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Content overview

Editor's Preface

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

First, there is Trine-Lise Wilhelmsen's article which deals with questions of cover of political risks under the Nordic Insurance Plan, and with a comparative look to the corresponding provisions of the UK terms.

Second, there is Alla Pozdnakova's article discussing EU competition law aspects of a recent case – Vlaams Gewest – involving questions of whether national provisions constituting a restriction on free movement of services may be justified – pertaining to charge for vessel traffic services (VTS) in a Flemish port.

Third, the is my own article aiming at bridging a gap between maritime law and general tort law in the area of ship collisions and questions of contributory negligence on the respective party's side.

Trond Solvang

Insurance of political risk under the Nordic Marine Insurance Plan

– some reflections post the *Heroic Idun* case

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Content

1 Introduction and overview

The topic of this article is the insurance of political risk under the Nordic Marine Insurance Plan 2013 (NP). The Nordic Marine Insurance Plan is a Nordic agreed standard contract regulating insurance for vessels. The main types of insurance in this context are hull insurance, covering damage to and loss of hull and machinery, and loss of hire insurance, covering loss of freight income in certain defined situations.

The term "politics" refers in everyday life to the way in which countries are governed, and to the ways in which governments make rules and laws to manage human society properly. The concept of “political risk” means risk created by political institutions or political decisions. In terms of insurance for vessels, risk means the risk of damage or loss covered by the insurance. The most serious political risk for vessels is war and war-related situations where the use of weapons may directly strike the vessel, but other types of political risks may also strike the vessel in serious ways. Typical examples are the arrest and detentions of vessels due to real or alleged breaches of customs or trade regulation, causing extensive delay if not literal damage to the vessel. Examples from case law are the detainments of the vessels *B Atlantic* in Venezuela, *Poavosa Ace* in Algeria and *Sira*, *Team Tango* and *Heroic Idun* in Nigeria. Closely connected to this risk are the similar attacks on vessels caused by political groups fighting existing regimes. Such groups may not have the political legitimacy of the ruling government, but a seizure by such a group may have the same consequences for the assured. The concept of political risk in this article therefore includes risk created by groups opposing the elected or governing regime.

This means that the topic of this article is more specifically the coverage under the NP for damage to or loss of the vessel and loss of income caused by risks created by political acts, either based on political authority in the form of legislation, regulations or administrative decisions, or else created by political groups opposing the ruling regime. This risk is different from the so-called perils of the sea creating the maritime risks that the vessel encounters when sailing between ports, in the form of bad weather, navigational errors, collisions with other vessels etc. Such everyday risk may normally be calculated based on statistics gathered over several years. Political risk, on the other hand, is more unpredictable and difficult to calculate both as to their frequency and the magnitude of the losses. It may also strike the vessel in different ways from the ordinary marine risks, which mainly result in damage to the vessel followed by either loss of income or total loss. Seizure and long-time detainment will result in loss of income, but not necessarily damage to the vessel.

Due to these different characteristics, marine insurance conditions have at all times made a distinction between war risk and marine risk cover. This distinction dates back to the first Norwegian Marine Insurance Plan in 1871 and it has been developed and refined in later versions of the Norwegian and later the Nordic Plan. A central feature of this distinction is that the war risk cover is extended to cover loss of hire and total loss due to detention of the vessel by foreign state power.

A major revision of the distinction between marine risk and war risk in relation to political risk under the NP took place in 2019. One important purpose of the amendment was to provide better protection against the political risk created by less developed regimes, in relation to detention without clear legitimate reasons of vessels in port, resulting in long periods of delay. This was achieved by extending the marine risk cover, combined with a clarification of the war risk cover in this regard. However, even if this resulted in better marine risk cover and a clarified borderline between war and marine risk cover, the distinction between marine risk and war risk is still difficult. One issue is that the criterion for triggering the

war risk cover may be difficult to use in practice. Another issue is that the criterion is so strict that the difference between the extended cover and actual war risk may be blurred. A third issue is that the cover is first and foremost tied to interventions taken by state power. In today's geopolitical environment, several non-state groups are seizing vessels for political or even criminal purposes. The question, thus, is how to handle this risk.

These problems are reflected in several arbitration cases from the last years, the latest being the *Heroic Idun* award from 5 August 2025. The problems are also reflected in discussions in the market where, in particular, part of the UK marine insurance market advises against war risk cover on NP conditions, arguing that UK war risk conditions provide better cover.

The purpose of this article is to discuss the cover for political risk under the NP in light of these problems, and to investigate whether the UK conditions provide better cover.

In what follows, the Nordic regulation is presented in chapter 3 and the UK regulation in chapter 4. As an introduction to these discussions, chapter 2 provides an overview of the legal sources. Chapter 5 concludes the article with some reflections.

2 Overview of the legal sources

2.1 The Nordic sources

Each of the Nordic countries has its own legislation on insurance contracts.[1] However, none of the Nordic insurance contracts acts contain any regulation of the scope of cover for marine insurance. They will therefore not be addressed further in this article.

Until 2013, each of the Nordic countries also had its own marine insurance conditions. However, in 2013 a common Nordic Marine Insurance Plan (the NP) was introduced, based on the Norwegian Marine Insurance Plan 1996 Version 2010 (the NMIP 2010). The NP 2013 is widely used, not only by the Nordic ship owners, but also internationally.

As the NP is based on the NMIP 2010, it is appropriate to outline the historical development of the Norwegian Marine Insurance Plan, in order to establish the characteristic features of the current Nordic Plan.

The first Norwegian Marine Insurance Plan was published in 1871, and was later followed by several further Plans,[2] the most recent being the 1996 Plan. The 1996 Plan was published in several versions, up until 2010.[3] In 2010, the Nordic Association of Marine Insurers (Cefor), which is responsible for the maintenance and publishing of standard marine insurance conditions in the Nordic market, decided that instead of operating with one set of standard conditions in each of the Nordic countries, the maintenance effort should be concentrated on one common set of conditions. As the basis for a set of unified Nordic conditions, Cefor chose the Norwegian Marine Insurance Plan 1996 Version 2010. An agreement was entered into between Cefor and the Norwegian, Danish, Swedish, and Finnish Ship-owner Associations on 3 November 2010 to construct the Nordic Marine Insurance Plan of 2013, which then came into force in January 2013. It was amended in 2016, in 2019 and in 2024.[4]

Several characteristic features of the Plan are important when considering its legal status. *First*, the Plan is an agreed document drafted by a committee consisting of participants from all interested parties, i.e. the ship-owners, the insurers, and the average adjusters. *Secondly*, widespread participation in the drafting of the Plan has secured its neutrality and balance. This stands in contrast to many other standard conditions in the marine insurance market drafted by the insurers with no participation from the assureds.[5] A *third* characteristic feature of the Plan is that it contains a fully comprehensive regulation of all aspects of marine insurance. Both the structure of the Plan and the drafting of the individual clauses are more similar to legislation than to ordinary standard contracts.[6]*Fourth*, the Plan is supplemented by extensive and published commentaries (the Commentary). The Commentary is published on Cefor's website.[7]

These characteristic features also have some implications for the interpretation of the Plan conditions. As the Plan is an agreed document, one cannot fall back on

1 For Norway; the Insurance Contracts Act (ICA) of 16 June 1989 (no 69). For Denmark; The Insurance Contract Act 2015 (Lovbekendtgørelse 2015-11-09 nr. 1237). For Sweden: Försäkringsavtalslag (2005: 104). For Finland: Insurance Contracts Act 28 June 1994.

2 The Norwegian Marine Insurance Plans of 1881, 1894, 1907, 1930 and 1964.

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

4 Trine-Lise Wilhelmsen and Hans Jacob Bull, Handbook on hull insurance, 2. Ed., 2017 (Wilhelmsen and Bull) p. 26, agreement-nordic-plan---amended-8-may-2024---sign.pdf .

5 Wilhelmsen and Bull p. 26.

6 Wilhelmsen and Bull p. 26.

7 http://www.nordicplan.org/Commentary/ The references to Commentary 2019 and Commentary 2023 in this article are to the pdf download placed on this web site for these versions of the Plan.

the ordinary main rule: interpret a standard agreement against the party having drafted the clause. The similarity to legislation rather than to contract implies that it would be more correct to interpret the Plan according to principles for interpretation of legislation than for contracts. The Commentary also states that the Commentary "shall carry more interpretative weight than is normally the case with preparatory works of statutes",[8] even if the Plan does not contain any explicit reference to the Commentary and its significance as a basis for resolving disputes. The reason is that the Commentary has been thoroughly discussed and approved by the Nordic Revision Committee, "and must therefore be regarded as a part of the standard contract which the Plan constitutes".[9]

This statement in the Commentary has been accepted both by the Norwegian Supreme court[10] and in arbitration practice.[11] In the newest arbitration case 5.8.2025 *Heroic Idun,* the court made a detailed analysis of the weight of the Commentary and concluded in para 1208:

> "Viewed collectively, while an important contribution to the interpretation and adaption of the provisions, the Commentary cannot and should not overshadow or substitute the wording of the provisions relevant to the case, and the weight to be given to references in the Commentary must always be assessed in light of its purpose and the context in which it appears."

This implies that the weight given to the Commentary will depend on the relationship between the Plan text and that of the Commentary. If the wording does not directly solve the disputed issue, the Commentary is given much weight.[12] In arbitration practice, the court has also accepted that the interpretation of the Plan has been amended through the Commentary in cases where the Plan text could be interpreted in different ways and therefore did not hinder the amendment.[13] On the other hand, if there is obvious conflict between the Plan text and the Commentary, the text shall prevail over the Commentary as the primary legal source.[14]

2.2 The UK regulation

In international hull insurance, the UK conditions have traditionally dominated. These conditions are also used in the Nordic market.

In the UK, marine insurance is regulated by the UK Marine Insurance Act of 1906 (the "MIA 1906").[15] In addition, the Insurance Act 2015 regulates some issues which are also relevant for marine insurance. However, similarly to the Nordic Insurance Contract Act, these pieces of legislation are not relevant to the questions addressed in this article. However, the MIA 1906 contains a schedule with "Rules for Construction of Policy", which were adopted for the SG Form of Policy traditionally incorporated in the MIA. Even if this policy form is no longer used, the

8 Commentary 2023 p. 26 to Cl. 1-4.

9 Commentary 2023 p. 26 to Cl. 1-4.

10 ND 2009 p. 202 NA *Bulford Dolphin*, ND 1998 p. 216 NSC *Ocean Blessing*, ND 1969 p. 49 NSC *Grethe Solheim*, ND 1956 p. 318 NSC *Bandeirante*, ND 1956 p. 323 NSC *Pan*, see also HR-2019-187-U referred below. See also Arbitration Case 5.8.2025 *Heroic Idun*. Similar statements have been made by other Nordic courts in relation to other so-called agreed documents with commentaries prepared by the drafting committee (see, for example, the judgment of the Swedish Supreme Court in NJA 2018 p. 301, paragraph 11).

11 ND 2000 p. 442 NA *Sitakathrine*.

12 ND 1998.216 NSC *Ocean Blessing*.

13 ND 2000.442 NA *Sitakathrine.*

14 Cf. Commentary 2023 p. 26 to Cl.1-4.

15 https://www.jus.uio.no/lm/england.marine.insurance.act.1906/doc.html#377

construction rules are still applied whenever the clauses used today contain the same wording as those of the SG Form of Policy. In relation to the issues discussed here, Rule no. 10 of the schedule, addressing political or executive acts, is relevant.

The UK market is divided between Lloyd's and the corporates which effect insurance on identical conditions. Marine risk insurance for ocean-going ships is regulated by several sets of clauses.[16] A common feature of these clauses is that they are based on the named perils principle, whereby the perils insured against are specifically listed. None of the clauses used contain cover for political risk, which means that this peril is not covered under an insurance against marine perils. However, coverage for this peril is provided by the Institute War and Strike Clauses (Hulls-Time) 1/10/83 as amended 1/11/95 (IWSCH) (Cl. 281).[17] IWSCH are therefore the relevant set of clauses for this article.

16 Institute Times Clauses (Hulls) of 1983 and 1995, International Hull Clauses of 2002 and 2003.

17 https://www.garex.fr/documents/IWSC_HULL_CL281_1995.pdf

3 Insurance of political risk – the Nordic system

3.1 Development and overview

The historical starting point was that marine insurance against marine perils covered all perils to which the insured interest was exposed.[18] This included political risks to the extent that this risk resulted in loss covered by the insurance. Except for P&I insurance, however, marine insurance with this wide scope of cover was not, in practice, used. Instead, the scope of cover was divided between insurance against marine perils and insurance against war perils. In formal terms, this distinction was made in two steps. The insurance against marine perils was based on the all-risk principle, which stated that the insurance covered all perils to which the interest was exposed, unless the peril was especially excluded. Perils covered under the war risk insurance were then excluded from the marine risk cover.[19] Interventions by a war-faring state were regulated as a war risk and were thus excluded from the marine risk cover.[20]

The war risk insurance did not cover interventions from non war-faring countries, and nor were such interventions excluded from the marine insurance cover in NMIP 1930. Such exclusion was, however, inserted in NMIP 1964 for Norwegian or allied state power, to avoid these interventions being covered through the all-risk principle,[21] and this was extended in the 1996 revision of the NMIP to apply to all state interventions. The central approach was thus that the cover for marine risks is based on the all-risk principle, with exclusions both for war risks and for interventions arising from state power that are not covered under the war risk insurance. However, a more detailed approach to political risk was established in the NP revision in 2019.[22] In the NP today, the marine risk and war risk are regulated as follows:

> **Clause 2-8. Perils covered by an insurance against marine perils**
>
> An insurance against marine perils covers all perils to which the interest may be exposed, with the exception of:
>
> a) perils covered by an insurance against war perils in accordance with Cl. 2-9,
> b) capture at sea, confiscation, expropriation and other similar interventions by own State power provided any such intervention is made for the furtherance of an overriding national political objective. Own State power is understood to mean the State power in the vessel's State of registration or in the State where the major ownership interests are located. Own State power does not include individuals or organisations exercising supranational authority,
> c) requisition by State power,
> d) insolvency or lack of liquidity of the assured or the operation of ordinary legal process to enforce payment of any fine, penalty, debt or right to security unrelated to a claim or liability covered by the insurance,

18 NMIP 1930 § 4 subparagraph 1, see also Nordic ICA 1930 § 60.

19 Commentary NMIP 1964 p. 11.

20 NMIP 1930 § 42 no. 2.

21 NMIP 1964 § 15 (b), Commentary NMIP 1964 p. 15.

22 The revision is described further in Trine-Lise Wilhelmsen, "Cover for intervention by state power in the Nordic Plan from 2019. A fair and timely compromise?", *Journal of international Maritime Law*, vol. 24 (2018) p. 354-368 and "Marine insurance for intervention by State power", *Marius* no 519 (2019), p. 151-198 (*Simply* 2018).

…

Clause 2-9. Perils covered by an insurance against war perils

An insurance against war perils covers:

a) war or war-like conditions, including civil war or the use of arms or other implements of war in the course of military exercises in peacetime or in guarding against infringements of neutrality,
b) capture at sea, confiscation, expropriation and other similar interventions by a foreign State power, provided any such intervention is made for the furtherance of an overriding national or supranational political objective. Foreign State power is understood to mean any State power other than own State power as defined in Cl. 2-8 (b), second sentence, as well as organisations and individuals exercising supranational authority or who unlawfully purport to exercise public or supranational authority,
c) riots, sabotage, acts of terrorism or other social, religious or politically motivated use of violence or threats of the use of violence, strikes or lockouts,
d) piracy and mutiny,

…

The insurance does not cover:

a) insolvency or lack of liquidity of the assured or the operation of ordinary legal process to enforce payment of any fine, penalty, debt or right to security unrelated to a claim or liability covered by the insurance,

…

e) requisition by State power.

