International Max Planck Research School for Maritime Affairs
at the University of Hamburg

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The Hamburg

HAMBURG STUDIES ON MARITIME AFFAIRS 23

International Max Planck Research School (IMPRS)
for Maritime Affairs
at the University of Hamburg

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Hamburg Studies on Maritime Affairs
Volume 23

Edited by

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The Hamburg Lectures on Maritime Affairs 2009 & 2010

with the cooperation of Anatol Dutta

Springer

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ISSN 1614-2462 e-ISSN 1867-9587
ISBN 978-3-642-27418-3 e-ISBN 978-3-642-27419-0
DOI 10.1007/978-3-642-27419-0
Springer Heidelberg Dordrecht London New York

Library of Congress Control Number: 2012930486

Preface

The Hamburg Lectures on Maritime Affairs are a joint venture of the International Tribunal for the Law of the Sea and the International Max Planck Research School for Maritime Affairs, both established in Hamburg. The two institutions have started this lecture series to improve the general background formation in maritime affairs for their respective constituencies: the scholars and associates, i.e. PhD students, of the IMPRS and the trainees, mainly junior government officials, of the internship program offered by ITLOS and funded by the Nippon Foundation. The lectures series is meant to cover the full range of maritime subjects and to represent a broad international survey over scholarship on maritime affairs.

The present volume, which is the second in the series, collects eight papers delivered in 2009 and 2010. It represents a broad spectrum of topics reaching from maritime jurisdiction under international law across environmental issues, maritime labour law and competition to more general reflections on maritime law as a whole. Different national styles of legal scholarship likewise come to the fore. Since the lectures are of general interest, the authors were asked to prepare them for publication and we gratefully acknowledge their having made this additional effort. The collected papers are published in the book series Hamburg Studies on Maritime Affairs, edited by the directors of the IMPRS.

The editors of this book are indebted for their editorial cooperation and assistance to Dr. Anatol Dutta and Ingeborg Stahl, who prepared this volume, and to Michael Friedman for the language editing of the several articles.

Hamburg, November 2011

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Part I:

The Hamburg Lectures 2009

Competition in Liner Shipping

Francesco Munari

I. Some definitions: liner *vs.* tramp shipping

Prior to addressing the matter concerning competition in liner shipping, we have preliminarily to understand what is meant by liner shipping, which is one of the two modalities for the carriage of goods by sea, the other being non-liner shipping, better known as "tramp" seaborne transportation of goods.

Liner differs from tramp shipping in several instances: in the first place, in liner services vessels are scheduled according to a given frequency of calls at predeter-

J. Basedow et al., *The Hamburg Lectures on Maritime Affairs 2009 & 2010,*
DOI 10.1007/978-3-642-27419-0_1,

mined specified ports along a given route, while in tramp shipping the service is not scheduled and the entire vessel is normally chartered for a given voyage or for a period of time. Secondly, vessels used for liner shipping also have quite different characteristics from other kinds of vessels: in particular, since containerization has taken place, and has virtually replaced all other forms of transportation of goods in cargo units, ships used in liner services are cellular container vessels, having different sizes and tonnages, and are capable of carrying from a few hundred boxes up to several thousands. Hence, liner vessels are capable of carrying a large variety of goods in small parcels whereas tramp vessels usually transport one and the same good in large quantities, be it solid or liquid, as it happens with, respectively, bulkers and tankers.

The capacity of liner vessels to transport a large and variable number of goods in parcels or cargo units displays a third peculiarity of liner services compared to tramp ones: as we have just pointed out, tramp vessels carry dry or bulk liquid cargo (oil, ore); in contrast, goods moved in liner services are high-value ones, *i.e.* either manufactured or semi-manufactured goods.

Finally, substantially different are also the contractual terms accompanying liner transport vis-à-vis tramp shipping: in the former mode of transportation, the relationship between shippers and carriers is regulated by standard printed forms of contracts (*e.g.* bills of lading or similar documents) whose terms and conditions are directly prepared by carriers without any negotiation with their contractual counterparts, except as regards tariffs. In tramp shipping, the trader normally charters and pays a negotiated rate for the whole ship, either for a voyage or for a period of time.

II. The origins of cartels in liner shipping: economic reasons or simple excess capacity?

Cooperation among liner shipowners has always been structural: as we shall see, it dates back many years ago. The quest for cooperation among competing shipping lines has for a long time been explained using sophisticated economic theories; that approach lasted for decades and still continues to fascinate some scholars. Probably, however, strong and successful lobbying has reinforced the (now gone) ideology calling for a "necessary" cooperation among liner shipping carriers, coupled with the characteristics of the demand for transport services, whose inelasticity has permitted the international economic system to live well with supra-competitive prices in liner shipping for a remarkably long period of time.

Additionally, and tracing back the whole history of international liner shipping services, I believe that a further element has contributed to the success of cartelization in shipping, *i.e.* the first and largest… "beggar thy neighbour" policy in international trade, allowing the maritime nations to extract wealth from exporting countries as well as from non-maritime economic systems served by foreign shipping lines: as we shall see below, when this phenomenon was discovered at an inter-state level, a revolution in international liner shipping took place, with a view

to allowing – at least for a couple of decades – a more equitable allocation of the benefits of shipping cartels among industrialised and developing countries.

For a long time, scholars explained the need for shipowners to avoid competition among themselves using economic theories: in particular, it was maintained that liner shipping demonstrates peculiarities that cannot cope with a competitive market model since, inter alia, (a) fixed costs are proportionately much higher than variable costs, (b) entering and exiting a given market (*i.e.* a liner service) is not so easy and entails substantial shifting costs, (c) the unit of supply in the liner shipping market (*i.e.* the vessel) does not correspond to, and is much bigger than, the unit of demand (*i.e.* the parcel or cargo unit), this making it quite awkward for the carrier to constantly adapt its offer in order to match the fluctuations of demand.

The above reasons stood as an obstacle to conceptualising the application of the perfect competition model in our sector: hence, it was a matter of common sense to state that, if liner carriers were to compete among themselves for pricing, this would produce "rate wars" and a "destructive competition" whose consequences would undermine the stability of trade.

Given the importance of having reliable and constant shipping services carrying goods traded in world markets, not only was cartelization accepted, but it was even welcomed in many instances as the most effective organizational model for our sector. In this regard, also the stability of tariffs deriving from this model was acknowledged as being of value, since this would reduce fluctuations of prices in the goods traded worldwide, this being depicted again as an overall advantage for the economic system.

The economic reasoning summarised above – which stands now as largely criticised – may not have been entirely biased. Yet, a more persuasive reading of the whole history exists: as a matter of fact, rather than theory, cartelization of liner shipping has clear factual and economic causations that can be best summarised with chronic excess capacity.

This overcapacity has different origins and different timing: the first factor is technological and is represented by the introduction of steam vessels *in lieu* of sailing ones; steamships could travel at a higher speed than clippers and were much more reliable than the latter because of their potential to navigate independently from winds and related seasonal sailing routes. Hence, replacement of sailing with steamships introduced in the markets considerably more productive vessels for the carriage of an overall volume of trade which did not increase at the same pace of the enhanced productivity of seaborne transportation.

The second cause of overcapacity is geographical and is due to the opening of the Suez Canal: when this infrastructure was finished in 1869, it practically halved the duration of voyages across probably the most important trade route of that time (Asia-Europe); this, in turn, doubled the productivity of the vessels therein deployed. No wonder that a few years later the response to the excessive capacity created by the Suez Canal was the first structured shipping cartel on that route: although conferences had existed since 1868 in the North Atlantic trade, the Calcutta Conference, formed in 1875, is known as the "mother" of the conference system which would dominate liner shipping for the subsequent 120 years.

More recently, a third critical factor of oversupply has emerged and has to do with the evolution of cargo handling: again, the shift from break-bulk to cellular vessels has had an enormous impact on ships' productivity; suffice it to note that the time spent in port by a sailing vessel was previously twice as long as that spent for navigating, with ships berthed in ports for weeks during loading and unloading operations; now this proportion is more than reversed, and a port call of a huge container vessel hardly lasts more than a couple of days.

This having been said, one has to admit that an analogous overcapacity (with some caveat in respect of cargo handling) has also characterised non-liner shipping: yet, in the tramp sector there has been no track record of collusion among shipowners until recently, when shipping pools emerged in some trade. The above means that cartelization in liner shipping has been possible and has been carried out because of the existence of further reasons that may be connected to the peculiarities of the markets for liner services vis-à-vis tramp ones: whereas the latter are clearly worldwide, the former are much smaller and are represented by each liner trade, route or, at best, range thereof; in these smaller markets, players are much fewer in number, are more interdependent from one another and therefore operate within an environment where collusion is much easier. Compared to tramp shipping, liner shipping is the perfect place where Adam Smith's tenet about collusion among entrepreneurs holds true: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in conspiracy against the public, or in some diversion to raise prices".

III. Main features of cooperative agreements in liner shipping

Shipping practice has developed a limited number of cartel-type agreements among shipowners operating in seaborne transportation, the oldest and most important kind being that of the liner shipping conference.

The liner conference (or conference) is a cartel agreement among shipping lines serving the same route; its scope can encompass one or both directions of trade, and normally the latter is the preferred option. Conference members fix and agree on schedules, in order to rationalise the capacity and the frequency of services offered to their customers, as well as the tariffs that are publicly available. By the same token, at least initially, also contractual relationships with shippers are identical for all conference shipowners, so that shippers enjoy the same terms and conditions of carriage independently from the liner they use on the trade served by the conference. These contractual conditions may be such as to restrict competition further, as it happens when shippers are granted rebates on tariffs, provided they grant exclusivity to the conference members: this kind of arrangement has been called a loyalty agreement and was very frequent in the past.

Further restrictions on competition among conference members take place when they pool revenues and/or volumes according to a fixed quota, with a view to eliminating any remaining "internal" competition among them *e.g.* in the quality of the services they render. Pooling agreements were also quite abundant in the past, and their ultimate effect was that of freezing market shares among

conference members, irrespective of their different levels of efficiency and quality in providing transportation services.

A conference may or may not form a new legal entity: de facto, each member continued to issue its own bills of lading and enter into commercial relationships with clients on a one-to-one basis; yet, especially larger conferences worked through a secretariat, which was responsible for preparing tariffs, keeping contacts with shippers in particular for the sake of providing them with general marketing and pricing information, canvassing and organising all relevant data regarding the service rendered by the members, in order to prepare statistics, disseminating information and checking compliance of the conference viz. pool agreements.

In the golden age of liner conferences, they also indulged in retaliatory measures against independent liners competing with them on a given route: for instance, the most popular behaviour utilised by conferences was that of deploying on the route so-called fighting ships, *i.e.* vessels having a schedule coincident with that of the independent liner, and practicing predatory prices; losses arising out of the use of these fighting ships were allocated among members, whereas the independent liner was often persuaded to leave the trade or join the cartel.

In essence, from the antitrust point of view liner conferences were price-fixing cartels, often coupled with market sharing; when they, furthermore, offered loyalty agreements to shippers and organised fighting ships against competitors, they were covering the whole catalogue of hard-core antitrust infringements proscribed by competition law. And yet, for a number of reasons, they prospered and survived over a very long period of time, actually marking the liner shipping sector with a model that, for many decades, was even praised as a highly sophisticated device for stabilising shipping world-wide.

More recently, when antitrust law had become more popular world-wide and the containerization of liner shipping trades had replaced the break-bulk modes of seaborne transportation, other forms of cooperation among liner shipowners developed: reference is made to the so-called consortium agreements, or consortia, *i.e.* agreements whose objective is that of rationalising capacity on container trade and offering joint liner services organised by two or more shipping lines on the same route. In a consortium, pooled vessels are normally identical, and cross-slot charters are executed with a view to reserving for each member of the consortium a fixed portion of the capacity of all vessels used in the service. Port terminals used by the members are clearly the same, and often also other equipment is pooled. Sometimes joint offices are also established, yet each member maintains its independency in respect of pricing and conditions of transport with clients.

A global alliance is a sort of consortium whose geographic scope is not a single trade, but is instead worldwide. Members of this alliance are hence capable of globally covering liner trade. Global alliances have emerged in the past years as a response which allows medium-sized shipping lines to compete globally with those few lines which are able to offer independent liner services on all trades: they are a product of globalization within a market that, in fact, has witnessed a profound merger and acquisition development over the past twenty years and nowadays shows impressive levels of concentration worldwide.

For many years, liner conferences coexisted with consortia, and sometimes with global alliances: when these two sets of agreements were contemporaneously in place, liner conferences concentrated more on tariffs, whereas consortia focused on technical matters: indeed, antitrust concern for consortia is certainly less than that for conferences; this is the reason why, as we shall see below, conferences have been finally banned, whereas consortia are still practiced in the liner shipping sector.

In the previous paragraph we have briefly hinted at the emergence of pool arrangements also in the tramp sector, whose formation is probably due to the need to respond to the more global demand characterising non-liner services which has also developed in the past years: these pools bring together a number of similar vessels under different ownership, and vessels are then operated under a single administration. A pool manager is normally responsible for commercial management and commercial operations. It often acts under the supervision of vessel owners. However, technical operation of vessels is usually the responsibility of each owner. Although these pools market their services jointly, the pool members often perform the services individually.

The history and track-record of these tramp shipping pools is still limited, and no case-law regarding them has developed so far: as we shall see below, the European Commission has started investigating these arrangements from a competition law point of view, and it has offered some important indications within a communication issued at the end of 2007,[1] which we shall further analyse below.

IV. Antitrust and liner conferences: a legal environment fostering collusion, but not worldwide

Shipping conferences were invented prior to the appearance of antitrust laws, and their operation in the international arena was practically seen as an extraterritorial phenomenon on which, especially in the nineteenth century, States had little to say: indeed, in a very early and famous case, the *Mogul* case, predatory practices carried out by a conference were examined under common law, but no infringement was established.[2]

On the other hand, with the unique exception of shipping, in those decades the international dimension of trade was not perceived; in such a situation, States' jurisdiction on international trade was not an issue and nobody furthered an extraterritorial application of law.

In the twentieth century, and some twenty-five years after the enactment of the Sherman Act, the United States did start to consider liner conferences as a potential antitrust problem, and, after extensive studies carried out by a Committee

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1 Commission Guidelines on the application of Art. 81 of the EC Treaty to maritime transport services, OJ C 245, 26.9.2008, p. 2−14 (hereinafter, the "2008 Guidelines").

2 *Mogul Steamship Co v MacGregor, Gour and Co and others* (1885) 15 QBD 476 and, in the House of Lords [1892] AC 25.

established by the US Congress, the Shipping Act of 1916[3] did introduce some specific provisions addressing the matter: conferences were not forbidden as such, but their behaviour was regulated by a US agency. Yet, for the first real US strike against the conference system, one had to wait until 1958, when the US Supreme Court decided the case *Federal Maritime Board v. Isbrandtsen Co.*[4], sanctioning the activities of a liner conference composed by several non-US shipping lines. This led to a reform of the US Shipping Act in 1961, under which the operation of liner conferences in the maritime trade with the United States was severely restricted.

Since no other State had antitrust laws, nor considered in any way unlawful the activities and practices of liner conferences, this approach by the United States led to significant confrontations and even conflicts of jurisdictions at the international level, with many European states even enacting blocking or claw-back statutes, whose purpose was that of nullifying the attempt by the United States to apply their antitrust provisions to liner shipping companies operating in the trade with the US.

This lasted practically until 1984, when a new Shipping Act 1984 was adopted:[5] in this new statute, the application of antitrust principles was relaxed, and liner conferences did enjoy a partial antitrust exemption also in the US legal regime, this allowing the solution of the existing conflicts especially in the Trans-Atlantic trade. The Shipping Act was finally improved through the Ocean Shipping Reform Act (OSRA) 1998[6], which is still in force (but might be modified soon[7]). Yet, some intuitions of the Shipping Act 1984 did create some new standard terms for liner conferences at the global level and were hence imitated also in non-US trade: reference is made, in particular, to the obligation entrusted to the conferences to allow their members to stipulate service contracts with shippers having different content than those generally applied, or to permit a conference member to declare an "independent action" vis-à-vis all other members and hence discontinue coordination or collusion for certain matters for a given period of time.

As we shall see shortly, all the above is the history of international antitrust; and yet, the experience found on both sides of the Atlantic Ocean, and the mutual (albeit sometimes belated) will of the US and the European legal systems to find a compromise solution for the international regulation of these cartels, was and is a "laboratory case" quite useful for the understanding and development of international competition law.

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3 39 Stat. 728 (1916), as amended 46 U.S.C. §§ 801-42 (1958).
4 *FMB v. Isbrandtsen Co., Inc.*, 356 U.S. 481 (1958).
5 Shipping Act of 1984, 46 App. U.S.C. 1701.
6 Public Law 105-258, 112 Stat. 902, Ocean Shipping Reform Act of 1998.
7 See *infra* XI.

V. The liner conference system as a tool for development during the years of the New International Economic Order and the UNCTAD Code of Conduct for Liner Conferences, 1974

The liner conference system encompassed all the world trade including that with the southern hemisphere. Given the possibility to set up a merchant marine without technological barriers, during the decade of the 1960s an interest grew in the then-called less developed countries to participate in maritime trade, which was seen as a mechanism to foster economic development, reduce trade dependence on foreign countries and improve the balance of payments.

After all, the purchase of line vessels and their placement in international routes was only a matter of investment, since no technological barrier existed for setting up a national merchant marine.

In pursuing this goal, the then less developed countries relied heavily on the UN Conference for Trade and Development (UNCTAD), in those times much more influential than now: UNCTAD produced papers and studies on liner shipping and on the conference system, and it theorised on the need for a global codification of the equal sovereign right of all States to ply for trade at the international level.

In particular, the basic idea was that of reserving portions of national cargo traded in international commerce for the national shipping lines. And since international liner routes were covered by liner conferences, they became the instrument chosen to establish this equitable participation: hence, from private cartels among shipowners, liner conferences were transformed into a regulatory framework for allocating cargo at the international level.

This objective – *de facto* using the stability of maritime trade allowed by the liner conference system – was achieved first through unilateral legislation reserving to the national shipping lines the transportation of substantial portions of cargo to be moved in international maritime routes; not seldom, this legislation evolved into agreements between two States sharing an interest due to their bilateral trade.

Eventually, the whole matter was established at the multilateral level through the UNCTAD Convention on a Code of Conduct for Liner Conferences, signed at Geneva in 1974.[8]

Part I of this Convention envisaged a global allocation of rights to carry a substantial portion of the liner trade generated by each country using national shipping lines operating within a conference.

Countries were at liberty to define the legal requirements to be considered a national shipping line for the purposes of the carriage of goods by sea. Cargo carried by the conferences was allocated according to the 40:40:20 formula, *i.e.* 40 per cent of the cargo was, respectively, allocated to the national shipping lines of the countries served by a given bilateral trade and the remaining 20 per cent was available for third country shipping lines, also called cross-traders.

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[8] Available also at <www.unctad.org/ttl/ttl-docs-legal.htm>.

Additionally, and consequently, the Code of Conduct established a right of each country to have its national shipping lines admitted into a conference serving its trade.

Part II of the Convention prescribed a global antitrust statute for liner shipping, in which a general exemption of liner conferences from the prohibition of cartels was foreseen, together with a series of rules aimed at reducing the risk that conferences might exploit their market power vis-à-vis their competitors (independent liner shipping companies) and their counterparts.

Hence, and for the first time in history, a comprehensive convention on antitrust matters came into existence – albeit limited in scope to liner shipping – in which detailed rules were set and agreed upon to legitimate the cooperation among liner shipowners: in exchange for their international legitimacy, they were entrusted to serve also "public" goals like trade participation in the interests of the respective economic and political systems.

The Code of Conduct was a landmark success – maybe the most important – of the New International Economic Order: notwithstanding its belated entry into force, only in 1983, nine years after its signature, its provisions were substantially applied in world liner trade (with the exception of that involving the US) long before, at least in respect of cargo sharing formulas; furthermore, the antitrust provisions contained in Part II of the convention became a benchmark for the national statutes which, in different legal systems including the then European Communities, would regulate competition matters in liner shipping.

Yet, its achievements were short-lived: progressively, by the mid-eighties of the last century, the development of containerization determined substantial changes both in the market structure and in the organizational patterns of liner trade: the market for liner shipping became highly concentrated and this M&A process brought about the acquisition of many "national shipping lines" by larger, global carriers; moreover, containerization engendered new forms of cooperation among shipowners (those consortia and global alliances examined above[9]), as well as new patterns of trade among countries: like in the air transportation sector, containers helped the growing of a "hub and spoke" model of liner shipping, *in lieu* of a (bilateral) point-to-point model, which was the typical frame on which liner conferences were formed and organised.

The above phenomena carried with them a progressive decrease of the market share carried by liner conferences. This, in turn, also determined a decrease of the market shares on which the 40:40:20 formula would apply, since it was applicable only to conference trade and not to trade carried by non-conference liners.

Additionally, the liberalization of world trade occurring a few years later cast doubt on the international feasibility of a liner shipping system advocating a rigid allocation of cargo quotas; consequently, a progressive abandonment occurred in respect of the "public" role of the national shipping lines as well as of the international legitimacy of their claim to carry part of their "national trade". The above, coupled with the already mentioned concentration in the liner shipping markets,

9 See *supra* III.

caused the gradual loss of importance of national shipping lines in world trade and eventually their disappearance at least as a legal notion.

Even if, in essence, the application of the Code of Conduct (albeit still in force) has faded away, its lesson remains and can be summarised as follows: in a legal environment which was totally unregulated, liner conferences and its members massively exploited their market power to the detriment of shippers, especially the weaker ones who were located in the less developed countries.

Consistent with a… "beggar thy neighbour" approach (or, in less strong terms, with a national welfare approach), the States whose merchant marines were exploiting other markets did not care to establish limitation to the conferences' behaviours, not even to apply competition rules, save the already mentioned exception of the United States.

The reaction of the exploited States resulted in a large portion of liner trade shifted from OECD shipping lines to the "national" shipping lines of these States, irrespective of any efficiency reason: from a pure market and competition point of view, this meant an overall loss both for the OECD shipping sector and for world trade.

Indeed, a fair allocation of world trade shares among shipping lines took place for a couple of decades; yet, this achievement no longer exists, at least as a general rule, since globalization schemes have substantially altered also the shipping industry, with the consequences that we shall shortly examine.

VI. Shipping and competition law in the wake of E(E)C

The European (Economic) Community had a terrestrial scope and not a maritime one: suffice it to note that the transport policy contained in (old) Title V of the E(E)C Treaty did not foresee any application of the relevant provisions to shipping and rather empowered the Council to "decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport".[10]

The "extraterritorial" nature of shipping for EC law was confirmed upon the enactment of the first EEC Regulation applying the competition rules of the then EEC Treaty, whose scope of application did not include maritime and air transport.[11] Indeed, E(E)C competition law was (theoretically) applicable to shipping

[10] See Art. 84(2) (thereafter Art. 80[2]) of the EC Treaty, now Art. 100 of the Treaty on the Functioning of the European Union (TFEU), whose precise (modified) terms establish the following: "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions".

[11] For sake of precision, EEC Regulation No. 17/62, implementing Articles 85 and 86 of the Treaty (OJ 1962 No. 13, p. 204−211) did not establish anything about its scope of application. Soon after, however, EEC Regulation No. 141/62 (OJ 1962 No. 124, p. 2751) exempted transport from the application of EEC Regulation No 17. Some years later, road, rail and inland waterways transport did include antitrust regulation (EEC Regulation No 1017/68 applying rules of competition to transport by rail, road

under the "provisional instruments" established by former Article 84 EC, but this possibility remained, in fact, theoretical and was never used.

Therefore, when the UN Code of Conduct was signed, the Community was unprepared to speak with a single voice on this important piece of international legislation, having both competition and regulatory aspects as well as clear effects on Community maritime transport. After a few years of debates, the E(E)C clarified its position vis-à-vis its shipping policy and the Code of Conduct, and by means of EEC Regulation No. 954/79[12] invited Member States to ratify it.

And when the Code entered into force in 1983, it was clear not only that a European policy on maritime transport had to be implemented with some rules, but also that the gap in the application of competition rules to maritime transport had to be filled as soon as possible.

This would take place a few years later with EEC Regulation No. 4056/86[13], which eventually introduced a special antitrust regime for liner shipping, establishing a block exemption for liner conferences. Regulation No. 4056/86 was in fact modelled after Part II of the Code of Conduct, and it repeated its structure both in respect of the antitrust exemption for cartels among liner shipping companies and with the introduction of rules aimed at prohibiting conferences from abusing their market power with shippers or with competing liners.

Tramp, cabotage and cross liner trade were not encompassed by the scope of application of this Regulation and were to remain under the "theoretical" measures of then Article 84 EC until 2008.

As we shall see, Regulation No. 4056/86 is no longer in force, so that it is outside of the scope of this paper to analyse its contents: suffice it to mention, however, that it did allow price fixing cartels among liner shipping companies to exist in European maritime trade, both between EC Member States and between them and third countries.

It was, needless to say, an unprecedented derogation from the application of competition law to hard-core agreements restricting competition that had no parallel in any other industrial or commercial field.

VII. The antitrust immunity for shipping cartels in the light of EC competition policy and the case-law developed under Regulation No. 4056/86

Yet, the idea of hard-core cartels being exempted from the prohibitions of Article 81 EC (and now Article 101 TFEU) was hard to live with. And in fact, the Commission and the EU Court of First Instance (now the General Court) made clear that the antitrust immunity enjoyed by liner conferences was not to be intended as an overall retreat of EC competition rules in the maritime sector.

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and inland water way, OJ 1968 No. L 175, p. 1−12). But not shipping, for which nothing was enacted until the end of 1986 (see *infra* note 13).

