling operations, due to being primarily built on steel, along with the further development of sustainable maritime practices, *safe and environmentally sound ship recycling* is a detrimental and integral part of this scaling process. This ensures the availability of resources, while contributing to the circular economy.[2] Now that Bangladesh ratified the Hong Kong Convention in June 2023 and fulfilled the last requirements for the Convention to enter into force, it is necessary to address the impact of the HKC on the ship recycling industry.[3]

The entering into force of HKC brings certain legal uncertainties, which have been addressed by BIMCO ("Baltic and International Maritime Council") and State Parties to the Convention.[4] Therefore, the interplay between the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal ("BC") and the HKC, became more relevant, and extensively questioned among shipowners, flag States, recycling States, recycling yards and other stakeholders. Questions around the coexistence of the two conventions, potential overlapping requirements and equivalent level of control are now circulating within the shipping industry, and these legal concerns shall therefore be central analysis points in this thesis.

1.1. Statement of the problem

Given the current legal uncertainties, along with the Hong Kong Convention scheduled to enter into force as of June 2025, the statement of the problem in this thesis is to determine the interplay between the two conventions, by assessing whether the Hong Kong Convention provides an equivalent level of control and enforcement as required by Article 11 of the Basel Convention.

1.2. Outline and scope of the thesis

The structure of the thesis is based on a chapter-by-chapter approach, each chapter containing corresponding sections, and sub-sections where applicable.

The first chapter discusses how ship recycling is regulated at international level by interpreting the Basel Convention and the Hong Kong Convention in the light of the Vienna Convention Law of the Treaty ("VCLT") Article 31 and 32. The section focuses on both conventions' suitability to address ship recycling concerns pertaining safety of the environment and human health.

The second chapter examines the interplay between the HCK and the BC. This chapter is divided into two subsections. First the conflict clauses in the two conventions, namely the Article 11, BC and Article 15, HCK is interpreted in the light of the international principles of VCLT, and *lex specialis* to determine the

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1 Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (Adopted 15 May 2009) SR/CONF/45; Preamble

2 Global Maritime Forum, "Shipping's circular economy," Available at: Shipping's circular economy | Global Maritime Forum (last accessed 1st December 2024)

3 International Maritime Organization 'Hong Kong ship recycling Convention set to enter into force,' <HKC set to enter into force> (accessed 1stDecember 2024)

4 MEPC 82/16/7 (9th August 2024)

relationship between the two regimes. Secondly, the thesis analysis whether the HCK provides an equivalent level of control and enforcement as required by the Article 11, BC. Both conventions aim at protecting the human health and the environment from the harm caused by the hazardous material in relation to ship recycling. Article 11, BC requires that agreements must be "compatible with the environmentally sound management of hazardous wastes and other wastes."[5] The comparative analysis of the two regimes examines the HCK principle of safe and environmentally sound ship recycling in the contrast with the environmentally sound management, principle ("ESM") in the BC.

The thesis shall not address EU legislation in relation to ship recycling, or how the two conventions requirements are transposed in national legislation. Moreover, the thesis shall not address the connection between the BC and imposed international environmental principles, i.e. polluters pay principle, precautionary principle, environmental justice principle, and so forth, because such principles are not present in the HKC. The thesis addresses the principle of environmental sound management, as this principle is partially reflected in the HCK. The thesis shall not address the criminal liability in the BC, besides from underlining the lack of this enforcement mechanism in the HKC. The International Labour Organization ("ILO") guidelines on "Safety and health in shipbreaking guidelines for Asian countries and Turkey" shall not be addressed in this thesis, as it falls outside the scope of its. Lastly, any matters pertaining to human rights have been excluded from this thesis based on above reasons.

1.3. Methodology

The legal analysis is based on various legal sources, such as international conventions for ship recycling, namely the Basel Convention and the Hong Kong Convention, as well as their corresponding guidelines. These sources set the legal landscape, analysed by using the legal doctrinal method. Additionally, the thesis applies the functional approach for comparing the two conventions. The purpose of using the functional methodology, is to analyse whether the two regimes are compatible, and if the HKC has the same equivalent level of control and enforcement as is required by Article 11, BC, in line with principle of environmental sound management.

Furthermore, the rules of treaty interpretation in the VCLT have been used along with other legal sources such as relevant conventions, guidelines, acts by international organisations and legal literature. These legal sources will "be weighed against each other"[6] to set the legal landscape and to establish whether the HCK provides an equivalent level of control and enforcement, in line with Article 11, BC and the ESM principle, and finally to determine the interplay between the HCK and the BC.

Prior proceeding any further, the BC is regarded as *de lege lata*, whereas the HKC is still subject to entering into force. This means that the HCK is not yet regarded as *de lege lata*. However, for the purpose of this thesis, the authors shall consider the HKC as *de lege lata.*

1.4. Legal sources

Given that a variety of sources has been used throughout the process of research, it is important to address the hierarchy of the sources used prior proceeding any further. In line with public international law principles, as established by Article 38 (1) of the International Court of Justice ("ICJ Statute"), stipulates that "interna-

5 BC, Article 11(2)

6 Riis Thomas, Trzaskowski Jan, *Skriftlig jura – den juridiske fremstilling*, 1. edition (Ex Tuto Publishing, 2013) s. 280.

tional conventions, whether general or particular"[7] containing "rules expressly recognised"[8] shall have primacy. In this thesis, the primary sources of law are the conventions. Nonetheless, secondary sources of law shall be used, supplementary to the text of the conventions, for the purpose of better defining or filling certain lacunae in the conventions' text.[9] Articles 31 and 32, VCLT shall be used in support of interpreting the conventions and corresponding guidelines. The authenticated language of the conventions addressed throughout this thesis, as per Article 33 of VCLT the Conventions' text, shall be "equally authoritative in each language"[10], unless decided otherwise for the purpose of interpretation of the conventions considering Article 31 and 32 of VCLT.[11]

The thesis also uses acts adopted by the Conferences of the Parties of Basel Convention ("COP of Basel"), as well as acts adopted by the Marine Environment Protection Committee ("MEPC"). Such acts are commonly known as secondary legislations, constituting "an important source of international law."[12] They may, or may not be binding, and can potentially alter treaty obligations, or assist in interpreting treaty obligations in an authoritative manner.[13]

To be noted that throughout this thesis, *travaux preparatoires* has solely been used for the purpose of illustrating what *safe and environmentally ship recycling* is. The thesis uses the *Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships*[14] and the IMO guidelines, which are meant to be utilised upon the entering into force of the Convention.[15] The legal character of the guidelines has been, and remains widely debated, depending on whether guidelines are soft law or hard law. However, the discussion of when do guidelines as soft law become hard law shall not be addressed in this thesis, due to the inherent extensive complexity on this matter, along with the imposed words limitation. Since an extensive number of sources has been used throughout this thesis, their purpose, type of source, limitations, and relevancy to both conventions, shall be addressed when discussed in the relevant sections. Nonetheless, their usage and relevancy shall be addressed in the following sub-section.

1.4.1 Remarks and challenges on the legal sources

The authors have experienced certain challenges during the research process of this thesis, due to limited academic sources on the topic of equivalency analysis of the HKC, as required by the BC. Therefore, the authors have used the available legal literature and gathered a wide range of different sources, relevant to the topic of this thesis, to adequately answer the research questions. To be noted, reports published by NGOs have also been used in the thesis, but only to illustrate a certain point of view, namely that the HKC has been criticised by NGOs for allegedly lacking the same equivalent level of control as BC. The authors are aware that NGO are often regarded as being too one sided, however, the authors have been critical to using such sources extensively. Given that the HKC has not yet

7 ICJ Statute, Article 38(1)(a).

8 Ibid.

9 Ibid., Article 38(1)(d).

10 VCLT, Article 33.

11 Ibid., Article 33(4).

12 Sands Phillipe and Peel Jacqueline, *et al.*, *Principles of International Environmental law*, 4th. edition (Cambridge University Press, 2018), p. 116.

13 Ibid., p. 116.

14 Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships, Decision VI/24 (UNEP/CHW 6.23 (2002)).

15 Kristina Siig," Private law responses to of imperfect regulation in international public law – the case of vessel recycling," in *Routledge Handbook of Privat Law and Sustainability* Marta Sontas Silva, Andrea Nicolussi *et al* (eds), (London Routledge 2024), p. 226.

entered into force, there are no available case law on issues falling under the scope of the HKC specifically.

2. How is ship recycling regulated at International Level

At international level, ship recycling is regulated through the Basel Convention[16] and the Hong Kong Convention.[17] This thesis focuses solely on the interplay between the two conventions and shall not address the regulation of ship recycling at EU level.[18] The following sections will examine the regulatory landscape of the ship recycling by interpreting the BC and HCK in light of the international principles in Article 31 and 32 of the VCLT. With the HCK entering into force, the following section shall thoroughly analyse the Conventions and their requirements on ships and ship recycling facilities.

International conventions shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[19] The process of interpreting shall be used solely when the rules are *ill-defined*.[20] Article 31, VCLT mitigates this through the general rules of interpretation by stating that the literal interpretation of the *ordinary meaning*[21] shall have primacy,[22]and ought to be in "the light of its object and purpose."[23] Moreover, Article 31 VLCT establishes that such an interpretation must be uniform with the framework of the treaty, while considering both the preamble and annexes of the treaty.[24] The teleological elements in the first two paragraphs of Article 31, VCLT serve the purpose of hindering narrow interpretations of a treaty.[25] Furthermore, the Article 32, VCLT extends its scope and includes *travaux preparatoire,* underling that the circumstances under which the preparatory work of the treaty was concluded shall be considered in the interpretation process. In cases where the meaning of the treaty is vague, or leads to unreasonable results[26], such interpretative elements are key factors when interpreting the meaning of a treaty.

2.1. The Basel Convention

The Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal of 1989 entered into force in 1992 and is currently ratified by 191 of the United Nations.[27] The BC was adopted as a solution to prevent the export of hazardous waste from developed countries to non-developed countries. Hence, the Convention prohibits export of waste to non-developed pursuant to

16 The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Adopted 22ndMarch 1989, entered into force 5thMay 1992. Available at: The Basel Convention (Last accessed 1st December 2024)

17 The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (adopted 15th May 2009, enters into force 23rd June 2025). Available at: The Hong Kong Convention . (Last accessed the 1stDecember 2024)

18 Supra Section 1.2.

19 VCLT., Article. 31.

20 Cecile Legros, "Interpreting International Shipping Law with EU Soft Law Instruments," European Journal of Commercial Contract Law 7, no. 1/2 (June 2015): 32-38.

21 Ibid., p. 33.

22 Ibid., p. 33.

23 VCLT., Article 31(1).

24 Ibid., Article 31(2).

25 Lo Chang-fa ed., *Treaty Interpretation Under the Vienna Convention on the Law of Treaties - A New Round of Codification,* (Springer Singapore 2017), p. 41.

26 VCLT, Article 32.

27 See ratification status of the BC. Available at: Ratification States of the Basel Convention (last accessed 1st December 2024)

Article 4(5) (limited ban).[28] The following sections discuss the applicability of the BC regarding dismantling (Section 2.1.1.), its fundamental principles, (section 2.1.2 and 2.1.3), the Basel Ban Amendment (section 2.1.4), while aiming to discuss whether BC, as a general waste movement regime provides sufficient measures to ensure safe and environmentally sound ship recycling (section 2.1.5).

The BC has many objectives[29], among which the protection of human health and environment against adverse effects caused by the generation[30], and transboundary movement[31] of hazardous wastes and other wastes; by ensuring that such wastes are managed in an *environmentally sound manner*.[32] The BC aims at minimising generation and transboundary movement of hazardous wastes and other wastes by calling the parties to endeavour treating and disposing the waste as close as possible to their generation source.[33] The Convention seeks to control transboundary movement of hazardous wastes and other wastes by prohibiting their export, unless the waste is to be carried out in compliance with the *prior informed consent procedure* ("PIC") and the principle of ESM.[34]

2.1.1. The scope and applicability of the Basel Convention

The applicability of the Convention to ships per se, requires that the vessel is categorized as *hazardous waste*[35], and that it shall be subject to a *transboundary movement*[36] between the State of export and State of import, where both are parties to the BC.[37] The Convention's legal suitability for ship dismantling processes has been widely debated and controversial for many years. Whether the obsolete vessel can be classified as *hazardous waste*[38] once she is taken out of service to be sent for dismantling, and as to whether the export of the vessel is for disposal or recovery are questions arising in the context of vessels sold for recycling.[39]

The term *waste* is defined as "substances or objects which are disposed of or are intended to be disposed of by the provision of national law."[40] The BC does not explicitly state whether the obsolete vessel may constitute as *waste*.[41] Nonetheless, categorising the vessel as *waste* does not necessarily mean that the export of the vessel is included under the BC. The Convention only applies to ships when the ship is considered *hazardous waste* as per Article 1.[42] To be noted that the hull of the vessel is predominantly steel, and steel does not fall under the *hazardous waste* criterion in the BC. Nevertheless, some parts of the hull and equipment of

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28 Katharina Kummer ed., *International Management of Hazardous Wastes:The Basel Convention and related Legal Rules*, (Oxford University Press 1995), p. 95.

29 BC, Preamble.

30 Ibid., Article 4.2(a).

31 Ibid., Article 4.2(d).

32 Ibid., Article 4(2)(d), 4(2)(g), 4(8), 4(9) and 4(10). *See also:* Urs Daniels Engels ed., *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention*, (Berlin Springer 2013), s. 124.

33 BC, preamble recitals 9, and Article 4.

34 Ibid., Article 4.

35 Ibid., Article 1(1).

36 Ibid., Article 2(3).

37 Ibid., Article 4(5). *See also:* For a detailed discussion of the Basel Convention *ratione materiae.* Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention*, p.126-131.

38 "Hazardous wastes" are further defined in Annex I and "other wastes" in Annex II.

39 UNEP/CHW.7/33, (25. January 2005), p. 5-6) and UNEP/CHW.13/18, (16 August 2017), 32 – 33.

40 BC, Article 2.

41 The exclusion clause in Article 1(4) expressly states that the vessel's operational wastes are excluded from the scope of the Convention. Thus, the discharge of the vessels operational wastes is covered in another international instrument *e.g.* MARPOL. See: (UNEP/IG.80/4), Annex 1, p. 10.

42 Waste that belong to any category listed in Annex I are considered as "hazardous waste", and will be subject to control, unless they do not possess any of the characteristics listed in Annex III.

the vessel may contain toxic components such as asbestos, oils, heavy metals and other components as such, which may be categorised as *hazardous waste* under the BC.[43] These materials are often released during the extraction phase of the dismantling process.[44] On this matter, the COP of Basel adopted Decision VII/26 titled "Environmentally sound management of ship dismantling"[45]. In that decision the Parties concluded that end-of-life vessels are considered *waste* pursuant to Article 2 and emphasised that vessels categorised as *hazardous waste* are subject to the control of the Convention, when the ship in question contains hazardous materials listed in the Annexes.[46] Thus, a vessel may be categorised as *hazardous waste*, unless the vessel has been pre-cleaned prior to being sent to dismantling.[47] Whilst the vessel may first be considered *hazardous waste*, it does not fall under the BC requirement of *waste,* until after the shipowner intends to export the vessel for recycling.[48] The shipowner's intention to commence the vessel's final journey to the ship recycling facility shall be clear from the moment the shipowner gives notification in accordance with the PIC. Determining the true intentions of the shipowner can be challenging, because it can be difficult to prove the shipowner's intention of disposing the ship before it leaves the territorial waters of the export State, if such notification has not been given.[49] The intention of disposing the vessel can be established by proving that preparatory acts were taken by shipowner prior to the vessel being sent to the ship recycling facility. Preparatory acts can be legal and/or physical actions such as reflagging of the vessel, but also cancellation or modification of insurance.[50]

The applicability of the BC is based on the physical commencement of the transboundary movement.[51] The decision to dismantle the vessel must therefore be made whilst the vessel is still physically within the territory of the exporting State. Monitoring the vessel's final voyage to the ship recycling facilities may, however, be difficult for national authorities because the geographical scope of the Convention has given the shipowner various of ways of circumventing the Convention. The shipowner can for instance ensure that no transboundary movement

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43 Hazardous materials are listed in Annex I, possessing the listed hazardous characteristics in Annex III of the BC.