The starting point, according to NP Cl. 2-8 sub-clause 1, is that insurance against marine risks covers all perils, including thereunder political risks created by own or foreign state power, or by groups purporting to have such power, or military groups opposing the country's government. However, to the extent that such political risks are covered by the named perils cover in NP Cl. 2-9, this risk is excluded from the marine insurance cover, according to NP Cl. 2-8 letter a. Since NP Cl. 2-9 letter b covers "capture at sea, confiscation, expropriation and other similar interventions by a foreign State power, provided any such intervention is made for the furtherance of an overriding national or supranational political objective", these interventions will not be covered under marine risk insurance. Foreign state power in this context means any state power "other than own State power as defined in Cl. 2-8 (b), second sentence, as well as organisations and individuals exercising supranational authority or who unlawfully purport to exercise public or supranational authority". Broadly speaking, therefore, the war risk insurance covers interventions made for the furtherance of an overriding political objective made by foreign state power and by organisations "who unlawfully purport to exercise public or supranational authority".

Furthermore, NP Cl. 2-8 letter b excludes "capture at sea, confiscation, expropriation and other similar interventions by own State power provided any such intervention is made for the furtherance of an overriding national political objective". These interventions are not covered under NP Cl. 2-9. Thus, political risks in the form of such interventions made by own state power against the vessel are not insurable under NP.

Neither NP Cl. 2-9 letter b nor NP Cl. 2-8 letter b apply to military groups opposing the existing regime but without purporting to exercise public or supranational authority, and this risk has not been much discussed under the revisions. However, Cl. 2-9 letter c covers "acts of terrorism or other social, religious or politically motivated use of violence or threats of the use of violence". To the extent an attacking military group is listed as a terrorist group, it will therefore be covered, and the same is true for military groups using violence or threats of violence against the vessel for political purposes.

On the other hand, interventions that do not have "an overriding national political objective" made by own or foreign state power, or by organisations who unlawfully purport to exercise public authority, are covered by the all-risk principle. Typical examples are arrest or detention of the vessel due to breaches of customs or trade regulations.

There are however two common exclusions from this cover. The first exclusion is "Insolvency or lack of liquidity of the assured or the operation of ordinary legal process to enforce payment of any fine, penalty, debt or right to security unrelated to a claim or liability covered by the insurance", cf. NP Cl. 2-8 letter d and Cl. 2-9 sub-clause 2 letter a. Since NP Cl. 2-8 letter b is now limited to interventions for the furtherance of overriding national political objectives, any other intervention would, as a starting point, be covered by the all-risk principle. This is a very wide scope of cover, and it was necessary to restrict it through an exclusion for legal proceedings to enforce a debt or obtain security for a debt. The exclusion does not apply to e.g. proceedings relating to public law matters, such as the enforcement of customs or trading regulations. Such cases are governed by the rules in Cl. 3-16.[23] It should also be noted that the exclusion has a rather limited application, as it is unlikely that the operation of ordinary legal processes will be the direct cause of physical damage to a vessel or lead to the owner being deprived of the vessel without any prospect of recovery. Even so, it was necessary to avoid insurance cover if damage were to trigger a delay or legal costs for enforcing the payment of debts or other legal rights against the assured or the vessel.[24]

The second exclusion is requisition, cf. NP Cl. 2-8 letter c and Cl. 2-9 sub-clause 2 letter b.

The exclusion is absolute and applies to requisition by any state power, regardless of whether it is for ownership or other use. Even if it is argued that a state only has authority to requisition vessels under its own flag, requisition by a foreign state is also excluded. There is no court decision providing a definition of the concept of requisition, and the concept is not clear in Nordic marine insurance. However, according to the Commentary, the typical characteristics are that the state will "requisition" the vessel for ownership or use according to legislation and in national interest and that the relevant legislation provides a formal procedure to be followed. Requisition is typically limited in time, and the intention is that the vessel shall be redelivered to the owner after a certain period. The rule is also that the state should compensate for the use of the vessel and pay for any damage incurred during the period of use, but this is not a requirement for the exclusion to apply.[25]

3.2 The difference between marine risk and war risk cover

As demonstrated under 3.1, NP Cl. 2-8 and Cl. 2-9 sub-clause 1 letters b and c provide a broad cover for political risk, with exclusions only for interventions by own state for the furtherance of overriding political objectives, the operation of ordinary legal process as defined, and requisition. The goal is for an assured

23 Commentary 2023 p. 49 to Cl. 2-8 letter d.

24 Commentary 2023 p. 49 to Cl. 2-8 letter d.

25 Commentary 2023 p. 47 to Cl. 2-8 letter c.

effecting insurance against marine risks and war risks to have the best cover possible, provided that the risk can be reinsured.

NP Cl. 2-8 and Cl. 2-9, however, only regulate the "perils" insured. Nordic marine insurance makes a distinction between perils insured, the insured event, losses covered and causation. The perils insured define what perils or risks are covered under the insurance. The insured event defines how these perils must materialize and strike the vessel for the insurer to be liable. The losses covered define what losses are covered. These three elements are tied together with a requirement of causation. The rules on causation and losses covered are different for marine risk than for war risk cover.

Causation for marine perils is regulated under NP Cl. 2-13, where the approach is attribution of loss over different perils. Causation for war perils is singled out by a special rule in NP Cl. 2-14, where the starting point is the dominant cause rule. As the difference is a matter of approach, the question of which solution is better for the assured will depend on the circumstances.

Losses covered are regulated under NP Chapter 11 for total loss, Chapter 12 for damage, and Chapter 16 for loss of hire. These rules apply both for marine risk and for war risk cover. However, in addition to these rules, NP Chapter 15 provides for extended cover for war risk. The characteristic feature of the rules on total loss in NP Chapter 11 is that compensation for total loss requires the vessel to be actually lost to the assured.[26] NP Chapter 15 extends this to provide cover for total loss for two war perils. First, if "the assured has been deprived of the vessel by an intervention by a foreign State power, for which the insurer is liable under Cl. 2-9", and the vessel is not "released within twelve months from the day the intervention took place".[27] This provision presumably refer to the cover for foreign state power according to Cl. 2-9 letter b even if the specific motive requirement is not mentioned. Second, a similar rule applies if "the vessel has been captured by pirates or taken away from the assured by similar unlawful interventions, for which the insurer is liable under Cl. 2-9". The provision refers to "pirates", but the purpose of piracy is normally economic profit[28] and thus less relevant here. The expression "similar unlawful interventions" is more unclear as it may refer to the interventions mentioned in Cl. 2-9 letter d (piracy and mutiny) or include also letter c (terrorism and politically motivated use of violence). The Commentary refers to mutiny and war-motivated theft,[29] but as the wording of the clause is broader, this should be decisive. There are no court cases on this issue, and the interpretation appears uncertain.

Furthermore, if "the vessel is prevented from leaving a port or a similar limited area due to blocking, the assured may claim for a total loss, if the relevant obstruction has not ceased within twelve months after the day it occurred".[30] It is not stated who may perform the blocking, and the concept of blocking is not explained. The Commentary has the following comments:[31]

> "The provision is aimed primarily at cases where the hindrance is of a physical nature, for example, when the vessel remains trapped because the lock gates have been destroyed by bombing, or because a bridge has been blown up by sabotage and blocks the way out of port. The lines are fluid, however, between hindrances of this type and hindrances consist-

26 NP Cl. 11-1.

27 NP Cl. 15-11 sub-clause 1. If the assured may claim total loss according to Cl. 15-11, it is "irrelevant for the assured's claim that the vessel is released at a later time, cf. sub-clause 4".

28 Commentary 2023 p. 65.

29 Commentary 2023 p. 353.

30 NP Cl. 15-12 sub-clause 1.

31 Commentary 2023 p. 354.

> ing of a foreign State power detaining the vessel in port due to fear that it will fall into enemy hands. The detention may be reinforced by the area around the vessel being mined or by other measures aimed at preventing the vessel from leaving the area. Regardless of whether the authority in question implements separate physical measures, a detention of this nature will be deemed to be blocking and trapping within the meaning of the provision, and will also fall within the scope of Cl. 15-11."

Thus, it appears that both physical blocking and blocking due to detention is covered, but also that the provision only applies to "foreign state" power. The Commentary here appears somewhat contradictory to the wording of the clause.

In addition, the main rule in NP Chapter 16 is that cover for loss of hire is triggered by damage to the vessel.[32] NP Chapter 15 provides better cover on two issues: *First*, the insurer "is liable for loss due to the vessel being wholly or partly deprived of income because it is prevented from leaving a port or a similar limited area", regardless of any damage to the vessel.[33] There is no requirement of (physical) blocking and no reference to who is preventing the vessel from leaving the port. The Commentary, however, clearly limits the peril to "interventions by foreign power" and delimits against interventions by terrorists and pirates.[34]

Second, the insurer is also liable for loss of time if the vessel is brought into a port by a foreign State power for the purpose of visitation and search of cargo, etc., together with capture and temporary detention.[35]

If the agreed value of the vessel according to NP Cl. 2-3 is higher than the market value, the assured will have an economic incentive to claim total loss for the vessel in order to receive the high agreed value, leaving the vessel to the insurer. For this reason, there is a lot of pressure on NP. Cl. 15-11 and Cl. 15-12 in cases where the vessel is arrested and detained in port. Most cases on this issue concern the distinction between the interventions by foreign state power that are covered by NP Cl. 2-9 letter b and those covered under Cl. 2-8, lacking the extra cover for total loss regardless of whether the vessel has actually been lost. Thus, the main issue here is the content of NP Cl. 2-9 letter b, which will be discussed in 3.3 below. The cover for terrorists and military groups acting with political motive is as mentioned more unclear, but presumably such groups are covered under Cl. 15-11 sub-clause 2 but not under Cl. 15-12.

3.3 The political risk covered according to Cl. 2-9 sub-clause 1 letter b

3.3.1 Introduction

NP Cl. 2-9 **Perils covered by an insurance against war perils** sub clause 1 letter b states that an insurance against war perils covers:

> capture at sea, confiscation, expropriation and other similar interventions by a foreign State power, provided any such intervention is made for the furtherance of an overriding national or supranational political objective. Foreign State power is understood to mean any State power other than own State power as defined in Cl. 2-8 (b), second sentence, as

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

33 NP Cl. 15-16 sub-clause 2.

34 Commentary 2023 p. 358 with reference to ND 2009 p. 202 NA *Bulford Dolphin.*

35 NP Cl. 15-17 sub-clause 1.

> well as organisations and individuals exercising supranational authority or who unlawfully purport to exercise public or supranational authority,

The heading of the provision is "perils" insured against. As mentioned above in 3.2, Nordic marine insurance makes a distinction between the peril that is insured and the insured event, which must be caused by the peril. The peril in letter b is defined as two elements combined with causation: it must be a foreign state intervention, and this must be "for the furtherance of" or caused by the state's overriding political objective. It thus appears that the foreign state intervention is the casualty, that the overriding political objective is the peril, and that these elements are tied together through a requirement of causation.[36]

In the following, the insured event is discussed in 3.3.2 and the peril – for the furtherance of an overriding political objective in 3.3.3. The issue of causation is discussed in 3.3.4.

3.3.2 The interventions

The intervention "capture at sea" means, according to the Commentary, that:[37]

> "the vessel is intercepted, seized or arrested by a foreign State power at sea. This covers the situation where the insured vessel is stopped at sea by a war vessel or military vessel using power or threatening to do so. It is not capture "at sea" if the vessel is arrested and detained in port without a foregoing capture. On the other hand, when the vessel is captured at sea, it will normally be escorted by power into port for further control. As long as the detainment in port is due to the same cause as the capture, the stay in port must be regarded as part of the capture. If the vessel sails into port without any threats from the foreign State, this is outside the concept of "capture at sea". This is true even if the State could have forced the vessel to enter the port."

It appears from these remarks that "capture" is an intervention made by a "state power". In that case, it is not capture if the vessel is seized by terrorists, military groups or pirates. However, NP Cl. 15-11 sub-clause 2 provides cover when the vessel "has been captured by pirates". This is confusing, as the Norwegian word for "capture" in NP Cl. 2-9 sub-clause 1, letter b is "oppbringelse", which means

> "beslagleggelse av et fiendtlig skip, eller et nøytralt skip som har krenket nøytralitetsreglene, under krig. Oppbringelse pleier å starte med visitasjon og blir endelig avgjort av en priserett."

From the way this concept was used in the earlier versions of the Norwegian Plan, it was clear that it had this rather narrow meaning.[38] However, it was theoretically argued that the concept of "oppringelse" also referred to capture by the state in cases of breaches of, for instance, fishery regulation.[39] As this created some confusion, the requirement for an overriding political motive in the 2019 revision was also tied to "capture". When the expression "capture" is also used in regard to pirates, it is obvious that such qualification was needed.

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36 Trine-Lise Wilhelmsen, "Marine insurance cover for detainment of vessels by a foreign state – the Team Tango case", *The Modern Law of Marine Insurance* Vol 5, 2022, edited by Rhidian Thomas, Informa Law from Routledge, 2022, ch. 9, para 9.57-9.59.

37 Commentary 2023 p. 57.

38 Trine-Lise Wilhelmsen, "Wars and laws. How war has influenced the development of the law of marine insurance – the Norwegian/Nordic perspective", *Marius* no 583 (2024), (*Simply* 2023) pp. 63-86 at pp. 74-75.

39 Sjur Brækhus and Alex Rein *, Håndbok i kaskoforsikring*, 1993, p. 69.

The concept "expropriation" means, according to the Commentary, that "the State takes over the vessel for a purpose deemed to be in the public interest". The Plan Committee found that expropriation is more similar to confiscation than it is to requisition. Both expropriation and confiscation mean a permanent loss of ownership, whereas requisition is typically only for a limited period in time and can also be limited to use, not ownership transfer. It was therefore agreed that expropriation by a foreign state should be covered on a similar basis to confiscation. However, whereas confiscation does not generate compensation, when the vessel is expropriated, the assured may be compensated for his loss. It follows from general insurance principles and is also stated in the Commentary that any "such compensation must be deducted from the liability of the insurer".[40]

The term "other similar interventions" is, according to the Commentary, meant to have:[41]

> "similar consequences for the assured as "capture at sea" and "confiscation". Typical for these interventions is that the ship-owner is being divested of the right of disposal of the ship. This is therefore a necessary condition for an intervention to be covered under this group. An intervention that satisfies this criteria can of course take place while the vessel is in port."

3.3.3 The overriding political objective

The intervention must, according to Cl. 2-9 sub-clause 1 letter b, be made "for the furtherance of an overriding national or supranational political objective". The expression "overriding national… political objective" is, according to the Commentary, based on four arbitration cases concerning war risk cover for interventions by foreign state powers under NMIP 1964 and NP 2013, Version 2016.[42] The Commentary states that:

> "The three first cases are summarized in the Sira-case, which states that interventions for the "furtherance of overriding political goals" are interventions that are typical for war or times of international crisis, and often can be explained by foreign policy considerations. The justification for the intervention may be a warranted or unwarranted suspicion that the vessel has breached rules for the protection of the security of the State. It is not decisive that the general political situation in the State has contributed to the intervention. It follows from this that abuse of power is neither a necessary nor a sufficient condition for war risks cover. If an overriding national political goal is detected, there is no need to establish misuse of power. On the other hand, misuse of power need not be explained by such overriding political motives. Misuse of power may be a reflection of a dysfunctional State and indicate another motive, but misuse of power is not in itself a necessary condition for cover."