12 OJ 1979 No. L 121, p. 1−4.

13 OJ 1986 No. L 378, p. 4−13.

The above was, hence, implemented through a narrow interpretation of any antitrust immunity in the maritime sector. Therefore, and in the first place, no immunity could ever be pronounced in the event a liner conference abused its dominant position in a given market under then Article 82 EC (and now Article 102 TFEU). And in this vein, it is worth mentioning that, because of the specific linkages existing among conference members, the dominant position was immediately considered as being jointly held by any and all shipping companies member to a conference, irrespective of the market share held by each of them.[14]

On the other hand, not only the abuse of a dominant position was struck down by EU competition law, but the mere achievement of such a dominant position would be fatal to maintaining antitrust immunity: this was expressly established by Regulation No. 4056/86 and was thereafter strictly implemented.

More generally, one can easily say that the exception of liner conferences was never intended as operating *per se*, and, rather, price fixing agreements among shipowners and all related aspects of liner conferences agreements have always been subject to the condition precedent that no disproportionate harm to competition arises from the operation of a liner conference on a given trade: therefore, and in the first place, the exemption was granted as long as the conference members did not discriminate or distort trade vis-à-vis shippers, ports or users; by the same token, the antitrust immunity for conferences would be removed if an excessive imbalance in the bargaining positions with shippers had resulted.

We have already recalled that, with the emergence of containerization in liner trades, other arrangements among shipowners developed, *i.e.* consortia:[15] these agreements, which have become very common among liner carriers, did not enjoy a "relaxed" interpretation of cartel prohibition under Regulation No. 4056/86 and were indeed strictly scrutinised.

As a matter of fact, the joint operation of liner shipping companies increases schedules and provides an enhanced offer for liner transportation along specific routes; hence, consortia do have, in principle, positive results for users. In such a situation, they fully qualify for an exemption in respect of cartel prohibition under Article 101.3 TFEU (formerly Article 81.3 EC); and yet, the block exemption regulations regularly issued for consortia (the latest one being established by Council Regulation No. 246/2009[16], implemented by Commission Regulation No. 906/2009[17]) have always been limited in time and have never included the possibility for carriers to agree on prices and tariffs.

Moreover, and above all, their exemption was subject to demonstrating that a sufficient level of competition remained in the trade, this being measured with an analytic reference to market shares in affected trade, with decreasing critical thresholds if the members of the consortium were also joining a liner conference. *De facto*, liner conferences and consortia often co-existed on a given route, the

14 See the Commission decision 93/82/EEC, *Cewal*, OJ 1993 No. L 34, p. 20.
15 See *supra* III.
16 OJ 2009 No. L 79, p. 1−4.
17 OJ 2009 No. L 236, p. 31−34.

former being used for tariff purposes, the latter for jointly organising the liner transport services.

In a nutshell, and as the relevant case-law soon demonstrated, the antitrust immunity of liner conferences was never intended as being a catch-all immunity: the EU competition policy did immediately choose a case-by-case approach and was always ready to lift such an immunity as soon as (a) the degree of competition on a given route decreased below acceptable levels, or (b) members of a liner conference tried to implement restrictions of competition beyond the conditions allowed by Regulation No. 4056/86.

Examples of this approach are manifold: for instance, the Commission and the General Court soon clarified that the antitrust immunity covering liner conference-agreed freight rates would not operate for tariff agreements among conference members encompassing non-maritime legs;[18] by the same token, the prohibition included price-fixing by liner shipping companies for inland transport supplied in combination with maritime transport as part of a door-to-door service.[19]

Similarly, it was established that no cartel exemption would be enjoyed by conference members in a case where they agreed on a limitation of the respective capacity offered in a given trade, aimed at reducing or excluding marginal freight at lower rates.[20]

In another case, liner conference members were deprived of their immunity and sanctioned for having infringed EU competition law when they tried to impose restrictions within loyalty agreements with shippers in excess of those expressly foreseen and allowed by Regulation No. 4056/86.[21]

Finally, outside the liner conference realm, no relaxed enforcement of EU antitrust rules ever existed; therefore, and to offer some examples, the exchange of commercial information among members of a consortium agreement was punished as going beyond the cartel exemptions enjoyed by consortia;[22] foreclosing practices adopted by a dominant ro-ro liner vis-à-vis its competitors for the use of port facilities were sanctioned under present Article 102 TFEU;[23] and freight rates arrangements or concerted practices between liner ro-ro shipping companies which took place outside a conference were also severely sanctioned.[24]

VIII. The OECD Report on competition in liner shipping (2002)

By the turn of the century, the popularity of liner conferences started to fade.

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18 See in particular the Commission decision 1999/243/EC, *Trans-Atlantic Conference Agreement (TACA)*, OJ 1999 No. L 96, p. 1.

19 See case T-86/95 *Compagnie Générale Maritime* [2002] ECR, II-1011.

20 See the Commission decision 99/485/EC, *EATA*, OJ 1999 L 193, p. 23.

21 Case *CMB et al.*, Press Release IP/93/739, of 9 September 1993.

22 *EATA* case (*supra* note 20).

23 See the Commission decisions *Sea Containers/Stena Sealink*, OJ 1994 No. L 15, p. 8−19; *Port of Rødby*, OJ 1994 No. L 55, p. 52−57.

24 See case T-65/99, *Strintzis Lines Shipping SA v Commission*, ECR [2003], II-5440.

When it became "politically correct" to abandon the idea that national merchant marines had a claim to carry a portion of the trade generated by the national industry,[25] economic studies started to be published advocating that – opposite to the old story detailing the existence of specific features in the liner shipping industry that would make the application of competition law impossible – this sector is not "unique" in respect of many other economic sectors and, hence, does not require any special treatment under antitrust rules.

This new scientific literature was endorsed by some international institutions, including the World Bank. But the most important study for our purposes was released by OECD in 2002, when a seminal report on competition in liner shipping was published.[26]

In this Report, after a thorough economic and market assessment of the characteristics of modern liner maritime transportation, member States of the OCED were formally recommended to seriously consider removing antitrust exemptions for price fixing and rate discussions among shipowners and to retain exemptions for other arrangements so long as these would not result in excessive market power.

More precisely, even without achieving the idea of promoting a model law for antitrust in international shipping, the OECD suggested that its members adopt new national rules based on the following principles:

- *freedom to negotiate* between shippers and carriers on an individual and confidential basis;
- *freedom to protect contracts* – carriers and shippers should always be able to contractually protect key terms of negotiated service contracts;
- *"conditioned" freedom to coordinate operations* – carriers should be able to pursue operational and/or capacity agreements with other carriers as long as these do not confer undue market power.

Needless to say, the OECD Report marked a watershed in liner shipping competition policy and substantially diverged from the contents of both the Code of Conduct for Liner Conferences (whose practical importance had, however, diminished), and from those of many OECD members' acts of legislation, including the EU and its Regulation No. 4056/86.

No wonder therefore that, pushed by the case-law which hardly tolerated the large immunities enjoyed by liner shipping cartels and by the political implications of the OECD Reports, the then European Community finally found the courage to reform its antitrust policy in our sector.

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[25] See *supra* V.

[26] OECD Directorate for Science, Technology and Industry, Division of Transport, Final Report, doc. DSTI/DOT/2002.2, 16 April 2002, available at <www.oecd. org>.

IX. The watershed of 2006: disappearance of the special regime for shipping … and a good-bye to the UN Code of Conduct

With Regulation No. 1419/2006[27] the EU adopted the most radical option suggested by OECD: shipping, of whatever form and nature, would become no longer subject to any "special regime" in respect of the application of EU competition law; rather, the general rules of Regulation No. 1/2003 implementing Articles 81 and 82 EC (and now Articles 101 and 102 TFEU) would become the reference also for maritime transport, just as for any other industry.

The effects of the entry into force of Regulation No. 1419/06 have been immediate for those shipping sectors that, until that date, were not covered by any secondary piece of legislation implementing EU antitrust rules: as we have already recalled, tramp shipping and cabotage – and also shipping carried out between non-EU countries – had been excluded not only from the scope of application of Regulation No. 4056/86, but also from any other regulation adopted under Article 83 EC (now Article 103 TFEU). Hence, and finally, Regulation No. 1419/06 puts an end to the "provisional regime" as per Article 84 EC that had characterised these maritime transport sectors, a regime which had practically implied a 50-year long full immunity from EU antitrust. Indeed, such an immunity was not total, since national antitrust statutes had been in existence for many decades in many EU Member States and had applied sometimes also in the maritime sector. However, no recollection exists that Member States have ever applied their competition rules to agreements restricting competition among shipowners operating in third country trade, even though I have always believed that also these agreements may be impacted by EU antitrust provisions when they produce effects in EU trade and/or markets; additionally, and more generally, this legal vacuum was, indeed, extraordinary.

In order to lift the antitrust immunity enjoyed to that point by shipping conferences, Regulation No. 1419/2006 abolished Regulation No. 4056/86, but it gave the market a two-year moratorium prior to declaring shipping conferences illegal in order to allow shipowners and shippers to adapt to this new legal era in shipping. The moratorium for liner conferences expired in October 2008.

Maybe due to its conscious decision to tackle, eventually, one of the "sanctuaries" of international antitrust, Regulation No. 1419/06 was very clear and detailed in explaining why, after so many decades in which liner conferences were first sponsored, then legitimated, and finally at least tolerated, the time had come to declare that they were outlawed: in particular, explanations have been provided to specify that no unique features exist for the liner shipping sector because the cost structure of shipping lines does not substantially differ from that of other firms. Based on the above, the European legislator excluded the existence of evidence capable of indicating that this sector should be protected from the application of competition rules.

After having demolished the economic backgrounds on which the antitrust immunity for liner conferences had been built, extensive reasons were provided to

[27] OJ 2006 No. L 269, p. 1−3.

explain why none of the four conditions precedent under Article 81.3 EC (and now Article 101.3 TFEU) would be satisfied, and therefore why no exemption from cartel prohibition can be secured for agreements fixing rates or allocating capacity among shipowners.

Interestingly enough, the details characterising this part of Regulation No. 1419/06 disclose an intention of the EU legislator to offer guidance for the future enforcement of EU competition rules in shipping by the competent EU and national authorities; on the other hand, after the modernization and decentralization of EU antitrust, the international implications of shipping make it probable that EU norms, rather than national ones, will be applied to scrutinise anti-competitive behaviours of shipping companies having effects in the EU markets. Hence, the opportunity is exploited within Regulation No. 1419/06 to illustrate how arrangements restricting competition among shipping lines should be considered upon the expiration of the two-year moratorium for liner conferences.[28]

[28] *First*, concerning the condition requiring that the restrictive agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress, recital no. 4 contends that conferences no longer attain efficiency because they have ceased to apply "the conference tariff although they still manage to set charges and surcharges which are a part of the price of transport". Furthermore, no evidence exists showing that the conference system leads to more stable freight rates or more reliable shipping services than would be the case in a fully competitive market, due consideration being taken of the fact that conference members "increasingly offer their services via individual service agreements entered into with individual exporters. In addition, conferences do not manage the carrying capacity that is available as this is an individual decision taken by each carrier. Under current market conditions price stability and the reliability of services are brought about by individual service agreements. The alleged causal link between the restrictions (price fixing and supply regulation) and the claimed efficiencies (reliable services) therefore appears too tenuous to meet the first condition of Article 81(3)". *Second*, as regards compensation to consumers that must take place to offset the negative effects resulting from the restriction of competition, recital no. 5 is quite clear in qualifying that the negative effects of price fixing agreements "are very serious", and that "no clearly positive effects have been identified" for them. Hence, the conclusion is straightforward in stating that neither the second condition of (now) Art. 101(3) TFEU is fulfilled by liner conferences. *Third*, in respect of the proportionality principle, recital no. 6 points out that the practice and market usages show that "adequate, reliable and efficient scheduled maritime services" can be achieved through much less restrictive agreements than those permitted under Regulation No. 4056/86 (price fixing and capacity regulation), which therefore are not considered to be indispensable for the purposes of (now) Art. 101) TFEU: examples of these agreements are both the consortia, "that do not involve price fixing and are therefore less restrictive than conferences", and the individual service agreements, which "do not restrict competition and provide benefits to exporters as they make it possible to tailor special services", while at the same time fostering price stability "because the price is established in advance and does not fluctuate for a predetermined period (usually up to one year)". *Fourth*, referring to the requirement that arrangements restricting competition should nonetheless remain subject to effective competitive constraints, recital no. 7 notes that, while conferences are present in nearly all major trade lanes and compete with carriers grouped in consortia and with independent lines,

As to the addressees of this illustration, one can easily refer not only to the entrepreneurs operating in the market, whether on the supply or on the demand side of liner shipping services, but also to those institutions required to implement the new EU approach on competition in this sector: hence, national competition authorities and Member States' domestic courts. Whereas, in respect of the European Commission, which largely contributed to the drafting of the Regulation, its contents happen to be a kind of declaration on how, in its capacity as EU public antitrust enforcer, it shall apply Articles 101 and 102 TFEU vis-à-vis liner shipping cartels. And to make things even clearer, one should further recall that, in its proposal for the repeal of Regulation no. 954/79, the Commission stated that, after 18 October 2008, liner conferences operating between trade to and from Member States "shall become illegal".[29]

This having been said, however, there is probably a second rationale for such an extensive explanation of the reasons why the block exemption for liner conferences is to be abolished: more precisely, especially at that time, an implicit concern may well have existed among European legislators on the consequences of such a decision on the international liner trades involving European ports.

In fact, in those years liner conferences still existed and were numerous in world shipping.[30] And the desire of the EU was to promote a smooth dismantling at least of those operating along EU routes.

The reason for this dismantling was evident, because on the same date fixed for declaring liner conferences no longer exempted by EU competition law, also Regulation No. 954/79 was to be repealed by virtue of Regulation No. 1490/2007:[31] the political will behind this Regulation is evident and is that of lifting the "cover" allowing EU Member States to adhere to the UNCTAD Code of Conduct for Liner Conferences.

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this is not sufficient to grant that price competition may effectively take place: this because "whilst there may be price competition on the ocean freight rate due to the weakening of the conference system there is hardly any price competition with respect to the surcharges and ancillary charges. These are set by the conference and the same level of charges is often applied by non-conference carriers". In addition, since carriers participate in conferences and consortia on the same trade, they exchange commercially sensitive information and cumulate the benefits of the conference (price fixing and capacity regulation) and of the consortia (operational cooperation for the provision of a joint service) block exemptions. Therefore, "given the increasing number of links between carriers in the same trade, determining the extent to which conferences are subject to effective internal and external competition is a very complex exercise" and cannot be dealt with under a block exemption; rather, the solution may found, "only … on a case by case basis".

29 COM(2006) 869 final of 30 January 2007.

30 In evaluating the proposal of the Commission COM(2006) 869 def. – 2006/0308 (COD) regarding the adoption of the regulation repealing Regulation No. 954/1979 (OJ 2007 No. C 256, p. 62−65), the European Economic and Social Committee counted some 150 liner conferences still existing, 28 of which were operating along routes connecting EU countries (see p. 12).

31 OJ 2007 No. L 332, p. 1−2.

Since the EU has never been a party to this Convention, this was the only tool the EU had to force the exit of "EU trade" from the regulatory framework of the UN Liner Code. To my knowledge, and so far, the smooth operation has been successful: liner conferences have disappeared from EU trade (and beyond as well), and even if no Member States have yet denounced or withdrawn from the UN Convention, the lack of conferences in respect of this trade makes their participation in the Liner Code irrelevant, avoids international tensions with third countries still parties to it, and makes the EU request on Member States to retreat from the Liner Code itself pointless.

X. The implementation of EU competition rules in shipping after 2008: technical agreements, consortia and a prognosis on other arrangements potentially impacted by Article 101 TFEU

Since the expiry of the two-year moratorium provided for shipping conferences by Regulation no. 1419/2006, liner maritime transportation has become subject to general antitrust rules. This has obliged scholars and operators to question what room is left for arrangements restricting competition in shipping, and more specifically in liner shipping.

If we consider rate agreements, my firm belief is that there is no possibility for them ever being exempted from antitrust prohibitions: after some years of empirical observation, it has been shown that profitability is possible for liner shipowners even when price competition takes place; moreover, with the old story about the necessary trade-off between stability and competition discarded, we cannot but confront ourselves with the principles stated by the then Court of First Instance (and now General Court) in its judgment *Atlantic Container Line (TAA)*, when it was clarified that, even at the time of block exemption of liner conferences, the EU legislator "did not assert (and indeed could not have asserted) that stability is more important than competition".[32] Finally, the opposition to these cartels has been officially stated by the European Commission,[33] what makes also quite unlikely that, even in very limited cases, they might benefit from an individual exemption under Article 101.3 TFEU. In my view, the same can be said not only for agreements regarding freight tariffs, but also for all arrangements on other elements coming together to compose the costs of (maritime) transport: I refer to surcharges, agency fees and the like.

As hard-core horizontal cartels, I further believe that also agreements fixing capacity or allocating markets or routes are doomed by EU competition rules.

However, a different perspective can be taken for (other kinds of) non-rate-making agreements.

In the first place, technical arrangements continue to be available for shipping lines since they do not affect competition and therefore fall outside the scope of

[32] Case T- 395/94, *Atlantic Container Line (TAA)* [2002] ECR, II-875, § 261.

[33] See *supra*, note 29 and accompanying text.

application of Article 101 TFEU.[34] Horizontal agreements of this kind are, for instance, those having as their sole object and effect the implementation of technical improvements or the achievement of technical cooperation. This kind of agreement has always been considered as being fully legitimate also by the European Commission and by the General Court.[35] The Commission has additionally declared that agreements relating to the implementation of environmental standards can also be considered to fall into this category.[36]

In respect of consortia, a fully fresh block exemption regulation has been newly adopted, representing the state-of-the-art for them: Commission Regulation No. 906/2009[37] amends the previous regime which had been enacted during the period in which the block exemption for liner conferences was in force and establishes terms and conditions under which, in a shipping sector freed from rate-making agreements, consortia can be justified under Article 101.3 TFEU.

Among the most important features of this piece of legislation, it is worth observing its convergence towards those block exemption regulations existing in respect of other horizontal agreements. We still have a market share limitation, which is now generally set at 30% of the relevant market, a white list clause,[38] and a black list clause specifying so-called hard-core restrictions that are prohibited

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[34] These agreements had already been expressly declared irrelevant for antitrust purposes by Art. 2 of Regulation No. 4056/86, which listed however a series of arrangements that, twenty-five years later, needs to be substantially reduced because of the disappearance of liner conferences and the transformation that, meanwhile, has occurred in our sector.

[35] See the *Far Eastern Freight Conference (FEFC)*, OJ 1994 No. L 378, p. 17−36; *Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA)* decisions, OJ 2000 No. L 268, p. 1−34; Case T-229/94 *Deutsche Bahn v Commission* [1997] ECR, II-1689.

[36] See the 2008 Guidelines (*supra* note 1), § 37.

[37] See *supra* note 17.

[38] Under Art. 3 of Regulation No. 906/2009, "Pursuant to Article 81(3) of the Treaty and subject to the conditions laid down in this Regulation, it is hereby declared that Article 81(1) of the Treaty shall not apply to the following activities of a consortium: 1. the joint operation of liner shipping services including any of the following activities: (a) the coordination and/or joint fixing of sailing timetables and the determination of ports of call; (b) the exchange, sale or cross-chartering of space or slots on vessels; (c) the pooling of vessels and/or port installations; (d) the use of one or more joint operations offices; (e) the provision of containers, chassis and other equipment and/or the rental, leasing or purchase contracts for such equipment; 2. capacity adjustments in response to fluctuations in supply and demand; 3. the joint operation or use of port terminals and related services (such as lighterage or stevedoring services); 4. any other activity ancillary to those referred to in points 1, 2 and 3 which is necessary for their implementation, such as: (a) the use of a computerised data exchange system; (b) an obligation on members of a consortium to use in the relevant market or markets vessels allocated to the consortium and to refrain from chartering space on vessels belonging to third parties; (c) an obligation on members of a consortium not to assign or charter space to other vessel-operating carriers in the relevant market or markets except with the prior consent of the other members of the consortium".

anyway;[39] these lists, however, are simplified vis-à-vis past editions and do consider the developments that have taken place over the last years in respect of market practices and above all disappearance of rate-making agreements. Hence, and in a nutshell, the whole structure of the Regulation provides certainty of rights and prevents consortia from becoming a hidden tool for creating restrictions of competition among shipowners that go beyond the mere joint organization and exploitation of liner maritime transport services. And I would warmly suggest that shipping lines do not overstep the boundaries provided for by Regulation 906/2009.

The new exemption is going to last until April 2015: but under these new perspectives, one can reasonably assume that consortia will be legitimated also beyond this term, unless radical market developments take place, such as a huge market concentration in the liner shipping sector which makes joint liner services no longer necessary. Such a circumstance, however, would be highly undesirable since market structure is already very tight.

Apart from consortia, is there any room for manoeuvre left for shipping lines to enter into cooperative agreements?

My humble answer is no: horizontal agreements among undertakings are always very difficult to justify under competition law and, given the relatively simple nature of the liner shipping business, it is hard to find – in addition to consortia – particular instances where arrangements restricting competition may be considered pro-competitive and hence potentially capable of benefiting from an individual exemption under Article 101(3) TFEU.

Once this sector has been fully normalised, it is hard to believe that any special interpretation or application of EC competition rules may be expected in liner shipping, nor in fact in any kind of shipping: therefore, the future reasoning for any anti-competitive practice adopted in our sector will be the same as that applied in general in EC antitrust law.

In particular, a case-by-case approach will be used in evaluating any behaviour capable of triggering the application of Article 101 (or 102) TFEU. And this will imply the usual investigation concerning, for instance, matters such as (a) the effect on trade between Member States, (b) the relevant market (product and geographic dimension), and (c) the market share.

This is, indeed, the approach chosen by the European Commission in the 2008 Guidelines[40] (a draft of which had been published earlier in 2007), providing extensive explanations on how Articles 101 and 102 TFEU (then Articles 81 and 82 EC) would be applied.

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[39] Under Art. 4, "The exemption provided for in Article 3 shall not apply to a consortium which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, has as its object: 1. the fixing of prices when selling liner shipping services to third parties; 2. the limitation of capacity or sales except for the capacity adjustments referred to in Article 3(2); 3. the allocation of markets or customers".

[40] See *supra* note 1.

In this regard, one can briefly consider which situations may deserve attention from the competition law point of view.

Having already carved out all horizontal agreements, let us consider now vertical arrangements: I do not believe them likely to raise particular concerns or interest, at least as long as they are not intertwined with issues of a dominant position (single or joint) held by any of the parties to these agreements: while service contracts will continue to be available to shipping lines, the same can be said, almost certainly, also for exclusivity or loyalty arrangements, if and when they may be still practicable.

More uncertain is the evaluation of information exchanges: while their treatment will follow an abundant ECJ case law which has developed over more than thirty years,[41] caution will have to be employed by liner shipping companies not only in exchanging their pricing or commercial policies, but even in unilaterally carrying out announcements of these policies to the public. The frequency of these practices will also be relevant, as will the degree of concentration of the market in which these practices occur.[42]

In this vein, even if it is settled case law that Article 101 TFEU does not prevent undertakings from adapting themselves intelligently to the existing or anticipated conduct of competitors,[43] one has to keep in mind that many liner trades have oligopolistic characteristics, which consequently imply a more rigorous evaluation of the anti-competitive effects of information exchanges. On the other hand, transparency in the market is normal, and this should, in my view, always be taken into consideration as a mitigating factor in assessing the anti-competitive effects of information exchange or dissemination.

Finally, a few words should be addressed also to agreements restricting competition in tramp shipping.

As long as no implementing provisions existed under former Articles 81 and 82 EC (and now 101 and 102 TFEU), the application of competition rules to tramp shipping was not an issue, especially because of the fragmentation existing in the market and the virtual non-existence of cartels among tramp shipowners.

However, recent trends in this sector have also occurred, and the Commission has been keen in dealing with them in its 2008 Guidelines:[44] in particular, specific attention has been paid to pool agreements, *i.e.* arrangements among shipowners

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41 See Joined Cases 40-48, 50, 54-56, 111, 113-114/73 *Suiker Unie v Commission* [1975] ECR 1663; Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 & C-125/85 to C-129/85 *A. Ahlström Osakeyhtiö and others v Commission* [1993] ECR I-01307; Case T-35/92 *John Deere Ltd v Commission* [1994] ECR II-957; Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111; Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125; Case C-194/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821; Case C-238/05 *Asnef-Equifax v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2006] ECR I-11125.

42 See the 2008 Guidelines (*supra* note 1), in particular §§ 41 *et seq*.

43 This principle has been established by the ECJ since the *Suiker Unie* case (*supra* note 41), paras 173−174.

44 See §§ 60 et seq of the 2008 Guidelines (*supra* note 1).

bringing together a number of similar vessels and operating them under a single administration.

This kind of agreement falls within the category of joint selling and joint production arrangements,[45] which may become relevant for antitrust purposes. Since shipping – of any nature – is no longer an autonomous subject matter under EU competition law, these pool agreements must be analysed under the common framework existing for horizontal cooperation agreements. Therefore, depending on its characteristics, each pool agreement must be analysed on a case-by-case basis to determine, due consideration being made to all the elements concerning the agreement and the market situation in which it is placed, whether it falls within the scope of application of Article 101(1) and, in such case, whether it fulfils the four cumulative conditions established by Article 101(3) to enjoy a favourable evaluation.

XI. The international impact of the EU approach to liner shipping. And the end of the international regulatory framework which coexisted with liner conferences

As we recalled above,[46] the decision by the European Union to sanction liner conferences – even if somehow risky – has been so far harmless in respect of international relationships with third countries: maybe the time has really come for a general good-bye to the liner conference system and to the UN Code of Conduct, even if still binding on 16 EU Member States.[47]

Indeed, the EU might become a leading legal system to help overcome the past scenario: suffice it to mention that, in September 2010, a bill has been introduced in the United States (titled "The Shipping Act of 2010"), whose aim is the abolishment of liner shipping cartels, *i.e.* exactly the same aim as that fostered by Regulation 1419/2006.[48]

Moreover, initiatives are being made by the European Union, and particularly by the Commission, to persuade other States to adopt measures having the same

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45 For instance, as the 2008 Guidelines (*supra* note 1) point out, in these agreements a pool manager is appointed and is normally responsible for the commercial management (for example, joint marketing, negotiation of freight rates and centralization of incomes and voyage costs) and the commercial operation (planning vessel movements and instructing vessels, nominating agents in ports, keeping customers updated, issuing freight invoices, ordering bunkers, collecting the vessels' earnings and distributing them under a pre-arranged weighting system, etc.). The pool manager often acts under the supervision of a general executive committee representing the vessel owners, whereas the technical operation of vessels is usually the responsibility of each owner (safety, crew, repairs, maintenance, etc.).