44 On the third meeting, the COP of Basel decided on working on exploring limits value for use of the listed categorise of hazardous waste in Annex I. Decision III/12 (UNEP/ CHW. 3/35, p. 10)

45 The BC nor the subsequent guidelines provide a definition of a ship, *cf*. the HCK, Art. 2(7).

46 Decision VII/26 (UNEP/CHW.7/33. (25th January 2005)), p. 63.

47 BC, Art.2(1), read with Basel Convention Decision VII/26 (UNEP/CHW.7/33. (25th January 2005)) p. 63. *See also:* Siig," Private law responses of imperfect regulation in international public law – the case of vessel recycling," p. 225.

48 BC, Article 2(1). Additionally, BC Article 2(4) also defines "disposal" to any operations listed in Annex VI Section A and B, including recycling of metals. However, Article 4(9)(b) also stipulates that material should be considered as "waste", when intended for recycling.

49 *See* the Dutch *Seatrade* case. Four vessels were in this case sold to an intermediate buyer, also known as a "cash buyer" with the intention of shipping them from the port of Rotterdam and Hamburg to ship recycling facilities in South Asia, well known for using the beaching method. The ships contained hazardous wastes, and the court therefore held that the ships were considered "waste" pursuant to European Waste Shipment Regulation requiring, based on the exchanges of several e-mails and other evidence that together proved the intention of the shipowner to send the vessel to recycling. Notable EU has transposes and implements the provisions of the Basel Convention and the Basel Ban Amendment. As foreign case law the Dutch caselaw is non-binding for other (EU) countries and can only be used as inspiration for interpretation. (The *Seatrade,* Case No. 10/994550-15, District Court of Rotterdam, 15 March 2018 available at: https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/RechtbankRotterdam/Nieuws/Documents/English%20translation%20Seatrade.pdf)

50 Basel Action Network and Greenpeace International, *Shipbreaking and the legal obligations under the Basel Convention,* at para.1(2). *Also see: F*or a more detailed discussion of the Basel Convention's interpretation of "disposal" and "intends to dispose" Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention*, p. 127-131.

51 BC, Article 2(1).

has occurred by organising a deceptive second-to-last voyage to a non-State party, or by organising a sale with the purpose of recycling on the high seas.[52] Thus, identifying the State of export may also be difficult in such cases. This undermines the BC requirements, along with the national authorities' struggle with evidentiary issues and enforcement difficulties.[53] If the vessel is subject to the provisions of the BC, the allowance of transboundary movement of hazardous wastes and other wastes requires compliance with the PIC and that the *wastes* are disposed in an ESM.

2.1.2. The Prior Informed Consent Procedure

The PIC procedure is one of the fundamental principles in the BC. The procedure requires that the *exporter*[54] or the *generator*[55] of the waste (also categorised as the *notifier*) is obliged by the exporting State to notify the competent authorities in the export State, the import State and the transit States of the proposed transboundary movement of the vessel.

The Convention contains an extensive definition of the responsible parties, consisting of a wide range of both legal and natural persons, taking part in activities related to the process of sending the vessel to the recycling yards, and readying it for dismantling, for instance the owner of the ship, the charter or the broker.[56] The decision of dismantling the vessel is taken by the shipowner and he may therefore be considered as the *exporter.*[57]

The shipowner's obligation is to give notification in accordance with the PIC. As the *notifier*, the shipowner must notify the competent authorities in all the States involved into transboundary movement of vessel.[58] The shipowner must give notification by issuing a notification document and movement document to the competent authorities.[59] The exporting State cannot allow the transboundary movement until the shipowner has received (i) the written consent of the State of import and (ii) confirmed that the movement is governed by a contract between the shipowner and the ultimate disposer[60] specifying environmentally sound management of the vessel in question.[61] The purpose of this mechanism is to ensure that all the States involved into transboundary movement of vessel are notified about the movement and have given their consent here to. Hence, all States must give their consent prior to the transboundary movement before the export of the vessel is allowed according to the BC.

The transboundary movement of the vessel is, however, prohibited if the import State has for instance given notice under Article 13, prohibiting the import of the vessel[62], or the export State "has reason to believe that the (vessel) will not be managed in an environmentally sound manner".[63] Non-compliant transboundary waste movement is considered *illegal traffic*.[64] The BC imposes a further *take back*

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52 Nicholas Gaskell, Craig Forest, " *The law of wreck*", (Routledge Taylor & Francis group 2019), p. 672.

53 Alla Pozdnakova, "Ship recycling regulation under international and EU Law," p. 59 – 60.

54 BC, Article 2(15)

55 Ibid., Article 2(18)

56 Ibid., Article 6. *See also:* Alla Pozdnkova, "Ship Recycling Regulation under International Law and EU Law," p. 62.

57 Ibid., Article 2(1). *See also:* Strong Malcolm and Herring Paul, " *Sale of ships: the Norwegian Sale-form,"*(Sweet & Maxwell 2016), s. 303-304.

58 Ibid., Article 6 and Annex V A.

59 Ibid., Article 4(8).

60 Ibid., Article 2(19).

61 Ibid., Article 6(3).

62 Ibid., Article 4(1).

63 Ibid., Article 4(2)(e).

64 Ibid., Article 9.

obligation[65] if the movement of the vessel cannot be completed in compliance with the PIC procedure and the contractual terms between the shipowner and the disposer. This means that the exporter must *re-import* the vessel to the exporting State, unless the disposal of the vessel can be achieved in an environmentally sound manner in the State of import.[66]

2.1.3. The principle of Environmental Sound Management

Under this principle, the BC requires that all steps are taken in ensuring that those wastes disposed[67] "in a manner which will protect human health and the environment against the adverse effects which may result from such wastes" pursuant to Article 2(8). The definition of the principle of ESM is, however, vague, and it has been criticized for lacking clarity in terms of what it requires or where the responsibility to ensure ESM should be allocated.[68] The following section will examine the definition of ESM and where is the duty to ensure ESM allocated in the context of ship recycling.

In cooperation with IMO and ILO, The Secretariat of the Basel Convention ("SBC") developed a broader definition of ESM in the relation to ship recycling through the *Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships* ("TGB").[69] The TGB aim to provide guidance to the ship recycling States and their facilities to ensure a uniform compliance with the ESM. To be noted, the TGB purely address the technical and procedural aspects of ship dismantling in an ESM.[70] Hence, the TGB have no legal status, and are not therefore legally binding *per se* for the parties.[71] However, it has been emphasised in legal literature that the adoption of the guidelines at 6th meeting by the COP of Basel conferred them "persuasive force"[72] and "a special legal value"[73] as a fundamental standard for the States to fulfil their requirements under the Convention.[74] Notwithstanding, the guidelines' status, they can contribute to the interpretation of the norms for the adequate method for dismantling of ship pursuant to the ESM.[75]

The ESM compliance process consists of three stages: "preparation procedure of the vessel prior to the dismantling process, the dismantling process, the sorting for reuse, recycling and sorting."[76] The TGB recommend the parties to manage the waste derived from the dismantling process in accordance with the principle of waste hierarchy. The TGB also contain a list specifying the types of wastes considered inherent in the vessel structure, or on board. Additionally, the TGB

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65 BC, Article 8.

66 Ibid., article 8.

67 Ibid., Article 2(2) defines management as: "(...) collection, transport and disposal of hazardous wastes (...).

68 Zada Lipman, 'Trade in Hazardous Waste' in *International Environmental Law and the South,* ed. Shawkat Alam, Sumudu Atapattu, Carmen G Gonzalez and Jona Razzaque (Cambridge University Press 2015), p. 262.

69 Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships, Decision VI/24 (UNEP/CHW6.23 (2002)), p. 6. *See also:* Kummer, *International Management of Hazardous Wastes:The Basel Convention and related Legal Rules*, p. 92.

70 TGB, p. 17.

71 TGB., p. 79.

72 Ioanna Hadjiyianni and Kleoniki Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, (Edward Elgar Publish Limited 2024), p. 138.

73 Ibid., p. 138.

74 Ibid., p. 138. *See also:* Alan Boyle and Cathrine Redgewell, *International Law and Environment,*(Oxford University Press 2021), p. 496.

75 Ibid., p. 138.

76 TGB, p. 9f.

provide an identification of different types of environmental hazards, along with recommendations for specific measures to prevent and mitigate such hazards.[77]

To confirm compliance with the ESM, some degree of reporting and verification by the States is important. The TGB also provides such recommendations. Ultimately, the achievement of compliance with ESM at a ship recycling facility ("SRF") relies on the national authorities' "regulatory and enforcement infrastructure."[78] Thus, the TGB provide information and recommendations on procedures, processes which the facilities can implement in order to comply with the ESM principle in relation to the ship recycling. Nevertheless, allocation of the responsibility to ensure compliance with the ESM requirements remain unclear.[79]

The BC requires that both the State of export and import must ensure that the vessel subject to transboundary movement is managed in an environmentally sound manner in the State of import or elsewhere.[80] The export of the vessel is, however, only permitted if the waste is disposed in conformity with the rules and regulations of the exporting State according to the principle of *non-discrimination,* to prevent the export of the ship to a less environmental sound facility.[81]

The Convention requires that the State of export, *under no circumstances* shall allow the export of the hazardous waste to the importing State or transit State if the importing State cannot manage those wastes in an environmentally sound manner.[82] Based on Article 4(10), BC, the duty to ensure compliance of ESM is allocated primarily to the State of export.[83] On the other hand, the Convention also imposes a parallel obligation on the State of import to ensure compliance with the ESM principle by mitigating environmental impacts and protecting their people.[84]

Nevertheless, the Convention does impose that both States are obliged to prevent the import of hazardous waste, if they have *reason to believe* that there is a risk of damage to the environment and/or of harmful effects on human health caused by the hazardous wastes.[85] The Convention does not explicitly provide further guidance on how the States should verify compliance with the ESM principle at the facility. Therefore, regarding this matter, the *reason to believe* must be interpreted, as seen in the legal literature. As emphasised by Kummer, in cases where the lack of adequate facilities is "well known"[86], the State of export must interpret its obligation based on the information provided by the State of import.[87] Thus, the fulfilment of the obligation requires the exercise of due diligence, which also requires that the State of export has a higher degree of insight into the State of import's internal "self-verification of process of adequacy of waste management facilities"[88].

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77 TGB, p. 7.

78 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 138.

79 Ibid., p. 138.

80 BC, Article 4(8).

81 Kummer, *International Management of Hazardous Wastes: The Basel Convention and related Legal,* p. 56 and 92.

82 BC, Article 4(10).

83 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, p. 132.

84 Ibid., p. 140.

85 BC, Article 4(2)(g).

86 Kummer, *International Management of Hazardous Wastes:The Basel Convention and related Legal Rules,* p. 57.

87 Ibid., p. 57.

88 Hadjiyianni,Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 139.

Overall, the assessment of compliance with ESM is more complex, due to the vague definition of the principle, which can lead to various interpretations of what constitutes ESM of hazardous waste at a national level.

2.1.4. The Basel Ban Amendment

In 1995, the Basel Ban Amendment in Article 4A was adopted by COP of Basel[89] as an acknowledgement of the transboundary movement of hazardous wastes from OECD[90] countries to non-OECD countries which "have a high risk of no constituting an environmentally sound management of hazardous wastes as required by this Convention."[91] The Basel Ban Amendment was approved on the second meeting. However, the ban was not formally incorporated in the Convention when approved during the secondmeeting, leading to disputes between the parties about the legal character of the Basel Ban Amendment. To resolve the dispute, the Basel Ban Amendment was formally incorporated into the Convention by amending it and adding Annex VII too the Convention.[92] Nevertheless, the amendment to the Convention first entered into force in 2019 in accordance with the Article 17(5).[93]

The Basel Ban Amendment is considered a critical tool in preventing export of hazardous wastes to the non-OECD countries which lack the capacity or resources to ensure ESM of those hazardous wastes. Article 4A distinguishes between non-recovery operations, which as stated in Article 4A(1), and recovery operations, which is regulated in Article 4A(2). The Basel Ban Amendment prohibits export of hazardous waste from OECD countries, EU[94] and Lichtenstein to non-OECD countries.[95] Thus, export of hazardous waste is only permitted in accordance with the Basel Ban Amendment, if the hazardous waste is exported to countries within OECD. As a result of the Basel Ban Amendment, export of vessels to the major recycling States such as India, Bangladesh and Pakistan are forbidden, as all these countries are non-OECD countries.[96] Hence, export of vessels for dismantling to non-OECD countries constitutes *illegal traffic*[97], unless there is an agreement between the exporting State and the importing State pursuant to Article 11, BC. However, Article 11, BC provides an exception to the general obligation of exporting of waste to parties or non-parties of the Convention, as far as the agreement is "not less environmentally sound" than the provisions of the BC.[98]

Regarding the Basel Ban Amendment, if any exceptions were to be available, they would have explicitly been included in Article 4A. However, no reference to the Article 11, BC, is explicitly made in the ban, meaning that the ban cannot as such be circumvented by using an Article 11 Agreement. This interpretation

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89 Amendment to the BC was adopted by Decision III/I of the Parties to the Basel Convention on its third meeting, (UNEP/CHW. 3/35, p. 2. (the 28 thof November 1995)), p. 2. The decision added a new preambular paragraph 7 *bis.* Available at: Decision on the Basel Ban Amendment (Last accessed 1st December 2024)

90 The Organisation for Economic Co-operation and Development.

91 BC, Preamble (7) *bis. See also*: Decision III/1 (UNEP/CHW. 3/35, p. 2. (the 28thof November 1995))

92 Sands and Peel, *Principles of International Environmental law*, p. 662.

93 Basel Convention, "Entry into force of Amendment to UN treaty boosts efforts to prevent waste dumping," press release. Available at: https://www.basel.int/default.aspx?tabid=8120 (last accessed 1stDecember 2024).

94 The European Union has been party to the Basel Convention since 1993. See Council Decision of 1stFebruary 1993 on the conclusion on behalf of the Community of the Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel Convention) (93/98/EEC). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31993D0098 (Last accessed 1st December 2024).

95 BC, Article 4(A) and Annex VII.

96 Ibid., Annex VII.

97 Ibid., Article 9.

98 Ibid., Article 11.

also reflects the intention of the parties to the Convention.[99] Consequently, based on this interpretation, a valid 11 Agreement to export of waste is only possible to conclude: "(1) between the OECD state and another OECD state; (2) between a non-OECD state and another non-OECD state; (3) between an OECD state and non-OECD state, but only in respect of export from the latter to the former."[100] (emphasis added). Nevertheless, it could be argued that export of vessels for partial dismantling in non-OECD countries may be permitted, provided that the hazardous materials extracted from the dismantling of the ship are exported to an OECD-country from a non-OECD country in conformity with the PIC procedure and the ESM principle. This may only apply to vessels that fall outside the scope of the BC, prior their last voyage.

2.1.5. The suitability of the Basel Convention to address the ship recycling concerns pertaining to the safety of the environment and human health

The Basel Convention was originally designed to regulate transport of waste in general and is therefore not designed to solve the ship recycling practice. However, it was decided by the COP of Basel that the Convention also applies to vessels that are categorised as *waste* in accordance with Article 2 of the BC.[101] The question whether the BC provides sufficient measures to regulate unsafe and environmentally harmful ship recycling practices has, nonetheless, been subject to debate.

The BC was not tailormade to provide an efficient and effective solution for dismantling ships in an environmentally sound manner at international level. For instance, the Convention does not contain provisions which set out specific requirements to the most actors involved in the recycling process, namely the shipowners and the Ship recycling facilities.[102] Neither does it allocate the responsibility to these stakeholders.

As discussed above, the applicability of the geographical scope has led to evidentiary issues and enforcement difficulties for the national authorities.[103] The jurisdiction and the responsibility to control the transboundary movement of the vessel and ensure the environmental sound dismantling of the vessel is allocated at the State of export and not the flag State.[104] The territorial jurisdiction is one of the weaknesses of the BC.

Overall, the BC may be ill suited to solve the issues concerning safe and environmentally sound ship recycling due to its lack of ship-specific features. Therefore, the COP of Basel welcomed the IMO to develop an adequate regulatory framework addressing recycling of vessels, which led to the adoption of: The Hong Kong Convention.[105]

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99 Decision IV/8, UNEP/CHW.4/35, (23 – 27 thFebruary 1998), p. 17. *See also:* Zada Lipman, "Trade in Hazardous Waste: Environmental Justice Versus Economic Growth," (2002), Capacity Building for Environmental Law in the Asia and Pacific Region, p. 472 - 473.