According to the Commentary the purpose is to delimit the cover in relation to both ordinary administrative procedures and the misuse of power or corruption by the administration:[43]

> "It is therefore clear that interventions in accordance with applicable law for the purpose of enforcing customs-, police-, safety- or navigation-regu-

40 Commentary 2023 p. 57 to Cl. 2-9 sub-clause 1 letter b.

41 Commentary 2023 p. 58 to Cl. 2-9 sub-clause 1 letter b.

42 Unpublished award of 11 June 1985 relating to the *Germa Lionel*, ND 1988 p. 275 NA *Chemical Ruby*, The *Wildrake* case, which was settled, and ND 2016 p. 251 NA *MT Sira*, cf. Commentary 2023 p. 58

43 Commentary 2023 p. 58 to Cl. 2-9 sub-clause 1 letter b.

> lations or any private law rights against the insured vessel are outside the scope of the war insurance cover. If the ship is arrested/captured at sea by the Coast Guard or representations of the police or customs authorities to hinder or investigate illegal fishery, import or export or breach of trade regulations, this will not be covered. The same is true if the ship is arrested or detained in port because of doubt as to whether the ship is compliant with the rules regarding technical and operational safety, or because the crew is suspected of smuggling. Obviously, losses arising from the ship being detained or seized as part of debt-recovery proceedings against the owners are not covered, either; this follows in any event from the exclusion in sub-clause 2 (a).
>
> It does not matter whether such police or customs intervention is caused by illegal acts performed by a third party, for instance the charterer or the master or crew. Further, it is not decisive whether the State intervention is based on the legislation of the country or may be seen as abuse of power or corruption, if the intervention does not have an overriding national or supranational political objective. However, if an overriding national or supranational political objective is detected, it does not matter if the State power formally justifies the interventions with for instance police or customs regulations, or if the intervention has the character of abuse of power or corruption."

Whereas the expression "overriding … political objective" is based on the four arbitration cases mentioned, the word "national" is added to emphasize that a public state is involved.[44]

A natural interpretation of the Commentary is that abuse of power is neither a necessary, nor a sufficient, condition for war risk cover. If an overriding national political objective is detected, there is no need to establish misuse of power. On the other hand, misuse of power need not be explained by such overriding political motives. Misuse of power may be a reflection of a dysfunctional state and may indicate another motive, but misuse of power is not in itself a necessary condition for cover.

The overriding political objective requirement is further discussed in the *Heroic Idun* case.

The vessel *Heroic Idun* was insured by DNK for the period 21 July 2022 to 31 December 2022 on the Nordic Marine Insurance Plan of 2013, Version 2019. On 8 August 2022, Heroic Idun was drifting close to the AKPO offshore oil terminal, located approximately 10 nautical miles within Nigeria's Exclusive Economic Zone and about 200 kilometres from Port Harcourt. The vessel was under instructions from her charterers to load a cargo of crude oil at the AKPO Terminal. The area was designated as being high-risk for piracy. That evening, *Heroic Idun* was approached by the Nigerian Navy vessel *NNS Gongola*, which expressed concerns regarding the absence of the necessary clearances for loading at the terminal and ordered the vessel to proceed to Bonny Fairway Buoy, located approximately 64.5 nautical miles from the AKPO Terminal and serving as a key operational base for the Nigerian Navy.

The assured argued that the Master and the crew were unable to identify *NNS Gongola* as a naval vessel and, therefore, perceived the approach by the unidentified vessel as a potential piracy attack. Due to this misunderstanding the Master did not comply with the order to proceed to Bonny Fairway Buoy, but decided instead to sail Heroic Idun away from the potential threat and out of Nigerian waters. The insurer, on the other hand, argued that the Master and crew did indeed recognize the vessel to be a naval vessel and, in any event, that the absence of adequate steps being taken by the Technical Manager to identify the approaching vessel as a naval vessel amounted to gross negligence under the insurance contract.

After *Heroic Idun* had sailed away from NNS Gongola, she was drifting in international waters between 9 and 12 August 2022 outside of the Nigerian EEZ while assessing the situation and exploring the options to proceed. However, on 12 August 2022, at the request of the Nigerian authorities, *Heroic Idun* was arrested in the EEZ of São Tomé and Príncipe by the Equatorial Guinean Navy vessel Capitan David. The arrest was effected on the basis of alleged violations said to have been committed by the vessel in Nigerian waters and that the vessel had evaded NNS Gongola. The vessel and its crew were

44 Commentary 2023 p. 58 to Cl. 2-9 sub-clause 1 letter b.

subsequently detained in Equatorial Guinea for a period of approximately three months. In addition, the claimant was required to pay a fine of approximately EUR 2,000,000 in respect of alleged breaches of Equatorial Guinean law.

On 11 November 2022, again at the request of the Nigerian authorities, *Heroic Idun* and its crew were escorted and transferred from Equatorial Guinea to Nigeria.

Upon arrival, both the vessel and its crew were formally charged with respect to the events that occurred outside the AKPO Terminal on 8 August 2022. They remained in detention in Nigeria for a further period of more than six months.

The *Heroic Idun* was released on 27 May 2023, following a plea agreement between the assured and the Nigerian State. Under the agreement, the assured agreed to pay restitution in the amount of USD 15 million and to publish a formal apology, expressing its sincere regret for the difficulties caused to the Nigerian Navy and any embarrassment arising from the vessel's evasion of the Nigerian navy on 8 August 2022.

The assured's primary claim was for USD 180,000,000 plus interest, based on the contention that *Heroic Idun* was "captured at sea" by a "foreign State power", cf. NP. Cl. 2-9 sub-clause 1 letter b and not released "within six months from the day the intervention took place", cf. NP Cl. 15-11.

The main contested issue in relation to the primary claim was whether the detention of *Heroic Idun* by Equatorial Guinea, and/or the subsequent detention by Nigeria, qualified as interventions "made for the furtherance of an overriding national or supranational political objective" within the meaning of Clause 2-9 sub-clause 1 letter b. The insurer argued that none of the interventions were undertaken in furtherance of such an objective, but rather for the purposes of ordinary law enforcement, which falls outside the scope of cover under the war risk insurance.

The Tribunal pointed out that the chain of events that began on 8 August 2022 with the Nigerian Navy's request for a seemingly routine inspection of *Heroic Idun* would generally qualify as an instance of law enforcement and not a war risk. "However, on a panoramic view of the facts, there are features of this case which stands out and could distinguish it from a matter of ordinary law enforcement that is not covered by the war insurance" (para 1220). The Tribunal found it unlikely that the sequence of events that happened would have occurred without decisions and coordinated actions by governmental or other overarching authorities of Equatorial Guinea and Nigeria. It was "also apparent that the cooperation between the two States in relation to the arrest and detainment of the *Heroic Idun* formed part of a broader policy aimed at combatting piracy and maritime crime in the region. Moreover, the *Heroic Idun*'s evasion from the Nigerian Navy on 8 August 2022 seems to have caused embarrassment to the Navy and to have been perceived as reflecting negatively on its progress and deterrent capacity in combating piracy and maritime crime" (para 1223).

Given "the governmental functions, policy issues, and concerns involved, the intervention against the vessel might be said to have had a "political dimension", in the conventional understanding of that term. The pivotal question for the Tribunal is whether this "political dimension" meant that the interventions were "made for the furtherance of an overriding national or supranational political objective" in the meaning of Clause 2-9 sub-clause 1 letter b and thereby was covered by the war risk insurance" (para 1224).

The Tribunal analyzed the expression "overriding … political objective" as used in the four arbitration cases and the Commentary and stated:

> "that although interventions by lower-level state authorities may be political in a broad sense – for example, if taken to influence the policy decisions of the president or government, to strengthen the authority's position in relation to rival institutions, or to affect decisions on funding – such interventions are not covered by war risk insurance unless they are carried out in furtherance of an overriding political objective established at a higher level of the state hierarchy. In the Sira case, the sole arbitrator observed that an intervention by a lower-level body, such as detaining vessels in an attempt to win the favour of political candidates ahead of a presidential election or to "make a mark" in relation to other government entities at the same level, could not in itself be regarded as an act taken in furtherance of overriding political objectives".[45]

The Tribunal further observed that "political objective" in this context had a rather narrow meaning; "Interventions for any political objective in general will not qualify for cover. The relevant political objectives are qualified by the characterization "typical for war or times of international crisis and can often be explained by foreign policy considerations" and negatively by the exclusion for law enforcement and regulations. Hence, the term "overriding political objective" must be read in conjunction with these qualifications" (para 1247).

The Tribunal pointed out that although the Commentary used the expression "typical for war or times of international crises and often can be explained by foreign policy considerations", this expression was not discussed further (para 1249). The expression could not be similar in meaning to war or war-like conditions, as this was covered in letter a (para 1250). The qualification originated from the *Chemical Ruby* case, where the sole arbitrator suggested that a politically motivated detention during peacetime may also be covered, giving the following two examples of such cases:

45 Para 1245, referring to *Sira*, last page.

1) A detention forming part of a boycott or retaliatory action against the vessel's flag state, or the state from which the cargo originates or to which it is destined, where the specific circumstances of the vessel play a lesser role;
2) A politically motivated detention based on an unfounded suspicion that the insured vessel has violated regulations aimed at protecting the security of the state in question, or on a suspicion that persons on board have engaged in espionage, or assisted saboteurs, insurgents, or similar actors (para 1251).

The Tribunal also observed that whereas the Commentary used the term "international" crises, this was not reflected in the wording of the arbitration cases and that one had to include "national crisis" to give meaning to the context (para 1254).

The Tribunal concluded that the difficulty of analyzing the individual components of the expression "interventions for the furtherance of overriding political goals typical for war or times of international crisis" in isolation "strongly suggests that the phrase should be understood as a whole in the context in which it was used in the *Chemical Ruby* case, namely as a flexible requirement encompassing key situations covered by war risk insurance, by contrast to Law Enforcement" (para 1256). As a result, the Tribunal found it necessary to carry out an overall assessment of the circumstances, guided by those general characteristics of covered situations and contrasting them with the types of "Law "Enforcement" measures that are excluded from cover under the provision (para 1257).

The Tribunal referred to the remarks in the Commentary on the delimitation of overriding political goals with regard to the "Law Enforcement" referred to above (para 1258) and remarked that the reasoning and the examples "have a strong bearing on the understanding of what is not to be considered "overriding political objectives" in Clause 2-9, sub-clause 1(b). Thus, even though law enforcement, by way of interventions against vessels in principle, could have been considered to promote overriding political objectives in a broader and conventional understanding of that expression, such as political objectives relating to national security, public health, and the regulation of trade and commerce, it is not covered by Clause 2-9, sub-clause 1(b). The latter illustrates that it may be "easier to determine what is not covered by Clause 2-9, sub-clause 1(b) than setting out what is covered" (para 1259).

The Tribunal emphasized that the Commentary on law enforcement did not mention measures taken to combat piracy. The Tribunal however agreed with the *Sira* case that such measures must be considered to fall within the scope of police regulation "in its pure form" (*Sira* case, p. 265) (para 1260).

The Tribunal further pointed out circumstances that would not be sufficient to qualify as "overriding ... political objectives":

1) Misuse of power. An intervention that significantly exceeds what was necessary or common for the relevant kind of law enforcement, may indicate that it was motivated by "an overriding political motive",[46] but that is not sufficient. The assessment of "misuse of power" was not to be made using an objective norm but should be based on what could be expected in the relevant legal system (para 1262).
2) The involvement of the president or government (1263). "In legal systems that do not adhere to the same separation of powers between the executive and the judicial branch as in, for example, the Nordic countries, it may not be unusual for the government to be involved in important matters or for certain decisions that would in other countries typically be made by the courts. However, as with misuse of power, the fact that decisions relating to an intervention justified as law enforcement are made by the president or any other overarching body may, if supported by other circumstances, indicate that the true motive behind the intervention is to further an overriding political objective" (para1264).

The Tribunal also discussed the problems relating to proving the objectives of the intervention taken (para 1272). A major problem in this regard was that neither the insurer nor the assured normally had first-hand access to evidence showing whether or not an intervention made by authorities in a state, often a foreign state, was motivated by "overriding political objectives", and that it would be hard to obtain access to such evidence. The relevant state would often not be willing to provide access to such evidence, which might be politically or diplomatically sensitive. Furthermore, the relevant state might have an evident interest in not shedding light on such a case; for example, where its authorities have not complied with the rule of law (para 1273).

Based on the legal sources, the Tribunal put forward the following guidelines to establish whether the intervention was motivated by overriding political objectives:

a) The general domestic and foreign political situation may explain the detention, with the specific circumstances of the individual vessel playing a lesser role. The intervention is generally politically motivated if the intervention against the vessel is merely instrumental in achieving a broader political objective; for example, where the detention forms part of a boycott or retaliatory action against the vessel's flag state, or against the state from which the cargo originates;

46 Para 1261 with reference to the *Germa Lionell* case as referred in Wilhelmsen and Bull, p. 97, and Brækhus and Rein, p. 74.

b) The intervention is caused by an unfounded suspicion that the vessel has violated regulations intended to protect the security of the state in question, or has otherwise threatened the state's security interests; for instance, suspicions that the crew on board, or individuals connected to the shipowner, have engaged in espionage or provided assistance to saboteurs or political opponents of the state;
c) The intervention exceeds what would be considered necessary for the purpose of law enforcement; for example, if its duration is longer than usual by the standards of the legal system in question, or if the authorities resorted to violence against the master or crew in connection with the intervention;
d) The intervention against the vessel was initiated or involved participation by the government or another overarching authority, and it cannot reasonably be explained as a legitimate act of enforcing customs, police, safety, or navigation regulations, or as the enforcement of any private law rights, having regard to how such decisions are normally made in the state in question;
e) Circumstances of war and crisis, broadly understood, may generally support a finding that the intervention was carried out in furtherance of an overriding political objective, and ease the evidentiary threshold required to show that it is attributable to such an objective, rather than to an act of law enforcement (para 1278).

The assured had argued that the war risk insurance was triggered for the period from 12 August 2022 to 28 May 2023, as a result of the capture and subsequent detention of *Heroic Idun* by Equatorial Guinea and, later, by Nigeria. The assured contended that the following decisions made by the authorities of Equatorial Guinea and Nigeria should be assessed separately in respect of their motives:

- The evasion of *Heroic Idun* from the Nigerian Navy on 8 August 2022;
- The capture of *Heroic Idun* on 12 August 2022;
- The further detainment of *Heroic Idun* in Equatorial Guinea;
- Equatorial Guinea's decision to rendition *Heroic Idun* to Nigeria, and;
- Nigeria's request of *Heroic Idun* and the detention in Nigeria.

The Tribunal analyzed all these decisions based on the factual evidence as presented by the assured and concluded that none of the decisions were based on overriding political objectives as required by Cl. 2-9 sub clause 1 letter b (para 1387). As a final step, the Tribunal tested this conclusion by way of an overall assessment, measured against the guiding factors set out above:

a) There was little to suggest that the interventions could be explained by foreign policy considerations. It was not evidenced that the measures constituted any form of retaliatory action directed at *Heroic Idun*'s flag state or any other state involved in the ownership, operation, or management of the vessel, or that the vessel was used as a tool or proxy to advance any political objective beyond those connected to law enforcement. On the contrary, the submitted evidence indicated that the intervention was triggered by what the Nigerian authorities perceived as a breach of applicable regulations through entry into the AKPO Terminal area without the necessary authorisation, *Heroic Idun*'s failure to comply with instructions issued by the Nigerian Navy, and the transmission of what was understood to be a false piracy alert.
b) Although representatives of a Nigerian delegation attending an International Maritime Organization meeting in London in November 2022 are on record as stating that *Heroic Idun* matter "bothers on National Security", there was no evidence that this incidence posed any immediate or concrete threat to the national security interests of Nigeria. Nigeria had never claimed that the Vessel was in violation of any rules or regulations that represented a threat to the security of the Nigerian state.
c) Even if the conduct of Nigeria under the investigation did not comply with ordinary standards of due process, the evidence presented in relation to other interventions involving vessels in Nigeria did not support a finding that the duration of the criminal investigation in this case exceeded what would ordinarily be regarded as typical within the Nigerian legal system.
d) Although the intervention against *Heroic Idun* probably involved participation by the government or other higher authorities, the Tribunal found that such involvement was essentially motivated by law enforcement, that is, the enforcement of customs, policing, safety, or navigation regulations, and not undertaken in furtherance of any overriding national or international political objective.
e) Although maritime crimes no doubt raised serious concerns for Nigeria at the time of the intervention, the situation could not be characterized as one of "war or times of crisis" that could warrant a lowering of the threshold for finding that the intervention was driven by an overriding political objective, rather than by an interest of law enforcement (para 1388).