46 See *supra* IX, at the end.

47 Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Italy, Malta, The Netherlands, Portugal, Rumania, Slovakia, Spain, Sweden and United Kingdom. Norway (a Member of the EEA) is also party to the UN Convention.

48 The Bill is registered as H.R. 6167, and has been proposed by Mr. Oberstar.

contents in order to foster a world-wide "normalization" of shipping from the competition law point of view.

If this happens, international economic law will no longer serve those "political" interests of the States that were the (targeted) focus of the UN Liner Code, *i.e.* to allocate to each of them a fair share of liner shipping trades, hence also giving them the opportunity to cover "marginal" viz. periphery trade or to sustain competitiveness in certain geographic areas.

However, one cannot deny that this choice by the EU coincides with a moment in which European shipping lines have a large share of the world market for water-borne transportation. And presumably, non-European competitors are seen as being incapable of threatening the strength of the European liner shipping industry. This situation may not continue over time, and if the market position of European shipping lines were to fade, then the advantages of world shipping liberalization might again be cast in doubt. Yet, in that case, the impetus for legislative or political decisions aimed at (again) reserving to our shipping lines a "fair" share of our trade would probably be much less noble than in the past.

XII. Selected Bibliography

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Regional Harmonization of Maritime Law in Scandinavia

Lars Gorton

I. General background

1. Scope of introductory lecture

I am deeply honoured to have been given the opportunity to participate in this series of Hamburg lectures on maritime affairs. Hamburg and particularly its Max

J. Basedow et al., *The Hamburg Lectures on Maritime Affairs 2009 & 2010,*
DOI 10.1007/978-3-642-27419-0_2, © Springer-Verlag Berlin Heidelberg 2012

Planck Institute are of great importance to all individuals concerned with private law matters. Of course, maritime law is not only of private law nature as public law aspects play an equally important role.

Irrespective of the particular aspect chosen, maritime law is probably one of the legal areas where international rules and customs developed earliest and have spread most widely. This is a fact which must be kept in mind when discussing regional solutions with respect to maritime law, and my personal conviction is that this is a legal area which should be approached from an international rather than from a regional perspective. It must, however, also be emphasized that there may be areas of law where, for particular reasons, regional solutions may be useful – especially from a short-term perspective – and may serves as a model for further international harmonization.

The theme for my introductory speech has been given as regional harmonization of maritime law in Scandinavia. I shall mainly focus on the developments in the 20th (and the 21st) century, but there are also some further historical aspects which should be considered as background to the present situation.

As already mentioned, "maritime law" covers various, distinct areas of law (the law of carriage, safety[1], flag and registration, pollution, limitation of liability, procedural rules, etc.). This variety of legal aspects is reflected in the Nordic Maritime Codes in their present versions, covering 23 chapters dealing with a various legal matters.[2]

In my presentation I intend to provide some general background, a few historical highlights and an overview of the development of the maritime law codifications in Scandinavia, but I shall also reflect somewhat on certain other practical aspects which have undoubtedly an impact on the development of maritime law.

2. Some overriding aspects on the Nordic Maritime Codes

As a general point of departure, it needs to be mentioned that several parts of the Nordic Maritime Codes are based on international conventions which have been adopted by a large number of countries. The Nordic countries have adhered to several of these conventions, which have then been transformed into national law normally after discussions and considerations among the different legislators. The present maritime codes from the 1990s are indeed similar although not identical. Thus Denmark and Norway have retained running sections throughout the legisla-

1 When safety aspects are discussed it needs to be kept in mind that "marine safety" today does not mean the same thing as it did in the 19th and the early 20th centuries. Today, "marine safety" is a wider concept than it used to be. Presently, there is also an ongoing discussion on piracy, which is an issue related to safety and international law.

2 In Statens Offentliga Utredningar, SOU 1990:13, p. 80 there is a description of the contents of the Swedish Maritime Code divided into certain main areas: 1) The ship (chapters 1–5), 2) Shipowner and master (chapters 6–7), 3) Liability (chapters 8–12), 4) Contracts of carriage (chapters 13–15), 5) Marine accidents (chapters 16–18), and 6) Penal provisions and procedure (chapters 19–23). It goes without saying that the various areas cover several different issues.

tion, whereas Finland and Sweden chose running sections within each chapter.[3] The Finnish and Swedish solutions broke with previous tradition in order to simplify amendment procedures.

In this overview I have chosen to outline some broad views on the Swedish Maritime Code (SMC), sometimes referring to the Nordic Maritime Codes (NMC) generally. In many instances I have chosen to simply refer to the "Maritimes Codes". In the latter part of the article I wish, however, to also focus on certain other aspects of harmonization which may take place through customs, standard contracts, teaching, court procedure, etc. The use of standard charter parties was thus recognized by the legislator and taken into consideration in the drafting of chapter 14 on charter parties in the Maritime Codes. The "travaux préparatoires" also acknowledged that English law has played a particular role in the development of several international standard charter parties. When discussing the Maritime Codes I have also chosen to focus mainly on certain parts of the Codes, namely chapter 13 dealing with the liability of an ocean carrier in respect of damage to cargo (also including some sections on transport documents) and chapter 14 dealing with chartering matters (basically covering voyage charters, time charters and volume contracts).

I have chosen to use these particular parts of the NMC as a point of departure for the discussion since the liability of the carrier, the transport document and the chartering are closely related to each other not least from a practical point of view. However, the two chapters also mirror fundamental differences in that chapter 13 to a large extent contains mandatory rules (the liability of ocean carriers) and is based on international conventions, whereas chapter 14 basically contains non-mandatory rules ("freedom of contract" is also recognized as a basic principle in charter parties following general principles of contract law) and there is also no international convention in this area, customs and standard contracts instead playing an important role. Chapter 13 also deals with transport documents, which are important both in relation to liner traffic and in relation to charter party trade.

During the last 30 to 40-year period there have taken place a number of changes which have affected the legal and economic framework around shipping and transport. New trading countries, new infrastructure, larger vehicles, the use of electronics, containerization, the new roles of freight forwarders and logistics, the division of functions and the creation of huge shipping companies or logistics operators etc. have all contributed to the new situation. In the process, the role of Finnish and Swedish shipping companies has diminished whereas Norway and Denmark still play an important role but in different segments of transport.

Transport documents have also developed within international frames. The use of bills of lading goes back to the *lex mercatoria*,[4] and they have subsequently

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[3] Thus the Danish and Norwegian Maritime Codes have well over 300 running sections. This is not different from Finland and Sweden, but the number of the chapters and sections comes out differently. Thus e.g. sec 13:42 (defining bills of lading), and 13:1 (general cargo) in the Swedish Code correspond to § 292 and § 321, respectively, in the Norwegian Code.

evolved into the transport documents used today. Neither bills of lading nor other transport documents have, however, been dealt with in depth in the earlier, different conventions related to the liability of an ocean carrier.[5]

The signing of the Rotterdam Rules took place in Rotterdam in September 2009, and the convention is now open for signing and ratification. So far 23 states have signed, among them Denmark and Norway, but not Finland and Sweden.[6] The new convention mirrors the traditional development of the liability of carriers for the loss of and damage to goods, as has evolved in international trade, but they also include an effort to regulate the various types of transport documents and their functions, including their use in an electronic era. The Rotterdam Rules, thus beyond the liability rules, also address more broadly the functions of transport documents and the right of disposal of goods.[7]

It should also be reiterated that harmonization does not occur only through legislation (basically through international conventions), but it may also be arrived at through customs and the use of standard terms and conditions. Furthermore a common business environment may enhance harmonization efforts. That being said, we presently also face a certain divergence between the attitudes among the Nordic states in respect of the new Rotterdam rules. I shall come back to this later.

There is, however, also another reason to narrow down the focus mainly to the rules related to liner service and charter parties, namely because it will facilitate the possibility of following a line of development.

During the period from the 1890s until present there have been a number of changes and amendments to the NMC, not least due to the adoption of new conventions and the need to transform such rules into national legislation. Such amendments have been made repeatedly, but apart from the introduction of the Hague Rules[8] into the earlier codes in the 1930s and the Hague-Visby Rules in the 1970s there have been few amendments to the rules on an ocean carrier's liability, bills of lading and charter parties. Certain modernization was also made during the 1970s in connection with the introduction of the Hague-Visby rules,[9] but other-

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4 See for instance *Schmitthoff*, Commercial law in a changing economic climate (2nd ed. 1981), in particular p. 18 et seq.

5 This is the case with respect to all three conventions, known as the Hague Rules (1924), the Hague-Visby Rules (1968) and the Hamburg rules (1978). There is mention of the bill of lading as the main transport document with respect to ocean carriage, but there is no in depth regulation of this document or the other transport documents in use in maritime carriage. Thus, the bill of lading, having its roots in *lex mercatoria*, came to be regulated in national law rather than in international conventions. In particular *Grönfors*, Successiva transpiorter (1968), and *Ramberg*, The law of transport operators in international trade (2005), have dealt with questions related to integrated transport.

6 So far, no country has ratified the convention.

7 In the SMC, both the bill of lading and the sea way bill have been regulated in chapter 13, in 13:42–13:59.

8 See further in II. 2.

9 See Proposal for legislation 1973:137. At this time the intention was that new legislation based on the Hague-Visby Rules would be introduced in the Nordic count-

wise the new maritime codes from the 1990s meant the first thorough revision of the chapters related to liner service and charter parties. Chapters 13 and 14 were also those parts in the NMC that underwent the most substantial changes in connection with the 1990 revision, and these are parts which may be affected by the signing of and the ratification of the Rotterdam Rules.

3. The Nordic countries and their history – some brief remarks

Of course, four of the Nordic countries (Denmark, Finland, Norway and Sweden) are geographically close. The fifth (Iceland) is geographically rather distant from the others. With respect to language Iceland represents an old version of a Scandinavian language, which is today not easily understood in the other Scandinavian countries, and Finnish is, of course, a language with completely different roots.

Seen in a broad historical perspective going back to the 9th and 10th centuries, it may be questioned to what extent we can really at that time talk of Denmark, Norway and Sweden as countries or whether they should rather be looked upon as administrative and geographical entities of another character. And, at that time there was no maritime law to speak of.

Sweden is often considered to be a distinct country from the 12th or 13th century onwards. Finland became part of Sweden at a rather early time, but it was particularly in certain coastal area that the Swedish language came to be influential.

During the 14th century there was a Nordic Union with Margarethe as the common queen of Denmark, Norway and Sweden. Norway was a part of Denmark for many years but was lost to Sweden in the peace negotiations after the Napoleonic wars and after a period when Sweden had lost its status as great power. In 1809 Sweden lost Finland to Russia. In 1905 the union between Norway and Sweden ceased and Norway became independent. In 1917 Finland gained its independence from the Soviet Union, and after that the Nordic political-geographical scene has remained essentially as it is observed today. This means that when discussing Nordic Maritime Codes back in the 17th century, those codes were really Danish and Swedish.

Against this background it may not be so odd that the Scandinavian countries[10] in some respects have had a close common legal tradition. Add to this that during the latter part of the 19th century there was a strong general Nordic sentiment (not least on the cultural level), and after the Second World War there was again some renaissance of "nordism", but now rather in order to give the Nordic states a stronger position in a world that was characterized by new political rifts (the Cold War, decolonization, the North-South conflict, etc.).

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ries and that the Hague Rules would at the same time be denounced. The denouncement, however, only took place in 1985.

10 Sometimes a distinction is made between the Scandinavian countries (consisting of Denmark, Sweden and Norway) whereas Nordic countries also embody Finland and Iceland. I have here chosen to use the two terms interchangeably, covering all five countries.

However, for different reasons Denmark, Iceland and Norway became members of NATO, whereas Finland and Sweden were neutral. Denmark joined the EC in 1973 and Finland and Sweden only in 1992. Norway is not a full member of the EU but has instead the EEA agreement. Finland has adopted the Euro, Denmark and Sweden for different reasons have not. Following the 2008/2009 financial crisis, Iceland finally applied for full membership in 2009.

4. A few notes on the historical background of the Maritime Code of 1667

The Swedish Maritime Code of 1667 is still regarded as a good piece of legislation for its time.[11] This codification was by no means a genuine Swedish product, but there was much influence from the Visby maritime law. Dutch, Lübeck and Danish law also played an important role in connection with the drafting of the Swedish code. In Denmark a maritime code had been introduced in 1561 (Fredrik II), and a new maritime code was enacted in the Code of Christian V in 1683. The Danish as well as the Swedish maritime codes had not surprisingly different structures and different contents in comparison with the present maritime codes, but in both there were provisions on the carriage of goods.

In chapter 15 of the Swedish Maritime Code from 1667 the liability of ocean carriers was regarded to be strict excepting force majeure events.

II. Legal cooperation between the Nordic countries

1. Some general observations

In some legal areas, mainly of private law character, there was for a long time a close cooperation among and between the Nordic countries. They have generally cooperated not only in international convention work during convention negotiations, but also in connection with the later transformation of conventions into national legislation. To some extent this is true also today in connection with legislation within the EU. The impression is, however, that Nordic cooperation in the course of new EU legislation is not as active as one might have expected.

The Nordic legal system is often looked upon as a separate legal family within the civil law system.[12] It is generally recognized that there is a certain common Nordic legal approach, but it also has to be admitted that, although there are in many legal areas substantial similarities, there are also other spheres where the legal traditions of the Scandinavian countries differ. This is evident the legal

[11] The background of this maritime code was discussed at a symposium in Gothenburg in 1981 and published in *Modéer* (ed.) 1667 års sjölag – Ett 300-årigt perspektiv (1984).

[12] Recently the concept of "legal families" has been questioned, but it is still recognized as a practical tool to keep different legal systems together. Nordic law has sometimes been described as a mixture between civil law and common law, and this is true in so far as there is in the Nordic countries no equivalence to the great European civil law projects of France and Germany.

scholarship as well as in court practice. Legal writers in central private law treaties often refer to the authors in other Nordic countries, and it is not infrequent that a court in one Nordic country will in its considerations take into regard and refer to the legal development and case law in other Nordic countries.[13] This may be so in respect of central private law rules and principles and particularly so in cases before the Supreme Courts. Not the least in maritime law matters there is a tradition among lawyers to work with legal material from the different Nordic jurisdictions.

In some legal fields, such as public law, tax law, procedural law, etc., the differences are generally more substantial. But also where common Nordic legislation has been achieved there is seldom total harmonization.

After Denmark, as the first Nordic country, joined the European Community in 1973, one observable development seems to be that there was some decline in the Scandinavian legal harmonization work generally. It also needs to be underscored that there is a growing effort on the part of the EU to replace the member countries as the negotiating and signing party to international conventions.

This being said there is nevertheless still much cooperation between the Nordic countries – in the furthering of private law generally and maritime law in particular – from a practical as well as a jurisprudential point of view.

Against this background it is thus relevant to ask if, and then to what extent, there is still a common Scandinavian legal approach and a Scandinavian harmonization programme. I believe that it is fair to say that there is overall a common Scandinavian legal foundation, and there is still also a certain level of coordination and cooperation in order to achieve common Nordic solutions. This is so in respect of the transformation of international conventions into national rules and also in respect of legislation on the EU level.

Even though my object in this overview is to focus on maritime law and particularly the law on ocean carriage and the law on charter parties from a Nordic perspective, it is necessary also to put maritime law into its legal context. Apparently, maritime law is a legal area where business is largely international. This is a circumstance which has an impact on the legal development which is driven to a large extent by international conventions. In this sense, there is on the one hand less scope to talk of a particular Nordic law in this area, but on the other hand, more or less common Nordic Maritime Codes were created in the 1990s following a 100-year tradition, and a particular Nordic perspective has been retained. This is reflected in the present Maritime Code (corresponding solutions are used in the other Nordic codes) where art 13:2 spells out:

> The provisions of this chapter are applicable to carriage by sea in domestic traffic in Sweden and in traffic between Sweden, Denmark, Finland and Norway. In respect of

[13] International conventions are always based on an idea that harmonization should be achieved between different legal systems in respect of the material item covered in the convention. The International Sales Convention (CISG), for example, expresses this in art. 7: "In the interpretation of this Convention regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade".

> contracts of carriage in domestic traffic in Denmark, Finland and Norway, the law in the country where the carriage is performed shall apply.
> In other traffic the provisions apply to contracts of carriage by sea between two states when
> 1. the agreed port of loading is in a contracting state,
> 2. the agreed port of discharge is in Sweden, Denmark, Finland or Norway,
> 3. the transport document has been issued in a contracting State, or
> 4. the transport document provides that the Convention or a law based on the Convention shall apply.
>
> If neither the agreed port of loading nor the agreed port of discharge is in Sweden, Denmark, Finland or Norway, the parties may, however agree that the contract of carriage by sea shall be subject to the law of any other specified contracting State.

This means that there is a particular Nordic slant to the rules. This system goes back to the introduction of the Hague Rules into the various statutory laws of the Nordic countries, when the particular rules of the Nordic Maritime Codes from the 1890s applied to Nordic traffic and the particular rules based on the Hague Rules applied in other relations. So the system may be seen as a reminiscence of the earlier dichotomy of the former rules in the Maritime Code from 1891 and the amendments following the introduction of the Hague Rules. We meet a similar type of solution in the sales convention (CISG) where the Nordic countries have a common reservation with respect to purchases related to the Nordic market.[14]

Having said this, it also has to be admitted that particularly those rules which I am here dealing with differ in some basic ways. The rules related to the carriage of general cargo (dealt with in Chapter 13 of the Maritime Code) and the chartering of vessels (dealt with in chapter 14 of the Code) thus have a different nature. The former chapter is based on international conventions and several of the rules are mandatory. The latter chapter, although this business is at least equally international in character, covers a legal area where there is no particular international convention and the rules are mainly non-mandatory.[15] Chapter 14 has thus been drafted against the background of international shipping practice and international standard documents rather than on international conventions.

So, although as outlined above it is questionable to what extent one could speak of a common Nordic legal system, there is still a high degree of harmonization of maritime law: in preparatory works, in legislation, in case law and in the legal doctrine, yet also in other respects as well.[16]

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[14] There is, however, an ongoing discussion whether this reservation should be revoked. See further in II. 2. below.

[15] There is no international convention on chartering. On the other hand, it has been necessary in the international conventions regarding the liability of ocean carriers to draw a line between the different types of business, such as liner service (mandatory rules) and charter (non-mandatory rules). The chartering business has, however, been recognized also in United Nations. Thus in 1974 the United Nations published a study on charter parties in a report by the UNCTAD (United Nations Conference on Trade and Development) secretariat.

[16] There is, however, a need to recognize that the Nordic cooperation, instead of increasing so that the Nordic countries become a more powerful group within the EU, seems to be decreasing, see for a discussion *Schelin*, Juridisk Tidskrift 2007, 140. This

2. Some remarks generally on common Scandinavian legislative efforts in the late 19th/early 20th century

Now, looking at the situation at the end of the 19th and the beginning of the 20th century, we thus find common Nordic legislation in a number of legal areas. The Swedish Maritime Code of 1891 (SMC 1891), which had replaced the code from 1864, had its counterpart in the Danish Maritime Code of 1892 and the Norwegian Code of 1893.[17] Iceland introduced a Maritime Code in 1914 (modelled on the Danish legislation). Finland had a Maritime Code of 1873 but introduced a new one in 1939 which was based on the other Nordic Maritime Codes. The different codes were similar although not identical. The strict liability rule for ocean carriers remained, but it was based on a right of the carrier to limit its liability.[18]

In the early 20th century the number of international conventions was limited. For several reasons English law had an international impact in commercial law[19], but the Swedish and Danish legislators as well as the legal doctrine were at the time more geared to German law and the German legal doctrine than to English law and English legal doctrine. Furthermore, the 19th century efforts to create *civil codes* following the great French and German law projects eventually faded away, and the end result was a more or less a common Nordic purchase act introduced in Sweden in 1905.[20] The common purchase act from 1905 was never enacted in Finland, but instead Finland (after its independence) came to indirectly use the Swedish purchase act. This may possibly explain why "general principles"[21] came to be more discussed and used in Finland than in, for example, Swedish law.

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also seems to be the case with respect to the ongoing discussions and work related to the Rotterdam Rules.

17 It is noteworthy that Norway, although at the time in union with Sweden, introduced its own maritime code in 1893, and that Finland, part of Russia, had its own maritime code.

18 It seems that there may have been some difference in opinion between the Swedish and the Danish and Norwegian legislators in that in the Danish and the Norwegian travaux préparatoires the liability was expressed to be one of negligence although stronger words were used.

19 It is, of course, well known that England was at that time a powerful trading nation, and this had also an impact on English law playing a particular role in international business, not the least in respect of charter parties, cf also below in 4.

20 There is also an interesting Nordic development as to purchase law during the 1990s and forward. Following the introduction of the international sales convention (CISG) new acts were introduced in all Nordic countries with respect to international sales, but then also specific legislation, similar to the CISG, was introduced covering purchases within a Nordic country or between Nordic countries. Thus, in Finland, Norway and Sweden new national purchase acts were introduced. Denmark, however, decided not to introduce any new purchase act for Nordic or national conditions, but it has instead maintained the old purchase act from the early 20th century. So here again is an example where Nordic legal unity has been broken. On this development see, inter alia, *Herre/Ramberg*, Allmän köprätt (5th ed. 2009) 27.

21 "De allmänna lärorna".

Somewhat later a common contract act with almost identical wording was enacted (Sweden 1916, Denmark 1917, Norway 1918 and Finland 1929).[22] There was also a more or less common act on commercial agents (and commission agents)[23]. Also other areas of private law nature mirror a close cooperation between the various Nordic countries until at least the 1930's, when the act on promissory notes was enacted in 1936. During World War II such legal cooperation was naturally put on hold for a long period.

3. Maritime legislative development during the 20th century

Now, looking at some legal frameworks in respect of maritime law we shall find that there was to a large extent a common legal framework from the end of the 19th century among the Nordic countries. As mentioned, an ocean carrier's liability for damage to or loss of cargo was regarded as a non-mandatory strict liability according to the SMC of 1893.[24] Here charter matters were dealt with in chapter 5, setting out rules on general matters in sec 71–75, voyage charter in sec 76–136 (incl. provisions on cargo liability), time charter in sec. 137–150, and particular provisions on bills of lading in sec 151–167.

In connection with the Brussels Convention of 1924 on an ocean carrier's liability, which came to be known as the Hague Rules, the Nordic countries had cooperated as early as the preparatory work carried out within the Comité Maritime International (CMI). The Hague Rules were adopted at a diplomatic conference in Brussels in 1924.[25] There was continued Scandinavian cooperation during the transformation of the convention into national law, but it took several years before the Hague Rules became law in the Nordic countries. The new rules were at the time not amalgamated into the existing articles of the maritime codes, but instead a separate, new legislation was introduced about ten years later, known as "Haaglagen". Thereby the Hague Rules came into force in Sweden in 1936, in

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22 During the 1960s and 1970s consumer protection legislation increased and as one (of many) consequence(s) an amendment was made into the contract act in 1976 (Sweden) through the so-called "general clause" aimed at giving the courts a rather wide right to disregard "unfair" contract terms and even to rewrite contracts particularly in respect of consumer relations.

23 Now, of course, the EU directive on commercial agents and subsequent legislation on commercial agents and commission agents has meant that the legislation in the Nordic countries is similar from a European perspective, but some of the common Nordic basis has been lost. Instead, a new Swedish act on commission agents has been introduced in 2009, see Kommissionslag 2009:865.

24 In *Grönfors*, Sjölagens bestämmelser om godsbefordran (under medverkan av Lars Gorton) (1982) the various sections of the SMC is accounted for. See also Sveriges Offenliga Utredningar (SOU) 1990:13, p. 71 et seq. where there is an account of these questions.

25 With respect to this development for Swedish conditions see, inter alia, *Gorton*, Transporträtt – En översikt (2nd ed. 2003) 11 et seq.; *Grönfors*, Inledning till transporträtten (2nd ed. 1989) 15 et seq.; *Johansson*, An outline of transport law – International rules in Swedish context (2008).

Denmark in 1937, in Norway in 1938 and in Finland in 1939. As mentioned, the rules in the Nordic Maritime Codes from the 1890s continued to apply for intra-Nordic carriage.

The legislation in the different Nordic countries based on the Hague Rules was thus enacted during the 1930s but came to have practical effect only after World War II. Nordic case law in this legal area then expanded substantially over a number of years.

CMI had also played an important role in the furthering of international harmonization of maritime law in other areas beyond the liability of ocean carriers (such as conventions on the arrest of vessels, limitation of liability, oil pollution, mortgages and maritime liens, liability for passengers, etc.). Within CMI the Nordic delegates cooperated closely with respect to drafting, and in connection with the transformation of the various conventions into national law the Nordic countries similarly strived for a common approach.

Also, Nordic delegations have cooperated on the international level in international bodies of a different character dealing with legislative work in respect of the several different conventions, having been drafted within bodies such as UNCITRAL and IMO.[26] To some extent CMI maintained its role as a platform for the development of international maritime law, but gradually the final stage of such legislative projects came to be handled within UNCITRAL and IMO. It is probably accurate to say that CMI had the initiative when it came to the modernization of the Hague Rules and meeting the requirements of new methods of carriage, such as containers and combined transport. In 1968 a new convention came into being mirroring some of the new business practices (inter alia, the use of containers) and also reflecting monetary change in respect of limitation amounts (the Hague-Visby Rules). This convention came to lead to amendments in the national maritime legislation, inter alia, in the Nordic countries. The new drafting meant that the Hague-Visby Rules were transformed into Scandinavian legislation.