100 Zada Lipman, *Trade in Hazardous Waste: Environmental Justice Versus Economic Growth,* p. 473.

101 Supra Section 2.1.

102 Alla Pozdnkova,"Ship Recycling Regulation under International Law and EU Law," p. 61.

103 Ibid., p. 61. Supra Section 2.1.

104 BC Article 2(8), Article 2(10) and Article 4(10).

105 Decision VII/25 (UNEP/CHW. 7/33. (25 thJanuary 2005)), p. 62. *See also:* MEPC 51/3. (23rdJanuary 2004), p. 1.

2.2. The Hong Kong Convention

The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships was adopted on 15 May 2009[106], and is scheduled to enter into force on 26 June 2026.[107] The drafting of the HKC has been developed in collaboration with the ILO, the COP of Basel, along with opinions from the IMO Member States.[108] The overarching objective of the HCK is that upon recycling of a vessel at the end of its life, human health and safety and the environment are safeguarded, and no risks are posed in this direction.[109]

The following sections discuss the requirements of the entering into force of the HCK (section 2.2.1), the scope and applicability of the HCK (section 2.2.2), the requirements of the ships and the ship recycling facilities (section 2.2.3 and section 2.2.4) and the compliance and enforcement of the HCK (section 2.2.5). Lastly, the thesis will discuss the suitability of the HCK to address the ship recycling concerns pertaining to the safety of the environment and human health (section 2.2.6).

The HKC consists of 21 articles and an Annex containing 25 Regulations which set out general provisions together with specific requirements for ships and ship recycling facilities and requirements for reporting. The Annex is an integral part of the Convention, and Article 1(5) clearly states that referring to the HKC, becomes a reference to its Annex, except if indicated differently.[110] In addition to the Convention, seven guidelines have been developed which provides support to the implementation of a specific set of substantial obligations.[111]

Prior moving any further, it is important make a clear distinction between the different types of actors involved in this process, namely, state entities and private entities. However, the HCK is only legally binding for the State parties, namely the flag State and the ship recycling State.[112]

2.2.1. The entering into force of the Hong Kong Convention

Given the complexity of the HKC, its entering into force criteria is significantly more constricted.[113] Article 17, HKC is designed as a *three-pronged entry-into-force provision*, indicating the complex requirements, and the contribution of the actors involved in the ship recycling industry.[114]

For the HCK to enter into force, all three requirements imposed in Article 17 must be fulfilled, with the first requirement being the number of ratifications. This requirement must be read in conjunction with the second requirement of a minimum tonnage of the countries which signed the Convention prior its entering into force. This requires that the Convention ought to be accepted by minimum 15 States, whose combined fleet reflects a minimum tonnage of 40 percentage of

106 The Hong Kong Convention on Safe and Environmentally Sound Ship Recycling (adopted 15th May 2009, enters into force 23 June of 2025.SR/CONF/45. Available at: The Hong Kong Convention (last accessed 1st December 2024.)

107 IMO, "The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships," Available at: Entering into force of the HKC (last accessed 1stDecember 2024)

108 HCK, Article 1. *See also:* Decision VII/25 (UNEP/CHW.7/33. (25th January 2005) p. 62.

109 Ibid., article 1(1).

110 The Convention's annex is easier to amend then the Articles pursuant Article 18(5), which makes it easier to amend or adjust the requirements in the annex *after* the HCK enters into force. Especially if streamlining of the HCK with BC is required.

111 Siig, "Private Law Responses to Imperfect Regulation," p.226

112 HCK, Article 3(1).

113 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention*, p. 27.

114 Hadjiyianni,Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader, p*. 42.

the global fleet.[115] The third requirement imposes that the total and maximum ship decommissioning volume from over the past decade, adds up to a minimum of 3 percentage of the contracting parties' gross tonnage.[116] This requirement emphasizes the active participation of the ship recycling States and aims to ensure that the fleets of contracting States have the necessary combined ship recycling capacity available for their ships to be recycled, prior the entering into force of HKC. The purpose of this is to prevent ships being *stuck afloat* because of a potential absence of a *minimum* ship recycling capacity.[117] Such requirements reflect the many interests involved in the ship recycling process, as well as the "the balancing sought among the actors of IMO".[118]

Moreover, the ship recycling capacity is governed by the variety of the age deteriorating world fleet. In 2009 the fulfilment of the third requirement required the participation of at least two of the three major ship recycling States, namely: India, Pakistan and Bangladesh.[119] Nevertheless, the increasing world fleet means that the requirement of the number of contracting States also will increase progressively to fulfil the requirements of the minimum tonnage, along with the minimum ship recycling capacity.[120] India accessed as the first major ship recycling State the HKC in 2019[121], followed by Bangladesh that ratified the Convention in June 2023.[122] The Convention is set to enter into force within 24 months after Bangladesh became a contracting State to the Convention.[123] With the three requirements imposed in Article 17 having been fulfilled, it indicates that the HKC is ready for entering into force, as of June 2025.[124]

2.2.2. The scope and applicability of the Hong Kong Convention

The Convention applies to merchant vessels of 500 gross tonnage[125] ("gt"), or more entitled to fly the flag of a contracting State, and a ship recycling facility operating under the jurisdiction of a contracting State pursuant to Article 3(1).[126] Ships below 500 gt., and ships operating within the waters of the flag State are excluded from the scope of the Convention. Naval ships and government vessels operating non-commercial are also excluded from its scope.[127]

The term *ships,* as per the HCK definition, is a vessel of any kind, engaged, or having been engaging in operations in the marine environment.[128] The HKC definition includes other submersibles, floating platforms, and other structures[129], however this thesis shall focus solely on merchant vessels.

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115 HCK, Article 17(1) and 17(2).

116 Ibid., art. 17(3).

117 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention,* p. 51 ff.

118 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 167.

119 IMO, "India accession brings the ship recycling convention a step closer to enter into force," 28thof November 2019, available at: IMO press release (last accessed 1stDecember 2024)

120 Hadjiyianni,Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 42.

121 IMO,"India accession brings the ship recycling convention a step closer to enter into force"

122 IMO, "Hong Kong ship recycling convention set to enter into force",.

123 HCK, Article 17(1).

124 IMO, "Hong Kong ship recycling convention set to enter into force".

125 The Hong Kong Convention, Article 2(8)

126 Exception of ships is listed in HCK, Article 3(2) and 3(3).

127 HCK, Article 3(2) and 3(3). *See also:* MEPC/55/23 (16thOctober 2006) p. 24.

128 Ibid. Article 2(7).

129 Ibid, Article 2(7).

The HKC imposes requirements on the Contracting States to give no favourable treatment to vessels flying the flag of non-contracting State,[130] and with this provision, the Convention aims to ensure that the facilities in contracting States are compliant with the requirements in the Convention, regardless of the flag of the vessel.[131] Nevertheless, the HKC allows vessels flying the flag of non-contracting States to be recycled at SRFs in contracting States, provided that the vessel meets the criteria imposed by the Convention.[132]

2.2.3 The Hong Kong Convention's requirements for the ship

The following section discusses the HKC requirements for ships which can be divided into three parts: firstly, the requirements and rules pertaining to the design, i.e. construction and maintenance of ships, including the barring on the usage of hazardous materials. Secondly, the requirement of an Inventory of Hazardous Materials ("IHM") and corresponding certificate, and thirdly, the establishment of a Ship Recycling Plan ("SRP"). Once these requirements have been fulfilled, the flag State will issue the International Ready for Recycling Certificate ("IRRC"), which is the last step before the vessel is sent to recycling by the shipowner.[133]

2.2.3.1. Hazardous Materials

The HKC regulates the processes of designing, constructing, operation and preparing ships, to assure the safest and most suitable environmental recycling process, without interfering with the ship's safety and efficiency.[134] The following subsections discuss the concept of *hazardous materials* within the context of the HKC.

2.2.3.1.1. Prohibition on installation and use of hazardous materials

This subsection delves into the prohibition of installing and usage of hazardous materials. The HKC prohibits, or at a minimum restricts the installation or use of hazardous materials,[135] which are listed in Appendix 1 for all ships.[136] These restrictions are applicable for all ships entering a member State's ports, shipyards, ship repair yards or offshore terminals.[137] Hence, the Convention provides that the restrictions to the structure of the ship also apply on non-party ships, if the new installation or use of hazardous materials takes place within the territorial boards of the Contracting State.[138] The HCK requirements are thereby a substantial global influence which extends beyond the ships of its member parties.[139] Compliance with the restrictions, or prohibitions on installation and use of hazardous materials as per Regulation 4 can be monitored by the flag State through the Part I of the IHM.[140]

Overall, the restrictions on installing or using hazardous materials may ensure compliance with the broader objectives of the HCK by improving the conditions for the disposal of the vessel at the ship recycling facility and better mitigate the

130 HCK, Article 3(4).

131 Ibid., Article 3(4) and 6.

132 Ibid., Article 3(4).

133 HCK, Article 1(8) contains a broad definition on shipowner term.

134 IMO, "The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships," Entering into force of the HKC

135 Hazardous materials are defined as *"any material or substance which is liable to create hazards to human health and/or the environment."* in Article 2(9), HCK.

136 HCK, Regulation 4(1).

137 Ibid., Article 4(2).

138 Ibid., Regulation 4 and Article 3(4).

139 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, p. 175.

140 Ibid., p. 175.

risk of adverse effects on human health and the environment. Consequently, these restrictions imposed in Regulation 4 gives an *ex ante* tool that aimed at minimising the generation of hazardous materials and transboundary movement of hazardous waste on boards the ships.[141]

2.2.3.1.2. Inventory of Hazardous Materials

This subsection addresses the Inventory of Hazardous Materials ("IHM") to better illustrate its purpose, and its role throughout the ship recycling process, particularly regarding the compliance as per the HKC requirements. The Convention sets out in Regulation 5 that ships must have the IHM list onboard throughout the *operational life* of the ship.[142] The IHM was first developed in 2001 through the Industry Code of Practice on Ship Recycling by the International Chamber of Shipping (ICS) and was then adopted IMO's Guidelines on Ship Recycling (Resolution A.962(23))[143] in 2003.[144] This led to the subsequent development of a legally binding, comprehensive HKC. The Convention's implementation has to some extent superseded the Code of Practice on Ship Recycling by ICS and the IMO's Guidelines on Ship Recycling (Resolution A.962(23)).[145] Furthermore, the guidelines on the development of the IHM have been developed to adhere with the compliance process, as per the requirement imposed in Regulation 5, a fact which should be considered when assessing the guidelines' significance in supporting the HKC regime.[146] Nevertheless, prior the entry into force of the HCK, the requirements in HCK are not legally binding for the member States.[147]

The IHM is primarily designed to lay out a list on the type of hazardous materials specific to each ship, which is a key feature to HKC as a tailormade convention. The objective of the IHM is to provide *ship-specific* information on the actual location of the hazardous materials on board and the approximate quantities, to prevent, or mitigate any harm resulting from the ship recycling process.[148] By having the IHM list in place, SRFs, as well as other stakeholders, can use the information contained in the list for determining the types of hazardous materials, their quantities, and ultimately assessing whether this complies with the safe and environmentally sound criteria.[149]

The IHM requirements are under Appendix 1 and 2 of the HKC, and describe the materials contained in the ship's structure, along with the equipment and location of the hazardous materials and approximate quantities.[150] Furthermore, the inventory elements containing hazardous materials as listed in the appendixes shall be maintained and regularly updated throughout the operational life of the vessel to ensure that the IHM reflects the changes in the structure of the ship and its equipment.[151] The shipowner has the responsibility for duly maintaining and

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141 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 175.

142 HCK, Regulation 5 (1)(3).

143 The IMO Guidelines on "the Green Passport" is similar to the IHM.

144 Lloyds, Shipping and Trade Law, "The Hong Kong Convention: ship recycling gets a new law," 31stOctober 2023.

145 (UNEP/CHW.8/INF /21 (4thAugust 2006)) p. 3.

146 2023 Guidelines for the Development of the Inventory of Hazardous Materials (Resolution MEPC. 379(80).

147 UNEP/CHW.8/INF/21. (4 thAugust 2006) p. 2. *See also:* Engels: *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention,* p. 232.

148 2023 Guidelines for the Development of the Inventory of Hazardous Materials (Resolution MEPC. 379(80)), p. 1.

149 Ibid., p. 3.

150 HCK, Regulation 5(1).

151 Ibid., Article 5(3). *See also:* 2023 Guidelines for the Development of the Inventory of Hazardous Materials (Resolution MEPC. 379(80)), p. 3.

updating Part I of the IHM, and in addition to this, the shipowner must, prior to the ships last voyage, include Part II for operationally generated wasted, along with Part III for stores on board, which ought to be prepared and verified accordingly through surveys conducted by the Flag State or recognised organisations.[152]

The HKC sets a clear distinction between new ships and already existing ships. New ships are required to have on board the IHM[153], whereas existing ships must have the IHM on board not later than 5 years after the HKC enters into force.[154] The IHM is seen as one of the many cornerstones of the HKC, under a legal framework which offers an ongoing overview for safeguarding safe and environmentally sound ship recycling.[155] Thus, the IHM ensures compliance with the broader objectives of the Conventions at the early stages in the life cycle of the ships. In conclusion, the IHM is a key element in the compliance and enforcement of the HKC, as emphasised by Engels, it is "the procedural chain of documentation, as established by HKC, supposedly serves as a safeguard to ensure compliance *ex ante.*"[156]

2.2.3.2. The Ship Recycling Plan

Having emphasised the importance of the IHM in the context of compliance with the HKC and ship recycling process, the purpose of this subsection is to address the Ship Recycling Plan ("SRP") and its reliance on the IHM. As per Regulation 9, HKC, the SRFs are responsible for developing the *ship specific* SRP[157], while considering the IMO Guidelines.[158]

The SRFs establishes the SRP based on the information received from the shipowner.[159] Through the SRP, the HKC aims to ensure that the information about the *safe-for-entry* and s*afe-for-hot* working environment and operations is clearly outlined, along with the type and quantity of the hazardous materials as stated in the IHM. This ensures that the hazardous materials are monitored and managed in a safe and environmentally sound manner.[160] The SRP will then be assessed by the ship recycling State[161], as per Art.16(6), HKC, which requires the SRP to be approved, *explicitly* or *tacitly* by the ship recycling State, prior the start of the ship recycling process at the authorised SRF.[162] However, for this approval process to be possible, the State in question, must have affirmed its manner of approval, i.e. *explicit* or *tacit*, at the time it has consented to become legally bound by the HKC.[163] This approval serves the purpose of confirming that that SRF and its capacity, aligns with the prerequisites of the ship to be decommissioned. With the HKC having this option of a *tacit* approval system, the Conventions gives more leeway in a sense that could be challenging at a later stage during the ship recycling

152 HCK, Regulation 5(4), Regulation 11(1) and Regulation 10(1).

153 Ibid., Regulation 5(1).

154 Ibid., Regulation 5(2).

155 MEPC 64/3/1 (21stJune 2012), p. 2.

156 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention,* p. 41. *See also:* Hadjiyianni,Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 175. There seems to be a consensus in the legal literature that the IHM is an information tool for the stakeholders working with the vessel throughout its life.

157 HKC, Regulation 9 (preamble).

158 Ibid., Regulation 9 (preamble).

159 Ibid., Regulation 9(1).

160 Ibid., Regulation 9(3).

161 Ibid., Regulation 9(4).

162 Ibid., Article16(6).

163 Ibid., Article16(6).

process.[164] However, this will be further addressed in detail, in section 3.2.3. of this thesis.

Upon the approval of the SRP, and prior the start of the ship recycling process, a final survey must be carried out by the Flag state to validate that the IHM corresponds with the HKC requirements and pertaining guidelines.[165] Moreover, the approved SRP must include the information about the *safe-for-entry* and s*afe-for-hot* working environment and operations.[166] The last step in this direction, is that the final survey, which verifies that the SRF where the recycling process shall be carried out, is adequately authorised.[167] This is an essential and precursory step for the flag State to issue the IRRC.