A principal observation from this case is that the expression "for the furtherance of overriding political objectives" is not easy to interpret, either when based on the wording used, or if based on the Commentary or the previous arbitration cases. The Tribunal states that the difficulty of analyzing the individual components of the expression "interventions for the furtherance of overriding political goals

typical for war or times of international crisis" in isolation "strongly suggests that the phrase should be understood as a whole in the context in which it was used in the *Chemical Ruby* case, namely as a flexible requirement encompassing key situations covered by war risk insurance, by contrast to Law Enforcement" (para 1256). Furthermore, the overall assessment is made based on an assumption that "it may be easier to determine what is not covered by Clause 2-9, sub-clause 1(b) than setting out what is covered" (para 1259) and provides 5 elements for the evaluation that may give a "flexible tool" for the assessment.

This may provide "flexibility" for the insurer, but it is difficult for the assured to deduce all these elements from the expression "overriding political objectives". The approach therefore appears contrary to considerations of legal security and predictability.

From the perspective of legal security and predictability it is also unfortunate that an understanding of the clause needs to combine the wording with the Commentary's reference to "war or times of crisis" to map out the real meaning of the clause. The expression of "war" creates some confusion in terms of the relationship between Cl. 2-9 sub-clause 1 letter a and b, and the expression "times of crises" is rather vague and not further developed in the Commentary. In particular, it is unclear when a dysfunctional state not operating according to Nordic legal standards crosses the border to be in a state of "crisis".

It is also unfortunate that the clause apparently raises considerable problems regarding evidence, in particular that it cannot be expected that the foreign state involved will provide any help in producing relevant evidence. Even though the Tribunal in the *Heroic Idun* case had access to considerable evidence, this will not always be the case.

Another observation is that even if the capture of *Heroic Idun* started with a breach of trade legislation, and the Tribunal found no evidence that the decisions made by the involved states in the chain of events after the capture were made for the furtherance of an overriding political objective, the chain of events illustrates that what starts as unlawful conduct may lead to situations appearing with an extraordinary character outside the scope of marine perils normally encountered in marine trading. Although it may be argued that such delay is to be expected from dysfunctional states, and the detainment in this case could also be explained by the vessel's behavior after the breach by fleeing to another jurisdiction and raise a false piracy alarm, the detainment from a general perspective appears to be out of proportion compared to the initial breach. This raises the question of the possibility of loss of hire cover under the marine risk insurance for detainment in cases where the delay is caused by such breaches, presuming the breach is outside the scope of the NP Chapter 3.

3.3.4 Causation

NP Cl. 2-9 sub-clause 1 letter b covers the defined interventions only if the intervention "is made for the furtherance" of an overriding political objective. As mentioned above in 3.3.1, the expression "is made for the furtherance" contains a requirement for causation.

According to the wording and the conditional sine qua non principle, the intervention is caused by the overriding political objective if the overriding political objective was a necessary condition for the intervention, i.e. in the absence of such objective there would be no intervention.[47] If it is established that there was no overriding political objective for the intervention, we are outside the scope of Cl. 2-9 sub-clause 1 letter b. It is, however, possible that there is a combination of objectives that qualifies as necessary conditions, for instance where a sanction

47 Wilhelmsen and Bull p. 116.

against a breach of trade legislation is combined with overriding political objectives. This situation is regulated by NP Cl. 2-14, which reads:

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

The starting point in Cl. 2-14 is that the dominant-cause rule shall apply. If neither of the classes of perils is considered dominant, both shall be deemed to have had equal influence on the occurrence and extent of loss. The natural understanding of the expression "dominant cause" is that a relatively material predominance is required, in order to characterize a peril as the "dominant cause".[48] This is further elaborated upon in the Commentary to the provision: "It is not sufficient to reach the conclusion – perhaps under doubt – that one peril is slightly more dominant than the other; it is precisely the arbitrary choice between two causes which carry approximately the same weight that should be avoided. On the other hand, a 60/40 apportionment should probably constitute the upper limit for an equal distribution. If we get close to 66%, one of the groups of perils is after all considered twice as «heavy» as the other ".[49]

The "combination of perils" here consists of a combination of an overall political objective and other objectives for detention, for instance breaches of different kinds of legislation that provide a legal basis for an intervention against the vessel. The dual objectives can interact in different ways. One example is ND 2029 p. 6 NA *Team Tango:*

> The vessel was detained for lacking the necessary permit to import a cargo of urea fertiliser, which could lawfully be imported only by two designated Nigerian companies. It was undisputed that one motivation behind the restriction was to prevent the terrorist group Boko Haram from obtaining urea for use in bombmaking. However, in assessing whether the detention was taken in furtherance of an overriding political objective, the Tribunal held that, although the underlying reason for the restriction reflected such an objective, it was too remote to be regarded as the decisive cause of the detention. Rather, the arbitral tribunal found that the primary motivation of the intervention was the breach of import regulations, and that detention was a typical and foreseeable consequence of such a breach, regardless of any broader political motive.

In this case, the direct cause of the arrest was breach of trading legislation, but the trading legislation was partly based on overall political objectives. The Tribunal does not really discuss the issue, but the assessment is in conformity with previous practice on the combination of marine and war peril. The guideline based on these cases is that the direct or immediate cause is the dominant cause unless a previous cause, creates a substantial risk of the direct cause occurring.[50]

The claimant in the *Heroic Idun* case submitted that even if the intervention started as a matter of law enforcement, it could, at some point, acquire a political character within the meaning of NP Cl. 2-9, sub-clause 1 letter b. The Tribunal remarked that this could be the case if the intervention resulted in international criticism or the threat of sanctions by the flag state, and the government then intervenes to prolong the detention. In such a case, the intervention may be covered entirely under the war risk insurance from the point at which the political motive becomes the dominant cause of the intervention (para 1270). However, the Tribunal did not find this to be the case.

It is correct, as remarked by the Tribunal, that if an intervening governmental act to obtain overriding political objectives constitutes the dominant cause of a

48 Wilhelmsen and Bull pp. 124-125.

49 Commentary 2023 p. 86 to Cl. 2-14.

50 Wilhelmsen and Bull p. 126, Wilhelmsen (2022), para 9.64-9.68.

prolonged delay, the intervention will change from being a marine casualty to becoming a war casualty. However, in the *Heroic Idun* case, a casualty in the form of an intervention covered by insurance against marine perils had occurred. If a potential war peril had interacted with this casualty at a later stage, the starting point, according to the Commentary, would be that the casualty shall carry the most weight.[51] The main rule is therefore that if the marine casualty interacts with a new intervening war risk cause, the casualty is assessed as being the dominant cause.

51 Commentary 2023 p. 86 cf. p. 84 and ND 1941 p. 378 NA *Veslekari* and ND 1977 p. 38 NSC *Vestfold I*.

4 The UK regulation

4.1 Introduction

Since the ITCH/IHC are based on the named perils principle and do not mention intervention by state power, the implication should be that such interventions are not covered by the insurance against marine perils. Even so, the clauses contain the following paramount war exclusion:[52]

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

This means that the cover provided according to NP Cl. 2-8 on political risk is not covered by ITCH. The IWSCH 1995, however, covers the following perils:

> 1.2 capture seizure arrest restraint or detainment, and the consequences thereof or any attempt thereat
>
> ...
>
> 1.6 confiscation or expropriation

but with the following exclusions:

> 5.1.2 requisition or pre-emption
>
> 5.1.3 capture seizure arrest restraint detainment confiscation or expropriation by or under the order of the government or any public or local authority of the country in which the Vessel is owned or registered
>
> 5.1.4 arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations
>
> 5.1.5 the operation of ordinary judicial process, failure to provide security or to pay any fine or penalty or any financial cause

The content of these provisions is further outlined below in 4.2 and 4.3.

IWSCH 1995, similarly to NP Cl. 15-11, provides cover for detainment in Cl. 3:

> In the event that the Vessel shall have been the subject of capture seizure arrest restraint detainment confiscation or expropriation, and the Assured shall thereby have lost the free use and disposal of the Vessel for a continuous period of 12 months then for the purpose of ascertaining whether the Vessel is a constructive total loss the Assured shall be deemed to have been deprived of the possession of the Vessel without any likelihood of recovery.

IWSCH 1995 does not contain a blocking and trapping clause similarly to NP Cl. 15-12, but the following clause is much used:[53]

> It is hereby agreed that the Inability of the Vessel to sail from any port, canal, waterway or other place to the high seas for a continuous period

52 ITCH 1983/1995 clause 24, cf. IHC 2001/2003 clause 29.2.

53 LPO-444-For-use-with-Institute-War-and-Strikes-Clauses-Hulls-1-11.

> of 12 months as a result of the closure of the connecting channel to all vessels of such size or draft is within the term "restraint" appearing in Clause 3 of the Institute War and Strikes Clauses – Hulls 1.11.95 provided that such closure has arisen through the blockage of the waterway by a warlike act, or act of national defence.

The content of these provisions will depend on the definition of the different interventions as described in 4.2 and 4.3 below.

4.2 The covered perils

The perils that are covered in IWSCH Cl. 1.2 and 1.6 are "capture", "seizure", "arrest" "restraint", "detainment", "confiscation" and "expropriation". The terms are not mutually exclusive, and they overlap to a certain extent.

The cover applies to the actions that are described, regardless of any war or war-like situation, who is performing the actions, and the legal basis for the actions. The cover thus also applies in times of peace,[54] and there is no explicit requirement for state involvement or legal justification for the intervention. However, this may follow from interpretation of the concepts and from the exclusions discussed below in 4.3.

"Capture" is a taking by the enemy as prize, in time of war, or by way of reprisals, with intent to deprive the owner of all dominion or right of property over the thing taken.[55] "Capture" seems to presume a belligerent act.[56] It appears to include every act of seizing or taking by an enemy or belligerent.[57] Capture is prima facie a case of total loss, which gives the assured an immediate right to notice of abandonment. However, the loss cannot as a rule be said to be irretrievable at the moment of capture, so as to entitle the assured to treat it as an actual total loss, since there is no immediate loss of title. The loss of title occurs when there is an official sentence of condemnation pronounced by a prize court of the government of the captor.[58]

The UK concept of "capture" thus seems to imply either a state intervention or intervention by persons purporting to act on behalf of a state. This appears similarly to the traditional concept of capture in Norwegian marine insurance, but today, the word "capture" in this context is also used for seizure by pirates.

"Seizure" is a broader concept than "capture" and includes other forms of taking, such as taking by revenue or sanitary officers of a foreign State,[59] or due to smuggling by the ship's master.[60] Nor is "seizure" confined to acts of state. It includes seizure by pirates, passengers or by natives whose object is to plunder the vessel.[61] It embraces every act of taking forcible possession, either by lawful authority or by overpowering force.[62] The seizure need not be belligerent.[63] However, it does not include misappropriation by those already in possession of the ship.[64]

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54 Hudson, Madge, Sturges, *Marine Insurance Clauses*, 2012, p. 359, Keith Michel, *War, terror and carriage by sea*, 2004, pp. 204-205.

55 Arnould, *Law of Marine Insurance and Average*, Lnd. 2024, Volume II, p. 267-268.

56 Arnould p. 267 note 166.

57 Arnould p. 267, Hudson et al p. 342.

58 Arnould p. 269.

59 Arnould p. 267.

60 Michel pp. 203-204.

61 Arnould p. 267, Hudson et al p. 342, Michel p. 204.

62 Arnould p. 267-268, Hudson et al p. 342, Michel p. 205.

63 Michel pp. 205-207.

64 Arnould p. 268.

This means that "seizure" may be a state intervention, but the concept is broader and includes taking the vessel by forcible means from other groups. This concept is not used in the NP but appears to be included in the concept of "capture". Compared to the Nordic regulation, the interesting point is that both seizure by a state without any overriding political motive with reference to war or times of crisis, and also by political groups not qualifying as a state, is covered by war risk insurance.

The perils "arrests, restraints, and detainments" are also listed, without reference to involvement of a state. However, the interpretation is that these interventions must be performed by the ruling power of the country.

In the previous SG form of policy, the wording was instead "arrests, restraints, and detainments of all kings, princes and people of what nation, condition or quality soever". According to rule 10 of the "Rules of Construction of Policy" in Sch. 1 to the Marine Insurance Act 1906, these words are declared to refer to "political or executive acts", and do not include a loss caused by riot or by ordinary judicial process.[65] The reference to "kings, princes and people" no longer appears in the current perils clauses. But although the new policy forms are not a policy of like form, such as would make mandatory the Rules for Construction scheduled to the 1906 Act, it is nonetheless clear that the meaning of these perils has not been altered and that the principles laid down by rule 10 continue to apply. The word "people" did not mean mobs or multitudes of men, but instead referred to the ruling power of the country.[66]

These interventions are thus more narrowly interpreted than the interpretation of "seizure".

There is no clear distinction between the terms "arrest", "detainment" and "restraint", nor is there a clear distinction between arrest and capture, because there may be an arrest when the authorities intend to permanently confiscate the insured property.[67] However, the blocking and trapping clause only applies to "restraint", which according to the interpretation refers to interventions performed by a state and according to the provision itself only if the blockage of the waterway is "a warlike act, or act of national defence". This appears to correspond to Cl. 15-12, where blockage according to the Commentary must be performed by a foreign state in relation to a war risk.

Confiscation and expropriation refer to acts done by governmental authorities or by persons professing to represent those in power.[68] There is no judicial determination on these concepts in relation to this particular clause.[69] Such acts will normally also be included in the term "restraint". Both expressions are probably confined to circumstances where the appropriation of the vessel for public use is intended either to be permanent or to be reversible only on payment of some fine, penalty, or other exaction.[70] It is argued that these expressions are confined to circumstances where no compensation is paid.[71]

4.3 The exclusions

Cl. 5.1.2 excludes "requisition or pre-emption". This is similar to NP Cl. 2-8 letter c and Cl. 2-9 sub-clause 2 letter c and not problematic in the context of this article.

> "Requisition" refers to a formal act, rather than to the temporary occupation of a vessel and must usually import the compulsory taking-over of

65 Arnould p. 270, Hudson et al p.342.

66 Arnould p. 270.

67 Arnould p. 272.

68 Arnould p. 272.

69 *Miller's Marine War Risks* (Michael Davey, James Davey and Oliver Caplin eds, 4th edn, Informa Law from Routledge 2020) (Miller), p. 179.

70 Arnould p. 273.

71 Arnould p. 273.

> a vessel on the part of a government acting in a formal manner, which may involve either a transfer of property or title or hiring of the vessel to the government.[72] It is suggested that requisition is normally made by the vessel's flag State, as a State normally does not have authority to requisite a foreign vessel, but this is not clear.[73]

Cl. 5.1.3 excludes "capture seizure arrest restraint detainment confiscation or expropriation by or under the order of the government or any public or local authority of the country in which the Vessel is owned or registered".[74] This is similar to NP Cl. 2-9, as measures taken by the vessel's own state will not be covered by war risk insurance. The exclusion is also parallel to NP Cl. 2-8 letter b in situations where the mentioned interventions are made for the furtherance of overriding political objectives. On the other hand, if such interventions are made with other objectives, for instance due to breach of trade regulations, they will be covered as a marine risk by the all-risk principle in Cl. 2-8.