Various arguments were however raised for the need for a new international convention due to the changing structure of the maritime industry, e.g. the use of containers, the growing use of multimodal transport and the use of electronic documentation. Additionally, an increasing dissatisfaction with the existing liability rules and amounts of liability grew in a number of countries, in particular developing countries. Work was carried out mainly within UNCITRAL, where the Nordic delegations took an active part in addressing the changes.[27] The end-product, the so-called Hamburg Rules agreed upon in 1978, was signed by a number of states, but as only some countries representing too little tonnage have ratified this convention it has consequently not had much impact.

During the 1980s and thereafter new efforts were also made to create new conventions on combined carriage and, later, also on the liability of terminal opera-

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[26] United Nations Conference on International Trade Law and International Maritime Organization, respectively.

[27] *Grönfors* has accounted for this development in Sjötransportörens ansvar. Från 1667 års sjölag till Hamburgreglerna, cf. 1667 års sjölag i ett 300-årigt perspektiv, 33 et seq.

tors. Neither of these projects proved successful; instead, contractual solutions have been introduced.

In the late 1980s common efforts were undertaken by the Nordic countries to create a new maritime code. These efforts led to the enactment of new maritime codes in the Nordic countries during the first years of the 1990s, in Sweden through Sjölagen (1994:1009). Chapter 13 of the Nordic Maritime Codes is based on the Hague-Visby Rules, but in the drafting of the new legislation the Nordic legislators also decided to take into consideration and to some extent use certain solutions adopted in the Hamburg Rules.[28] The present NMC are thus based on those international conventions related to the carriage of goods which have been adhered to by the Nordic States.[29]

In many parts no significant amendments were made in the new Nordic Maritime Codes, but chapters 13 (general cargo) and 14 (chartering) were new and meant substantial changes as compared to previous rules.

III. The Rotterdam Rules from a Nordic perspective

1. General remarks on the new convention

During the end of the 1990s and the beginning of the 2000s a new project was started for an international convention on ocean carriers and ancillary carriage, particularly with respect to a carrier's liability for loss of or damage to goods, but also covering a number of other items. The project to create a new convention on ocean carriers was started within CMI, where a draft instrument was agreed in the group involved in the preparatory work in the early 2000s. The project was then transferred to UNCITRAL for the finalization of a new convention.

The new rules were adopted by the UNCITRAL General Assembly on 11 December 2008. A uniform regime was established governing the rights and obligations of shippers, carriers and consignees under a contract for door-to-door carriage which includes an international sea leg. This convention has been open for signing since September 2009 in Rotterdam. So far 23 states have signed the convention, but so far no state has ratified it.

The new convention is known as the Rotterdam Rules. It embodies substantial differences in relation to previous conventions. The new convention has a different structure than earlier conventions on the liability of ocean carriers. It is much more detailed, and it also covers items which have not been previously covered.[30] Thus, it contains rules, inter alia, on transport documents, the right of disposal of the goods, the use of electronic means and the liability of the shipper. It has also

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28 This drafting method was much criticized when the new legislation was introduced.

29 Thus, for example, they no longer recognize the Hague Rules.

30 The degree of complexity and length has also been regarded as a drawback of the Rotterdam rules.

been described as an ocean plus ("plus" meaning ancillary land carriage) convention.[31]

2. Nordic attitudes to the Rotterdam Rules

The work within CMI and UNCITRAL mirrored a change in the common Nordic approach in connection with the drafting of an international convention. Following the differences in the development of the maritime industry in the Nordic countries, it is clear that there is presently no unanimous Nordic view regarding the Rotterdam Rules and the subsequent work in this context. I am not quite certain whether this is a consequence of the differences in the development of the merchant fleets of the respective Nordic countries, or whether this is rather the product of a desire by Finland and Sweden to protect the Carriage by Road Convention (CMR) or the activities of freight forwarders.

There have been differences in views among different countries involved in the project all along the road of its development. As of the end of 2010 there is no clear indication on how many countries will be willing to ratify the Rotterdam Rules and transform them into legislation[32], renouncing previous conventions on the liability of the ocean carriers.

Thus, at present the United States seems to be one country which is in favour of the new convention and so is Holland. China may turn out to be prepared to sign the new convention. Some countries are opposed or hesitant, such as Germany and Canada. When it comes to the Nordic countries there are differences of view. Denmark (with one of the largest container operations in the world) seems to be that Scandinavian country where the shipping community is the most receptive to the Rotterdam Rules. Norway, which also remains a large ship owning nation, seems to have gradually become more sympathetic to the new convention whereas Finland (in particular) and Sweden, both with presently rather insignificant merchant fleets, have been more cautious in their attitude to the new convention (with some Finnish voices being strongly against it).[33] The Swedish legislator seems to have little interest in this particular legal domain, and it seems possible that in the case of a sufficient number of ratifications, the Swedes may adopt a method whereby the convention is translated into Swedish law instead of being "melted" into the SMC provisions.[34] Should this happen, it would be a blow to Nordic harmonization in the field.

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31 It should be kept in mind that all efforts during the 1980s to create a separate convention on combined transport failed.

32 See for example *Honka*, Regulation of shipping and transport within international organisations – Is it effective?, in: General trends in maritime and transport law 1929–2009 (2009) 44 seq.

33 At least to some extent this difference is a consequence of Denmark and Norway allowing for registration of vessels on a particular registry although carrying foreign flags while Finland and Sweden never adopted such solution.

34 This is a method that has been used on a number of occasions, but if two of the Scandinavian countries will, as it now seems, be considering to transform the convention into the present legislation, that would mean a break in the harmonization.

So, although there is (albeit gradually less and less so) a tradition of common general legislation among the Nordic countries in respect of private law generally and maritime law in particular, there are also differences. The influence of the EU, from where a stream of directives and regulations come, has forced member states to adopt these rules and has had an impact on the legislative work carried out also in the Nordic countries; but other factors as well have had an impact on this development as a consequence of differences in economic policies and infrastructure.[35] That being said I do believe, provided that a substantial number of countries sign the new convention and that the previous conventions are denounced, Sweden will sign the new convention in due course.[36]

IV. Influence of Anglo-American law on Scandinavian interpretation – the case of charter parties

I would also like to address a particular legal issue of some practical and theoretical importance, namely the relation between Scandinavian law and Anglo-American contract drafting. Now, it is important to keep in mind that there is nothing like "Nordic law" in a technical sense. Each of the Nordic countries has their own legal systems with their own courts. So in this sense, when applying "Nordic law" it rather refers to certain harmonizing measures made between the Scandinavian countries.[37] When drafting chapter 14 of the NMC, the Scandinavian legislators recognized that contract practice had an impact on the legislative solutions chosen.

It is also generally recognized that Anglo-American law has played a particular role in the development of the standard charter party forms. This may lead to a question concerning the relation between Anglo-American law and Nordic court (or arbitration) practice based on any of the Scandinavian laws. The more precise question is related to a charter party which, for example, makes Swedish law applicable and prescribes "arbitration in Stockholm". Let us assume that the charter party is between a Swedish charterer and a Norwegian shipowner. The standard charter party used is one of the standard forms where English and US law played a role in the drafting of the form. Certain amendments have been made, but they have no significance in relation to the dispute arising between the parties.

One question that may come up in connection with the interpretation of the charter party concerns the determination of the applicable law and its use in the particular dispute. Which will then be the approach of the arbitrators? If Swedish law were not very clear on a disputed point in the charter party, should the arbitrators then take into consideration Norwegian law or should they fall back on English law because the standard form had some basis in English law? The point

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35 Possibly, also the fact that Denmark and Norway are oil and gas countries whereas Finland and Sweden are not, may have played a role in this development.

36 Whether and when it will be ratified is a different matter.

37 That being said, however, I think that if a charter party would refer to "Nordic law" as the applicable law and jurisdiction arbitration in Oslo, it is very likely that the arbitrators would apply Norwegian law (possibly somewhat modified).

of departure is that the arbitrators would try to determine the Swedish law on the particular point, but they may also take into consideration Norwegian law, which is similar in this area but possesses a more extensive body of case law. The question could, however, also arise whether the court or the arbitrators should consider resorting to or considering the impact of English law under the circumstances in order to determine a particular legal point.

The question is of some general interest since it illustrates from one particular perspective how legal thoughts may be transposed from one legal system to another. In this particular case such reasoning emanates from the fact that several of the standard charter party forms used world-wide have been drafted on the basis of English (and American) law. This particular point has been raised in some "Scandinavian" cases, and it has been discussed in the Scandinavian legal doctrine.[38] It is important to keep in mind that some sort of "Scandinavian" approach may be used (in the case considered above, Swedish law would be used because it is the applicable law, but Norwegian law may also serve to provide illustrative examples) and due to the fact that there is particular Nordic cooperation in this particular area of the law.

In respect of charter parties the law is of a non-mandatory nature, and the parties are thus free to negotiate and contract "as they please" (always within general legal frames). Although there are no international conventions within this area of law, national law has evolved also in accordance with international customs. England (like for that matter the US) has no particular legislation in respect of charter parties, but charter party law has developed as a part of common law and also in an international business environment. Some legal systems seem to have played a particular role in the development. In particular English charter party law has played an important role in the general development of the law related to charter parties as part of general contract law. A great number of charter party disputes have also served to develop the common law of contract. Many of these cases are also referred to in contract law treaties.[39]

The law related to charter parties, especially during the 19th and 20th centuries, developed within English common law in particular and very often the various contract forms and individual clauses were "tested" by English courts and arbitration panels. Thus, often following the outcome of English court cases, the charter party forms underwent gradual amendments.

It is not uncommon that English law (and arbitration in London as jurisdiction) is applicable for settling contractual disputes in relation to charter parties where, for example, a Swedish shipping company or a charterer is party to a voyage charter between two different countries or in a time charter party covering a period

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38 The particular question has also been discussed by *Adlercreutz/Gorton*, Avtalsrätt II, 6 uppl. (2010) 68 et seq., where reference is also made to other Swedish writers in respect of the particular question.

39 In Swedish law, on the other hand, charter party law has normally been regarded as a particularity which is rather left with persons with an interest in maritime law. One reason is obviously that there are comparatively few cases involving charter party disputes in Swedish law.

during which the vessel may be operated world-wide.[40] There seems to be an understanding among a number of maritime lawyers in the Nordic countries that London and New York are often acceptable places for settling charter disputes and that English/New York law works reasonably well.[41] It should be kept in mind that also English courts may under certain circumstances consider the reasoning found in and decisions rendered by foreign courts, particularly where legislation based on an international convention is involved.[42]

Charter party law is an area of law where influences from other countries and the international setting may be observed. In at least two cases the Swedish Supreme Court has had to consider related questions, NJA 1954 s. 574 and NJA 1971 s. 474.

Both cases involved the understanding of certain clauses in charter parties, the latter mainly focusing on the question of the payment of brokerage commission.

In the first case, when determining the understanding of a clause, the Swedish Supreme Court found that even if English law did not apply to the charter party involved, the construction of the relevant clause had to take into consideration the understanding of such clauses in English law since English law was regarded to have particular importance in respect of charter parties.

In the second case, involving the understanding of a particular clause in a charter party, the Supreme Court expressed that when determining the meaning of such clause the understanding thereof in the international shipping community was of importance when determining its meaning and applicability. The Supreme Court also took into consideration several aspects concerning the usage in the trade but eventually decided that there was no particular usage and not any unequivocal understanding in the particular case. Thus English law might have particular importance in this legal area even if it is not directly applicable to the contract.

There are also some Norwegian cases illustrating related questions.[43] In ND 1974.103 the Norwegian Supreme Court decided that English law could be used as background law also when Norwegian law was applicable to a contract. In a later case, ND 1983.309, the defendant argued that, against the background of the 1974 case, it was well settled that where Norwegian law applied to a charter party some considerations also had to be given to the Anglo-American background law. The arbitrators in this case (a panel of three) found that when deciding the case consideration could be given to English background law; in the particular case, however, the arbitrators decided that Norwegian law was the actual background law and that there was therefore no reason to consider another law.

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40 It is not only where Swedish parties are involved, but also where there is another Scandinavian party in the charter.

41 For reasons of heavy legal fees and the lack of a sufficient number of experienced arbitrators in London, there seems to be some inclination by shipping companies to choose jurisdictions other than London or to choose solutions other than arbitration.

42 See for instance the case *CMA CGM v. Classica Shipping* [2004] EWCA Civ 114.

43 See *Selvig*, Tolkning etter skandinavisk rett av certepartier og andre standardvilkår utformet på engelsk, Tidsskrift for Rettsvitenskap 1986, 1 et seq.. See also *Grönfors*, Inledning s. 41 och Adlercreutz & Gorton (supra n. 38).

In a later case, ND 2002 p. 80, the parties were in agreement that Norwegian law applied to the charter party dispute. The defendant, however, among other things expressed as his opinion that Norwegian law had to be supplemented by English law since the particular charter party form used had been drafted against the background of Anglo-American legal tradition. The arbitrators came to the conclusion that English law could not be used as background law in the case. The matter was discussed from various points of view and the conclusion was that as a matter of principle English background law could be used in some instances. With respect to the individual case, however, it was found that it would go too far to apply English law to the legal effect of consequences of the vessel not meeting the description requirements in the contract, and it was not overly clear that English law would be of any significance. Reference could also be made to a rather recent Norwegian court decision concerning a dispute in relation to a bareboat charter party.[44] Here there was a dispute on specific performance or, alternately, damages. In that case, reference was made to both English and American case law. The court discussed in some detail to what extent regard should be had to the law's development in other legal systems, and it stated explicitly that ocean carriage is international and that maritime law is correspondingly an area of law that has developed in an international setting. There is an exchange of rules and an extensive cooperation with respect to the making of rules. "Presumably Norwegian rules to a large extent should be regarded to be in accordance with international principles in maritime law."

I believe that Scandinavian law might generally be said to accept that the particular background law of a certain document may be relevant for the understanding of a certain contract even if Danish, Finnish, Norwegian or Swedish law would generally apply to the contract. That means that there are situations where Anglo-American law may within certain frames be used to supplement the primarily relevant legal system. There are certainly restrictions to such interpretation, but it is far from easy to state in general terms which cases will allow for such interpretation and in which cases the consideration will be more narrow. Only an in-depth study could more clearly detail and examine how such legal applications have developed and how they are being made, and if there are differences in different legal areas.

[44] City court of Bergen 31 August 2004. None of the Scandinavian maritime codes has any provisions on bareboat charter parties or leasing contracts.

V. Nordic cooperation in other ways: standard terms, dispute settlement and education

1. Some general remarks

Legal development, however, takes place not only (maybe even not primarily) through the legislator. Rather, there are several instances where law takes a fresh course due to new business and technological developments.[45]

The promotion of harmonization may thus have several different causes, and, apart from a certain common approach with respect to legislation in the maritime law area, there are also among the Nordic countries other important factors which have an impact on the harmonization of maritime law. Nordic cooperation in maritime law has thus taken place on different levels in different forms and through various organizations and bodies. Without delving deeply into these questions, certain aspects merit mention.

In respect of maritime law this evolution is thus apparent in several instances, including matters such as the development of new standard contracts and discussions among authorities concerning maritime safety. Various networks have been established over time, among legislators, judges, practising lawyers and at the teaching and research level. The Nordic Council has also contributed to facilitate such cooperation.

2. Standard documents – common Nordic approaches

There is in the maritime industry an extensive use of standard documents. These are of different types depending on the particular type of business. Such documents concern chartering, shipbuilding, the sale of second hand vessels, towage, management services, etc.

Charter parties and transport documents. Many of these standard documents have been developed within an international framework or for the international market; but in many cases Scandinavian interests have also cooperated in the creation of the documents, and some of them have a Nordic background. There are also many private forms in use, where tanker charter parties like Shellvoy, BP Time, etc. could be described as a mixture. Intertanko stands as another type of organization. Situated in Oslo but representing independent tanker owners, Intertanko has drafted certain "Intertanko forms" for use worldwide.

The above applies to *charter parties, bills of lading* and *waybills,* sometimes evolved in international organizations, in other cases developed by one carrier or jointly by a group of carriers. Negotiations and contracting in respect of chartering are often based on a printed standard form, of which there are several.[46] BIMCO

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[45] It may very well be that such a pattern is clearer where non-mandatory legislation is involved than otherwise. This is in my experience with respect to maritime law.

[46] Cf. *Gram*, Fraktavtal og deres tolking (4th ed. 1977) and S. Bonnick (ed.), Gram on chartering documents (2nd ed. 1988). See also *Gorton/Hillenius/Ihre/Sandevärn*, Shipbroking and chartering practice (7th ed. 2009) 101 et seq.

(an international shipping organization based in Copenhagen) alone has drafted probably in the neighbourhood of 100 various forms in respect of voyage charter as well as some related to time charter, volume contracts of affreightment and to bareboat charter. Apart from these standard forms, whether *recommended*, *agreed* or *adopted,* BIMCO also has been involved in the development of particular charter party clauses.

Some standard charter parties have been drafted for Nordic trade. One standard charter party drafted particularly for the Nordic markets and also intended for use without amendments was the so-called Scancon CP. This came into use in the 1950s but never saw widespread application. Otherwise charter party forms are often intended for international business, and often the printed text sets out alternatives for the particular law to be applied and the jurisdiction to be used. Charter party forms are rarely used as standard documents of a *take it or leave it* character. Rather, they are intended to be used by the parties in the negotiations with the printed form later being amended in various ways depending on the individual negotiations.[47]

Bills of lading and seaway bills are documents used to express the carrier's acknowledgment that goods have been received for shipment (received for shipment bill of lading) or taken on board a vessel for carriage (shipped bill of lading), also implying (or expressing) a duty on the part of carrier that the goods shall be carried with due care to the point of destination and there be delivered to the appropriate receiver. Neither the bill of lading nor the waybill is intended for amendments but are used as they stand, i.e. on a take it or leave it basis. BIMCO is also in this connection the drafter of a number of documents, such as the Conlinebill and the Combiconbill. They are not particularly Nordic but are basically used internationally. In the earlier days of containerization, various pools were established between several Scandinavian carriers, and the pool then often issued various types of transport documents. Otherwise, large carriers as well may use their own forms signifying the particular needs of a certain trade and a particular carrier.

Shipbuilding contracts, second-hand sale and ship repair. Shipbuilding, the sale of vessels and the repair of vessels are other areas where there is little particular national legislation (or for that matter international convention work). National purchase acts may apply, but they are seldom well-suited for the particular requirements of a shipbuilding contract or with respect to the second-hand sale of a ship, and even less so with respect to ship repair.

Thus, particular standard documents are regularly used: sometimes drafted by individual shipyards but in other instances by organizations of shipbuilders and shipowners; sometimes on a national level in other instances on a regional or international level. With the disappearance of the Swedish shipbuilding industry the impact of Sweden in this industry is nowadays very small, but there is still some shipbuilding industry to be found in Denmark, Finland and Norway. The so-called AWES contract[48] used to have an important practical impact for the West

[47] I take no account here of the growing use of "electronic" negotiations.

[48] Association of West European Shipbuilders.

European shipyards, although different shipyards also used their own standard forms (nevertheless bearing many resemblances with the AWES contract). There is in present use a Norwegian Shipbuilding contract from 1999 which is a form agreed upon between the Norwegian Shipowners' Association and the Norwegian Shipbuilders'Association (thus an agreed document). Similarly Danish shipbuilders have often used their standard forms just as the Finnish shipbuilders have used theirs. Generally the contents of shipbuilding contracts are fairly similar, although the structure of the documents can vary. The large shipbuilders in Japan, Korea, China and Brazil often use their own forms, not seldom drafted by English or American lawyers, and again the contents do not differ all that much between them, although the structure differs.

In 2008 BIMCO launched a particular standard form for use in connection with international shipbuilding.

A particular form of standard contracts with a particular Norwegian background is the so-called Norwegian sales form (MOA), one of the few standard contracts used in connection with sale of *second-hand* vessels. This standard form has evolved over time and has been amended and updated gradually.[49] Nowadays this form also numbers among the BIMCO documents. The latest version is MOA 1999. It is a predominant form used in this particular trade. This contract again is used as a basis for negotiations; individual parties amend the form in accord with their individual negotiations.

3. Freight forwarder documents

Some words should in this connection be mentioned on the freight forwarder business. Related questions could equally well have been mentioned above in connection with bills of lading and other transport documents, but some particularities make them more suited to being presented here.

Thus, particular standard forms have been developed with respect to the freight forwarder business, namely the so-called General Conditions of the Nordic Associations of Freight Forwarders (Nordiska Speditionsvillkoren 2000). This is an agreed document between the forwarders and their customers which is designed to be used in the Nordic markets and is based on the FIATA Model agreement.[50] The forms have been drafted based on their international counterpart, but the Nordic forwarding agents (freight forwarders) have drafted jointly the Nordic forms in use for the Nordic market. The relevant contract may then refer to any of the laws of the Nordic countries. It merits mention that as contrasted to maritime law, where the legislation is quite substantial, there is in Scandinavia no particular legislation with respect to freight forwarders. If, however, a freight forwarder in

[49] There are to my knowledge not very many standard documents in use for this particular trade, one exception being Nipponsale. This could explain why the Norwegian MOA could be seen as a kind of document monopoly.

[50] NSAB explicitly spells out that the "Conditions give the customers in all respects at least the protection stipulated by the FIATA Model Rules for Freight Forwarding Services (1996 version)".

the individual case actually appears as a carrier, the relevant rules of carriage will apply to the particular carrier. Where, however, the freight forwarder is acting on an intermediary basis, the corresponding rules will be applicable.[51]

4. Legal education and legal doctrine in the maritime law field

Legal education within the field of maritime law is of practical as well as academic importance in this area, and here the Scandinavian countries stand out as being unique. Thus a particular institute was created for cooperation between the Nordic countries, namely the Scandinavian Institute of Maritime Law (Nordisk Institutt for Sjörett – NIFS). It was established in Oslo in 1963, in connection with the Oslo law faculty, and was first led by Professor Sjur Braekhus. The Institute now forms part of the University of Oslo as an autonomous entity, and it still receives funds from the Nordic Council. Numerous lawyers from the different Scandinavian countries, but nowadays also from several other countries, have thus had an opportunity to meet and study maritime law at the Institute The Institute has also proved to be a research institute of renown. NIFS has, moreover, also established a good basis for cooperation between the university and the industry (including lawyers).

Maritime law thus came to be regarded as one of those legal areas where a Nordic perspective was promoted. Later, NIFS also managed to tie new legal areas into its domain, such as EU law, and oil and gas law. There appeared to be a number of similarities between parts of maritime law and parts of oil and gas law, e.g. with respect to contractual matters such as shipbuilding contracts, contracts for the construction of platforms, charter parties and contracts concerning chartering of platforms. It goes without saying that there are also substantial differences between these legal areas.

The maritime law library at NIFS ranks among the best in the world, something which has contributed to visits frequently being made to the Institute. An important part of the activities of NIFS relates to the organization of maritime law seminars held at the premises of the Institute. Additionally, biennial seminars running two to three days are arranged within Scandinavia. The venue for this particular seminar rotates between the different Nordic countries. These various activities have been of great importance in creating a meeting place for maritime lawyers and have promoted legal research in maritime law as well as education in respect of maritime law. NIFS also serves to establish and maintain important contacts with other maritime law centres around the world.

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[51] The split of functions is made clear in NSAB 2000 where §§ 15 et seq. covers the freight forwarder's liability as carrier and §§ 24 et seq. covers the freight forwarder's liability as an intermediary. The development of the forwarding business and the rather complex structure of the business have been dealt with particularly by *Ramberg*, Spedition och fraktavtal (1983) and *Ramberg*, The law of transport operators in international trade (2005).

With more than 400 volumes issued thus far, the series "Marius" has over the years published innumerable academic articles addressing issues of maritime and energy law.[52]

Maritime and transportation law have, however, also been recognized in other Scandinavian countries as legal areas of particular importance. Thus, in Sweden a transport law centre was created under the leadership of Professor Kurt Grönfors, and in cooperation with the Swedish Maritime Law Association a series of maritime law publications has been published. Additionally, the centre regularly sponsors and hosts education and research as well as seminars in the maritime law field.

Similarly, in Stockholm the Axel Ax:son Johnson Institute of Maritime and Transport Law arranges seminars and also publishes a series of articles and books. Maritime law is taught at the law faculty. Åbo in Finland has created a Finnish centre of maritime law, and also in Copenhagen an interest in maritime law now seems to have regained its importance within legal education and research. At the University of Lund as well, maritime law has been taught in recent years.

Thus, at the academic level there are numerous avenues of cooperation whose aim include the harmonization of maritime law. From this perspective, NIFS serves as a spider in the net.

5. Dispute settlement and court practice

The common Nordic case book, Nordisk domme i sjöfartsanliggender (Nordic judgments in maritime matters – ND) is a common publication of court decisions and arbitration awards rendered by different courts in the Nordic countries in relation to maritime law and also (to some extent) to the general law of transportation. In this way court practice as found in the different Nordic countries is easily available to practising lawyers and also to those performing legal research in the field.

It is also not uncommon to find that a court in one Nordic country will refer to a decision in another Nordic country not only to illustrate the legal reasoning, but also to set forth persuasive evidence of the contents of law.

VI. Some concluding remarks

Apparently ocean carriage is a business which is worldwide in character even though it may be performed both by small vessels in domestic or regional trade as well as by very large entities in deep sea transportation. Carriage may be performed in separate legs (ocean, road, air), or it may be performed successively with individual contracts of carriage covering different legs. Maritime law is geared to the ocean leg.

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[52] Marius is a series of publications covering maritime law and also energy law. Marius replaced Arkiv for Sjorett (AfS), which was the first series published by NIFS. Initiated at the inception of the Institute, several volumes of AfS were published over the years.

Generally, the law related to ocean carriage is international in character. In this sense there is nothing specifically Nordic about the law on ocean carriage. Nevertheless, this is a legal area where law to a large extent has been developed by the Scandinavian countries acting in cooperation in an international environment.