2.2.3.3. International Ready for Recycling Certificate

The HKC requires that the shipowner notifies the flag Stat in writing and in due course, of the intent of recycling a ship, so as the flag State may arrange for the necessary steps prior the ship's delivery to the recycling facility. The flag State must conduct the final survey and issue the relevant certifications, and the IRRC.[168] The final survey verifies that the IHM as required by Regulation 5(4) is in accordance with the requirements of the Convention.[169] Thus, the shipowner is required to provide an IHM including a maintained and updated Part 1, Part II for wastes generated and Part III for stores, prior the recycling.[170] The final survey is a rather lengthy process, with significant reliance on the IHM, extensive obligations to be fulfilled, yet an essential and precursory step for the flag State to issue the IRRC.[171] The Convention emphasises that the flag State shall assume responsibility for the IRRC.[172] Upon the successful completion of these steps, the flag State or the recognised organisation issues the valid the IRRC,[173] which shall be accepted by other parties[174] and is at the same time subject to inspections.[175] The IRRC is valid for up to three months, but it may be extended for a single point to point to the ship recycling facility.[176][177]

Prior the vessel's arrival at the SRF, the responsibility transfers from the flag State and to the recycling State.[178] In conclusion, the shift of the responsibility begins with the shipowner notifying the flag State.[179]

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164 Hadjiyianni, Pouikli., *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, 176.

165 HCK, Regulation 10(4)(1).

166 Ibid., Regulation 10 (4)(2).

167 Ibid., Regulation 10(4)(3).

168 Ibid., Regulation 24.

169 Ibid., Regulation 10(4)1.

170 2012 Guidelines for the Survey and Certification of Ships under The Hong Kong Convention (MEPC.222(64)), para 3.4.5, p.7.

171 HKC, Regulation 11(11).

172 Ibid., Regulation 11(11).

173 Ibid., Regulation 11(11).

174 Ibid., Regulation 11(12).

175 Ibid., Article 8.

176 Ibid., Regulation 14(3) and Regulation 14(5).

177 *E.g.* in case the vessel also is subject to the PIC-procedure under BC.

178 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p . 176.

179 HCK, Regulation 24(1).

2.2.4. The Hong Kong Convention's requirements for ship recycling facilities

In addition to having extensive requirements for the ships, the HKC places substantial regulatory standards pertaining to the functioning of the SRFs. As underlined by Engels: "both the location and the process of ship recycling present the main and efficient regulatory starting points"[180], to ensure protection of the human health and the environment from the risks posed by ship recycling.[181] The following section therefore examines the requirements the HCK imposed on the SRFs, focusing on the *grave* phase during the recycling process to ultimately ensure safe and environmentally sound ship recycling.

2.2.4.1. The authorisation of the ship recycling facility

This subsection addresses the authorisation process of the SRFs and discuss how these requirements leave significant discretion on the ship recycling States.

As per Article 6, SRFs operating under of the jurisdiction and which intend to recycle ships under the HKC, or other ships falling under the scope of Article 3(4), must be authorised by the ship recycling State through verification of the documentations and an on-site inspection.[182] Nevertheless, the HKC is silent on how to approve the SRFs, which results in a broader margin of discretion for the ship recycling States. The HCK puts the responsibility on the Ship Recycling State to approve SRFs in accordance with the HCK minimum requirements. Nonetheless, Regulation 17 lays down some general requirements on the SRFs. For instance, the authorised SRFs must set up management systems, and procedures which do not pose a health risk for the workers involved, or population residing in the proximity of the SRF, with the aim of preventing, minimising any harmful consequences.[183] While a level of protection is incorporated in Regulation 17, at the same time, it fails to establish which systems or procedures would ensure the required level of protection.[184] Hence, the HCK gives discretion to the individual ship recycling State to interpret the requirements stated in Regulation 17.

Furthermore, the authorised SRF must develop the Ship Recycling Facility Plan ("SRFP") pursuant to Regulation 18, while considering the IMO guidelines. Regulation 18 requires that the SRFP contains policies on workers' safety, protection of human health and the environment, alongside with establishing objectives set to minimise and prevent these harmful consequences of ship recycling.[185] Such requirements provide a detailed picture of what the SRFP must include to ensure compliance with the safe and environmental sound ship recycling objective.[186] The SRFP, is a critical point in the process given the high compliance requirements with the HKC, particularly requiring that the plan contains in detail the operations and procedures contained at the SRFs.[187] The language in Regulation 18 is formulated in general terms, and it does not set out specific approaches or methods to the recycling process.[188] The level of protection reflected in the requirements for SRFP is therefore abstract, leading to discretion and variation in level of protection. As

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180 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention*, p. 39.

181 Ibid., p. 39.

182 HCK, Regulation 16(1)(2).

183 HCK., Regulation 17(1).

184 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 184.

185 HKC, Regulation 18(1).

186 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention*, p. 39.

187 2012 Guidelines for Safe and Environmentally Sound Ship Recycling (MEPC.210(63)), p. 7.

188 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 185.

a result, this could lead to various levels of protection, depending on the balance between different factors such as economy, social and environmental that will be different from State to State.[189]

As it can be seen, these two Regulations lack sufficient guidance for the ship recycling states and SRFs, which can result in difficulties enforcing the HKC standards at national level. This is where the IMO guidelines' importance comes into play, because they provide more guidance on these general terms in the Regulations, however, the following section will discuss this further below.

2.2.4.2. Safe and environmentally sound ship recycling

This subsection examines the broader objective of HCK regarding s*afe and environmentally sound recycling of ships.* The Convention makes extensive references to *safe and environmentally sound recycling;* however, it lacks an explicit definition, giving Parties the freedom of interpreting this broader objective at national level. The objective of the HCK shall therefore be assessed considering Article 31 and 32, VCLT, by examining the Convention and its guidelines for the purpose of better defining of s*afe and environmentally sound recycling*.

As discussed above, Article 6, HCK requires the SRFs to be authorized through extensive verification[190], along with requiring the SRFs to develop ship specific recycling plans following the HCK's standard on safe and environmentally sound ship recycling.[191]

Regulation 20 in the HCK regulates safe and sound management of hazardous materials, emphasising that the SRFs must take the necessary steps to ensure that hazardous materials are treated in an environmentally sound manner. Regulation 20(1) stands out in particular because of its manner of allocating the responsibility of managing hazardous materials through the IHM and SRP, as well as *when* and *how* these documents must be used prior and during the process of removing hazardous materials. Moreover, Regulation 20(2) requires the adequate identification, labelling, packaging and removal of hazardous materials to the maximum possible extent. This must be done prior to cutting the vessel, by using "properly trained and equipped workers."[192] Noteworthy, the SRFs are heavily depending on the information in the IHM provided by the shipowner. Therefore, the accuracy of the IHM is detrimental for the SRF in issuing a correct SRP, and for removing hazardous materials in a safe and environmentally sound manner. Nevertheless, Regulation 20 only regulates the removal of the hazardous materials and waste management in a safe and environmentally sound manner, which is only one part of this lengthy recycling process. This alone is not sufficient to fulfil the safe and environmentally sound ship recycling objective, leaving substantial responsibility on the ship recycling States and their infrastructure.

The Convention on its own does not provide sufficient guidance for defining s*afe and environmentally sound recycling of ships,* and it provides the parties with leeway to interpret, comply and enforce its requirements. It is important to consider the IMO guidelines and see how they supplement the HKC. The rationale behind the IMO guidelines is to provide a uniform, harmonious interpretation, compliance and enforcement of the requirements, procedures and measures relating to the ship recycling process.[193] Hence, the IMO adopted the 2012 Guidelines for Safe and Environmental Sound Ship Recycling (Resolution MEPC.210(63)) to provide

189 Hadjiyianni, Pouikli, The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader, p. 185.

190 HKC, Article 6.

191 Ibid., Regulation 9.

192 Ibid., Regulation 20(2) and Regulation 22.

193 Michael Galley, " *Shipbreaking: Hazards and Liabilities,*" (United Kingdom, Springer International 2014) p. 173.

further guidance on this matter. Prior moving any further, the guidelines act as a recommendation for the industry's stakeholders, with the aim of facilitating the implementation of HKC.[194] These guidelines focus on the SRFs, recommending on the content of the SRFP with references to Regulation 18.[195]

Regulation 18 is therefore reintroduced in this section. However, it is used for the purpose of illustrating key points in the process of environmentally sound ship recycling.[196] In the essence, Regulation 18 emphasises the requirement of the SRFP to include training procedures for workers' safety, emergency preparedness and other procedures as such to safeguard human health and the environment.[197] However, due to lack of sufficient guidance in Regulation 18, the IMO Guidelines shall be used as a supplement to fill some gaps which are missing in the general terms of this Regulation.[198] Resolution MEPC.210(63) provides examples of approaches and methods for procedures, operations and management systems which safeguard the environment, workers' health and safety[199], while considering the aim of preventing and minimizing the environmental effects resulting from ship recycling.[200] These requirements fall under the broader objective of safe and environmentally sound ship recycling.

The IMO guidelines are deemed as a necessary instrument, and as further underlined by the MEPC the guidelines shall form a "complete set of technical standards"[201]. Given that the IMO guidelines have a strong technical character, their usage in this thesis is limited to the purpose of only using parts which are relevant for illustrating certain legal issues or concepts. To be noted, in the legal literature the character of the IMO guidelines is considered as non-legally binding, and based on this assumption, they are not legally binding for the parties or the actors, up until they are implemented in national laws by the State.[202] In this case, for the purpose of defining this broad HKC objective of safe and environmentally sound ship recycling, the IMO guidelines will be used solely as a supplement and recommendation to the Convention.

Overall, in the absence of a clear definition in the HKC of what safe and environmentally sound ship recycling is, this objective may therefore be defined in the light of the requirements such as the IHM, the SRP and the SRFP.[203] Nonetheless, as minimum requirement convention, the HCK gives significant discretion to the parties to interpret, implement and enforce the requirements at national level. This could potentially lead to various ways of interpreting s*afe and environmentally sound recycling*, which would conflict with the purpose of regulating ship recycling at international level. All the actors involved in the process of dismantling a ship are therefore encouraged to use the IMO guidelines as a supplementary tool and tailor the content of those guidelines, along with the HKC, to fit the needs, objectives and aims. Such an approach might facilitate defining and fulfilling the broader objective of safe and environmentally sound ship recycling, aligning with Parties' national infrastructure. When the HKC is supplemented with the IMO Guidelines, it increases the chances of ensuring a uniform, harmonious interpretation, as well as providing better compliance and enforcement of the Convention.

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194 2012 Guidelines for Safe and Environmental Sound Ship Recycling (Resolution MEPC.210(63)), p. 6

195 Ibid., p.1.

196 Supra Section 2.2.4.

197 Supra Section 2.2.4.2.

198 Supra Section 2.2.4.1.

199 2012 Guidelines for Safe and Environmental Sound Ship Recycling (Resolution MEPC.210(63)) p. 1.

200 Ibid., p. 1.

201 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention,* p. 154.

202 Saiful Karim, *Implementation of IMO Legal Instruments: International Technical and Legal Aspects* (Australia Springer 2014), p. 128.

203 HCK, Regulation 20 and Regulation 18.

Additionally, the HKC encourages cooperation between the Parties in order to comply with the *safe and environmentally sound ship recycling* objective[204] by allowing parties to provide their technical assistance regarding training of workers, adequate technologies, facilities, and initiating research and development projects.[205] Such an approach from the HKC illustrates the global aspect of ship recycling and actively seeks to foster cooperation between the Parties, to achieve the objectives set forth in the Convention.

Nevertheless, the assessment of safe and environmentally sound ship recycling has been measured primarily based on the focal points beaching, pre-cleaning, downstream waste management, when discussion the level of standard and protection the HCK provides. However, this will be addressed further below in the analysis on whether the HCK equivalence level of control and enforcement as required by BC.[206]

2.2.5. Compliance and enforcement of the Hong Kong Convention

As emphasised in the earlier sections, as a minimum requirement convention, the HCK gives discretion to the parties, which potentially could result in challenges with compliance and enforcement matters. The following section addresses these matters from the perspective of violations as per the HCK, as well as discussing the potential risks for non-compliance with the broader objectives of the HCK.

The HCK follows "a sovereignty-based approach"[207] by establishing that any violation of the Convention shall be prohibited within the jurisdiction of the parties.[208] The HKC divides the jurisdiction between the flag State and the recycling State, namely regarding ships, the flag State must prevent violations, and the same applies for the recycling State, regarding SRFs.[209] The HCK also urges the parties to endeavour collaboration for the achievement of "effective implementation of compliance with and enforcement of this Convention."[210] This sovereignty-based approach in the HCK gives significant discretion to the parties to determine the type of sanctioning at national level which may include both criminal and civil sanctions.[211] However, the Convention requires that the parties collaborate in the detection of the violation pursuant to Article 9, and in doing so it constructs a structure through which parties could ask the recycling State or the flag State to initiate investigations on supposed violations of the HKC requirements.[212]

The Port States also have right to carry out an inspection of the vessel within its ports, in order to ensure that the vessel is in compliance with the HCK requirements. However, the port State control is limited to verify that the vessel has all required certificates onboard, including the IHM and the IRRC.[213] In case of a violation, the port State may "warn, detain, dismiss or exclude the ship from its ports", while the flag State and the IMO immediately is informed about the

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204 HCK., Article 13(1).

205 Ibid., Article 13(1).

206 Infra section 3.2.

207 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, p. 226.

208 HCK, Article 10(1).

209 Ibid., Article 10(1) (2).

210 Ibid., Article 1(3).

211 Hadjiyianni,Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 226.

212 Ibid., p. 168.

213 HCK, Article 8(1).

violation.[214] Thus, the Port State has a limited authority to enforce the Convention, if a violation is detected during a port State control.[215]

Due to the "sovereignty-based approach"[216], IMO lacks the power to enforce the HKC, and to sanction any violation of the HCK.[217] As a result, the HKC relies extensively "on the legal standards of operation, inspection and enforcement"[218] created and mandated by the different ship recycling States and left at the discretion of the national authorities.[219] Compliance and enforcement with the HCK will differ from State to State, because each State must determine what constitutes a violation of the Convention, which potentially could result in different level of standards between HCK-compliant SRF.

2.2.6. The suitability of the Hong Kong Convention to addresses ship recycling concerns pertaining to the safety of environment and human health

The HCK was tailormade to ensure safe and environmentally sound ship recycling process, by imposing requirements on the shipowners and the SRFs. The following section will discuss whether the HCK and its *cradle to grave* approach provide an efficient and effective solution for safe and environmentally sound ship recycling. As discussed above, the safe and environmentally sound ship recycling can be defined in the light of the requirements such as the IHM, the SRP and the SRFP. The discussion is based on the above findings, along with some of the authors' reflections.

The requirements on the ships design, construction and maintenance in Regulation 4 prohibiting the installation of hazardous materials and use of hazardous materials during the operational life of a ship, provide an *ex ante* tool for the Parties to ensure minimisation and generation of hazardous materials.[220] Moreover, the requirement of an IHM onboard of a vessel throughout its operational life ensures *ex ante* compliance with the HCK by establishing a procedural chain of documentation.[221] Thus, the earlier stage requirements on the ships, and throughout their lifecycle, ensures safe and environmentally sound ship recycling.

However, the HCK also faces some critique, because as a minimum requirement convention, the HKC gives significant discretion to the parties without providing further guidance on how to ensure adequate safe and environmental sound ship recycling. As discussed above, the HKC and its Regulations are not sufficient in their guidance for the State parties and stakeholders, potentially leading to enforcement challenges when transposing the HKC requirements in national laws.[222] Nonetheless, IMO's guidelines plays an active role and provides that necessary guidance through their set of guidelines. By supplementing the HKC with the IMO Guidelines, the interpretation process is to a certain degree more uniform, harmonious, ultimately leading to an improved compliance and enforcement of the HKC. However, as emphasised earlier the IMO guidelines are not considered legally binding for the Parties.[223]

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214 HCK, Article 9(3).

215 Ibid., Article 8.

216 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader, p*. 226.

217 Galley, *"Shipbreaking: Hazards and Liabilities," p. 173.*

218 Ibid., p. 223.

219 Ibid., p. 223.

220 Supra Section 2.2.3.1.1.

221 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention*, p. 41.

222 Supra Section 2.2.4.1.

223 Supra Section 2.2.4.2.

The HKC is also the first convention *to directly* place certain requirements on the ship recycling actors, for safeguarding and protection of the environment, human health and safety. However, these requirements are considered of minimum level, and this has been subject to criticism by Non-Governmental Organisations (NGO) for not providing sufficient level of protection of the human health and the environment.[224] The minimum requirements could also be seen as conflicting with the purpose of ensuring uniform and harmonious practice within the ship recycling industry at international level. Nonetheless, Article 1(2), HCK allows Parties to impose stricter requirements on the actors at national level or regional level. In this regard, EU is an excellent example of imposing stricter requirements in the Ship Recycling Regulation and its "extraterritorial reach"[225]*e.g.* for the SRFs.[226] On the contrary, stricter requirements in the HCK would have potentially made the parties more reluctant to ratifying the HKC in the first place, which could have resulted in difficulties of enforcing the Convention, as per the Article 17 requirements.[227] Despite these requirements being widely contested, they might bring a new level of protection for safe and environmentally sound ship recycling at international level.