Cl. 5.1.4 excludes "arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations". This exclusion applies to both own and foreign states, but is limited to interventions based on certain regulations.

According to court practice, the expressions "customs or trading regulations" are to be given a "businesslike interpretation in the context in which they appear", in light of the fact that the clauses are to be used worldwide and are intended to cover laws in force anywhere in the world without turning on niceties of local law.[75] The decisive issue is therefore whether the regulation concerns trade or customs, not how the regulation is structured. This means, for instance, that the term "customs regulation" refers to laws in force in the country concerned, whatever their form, which deal with smuggling or other offences in the field of customs.[76] It includes smuggling of narcotics, even if beyond the scope of UK customs legislation.[77] Where a court purported to condemn a vessel on account of smuggling activities by the crew, the assured would have the burden of displacing the prima facie application of the exception by establishing a break in the chain of causation, which he could only do by showing either that the court which ordered the confiscation of the vessel for smuggling had knowingly acted outside its jurisdiction, or else that the court had acted in response to some political intervention unconnected to the offence.[78] It does not matter whether or not the owner is acting in good faith.[79]

The concept of "trading" refers to regulations forbidding, controlling or otherwise regulating the sale or importation of goods into a country and the carriage

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72 Arnould p. 292, see also Hudson et. Al p. 364-365, Miller p. 225.

73 Miller p. 189.

74 It was a supposed rule of UK law that a marine insurance policy subject to that law would not cover the risk of British capture, on the grounds of public policy. However, once the House of Lords had decided that such cover was afforded if recovery could not be denied due to illegality or war-related public policy, a specific exclusion was included to secure this result, cf. British and Foreign Marine Insurance Co v. Sanday, (1916) 21 Com Cas 154, Hudson et al p. 365.

75 Panamanian Oriental SS Corp v Wright (*Anita*) [1970] 2 Lloyd's Rep 365, Atlasnavios Navegacao Lda v Navigators Insurance Co Ltd (*B Atlantic*) (2019) A.C. 136 (2018) 2 Lloyd's Rep 1, Sunport Shipping Ltd V Tryg-Baltica International (*Kleovoulos of Rhodes)* [2003] EWCA Civ 12, [2003] 1 All ER (Comm) 586, para 38, EWHC 802 (Comm), [2012] 1 Lloyd's Rep 629, paras 22 and 23, *Aliza Glacial* [2002] EWCA Civ 577, [2002] 2 All ER (Comm) 39.

76 *Anita*, Arnould p. 294-295.

77 *Kleouvoulos of Rhodes*, Hudson et al. p. 365-366, Arnould p. 294.

78 *Anita*, Arnould p. 294.

79 Hudson et al. p. 366, Arnould p. 295.

of goods for that purpose.[80] This would mean that arrest of the vessel due to lack of necessary permission for loading oil, which was the situation in the *Heroic Idun* case, would be excluded from the UK war cover.

The concept of trade does not, however, include regulations prohibiting or controlling fishing for the purposes of conservation.[81] This appears to be different from the NP regulation, as the Commentary emphasizes that: "If the ship is arrested/captured at sea by the Coast Guard or representations of the police or customs authorities to hinder or investigate illegal fishery, import or export or breach of trade regulations, this will not be covered."[82]

There are no authorities on the meaning of the words "quarantine regulations", but in a recent case concerning a similar term in the American conditions, and applying the same approach for interpretation, the judge stated that "it is clear that quarantine regulations are laws concerned with the protection of health, whether of people or animals."[83]

In the same case, the judge found that detainment of the vessel by the Indonesian government for anchoring without permission in Indonesian territorial waters "had no relevant similarity to an arrest or detention under customs or quarantine regulations. It was completely unconnected with the import of goods (the vessel was in ballast) and with health (there was no question of any cargo being infected, as there was none, and no suggestion of any member of the crew having any disease) and there was no suggestion that the crew was engaged in smuggling."[84]

Win Win dropped anchor in a position just inside Indonesian territorial waters on 14 February 2019. This was within an area, partly inside and partly outside Indonesian territorial waters, which was generally understood to be Eastern OPL Singapore and which had for many years been used as an anchorage by hundreds, perhaps even thousands, of vessels without any problem. Many other vessels were also anchored in the vicinity when *Win Win* arrived and, prior to February 2019, there had been no known instances of any vessel being detained or reprimanded by the Indonesian authorities simply for anchoring within territorial waters.

This all changed very suddenly in February 2019. Starting from around 8 February 2019, the Indonesian Navy arrested a large number of ships for anchoring in territorial waters without permission. On 17 February 2019, *Win Win* was boarded by armed personnel from the Indonesian Navy, who demanded and removed all her documents and told the Master that the vessel was being detained because it had entered Indonesian waters illegally. The Navy ordered the vessel to shift to a different location in the port of Batuampar under threat of seizure of the vessel and the arrest of the captain. *Win Win* dropped anchor on 18 February 2019. Attempts were made over the following weeks to obtain the release of the vessel, but the authorities would not release the vessel unless the assured paid a bribe. The vessel was formally redelivered to the assured on 9 January 2020.[85]

The vessel was insured on American war risk conditions which covered "Capture, seizure, arrest, restraint or detainment, or any attempt thereat" with an exclusion for "Arrest, restraint or detainment under customs or quarantine regulations and similar arrests, restraints or detainments not arising from actual or impending hostilities". The agreed value in case of total loss was US $37.5 million. Detainment of the vessel for six months constituted total loss, and the assured claimed the agreed value as the vessel was detained for more than that period. The insurers denied cover and argued that the detainment was under "similar" arrests as for that of customs or quarantine regulations. The court interpreted the conditions "as it would be understood by commercial people in the shipping and marine insurance industry", which was the same approach as that used to interpret the UK clauses. The claim was granted.[86]

Whether the detainment in this case would be covered by the NP Cl. 2-9 sub-clause 1 letter b is not clear. The Indonesian Law on Shipping records stated that "Every

80 Arnould p. 296.

81 Arnould p. 296.

82 Commentary 2023 p. 58 to Cl. 2-9 sub-clause 1 letter b.

83 *Win Win*, Delos Shipholding SA & Ors v Allianz Global Corporate and Specialty SE & Ors [2025] EWCA Civ 1019 para 53.

84 *Win Win* para 58.

85 *Win Win* para 11-17.

86 *Win Win* para 39-40.

vessel that sails is obligated to possess a PortClearance issued by the Harbour master", and the reason for the detainment was a breach of this rule. The purpose of the law was to "strengthen national resilience, to provide for a national transportation system to support economic growth and regional development, and to strengthen state sovereignty".[87] It may be argued that exercising the right to control the entry into a country is a political decision and that to strengthen state sovereignty is an overriding political objective, but there was no mention in the case of war and times of crisis. The NP Commentary also mentions that "interventions in accordance with applicable law for the purpose of enforcing customs-, police-, safety- or navigation-regulations or any private law rights against the insured vessel are outside the scope of the war risks insurance cover."[88] The Indonesian regulation could be qualified as a rule on navigation in Indonesian territorial waters.

The link between the regulation and the interventions is worded differently in the clause, cf. "under" as opposed to "by reason of infringement". In the *Win Win* case, however, the judge argues that the term "under" means the same as "by reason of", with regard to breach:[89]

> "In my judgement, and in agreement with Lord Justice Lloyd in *The Wondrous* [1992] 2 Lloyd's Rep 566, 571, I consider that there is no significance to be attached to the fact that in the English clause the detention in one case must be 'under' a particular kind of regulation and that in the other case it must be 'by reason of' a different kind of regulation. … I consider the better view to be that these are equivalent wordings and would be so understood by business people."

The expression in Cl. 5.1.3 is that the detainment must be "by reason of" infringement. This suggests a causal link between the actual infringement and the detainment.[90] In the UK regulation, this issue is regulated through the principle of "proximate cause".[91] The question here is thus whether the expression "by reason of" involves a question of proximate cause. This issue was discussed in the *B Atlantic* case:[92]

The case concerned a substantial quantity of narcotics that was deliberately planted on board a vessel in harbour in Venezuela. On discovery of the drugs, the vessel was impounded as part of judicial proceedings.[93] It was argued that the secreting of drugs constituted a malicious act that was covered by the war risk insurance clause 1.5, which provided cover for 'any terrorist or any person acting maliciously or from a political motive'. If so, the question was whether this malicious act was the proximate cause of the loss, and not the detention by reason of infringement of customs regulations, which was excluded. The Appeal Court considered whether the phrase 'by reason of' the infringement involved a question of proximate cause, but argued that 'by reason of' then begged the question of 'why' the vessel was detained, and that this question was not identical to the question of proximate cause.[94] The Supreme Court rejected the argument that the proximate cause was the malicious act rather than the infringement, as the malicious act could not be distinguished from the infringement. The court further stated that as 'a matter of construction, the analysis of the present Clauses falls into three stages. The first stage, if clause 1.5 is capable of applying at all, is that there was a loss caused by a "person acting maliciously". Assuming that there was, the second stage is that the means by which loss arose was the vessel's consequent detainment and the fact that this lasted for a continuous period of six months. Only on this basis were the owners able to treat the vessel as a constructive total loss under clause 3. The third stage involves the question whether such detainment was by reason of any

87 *Win Win* para 18 and 21.

88 Commentary 2023 p. 58 to Cl. 2-9 sub-clause 1 letter b.

89 *Win Win* para 55.

90 Michel p. 191.

91 Wilhelmsen and Bull, p. 128; Miller ch. 28, Arnould ch. 22.

92 Here referred from Miller p. 154, 191.

93 Miller p. 154.

94 Miller p. 191.

infringement of customs regulations within clause 4.1.5.'[95] It is 'possible that a loss may both be caused by a person acting maliciously within clause 1.5 and at the same time arise from detainment by reason of infringement of customs regulations within clause 4.1.5.'[96] '[W]hile the general aim in insurance law is to identify a single real, effective or proximate cause of any loss, the correct analysis is in some cases that there are two concurrent causes. This is particularly so where an exceptions clause takes certain perils out of the prima facie cover'.[97] The court concluded that even 'if it had been possible to view the loss as caused by a person acting maliciously within clause 1.5, it would still have been excluded by clause 4.1.5 as arising, at least concurrently, from detainment by reason of infringement of customs regulations.'[98]

It appears from this that a loss can be proximately caused, both by a peril insured against and by a peril that is excluded, and that in such case, the exclusion prevails. Applied to the *Heroic Idun* case, the seizure was caused by a breach of trading regulation, which is excluded. Even if a subsequent state act intervened, the loss would be excluded as "arising, at least concurrently", by reason of breach of trade regulation. This appears to be similar to NP Cl. 2-14. Even if – as noted by the Tribunal in the *Heroic Idun* case – a subsequent state action may constitute a dominant cause for prolonged detention, the main rule is that the casualty constitutes the dominant cause.

In general, the exclusion in Cl. 5.1.4 would also follow from the requirement in NP Cl. 2-9 sub-clause 1 letter b that the intervention is made for the furtherance of overriding political objectives, and where the Commentary expressly delimits against interventions regarding customs and trading regulations. However, the requirement for overriding political objectives will bar cover for breaches of several types of legislation that are not excluded in Cl. 5.1.4, thus providing a much narrower war risk cover for such breaches. On the other hand, similarly to what is stated on Cl. 5.1.3, such interventions will be covered by marine insurance pursuant to the all-risk principle in NP Cl. 2-8. This cover does not, however, contain a total loss clause for seizure, detainment or blocking and trapping.

Cl. 5.1.5 excludes the "operation of ordinary judicial process, failure to provide security or to pay any fine or penalty or any financial cause". This conforms to the exclusions in NP Cl. 2-8 letter d and Cl. 2-9 sub-clause 2 letter a.

95 *B Atlantic* para 41. See also Miller p. 191.

96 *B Atlantic* para 42.

97 Ibid para 43.

98 Ibid para 55.

5 Some reflections

It appears that the strengthening of the cover for insurance of marine risk regarding political risk in 2019 was highly relevant in relation to the problems met by the ship owner industry in today's geopolitical surroundings. This cover is also far better than the UK marine risk cover. The NP marine risk cover does not, however, include total loss cover for seizure/detention and blocking and trapping or loss of hire cover if the vessel is prevented from leaving port.

The NP war risk cover appears as a main rule to be similar to the UK war risk cover even if the approach is different. The interventions covered by NP Cl. 2-9 letter b appear to be covered also under the UK war risk clauses, and the cover for detention and blocking also seems to be similar.

However, the UK war risk clauses cover "arrest restraint detainment confiscation or expropriation" by foreign state unless these interventions are under quarantine regulations or by reason of infringement of any customs or trading regulations. This is a broader war risk concept than NP Cl. 2-9 sub-clause 1 letter b requiring interventions "for the furtherance of overriding political motives" as the Commentary delimit such overriding political motives against "interventions in accordance with applicable law for the purpose of enforcing customs-, police-, safety- or navigation-regulations or any private law rights against the insured vessel are outside the scope of the war insurance cover" and states that if "the vessel is arrested/captured at sea by the Coast Guard or representations of the police or customs authorities to hinder or investigate illegal fishery, import or export or breach of trade regulations, this will not be covered. The same is true if the ship is arrested or detained in port because of doubt as to whether the ship is compliant with the rules regarding technical and operational safety, or because the crew is suspected of smuggling." It should be noted that this difference is only relevant for the detainment cover and not for the blocking and trapping cover, but it is still a distinguished difference.

As an extension of this, it can be questioned whether the criteria chosen in NP to distinguish between war and marine risks for the sake of clarification are convenient. In the words of the *Heroic Idun* case, the difficulty of analyzing the individual components of the expression "interventions for the furtherance of overriding political goals typical for war or times of international crisis" in isolation "strongly suggests that the phrase should be understood as a whole in the context in which it was used in the *Chemical Ruby* case, namely as a flexible requirement encompassing key situations covered by war risk insurance, by contrast to Law Enforcement" (para 1256). This implies that the expression in the Plan text is quite meaningless on its own, and that the core of the matter lies in the Commentary, which provides little help on what constitutes "typical for war and times of international crisis". Again, from the *Heroic Idun* case: it is easier to state what is not covered than what is covered. The guidelines listed in the case and the problems pointed out regarding evidence further demonstrate that the criteria are not easy to use.

This is interesting because the opposite approach – to exclude what is not covered – is used in the UK war risk conditions. These conditions start out with a wide blanket cover for a long list of interventions – broadly speaking comprising the same interventions as listed in fewer words in NP – but then narrow the cover down through exclusions. The interesting exclusions in this context are exclusions for interventions made by own state power (cl. 5.1.3) and "under quarantine regulations or by reason of infringement of any customs or trading regulations" (cl. 5.1.4). The latter exclusion does not include "capture", but the word capture has a narrower meaning and does not encompass interventions taken for the mentioned reasons. This approach could easily be adjusted to NP Cl. 2-9 sub-clause 1 letter b by adopting similar wordings to the UK conditions for the exclusions: "capture at sea, confiscation, expropriation and other similar interventions that is not made

by own state power or caused by infringement of regulations concerning quarantine, customs or trading".

There are two advantages to this approach. First, as mentioned, some market participants have criticized NP for providing a narrower cover than the UK conditions, which as described above is correct in this regard. The second advantage is that the Commentary can outline the cover by defining and discussing the exclusions, instead of trying to explain the expression "overriding political objectives", which has turned out to be extremely difficult. The exclusion may also be broadened by adding the expression "or similar regulation" if a narrower war risk cover is wanted.[99]

On the other hand, the solution creates a disadvantage for the insurer because the burden of proof will shift: the starting point is that the interventions are covered, and the insurer will have the burden of proving that the intervention was made by own state or due to the mentioned breaches of the listed legislation. This outcome will, however, be similar to the UK regulation.