There is a split between, on the one hand, certain rules which are of mandatory nature (general cargo and liner service, chapter 13, SMC) and, on the other, rules which are non-mandatory (chartering, chapter 14, SMC). The law as to the former is based on international conventions, but in respect of chartering and charter matters there is no particular convention; rather, international practice and international standard forms have set the frame.

Even if the solutions adopted in the Nordic Maritime Codes are thus not very Nordic *per se*, there are several instances where the Nordic approach is quite important. The Nordic countries still cooperate on legislative matters: in international convention work, in national legislation (although for the time being less so), among various state bodies and among private organizations. On the academic level the cooperation is extensive.

Overall I think that the above leads to the conclusion that there is a common Nordic approach in the international surrounding with respect to ocean carriage.

Without any doubt the Nordic Maritime Codes of present are a fruit of common Nordic legislative work and cooperation. The present legislation as such is national, but it is more or less common for all the Nordic states, though with certain variations. Denmark and Norway have adopted running articles whereas Finland and Sweden decided for running articles within each chapter. The material content of the law is, however, more or less identical. There may be minor differences in the application of the rules in particular cases, but on the whole the common Nordic Maritime Codes have contributed to a common Nordic approach in this area of the law.

One may ask if the Nordic countries will be able to uphold a common approach in this particular field. Is there still sufficient ground to maintain a common Nordic view? Although there are differences in view between the Nordic countries, I am certain that if the Rotterdam Rules prove successful, these nations will again cooperate in transforming the convention rules into national legislation. For the time being the situation is, however, unclear.

That being said, it also remains to be seen how EU law will develop in relation to international convention work and how this will affect the cooperation between the Scandinavian countries.

Part II:

The Hamburg Lectures 2010

The Proposal for a Reform of German Maritime Law

Beate Czerwenka

I. Background of the Reform

German maritime law, enacted in the Fifth Book of the German Commercial Code (*Handelsgesetzbuch*), has been criticized as outdated since its existence. The reason is that many of its provisions are based on the earlier German Commercial Code from 1861 (*Allgemeines Deutsches Handelsgesetzbuch*) and have never undergone a comprehensive review. Thus, many rules date back to a time before the enactment of the Civil Code, the *Bürgerliches Gesetzbuch*. Moreover, German maritime law reflects to a large extent – as described so vividly by the famous maritime lawyer Wüstendorfer in his monograph "Neuzeitliches Seehandelsrecht" from 1950[1] – the era when small wooden sailing ships were used, when tramp shipping was the common means of trading and liner shipping – with sizeable motorized vessels and with goods attributable to a considerable number of shippers – was unknown, and when big shipping companies and liner shipping conferences did not exist. It is true that in the meantime the Fifth Book of the German

[1] See *Wüstendorfer*, Neuzeitliches Seehandelsrecht (1950) 22.

J. Basedow et al., *The Hamburg Lectures on Maritime Affairs 2009 & 2010,*
DOI 10.1007/978-3-642-27419-0_3,

Commercial Code has been reformed several times. These reforms have concentrated, however, on the adaptation of German law to international conventions. A comprehensive maritime law reform remains outstanding.

Thus, in 2004 the former Minister of Justice, Brigitte Zypries, decided to assemble an expert committee with the mandate to (i) consider which provisions in the Commercial Code are outdated, impracticable or superfluous, (ii) scrutinize issues which have not been but need to be regulated in the German Commercial Code, (iii) examine whether there exist unjustified differences between the existing maritime law and the general transport law and (iv) assess the areas where maritime law can be aligned with the general private law. The minister further requested the expert committee to elaborate – on the basis of its findings – a draft bill that would enable the legislator to modernize German maritime law in accordance with today's requirements of shipping and modern trade.

The expert committee consisted of a university professor,[2] a renowned judge[3] and seven experienced lawyers drawn from private practice, industry and industry associations.[4] Its work was supported by the Federal Ministry of Justice. After 20 meetings, in August 2009 the expert committee handed over to the minister a report on a future maritime law reform. The report was subsequently published on the website of the Federal Ministry of Justice.[5] The Federal Ministry of Justice then invited comments on the report from interested stakeholders. On the basis of the report and the comments thereto, the Federal Ministry of Justice elaborated a draft bill (*Referentenentwurf*). The draft bill has been published in May 2011 for subsequent hearings scheduled for September 2011. On the basis of the written and oral submissions, the Federal Ministry of Justice will elaborate a revised draft which will then be sent for adoption by the Federal Government (*Bundesregierung*). Thereafter, the government's draft (*Regierungsentwurf*) will first be submitted to the Federal Council (*Bundesrat*) and then – together with a formal opinion given by the Federal Council and possibly a formal response by the Federal Government – to Parliament (*Bundestag*).

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2 Prof. Dr. Rolf Herber (chairman).

3 Dr. Fritz Frantzioch (Hanseatisches Oberlandesgericht in Hamburg, retired).

4 Ralf Dreesmann (BLG Logistics Group AG & Co. KG, Bremen), Dr. Henning C. Ehlers (nominated by the Gesamtverband der Deutschen Versicherungswirtschaft (GDV)), Winfried J. G. Holzwarth (retired, at that time Deutsche Bank AG, Frankfurt), Dr. Hans-Heinrich Nöll (at that time CEO of the Verband Deutscher Reeder, Hamburg), Dr. Oliver Peltzer, LL.M. (at that time Volkswagen Transport GmbH & Co. OHG, Wolfsburg), Dr. Dieter Rabe (retired, at that time CMS Hasche Sigle) and Kurt-Jürgen Schimmelpfeng (Verein Hamburger Spediteure, Hamburg).

5 Available at <www.bmj.bund.de>.

II. General Outline of the Draft Bill

1. Guidelines and Structure

The draft bill lays down the foundations for a comprehensive modernization of German maritime law as it is enacted in the Fifth Book of the Commercial Code. Accordingly, the draft bill completely restructures the Fifth Book of the Commercial Code. At the same time, it substantially reduces the number of provisions: Whereas the current Fifth Book contains in its present version about 300 provisions, the draft bill contains only 144 provisions.

The draft First Chapter of the Fifth Book is headed "Persons in Shipping" (*Personen der Schifffahrt*). The Chapter aggregates the provisions in the current First, Second and Third Chapter, insofar as they deal with shipowners, operators, crews and masters. At the same time it repeals the majority of the 40 provisions[6] in the current Third Chapter on the rights and duties of the master. Through this change, the draft bill recognizes that the concept of the current law, according to which the master of a vessel has an entrepreneurial position, is no longer valid. Consequently, it is no longer justified to retain, for example, a provision that creates a quasi-contractual liability of the master in respect of a shipowner's contracting partners. The draft bill therefore confines itself to regulating a master's power to represent a shipowner and his duty to keep a ship's log. Moreover, it repeals the provisions in the current Second Chapter on the so-called *Partenreederei* (shipowning partnership).[7] The *Partenreederei* is a legal institute which dates from the Middle Ages[8] and is defined in § 489 of the current Commercial Code as a structured group of persons that own a vessel and agree to use it in maritime trade on joint account. A *Partenreederei* is – in contrast to usual trading companies – based on the concept of ownership of a single vessel used for a single voyage; it is not a legal entity. The limited purposes of a *Partenreederei*, its uncommon structure as well as the now-existing company law rules have lead to the insignificance of the *Partenreederei*. Therefore the draft bill abolishes it and refers to existing company law.

The draft Second Chapter, which is headed "Contracts of Carriage" (*Beförderungsverträge*) replaces the current Fourth Chapter on the contract for the carriage of goods (*Frachtgeschäft zur Beförderung von Gütern*) as well as the present Fifth Chapter on contracts for the carriage of passengers and their luggage (*Personenbeförderungsverträge*). As explained below, the substance of the current law will be considerably changed.

Entirely new is the Third Chapter on "Charter Contracts" (*Schiffsüberlassungsverträge*). This Chapter does not have any parallel in the current Fifth Book.

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6 §§ 511 to 520, 526 to 555 of the Commercial Code.

7 §§ 489 et seq. of the Commercial Code.

8 *Wüstendörfer* (supra n. 1) 147 characterized it as a "petty-capitalist form of organization of a typically medieval character" ("kleinkapitalistische Organisationsform von typisch mittelalterlichem Gepräge").

The draft Fourth Chapter, which is headed "Ship's Emergencies" (*Schiffsnotlagen*), assembles the provisions in the current Seventh and Eighth Chapters, which deal with collision between vessels, salvage and average. Except for average the law will in substance remain the same. The same applies to the draft Fifth Chapter which is headed "Maritime Creditors" (*Schiffsgläubiger*). The Chapter carries over the provisions in the current Ninth Chapter.

The draft Sixth Chapter assembles the rules on prescription. In the current law they are not only enacted in the Eleventh Chapter, which is, like the draft Sixth Chapter, headed "Prescription" (*Verjährung*), but are also divided up in the Fifth Book and the Civil Code.

The draft Seventh Chapter on "General Limitation of Liability" (*Allgemeine Haftungsbeschränkung*) implements the rules on global limitation of liability, which are enacted in the Second Chapter under current law. As stated in the explanatory report to the draft bill, it seems more systematic to regulate the legal bases for maritime claims before dealing with issues relating to the global limitation of liability. In substance, the law remains the same.

Finally the draft Eighth Chapter, which is headed "Procedural Rules" (*Verfahrensvorschriften*), assembles the current rule in § 753a of the Commercial Code on a salvor's right to interim payment[9] and a new rule on a master's authority to act as the addressee for the service of court documents in proceedings relating to a forced sale or to an arrest of a vessel.[10] On the other hand, the draft bill repeals the rules on the *Verklarungsverfahren*.[11] The *Verklarungsverfahren* is a kind of "sea protest", namely a special procedure for the preservation of evidence, the procedure instituted after an accident of a vessel on the demand of the master before a court or – if the accident happened outside of Germany – before a German embassy. Considering that German general procedural law already provides for similar proceedings for the preservation of evidence, i.e. the *selbständiges Beweisverfahren*[12], the practical significance of the *Verklarungsverfahren* lies in its application abroad. Experience has shown, however, that there have been hardly any cases in recent years where a *Verklarungsverfahren* was instituted before an embassy. According to the draft bill, other procedural issues, such as jurisdiction in matters relating to a contract of transport, the arrest of vessels and the impermissibility of a forced sale of a vessel that is sailing, are regulated in the Code of Civil Procedure (*Zivilprozessordnung*).

2. Contracts for the Carriage of Goods by Sea

At the centre of the suggested changes is the law on the carriage of goods by sea. The draft bill suggests a complete restructuring of the Fourth Chapter of the Fifth Book of the Commercial Code on the Contract for the Carriage of Goods (*Fracht-*

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9 See draft § 619 of the Commercial Code, which implements – like § 753a of the Commercial Code – Art. 22 of the International Convention on Salvage of 1989.

10 See draft § 620 of the Commercial Code.

11 §§ 522 to 525 of the Commercial Code.

12 §§ 485 to 494a of the Code of Civil Procedure.

geschäft zur Beförderung von Gütern). In this context it distinguishes clearly between a contract for the carriage of general cargo (*Stückgutfrachtvertrag*) and a voyage charter contract (*Reisefrachtvertrag*). The proposal follows the perception that a voyage charter contract is a special kind of a contract for the carriage of goods. The key difference is, that according to § 527 of the draft Commercial Code, the carrier under a voyage charter contract undertakes to perform the carriage with a specific vessel as a whole, with a proportional part of a specific vessel or in a certain hold of a specific vessel on one or several voyages. Due to these specific characteristics of the voyage charter contract the draft provides for special rules on loading, unloading and laytime. For the rest it stipulates that the provisions generally applicable to contracts for the carriage of goods shall apply to voyage charter contracts as well. There are, however, two important exceptions. The first relates to documentation: According to the draft bill the provisions on bills of lading shall not apply to voyage charter contracts. The second exception relates to freedom of contract: Based on the assumption that the parties to a voyage charter contract do not need specific protection the draft grants complete freedom in respect of voyage charter contracts.

With regard to the general provisions on contracts for the carriage of goods by sea the draft bill brings the provisions into closer accordance with the general transport law enacted in the Fourth Book of the Commercial Code. Thus the provisions on a carrier's rights where the shipper is in breach of duty to discharge the goods in time,[13] on the shipper's and the consignee's rights of instruction[14] as well as on the carrier's rights and obligations when there is an obstacle to carriage or delivery[15] are drafted closely along the lines of the provisions in the Fourth Book. The same applies to the provisions on time for payment and on the calculation of the freight.[16]

Despite the target of aligning the law on contracts for the carriage of goods by sea closer to the German general transport law, the draft bill acknowledges that the peculiarities of maritime trade need to be observed. Thus, in contrast to general transport law, draft § 485(2) of the Commercial Code obliges the carrier to load and stow the goods. Above all, the draft bill provides for liability rules which are patterned on the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (Hague Rules), on the Hague Rules as amended by the Protocol to amend those Rules, 1968 (Hague Visby Rules), and on the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (Rotterdam Rules). Beyond that, the draft bill takes into consideration modern legal systems, such as the Norwegian Maritime Code, and actual shipping practice. Following the example of the international and national law mentioned above, the draft bill thus provides for a fault-based liability of the carrier with the – rebuttable – presumption of fault on the

13 Draft § 489 of the Commercial Code.
14 Draft § 490 of the Commercial Code.
15 Draft § 491 of the Commercial Code.
16 Draft § 492 of the Commercial Code.

side of the carrier.[17] Moreover it creates carrier's liability for delay in delivery[18] – a provision which is patterned on the Rotterdam Rules.[19] The same is true for the list of events or circumstances that may relieve the carrier of its liability. Accordingly, the draft bill lists in draft § 499(2) of the Commercial Code, similar to Art. 17(3)(l), (m) and (n) of the Rotterdam Rules, measures to save life at sea, reasonable salvage measures and reasonable measures to prevent or minimize damage to the environment. In addition, it deletes – like the Rotterdam Rules – the nautical-fault-excuse. Moreover, it raises the existing limits of liability to the limits provided for in Art. 59 and 60 of the Rotterdam Rules. Thus, it fixes the limit of the carrier's liability for loss of or damage to the goods to an amount of 3 Special Drawing Rights per kilogram and 875 Special Drawing Rights per package or unit and the limit of the carrier's liability for delay in delivery to an amount equivalent to two and one-half times the freight or to the maximum amount payable in respect of the total loss of the goods concerned.[20] Finally, it is Art. 63 of the Rotterdam Rules which serves as the source of inspiration for the provision according to which claims based on a contract for the carriage of goods or a bill of lading cannot be exercised by reason of the expiration of a period of 2 years.[21]

In addition the draft bill introduces the concept of the "actual carrier" – a concept that can be found in all modern international conventions, amongst those the Rotterdam Rules,[22] as well as in German general transport law.[23] According to draft § 509(1) of the Commercial Code, the actual carrier is considered to be any third person that totally or partially performs the carriage by sea. Thus, contrary to the expert group's proposal, the actual carrier is not only the *Reeder*, i.e. the shipowner who uses the vessel for the purpose of obtaining earnings from navigation. Nor is the actual carrier the equivalent of the "maritime performing party" within the meaning of the Rotterdam Rules − even though the Rotterdam Rules contain a similar concept with the "maritime performing party".[24] For the draft bill only regulates contracts for carriage by sea and not – like the Rotterdam Rules – specific kinds of multimodal transport contracts. Consequently, the actual carrier is not any person that performs or undertakes to perform any of the carrier's obligations exclusively during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. In particular, the actual carrier may, in principle, not be a terminal operator that handles or stores goods in a port on behalf of the contracting carrier. The actual carrier may, however, be a terminal operator that loads the goods into the ship. In view of this difference, draft § 509(1) of the Commercial Code clarifies that carriage by

17 See draft § 498 of the Commercial Code.
18 See draft § 498 of the Commercial Code.
19 See Art. 17 of the Rotterdam Rules.
20 See draft § 503 of the Commercial Code.
21 See draft § 607 no 1 of the Commercial Code.
22 See Art. 19 of the Rotterdam Rules.
23 See § 437 of the Commercial Code.
24 See Art. 1(7) of the Rotterdam Rules.

sea includes the loading of the goods on the vessel and the unloading of the goods from the vessel.

In contrast to the provisions on a carrier's liability, the provisions in the draft bill dealing with a shipper's liability[25] are rather patterned on the Hague Visby Rules. Hence the draft provides that a shipper is strictly liable for inaccurate information on the measure, number, weight and marks of the goods which he had furnished to the carrier for the issuance of a bill of lading.[26] As a general rule the draft bill states, however, that the shipper is only liable for any breach of obligation under the contract of carriage by sea unless he can prove that he is not responsible for that breach.[27]

The conventional German legal concept of the *Ablader*, which is only remotely comparable with the concept of the "documentary shipper" under the Rotterdam Rules,[28] has been retained, since this concept seems to be necessary in order to allow a person other than the shipper (e.g. the seller in an FOB-sale) to keep the control over the goods after having them handed over to the carrier. However, for the first time, a definition of the notion *Ablader* is introduced. According to draft § 513(2) of the Commercial Code, the *Ablader* is considered to be the person who hands over the goods to the carrier for carriage and has been named by the shipper for the purpose of being recorded in the bill of lading. If the *Ablader* truly exists, the carrier is obliged to issue the bill of lading to him.[29] The possession of the bill of lading allows the *Ablader* to keep control over the goods.[30] In return the *Ablader*, like the shipper, is liable for any inaccurate information provided to the carrier at the time of delivery.[31] Contrary to the "documentary shipper" within the meaning of the Rotterdam Rules,[32] the *Ablader* does not, however, assume all obligations and liabilities imposed on the contracting shipper.

With regard to the issue of freedom of contract the draft bill[33] develops an independent solution on the basis of the different national and international rules: Like the general transport law, it prohibits, in principle, any derogation from the statutory rules dealing with a carrier's liability. Contrary to the Hague Visby Rules, this barrier to freedom of contract also relates to the freedom to restrict a carrier's period of responsibility to the tackle-to-tackle-period by excluding a carrier's liability for loss of or damage to the goods prior to their loading on the ship or subsequent to their discharge from the ship. There are, however, three very important exceptions to this basic rule: Firstly, the parties to the contract of carriage may, by individual agreement, modify the statutory liability rules; secondly, the parties may agree on higher limits of liability for the carrier; thirdly,

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25 See draft § 487 of the Commercial Code.
26 See draft § 487(3) of the Commercial Code.
27 See draft § 487(1) of the Commercial Code.
28 See Art. 1(9) of the Rotterdam Rules.
29 See draft § 513(1) of the Commercial Code.
30 See draft § 520 of the Commercial Code, which confers the right to dispose of the goods to the legitimate holder of the bill of lading.
31 See draft § 487(2) and (3) of the Commercial Code.
32 See Art. 33 of the Rotterdam Rules.
33 See draft § 512 of the Commercial Code.

the parties may agree on a liability system comparable with the liability system of the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, 1999. The latter condition is fulfilled if the contract of carriage makes provisions for a strict liability of the carrier, for a limit of liability in an amount of at least 19 Special Drawing Rights per kilogram and for a preservation of the carrier's benefit of limited liability even when the damage resulted from an act or omission with intent to cause such damage or recklessly and with knowledge that such damage would probably result.

As far as the transport documents are concerned, the draft bill introduces a special chapter in the Commercial Code on *Beförderungsdokumente*.[34] Novelties are improved protection for a third party who acquires a bill of lading acting in good faith, the alignment of the straight bill of lading (*Rektakonnossement*) to the negotiable bill of lading by conferring the "effect of tradition" also to the straight bill of lading (i.e. the effect that the transfer of the bill of lading by the carrier, who is in possession of the goods, to the named consignee has the same effect as the transfer of the goods), and the introduction of a general rule on sea waybills.[35] With regard to bills of lading it also provides for a special provision on freedom of contract which refers to the general provision on freedom of contract[36] but declares a derogation from the statutory liability rules to the detriment of the shipper or *Ablader* as null and void in relation to a third party holder of the bill of lading.[37] Above all, however, the draft bill introduces a legal framework for electronic bills of lading as well as for electronic sea waybills.[38] The regulation is inspired by the Rotterdam Rules. Contrary to the Rotterdam Rules the draft bill does not, however, leave it merely to the parties of the contract of carriage to agree on the details relating to the issuance, presentation, rendering and transfer of the electronic record, but instead opens the possibility that the details be regulated separately by way of legal ordinance.

3. Charter Contracts

Another novelty is the introduction of a special chapter on bareboat charter contracts (*Schiffsmietverträge*) and time charter contracts (*Zeitcharterverträge*).[39] Being aware that these contracts are of immense importance in practice, the draft bill provides a basic legal framework for them. The chapter is titled *Schiffsüberlassungsverträge*. It ranks on the same level as the chapter on contracts for the carriage of goods by sea. By this the draft bill intends to make clear that the contracts regulated in the chapter on *Schiffsüberlassungsverträge* are distinct from contracts for the carriage of goods by sea. In contrast, the voyage charter contract

34 See draft §§ 513 to 526 of the Commercial Code.
35 See draft § 524 of the Commercial Code.
36 Draft § 512 of the Commercial Code.
37 See draft § 525 of the Commercial Code.
38 See draft § 516(2) and (3) and draft § 526(4) of the Commercial Code.
39 See draft §§ 553 to 570 of the Commercial Code.

is, as stated above, a special kind of contract for the carriage of goods and thus follows the rules applicable to such a contract of carriage.

The draft bill defines a bareboat charter contract as a contract according to which the owner (*Vermieter*) undertakes to provide the charterer (*Mieter*) with a specific vessel without a crew for use during a period of time.[40] Amongst the basic rules which are stipulated in the draft bill is the rule that the charterer shall maintain the vessel for use in accordance with the contract.[41]

A time charter contract is defined as a contract according to which the owner (*Zeitvercharterer*) undertakes to provide the charterer (*Zeitcharterer*) with a specific vessel with a crew for the employment of the vessel during a specific period of time and to carry goods or persons or render other agreed services with that vessel.[42] Amongst the basic rules relating to a time charter contract are the rules on time and place of delivery[43] and redelivery of the vessel,[44] on the owner's obligation to maintain the vessel,[45] on distribution of the costs for the employment of the vessel[46] and on the time when the hire (*Zeitfracht*) is due.[47]

All the provisions on charter contracts are non-mandatory. Therefore, they only apply if the parties did not make provision in their charter contract for issues regulated in the draft bill.

4. Contract for the Carriage of Passengers by Sea

The draft bill also revises the law on the liability of carriers of passengers by sea in the event of accidents. Given that Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents[48] is not applicable to all carriages by sea, the draft bill contains rules equivalent to this regulation. This technique serves to ensure that in cases where Regulation 392/2009 does not apply, passengers on board of ships have access to the same level of protection as under that regulation, provided that German law is applicable. Nonetheless, the draft bill deviates from the regulation on the following points: Firstly, the draft bill does not regulate insurance issues; these issues shall be dealt with in a separate bill which is currently being elaborated by the Federal Ministry of Transport. Secondly, the draft bill does not adopt the provisions in Art. 6 and 7 of Regulation 392/2009 on the carrier's obligation to make advance payments in cases of personal injury and to provide passengers with appropriate and comprehensible information about their legal rights. The draft bill suggests to first await the experience had with the EU regulation.

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40 See draft § 553(1) of the Commercial Code.
41 See draft § 554(2) of the Commercial Code.
42 See draft § 557(1) of the Commercial Code.
43 See draft § 558 of the Commercial Code.
44 See draft § 570 of the Commercial Code.
45 See draft § 559 of the Commercial Code.
46 See draft § 564 of the Commercial Code.
47 See draft § 565 of the Commercial Code.
48 See OJ 2009 No. L 131, p. 24 et seq.

5. Average

Substantial changes are also suggested with regard to the provisions in the current Seventh Chapter on average. The draft bill replaces the more than 30 detailed rules on average[49] with 8 basic rules on general average.[50] For the rest it leaves it to the parties to draw up more detailed rules, in particular to agree on the application of a version of the York Antwerp Rules.

6. Procedural Issues

Finally, the draft bill provides for a special rule for the arrest of a vessel. In particular it provides for a modification of the current § 917 of the Code of Civil Procedure, according to which an arrest can only be made if there is a special reason for it (*Arrestgrund*), i.e. the fear that enforcement of a claim will be made either impossible or substantially more difficult. According to the draft bill, this requirement shall be waived in cases of an arrest of a ship.[51] This provision is based on the model of Art. 728 in connection with Art. 711 of the Dutch Wetboek van Burgerlijke Rechtsvordering.

III. Impact on International Conventions

1. Approach of the Draft Bill

With regard to international conventions, the draft bill acknowledges that there is a considerable number of international conventions which have been ratified by Germany. With regard to these conventions the draft bill maintains the present concept that international conventions which are drafted in a way so as to be directly applicable (self-executing) should be – subject to their content – either implemented into the Commercial Code or remain self-executing in Germany. Thus, the draft bill suggests, in particular, that the following conventions should remain self-executing:

- Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, 1910,
- International Convention Relating to the Arrest of Sea-Going Ships, 1952,
- Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol 1996,
- International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

In principle the conventions only apply within their scope of application. As demonstrated by the draft rules on collisions of vessels,[52] the provisions of a

[49] §§ 700 to 733, 615, 663 §§ 1 of the Commercial Code.
[50] Draft §§ 589 to 596 of the Commercial Code.
[51] See draft § 917(2) of the Code of Civil Procedure.
[52] See draft §§ 571 to 574 of the Commercial Code.

convention may, however, even apply where the convention would not be applicable based on its specified scope of application. For the draft bill implements the provisions of the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, 1910, and thus ensures that the same rules apply in all cases where German law applies.

Another path is taken with regard to the International Convention on Salvage, 1989. The draft bill carries over the current system whereby the Salvage Convention is not directly applicable but shall be applicable by means of the provisions in the Commercial Code.[53]

The draft bill recognizes that there are other international conventions which have not been ratified by Germany. Amongst those conventions are the following:

- International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, 1967,
- International Convention on Maritime Liens and Mortgages, 1993,
- International Convention on Arrest of Ships, 1999,
- International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 25 August 1924, as amended by the Protocol of 23 February 1968 and the Protocol of 21 December 1979 (Hague Visby Rules),
- United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules),
- United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (Rotterdam Rules).