Some of the weaknesses of the HCK are the "sovereignty-based approach"[228], and the flag State principle. Regarding this approach, the HKC compliance and enforcement might differ from State to State, because each State must evaluate what constitutes a violation under the HKC regime, possibly leading to, for instance, differences in the standards among the HCK-compliant SRFs. As for Flag State principle, the HKC is following this principle, similar to other IMO Conventions.[229] In practice, this means that the prescriptive and enforcement jurisdiction in relation to ship is placed at the flag State.[230] This is problematic, because it is rather easy to circumvent the HCK by reflagging to a non-party of the HCK, therefore avoiding any potential liabilities.

All things considered, the HCK and its *cradle to grave approach* provides a solution for safe and environmentally sound ship recycling with its requirements on the shipowner and the SRFs. However, as pointed out by NGOs, the Convention lacks a sufficient level of protection, and it might not bring significant changes in the industry. Nevertheless, the effectiveness of the HKC can first be decided once the Convention enters into force, and only the future will show if it is necessary for the HCK to be amended.

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224 NGO Shipbreaking Platform, "Does the Hong Kong Convention Provide an Equivalent Level of Control and Enforcement as Established Under the Basel Convention," published 10thMay 2011, p. 14.

225 Hadjiyianni, Pouikli, ' *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*,' p. 190

226 Ibid., p. 190.

227 HCK, Article 17 requires both the major flag State and ship recycling State to ratify the Convention. Supra Section 2.2.1.

228 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 226.

229 Typically, the Flag State holds the strongest connection with the ship. Thus, the ship flying the flag of a State is also subject to the Flag States' prescriptive and enforcement jurisdiction, unless provided otherwise pursuant to United Nations Convention on the Law of the Sea (hereinafter UNCLOS), Article 91 and 94.

230 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 180.

3. The interplay between the Hong Kong Convention and the Basel Convention

Several questions have arisen since Bangladesh ratified the Convention in June 2023 and hereby fulfilled the requirements for the HCK to enter into force in June 2025. BIMCO and several countries such as Norway, Bangladesh, Pakistan and India, requested MEPC under IMO, prior its 81st meeting, to clarify the legal uncertainties of the interplay between the HKC and the BC to avoid potential overlap.[231] The MEPC encouraged during its 81st meeting its Secretariat to fortify the inter-agency cooperation with the Secretariat of the Basel Convention, with the objective of safeguarding that the HKC is implemented in a consistent manner, corresponding to the level of control and enforcement required by BC.[232] The establishment of an inter-agency between the Secretariat of the Basel Convention, IMO and ILO to develop an international regime to govern dismantling of ships was agreed on between the parties during the fifth meeting of the COP of Basel.[233] The purpose of the inter-agency cooperation is the avoiding of overlapping of roles, responsibilities and competencies between the three Organisations.[234] Moreover, the importance of the cooperation is to prevent duplicating "regulatory instruments that have the same objective".[235]

Furthermore, MEPC requested the Secretariat of the Basel Convention at its 81st meeting to collaborate on developing "guidance on the implementation of the Hong Kong and Basel Convention with respect to the transboundary movement of ships intended for recycling."[236] However, the Secretariat of the Basel Convention informed IMO that the Secretariat is unable to assist with the development of this guidance until the matter had been reviewed by the COP of Basel at its 17th meeting, which is scheduled between the 28th of April to 3rd of May 2025 just little over a month before the entering into force of the HCK. Thus, the IMO developed the draft of the guidance exclusively, focussing on the two conflict clauses[237] in the two conventions.[238] Nothing, that the assessment of whether the HCK provides an equivalent level of control and enforcement as required by the BC, falls within the competence of the COP of Basel pursuant to Article 11(2), BC. However, the last time the COP of Basel discussed the equivalence between the two regimes, no consensus was reached.[239] This issue has been subject to institutional debate, but at the same time also the driving force for setting the equivalence discussion into motion, under the auspices of the Basel COP, and latest at the MEPC 82 meeting, putting the ball in the COP of Basel's court. Nevertheless, the issue remains to this day unanswered.[240]

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231 MEPC 81/15/5 (25th of January 2024).

232 MEPC/81/16 (8thApril 2024), p. 72f.

233 Adoption of Decision V/28, (UNEP/CHW. 5/29, (10thDecember 1999)) p. 11 The Conferences of the Parties decided to mandate the Technical Working Group to collaborate through the Secretariat of the Basel Convention with the appropriate body of IMO on the subject of the dismantling of ships, and to prepare guidelines for the environmentally sound management of the dismantling of ships.

234 Decision VII/25 (UNEP/CHW. 7/33. (25 thJanuary 2005), p. 62. *See also:* MEPC 51/3 (23rdJanuary 2004), p. 1.

235 Decision VIII/11. (UNEP/CHW. 8.16. (5thJanuary 2007)), p. 39.

236 Draft guidance on the implementation of the Hong Kong and Basel Conventions regarding the transboundary movement of ships intended for recycling (MEPC\82\16 (11thJuly 2024)), p. 3.

237 HCK, Article 15, respectively BC, Article 11.

238 Draft guidance on the implementation of the Hong Kong and Basel Conventions regarding the transboundary movement of ships intended for recycling (MEPC\82\16 (11thJuly 2024)), p. 3.

239 UNEP/CHW.10/28. (1stNovember 2011), p. 15 – 16.

240 UNEP/CHW.10/28. (1 stNovember 2011), p. 15 – 16. *See also:* Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, p. 228.

The purpose of the following section is to determine the interplay between the BC and the HCK. The section first examines the conflicting clauses in the two Conventions, namely Article 11, BC and Article 15, HCK. The conflicting clauses shall be interpreted in light of the international principles governed in the VCLT and *lex specialis*.[241] The next section analyses whether the HCK provides an equivalent level of control and enforcement as required by the BC.

Acts adopted by both the COP of Basel and MEPC will in the following sections be used to set forth an authoritative interpretation of the HCK and the BC to determine the relationship between the two conventions. Furthermore, to be noted, the provisional guidance on the implementation of the HKC and BC with respect to the transboundary movement of ships intended for recycling is solely developed by MEPC. Moreover, MEPC has emphasised that the draft guidance is merely an option for the parties of both Convention, underlining that "the interpretation of treaties is the sole prerogative of the States Parties thereto".[242]

3.1. The Interpretation of conflicting clauses in the Basel Convention and The Hong Kong Convention

Ship recycling is governed at international level by the BC, regulating the management and transboundary movement of the end-of-life-ship as *waste,* and the HCK regulating the entire life cycle of the ship, including the last part of the end-of-life stage. Thus, "the same subject of matter"[243] is covered by both conventions in the context of ship recycling, leading to a potential conflict between the two regimes. It is important to point out that through these two different regimes, the aim should be that of encouraging the parties to implement both conventions as far as possible in the light of mutual accommodation and in line with the principle of harmonization. Alongside with ensuring that the substantive rights and obligations of the conventions is prevented from being undermined.[244]

This section examines the international principles governed VCLT, which might provide some guidance regarding the relationship between the BC and the HCK. It is worth mentioning that the principles of VCLT, especially Article 30 of VCLT which scope has been widely debated, is in this section regarded as customary international law. Thus, the principles of VCLT are applicable for all parties even those, who are not party to VCLT.[245] Furthermore, to be noted that the analysis about which of the conventions takes priority applies solely to ship recycling and does not apply to issues concerning waste management in general covered by the BC.[246]

There are various approaches of solving conflicting clauses between two regimes, however, such an assessment must be based on the specific context.[247] Nevertheless, the interrelation between BC and HKC can be ascertained by looking at *when* these consecutive conventions were adopted in the first place, assessing

241 Supra Section 1.3.

242 Draft guidance on the implementation of the Hong Kong and Basel Conventions regarding the transboundary movement of ships intended for recycling (MEPC\82\16 (11thJuly 2024)), p. 3.

243 VLCT, Article 30.

244 ILC 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 13thApril 2006, A/CN.4/L.682, para 26.

245 Kummer, *International Management of Hazardous Wastes: The Basel Convention and related Legal Rules,* p. 96.

246 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, p. 230.

247 Hadjiyianni, Pouikli, The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader, p. 228.

their status on membership requirements, and see if the one of the conventions is significantly "more extensive and specialised" in contrast to the other.[248]

As a starting point, the establishment of the relationship between treaty regimes "relating to the same subject matter" is governed by Article 30 of VCLT. The principles stated in Article 30, are applicable, if both treaties governing the same subject matter are inconsistent to apply at the same time in a specific case, or in other words when the requirements by a certain conventions, constitutes a "violation of a rule of the other."[249] In the narrow sense, the Basel Ban Amendment is for instance incompatible to apply at the same time as the HCK if the SRF is located in a non-OECD country.[250] The requirements in both conventions cannot be fulfilled at the same time, which leads to conflicting issues between the two regimes.[251] More broadly, the incompatibility of two conventions can also include situations where the fulfilment of the requirement of one convention could, apart from preventing the fulfilment of the other convention's requirements, lead to undermining the purpose and objectives of the other convention.[252] The HKC may for instance be seen as undermining the purpose of the BC, as the HCK is not concerned with the transboundary movement of the vessel and does not impose the PIC-procedure as such. This will be discussed further below.[253]

The next subsections will examine the conflict clauses in the two conventions (section 3.1.1), in the light of the international principles in VCLT, namely the Lex Posterior Derogat Legi Priori (3.1.2), and the principles of Lex Specialis Derogate and Legi Generali (3.1.3)

3.1.1. Conflict clauses

To determine whether the BC or the HCK prevails, the conflict clauses included in the BC and the HCK shall be interpreted in light of Article 30(2), VCLT. Article 30(2), VCLT merely anticipates the scenario of a treaty containing a conflict clause which explicitly specifies how the other treaty's provisions take precedence. Therefore, Article 30 VCLT is not considered exhaustive, using other types of conflict clauses is generally recognised in international law too.[254]

Article 15(2) in the HCK stipulates that "nothing in this Convention shall prejudice the rights and obligations of Parties under the relevant and applicable international agreements." While Article 15(2) does not explicitly specify which other international agreements prevail, it could be argued that Article 15 could be categorised as a clause subject to those rights and obligations in other conventions that, either will prevail or apply together with the HCK if possible.[255] Regardless of whether Article 15 is deemed as a declaratory reference to Article 30(2), the purpose of the Article is to define and distinguish between competence.[256]

Furthermore, although no reference to the BC is made explicitly in Article 15(2), HKC, it may be regarded as "relevant and applicable agreements", because references to the provisions in BC and the TGB have been made both in the HCK and

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248 Hadjiyianni, Pouikli, The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader, p. 228.

249 Ibid., p. 229.

250 Supra Section 2.1.4.

251 Ibid., p. 229.

252 Report of the Study Group of the ILC finalized by Martti Koskenniemi on 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 13 April 2006, A/CN.4/L.682, para 254.

253 Infra, Section 3.2.3.

254 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 230.

255 Ibid., p. 230.

256 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention*, p. 132.

IMO Guidelines, requiring the parties to take them into consideration.[257] Regarding the relationship between the BC and the HCK, the provisions in BC do *in principle* prevail from the HCK based upon this interpretation of Article 15(2). Nonetheless, given the principles of *lex specialis* and *lex posterior,* as well as Article 11 in the BC with its equivalence principle, establishing the interplay between the HCK and the BC is rather challenging.[258]

As per Article 11(1), BC, parties are allowed to "enter into bilateral, multilateral or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with Parties or non-Parties provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes." (emphasis added). Article 11, BC thereby establishes the priority of existing and future agreements provided that such an agreement is compliant with the principle of ESM, governed by the BC.[259] To be noted, in this thesis the analysis will solely focus on the term "agreement" with reference to the VCLT's definition of agreement as "a convention or treaty concluded between two or more States"[260]

In light of Article 30(2), VCLT, Article 11(1) in the BC can be interpreted as giving priority to other agreements regarding transboundary movement, provided that the agreement is either providing a similarly or more environmentally sound approach to ship recycling. In contrast, Article 11(2), BC could also be interpreted as a clause establishing priority to the BC over agreements which provides a less environmentally sound approach. Notably, beyond the ESM requirement, Article 11, BC does not require further conformity with other requirements in the BC.[261] Thus, in the assessment of the compatibility an agreement with the provisions in the BC, ESM of hazardous wastes is the central element of the assessment. As discussed earlier, the definition of ESM in Article 2(8) in the BC is vague, and more stringent formulations to Article 11 were also proposed in earlier drafts *e.g.* "compatibility with the aims and purposes"[262], but were rejected as resistance was made by certain parties. Nevertheless, a teleological approach to the interpretation of the ESM of hazardous wastes may provide some direction by assessing whether the agreement is aligned with the objectives and purpose of the BC as suggested by Kummer.[263]

Lastly, Article 11, BC could also fall under the scope of Article 41, VCLT, which allows *inter se* agreement or modification to be concluded between certain of the parties. Notably, the *inter se* agreement does not revise the original convention but modifies the application of the original convention between certain of the parties.[264] An *inter se* agreement can be concluded, if "all the parties to the second treaty were also parties to the first treaty (…) whose permissibility would have to be resolved by interpreting the first treaty."[265] Based on the ratification status

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257 The HCK, Regulation 3, and 2012 Guidelines for Safe and Environmentally Sound Ship Recycling, Annex 4, Resolution MEPC.210(63), para 3.4 addressing environmentally sound management in relation to ship recycling.

258 Infra Section 3.2.

259 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention,* p. 134.

260 VCLT, Article 2(1)(a). *See also:* Kummer, *International Management of Hazardous Wastes: The Basel Convention and related Legal Rules,* p. 88.

261 Kummer, *International Management of Hazardous Wastes: The Basel Convention and related Legal Rules,* p. 90.

262 Ibid., p. 91.

263 Ibid., p. 91.

264 Report of the Study Group of the ILC finalized by Martti Koskenniemi on 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 13 April 2006, A/CN.4/L.682, para 305. Available at: Available at: https://documents.un.org/doc/undoc/ltd/g06/610/77/pdf/g0661077.pdf (last accessed 1stDecember 2024)

265 Ibid., para 305.

of the BC, almost all parties of the HCK may be parties of the BC too.[266] Thus, the HCK's permissibility may be clarified by interpreting the BC in accordance with Article 41 VCLT.[267]*Inter se* agreements are, however, only permitted if (a) such modification is explicitly allowed under the convention, or *vice versa* (b) the convention does not prohibit the modification, and (i) the modification does neither impact on the rights or obligations of other parties or (ii) undermine the key purpose of the convention pursuant to Article 41 of VCLT. Similar to Article 41, VCLT, Article 11 in the BC also contains an explicit permission for modification, meaning that the original obligations under the BC can be deviated by certain parties. The admissibility of the *inter se* deviation is, however, conditional upon that no agreement provides a "less environmentally sound approach" than the provisions of the Basel Convention.[268] The reasoning behind the structure of both provisions is to ensure that the later agreement does not undermine the purpose of the previous Convention, in its entirety. *Inter se* deviation from the general obligations of the BC is therefore permissible if the HCK does not undermine the overarching objectives and purpose of the BC.

In summary, based on Article 41, VCLT the interpretation of the scope of Article 11's compatibility would be more limited, if the assessment of the equivalence level of control under Article 11, BC will be determined merely on the basis of the principle of ESM, instead of the interpretation of the equivalence level control and enforcement under Article 11 in the light of the BC's objectives and purposes.[269]Ultimately, this question requires a thorough analysis of the equivalent level of control and enforcement between the two regimes.[270] This will be examined further below in Section 3.2.

3.1.2. Lex Posterior Derogat Legi Priori

Should no formal decision have been made by the COP of Basel at the time the HCK enters into force in June 2025, the rules in Article 30(3) and Article 30(4) shall apply instead.[271] Nonetheless, the applicability of these additional principles is determined by the membership of the conventions. The BC has currently 191 members[272], of which not all are member of the HCK, whereas the HCK has 23 members.[273] Yet, with the HCK's entering into force in 2025, it is possible that more countries soon will ratify the HCK.[274]

For parties to both the BC and the HCK, Article 30(3) of VCLT stipulates that "(...) the earlier treaty applies only to the extent that its provisions are compatible with

266 Report of the Study Group of the ILC finalized by Martti Koskenniemi on 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 13 April 2006, A/CN.4/L.682, para 305. Available at: Available at: https://documents.un.org/doc/undoc/ltd/g06/610/77/pdf/g0661077.pdf (last accessed 1stDecember 2024)., para 305.