The risk for seizure by military groups that is not acting on behalf of a governing state is covered by IWSCH 1.2, and included in the cover for detainment, but not for blocking. This risk appears to be covered by NP 2-9 sub-clause 1 letter c, but it is more uncertain whether Cl. 15-11 sub-clause 2 applies to this situation.

The UK conditions have no extended loss of hire cover similarly to NP Cl. 15-16 sub-clause 2. This extension is limited to war risk as defined in Cl. 2-9 sub-clause 2. To avoid pressure against the total loss cover in Cl. 15-11 and 15-12 it may be convenient to consider an extension of such loss of hire cover to blocking by terrorists or military groups. In light of the criteria "for the furtherance of overriding political motives", it may also be argued that there is a need for loss of hire cover in severe cases of corruption/misuse of power. Even if it is generally agreed that a breach of trading and customs regulation is not a war risk, such breaches may be outside the knowledge of the assured and may have consequences in the form of misuse of power that is out of proportion compared to the initial breach. However, this presumes that a majority of the assureds want such cover in the general standard conditions, instead of political risk insurance effected by the individual assured that needs it.

99 See the American clause referred to in the *Win Win* case.

Freedom of international maritime transport services in EU: a short commentary on C-413/24 *Vlaams Gewest v P&O North Sea Ferries Limited*

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Content

1. Introduction

In the Case C-413/24 *Vlaams Gewest v P&O North Sea Ferries Limited*,[1] the EU Court of Justice (CJEU, or the Court) issued a preliminary ruling on the questions submitted by the referring Belgian court in the proceedings between the claimant, the Flemish region, and the defendant, the shipping company P&O Ferries Limited and P&O North Sea Ferries Limited (its Belgian subsidiary). The case concerned the lawfulness under both Regulation 4055/86 on the free movement of international maritime transport services[2] and Article 56 TFEU[3] of the indistinctly applicable national charge for vessel traffic services (VTS) in a Flemish port. The case also concerned the application of the international maritime transport services provisions of the EU- UK Trade and Cooperation Agreement,[4] adopted following the United Kingdom (UK)'s withdrawal from the EU (known as 'Brexit'), since the defendant, the shipping company, was a national of the UK.

Although, in the *Vlaams Gewest* case, the Court generally confirmed the well-established interpretation of EU law rules on the freedom of movement of international maritime transport services, the judgment is worth taking note of. The Court explains whether, and by what criteria, national provisions constituting a restriction on free movement of services may be justified. Importantly, this case illustrates the implications of 'Brexit' on the freedom of movement of international maritime transport services: the defendant is a UK shipping company operating ships from and to the EU Member State concerned both before and after the expiry of the transition period in the EU-UK arrangements. Thus, the case allowed the EU Court to determine whether freedom to provide maritime transport services still applies under the same conditions following the UK's departure from EU.

This article will first briefly present the factual and legal background of the *Vlaams Gewest* case (Section 2). Then, it will explore the CJEU's approach and reasoning in the questions referred to it in the case: the concept of restriction of the free movement of international maritime transport services and the criteria for lawfulness under EU law of such restrictions (Section 3). The Court's analysis of the (non-)application of Regulation 4055/86 to individuals established in the UK, and the discussion of the effects of the cooperation agreement between the EU and the UK, are presented in Section 4. Section 5 contains a short comment and conclusions.

1 C-413/24 *Vlaams Gewest v P&O North Sea Ferries Limited, P&O Ferries Limited,* judgment of 22 January 2026.

2 Regulation 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries [1986] OJ L 378, 1-3.

3 Treaty on the Functioning of the European Union [2012] OJ C 326/47.

4 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, on the one part, and the United Kingdom of Great Britain and Northern Ireland, on the other part, adopted on 30 December 2020, in force 1 May 2021 [2021] OJ L 149/10.

2. *Vlaams Gewest v P&O North Sea Ferries Limited*: the factual and legal context

The Belgian national provision giving rise to the proceedings requires shipping companies sailing to Flemish maritime ports to comply with the rules imposing a a charge for the mandatory use of services under the vessel traffic services (VTS) system by vessels bound for a port located in that system's operational area. The charge must be paid by any vessel of more than 41 metres coming from the sea and bound for a Flemish port included in the VTS system, and is only payable once per voyage, even if the vessel enters the area concerned more than once per day.

A fixed element of the charge is determined based on the length of the vessel concerned. The charge is not payable in respect of navigation between Flemish ports, for navigation on inland waterways, for vessels less than 41 metres in length, or for certain other categories of vessels.

P&O North Sea Ferries Limited (P&O), a company domiciled in the UK with a Belgian subsidiary, has refused to pay the invoices for the mandatory use of the VTS system since 1996. The contested invoices for VTS concerned navigation to or from Zeebrugge (Belgium). The outstanding amount totals more than 13 million EUR. The Flemish Region has brought proceedings before the referring national court seeking an order for P&O to pay the invoices which have remained unpaid since 30 April 1996, together with statutory interest where applicable.

The legal basis for the parties' claims is Regulation 4055/86[5] in conjunction with Article 56 TFEU and related EU *acquis*. Article 56(1) TFEU provides that, '[w]ithin the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.' Article 56 and other provisions on the freedom to supply international maritime services were first made applicable by this Regulation, since it follows from Article 58(1) TFEU, in conjunction with Article 100(2) TFEU, that, in the maritime transport sector, application of the freedom to provide services requires the Council to adopt secondary legislation.[6]

The Regulation applies to the cross-border maritime transport services between Member States and between Member States and third countries. This freedom only applies, however, to the persons set out in Article 1 of the Regulation: firstly, to the nationals of Member States who are established in a Member State other than that of the person for whom the services are intended,[7] secondly, to nationals of Member States established outside the EU, and, thirdly, to shipping companies established outside the EU *and* controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation.[8] Thus, the Regulation by its wording does not apply to nationals of the UK following its exit from the EU.

The 'maritime transport services between Member States and between Member States and third countries' are covered by the Regulation if they are normally provided for remuneration and include the carriage of passengers or goods by sea between Member States or between Member States and offshore installations, as

5 Regulation 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries [1986] OJ L 378/1.

6 Article 100(2) of TFEU (Common Transport Policy).

7 Article 1(1). See also C-83/13 *Fonnship A/S v Svenska Transportarbetareförbundet, Facket för Service och Kommunikation (SEKO), and Svenska Transportarbetareförbundet v Fonnship A/S*, Judgment of 8 July 2014.

8 Article 1(2). EEA nationals (Iceland, Norway and Liechtenstein) are also included, as the Regulation (except Articles 5 to 7) is incorporated in the EEA Agreement.

well as the carriage of passengers or goods by sea between the ports of a Member State and ports or offshore installations of a third country.[9]

Further, Article 8 of the Regulation provides that, '[w]ithout prejudice to the provisions of the Treaty relating to right of establishment, a person providing a maritime transport service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, *under the same conditions as are imposed by that State on its own nationals*.' (author's italics)

The Trade and Cooperation Agreement between the EU and the UK (the TCA)[10] was invoked by the claimant in this case, as P&O North Sea Ferries Limited was a company established in the UK. The TCA contains its own provision on the international maritime transport services, importantly, Article 191, which establishes the principle of equal treatment with regard, among other aspects, to access to ports, use of port infrastructure, use of maritime auxiliary services, assignment of berths and facilities for loading and unloading, and related fees and charges.[11] It also seeks to abolish any unilateral measures or administrative obstacles which could constitute a disguised restriction or have discriminatory effects on the free supply of international maritime transport services. However, Article 191 of TCA is not fully identical to EU acquis in relation to the international maritime transport services.

Moreover, it is expressly provided in Article 5 of the TCA that its provisions do not confer rights or impose obligations on individuals and cannot be invoked in the domestic legal systems of the Parties. Thus, by contrast to the directly effective provisions of the Regulation 4055/86, the natural and legal persons such as P&O North Sea Ferries Limited, who are (indirectly) protected by the provisions of the TCA, may not rely on these provisions in courts.

The following questions were referred to the CJEU by the national court:

(1) Does a vessel traffic services (VTS) regime, with the associated fixed tariff based on the length of the vessel, that applies to maritime traffic to a Flemish port from a port in another Member State, but which does not apply to traffic between Flemish ports because such traffic is exempt from the tariff, constitute an obstacle to the freedom to provide services pursuant to Regulation [No 4055/86], in conjunction with Article 56 TFEU?

(2) Does the application of a uniform VTS tariff, based solely on the length of the vessel, for access to ports that are substantially distinct, have the effect of rendering the VTS tariff contrary to the freedom to provide services in Article 56 TFEU and Regulation [No 4055/86], because other important factors specific to the route of navigation to the port, such as the distance travelled by the vessel in the VTS area, the distance between the open sea and the port, and the complexity and particular characteristics of the port, are not taken into account?

(3) Should Article 191 of the [TCA] be interpreted as meaning that, even after the withdrawal, service providers established in the UK can invoke EU law, and [should the first and second questions] be answered in the same way both before and after the withdrawal of the UK?

9 Article 1(4) of the Regulation.

10 See footnote 4.

11 Article 191(1)(a) of TCA.

3. The indistinctly applicable piloting charges under EU law provisions on the freedom of international maritime transport services

3.1 Restrictions on the freedom under Regulation 4055/86: The concept and scope of the prohibition

The case of *Vlaams Gewest v P&O North Sea Ferries Limited* concerned the dispute arising from Belgian national rules which imposed charges for identical VTS services on vessels longer than 41 meters operating between a port in Belgium and a Flemish port and a port in another Member State. These services had to be paid by vessels above a certain length sailing between a port in a different Member State and a port in Belgium and a Flemish port, but at the same time were provided free of charge to any vessel sailing on a domestic route between Flemish ports.

The CJEU confirmed that Article 1(3) and Article 8 of Regulation 4055/86 make applicable the whole of the Treaty rules relating to freedom to provide services, to the questions covered by this Regulation.[12] The freedom of movement for international maritime transport services under the Regulation means that not only nationality-based discrimination against persons covered by the Regulation, but also other, *indistinctly applicable*, restrictions are prohibited when they are 'liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he or she lawfully provides similar services'.[13]

It is clarified in the earlier case law that the Regulation prohibits, among other things, the application of different tariffs for identical (piloting) services for undertakings, depending on whether or not an undertaking, even one from that Member State, which provides maritime transport services between that Member State and another Member State, operates a vessel authorised to engage in maritime cabotage, which is reserved to vessels flying the flag of that State.[14]

By applying a charge for VTS services in a way that treats vessels on such routes less favourably than on domestic routes, Belgium infringed Article 56 TFEU, since this rule was liable to impede or render less attractive the provision of services supplied by a provider established in another Member State. Such legislation therefore constitutes a restriction on the freedom to provide services.[15]

3.2 Safety of ports as objectives of overriding public interest justifying the restriction

In line with the general approach under EU law, the CJEU accepted that national rules imposing a restriction on freedom of maritime transport services can, in principle, be justified by overriding reasons in the general interest, assuming that such rules are equally applicable to all persons or undertakings pursuing an activity in the territory of the host Member State. In addition, such national rules 'must be suitable for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it' (proportionality of the restriction).[16]

12 Judgment in *Vlaams Gewest* (n 1), para 21. See also C-430/99 and C-431/99 *Sea-Land Service and Nedlloyd Lijnen* cited in the judgment .

13 Judgment in *Vlaams Gewest* (n 1), para 22. See also C-76/90 *Säger*, para 12, and C-398/95 *SETTG*, para 16.

14 Judgment in *Vlaams Gewest* (n 1), para 23. See also C-18/93 *Corsica Ferries*, para 35.

15 Judgment in *Vlaams Gewest* (n 1), para 27; *Sea-Land Service and Nedlloyd Lijnen* (n 12), para 38.

16 Judgment in *Vlaams Gewest* (n 1), para 28; *Sea-Land Service and Nedlloyd Lijnen* (n 12), para 39.

The aim of securing safety in port waters is, in principle, accepted as being such a reason, according to well-established case law.[17] The Court agreed that a traffic services system,, such as the VTS, constitutes a nautical service essential to the maintenance of public security in coastal waters as well as in ports. The imposition of a fee for the mandatory use of that system, to which vessels of a length of 41 metres or more are subject as users of that system, appeared to the Court to be capable of contributing to the objective of general interest regarding security in port waters.[18]

With regard to the charge applied solely on the length of the vessels concerned, the CJEU accepted that the length may, in principle, be a relevant criterion for imposing such a charge. However, the Court pointed out that there must be an actual correlation between the cost of the service from which those vessels benefit and the amount of that charge.

It follows from the earlier rulings by the Court that this is not the case where that amount includes cost factors chargeable to categories of ships other than sea-going vessels longer than 41 metres.[19] In *Vlaams Gewest*, significant regional disparities existed between the ports, since accessibility of different ports may be fundamentally different in nature and complexity, influencing the need for VTS. The Court established that 'the application of a single tariff to vessels of a certain length, irrespective of the *objective difficulties specific* to navigation and docking in the designated ports, in the light, moreover, of the *non-application of that tariff to comparable vessels* sailing a domestic route from or to a port to which access might prove just as difficult as for vessels departing from or bound for a Member State other than the Kingdom of Belgium, goes *beyond what is necessary* to attain the asserted objective of safety.'(author's italics)[20] This conclusion is hardly surprising, although it is more indicative of the Court's disapproval of the inherently discriminatory nature of the charge in question, than of its excessive character ('beyond what is necessary').

17 Judgment in *Vlaams Gewest* (n 1), para 30 ; *Sea-Land Service and Nedlloyd Lijnen* (n 12), paras 41 and 42; C-128/10 and C-129/10 *Naftiliaki EtaireiaThasou and Amaltheia I Naftiki Etaireia*, para 45.

18 Judgment in *Vlaams Gewest* (n 1), para 31.

19 *Sea-Land Service and Nedlloyd Lijnen* (n 12), paras 32-33.

20 Judgment in *Vlaams Gewest* (n 1), para 35.

4. The EU-UK Trade and Cooperation Agreement in the EU legal order

As noted earlier, P&O North Sea Ferries Limited has refused to pay the invoices for the mandatory use of the VTS system since 1996. Following 'Brexit', the withdrawal of the UK from the EU was governed by the 'Withdrawal Agreement', which established a transition period during which EU law remained applicable to the UK.[21] This transition period expired on 31 December 2020. Since then, legal relations between the United Kingdom and the European Union have been governed by the TCA.

The P&O companies invoked Article 191(1) of the TCA, which provides that 'each Party shall implement the principle of unrestricted access to the international maritime markets and trades on a commercial and non-discriminatory basis'. They claimed that this provision requires that maritime traffic to the EU from the UK is not to be treated less favourably than maritime traffic between Member States. The P&O companies submitted that, in light of that provision, the freedom to provide services continues to apply after the UK's withdrawal from the EU and that the referring court should therefore also apply Regulation 4055/86 to the part of the invoices relating to the period following that withdrawal.

The CJEU did not agree with P&O on this matter. It recalled that competent EU institutions and the third States could, in principle, agree what effect the provisions of the agreement will have within the internal legal order of the parties. The Court recalled its earlier jurisprudence, according to which '[o]nly if that question has not been settled by the agreement does it fall to be decided by the courts having jurisdiction in the matter, and in particular by the Court of Justice, in the same manner as any question of interpretation relating to the application of that agreement in the European Union.'[22] Nevertheless, in this case, the question of the application of Article 191 of the TCA is explicitly governed by Articles 4 and 5 of the TCA. Namely, the TCA itself provides for the approach to interpretation based on the international rules of treaty interpretation laid down in the Vienna Convention on the Law of Treaties.[23]

Article 4(2) of the TCA further specifies that '[the TCA] [does not establish] an obligation to interpret [its] provisions in accordance with the domestic law of either Party'. Furthermore, Article 5(1) of the TCA provides that, subject to any exception, 'nothing in this Agreement … shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement … to be directly invoked in the domestic legal systems of the Parties'.[24]

The CJEU concluded that after the withdrawal of the UK, maritime transport service providers established in the UK may no longer rely on EU law before the national courts of the Member States, and in particular, on Article 1 of Regulation 4055/86, read in conjunction with Article 56 TFEU, as regards facts or legal situations arising after 31 December 2020.[25]

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21 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C 384 I/1, 1-177, Articles 126 and 127.