In principle, the draft bill acknowledges that these conventions have not been ratified and should not be implemented into the Commercial Code. It leaves open the question whether Germany will in the future ratify one of the conventions listed above. In its explanatory report it points out, however, that it would still be premature to ratify the International Convention on Maritime Liens and Mortgages, 1993, since this convention did not meet with the strong support of European states. The same applies to the Rotterdam Rules. Thus, the explanatory report states that a decision on the ratification of the Rotterdam Rules should only be taken once it can be foreseen that they would have a chance of entering into force among major shipping nations. This, however, would not be the case today. For until now, the Rotterdam Rules have not been signed by major shipping nations such as China, Japan or the United Kingdom, and they have been ratified only by Spain. If, however, a decision to ratify were taken, it might be preferable to directly apply the Convention instead of implementing it into the Commercial Code.

On the other hand, the draft bill suggests to denounce the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 25 August 1924 (Hague Rules). The reason for this suggestion is that the provisions on contracts for the carriage of goods by sea are not, in all cases, in accordance with the Hague Rules. This can be seen, for example, from the removal of the nautical-fault-excuse. In view of the fact that, according to Art. 15(2) of the

[53] See draft §§ 590 to 596, 619 of the Commercial Code.

Hague Rules, a denunciation shall take effect only one year after the notification has reached the Belgian Government, the draft bill suggests, however, to introduce a transitional provision which allows a rapid entry into force of the bill but ensures at the same time that Germany will meet its obligations under the Hague Rules until the effective date of the denunciation.

2. Comparison with the Rotterdam Rules

As already mentioned above, the draft bill contains many provisions that are inspired by or comply with the Rotterdam Rules. Amongst those provisions are those on a fault-based liability of the carrier, on the carrier's liability for delay in delivery, on the events or circumstances that may relieve the carrier of its liability (including the deletion of the nautical-fault-excuse), on the limits of liability for loss of or damage to the goods as well as for delay in delivery, on a limitation of liability for a breach of contract that does not result in a loss of or damage to the goods or in a delay in delivery, on the actual carrier, on electronic documents, on the limitation period and on freedom of contract.

It is true, however, that there are also differences between the Rotterdam Rules and the draft bill. Thus, the draft proposal does not, like the Rotterdam Rules, contain rules on multimodal transport contracts. This is because the law on multimodal transport contracts has already been enacted by the general transport law reform in 1998. Accordingly, §§ 452 to 452d of the Commercial Code already contain specific rules on multimodal transport contracts. As experience has shown, there is no need to substantially change those provisions.

Also, contrary to Art. 59(1) of the Rotterdam Rules, the draft bill does not limit liability for a breach of contract that does not result in loss of or damage to the goods or in delay in delivery to an amount of 875 Special Drawing Rights per unit or package or 3 Special Drawing Rights per kilogram. Instead it adopts the rule of general transport law according to which the limit is triple the amount payable in the event of the loss of the goods.[54] Also, the draft bill allows – in contrast to Art. 63 of the Rotterdam Rules – that the time for initiating a suit may be subject to suspension or interruption. Furthermore, the draft bill does not – like Art. 19(1)(b) of the Rotterdam Rules – introduce a joint and several liability of the actual carrier alongside the contracting carrier for damages caused during the time when someone other than the actual carrier had custody of the goods. To the contrary, it requires that loss of or damage to the goods or delay in delivery must have been caused while the actual carrier had custody of the goods.[55]

As regards a shipper's liability, the draft bill does not, like Art. 31 of the Rotterdam Rules, provide for a strict and unlimited liability of shippers for inaccurate information required for the compilation of the contract particulars and the issuance of non-negotiable transport documents such as a sea waybill. Furthermore the draft bill does not, like Art. 33 of the Rotterdam Rules with its reference to the "documentary shipper", impose on an *Ablader* all obligations and liabilities

[54] See draft § 504 of the Commercial Code.
[55] See draft § 508 of the Commercial Code.

imposed on the contracting shipper. Instead, it confines itself to creating liability for any inaccurate information provided to the carrier at the time of delivery.

In comparison with the Rotterdam Rules the draft bill increases the freedom of contract: Firstly, it restricts the freedom of contract only in respect of agreements that derogate from the statutory rules on the carrier's liability. Accordingly, it does not prevent the parties from modifying the statutory rules on the shipper's liability and from agreeing on a limit of liability.[56] Secondly, the draft bill allows opting into a liability system comparable to that of the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, 1999. Thirdly, the draft bill always allows modification of the statutory liability rules by individual agreement.[57] In contrast, the Rotterdam Rules only allow, in principle, contractual modifications if the contract is a volume contract and if it contains a prominent statement that it derogates from the Rotterdam Rules.[58] There is, however, a noteworthy exception from that principle. That exception is enacted in Art. 12(3) of the Rotterdam Rules, according to which the carrier may revert to a tackle-to-tackle liability like under the Hague Visby Rules by stipulating in his general conditions that his "period of responsibility" is restricted to the period between the loading of the goods onto the ship and their discharge from the ship. This exception, which was fiercely debated during the negotiations on the Rotterdam Rules, has not been adopted by the draft bill.

IV. Outlook

As outlined above there is an obvious need for a comprehensive maritime law reform in Germany. Therefore, it is hoped that the reform may be realized soon. The positive responses to the experts' proposal give confidence for optimism. This is despite the request of some stakeholders to implement the Rotterdam Rules into the Commercial Code. As mentioned above it is still worth asking whether the Rotterdam Rules are not better left as self-executing. The length and structure of the Rotterdam Rules speak rather in favour of applying them directly once they become German law. Moreover, an international unification might be better achieved if the Rotterdam Rules were to remain self-executing. Based on this, there seems to be no need to await the ongoing international debate on the pros and cons of the Rotterdam Rules. In particular, it does not seem to be necessary to postpone maritime law reform until the moment when the leading shipping nations have – in a coordinated way – decided to ratify the Rotterdam Rules. Since all comments argue in favour of a maritime law reform, it should not be delayed. According to the draft bill the new law enters into force after its publication. If all goes well, the new maritime law may therefore enter into force in 2012.

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[56] In contrast, the Rotterdam Rules stipulate that any term in a contract of carriage is void to the extent that it limits the liability of the shipper; see Art. 79(2)(b).

[57] See draft § 523 of the Commercial Code.

[58] See Art. 80 of the Rotterdam Rules.

Maritime Delimitation Disputes – What Modes of Settlement?

Lucius Caflisch

I. Introduction

The present lecture combines two classical topics of international law: the law on the peaceful settlement of disputes and the law of the sea or, more precisely, on maritime delimitation. The questions addressed here will be: (i) whether maritime delimitation disputes can be settled by mechanisms of peaceful settlement; and, if so, (ii) by what mechanisms.

J. Basedow et al., *The Hamburg Lectures on Maritime Affairs 2009 & 2010,*
DOI 10.1007/978-3-642-27419-0_4,

The subject will be examined in three parts: an overview of the means of peaceful settlement in international law; an examination of the substantive rules governing maritime delimitation; and an enquiry into the methods of settlement – if any – best suited to resolve delimitation disputes.

II. The Peaceful Settlement of International Disputes

1. General Observations

It is axiomatic that international disputes – in particular those among States – should be dealt with peacefully. This idea is reflected in Art. 2(3) of the UN Charter, which provides that member States "shall settle their international disputes by peaceful means", this principle being the corollary of the prohibition against the use of force found in paragraph 4 of the same Article.

The various means of settlement available are listed in Art. 33(1) of the Charter: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement and resort to regional agencies or arrangements, "or other peaceful means of [the parties'] own choice". This enumeration calls for four observations:

The first is that the provisions just mentioned establish a general obligation to settle disputes peacefully and supply a list of methods making it possible to do so. But, as there is no duty to use one rather than another, the parties to the dispute have to agree on the means to be used. Thus there must be agreement in order to activate the general obligation.

A second observation is that the enumeration in Art. 33(1) is not exhaustive, as is acknowledged by that provision itself when it refers to "other peaceful means of [the parties'] own choice". Indeed, the enumeration fails to include "consultation" and "good offices". In addition, while recourse to regional organizations or arrangements is mentioned, Art. 33(1) makes no reference to Chapter VI of the Charter.

The fact that the various techniques of settlement are not arranged hierarchically suggests – this is the third observation – that they can be used consecutively and probably even simultaneously: unsuccessful negotiation, for instance, can be followed by mediation or conciliation; fact-finding could probably be simultaneous with, say, mediation; and, if those methods fail to yield a solution, they may be followed by recourse to adjudication.

The fourth and final observation is that a distinction must be made between methods of settlement which involve third parties and methods which do not, *i.e.* negotiation and consultation.

2. Diplomatic Means and Adjudication

On the theoretical as well as the practical level, a distinction is made between diplomatic (or political) and legal means of settlement.

The term "diplomatic methods" includes: consultation and negotiation; enquiry; mediation; conciliation; and recourse to international organizations and arrange-

ments. Their main characteristics are that, whatever the terms of settlement proposed, they are not, or are not necessarily, based on rules of law, and that they are suggested rather than imposed. To become binding on the parties to the dispute, they must be embodied in an international agreement.

The expression "adjudication" covers arbitration and judicial settlement. The latter's main features are that settlements are based on law and are binding on the litigants.

In practice, things are less clear-cut, however. First, nothing prevents the application of rules of law when using diplomatic methods; conversely, if the parties so agree, nothing bars an international court or tribunal from deciding *ex aequo et bono*, that is, with the help of extra-legal considerations. Another complication is that the parties may agree to ask for a non-binding judgment or award.

Despite these complexities, conventional wisdom has it that diplomatic means of settlement are preferable for the settlement of political disputes, while adjudication is considered more suitable for disputes of a legal nature, the difference between the two categories being that legal disputes concern the interpretation and application of rules of existing law while political controversies are about claims to have the existing law changed. As political disputes are about changing the law, law is obviously not very useful for settling them. A problem with this distinction is, however, that a great number of disputes are mixed in character.

3. Characteristics of the Diplomatic Means of Settlement

By far the oldest and most common dispute-settling device is negotiation: the issue remains "en famille"; there is no outside interference and no rules of law need be considered except those of *jus cogens*; there are no time-limits to be observed;[1] and the cost is minimal. The drawback of these diplomatic devices is that they end in a settlement only if the negotiation is successful and produces a treaty doing away with the bone of contention.

If no dispute settlement method can be or has been agreed on between the litigants, it becomes necessary to take one step back and to discuss that preliminary issue. Such discussions are often referred to as consultations. As a "prelude" to negotiations on the substance, they are subsumable under that notion.

Another "prelude" may become necessary when the disputants are not on speaking terms, as was the case between the Algerian Front of National Liberation and France, for instance, when negotiations were about to be engaged on the international status of Algeria. In such cases, a third party lends its good offices to set the conditions enabling the parties to engage in direct negotiations without, however, formulating suggestions for possible terms of settlement. Good offices in the classical sense of the term are confined to placing the parties in each other's presence and to providing the necessary infrastructure. If the third party indulges in fact-finding activities or in making suggestions on the substance of the dispute,

[1] Such time-limits must be reasonable, however, and if, between the parties concerned, a third-party method of settlement applies, it is the third party which will determine what is "reasonable".

it turns itself into a commission of enquiry, of mediation or conciliation. "Good offices", unlike negotiations, involve the intervention of a third party.

The next method to be addressed is fact-finding or enquiry. The assumption underlying fact-finding is that a controversy may be easier to settle once the States Parties involved have asked a third party to ascertain the facts. The salient features of this method are: the intervention of a third party agreed upon by the States concerned, usually a board of independent experts; the optional character of the results; and the limitation of the experts' mandate (which excludes pronouncing on points of law or proposing terms of settlement).[2] Today, rather surprisingly, there are but few instances of fact-finding, except in the framework of international organizations.

Certainly the most common device of third-party dispute settlement is mediation conducted by a State, an international organization or an individual.[3] Mediation requires the consent of the parties as it implies relatively massive interference with their internal affairs: the mediator ascertains and examines the facts of the case and may – without having to – suggest terms of settlement based on rules of international law or on other elements. To become effective, these terms must be accepted by the parties. Accordingly, mediation will not produce a solution when both parties, or one of them, reject proposals of the mediator. The latter should be independent, but that is not always the case; often the mediator may be guided by the interests of his/her own country rather than by those of the litigants. The mediator may be selected from among high officials of powerful nations (example: US Secretary of State Haig in the Falkland/Malvinas crisis). This is an advantage inasmuch as a major power can put political pressure on the parties to agree, but it is no guarantee of a balanced result, and the solution proposed may be repudiated as soon as the pressure is relaxed. Failed mediation leaves the dispute unsettled.

The examination of disputes in the framework of a global international organization (UN Charter, Chapter VI) or in a regional context (Organization of American States) is a special form of mediation. Such examinations must usually be tolerated by member States of the organization, but here, too, the solutions proposed will not be binding on the parties and will not always be accepted.

Conciliation is undoubtedly the most sophisticated device of diplomatic settlement.[4] It comes close to mediation because the conciliators, like the mediators, examine both the facts of the case and the possibility of a solution based on legal and/or extra-legal elements, and also because the terms of settlement proposed shall not be binding on the parties unless they have accepted them. The main char-

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2 On this means of settlement, see Art. 9 to 36 of the Hague Convention of 18 October 1907 on the Peaceful Settlement of Disputes, *Parry*, Consolidated Treaty Series (CTS) 205 (1907) p. 233. Cf. also the *Dogger Bank* incident of 1904, *Schneider*, Dogger Bank Incident, in Encyclopedia of Public International Law, ed. by Bernhardt, vol. I (1992) 1090.

3 Art. 2 to 8 of the 1907 Hague Convention (supra n. 2).

4 This mode of settlement came to the fore with the so-called Bryan Treaties on peaceful settlement. See for example Art. I to III of the Treaty of 4 February 1914 between the United States and Portugal, CTS 219 (1913−1914) p. 269.

acteristic of conciliation is that the conciliators, unlike mediators, will be independent experts. This may seem an advantage but is also a drawback: not being linked to any powerful State or organization, conciliators lack the political clout to force litigants into accepting the solution proposed. But, if agreement is eventually secured, it is likely to be of far better quality than proposals put forward by a mediator, for it will be based on proposals freely accepted by the parties rather than on political pressure.

4. Characteristics of Adjudication

As in the case of diplomatic third-party methods of settlement, the use of jurisdictional means requires the consent of the States concerned. Such consent can be given *ad hoc*, for a dispute or a series of disputes which have arisen already, or in advance, for all or given categories of disputes which may arise in the future. In principle, adjudication supplies answers in terms of law, and those answers are in principle binding on the parties. Accordingly, jurisdictional methods put a binding end to the dispute – which is precisely why States are so reluctant to accept them.

"Adjudication" encompasses recourse to both arbitral tribunals and permanent courts.

Even if agreed upon in advance by treaty, arbitration is an *ad hoc* mode of settlement in that the organ required is set up on a case-by-case basis – even if the modalities of its constitution have been agreed on in advance. There are many ways of establishing arbitral tribunals, each of which presents advantages and drawbacks. Art. 3 of Annex VII to 1982 Convention on the Law of the Sea[5] provides, for instance, that arbitral tribunals are to consist of one arbitrator appointed by each side and three arbitrators agreed upon by the parties or, failing agreement within a reasonable period of time, appointed by the President of the International Tribunal for the Law of the Sea (ITLOS).

The expression "judicial settlement" refers to the submission of disputes to permanent bodies such as the International Court of Justice (ICJ) or the ITLOS, sitting in plenary or in chambers.

Both forms of adjudication offer advantages. Arbitration allows the States Parties to work through small formations and with a considerable freedom of choice. The proceedings remain largely under their control, which may be seen as a plus. But this mode of settlement is relatively costly. Moreover, arbitral tribunals feel perhaps less bound to follow precedent than permanent bodies. In addition, the tribunal is set up after proceedings have started. This opens the possibility of a vacuum if the parties' antagonism makes it impossible for them to agree on the tribunal's composition. There may also be difficulties if requests for interim measures of protection are made prior to the constitution of the tribunals, especially in law of the sea matters.[6]

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[5] United Nations Law of the Sea Convention of 10 December 1982, UN Document A/CONF.62/122.

[6] In this respect, Art. 290(5) of the 1982 Convention provides that, pending the constitution of an arbitral tribunal to which a dispute is being submitted pursuant to

Judicial settlement offers reverse advantages and drawbacks. Being permanent, judicial bodies can build up their case-law and attempt to follow it faithfully; their members are generalists and usually have some competence in law of the sea matters, especially the judges of the ITLOS. There will be no need to agree on the composition of the court (unless it judges in *ad hoc* chambers) or to find a solution when interim measures are requested at the opening of the proceedings. Part of the costs is borne by all States Parties to the Law of the Sea Convention.[7] The only drawback – albeit a major one – is that the judges are permanent and, contrary to arbitrators, cannot be chosen *ad hoc* by the parties to the dispute.[8]

So much for the first part of this lecture which drew up an inventory of possible methods to settle maritime delimitation issues. The next item to be addressed are the substantive rules governing delimitation, the evolving case-law on this matter and the relevant procedural rules on dispute settlement.

III. The Rules Governing Maritime Delimitation

1. Boundaries and Limits in a Maritime Context[9]

In Grotius's time and for many years thereafter, the delimitation of marine spaces was unnecessary, except perhaps for laterally determining the extent of adjacent coastal waters. In those times, the main issue was the establishment not of a maritime limit between coastal States, but of limits separating their maritime waters from the high seas.

The need for formulating delimitation rules for States with adjacent and opposite coastlines arose with the continuous extension of maritime spaces under national jurisdiction. The evolution of those rules will be retraced in a moment. Before, something must be said about the difference between territorial and maritime delimitation.

Annex VII, any court or tribunal agreed on by the parties or, failing such agreement within two weeks from the date on which provisional measures were requested, the International Tribunal for the Law of the Sea (ITLOS) may prescribe such measures if it considers that, *prima facie*, the arbitral tribunal to be established will have jurisdiction and that the urgency of the situation so requires. Once constituted, that tribunal may modify, revoke or confirm the measures prescribed by the ITLOS.

7 Art. 19 of Annex VI to the Convention.

8 Except where *ad hoc* judges are concerned, cf. Art. 17(3) of Annex VI.

9 As explained elsewhere by the present author, the term "boundary" refers to dividing lines between spaces placed under the full sovereignty of States. The word "limits" applies to lines separating spaces not under one or several States' full jurisdiction (for instance, exclusive economic zones (EEZs) and continental shelves) or separating such spaces from international areas. This distinction serves to make it clear that spaces partially submitted to jurisdiction are not within the full sovereignty of the coastal States. See *Caflisch*, A Typology of Borders, in Liber Amicorum Božidar Bakotić (2010) pp. 183, 191–192.

2. Territorial and Maritime Delimitation

Territory is the spatial element where States exercise sovereignty; without territory there can be no State. To exercise its functions in a given territorial space, the State must have acquired sovereignty over it in accordance with certain conditions and effectively perform those functions. The territory in question must be precisely circumscribed, as must the territories belonging to neighbouring States. This can be achieved by interpreting the territorial title and/or by determining the precise points up to which State A or State B effectively exercises full or partial sovereignty.[10] This is true for territory in the physical sense of the term as well as surface waters such as rivers and lakes – which explains the paradox that some land boundaries run on water.

These considerations are alien to national maritime spaces. Such spaces – internal maritime waters, territorial seas, contiguous zones, exclusive economic zones (EEZs) and continental shelves – are appendages of a coastal State's land territory and "belong" to that State because they are adjacent to its land territory and not because the State has "title" to them or effectively performs sovereign functions on or in them. The control exercised over maritime space is not, therefore, of the same nature as the dominion over land territory. This has made it necessary to devise special rules on the delimitation of maritime spaces between States with adjacent coasts or with coasts facing each other.

3. The Evolution of the Substantive Law on Maritime Delimitation

a) Early Law

Art. 12 of the 1958 Geneva Convention on the Territorial Sea[11] and Art. 6 of the 1958 Geneva Continental Shelf Convention[12] consecrate the triple rule "agree-

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10 As is well known, the degree of the exercise of full sovereignty required may vary according to the circumstances relating to the territory concerned, for example its accessibility, see Permanent Court of International Justice, *Legal Status of Eastern Greenland*, judgment of 5 April 1933, PCIJ, Series A/B, No. 53, p. 46.

11 Art. 12 of the Convention provides:
"1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial sea of the two States in a way which is at variance with this provision.
2. The line of delimitation between the territorial seas of two States lying opposite to each other or adjacent to each other shall be marked on large-scale charts officially recognized by the coastal States".

12 Art. 6(1) and (2) of that Convention read as follows:
"1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of

ment-equidistance-special circumstances". This treaty provision applies between States with opposing or adjacent coasts and overlapping territorial seas or continental shelves. It has been abundantly commented on, so that only few observations are necessary:

(i) If delimitation takes place by agreement, the latter can say whatever the parties want it to say, and whatever they make it say will be presumed equitable.

(ii) An equidistant line is a line formed by points located at an equal distance from the nearest points on each coastline or, more precisely, on each baseline. This definition suggests that the result of the delimitation will be influenced by the way in which the coastal States position their baselines.

(iii) The concept of "special circumstances" is elusive. It is not defined in the relevant Articles but seems to relate mainly to geographical features (configuration of the coasts, presence of islands, length of the relevant coastline of each party) and, possibly, to navigational elements.

(iv) It has been asserted that equidistance is the dominant rule, "special circumstances" being the exception. This assertion is not particularly helpful, however: Where "special circumstances" are found to exist – whatever their definition – the "special-circumstances" rule applies; in the absence of such features, it is the equidistance rule that will be used.

b) Early Cases

The post-1958 era has produced a wealth of case-law emanating from the ICJ and arbitral bodies. These precedents go back to the North Sea Continental Shelf judgment of 1969,[13] in which the Court succeeded in creating considerable confusion by holding that the agreement-equidistance-special circumstances rule embodied in the 1958 Continental Shelf Convention had not attained customary status and that, in the absence of such a status, the applicable principle was that of delimitation on the basis of "equitable principles" producing "equitable results".

The question of what was "equitable" in given circumstances was answered by international courts and tribunals in widely diverging ways, described in the 2008 Hamburg lecture.[14] The cases in point had sometimes little to do with equidistance

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agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured".

13 *North Sea Continental Shelf* cases (Germany/Denmark and The Netherlands), judgment of 20 February 1969, ICJ Reports 1969, p. 3.

14 *Caflisch*, The Peaceful Settlement of Disputes on Maritime Delimitation, in The Hamburg Lectures on Maritime Affairs 2007 & 2008, ed. by Basedow/Magnus/Wolfrum (2010) 177, 185−193.

or "special circumstances", although the Arbitral Tribunal in the Delimitation of the Continental Shelf case between France and the United Kingdom[15] had attempted to clarify a confused situation by noting that the delimitations resulting from the equidistance-special circumstances rule of the 1958 Geneva Conventions and those yielded by the rule of "equitable principles" leading to "equitable results" were about the same.

Another clarification was provided by the cases where small islands located near or "on the wrong side" of the equidistance line would have produced a distorted line. Such islands may be given partial effect.[16] Finally, there was widespread agreement that geological features and the localization of resources in and around the delimitation area, though mentioned in the North Sea judgment,[17] should not enter into consideration when trying to effect equitable delimitations.

Despite these clarifications, emerging over a long period of time and during a long succession of litigations, the case-law grew in both density and confusion. The natural way to settle delimitation issues – by drawing an equidistant line and modifying it subsequently when its consequences would be inequitable, as suggested in the Franco-British arbitration – was replaced by an approach offering a variety of methods for different situations. When, from 1974 onward, the revision of the 1958 Geneva Conventions got under way, the group of coastal States had split into two factions according to the geographical situations in which they found themselves: those favouring equidistance and those preferring "equitable principles". This bitter controversy, which lasted for the entire UN Conference on the Law of the Sea and eventually threatened to wreck it, finally proved to be of minor importance, and to involve elements of psychology rather than of legal policy.

c) The 1982 Rules

The main delimitation rules in the 1982 United Nations Convention on the Law of the Sea are Art. 15 (territorial sea), 74 (EEZ) and 83 (continental shelf). As Art. 15 of the 1982 Convention is a carbon copy of Art. 12 of the Territorial Sea Convention of 1958, already examined, no further comment is needed on that text.

Art. 74 and 83 of the 1982 Convention, on the EEZ and the continental shelf, are similar in content, providing in their first paragraphs that

> the delimitation of the EEZ [continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law as referred to in Article 38 of the Statute of the ICJ, in order to achieve an equitable solution.

The second paragraphs of the two provisions prescribe that if no agreement is reached within a reasonable period of time, the States concerned shall use the dispute settlement provisions of part XV of the Convention. Under paragraph 3 of both Art. 74 and 83, they shall, pending agreement, "enter into interim arrange-

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15 *Ad hoc* Tribunal, award of 30 June 1977, International Law Reports (ILR), vol. 54, pp. 6 and 139.

16 A good example is provided by the *Continental Shelf* (Libya/Malta) judgment of 3 June 1985, ICJ Reports 1985, p. 13, which gives the islands of Malta a one-fourth effect.

17 Judgment cited supra in n. 13, para. 97.

ments of a practical nature" without prejudice to the final delimitation. The respective fourth paragraphs, finally, assert that existing agreements shall remain in force.[18] These provisions call for a series of comments:

(i) The basic rule is that delimitations of the continental shelf and of EEZs shall be effected by "agreement on the basis of international law", that is, in accordance with the relevant rules generated by the sources of international law enumerated in Art. 38 of the ICJ's Statute, "in order to achieve an equitable solution". Such delimitations shall thus be based on custom or on Art. 6 (equidistance-special circumstances rule) of the 1958 Geneva Convention on the Continental Shelf for States Parties to it. Accordingly, Art. 74 and 83 of the new Convention faithfully mirror the legal situation existing in 1982 as it has evolved up to the time at which the delimitation takes place. This solution was the result of a deal between the partisans of the equidistance-special circumstances rule and those favouring equitable principles producing equitable solutions.