267 Ibid., para 265. *See also:* Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention,* p. 135

268 BC, Article 11.

269 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, p. 231.

270 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention*, p. 137. Kummer, *International Management of Hazardous Wastes: The Basel Convention and related Legal Rules*, p. 91.

271 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention*, p. 135.

272 See ratification status. Available at: Ratification Status of the Basel Convention (last accessed 1stDecember 2024)

273 IMO, *"Pakistan becomes party to the Hong Kong ship recycling Convention,"* 1stof December 2023. Available at: The ratification status of the Hong Kong Convention (Last accessed 1stDecember 2024)

274 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, p. 231.

those of the later treaty," (*lex posterior derogate lege prior)* meaning that the BC only applies to the extent that "its provisions are compatible with" the HCK.

Regarding the transboundary movement of vessels, the requirement of HCK should apply according to Article 30(3) of VCLT.[275] However, MEPC has emphasised in its draft of guidance that State Parties' obligation to notify the Secretariat of the Basel Convention pursuant to Article 30(3) VCLT that the States involved intend to apply the HCK in relation to transboundary movement of ships, intended to be recycled at a HCK authorized SRF. Additionally, the State informs that hazardous waste arising from ship recycling will be managed in an environmentally sound management as required by the BC.[276] Based on MEPC's guidance, it is possible to argue the MEPC suggests that the BC gives priority to HCK, if the HCK provides an equivalent level of control and enforcement as required by Article 11, BC, by providing the same level of protection as ESM. This will be discussed further below in Section 3.2.

However, this rule only applies, if the earlier treaty has not been superseded or terminated according to Article 59 of VCLT.[277] A convention can be superseded or terminated in different ways pursuant to Article 59 of VCLT. Nonetheless, no intention of replacing the BC can directly be deducted from the HCK. On the contrary, the HCK requires its parties to take the BC and its guidelines into consideration to fulfil the requirements of the HCK.[278] It might be argued that such an approach from the HKC, is a way to show willingness of the convention to coexist with the BC regime. Though, neither can an intention to supersede the BC be deducted from in the Basel COP's decision on ship dismantling, as the decision itself recognises that even though a ship might become *waste,* as per Article 2 of the BC, that vessel might still concomitantly be considered *a ship* by other legal frameworks.[279] Furthermore, the definition of *waste* in Article 2 does not rely on whether the vessel is operating or continuing to generate income for the shipowner.[280] In practice, this means that the vessel in question is still subject to the laws of the seas, including the provisions of SOLAS and MARPOL.[281] Hence, in Decision VII/26 the parties of the BC have called upon the parties to comply with their obligations as per the BC where relevant, specifically regarding those obligations pertaining to the PIC, as well as the "minimization of transboundary movements of hazardous wastes and the principles of environmentally sound management".[282]

In the event of "the parties to the later treaty do not include all parties", different rules may apply pursuant Article 30(4), VCLT. Article 30(4) of the VCLT further distinguishes between State parties to both conventions, and parties of which only one of the State parties is party to one of the conventions. For State parties to both conventions the same rules apply as in Article 30(3)), meaning that the HCK prevails in this case. Whereas for relations between a State party to both conventions and a state party which only is party to one of the conventions, the rules of the convention to which both parties are parties to shall apply. Consequently, only the provisions of the BC should apply to both States, if one of the parties is not party of the HCK, but only the BC. Similarly, the requirements of the HCK should apply for both States, if one of the parties only is party to the BC pursuant to o

275 Notable, only ships that fall within HCK Article 3. *Infra* Section 3.2.1.

276 Provisional guidance on the implementation of the Hong Kong and Basel Conventions with respect to the transboundary movement of ships intended for recycling. HKSRC.2/Circ.1 Annex, p. 1.

277 VCLT, Article 30(3).

278 HCK, Regulation 3 and Article 1(2).

279 Decision VII/26 (UNEP/CHW. 7/33. (25thJanuary 2005)), p.63.

280 UNEP/CHW.7/INF/10, p. 9.

281 Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships, UNEP (CHW 6./23 (2003)), p. 32.

282 Ibid., p. 63.

Article 30(4) of VCLT, also reflecting "relative validity"[283]. Given that only 23 States so far have ratified the HCK, different rules will apply depending on relationship between the involved parties, provided that the COP of Basel has not concluded a formal decision by the time the HCK enters into force.

3.1.3. The principles of Lex Specialis Derogate and Legi Generali

The customary principle of *lex specialis derogate legi generali* applies in parallel to or may even supersede the principles in relation to time of adoption governed in Article 30 of VCLT, leading to the discussion of *lex specialis* versus l*ex posterior* in the context of ship recycling.[284] Accepted as general rule of law, the principle *lex specialis derogate legi generali* stipulates that a more specific and special norm should be given the priority in the event of a conflict between to conventions.[285] As a general waste regime, the BC is applicable to all sorts of waste, whilst the HCK is tailormade to be applied to both ships and ship recycling facilities. Moreover, the HCK reflects more shipping specific features, covering aspects of the ship that fall outside the scope of the BC.[286] This is among others the reason why the HCK should be considered as *lex specialis* in relation to ship recycling. However, in relation to environmentally sound management of ship recycling, the BC and its TGB may be considered *lex specialis* in this regard, as the BC and the TGB address a more specific and detailed environmentally sound management of hazardous wastes.[287] Even the IMO Guidelines refer to the BC and its TGB, recommending taking the TGB for environmentally sound management into consideration "as appropriate".[288] Moreover, as a framework convention, the HCK and its subsequent guidelines are developed in general terms, leaving considerable discretion to the national authorities of the parties. Furthermore, references to other international regulations are made throughout the HKC to provide certain specification on particular matters.[289]

Besides from assessing the substantive provisions in both conventions, the accession by numerous States around the world indicate that the parties recognize the BC as the main vehicle for dealing with transboundary movement of hazardous waste and their environmentally sound management of hazardous wastes.

Hence, the assessment of which convention is *lex specialis* is challenging and far from straightforward. As discussed above, neither of the two clauses in the BC or the HCK explicitly express any presumption of priority between the two Conventions.[290] Nevertheless, the parties should strive after implementing both conventions as far as possible, and in relations to certain matters such as the downstream management waste a solution to the coexistence between the two

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283 Provisional guidance on the implementation of the Hong Kong and Basel Conventions with respect to the transboundary movement of ships intended for recycling. HKSRC.2/Circ.1 Annex, p. 1. *See also:* Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention,* p. 135.

284 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, p. 232.

285 *Southern Bluefin Tuna, New Zealand v Japan,* Provisional Measures, ITLOS (1999) 38 ILM 1624, para 12. *See also:* Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 232.

286 Decision IX/30 (UNEP/CHW9/39 27 June 2008), p. 1. *See also:* The seventh meeting ofthe Open-Ended Working Group of the Basel Convention (UNEP/CHW/OEWG 7/11, 30 March 2010).

287 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 232.

288 2012 Guidelines for Safe and Environmentally Sound Ship Recycling, Annex 4, Resolution MEPC.210(63), para 3.4 addressing environmentally sound management in relation to ship recycling.

289 HCK, Regulation 3, and Article 1(2).

290 ILC 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 13 April 2006, A/CN.4/L.682, para 26.

conventions could be attained by harmonizing the interpretation of the HKC in light of the BC, which is a feasible results based upon this interpretation.[291] For instance, the HCK does not regulate the downstream waste management, meaning that the management of the hazardous materials extracted from the ship, after dismantling, falls outside the scope of the HCK. Based on this, it could therefore be argued that this would open the possibility of applying the BC provisions for downstream waste management, upon the dismantling of the ship. However, for the BC to apply, the requirement of transboundary movement must be fulfilled, meaning that the BC must apply for the last voyage of the vessel. For the BC to be applicable, the shipowner must notify the exporting State, and express intent of recycling the vessel. This must be done while the vessel is still physically in the territorial waters of the exporting State and prior it commences its final journey.[292]Assuming that the last journey commences outside the territorial waters of the exporting State, the BC provisions for downstream waste management are not applicable. Should the BC not apply, then the waste will neither be covered by the HCK nor the Basel, as no transboundary movement has occurred, and cannot be invoked at later disposal phase. The downstream management of the hazardous materials extracted from the vessel will then become subject to the national laws of the ship recycling State. This will be the case once the waste is removed outside the SRF.[293] This example is relevant for the scenario where both conventions work in an aligned manner and coexist with each other. Nevertheless, this scenario of HCK being considered as *lex specialis* triggers certain issues regarding to the scope of the BC, namely narrowing it down.[294]

On the other hand, should the BC instead *cede its competency* to the HCK, the same outcome would be reached, meaning the downstream waste management of those wastes extracted from the ship also will remain uncovered under both conventions.[295]

3.1.4. Determining the interplay between the Hong Kong Convention and the Basel Convention in the light of the international principles of VCLT

All things considered, determining the interplay between the HCK and the BC based on the international principles of VCLT and *lex specialis* gives different solutions. The following solutions are:

1) The BC prevails, given that the BC is considered a "relevant and applicable agreement" based on the interpretation of Article 15, HCK.
2) The BC cedes its competence to the HCK, if the HCK provides an equivalent level of control and enforcement as required by Article 11, BC.
3) Both conventions apply at the same time, *but the BC only applies* "to the extent that its provisions are compatible" with those in the HCK, pursuant to Article 30(3), VCLT and *lex posterior derogate lege prior.*
4) Different rules apply to the parties, depending on their membership to the two conventions, pursuant to Article 30(4).
5) The HCK prevails based on the *lex specialis* principle, provided that the HCK is considered as *lex specialis.*

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291 ILC 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 13 April 2006, A/CN.4/L.682, para 26.

292 BC, Article 4 and Article 6. Supra section 2.1.

293 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, p. 233.

294 Ibid., p. 233.

295 NGO Platform on Shipbreaking, "Does the Hong Kong Convention Provide an Equivalent Level of Control and Enforcement as Established under The Basel Convention?, Report, published 10th of May 2010, p. 14.

Consequently, the international principles in the VCLT do not provide a clear answer to the interplay between the HCK and the BC. Nevertheless, these principles can act as guidelines for addressing the interplay between the two conventions.

3.2. Equivalent level of control

The relationship between the HCK and the BC partially relies on whether the HCK establishes an equivalent level of control and enforcement as required by Article 11 in the BC, *in their entirety*.[296] Prior moving any further, it is important to look in retrospective at how the criteria for assessing the equivalent level of control and enforcement has been developed. When discussing the equivalent level of control, it is not required that the two conventions are identical *per se* in their principles, but that the conventions' need to be assessed considering the level of control and enforcement efficiency, along with a far-reaching analysis of the parallels between the frameworks with regards to their principles, objectives and scope.[297]

The COP of Basel with the adoption of decision VII 26 invited the IMO to proceed with the establishment of regulatory framework for ship recycling, emphasising that the new ship recycling regime should provide "an equivalent level of control as established under the Basel Convention."[298] The COP of Basel recalled this invitation at the eight meeting, and during this eight meeting they emphasised the avoiding of "the duplication of regulatory instruments that has the same objective."[299] At the ninth meeting, the COP of Basel requested the *Open-Ended Working Group of the Basel Convention* (OEWG) to conduct a preliminary evaluation for developing the criteria necessary for the assessment of whether the HCK provides an equivalent level of control as established by the BC. The preliminary evaluation was based on a set of conditions, considering the characteristics of the shipping industry, the fundamental principles governed in the BC and the decisions adopted by COP of Basel, as well as the pertinent comments given by the parties and the actors. As a result, COP of Basel adopted a list of conditions in Decision IX/30 which lays the foundation for the analysis of the *equivalence level of control and enforcement* under BC Article 11.[300]

The criteria can be divided into four broader categories: scope and applicability, levels of standards, control and enforcement by parties a long with cooperation and coordination.[301] Based on these criteria, the COP of Basel were expected by the parties to make a formal decision on the equivalence issue during the tenth meeting, however no consensus was reached, and this was the last time the COP of Basel discussed the equivalence between the two regimes.[302] As mentioned above, the issue remains unanswered to this day. Nevertheless, the COP of Basel emphasised that the BC should continue to be applied in relation to ships.[303]

For determining whether the HCK provides an equivalent level of control as required by the BC, this analysis shall be based on criteria adopted by the COP of Basel, namely: Scope and Applicability (section 3.2.1.), Levels and Scope of

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296 Decision VII/25 (UNEP/CHW.7/33, (25thJanuary 2005) p. 2.

297 See, on the differences between suggested criteria, 'Compilation of the completed tables and submissions received pursuant to decision OEWG-VII/12', UNEP/CHW.10/INF/18 (2011).

298 Decision VII/25 (UNEP/CHW.7/33, (25thJanuary 2005)), p. 2.

299 Decision VIII/11. (UNEP/CHW. 8.16. (5 thJanuary 2007)) p. 39. *See also*: Decision IX/30 (UNEP/CHW9/39 (27thJune 2008)), p. 1.

300 Decision IX/30 (UNEP/CHW9/39 (27thJune 2008)), p. 1.

301 The criteria were developed at OEWG 7 and adopted by decision OEWG-VII/12.

302 UNEP/CHW.10/28. (1 stNovember 2011), p. 15 – 16. *See also:* Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, p. 228.

303 Decision 10/17 (UNEP/CHW.10-28, (1stNovember 2011)), p. 53.

Standards (section 3.2.2.), Control Procedure (section 3.2.3) and Enforcement and Sanctioning (3.2.4), but will also be based on the legal framework sections above. To be noted that the analysis and the comparison of the equivalent level of control and enforcement under both conventions must be conducted *in their entirety* and not provision-by-provision analysis in the two regimes.[304]

Based on functional approach, a comparison analysis of the two conventions is conducted. The thesis shall examine the conventions, *in their entirety.* When assessing the *theoretical applicability,* it must then be included a review of *practical ability*[305] of the two conventions to see if the corresponding levels of enforcement and control are equivalent regarding the concerns at hand, from a functional perspective. In other words, this ensuing matter of the *practical ability,* i.e. its "fitness for purpose as regards ship recycling"[306] is of considerably greater significance.[307]

3.2.1. Scope and applicability of the Basel Convention and the Hong Kong Convention

The scope and the applicability of the HCK is different from the BC. One of the key differences between the two conventions is that HCK applies only to certain types of ships, but at the same time, excludes other categories of ships that also contains hazardous materials.[308][309] Nevertheless, the types of ships that are excluded from the HCK, will still fall within the scope of the BC, because the BC applies to all types of ships containing hazardous wastes, subject to transboundary movement, therefore not distinguishing between the size, operation or ownership of the ship.[310] Notably, the existing definition of the hazardous wastes under the BC has not been included in the HCK, thus both conventions contain two different definitions of hazardous wastes.[311]

Furthermore, the responsible parties in the HCK are the flag State and the ship recycling State.[312] Whereas the BC deviates from the flag State principle as it imposes obligations on the exporting State, based on the territorial jurisdiction, and not the flag State, because the final voyage of the vessel does not necessarily commence from the flag State.[313]As result this creates substantial loopholes, making it easier for the stakeholders to circumvent the two regimes.

The HCK does not ban export of vessels to non-parties and non-OECD countries, as required by Article 4 in the BC. However, the HCK does include a "no more favourable treatment" clause, which prevents the contracting parties from sending their ships to recycling in a non-party State.[314] At the same time, the authorised

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304 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention*, p. 139.

305 Under these circumstances, one must acknowledge that "practical ability" explicitly requires a practical application, which could only be evaluated in a hypothetical context, when a convention has not yet been enforced, namely the HCK. Nevertheless, this is rather a caveat addressing difficulties as such, and not a way at overanalysing.

306 Engels, " *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention*", p. 144.

307 Ibid., p. 144.

308 HCK, Article 3, and Article 2(7).

309 The exclusion of ships owned by the government may be justified due to national security as pointed out during the negotiation of the HCK, as long as the ships comply with the Convention "as far as reasonable and practicable" during their operation life. See IMO, Marine Environment Protection Committee, 56th session, 7-11 May 2007 (MEPC 56/3/12), para. 2 – 3.

310 BC, Article 2(1) and Article 1(1) and Decision VII/26 and HCK Article 15(2) and Article 1(2). Supra, Section 2.1. and 2.2.2.