22 Judgment in *Vlaams Gewest* (n 1), para 43. See also C-366/10 *Air Transport Association of America and Others*, para 49.

23 Judgment in *Vlaams Gewest* (n 1), para 42.

24 Judgment in *Vlaams Gewest* (n 1), para 42.

25 Judgment in *Vlaams Gewest* (n 1), para 45.

5. Discussion and conclusions

Effective and safe maritime transport is indispensable for global and European trade in goods. In the EU, maritime freight transport services account for more than two-thirds of freight transport performance. Maritime and road transport represent over 90% of total freight transport performance in the EU.[26] Sea carriage of passengers is also important, especially for Italy and the Mediterranean and the Baltic Sea.[27] The sea routes between the UK and the EU carried 18.4 million international sea passengers in 2024.[28] For the EEA States Norway and Iceland maritime transport is also crucial for sea carriage of cargo and passengers.[29]

Obviously, the smooth flow of maritime transport services is fully dependent on non-discriminatory, transparent and fair legal and regulatory frameworks. This is fully recognized in the Regulation 4055/86 and in the provisions of the TCA. As cases such as *Vlaams Gewest* show, EU law seeks to ensure that companies may access to shipping routes and ports of other Member States and operate there on equal conditions. Crucially, EU law provides shipping companies with actionable rights against unlawful restrictions of free movement imposed by Member States.

The *Vlaams Gewest* ruling contributes to the existing and well-established case law of the CJEU on the scope of Regulation 4055/86. The Court does not deviate from its earlier approach to the lawfulness of indistinctly applicable charges under EU law; in this case, VTS services. The Court predictably spells out the criteria to be met for such charges to be acceptable as a proportionate measure based on objectives of overriding public interest.

Importantly, in this case, the Court also has an opportunity to provide a clarification on the implications of 'Brexit' for operators of international maritime transport services established in the UK, but operating their services in the EU. The Court examines the legal position of third-country operators of shipping services regulated by free trade agreements with the EU.[30] This judgment is significant for the future policy of the EU in the international maritime transport sector, as the EU Industrial Maritime Strategy of 2026 emphasizes the Commission's goal to include comprehensive commitments on international maritime transport services in free trade agreements, improving market access conditions and non-discriminatory treatment of EU operators in third countries.[31] Thus, *Vlaams Gewest* explains some of the aspects of such agreements, using the example of the EU-UK TCA, but also illustrates issues which need to be considered in future negotiations, such as the effect of free trade agreement provisions in the EU legal order.

It should be noted that Regulation 4055/86 provides for the Council to extend the provisions of this Regulation to nationals of a third country who provide maritime transport services and are established in the EU. Although this provision probably aims to include nationals of OECD-countries, its wording is broad enough to cover

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26 Eurostat (February 2026) Freight transport statistics – modal split < https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Freight_transport_statistics_-_modal_split >.

27 Eurostat (27 November 2025), Maritime passengers in EU up by 24.3 million in 2024. < https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20251127-1 >.

28 UK Department for Transport (30 July 2025), Sea passenger statistics: international sea passengers 2024 < https://www.gov.uk/government/statistics/sea-passenger-statistics-all-routes-2024/sea-passenger-statistics-international-sea-passengers-2024 >.

29 The Norwegian Coastal Administration, Maritime transport < https://www.kystverket.no/sjotransport-og-havn/sjotransport/sjotransportbransjen/ >.

30 The UK's trade relations with the EEA EFTA States Iceland, Liechtenstein and Norway are governed by the Free Trade Agreement concluded in 2021: < https://www.efta.int/trade-relations/free-trade-network/united-kingdom >.

31 The EU Industrial Maritime Strategy, COM (2026) 111 final, nr. 3.5, p. 11 < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=comnat:COM_2026_0111_FIN >.

any nationality, making it potentially relevant for all third States entering into free trade agreements with the EU.

As described earlier, the Court has declined to apply Regulation 4055/86 to an operator from the UK which no no longer meets the criteria for the EU connection set out in Article 1 of the Regulation. Following expiry of the transition period set in the Withdrawal Agreement, the provisions of the TCA, and not the Regulation, now apply to such operators, preventing those operators from invoking Article 191 of the TCA directly in national courts of Member States. Due to the absence of the direct effect, specified in the TCA, disagreements on the interpretation of TCA provisions will have to be resolved through the inter-State dispute settlement mechanism established by the TCA. At the same time, as Advocate General Biondi points out in his opinion in *Vlaams Gewest*, the national authorities should still interpret domestic law, in so far as possible, in conformity with Article 191 of the TCA.[32] The latter obligation to conform interpretation also follows from the general international legal obligation of States to ensure the effectiveness of their international agreements.

32 Para 59 of the Opinion.

Contributory negligence and ship collisions

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Content

1 The topic

In both-to-blame ship collisions two legal phenomena are in play: negligence as a basis of liability for damage to the other ship, and negligence as the claimant's (skadelidtes) contribution to the damage to its own ship. In that sense, ship collision cases exhibit phenomena of general interest to tort law. Nonetheless, there are two distinct sets of rules under Norwegian tort law (and similarly under most legal systems). There is the Torts Act s. 5-1, dealing with contributory negligence (in the Act entitled "contributory liability") in general, and then there is the Maritime Code (MC) s. 161, governing ship collisions and providing for negligence (fault) as a mutual basis for liability.

More specifically: the MC provides for apportionment of damages by each ship's degree of negligence serving as a basis of liability towards the other ship, while at the same time (logically) regulating each ship's contribution to its own damage. The Torts Act s. 5-1, on the other hand, does not envisage two parties being liable towards one another, but instead, merely a reduction in a claimant's right to damages against a tortfeasor, based on contributory negligence by the claimant. However, in ship collisions one could in theory start by applying the Torts Act to assess each ship's contribution to its own damage and, then, potentially letting the outcome of that assessment determine whatever liability towards the other ship – which we shall see is not inapt from a historical perspective.

Despite this interlink between the two sets of rules there is a conspicuous lack of cross reference in contemporaneous legal literature from maritime regulation to general tort law, and vice versa. But historically that was not the case. The maritime law rule on both-to-blame ship collisions existed about 40 years before the general tort law rule of contributory negligence was enacted. The fault-based ship collision rule was enacted in the MC of 1860 s. 80, with slight revision in 1893 and 1913, as brought into today's MC 1994 s. 161 – and the general tort rule was enacted in the Penal Code's Implementation Act (PCIA) of 1902 s. 25, later brought into today's Torts Act 1969 s. 5-1.

Historically, standard volumes of tort law contain such cross referencing from one set of rules to the other. In Øvergaard, Norsk erstatningsrett, from 1942[1] around 70% of his chapter entitled "claimant's contribution" (skadelidtes medvirkning) consists of ship collision cases. The same tendency exists the other way around. Both Platou's maritime law volume from 1900[2] and Knoph's maritime law volume from 1931[3] contain extensive references from ship collision law to notions of contributory negligence in general tort law.

One could ask: why is this type of cross reference absent in our times? The legal phenomena – mutual liability in ship collisions and claimants' contributory negligence in general tort law – have just as much in common now as it had back then. In other words, there seems to be good grounds for giving renaissance to the phenomena, since one set of rules may shed light on the other, which can enrich our understanding of both. We will start by looking into the history of the topic and proceed by problematizing a selection of more recent court cases in view of the historical approach.

1 Later edition from 1958 – hereafter Øvergaard.

2 Platou, Norsk Søret – hereafter Platou.

3 Knoph, Sjørett – hereafter Knoph.

2 Historical approach

2.1 Oscar Platou and his modernization project

It seems logical to look at the development chronologically, taking as a starting point the influential legal scholars and the state of law as it existed at various points in time, along with the related disagreements.

Professor Oscar Platou was influential in maritime law (and in private law in general) in the period from around 1880 to 1920. He was preoccupied with what could be called his project of modernization of the law, within which maritime law played an important part. He emphasised that fault-based rules in ship collisions, and thus questions of claimants' contributory negligence, already formed part of the Maritime Code from its initial inception in 1860 (through its s. 80). From an international perspective he believed that the fault-based collision system of the Maritime Code contained a more modern and advanced solution than that found in most seafaring nations' legal systems.[4] He further advocated the view that the fault-based solution of the Maritime Code should be seen as reflection of general principles of tort law, heralding and serving as rationale for the general rule of contributory negligence enacted around 40 years later.[5]

Platou opposed the Roman law solution of apportionment of blame (compensatio culpae) as found at that time for example in English law, whereby negligence on the claimant's part negated the defendant-tortfeasor's negligence as a basis of liability: if the claimant had negligently contributed to his own loss, he was awarded no damages. Platou considered this English law position to be "the most retarded" (den mest tilbakestående),[6] in that it gave no room for half-way solutions, as did Norwegian maritime law.[7] In this he was correct, in the sense that the maritime law solution in the later Collision Convention 1910, as ratified by England, served as a stepping stone to English law eventually introducing a general system for contributory negligence, through its Contributory Negligence Act 1945. Any standard English volume on tort law illustrates how, in that sense, maritime law inspired and shaped an important part of English general tort law.[8]

Moreover, Platou discussed concepts of strict liability and causation in Norwegian law, in the following con Norwegian legislation all the way back to the 13th century (Magnus Lagabøtes Landslov) showed examples of how considerations of causation relating to a claimant's contribution to his own losses, affected the extent (quantum) of a defendant-tortfeasor's liability in cases where, as a starting point, such liability was strict in nature.[9]

Platou used the Germanic law inspired maritime rules of Roles d'Olerone as an example of the opposite, and in his view more primitive, legal thinking. Since under those rules moving ships were deemed liable for harm inflicted to ships lying stationary, it had happened that owners of sub-quality ships had placed them in the way of moving ships in order to have them run over and then claim damages, thus profiting from the incidence 'caused' by moving ships.[10]

Platou further commended Norwegian law for abolishing the General Average-like collision system found in other legal systems (such as the English), whereby

4 Platou pp. 478-482.

5 Platou p. 482.

6 Platou p. 481.

7 To be more precise: English law provided for a solution whereby, in both-to-blame situations, each party bore half of the aggregate losses of ships and cargoes, with no room for intermediate solutions based on the degree of the respective faults, Platou p. 481.

8 See e.g. John Cooke, The Law of Tort, 2017 p. 220.

9 Platou p. 478.

10 Platou p. 478.

in ship collisions the aggregate value of ships and cargos as a single passivum was awarded according to the degree of fault on each ship. In other words, an insolvency-like apportionment of aggregate losses.[11] According to Platou this approach was the result of ideas of identification (mutual imputation of liability) between ship and cargo which were obsolete in the context of modern commercial realities.[12]

In that respect Platou contributed to what he saw as being a further modernization of the MC. He chaired the Maritime Law Commission which in the MC 1893-version (s. 220) revised the previous MC 1860 (s. 80). The thinking behind the revision was this: the MC 1860 s. 80 stated that in the case of both-to-blame collisions, damages were to be determined according to each ship's respective fault "and the other circumstances of the case" (og Sakens øvrige Omstendigheter).[13] The courts had applied this latter phrase in such a way that the value of ships and cargo was taken into account when determining the apportionment of damages. This, Platou believed, was paying undue heed to obsolete systems of General Average influenced calculation (above), disregarding modern notions of fault-based apportionment.[14] To prevent the courts from adopting such obsolete thinking, the 1893 revision, in its s. 220, omitted the phrase "and the other circumstances of the case", and instead stated (in its entirety): "If there is fault (skyld) on both sides, the court shall, by having regard to the nature of fault on each side, determine if, and in what amount, damages should be paid by one of the parties, or if each ship should bear its own loss."

This discretionary rule was applied in subsequent case law in such a way that the courts often held it appropriate to let ship,A, having the lesser blame, cover parts of its own losses but without it being liable for the damage inflicted on ship B – and in cases of equal degree of blame, to let each ship bear its own losses, rather than being liable to cover half of the other ship's losses.[15] The thinking was that the degree of blame for having to bear one's own loss (a claimant's contributory negligence) would not necessarily correspond to the degree of blame as a basis of liability towards the other ship; it could often appear arbitrary from each ship's perspective as to what damage would be incurred by the other ship,[16] and these values should therefore *not* form part of the discretionary apportionment of damages. In other words, topics of foreseeability and remoteness of damages (adekvans) were given a role in disregarding the (often coincidental) extent of damage to the other ship and its cargo.

2.2 Ragnar Knoph and his opposing views

Platou's successor as maritime law professor, Ragnar Knoph, was critical of much of Platou's thinking, which Knoph saw as unduly succumbing to Roman law principles. In Knoph's era, the Collision Convention 1910 had been incorporated into the MC (through its revised s. 220) with the solution as we still know it today (in MC s. 161): the degree of fault on each ship determines the liability towards the other ship. Knoph considered such a solution to be close to self-evident; hence he was critical of the legal position under the earlier MC s. 220, on which he remarked:

11 Platou p. 481.

12 Platou p. 479.

13 The entire s. 80 read:" If the collision is not caused by intent or negligence (forsæt eller uagtsomhed) by any of the sides, no compensation for the losses is awarded, but each ship bears its own loss. If fault (feil) is committed on both sides, the court shall, according to the nature of the misdemeanor (forseelse) committed by each side *and the other circumstances of the case*, determine if and what level of damages should be awarded to either of the parties." (my emphasis)

14 Platou p 485

15 Ref. the final phrase of s. 220: "… or each ship bearing its own losses".

16 While the degree of damage to its own ship would be reasonably foreseeable.

”Both legal commentary and case law understood this [earlier] provision to mean that the ship which had the lesser blame would never have to cover any part of the other ship's damage, even if this [i.e. the damage arising from the lesser blame] in relation to the entire inflicted damage was greater than what followed from its degree of fault”.[17]

Knoph gave an example to illustrate the (in his view) unreasonable consequence of such a solution: “[S]hip A which has ¼ of the blame, is barely damaged by the collision. Ship B, on the other hand, is damaged to a value of NOK 100.000.”[18] – with Knoph surmising that in this case ship A ought to cover NOK 25.000 of ship B's losses.

Knoph also commented on the earlier position of letting each ship bear its own loss when being equally to blame:

“Moreover, the provision seemed to presuppose that when the ships were equally to blame, neither of the ships should be awarded any damages, even though one of them was hardly damaged, while the other sank and was lost.”[19] Knoph found this solution to be untenable and he partly ridiculed Platou by referring to Platou's book (p. 488) that such a solution would accord with “the correct (riktige) rule of general tort law”.[20]

Knoph went on to explain how in his view the amended provision of MC s. 220,[21] implementing the Collision Convention, had brought clarity to the law:

“[T]he Brussel Convention however enacted the apportionment principle in a clear and concise fashion, and in order to bring Norwegian law in accordance with the convention, MC s. 220 was amended in 1913. It now states with full clarity that *in all situations* where there is blame on both sides, the one ship shall compensate so much of the other ship's damage as shall correspond to the percentage of blame for the collision which is imputed to that ship. Each ship will then of course also bear a corresponding part of its own loss. If the one ship's percentage of blame is less than 1/2, it will not for that reason be exempted from its liability in damages, and where both ships are equally to blame, the duty to compensate is not forfeited, but the aggregate damage is 'shared equally', as the Code puts it. A different point is that in the final calculation of damages only one of the ships has a duty to pay anything, since the two payment obligations are, naturally, set-off against each other, as far as is allowed for.”[22]

Moreover, Knoph believed that the solution found in the revised MC s. 220 reflected a general principle in Norwegian tort law, despite the wording of the (by then) enacted PCIA s. 25 indicating otherwise through its wording, which was close to that of the previous MC s. 220.[23] Knoph stated:

“At first glance it seems that the Maritime Code adopts the apportionment system in a different form to that of the Penal Code Implementation Act s. 25, and in accordance with other considerations. The common understanding of this provision [s. 25] is that the damage is not only to be apportioned according to the blame (skylden) but also according to the remoteness (adekvansen), considering the committed faults' (de begåtte feils) 'impact on the damage.' No apparent differ-

17 Knoph p. 305; “… var større enn dets skyldbrøk tilsa.» This and subsequent quotes in my translation.

18 Knoph p. 305 fn 2.

19 Knoph p. 305.

20 Knoph p. 305 fn 3.

21 The provision stated, in line with today's MC s. 161: “If there is fault on both sides, each party shall compensate for the damage in proportion to the faults committed on each side.”