(ii) Read in isolation, Art. 74(1) and 83(1) of the 1982 Convention suggest that delimitation agreements are to "achieve an equitable solution". This could be taken to mean that all delimitation agreements, past, present and future, must be "equitable", *i.e.* that "equitableness" is a rule of *jus cogens* against which all such agreements must be measured.[19] That this is not the case is shown by the fourth paragraphs of the two Articles, which in essence perpetuate the existing agreements. This solution is justified by the need for stability and by the idea that what the States concerned found to be equitable *is* in fact equitable.

(iii) Art. 74(1) and 83(1) also seem to imply that delimitations can only take place by agreement. But this is contradicted by paragraphs 2 of the two Articles, which prescribe that "[i]f no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in part XV [third-party settlement procedures]".

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[18] The full texts run as follows:
"1. The delimitation of the exclusive economic zone [continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Art. 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone [continental shelf] shall be determined in accordance with the provisions of that agreement".

[19] In the *Maritime Delimitation* case, Guinea-Bissau/Senegal, *ad hoc* Tribunal, award of 31 July 1989, UNRIAA, Vol. XX, p. 119, there was some controversy on that point, see paragraph 79 of the award.

(iv) Paragraphs 3 of both Art. 74 and 83 require States to "make every effort" to enter into "provisional arrangements of a practical nature" and not to "jeopardize or hamper" the final settlement of delimitation issues. If such arrangements are not forthcoming or not observed, interim measures of protection can be taken under Art. 290 of the 1982 Convention, to the extent to which part XV of that instrument is deemed applicable.[20]

(v) The language of Art. 74 and 83 is near-identical, but the circumstances surrounding the delimitation of continental shelves and EEZs may differ and so may the equities involved and the applicable law. Regarding the surrounding circumstances, it is the geography of the area – configuration of the coast, presence of islands and proportionality (length of coastlines) – that is usually considered relevant, while other factors, such as the localization of living resources within the delimitation area, may loom large for the delimitation of EEZs. In other words, what may appear equitable for continental shelves may not for EEZs, and this difference could justify separate delimitation lines for the shelf and the zones. The interested States can, however, agree to ask for a single line (or two identical lines). If an international court or tribunal is requested to draw such a limit, it will do so either on a transactional basis – a compromise located somewhere between the separate lines that would have been chosen for the shelf and the EEZ – or by using "neutral" delimitation criteria, *i.e.* elements valid for both types of marine spaces (geographical elements).

(vi) Finally, there is, or at least was, a difficulty relating to the applicable law: while there are rules and precedents governing the delimitation of continental shelves and, therefore, sufficient elements to identify treaty and customary rules – the main sources of international law mentioned in Art. 38 of the ICJ's Statute – there was scarcely any law in 1982 on the delimitation of EEZs. There is more today, but will it be sufficient?

d) Some Recent Cases

Post-1982 case-law has done much to straighten out a chaotic situation. This is shown, in particular, by the *Jan Mayen* case brought before the ICJ by Denmark and Norway. The dispute, illustrated in sketch-map No. 1, concerned the delimitation of the continental shelf and the fisheries zones of Denmark and Norway where the coast of Greenland faces Jan Mayen, a small Norwegian island. The applicable law happened to be Art. 6 of the 1958 Geneva Convention on the Continental Shelf, customary law for the fisheries zones, and an agreement by the parties that identical lines had to be drawn for both spaces. Norway relied on equidistance between the coasts of Greenland and Jan Mayen, while Denmark claimed a full 200-mile continental shelf and fisheries zone for Greenland.

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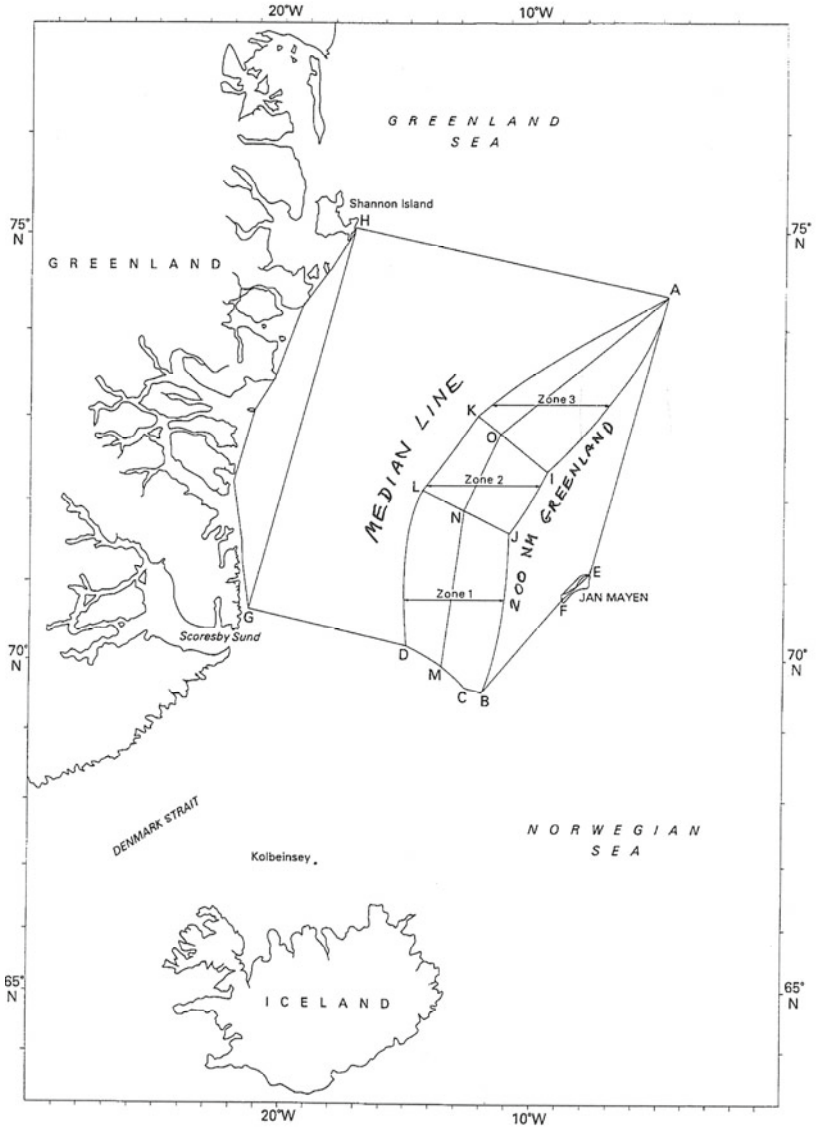
[20] This means, for example, that interim measures under Art. 290 of the 1982 Convention cannot be indicated by a conciliation commission established under Annex V, section 2 if the States concerned or one of them have excluded delimitation issues from the system of part XV, section 2, of the Convention pursuant to Art. 298(1)(a).

The Court's judgment of 14 June 1993[21] begins by explaining that the starting point of the delimitation process is an equidistant line constructed from the baselines of the two coasts, pointing, as the France-United Kingdom Arbitral Tribunal

Sketch-map 1



[21] *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Denmark/Norway, ICJ Reports 1993, p. 38.

had done in the late 1970s, to the similarity between the agreement-equidistance-special circumstances rule of Art. 6 of the 1958 Continental Shelf Convention and the equitable principles/equitable-result rule emerging from the case-law. As "special" or "relevant" circumstances, the Court mentions the disparity (1:9) of the lengths of the relevant coastlines and the need to give both parties access to the fisheries (capelin) in the delimitation area. These elements lead the Court to conclude that neither party's claim can be fully satisfied. Regarding fisheries, it finds that in the contested area there are three zones – forming the space A-K-L-D-M-C-B-J-I-A on sketch-map No. 1 – where capelin stocks are present and should be shared. Accordingly, these zones are divided up between the parties as shown in that map.

Two points in the Court's judgment deserve particular attention. The first is that, although the parties had asked the Court to draw identical lines for the fisheries zones and the continental shelf, the Court did not follow its usual practice of selecting a "neutral", *i.e.* a purely geographical, criterion,[22] but also took account of the presence of natural resources. Second, and more importantly, the Court seemed to say that from now on equidistance would be the point of departure of delimitation operations; the resulting line would then be adjusted to the specific situation, *i.e.* relevant circumstances. This seems to mean that the judge will henceforth begin where every sensible layman would: by looking at map 2, by drawing a hypothetical equidistance line on it and, if necessary, by adapting it to the "special" or "relevant" circumstances.[23] This method comes close to the time-honoured equidistance/special circumstances rule contained in Art. 12 of the 1958 Territorial Sea Convention and Art. 6 of the 1958 Convention on the Continental Shelf. As the delimitation obtained has to be "equitable", the judge will then make sure that the areas attributed to each State are roughly proportionate (or not clearly disproportionate) if one considers the length of the respective coastlines. This method is referred to as the "corrective-equity" or "two-step" approach.[24]

4. The Evolution of the Procedural Law of Maritime Delimitation − Procedural Rules

a) Prior to 1982

There are no provisions on dispute settlement in the Geneva Conventions on the Territorial Sea and on the Continental Shelf. This means that in the event of delimitation problems under Art. 12 of the former or Art. 6 of the latter, the dispute,

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22 As had been done in the case relating to the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Canada/United States, judgment of 12 October 1984, ICJ Reports 1984, p. 246, para. 194−195.

23 *Jan Mayen* case (supra n. 21), ICJ Reports 1993, para. 49−51. The term "special" is used in the context of the 1958 Convention, the word "relevant" in that of customary law.

24 Tanaka, Predictability and Flexibility in the Law of Maritime Delimitation (2006) pp. 353−355.

if it is not settled by negotiations, can only be submitted to the means accepted by the States concerned for the settlement of their disputes in general, or to means agreed on *ad hoc*. This has happened now and then, as attested to by some delimitation cases brought before the ICJ or arbitral tribunals.

An Optional Protocol was, however, appended to the 1958 Geneva Conventions which applied to States Parties to both the relevant Geneva Convention and to that Protocol. If these conditions were met, a State Party could bring a case before the ICJ. This, however, has never happened.

b) Under the 1982 Law of the Sea Convention

By contrast, part XV of the 1982 UN Convention establishes elaborate mechanisms for the settlement of disputes over the interpretation or application of the 1982 UN Convention. Those mechanisms offer States Parties to the Convention a "choice of procedures": they may, by means of a declaration, opt for the ICJ, the International Tribunal for the Law of the Sea (ITLOS) or general arbitration and, in some areas, for special arbitration, or for more than one of those means (Art. 287). In the absence of declarations or of matching declarations, States Parties are conclusively presumed to have accepted general arbitration under Annex VII to the Convention (Art. 286 and 287). This presumption forms the residual and compulsory element of the system. The means of settlement offered in part XV include the possibility of asking for and prescribing provisional measures (Art. 290) and the possibility of a procedure for the prompt release of detained vessels and crews (Art. 292), in which the ITLOS plays a central role.

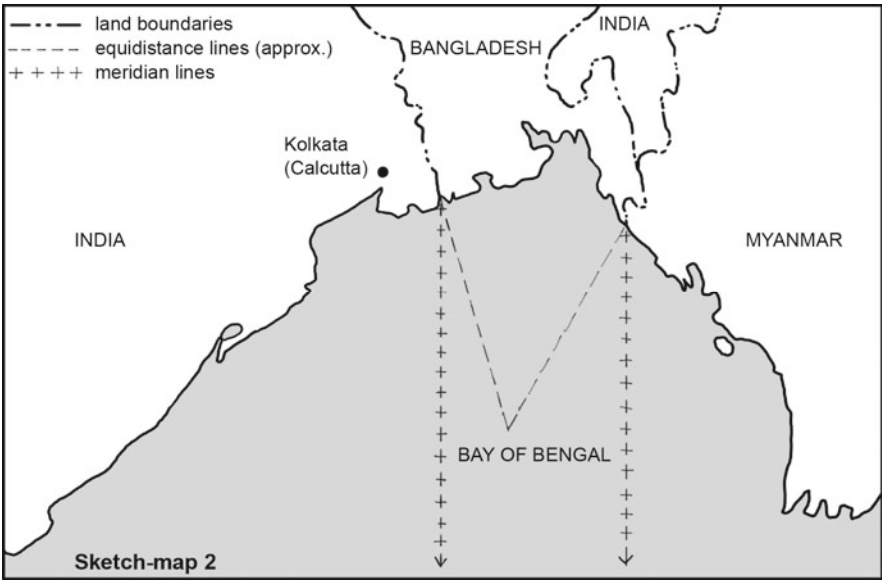
This complex system is far from all-embracing, however. It excludes altogether some categories of issues relating to the the coastal State's exercise of sovereign rights and jurisdiction in its EEZ and on its continental shelf (Art. 297). In addition, by means of unilateral declarations or statements which can be made at any time, it allows States to exclude: (i) issues concerning military and law enforcement activities; (ii) disputes pending before the UN Security Council; and (iii) "disputes concerning the interpretation of Art. 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles" (Art. 298(1)).

Paradoxically, compulsory adjudication can therefore be excluded precisely in one of the areas where it matters most and has proved most successful: the delimitation of territorial seas, EEZs and continental shelves. This optional exclusion is not complete, however: instead of adjudication, the excluding State is conclusively presumed to have accepted conciliation under Annex V, section 2, of the Convention.

Unfortunately quite a few States have availed themselves of the opportunity of excluding delimitation issues. This drawback is but partly compensated by the possibility of bringing such issues before a conciliation commission under Annex V, section 2, of the Convention (Art. 298(1)(a)), which shall make settlement proposals to the States concerned (Art. 6 of Annex V). But such proposals will not necessarily be based on law and must, moreover, be accepted by the parties concerned (as was

done, for example, in the *Jan Mayen* conciliation proceedings between Norway and Iceland).[25] Where there is no acceptance, there will be no settlement.

c) Delimitation Problems in the Bay of Bengal



In the 1970s two disputes emerged concerning the delimitation of the maritime spaces of three coastal States, India, Bangladesh and Myanmar, in the Bay of Bengal. India and Myanmar rely on equidistance; Bangladesh, the central riparian, favours the drawing of two lines following the meridians running, from north to south, through the end points of its coastline, until they reach the outer limit of the continental margin, located beyond the 200-mile limit. In 2008 Myanmar, acting pursuant to Art. 76(8) of the 1982 Convention, submitted to the Commission on the Limits of the Continental Shelf a claim to seabed areas in the Bay of Bengal beyond the 200-mile limit; Bangladesh plans to do the same by 2011.

The three countries' shelves overlap. If equidistance were the guideline to delimitation, the shelf of Bangladesh would be surrounded by those of its two neighbours; conversely, if the straight lines following the meridians suggested by Bangladesh were to prevail, both India's and Myanmar's shelves would be severely limited. One will note, finally, that in 1974, Bangladesh and Myanmar signed Agreed Minutes about the dividing line of their territorial seas; according to Bangladesh, that line has in fact been respected by both parties. The specific cause of the present disagreement between Bangladesh and Myanmar is that the government of the latter started to grant concessions in areas claimed by Bangladesh.

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[25] Report of the Conciliation Commission of May 1981, ILM 20 (1981) p. 797.

The dispute between India and Bangladesh has been brought before an arbitral tribunal under Annex VII to the 1982 Convention on the Law of the Sea. By contrast, Bangladesh's case against Myanmar is currently pending before the ITLOS. It is clear, however, that that case has a trilateral dimension. Indeed, the delimitation lines claimed by Bangladesh run on meridians from north to south. If the meridian located in the West were to be retained, it is not unlikely that the eastern meridian between Bangladesh and Myanmar would be adopted as well, the result being an amputation of both Myanmar's and India's maritime spaces. Conversely, if equidistance were retained in the eastern area, this could influence delimitation in the western region, which would result in an amputation of both India's and Myanmar's maritime spaces. The geographical situation of Myanmar and Bangladesh in the east being mirrored by that existing in the west between India and Bangladesh, India might consider intervention in the proceedings before ITLOS pursuant to Art. 31 of Annex VI to the 1982 Convention.[26]

Another interesting aspect of the dispute opposing Bangladesh to Myanmar is the path it took to reach the ITLOS. Initially their disagreement had led to protracted negotiations between the two countries, which came to naught. Both States later ratified the 1982 Convention but made, under Art. 287(1), a declaration accepting the compulsory character of one or several of the means listed in that Article; neither withdrew delimitation disputes from the procedures of part XV of the Convention as they could have done under Art. 298(1). This meant that the residual compulsory means of settlement was arbitration under Annex VII to the Convention. Accordingly, Bangladesh initiated arbitration proceedings against both India and Myanmar. At that point, Myanmar expressed a preference for the ITLOS, however, and Bangladesh fell in with this proposal. Both countries then made declarations, under Art. 287(1), accepting the jurisdiction of the ITLOS over that particular dispute. This is not the usual way in which the system of part XV of the Convention is supposed to function, but the language of Art. 287 is broad enough also to cover *ad hoc* declarations limited to specific cases. As there have been no similar declarations regarding the dispute opposing Bangladesh to India, the Annex VII arbitration will continue in their part of the area to be delimited.

IV. Conclusions

Today there exists a fairly stable and clear set of rules on maritime delimitation deriving from treaty and adjudication practice, and it is to these elements that the

[26] Art. 31 of Annex VI to the 1982 Convention is modelled on Art. 62 of the Statute of the ICJ for its first two paragraphs and provides the following: "1. Should a State Party consider that it has an interest of a legal nature which may be affected by the decision in any dispute, it may submit a request to the tribunal to be permitted to intervene. 2. It shall be for the Tribunal to decide upon this request. 3. If a request to intervene is granted, the decision of the Tribunal in respect of the dispute shall be binding upon the intervening State Party in so far as it relates to matters in respect of which that State Party intervened".

two basic provisions of the 1982 Convention – Art. 74 and 83 – make reference. The practice in question seems to have obliterated the distinction between the equidistance/special circumstances rule of 1958 and the rule prescribing recourse to "equitable principles" producing equitable results, and to have replaced it by a "corrective-equity" or "two-step" system which, as the Tribunal in the *Continental Shelf* arbitration between France and the United Kingdom[27] had pointed out as early as 1977, produces results that are not very different. That system may be described as a set of legal-technical rules which start from the assumption that the maritime spaces adjacent to coastal States are appendages of their land territories, the extent of which is to be determined on the basis of equidistance unless relevant circumstances justify a departure from that line. The equitableness of the resulting limit will be tested, in particular, by comparing the length of the relevant coastlines.

This is a far cry from the earlier practice, which was vague and unpredictable. It can be argued that the now prevailing method in the field of maritime delimitation is both simpler and clearer and that it enhances foreseeability and stability. The creation of stability is the main purpose of delimitation. Coupled with the fact that adjudication produces binding results, this feature turns arbitration and judicial settlement into desirable means for disposing of delimitation disputes. And, indeed, the track record of these means has been impressive. Since 1969, the ICJ and its *ad hoc* chambers have settled, or are about to settle, a dozen such disputes,[28] while another nine cases were sent to arbitration.[29] This shows that a num-

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27 *Delimitation of the Continental Shelf* (supra n. 15).

28 *North Sea Continental Shelf* cases (supra n. 13); *Continental Shelf* case, Tunisia/ Libya, judgment of 14 April 1981, ICJ Reports 1981, p. 18; *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (supra n. 22*); Continental Shelf*, Libya/Malta, (supra n. 16); *Land, Island and Maritime Frontier Dispute*, El Salvador/ Honduras, Nicaragua intervening, judgment of 11 December 1992, ICJ Report 1992, p. 351; *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Denmark/ Norway, (supra n. 21); *Maritime Delimitation and Territorial Questions*, Qatar v. Bahrain, judgment of 16 March 2001, ICJ Reports 2001, p. 40; *Land and Maritime Boundary*, Cameroon v. Nigeria, judgment of 10 October 2002, ICJ Reports 2002, p. 303; *Territorial and Maritime Dispute in the Caribbean*, Nicaragua v. Honduras, judgment of 8 October 2007, ICJ Reports 2007, p. 659; *Maritime Delimitation in the Black Sea*, Romania v. Ukraine, judgment of 3 February 2009, ICJ Reports 2009, p. 61. To these, two pending cases may be added: *Maritime Dispute* (Peru v. Chile) and *Territorial and Maritime Dispute* (Nicaragua v. Colombia).

29 *Delimitation of the Continental Shelf* case (supra n. 15); *Dubai/Sharjah Border*, *ad hoc* Tribunal, award of 19 October 1981, ILR, vol. 91, p. 543; *Delimitation of Maritime Boundary*, Guinea/Guinea-Bissau, award of 14 February 1985, UNRIAA, vol. XIX, p. 149; *Maritime Delimitation*, Guinea-Bissau/Senegal, award of 31 July 1989 (supra n. 19)); *Delimitation of Maritime Areas*, Canada/France, *ad hoc* Tribunal, award of 10 June 1992, ILM 31 (1992) p. 1149; *Maritime Delimitation*, Eritrea/Yemen, *ad hoc* Tribunal, award of 17 December 1999, IRL, vol. 119, p. 417; *Maritime Delimitation*, Barbados/ Trinidad-and-Tobago, *ad hoc* Tribunal, award of 11 April 2006, ILM 45 (2006) p. 798; *Maritime Delimitation*, Guyana/Suriname, *ad hoc* Tribunal, award of 17 September 2007, ILM 47 (2008), p. 166. To these cases, the dispute between

ber of States consider adjudication (preceded by negotiations and, possibly, conciliation) to be a preferred way of settling maritime delimitation matters.

It seems strange, therefore, that precisely in this field, so eminently suited for adjudication, Art. 298(1) of the 1982 Convention gives States the option to withdraw delimitation issues from the compulsory means of adjudication established in Art. 287(1) of the 1982 Convention, provided that they accept conciliation, a procedure far from generating the kind of certainty offered by adjudication. It was, perhaps, the wish of some States to avoid such certainty that led them to withdraw delimitation issues from the catalogue of "justiciable" matters.

An eminent international lawyer and authority on both the Law of the Sea and the peaceful settlement of disputes seems to suggest that conciliation rather than adjudication would be the ideal way of tackling delimitation disputes.[30] This is so, he argues, because delimitation has to be "equitable", that adjective being an invitation to decide *ex aequo et bono* rather than on the basis of law. It is difficult to share this view because the ICJ, as early as 1969, had emphasized that it was not "equity" it had in mind, but principles of law apt to produce equitable results.[31] A similar situation prevails in the field of international watercourses, where a set of "equitable principles" – viewed as legal precepts – govern the determination of the equitable and reasonable part of waters or water uses to which each riparian State is entitled.[32]

The upshot is that, whatever may have occurred in the initial stages of a delimitation dispute – negotiation, fact-finding, mediation, conciliation – a legally binding delimitation will ultimately have to be achieved, all the more so since the sea as a space and as a resource is of concern to the international community as a whole and not only to those directly involved in delimitation disputes.

Arbitration or judicial settlement? An attempt has been made in this lecture to highlight the advantages and drawbacks of various modes of settlement. Arbitration of course carries the capital advantage of flexibility in the choice of both the arbitrators and the procedure. It has a good record in the field of maritime delimitation, witness in particular the outcome of the *Delimitation of the Continental Shelf* arbitration between France and the United Kingdom, which may be at the origin of the reversal in the ICJ's case-law.[33] It may also be more responsive to the need for injecting transactional elements into settlements on the basis of law. It is certainly these advantages – mainly that of flexibility – which pushed the Third UN Conference on the Law of the Sea to select arbitration as the subsidiary and compulsory method of settlement.

Bangladesh and India in the *Bay of Bengal* (referred to supra, pp. 83–84) must be added.

30 *Rosenne*, Equitable Principles and the Compulsory Jurisdiction of International Tribunals, in Festschrift für Rudolf Bindschedler (1980) p. 407.

31 *North Sea Continental Shelf* cases (supra n. 13) § 85.

32 See Art. 5 and 6 of the UN Convention on the Law of the Non-navigational Uses of International Watercourses, of 21 May 1997, Annex to General Assembly Resolution 51/229.

33 Award of 30 June 1977 (supra n. 15), para. 70.

Settlement by a permanent judicial organ also has its points. Such organs decide on the basis of law, even more so than arbitrators. They are pre-established and permanent, and they exist prior to the submission of the dispute to them. All the difficulties inherent in the constitution of a tribunal and the drawing up of rules of procedure are avoided, and so are the previously-mentioned problems relating to provisional measures. Costs are reduced as well since the organs concerned are financed by contributions of the States Parties to the Conventions which have established them. The price to pay for these advantages is that judicial settlement offers less flexibility.

A last question one may be tempted to raise is whether preference should go to the ICJ or the ITLOS. The ICJ, to be sure, has a much wider experience, the only question being whether it is good experience. Until the early 1990s, one might have answered in the negative. Today, the Hague Court has significantly improved the situation, as its case-law has become more transparent and predictable. For the ITLOS, the situation is different. It is, on the one hand, a judicial organ specialized in law of the sea matters, which should encourage seekers of delimitation, especially developing countries since 11 out of its 21 members are nationals of such countries. On the other hand, the ITLOS, apart from dealing with requests for provisional measures, has had little opportunity to gather experience. If it were allowed to do so in the coming years, recourse to it would become an attractive option.

Mediterranean Maritime Jurisdictional Claims: A Review

David Joseph Attard*

I. Introduction

I am privileged to be invited to give a lecture at the prestigious Law of the Sea Tribunal in Hamburg. Since its establishment, the Tribunal has become an important authoritative source of judicial decisions which have contributed directly and in a meaningful manner towards the development, interpretation and implementation of international maritime law. I am honoured to record that over the years the Tribunal, and its Judges, have had close and fruitful relations with my Institute.[1] The Tribunal's excellent work was recognized through the granting of the IMLI Award for Meritorious Contribution to International Maritime Law, which was received by its President in Malta on 3 May 2008.