311 BC, Article 2(1), Article 1(1) and Annexes I, III, VIII and IX, as well as Decision VII/ 26 *cf.* HCK, Article 2(9), Regulation 4, Regulation 5 and Appendixes 1 and 2.

312 HCK, Article 5 and 6.

313 BC, Article 2(10).

314 HCK, Regulation 8(1)(1) in conjunction with Article 3(4).

SRFs are only allowed to accept ships which are compliant with the requirements of the HKC or fulfil those requirements.[315] This also extends the scope of the Convention to including non-parties.[316]

Lastly, both conventions have different approaches concerning on how the ship must be regulated. The HCK has the requirements and rules pertaining to the design, construction and maintenance of the vessel during its operational life.[317] What sets the HKC apart is that it focuses on the life cycle of the ship, and it has the *cradle to grave* approach throughout its articles and regulations. In contrast, the BC regime which only focuses on the *end-of-life-ship*. These requirements are key characteristics of the HCK, and the HCK does somewhat implement comparable requirements for the minimisation of hazardous waste from the beginning of a ship's life, along with the control of the ESM at the SRFs. However, opposite to the BC, the HCK does not impose explicit requirements for downstream waste management beyond the SRF, leaving considerable discretion for the ship recycling States to regulate the handling of the materials after the dismantling process.[318] This will be discussed further below.

Overall, the scope and applicability of the HCK does contain more explicit requirements for ships and the SRFs, making it more suitable for ship recycling. While the BC provides a less specific regime, focusing only on managing waste environmentally sound manner in general, and not as explicit concerning its, and narrowing its approach to "one stage of the life cycle."[319]

3.2.2. Level and scope of standards in both Basel Convention and the Hong Kong Convention

When assessing whether the HKC establishes an *equivalent level of control* and *enforcement* as required by Article 11, BC, in its *entirety,* it is necessary to analyse the different levels of standards between the two conventions. The comparison of the standards in the two conventions, shall provide support for determining the level of compatibility or lack thereof. In terms of standards, this thesis refers to the requirements stated in BC corresponding to the ESM, *i.e.*, the beaching method, pre-cleaning, downstream waste management and respectively safe and environmentally sound ship recycling in the HKC, and other requirements as such falling under the scope of these two principles. These standards are addressed differently by the two conventions; therefore, a parallel comparison will be made between the two conventions' standards.

In the authors' view, the concept of *equivalent level of control* under Article 11, and as per the ESM, is essentially comprised of standards, and the level of those standards has the purpose of assuring that the export and import States on the ESM of the hazardous waste, and the waste itself has been subject to rigid control in accordance with the PIC procedure, prior transboundary movement occurs. Certainly, this rigid control must extensively cover all *wastes falling* under the scope of *hazardous and other waste,* along with the responsibility of overseeing transboundary movements which fail to comply with these standards. A lack of adherence to this, can potentially result in criminal liabilities and might require the parties in question to *re-import* the hazardous wastes.[320] However, these are

315 HCK, Article 6, and Regulation 17(2) in conjunction with 3(4).

316 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, p. 182 – 183.

317 HCK, Article 5, Regulation 4 and 5.

318 Galley, *Shipbreaking: Hazards and Liabilities*, p. 186.

319 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention,* p. 140.

320 BC, Article 8 and Article 9.

elements of control procedures such as the PIC procedure and the criminalisation of illegal traffic will be discussed further below.[321]

The *beaching method* is a rather controversial standard in both the BC and HKC, with the main reason being that none of the conventions explicitly address, prohibit, or permit it. This lack of certainty must be assessed by considering both the principle of environmentally sound management, and that of the safe and environmentally sound ship recycling, along with the strict standards and requirements to which parties to both conventions must adhere to.

When discussing the beaching method, the thesis refers to the *beaching method,* falling under the scope of "dismantling of ships without the use of fixed installations for collection and handling of dangerous and polluting waste."[322] Having two conventions governing ship recycling which do not explicitly regulate the beaching method, it is in the authors' view concerning, given that this method is both the most common ship breaking method and the most dangerous in terms of working conditions and its harmful effects on the environment.[323] The main risks of this method are non-containment of hazardous materials, spillages, leakages, contamination of the marine environment, gas air pollution, workers' injuries, or loss of life, long term health damage to the workers, local marine vegetation and fish.[324] The list is not exhaustive, and this is an important aspect to keep in mind when analysing the beaching method against the standards in the two conventions.

The HKC does not explicitly, prohibit, nor permit beaching. However, throughout the Convention's articles and regulations there is a provision which stands out, namely Regulation 15(1). The Convention does not address per se, the term *design* and *construction* regarding SRFs in other regulations, guidelines or articles, therefore the key factors for interpretation of the convention beaching method within the HKC, lies within this regulation, namely the design and construction of SRF.

Prior moving any further, it is necessary to address that the thesis will conduct the analysis based on the literal meaning of the words *designed* and *constructed.* The Oxford Dictionary defines *designed/design* as making "drawings for the construction or creation of (something as a building, object)"[325]. *Construction* is defined as "the action of framing, devising, or forming (...); building"[326]. Having established the literal definitions of *design* and *construction*, it is essential to now demonstrate the correlation between the two elements, considering the conventional beaching method. As stated above, the beaching method requires that ship dismantling is conducted "without the use of fixed installations for collection and handling of dangerous and polluting waste."[327]

Regarding the beaching method, the emphasis is on ship dismantling *without using fixed installations*. With the *beaching method excluding* the use of fixed installations, the interpretation of Regulation 15(1) can be made by *including* fixed installations, through the terminology used in the provision of *design* and *construc-*

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321 Infra Section 3.2.3 and 3.2.4.

322 International Law and Policy Institute, 'Shipbreaking Practices in Bangladesh, India and Pakistan: An Investor Perspective on the Human Rights and Environmental Impacts of Beaching' (2016) p. 7, available at Microsoft Word - Shipbreaking report mai 2016.docx

323 Ibid., p. 8

324 Ibid p.9

325 Definition of "designed". Available at: Oxford English Dictionary (Last accessed 1st December 2024).

326 Definition of construction. Available at: construction - Oxford English Dictionary (Last accessed 1st December 2024)

327 International Law and Policy Institute, 'S *hipbreaking Practices in Bangladesh, India and Pakistan: An Investor Perspective on the Human Rights and Environmental Impacts of Beaching,*' p. 7, available at Microsoft Word - Shipbreaking report mai 2016.docx

tion. Based on this premise, it could be implied that HKC potentially permits beaching provided that the SRFs are *designed* and *constructed* corresponding to the HKC requirements.[328] In support to this, the guidelines attempt to regulate this by requiring an inspection of SRF, which verifies that the facility "is designed and constructed to manage any Hazardous Materials and wastes that are included in their application."[329] Nevertheless, the provision states that parties must transpose the HKC's requirements into their national laws and ensure that those legislations are fit and suitable for SRFs' to be "design, constructed, and operated in a safe and environmentally sound manner."[330] However, because the HKC is a *minimum threshold* convention, in practice, it gives discretion to the national authorities in the ship recycling state on how to transpose these requirements into their national legislations.[331] As discussed above this increases the chances for the HCK compliant SRFs to have different standards, depending on the ship recycling States national legislation and infrastructure.[332]

As a starting point, the BC requires that the dismantling facility possesses the adequate industrial facilities to manage the hazardous wastes present on the vessel in an environmentally sound manner.[333] Moreover, the TGB emphasise that dismantling of ships in an environmental manner among others includes taking certain measures to *contain the wastes*, and in this way preventing any potential leakages, spillages, or releases from during this process.[334]

However, the conventional beaching method does not allow for containment of the hazardous wastes, due to the vessels being primarily cut in the intertidal zone, where there is no access to any impermeable flooring, and drainage systems as in a dry dock. This indicates that facilities lacking adequate equipment for such procedures, might need to be upgraded, in the countries that use the beaching method.

The BC and the TGB do not explicitly prohibit the beaching method, because the BC is not designed to be a ship convention.[335] However, the BC does require that measures are taken to prevent hazardous materials from being discharged leaked, and other situations as such. This is an important factor when discussing ESM, because this is the principle standing at the base of Article 11, BC. Assessing whether conventional beaching, or other forms of beaching, aligns with the principle of ESM, is detrimental for further establishing the equivalent level of control and enforcement between the two conventions, as per Article 11, BC.

Regarding this concern, the NGO'Shipbreaking Platform' further noted that the *beaching method* cannot be considered compliant with ESM principle, because this method is unfit in preventing hazardous waste leaking or spilling from the ship to the highly sensitive marine environment ecosystem of the intertidal zone.[336] The lack of infrastructure for ensuring *complete containment* while using the conventional beaching method is one of the critical aspects for safeguarding environmental protection and preventing further damage. In this regards, Professor Alla Pozdnakova has emphasised in a teleological manner, that the usage of the beaching method is not obviously compatible with the principle of ESM, which implies that parties take all measures to "protect human health and the environment

328 HCK, Regulation 15(1).

329 2012 Guidelines for the Authorization of Ship Recycling Facilities Resolution MEPC 211(63), p. 8.

330 HKC, Regulation 15(1)

331 Ibid., Article 1(2), and Regulation 15(1).

332 Supra Section 2.2.5.

333 TGB, p. 10.

334 Ibid., p. 10.

335 Supra Section 2.1.5.

336 NGO Shipbreaking Platform, *"Does the Hong Kong Convention Provide an Equivalent Level of Control and Enforcement as Established Under the Basel Convention,"* p. 14.

against the adverse effects which may result from such waste."[337] Nonetheless, it can also be seen that the TGB take a similar approach to the BC, and lay out a set of minimum requirements, denoting "good practices"[338] for managing hazardous.[339]

The following standard to be assessed is the *pre-cleaning* of a ship before the dismantling process starts, to illustrate how the pre-cleaning standard is regulated in each of the conventions, and what this process consists of, to ultimately determine if it aligns with ESM.

As per Regulation 8(2), the HKC addresses the *pre-cleaning* standard, but to a limited extent, and it requires the minimisation "of cargo residues, remaining fuel oil, and wastes remaining on board"[340], prior the ship enters the SRF.[341] However, the HKC does not state the extent to which the ship should be pre-cleaned prior to being sent for dismantling.[342] The possibility of removing the hazardous materials from the vessel is also subject to debate, mainly because pre-cleaning the vessel prior its last journey might affect its seaworthiness.[343] As for the *pre-cleaning* standard in the BC, and the TGB, it is not addressed *per se,* but through its TGB, removal of the hazardous materials must be conducted "to the extent possible"[344], to limit transboundary movement.[345] The TGB are merely providing the parties with support and guidance in this area, as to listing the types of hazardous materials, and the managing procedures of such wastes, materials, in an environmentally sound manner.[346]

The hazardous wastes onboard the vessel should, to the extent possible, be removed from the vessel during its life cycle prior to its voyage for dismantling. The purpose of removing or pre-cleaning the vessel of the hazardous waste onboard prior the dismantling is to ensure safeness of the dismantling process itself. However, no clean-up can guarantee that hazardous wastes have been removed entirely, and there are indeed possibilities that traces of such wastes are found during the ship dismantling process.[347] Important to be noted that if the vessel has been cleaned from all hazardous materials, prior its final voyage,

337 BC Article 2(8). *See also:* Alla Pozdnakova, *Ship recycling regulation under international and EU law,* p. 62.

338 Hadjiyianni, Pouikli, *' The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*' p. 221.

339 Ibid., p. 221.

340 HKC, Regulation 8(2)

341 Ibid., Regulation 8(2).

342 Galley, *Shipbreaking: Hazards and liabilities*, p. 178

343 Ibid., p. 178.

344 TGB, p. 5.

345 TGB, p. 5.

346 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, p. 138.

347 Colin de la Rue, Charles B Anderson and Jonathan Hare, *Shipping and Environment - Law and Practice,* (Routledge (2023), p. 1201.

the vessel falls outside the scope of the BC, as the ship is no longer considered "hazardous waste".[348]

Pre-cleaning the vessel may also trigger certain challenges regarding compliance of international maritime safety regulations due to the vessel's structural integrity.[349] Hence, the hazardous wastes either cannot be removed or are necessary to comply with the safety requirements for the final voyage, and to ensure that the ship is seaworthy during its operational life.[350]

In terms of downstream waste management (DWM), the HKC in Regulations 20, and 19 it could be argued that the Convention is addressing the issue of disposal of hazardous materials, and requires that the SRF authorised by a Party, that such materials are "identified, labelled, packaged and removed"[351] as much as possible, however, it is clearly seen that the responsibility, therefore the load is put on the SRFs, and HKC requires SRFs to practice *environmental sound management* of the hazardous materials, in the IHM list.[352] The Convention also requires that such materials "shall be kept separate from recyclable materials and equipment"[353], which shows additional burden on ship recycling States and hereby also the SRFs to adapt to such requirements by either developing infrastructures, rebuilding and improving current infrastructures.[354]

With such extensive requirements imposed on the SRFs by the HKC, in comparison to BC, this opens for a broader waste management as per the BC standards. Upon the removal of hazardous waste was completed as per the HKC standards to the *maximum extent*, along with a clear lack of regulatory measures for the DWM standard in the HKC, and a lack of observation from some States, the remainder of the hazardous materials is left for the national authorities to find a solution for its *environmental sound management,* rather than allocating this responsibility internationally.[355]

On the contrary, the BC takes a firm position on the DWM standard by expressly stating that parties are required to take the necessary steps for guaranteeing that are sufficient and available disposal facilities for the ESM of *hazardous wastes,* and that such facilities are in the proximity of the disposal location to the most feasible extent.[356] The standard of DWM consists of undertaking all necessary, and feasible steps, that hazardous wastes, or other wastes, aligned with the ESM principle, to mitigate any harmful effects on the human health and the environment.[357] BC also

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348 Siig,"Private law responses to of imperfect regulation in public law - the case of ship recycling," p. 226. *See also:* The North Sea Producer Scandal case: In this case the FPSO North Sea Producer was sold for operational use to a buyer in Nigeria. Nevertheless, the sale and purchase contract contained a clause in which the buyer is obliged to recycle the vessel in line with the Hong Kong Convention and its standards on safe and environmentally sound ship recycling. The vessel was later resold to a ship recycling facility in Bangladesh, where the national authorities found that the vessel contained radioactive materials and Sulphur in its pipelines and other toxic materials such as asbestos. The High Court Division of the Supreme Court of Bangladesh therefore ruled that the import and recycling of the vessel was illegal under national public administration law. The Court, among other things, pointed out that the vessel did not have a valid pre-cleaning certificate. See https://www.maersk.com/news/articles/2019/04/04/maersk-tightens-its-ship-recycling-procedures (last accessed 2nd December 2024) and https://shipbreakingplatform.org/spotlight-north-sea-producer-case/ (last accessed 2nd December 2024).

349 Colin de la Rue, Charles B Anderson and Jonathan Hare, *Shipping and Environment - Law and Practice,* (Routledge (2023), p. 1201.

350 Ibid., p. 1201.

351 HKC, Reg. 20(2).

352 Ibid., Regulation 20(2).

353 Ibid., Regulation 20(4).

354 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, p. 222.

355 Galley, *Shipbreaking Hazards and Liabilities*, p. 180.

356 BC, Art. 4(2)(b).

357 Ibid., Art. 2(8).

permit transboundary movements, provided that such movements have the purpose of mitigating damage caused away from the point of origin, if those wastes are necessary "as a raw material for recycling or recovery industries in the State of import."[358] Nonetheless, this exception could apply in certain cases when the vessel is sent to ship recycling where the raw materials are recycled and support the local economy. However, this exception must be justified and used critically, because it should not be used for circumventing the Basel Ban Amendment.[359]

3.2.3. Control procedures

This section addresses the control procedures and mechanisms governed in the two conventions, their restrictions on the export of the vessel, as well as identifying the responsible parties in each of conventions for the purpose of illustrating where the responsibility is allocated.