22 Ibid p. 306.

23 The PCIA s. 25 read: “If [the claimant] has contributed to the damage through negligence (uaktsomhet) the question of if and to what extent damages shall be awarded, is determined by the court based on the nature of the fault (feil) *committed by each side* and their influence on the damage.” (my emphasis)

ence seems to exist, however, since the remoteness (adekvansen) in reality slips in as an element in the assessment of the degree of blame (skyldens grad)."[24]

Knoph did not explicate the latter phrase concerning remoteness (adekvans), but the following paradox ensued: Knoph wanted to move away from what he believed to be remnants of Roman law in Platou's recommendation of letting each ship bear its own loss when being equally to blame, while Platou believed this was *not* a reflection of Roman law but instead of Norwegian tort law principles concerning remoteness of damages (adekvans).

Apart from these points of departure between Knoph's and Platou's thinking, Knoph did not take issue with Platou's view that the concept of fault (skyld) in ship collision cases should be assessed objectively (based on the ship's 'faulty' manoeuvre) without regard to the subjective fault of those onboard.[25]

2.3 Jan Øvergaard – an attempt at a rejoinder

Then came Øvergaard and his attempt to merge the earlier differing views. Øvergaard disagreed with Knoph's view that the MC rule disposed with the Roman compensatio culpae all together, by pointing to the fact that the PCIA s. 25 was left unamended when the MC s. 220 was revised in 1913 – and that the non-amended PCIA s. 25 could, according to its wording, lead to each party having to bear its own losses when being equally to blame. That is, each party seen as *claimants* in the PCIA s. 25 sense, might under that rule have to bear its own losses, rather than being liable for 50% of the other party's losses. Øvergaard believed both solutions were open to use by the courts in ship collision cases,[26] but he gave a recommendation along the lines advocated by Knoph; that in situations of both-to-blame, each ship should bear a portion of the other ship's loss, rather than both just bearing their own.[27]

However, a difficulty with Øvergaard's view is that he discussed this in the abstract, not setting out the following dilemma: in general tort law one usually had *one* claim; the claimant's claim against the tortfeasor-defendant, and here it would be overly dramatic to apply the Roman law doctrine of no losses being recoverable by a claimant who has contributed to his own loss. Such total forfeiture of a claim had a different impact in both-to-blame collision cases where both ships suffered damage. Here there would be *mutual* forfeiture of claims, producing a less dramatic outcome than in ordinary tort law – in line with the position advocated by Platou.

Moreover, the way Øvergaard used the term compensatio culpae is somewhat confusing, because he did not refer to the Roman law doctrine of contributary negligence negating negligence as a basis of liability. Rather, he used the term in all cases where the claimant forfeited his claim because of contributory negligence, with no regard to the court's (or legal authors') rationale for such a result. In other words, it could well be the case that the claimant's contribution to its own losses was sufficiently grave to justify such outcome of forfeiture of the entire claim on discretionary policy grounds, rather than taking a detour to the (formalistic) doctrine of Roman law to explain the outcome.

Yet, for our purposes it is helpful to observe that Øvergaard, as well as Platou and Knoph, assumed that there was an intrinsic link between the ship collision rules and the general tort rules on contributary negligence. Moreover, Øvergaard

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24 Knoph p. 305.

25 Knoph p.304.

26 Øvergaard p. 258.

27 Øvergaard p. 259 who gave policy considerations by referring to the Danish scholar Bentzon who gave the following example (not overly realistic): if both were to bear their own loss that would give an incentive for a master to navigate in such a way that maximum damage was inflicted on the other ship and minimum on his own.

provided helpful observations on situations where the contribution to own losses did not consist in negligence (fault) but in other legal phenomena.[28]

28 Øvergaard p. 268 where the equivalent of strict liability is used 'the other way around' as a basis for contributory losses to be borne by the claimant.

3 Selected cases to illustrate the interlink between the two sets of rules

3.1 General

We now proceed by testing out these different ways of thinking on a few selected cases, to illustrate how the respective perspectives would fare, and to show that this area of law is probably more open-ended than is presented by contemporaneous works on the subject.

3.2 Technical failure and contributory liability – Fyksesund

The first case to look into is the Bergen City Court case, Fyksesund (ND 1955.148): Fyksesund had a defective port-side navigational light when encountering Ketty at nighttime in a narrow strait. Ketty, seeing only Fyksesund's starboard lantern, believed Fyksesund was coming from a port-side cross angle, and Ketty therefore steered to port to go what it believed would be behind Fyksesund, while Fyksesund in reality came from a direction straight ahead, and they collided. Blame was apportioned 25% on Fyksesund for having created the dangerous situation; the court found those onboard to be negligent in not having checked whether the lantern was lit before entering the narrow strait. 75% blame was apportioned to Ketty for not having slowed down to assess the situation; from the map it would appear unlikely that a ship would come from the direction Ketty believed Fyksesund was coming.

However, if we assume, for the sake of illustration, that the lantern onboard Fyksesund had been prudently checked and that the light bulb thereafter collapsed, leading to the same confusion by Ketty as described, how should that be assessed? There would then be no blame attributable to Fyksesund – and the blame attributable to Ketty would remain the same irrespective of whether Fyksesund's lantern was unlit, through negligence or otherwise.

Under the collision rules this assumed situation would mean that Fyksesund was not at fault, hence not liable for the damage to Ketty, while Ketty would be imputed the same blame due to maintaining too high a speed – which effectively would mean that Fyksesund would recover its full losses, since as a matter of causation in general tort law Ketty's degree of blame would be sufficient for the entire losses inflicted on Fyksesund to be recoverable.

But that would indeed be a strange outcome. Starting with the Torts Act, one would probably say that Fyksesund, irrespective of its blame, did confuse Ketty by Fyksesund's unlit lantern, and that Fyksesund therefore ought to bear a corresponding portion of its own loss – but *without* Fyksesund necessarily being liable towards Ketty, because of lack of blame on Fyksesund's part. In other words, the Torts Act opens up "other circumstances" (than negligence) on the claimant's part, to be likened with negligence as a basis for contributory liability,[29] and this provision could yield such an outcome as indicated: that Fyksesund bore one third of its own loss, but without being liable for any of Ketty's losses.

If so, we are back to the solution in Platou's days to the effect that the ship with the lesser blame had to bear (parts of) its own loss, but without being liable for the other ship's loss – with the difference being that in our example Fyksesund was *not* to blame, but had "other circumstances" (unlit lantern) leading to it bearing

29 Now Torts Act s. 5-1 (3) which reads: "The rules in No. 1 […] apply correspondingly in case of contribution by […] other circumstances for which the claimant […] is in this regard responsible." Admittedly this aims at circumstances which would render the party liable for harm caused to others (typically strict liability for dangerous activity – see Hagstrøm/Stenvik, Erstatningsrett, 2015, p. 468 – but could probably be applied by analogy to situations as here envisaged.

part of its own loss.[30] In other words, this example shows that the issues brought up by Platou more than 100 years ago are not 'dead'. It could be asked: would it be allowable under the MC to make this kind of complementation of the maritime rules with the provisions of the Torts Act?

3.3 Ship collision and the law of necessity – Njård II

Another case capable of illustrating the interlink between the ship collision rules and general tort law is the Bergen City Court case, Njård II (ND 1953.213).

The facts were essentially these: A sailing boat (a 16 meters long cutter with no engine, as was common at the time) was on a leisure trip in challenging waters (at Straumane, south of Sognesjøen in Western Norway), consisting of narrow straits subjected to strong tidal currents, and being trafficked by ferries. Amid these straits the wind suddenly died, leaving the sailing boat drifting and with the currents threatening to push it against surrounding rocks and thus damage it. To avoid this from happening, the boat owner dropped anchor, waiting for winds eventually to pick up and thus 'sail up' the anchor. But due to this anchoring the boat became exposed to other traffic, and some hours later a ferry passed and hit the boat, penetrating its hull, and the boat sank. No people were injured, and the ferry remained undamaged.

The boat owner claimed damages for the loss of the boat from the ferry company and succeeded in part. The Court found the master of the ferry to have acted negligently: the ferry had kept too low a speed. According to the Court the master should have applied full engine power to enable the ferry to manoeuvre with optimal precision in the strong head current while passing the boat. Hence, liability was imposed on the ferry company. Nonetheless, the Court reduced the amount of damages by one third on the basis that the boat owner had contributed to the loss through an act of necessity. In that respect the Court held that the boat owner could not be blamed for having ended up in a situation which required action to be taken when the wind died, nor for having dropped anchor in that situation – but that the dropping of anchor must be seen as an act of necessity, being as such lawful (justifiable, hence not negligent) but still creating a risk, and that this risk (which later materialized) could be seen as a kind of contributory negligence by analogy.

The practical outcome of the case is probably sound, but the Court's reasoning on the law of necessity is brief and non-analytic. The Court does not ask, for example: is it at all reconcilable with the rationale of the law of necessity to 'sacrifice' one's own property, by posing it at the risk of becoming damaged?[31] Or: what was here the greater value preserved to sacrifice the smaller? Was the 'greater' value that of avoiding the boat being damaged against the rocks, while the 'smaller' was that of, perhaps, being run down by other traffic? Or: can one at all 'sacrifice' something which may, or may not, happen sometime in the future?

The point is not to answer such questions, but to illustrate how evasively courts may treat this area of law. For example: It seems here that the Court is mixing up the concept of acts of necessity (emergency) per se, with the legal conception, embedded in the Torts Act 1969 s. 1-4 (at the time PCIA 1902 s. 24) of lawful

30 The example also illustrates the tendency in some jurisdictions to understand the concept of 'the ship's fault' in the Collision Convention to encompass technical failure (latent defects) as 'fault', see for Dutch and Belgian law, Frank Stevens, Inland Collision Law, Festschrift für Resi Hacksteiner, 2023, pp. 316 et seq.

31 Would it for example make sense to operate with a notional test of a criminal law pendant to destruction of goods in the law of necessity; that one is criminally liable for destroying one's own property? – or a notional test of a would-be victim of property damage not being entitled to meet the threat of damage with self defence; that one is not entitled to prevent oneself from destroying one's own good in acts of necessity? Such elaboration may be seen as mockery, but it illustrates central points at a conceptual level.

infliction of harm through acts of necessity; there may well be an act of necessity (emergency) which turns out to cause harm, but without it being sacrificial in the law of necessity sense.[32]

There is then another important aspect: this was a ship collision case subject to the fault based maritime rules. How was that reconcilable with having one party bear part of its own losses based on the law of necessity? The Court referred in this respect to an earlier case, the Jotun (ND 1910.433), in support of the proposition that the law of necessity could form a basis for liability in ship collision cases, and that by analogy the law of necessity could also work 'the other way around', as a basis for contributory liability.[33] But there are problematic aspects with this creative exercise.

Are acts of necessity fault, in the meaning of the MC 161? We shall not answer the question here other than by pointing to the fact that acts leading to a duty to compensate under the law of necessity are deemed lawful, while the fault concept in the collision rules in Norwegian law presupposes blameworthiness.[34]

Another point is this: if the court had not applied the MC but instead the Torts Act s 5-1,[35] the reasoning would have made sense. Here one could say that increased risk of becoming damaged by acts of necessity can be likened to the increased risk of becoming damaged by the claimant's negligence. The constellation fits squarely within Torts Act s. 5-1 (3) which lets "other circumstances" (such as the law of necessity) count as a basis for contributory liability on the claimant's part (see also the Fyksesund above).

The case does in that sense illustrate a merger between the MC collision rules and general tort law on contributory liability. The case also illustrates the potential asymmetry that Platou advocated under the previous law: if we assume that the ferry was also damaged, it could well be a solution that the boat owner bore 1/3 of his own losses without necessarily being liable for (a part of) the damage to the ferry – because the requirements for a duty to compensate in the law of necessity were not met, or because the fault concept in the collision rules does not allow for the application of (strict) liability in the law of necessity. In other words, one could take a more discretionary view than what seems to follow from MC 161 if merging the MC rules with those of the Torts Act.

3.4 Collisions other than ship collisions – a non-maritime case

The case Njård II concerned ship collision, albeit with claims being made only in one direction, since only one of the ships suffered damage. We saw that it was questionably decided within the law of necessity under the MC, but it could have served as an example under the Torts Act s. 5-1.

With that as backdrop, we switch perspective to ask: if claims are made both ways in a situation of mutual infliction of harm other than in ship collisions, how would that fare? Is it the case that the one party's portion of its own loss (as contributory liability) would serve as the portion of liability towards the other party's loss? There seem to be no cases demonstrating the point, but we can still illustrate the questioning by playing with the facts of a real case.

32 See the example in the Supreme Court case Kong Sigurd (Rt. 1955.1055).

33 Now the Torts Act 1969 s. 5-1, at the time PCIA 1902 s. 25.

34 This is not necessarily the case under other jurisdictions of the Collision Convention, such as Dutch and Belgian law, where 'fault of the ship' is construed to encompass latent defects (technical failure) leading to collision, see Frank Stevens, Inland Collision Law, in Festschrift Resi Hacksteiner, 2020 pp. 313 and 315-316. It is worth observing that this position is not far from Platou's advocation of a plain objective concept of the fault provision in the then MC, see Platou p. 84.

35 That is, the equivalent at the time, PCIA s. 25.

In the Supreme Court case in Rt. 1994.1440 a bicyclist ran into the back of a car and was injured. The car liability insurer was held liable on account of the car's brake light not working, which led the cyclist to miss the warning from the driver applying the brakes, and the requirement of the car 'causing' damage was thereby met.[36] However, the cyclist was found to have negligently contributed to his loss by riding too close behind the car (the accident happened in a bike race), and his claim for losses was reduced by one third.

We could then ask – in light of e.g. Knoph's proposition that the system of the MC reflected the general tort law position: what if damage was also inflicted on the car, and the car owner cross-claimed against the cyclist for such property loss, would then the same 33% of contributory negligence on the cyclist's part serve as a basis for the cyclist's liability towards the car owner? In other words, would the MC ship collision rules work in the same way outside the scope of ship collisions, as Knoph (and partly Øvergaard) argued they would?

Probably the answer would be no. Various factors would disrupt such a solution of symmetry between having to bear one's own loss and being liable for the other party's loss – such as the one claim being a property claim and the other a personal injury claim, where policy considerations could turn out differently – and that of the one, or both, injuries being covered by insurance.[37]

One would probably adopt a more discretionary evaluation under the provisions of the Torts Act. In other words, the cyclist might not be held liable at all, despite him having to accept a reduction of his own claim by 33% – which again serves as a reminder of the earlier position taken by Platou when advocating a freer assessment of damages extending to the ship collision cases of that time.

36 Car liability Act 1961 s. 4.

37 See the Torts Act s 4-2: The car owner, if having the damage to the car covered by insurance, would be entitled to raise a claim only in case of gross negligence on the cyclist's part.