The PIC procedure under the BC was not included in the HCK, instead, the HCK requires that the vessel must hold an IRRC onboard prior its final voyage.[360] The PIC procedure allows the involved States to prohibit the export or import of the hazardous waste.[361] Whereas the HCK allocates the responsibility of issuing the IRRC by the flag State.[362] Concomitantly, the ship recycling State approves the SRP for the specific ship explicitly or tacitly.[363] In contrary, the BC imposes obligations both on the of State of export and import, including transiting States.[364]

Not having included a legal mechanism such as the PIC procedure in the HCK, it restricts the flag State's ability to export the vessel, and therefore the flag State can only deny the issuance of the IRRC and hereby the export of the vessel. For instances if the SRP does reflect the information from the IHM.[365] The control of the flag State is constrained in such situations and can only inspect whether the information provided by the IHM is properly reflected in the SRP, as well as the compliance of the SRP with the HKC requirements. The flag State can neither ensure that the SRF is *de facto* compliant with the HKC standards of recycling the vessel in an environmentally sound manner or verify that the SRF holds a valid authorisation for ship recycling operations.[366] Consequently, the flag State's ability to restrict the export of the vessel is only by denying the issuance of the IRRC based on the documents provided by the shipowner and the SRF. Nonetheless, the flag State has no right to refuse the export of the vessel by denying the issuance of the IRRC, if it "has the reason to believe"[367] that the ship recycling facility cannot recycle the vessel in compliance with the EMS.[368]

Regardless, the BC is not flawless and has been subject to criticism for not clearly defining the ESM principle and providing sufficient guidance to the States on how to comply with it.[369] The exporting State's ability to restrict the export of the vessel, provided that the State has *reason to believe* that the ship recycling yard does not comply with the ESM principle, is also limited. Based on Kummer's

358 BC, Article 4(9b).

359 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, p. 162 – 163.

360 Supra Section 2.1.2. and 2.2.3.3.

361 BC, Article 4(2)(e), and Article 6.

362 HCK, Regulation 11(11).

363 Ibid., Regulation 9(4).

364 BC, Article 2(10), Article 2(11), Article (12) and Article 5.

365 HCK, Regulation 10(4)(2). *Also see:* Other situations where issuance of the IRRC can be denied in the listed in the HCK. Regulation 10(4).

366 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, p. 177.

367 BC, Article 4(2)(e), and Article 6.

368 HCK, Regulation 9.

369 Zada Lipman, *Trade in Hazardous Waste*, p. 262.

interpretation, the State of export is required to exercise a due diligence of the facility in accordance with the information received form the State of import, as well as the contract between *the generator* and *the disposer*.[370] Even so, the State of export can neither guarantee that the SRF is *de facto* complying with the principles of ESM in the BC, equivalent to the flag State's ability to restrict on this matter.

Although the HCK does include the PIC-procedure, the comparison indicates that in both conventions, the responsible Parties, namely the State of export (BC) and the flag State (HCK), ability to prevent the export of the vessel are restricted due to the lack of access to control, whether the dismantling process of the vessel is in compliance with the EMS principle in the importing State.

Additionally, the BC imposes a duty to re-import on the State of export, if the dismantling of the vessel cannot be compliance with the PIC procedure and/or the contractual terms between *the notifier* (shipowner) and *the disposer* (SRF).[371] This duty to re-import was also not included in the HCK. The conclusion of leaving out this *take back obligation* may be drawn based on the practical difficulties in performing this duty in relation to ship recycling. For instances the ultimate question is how the vessel can be re-imported to the State of export, if the dismantling process already have been started, and the vessel cannot be recycled appropriately.[372] Also, after the dismantling process has started, the ship most likely not be fit or seaworthy for the re-import.[373]

However, the HCK requires surveys and control of the ship and the SRFs goes further than the BC which does not contain such a requirement. Moreover, the establishment of surveys follows an approach from before the vessel is put into service, throughout its operational life to its very end, which further emphasizes the distinct HKC approach of c*radle to grave*.[374]

3.2.4. Enforcement and sanctioning

This section addresses the enforcement and sanctioning system, or lack thereof, in the two conventions and discusses whether the criminalisation of illegal traffic of hazardous wastes is a preventive tool to ensure compliance. This is, because unlike the BC, the illegal traffic of hazardous waste is not characterised as a criminal act in the HCK.[375]

The sovereignty-based approached in the HCK provides indeed significant discretion to the parties to determine the type of sanctioning at national level which may include both criminal and civil sanctions.[376] Contrary to the BC's stringent measures such as criminal liability, the HCK does allow to some extent lenient measures to be adopted by the parties such as civil liability. At the same time, the HKC requires that the sanctions must be "adequate in severity to discourage violations", but the assessment of the sanction remains a matter of national determination.[377] Thus, the HCK does not include any provisions that establish an

370 Kummer, *International Management of Hazardous Wastes: The Basel Convention and related Legal Rules,* p. 57.

371 BC, Article 8.

372 Ibid., Article 8.

373 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 225.

374 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention,* p. 38.

375 BC, Article 4(3) and Article 9.

376 HCK, Article 1(3). *See also:* Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 226.

377 Ibid., Article 10(3).

enforcement mechanism to addresses violations or criminalise illegal export of the vessel.[378]

Furthermore, the assessment of equivalence regarding enforcement may also be affected by practices diverging from the legislative standards. While criminalisation of illegal traffic can be a useful tool and might also improve the compliance, the national authorities have been challenged with proving the exact moment when the vessel is considered *waste* under BC, based on the shipowner's intention.[379] As discussed above, this is a weakness of territorial jurisdiction in the BC. Thus, criminalisation of illegal traffic under the BC can be difficult to comply with in practice. Nevertheless, the approach in the HCK appears to possibly be more effective in practice, provided that the membership of the HCK is becoming broader. The requirements in the HCK for the ships and SRF together with the "no more favourable treatment"[380] extends the reach of the HCK beyond the ships of its member parties and SRF.[381] Based on these assumptions, the HCK could potentially ensure improved compliance. The equivalence of the enforcement should not solely consider the practical efficiency of enforcement.[382] While the criminalisation in practice may not provide a better compliance due to evidentiary difficulties, the result of criminalisation of illegal traffic of hazardous waste at international level may be better changes for the States to cooperate, as well as providing a better level of protection due to the deterrent effect the criminalisation has.

Despite of the lack of criminalisation, the opinions on whether the two systems are equivalent is divided.[383] The NGOs[384] are against not criminalising illegal export of the vessel in the HCK, because sanctioning has a deterrent effect on, particularly the shipowner.[385] However, this enforcement mechanism might not be effective for a ship convention such as the HKC, because the HCK follows the flag State principles, which has been subject to critique for being easy to circumvent by reflagging the vessel. In the authors' view this leads to the discussion of the two conventions having different approaches for allocating the jurisdiction among different actors, namely the State of export in BC versus the flag State in the HCK. This means that there is a significant difference between the type of jurisdiction, and therefore it is enforced differently depending on the type of actor, i.e. *State of export* versus *flag State*.[386]

3.2.5. In their entirety

The COP of Basel stressed at its ninth meeting that the analysis of whether the HCK provides an equivalent level of control and enforcement as established by the BC, *in their entirety,* and further highlighted that this is an important matter to be addressed.[387] This section analyses the objectives of the two regimes, to assess whether the HCK "fit for its purpose".[388]

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378 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention*, p. 226.

379 Supra, Section 2.1.1.

380 HKC, Article 3(4).

381 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader*, p. 182 – 183.

382 Ibid., p. 226.

383 Ibid., p. 226

384 For instances NGO Shipbreaking Platform.

385 Including the cash buyer and the beneficial owner according to Regulation 1(8), HCK.

386 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention*, p. 145.

387 Decision IX/30 (UNEP/CHW9/39 (27thJune 2008)), p. 1.

388 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention*, p. 144.

The overarching objective of the Basel Convention is protection of human health and the environment against adverse effects caused by the generation,[389] and transboundary movement[390] of hazardous wastes and other wastes; by ensuring that those wastes are managed in an environmentally sound manner; as well as the minimisation of transboundary movement.[391] Whereas the overarching objective in the HCK is to protect the human health and the environment from harm caused by ship recycling, taking into consideration of the peculiarities of international shipping sector, while also reflecting the *cradle to grave* approach.[392] Notable, upon the HKC's entering into force from next year, these shall be the objectives to consider when assessing the efficiency of the HKC.[393] Prima facie, in the context of ship recycling, the conventions' overarching objectives addressed above, indicate that both conventions aim at protecting the human health and the environment from adverse effect from dismantling of ships.

Nevertheless, one of the cornerstones in the BC is to minimise the generation and transboundary movement of hazardous wastes and other wastes. This is achieved by calling the States to endeavour the treatment and disposal of the waste as close as possible to their generation source. The allowance of transboundary movement may be conducted only after complying with the PIC requirements and the principle of ESM.[394] This is of course unless the export of the vessel to non-OECD-country.[395] However, this control mechanism is lacking in the HCK, and additionally, the HCK does not prohibit export and import of ships, particularly to recycling States in the South Asia. To be noted that by lacking this control mechanism, it does not mean that the requirements in the HCK do not establish a procedural control mechanism, as the ship is subject to surveys during its entire life cycle as discussed above. Therefore, restrictions such as those in Regulation 4 provide an *ex ante* instrument targeting the generation of hazardous materials and transboundary movement of hazardous waste on boards the ships and minimising the levels of it.[396] In this regard, the IHM is a pivotal factor in enforcing the HCK, as well as ensuring compliance with the overarching objectives of the Convention during early stages of ships' lifecycle. Furthermore, as emphasised by Engels, "the procedural chain of documentation, as established by HKC, supposedly serves as a safeguard to ensure compliance *ex ante*".

Consequently, such requirements in the HCK, carry to a certain degree, equivalent requirements for minimising hazardous waste from the beginning of a ship's life, together with the control of the ESM at the SRF.[397] Nonetheless, with the HKC governing the *cradle to grave* approach, and throughout its requirements, the HKC does mirror this approach in its ways of "minimising the generation and transboundary movements of hazardous waste."[398]

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389 BC, Article 4.2(a).

390 Ibid., Article 4.2(d).

391 Basel Convention, Article 4.2(d), 4.2(g), 4.8, 4.9 and 4.10. *See also:* MEPC\82\MEPC 82-16.

392 HCK, Article 1(1). *See also*: Draft guidance on the implementation of the Hong Kong and Basel Conventions regarding the transboundary movement of ships intended for recycling (MEPC\82\16 (11th July 2024))

393 Engels, *European Ship Recycling Regulation: Entry-Into-Force Implication of the Hong Kong Convention,* p. 35.

394 BC, preamble recitals 9, and Article 4(2)(e), 4(2)(g), 4(8) and 4(10).

395 BC, Article 4A.

396 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 173.

397 Galley, *Shipbreaking: Hazards and liabilities,* p. 186 .

398 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 170.

To be noted, that Article 11, BC calls for uniformity with the objectives of the HKC, as opposed to "identical conformity"[399]. Effectively, it means that it does not require that the agreements of the Convention contain identical provisions, however, it is compulsory that it provides an equivalent level of protection for the environment, "in terms of result"[400]. Overall, it can be considered that the objectives of the two conventions are similar in terms environmental protection, even though the objectives in BC and HKC are streamlined differently.

3.3. Does the Hong Kong Convention establish equivalent level of control as required by the Basel Convention?

The above comparison indicated that the HKC is not identical to the BC, and that the principle of equivalence only requires that the HCK achieves the *same consistency and level of protection* as the BC.[401] Furthermore, the equivalent principle can be interpreted in two ways, namely by using a literal interpretation of the ESM principle in Article 11, BC, or by analysing whether the HCK provides an equivalent level of control and enforcement as established by the BC, *in their entirety.*

The level of protection as required by the ESM principle can be compared in the context of ship recycling based on the following elements: beaching, pre-cleaning and downstream waste management. The analysis showed that neither the BC, or the HKC prohibit, or allow the conventional beaching method. However, it can be argued that the HKC allows beaching, provided that structures are built for it, but this is a method which is entirely different from the conventional beaching method as defined above, contrary to the BC. In terms of pre-cleaning, the HKC govern stricter requirements, however if these strict HKC requirements would be applied to the BC, the hazardous wastes, would simply become waste, therefore falling outside of the scope of the BC. Lastly, regarding the downstream management, the HKC requires that hazardous materials are contained to the most possible extent, a requirement not as extensive as the one in the BC. Based on these findings, it could be argued that despite some differences between the two conventions, the HKC provides an equivalent level of protection as required by the ESM principle in the BC. Based on the literal interpretation of Article 11, BC, the HCK provides "no less environmental sound" than those provided by the BC.

Nevertheless, the HKC must also establish an equivalent level of control and enforcement, in its *entirety.*[402] Both conventions' overarching objectives are to protect the human health and the environment from the harm caused by hazardous materials extracted from the ship. The BC aims to achieve this objective by restricting transboundary movement of hazardous materials. On the contrary, the HCK with its "cradle to grave approach" aims to solve the problem of hazardous waste at an earlier stage of the vessel's life cycle by ensuring safe and sound ship recycling through its requirements of IHM, SRF and SRFP. Hence, the HCK "fits for its purpose", meaning that the HCK also provides an equivalent level of control and enforcement, *in its entirety*.

As noted in the scope of the thesis, the analysis did not include international environmental principles such as environmental injustice, polluters pay principle etc. Should these principles have been included, the thesis might have had a different result.

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399 Hadjiyianni, Pouikli, *The Regulatory landscape of ship recycling: Justice, Environmental principles, and the European Union as a Global leader,* p. 217.

400 Ibid., p. 217.

401 See, on the differences between suggested criteria, 'Compilation of the completed tables and submissions received pursuant to decision OEWG-VII/12', UNEP/CHW.10/INF/18 (2011) 116.

402 Decision IX/30 (UNEP/CHW9/39 27thJune 2008), p. 1.

Based on the above analysis, it can be concluded that the HCK establishes an equivalent level of control and enforcement as required by Article 11, BC.

4. Conclusion

This thesis aimed to determine the interplay between the two conventions which regulate ship recycling at international level, the Basel Convention and the Hong Kong Convention. As a general waste regime, the BC does not address the ship recycling concerns pertaining to safety of the environment and human health, because it does not impose any requirements on shipowners and SRFs. The BC is not designed for ship recycling, and therefore not suitable for this purpose. On the other hand, the tailormade HCK does impose requirements on all these actors. Hence, with its *cradle to grave* approach the HCK requires that the hazardous materials are managed in a safe and environmentally sound manner through the requirements of IHM, SRP and SRPF.

Nevertheless, both conventions regulate *the same subject of matter*, which potentially could lead to a conflict between the conventions and some of their provisions. There are various ways of analysing the interplay between the HCK and the BC. In this thesis, the interplay between the two conventions, has been analysed by interpreting both conventions in the light of the VCLT and the *lex specialis,* as well as the thesis has been analysing whether the HCK establishes an equivalent level of control and enforcement as required by the Article 11, BC. Based on the above interpretation, as per the international principles in the VCLT, and *lex specialis* the analysis indicated several potential namely:

1) The BC prevails, given that the BC is considered a "relevant and applicable agreement" based on the interpretation of Article 15, HCK.
2) The BC cedes its competence to the HCK, provided that the HCK provides an equivalent level of control and enforcement as required by Article 11, BC.
3) Both conventions apply at the same time, *but the BC only applies* "to the extent that its provisions are compatible" with those in the HCK pursuant to Article 30(3), VCLT" and *lex posterior derogate lege prior.*
4) Different rules apply to the parties, depending on their membership to the two conventions pursuant to Article 30(4).
5) The HCK prevails based on the *lex specialis* principle, provided that the HCK is considered as *lex specialis.*

All things considered, the analysis indicates that international principles, such as those in the VCLT, still do not provide enough clarity on the interplay between the HKC and the BC. Nonetheless, these principles can provide certain solutions and guidance for solving the interplay between the two conventions.

As for the question whether the HCK establish equivalent level of control and enforcement as required by Article 11, BC, the analysis suggested the following results. The HCK provides the same level of protection as required by the environmental sound management principle in relation to beaching, pre-cleaning and downstream waste management. Hence, based on literal interpretation of Article 11, the HCK establish an equivalent level of control and enforcement, because the HCK provides "no less environmental sound" requirements than those provided by the BC. Nonetheless, the HKC must also establish an equivalent level of control and enforcement, in its *entirety.* Both the BC and the HCK overarching objectives are to ensure the protection of the human health and the environment form the harm caused by the hazardous materials extracted from the ship.

However, the HKC does address the matter of hazardous waste at an earlier stage of the vessel's life cycle by ensuring a safe and sound ship recycling process through the IHM, SRF and SRFP. Therefore, in the light of these findings. It can be concluded that the HCK establishes an equivalent level of control and enforcement, *in its entirety.*

Notwithstanding, the above analysis indicated different solutions for determining the interplay between the two conventions. In conclusion, while considering the international principles in VCLT and l*ex specialis,* along with the principle of equivalence in Article 11, BC, the consistency between the two conventions is nowhere near to being settled.

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