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* The views expressed herein are strictly personal.

1 The IMO International Maritime Law Institute (IMLI).

J. Basedow et al., *The Hamburg Lectures on Maritime Affairs 2009 & 2010,*
DOI 10.1007/978-3-642-27419-0_5,

It is also a great pleasure to be hosted by The Nippon Foundation, which has become a leading institution in fostering training in the law of the sea. The Nippon Foundation has for a number of years sponsored the studies at IMLI of some 76 lawyers from all over the world. 2010 marks a very important milestone in our cooperation with the Foundation as we will be setting up two Chairs through its generosity, one in International Maritime Security Law and the other in International Maritime Environmental Law. I also would like to recognize the generous and outstanding contribution of its President, Mr. Yohei Sasakawa, to the whole process. Without his vision the above would not have been achieved.

Since I commenced my legal studies in the law of the sea, I have always been particularly interested in the fascinating subject of regional approaches to the law of the sea. Given Malta's location, I am particularly interested in developments that occur within the Mediterranean. In fact, my first doctoral thesis in 1977 was entitled 'The Mediterranean as an Enclosed Sea in the New Law of the Sea'[2]. Clearly since then, there have been considerable developments both in treaty law and customary international law which have led to the recognition of the legal regime of enclosed and semi-enclosed seas.

In this evening's lecture I propose to review the origins of this regime, its development and its application, paying special attention to the exercise of Mediterranean maritime jurisdictional claims. I recall that in the early 1970s when, together with colleagues at the International Ocean Institute, I was furthering the development of this regime, it was strongly argued that – given the geographical complexities and ideological diversity of the Mediterranean and its littoral States – the region could provide an excellent testing ground for the development of regional approaches to the law of the sea. It was also hoped that the approach developed in the Mediterranean could serve as a model which could be applied in the other enclosed and semi-enclosed seas of the globe. In fact, to a certain extent our aspirations were achieved.

The distinction between enclosed or semi-enclosed seas, and other parts of the oceans, gained widespread recognition mainly through the efforts of Italy. In 1968, it presented a Memorandum to the United Nations Seabed Committee which aimed at ensuring that enclosed seas received special consideration in any future law of the sea treaty.[3] Eventually, the matter was discussed in the Second Committee of the Third United Nations Conference on the Law of the Sea (UNCLOS III), under agenda item 17, entitled 'enclosed and semi-enclosed seas.'

The deliberations in the Committee showed that one of the main fears with regard to inserting the concept of enclosed seas into a new law of the sea treaty was that no clear legal definition of the concept existed. The Greek delegate held that it was 'extremely rash' to include a vague and undefined concept in the final

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2 See *Attard*, The Mediterranean in the New Law of the Sea (1997) (Faculty of Laws, University of Malta) 21–24.

3 *Rene Dupuy*, Secretary-General of the Hague Academy of International Law has called the Italian theory, the "theory of the Mediterraneans", see *Dupuy*, The Law of the Sea (1974).

document.[4] The French delegate went as far as to say that even the mere inclusion of an item on enclosed seas "tended to give an ambiguous formula legal status".[5]

However, the large majority of delegations at UNCLOS III remained convinced that such seas raised difficult problems which could only be solved within the framework of regional bilateral cooperation or agreements. The Swedish delegate held that each enclosed sea had "its own particular problems and each case warranted its specific solution". States which fronted on the oceans were far more likely to have common problems than states fronting enclosed seas. It was easier to solve those problems on a global basis, since the common denominator was less difficult to find. In the case of enclosed seas, on the other hand, there had to be particular solutions for each region, because the characteristics of those seas varied widely.[6]

The representative of Iran held that the problems of such seas with regard to "the management of their resources, international navigation and the preservation of the marine environment justified granting them a particular status constituting an exception to the general rule".[7] The delegate from Israel referred to the various proposals which were discussed in the United Nations Seabed Committee, holding that this "indicated the wide and long standing acceptance of the proposition that in any comprehensive examination of the law of the sea, special treatment would have to be reserved for enclosed and semi-enclosed seas of international interest, and that what might be appropriate and necessary for the wide ocean space would not automatically apply in those geographically distinct marine areas."[8] The Turkish delegate disagreed with the contention that problems in such seas should be solved solely on the basis of bilateral agreements. His delegation even presented various draft articles affecting such seas.[9]

UNCLOS III adopted the 1982 United Nations Convention on the Law of the Sea (UNCLOS) which, as will be seen, includes specific provisions encouraging regional approaches to the law of the sea. The entry into force of UNCLOS marked an important achievement in the international process to codify and progressively develop the law of the sea. Essentially UNCLOS may be considered as a constitution regulating humankind's uses of the seas. The drafters of the Convention believed that the legal stability it provided would contribute to the strengthening of peace, security, co-operation and friendly relations between States.[10] Its fundamental goal is that of establishing a maritime legal order which – while paying due regard to the sovereignty of all States – facilitates the international uses of the sea;[11] promotes the equitable and efficient utilization of their

4 See Official Records of the Third United Nations Conference on the Law of the Sea, vol. II, p. 277.
5 See UNCLOS III Records (supra n. 4) 276.
6 See UNCLOS III Records (supra n. 4) 275.
7 Ibid.
8 Ibid.
9 Ibid.
10 See Preamble.
11 See, in particular, UNCLOS, Part VII but also Part II, III, IV, V and VI.

resources;[12] and provides for the protection and preservation of the marine environment.[13]

Significantly, UNCLOS includes rules which require or encourage regional co-operation in the regulation of maritime issues. In Part IX, it establishes a definition of "an enclosed or semi-enclosed sea" which appears to cover the Mediterranean Sea:

> Art. 122
> *Definition*
> For the purposes of this Convention, "enclosed or semi-enclosed sea" means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

In respect to such seas, UNCLOS requires littoral States to cooperate in implementing the rules established by the Convention:

> Article123
> *Cooperation of States bordering enclosed or semi-enclosed seas*
> States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour directly or through an appropriate regional organization:
>
> (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
> (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
> (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
> (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

Thus Part IX recognizes the special needs of enclosed and semi-enclosed seas. It establishes specific rules regulating enclosed and semi-enclosed seas.[14] Regional organizations play a major role in fisheries management as specified in Part V.[15] The setting up of Regional Marine Scientific and Technological Centers is proposed in Part XIV[16]; and Part XII provides for regional co-operation in the protection and preservation of the Marine Environment.[17]

The following Mediterranean States are parties to UNCLOS: Albania, Algeria, Bosnia-Herzegovina, Croatia, Cyprus, Egypt, France, Greece, Italy, Lebanon, Malta, Monaco, Montenegro, Morocco, Serbia, Slovenia, Spain, Tunisia and

12 Ibid., Part V, VI, VII and XI.
13 Ibid., Part XII.
14 See Art. 122, 123.
15 See Art. 63, 66(5), 118.
16 See Art. 275, 276, 277.
17 See Art. 197.

United Kingdom.[18] Israel, Libya, Syria and Turkey have not yet adhered to UNCLOS.[19]

Complementing these regional approaches found in UNCLOS, there are other important and significant regional developments (although some predate UNCLOS) which in many respects are relevant. The United Nations Environment Programme, Regional Seas Programme, first developed in the Mediterranean, has been successfully exported to other enclosed and semi-enclosed seas. Indeed today more than 140 States participate in 13 Regional Seas Programmes established under the auspices of the United Nations Environment Programme (UNEP) to cover the: Black Sea, Wider Caribbean, East Asian Seas, Eastern Africa, South Asian Seas, ROPME Sea Area, Mediterranean, North-East Pacific, North-West Pacific, Red Sea and Gulf of Aden, South-East Pacific, Pacific and Western Africa. Six of the programmes are directly administered by UNEP.

The Regional Seas Programmes function through an Action Plan. In most cases the Action Plan is based on a strong legal framework in the form of a regional Convention and associated Protocols dealing with specific problems.

All programmes reflect a similar approach, yet each has been fine-tuned by its member States and institutions to suit their particular environmental challenges. Nevertheless, it is true to say that most drew their inspiration from the Mediterranean Action Plan (MAP) adopted in 1975 and revised in 1995.

The Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona Convention) was adopted in 1976 (amended 1995) and entered into force in 1978 (amended version in force 2004). Six Regional Activity Centres (RACs) are responsible for the implementation of respective components of MAP under the supervision of the Coordinating Unit (MEDU).

The Convention is complemented by six protocols which deal with: Pollution by Dumping from Ships and Aircraft (adopted 1976, in force 1978 (amended 1995)); Pollution from Land-Based Sources and Activities (adopted 1980, in force 1983 (amended 1996)); Specially Protected Areas and Biodiversity (adopted 1982, in force 1986 (amended 1995, in force 1999)); Pollution from Ships and Cases of Emergency (adopted 1976, in force 2002); Pollution from Exploration and Exploitation of Continental Shelf and Seabed (adopted 1994, not yet in force); Pollution by Transboundary Movements of Hazardous Wastes and their Disposal (adopted 1996, not yet in force).

There have also been other important Mediterranean developments in regional cooperation with respect to such areas ranging from marine research to the conservation and management of fisheries.[20] With respect to the latter, the General Fisheries Commission for the Mediterranean, which is made up of 23 States and the European Union, has become most active in promoting the development, con-

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[18] The United Kingdom has sovereignty over certain land areas in Cyprus; see further Sec. IV.1.a).

[19] See Law of the Sea Bulletin (No. 29) 5, published by the Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, hereafter referred to as "LOSB"*;* for the latest list see: <www.un.org/Depts/los/reference_files/status 2010.pdf>.

[20] See *Attard*, The Mediterranean in the New Law of the Sea (1977).

servation and rational management of fisheries in the Mediterranean, the Black Sea and in connecting waters.[21] The Commission negotiates regularly with the International Commission for the Conservation of Atlantic Tuna (ICCAT) which has jurisdiction on tuna and tuna-like fish in the Atlantic and Mediterranean. Significantly the European Commission has also for a number of years focused on establishing an integrated maritime policy which has a Mediterranean dimension.[22]

The longstanding work of the Mediterranean Science Commission (CIESM) in the field of Mediterranean scientific research continues to make a valuable contribution to regional scientific cooperation.[23] The Commission, with headquarters in Monaco, has grown from the 8 founding States to 23 Member States today. These support a network of several thousand marine researchers, applying the latest scientific tools to better understand, monitor and protect a fast-changing and highly impacted Mediterranean Sea. Structured in six committees and various taskforces, CIESM runs expert workshops, collaborative programs and regular congresses, delivering authoritative independent advice to national and international agencies.

The Commission integrates a broad spectrum of marine disciplines, encompassing geo-physical, chemical and biological processes, along with high-resolution mapping of the sea-bottom. CIESM involves researchers from all littoral Mediterranean States in its activities.

Noteworthy are a set of recent decisions adopted by the IUCN Mediterranean Sea Experts Group in the light of the disastrous consequences on human life and the marine environment of the Deep Water Horizon Accident which occurred in the Gulf of Mexico in April 2010. This accident highlighted the dangers which the Mediterranean Sea faces given that there are some 223 active offshore oil exploration platforms. Based on the work of its meeting, the Group:

1. Urges all Mediterranean States who have not yet done so, including the EU, to consider ratifying the 1994 Offshore Protocol.
2. Calls upon the bureau of the contracting Parties to review the current status of ratification of the Protocol to advance the process.
3. Further calls upon IUCN national committees and members to bring the status of the Offshore Protocol to the attention of the national governments and all other parties (including industry interests) and to raise public awareness of the urgent need for the Protocol to enter into effect and be fully implemented.
4. Also recommends that IUCN members initiate dialogue with industry regarding the Protocol.
5. Calls upon the UNEP MAP secretariat to start preparatory activities in anticipation of the upcoming entry into force of the Protocol.
6. Further urges the Depository State to facilitate the ratification of the Protocol as appropriate.

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21 See <www.gfcm.org/gfcm/about/1>.
22 See <ec.europa.eu/maritimeaffairs/policy_en.html>.
23 See *Attard* (supra n. 20).

There has also been considerable activity on the matter within the EU fora and the EU Commission. These deliberations illustrate the delicate dilemma that faces Mediterranean States. On the one hand the semi-enclosed nature and special hydro-dynamics of the Mediterranean Sea would cause considerable harm in the event of such an accident occurring. On the other hand, Mediterranean States are constantly searching for oil and gas resources which are vitally important for their economic well-being.

Reference should also be made to the participation of Mediterranean States and European Community in global maritime treaties. Particularly important is the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Particularly relevant are the applicable IMO treaties which apply either directly to the Mediterranean through the adherence of its littoral States[24] or via UNCLOS.[25] Safety of shipping in the Mediterranean is also protected by two regional Agreements: The 1977 Mediterranean Memorandum of Understanding and the 1982 Paris Memorandum of Understanding, both of which provide for port State control regulating inspection of ships entering Mediterranean ports. The Mediterranean Memorandum covers ports in the South and Eastern Mediterranean whilst the Paris Memorandum covers ports in the Northern Mediterranean.

I now intend to review State practice relating to the exercise of maritime jurisdiction in the relative confined areas of the Mediterranean Sea, bearing in mind the regional developments I have just mentioned. Essentially, I shall examine how Mediterranean legislators have adopted legal regimes which attempt to balance national interests and sovereign rights with the requirements of their neighbours and those of the international community.

II. Mediterranean Maritime Jurisdictional Claims

1. The Territorial Sea

Most Mediterranean States, consistent with UNCLOS, claim a 12 nautical mile territorial sea.[26] These include Albania, Algeria, Cyprus, Egypt, France, Israel, Italy, Lebanon, Libya, Malta, Monaco, Morocco, Spain and Tunisia.[27] There are, however, a number of Mediterranean States which claim a limit below the maximum breadth recognized by UNCLOS: Greece (6/10 nautical miles) and Turkey

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[24] See further: <www.imo.org/OurWork/TechnicalCooperation/GeographicalCoverage/ArbandMed/Pages/Default.aspx>.

[25] See for example Art. 21.

[26] See Art. 3.

[27] See Limits in the Seas (No. 36, 7th Revision, January 1995), published by the US Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, and hereafter referred to as "Limits".

(6/12 nautical miles). In 2003, Syria reduced its 35 nautical mile territorial sea claim to 12 nautical miles.[28]

2. Contiguous Zone

The Mediterranean States which have established a contiguous zone all claim a 24 nautical mile limit generally in accordance with the provisions of UNCLOS[29]; these include Algeria,[30] Cyprus, Egypt,[31] France, Malta, Morocco, Spain and Syria.[32] A considerable number of Mediterranean States do not claim a contiguous zone. These include Albania, Greece, Israel, Italy, Lebanon, Libya, Monaco, Tunisia and Turkey.[33]

Under UNCLOS, in order to control the removal of archaeological and historic objects from the seabed, reference is made to the contiguous zone regime.

> Art. 303
> *Archaeological and historical objects found at sea*
> 1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
> 2. In order to control traffic in such objects, the coastal State may, in applying Art. 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
> 3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.
> 4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

It is noteworthy that Algeria, Cyprus, France, Italy and Tunisia have over recent years established a 12 nautical mile archaeological protection zone beyond the outer limit of the territorial sea, which is designed to protect underwater cultural heritage.[34]

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28 See Law No. 28 of 13 November 2003.

29 See Art. 33.

30 Presidential Decree No.04-344 of 6 November 2004 establishes a zone contiguous to the territorial sea and claims therein the powers granted under Art. 33 and 303 of UNCLOS, see LOSB (supra 19) No. 57, p.116.

31 It is interesting to note that the Decree concerning the Territorial Waters of 15 January 1951, as amended by the Presidential Decree of 17 February 1958, claims in Art. 9 powers within the contiguous zone for the purposes of enforcing security.

32 See Decree No. 304 of 28 December 1963 which includes a claim to "security jurisdiction".

33 See LOSB (supra 19) No.23, June 1993.

34 See also the UNESCO Convention on the Protection of the Underwater Cultural Heritage done in Paris on 2 November 2001 and which entered into force on 2 January 2009. This Convention has been ratified by the following Mediterranean countries: Albania, Bosnia and Herzegovina, Croatia, Italy, Lebanon, Libyan Arab Jamahiriya, Montenegro, Slovenia, Spain and Tunisia.

3. Continental Shelf

Part VI of UNCLOS defines the continental shelf of a coastal State as *inter alia* comprising the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[35] Over the continental shelf, the coastal State exercises sovereign rights for the purpose of exploring it and exploiting its natural resources.[36] These rights are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the State.[37] Furthermore, such rights do not depend on occupation, effective or notional, or on any express proclamation.[38]

Mediterranean State practice with respect to the continental shelf's outer limits generally adopts the criteria found in the 1958 *Convention on the Continental Shelf*, wherein the term 'continental shelf' is used as referring:

(i) to a seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas;

(ii) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.[39]

Albania, Cyprus,[40] Egypt, France, Greece, Israel,[41] Italy, Malta, Spain, Syria and Tunisia have legislation which adopts the 1958 Convention definition and criteria. It should be noted however that – for parties to UNCLOS – Art. 311(1) applies: "This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958."

Given the relatively confined area of the Mediterranean, the emergence of the 200 nautical mile distance criterion regulating the outer limit of the continental shelf under customary international law is of particular importance. This criterion, which appears in Art. 76 of the 1982 Convention, detaches the legal continental shelf from the criteria found in the 1958 Shelf Convention. Consequently, the depth and exploitability criteria – adopted by a number of Mediterranean States in determining the continental shelf limits – would have to be considered in the light of this development, particularly when a dispute over the delimitation of the shelf arises.[42]

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35 See Art. 76.
36 See Art. 77.
37 Ibid.
38 Ibid.
39 See Art. 1. The Following Mediterranean States are parties to this Convention: Albania, Bosnia-Herzegovina, Croatia, Cyprus, France, Greece, Israel, Malta, Spain and Yugoslavia. See LOSB (supra 19) No. 2, December 1983.
40 Cyprus has adopted only the exploitability criterion.
41 Israel has adopted only the exploitability criterion.
42 See above Section II.3.

A number of Mediterranean States have not expressly proclaimed a continental shelf. These include Algeria, Lebanon, Libya, Morocco, Tunisia and Turkey.[43]

4. Exclusive Economic Zone

It is generally accepted that, unlike the continental shelf regime which exists *ipso facto*, the exclusive economic zone has to be expressly declared for the existence and enjoyment of zone rights.[44] It is interesting that a number of Mediterranean States – Egypt, Cyprus, France, Lebanon,[45] Morocco, Syria,[46] Tunisia and Turkey – have claimed an exclusive economic zone with different levels of implementation.[47] The problem of delimiting the zone's outer limit represents another formidable challenge given the relatively restricted geographical areas of the Mediterranean. Some States adopted a policy of self-restraint and have not implemented exclusive economic zone legislation with respect to their Mediterranean coast.[48] France, for example, adopted in 1979 *Decree Number 77/130* which established an economic zone off the French coast bordering the North Sea, the English Channel and the Atlantic from the Franco-Belgian border to the Franco-Spanish border. It would seem that the policy of France was not to establish an economic zone in the Mediterranean unless other States claim such zones adjacent to their own Mediterranean coasts.[49] The position may however change in the light of the 2009 French declaration on the future establishment of an "Exclusive Economic Zone" in the Mediterranean.[50]

III. Mediterranean Maritime Jurisdictional Claims under Customary International Law

An institution found in customary international law but not explicitly in UNCLOS is the exclusive fishery zone. Within this zone, which may extend to 200 nautical miles, the coastal State is entitled to claim sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources therein.[51]

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43 See LOSB (supra 19) No. 23, June 1993.

44 Ibid., p. 54−61, The Delimitation of the Continental Shelf and the Exclusive Economic Zone in the Mediterranean Sea, Il Regime Giuridico Internazionale del Mare Mediterraneo, ed. by Leanza Editor (1987).

45 See Note Verbale from the Permanent Mission of Lebanon to the Secretary-General of the UN dated 14 July 2010.

46 Law 28, 19 November 2003.

47 See further Section III below.

48 Morocco, through Act No. 1/81, of 18 December 1980, established a 200 nautical mile exclusive economic zone but seems to have applied it only for its Atlantic coast. Turkey established its exclusive economic zone only for its Black Sea coast through Decree No. 86/11267.

49 See *Pistorelli*, La Piattaforma Continentale: Un Istituto Ancora Vitale?, RDI 1978, 496 et seq.

50 See Section V below.

51 See *Attard*, The Exclusive Economic Zone in International Law (1987) 285, 287.

Four Mediterranean States claim an exclusive fishery zone: Algeria (32/52 nautical miles), Libya (62 nautical miles), Malta (25 nautical miles) and Spain[52]. Many others do not make specific claims but claim exclusive fishery rights beyond the territorial sea.[53]

Not without controversy are the efforts of States which have claimed jurisdictional zones around their Mediterranean coasts. In 2005 Libya established a Fisheries Protection Zone, claiming exclusive competence to fish in the area.[54] Given the controversy surrounding the Libyan Gulf of Sidra status,[55] of particular interest is the Libyan boundary for the zone. In a Declaration, the zone limits are described as follows:

> That area of the Mediterranean Sea lying north of the boundaries of Libyan territorial waters and extending seaward for a distance of 62 nautical miles, measured from the territorial sea line, is a fisheries zone subject to Libyan sovereignty and jurisdiction in which fishing, be it domestic or foreign, of any kind, for any purpose and by any means is prohibited unless the competent Libyan authorities have issued a permit to the person or persons concerned to conduct fishing operations in such areas in accordance with the laws and regulations in force in the Great Jamahiriya.[56]

It would appear that the inner boundary of this fishing zone is the outer limit of the Libyan territorial sea. In 2009 Libya declared an exclusive economic zone claiming sovereign rights in line with Art. 56 of UNCLOS.[57] Interestingly, the criteria for the establishment of the exclusive economic zone limits differ from those relating to the fishing zone:

> An exclusive economic zone of the Great Socialist People's Libyan Arab Jamahiriya is declared beyond and adjacent to its territorial sea, extending to the limits conceded by the international law and, when necessary the outside boundary of this zone shall be determined with the concerned neighbouring countries, by virtue of agreements to be concluded on the basis of the international law.[58]

Through Act No. 50/2005 Tunisia claimed an exclusive economic zone off its coast.[59] Whilst the Act follows Art. 56 of UNCLOS, the outer limit of the zone – like that of Libya – was not established firmly.[60] Art. 3 states:

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52 Limits (supra n. 27) No. 36 (1995); for the position of Spain see Section V below.

53 See, for example, the claim of Tunisia; Law of 26 July 1952 establishes a limit based on the isobaths of 50 meters.

54 See "General People's Committee Decision No. 37 concerning the declaration of a Libyan fisheries protection zone in the Mediterranean Sea", LOSB (supra 19) No. 58, p. 14.

55 See further below.

56 See General People's Committee Decision No. 37 concerning the declaration of a Libyan fisheries protection zone in the Mediterranean Sea, LOSB (supra 19) No. 58, p. 16.

57 See Art. 2, General People's Committee Decree No. 260 of 1377 P.D. (2009).

58 See Art. 1 ibid.

59 Act No. 50-2005, 27 June 2005, See LOSB (supra 19) No. 58, p. 19.

60 Ibid. Art. 2.

> Without prejudice to the relevant international conventions ratified by the Republic of Tunisia, this zone may extend to the boundaries provided for in international law.
> Where necessary, the outer boundaries of the exclusive economic zone shall be determined by agreement with the concerned neighbouring States.[61]

At the time of writing, Tunisia had not yet established its exclusive economic zone boundaries.[62]

Malta also amended its law to empower the Prime Minister to extended Maltese jurisdiction beyond its 25 nautical mile fisheries conservation zone.[63] The delimitation problems of the exclusive economic zone claimed by Egypt, Croatia, Cyprus and Lebanon will be discussed below.[64]

The UNCLOS provisions relating to bays do not apply to so-called 'historic' bays.[65] The issue is regulated by rules of customary international law.[66] It is generally agreed that a State may validly claim title to a bay on historic grounds if it can show that it has, for a considerable period of time, claimed the bay as internal waters and exercised therein effective control and authority. It is important that such a claim receives the acquiescence of other States, particularly specially affected States. Once such a claim is established, the coastal State is entitled to draw a closing line across the mouth of the bay, which line would then constitute the territorial sea baseline. There appears to be no rule determining the maximum length of such a line. One of the important consequences of such a claim is that it shifts considerably seawards the maritime jurisdictional claims of a State.

In the Mediterranean there are two 'historic' bay claims which have, at times, attracted widespread protest. On 19 October 1973 Libya announced that the Gulf of Sidra, located within its territory and surrounded by land boundaries on its east, south and west side, and extending north offshore to latitude 32 degrees and 30 minutes, constitutes an integral part of its territory and is under its complete sovereignty.[67] The Libyan announcement stated that throughout 'history and without any dispute' Libya had exercised its sovereignty over the Gulf.[68] Furthermore, it stated that its claim was necessary to ensure its security and safety.[69] This Libyan

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61 Ibid.

62 Information provided by diplomatic sources; see however the 2003 Algeria/Tunisia Agreement discussed below in Section V.

63 See Law 10 of 26 July 2005 amending Chapter 226: Territorial Waters and Continuous Zone Act.

64 See below Section V.

65 See Art. 10.

66 See *Tunisia/Libya Continental Shelf Judgment (1982) ICJ Reports*, 18 at 74. Also UNCLOS III Records, Vol. II, p. 100 et seq. and Vol. VI, p.196.

67 See *UN Legislative Series: National Legislation and Treaties relating to the Law of the Sea* (ST/LEG/SER.B/18), 1976, p. 26.

68 Ibid.

69 Ibid., see Also *Franconi*, The Gulf of Sidra Incident (United States v. Libya) and international law', Italian Yearbook of International Law 5 (1980−81) 85−109; *ibid.*, in Symposium on Historic Bays of the Mediterranean, Syracuse Journal of International Law and Commence 11 (1984) 205−415; *Spinnato*, Historic and Vital Bays: An

claim has met with protests from a number of States including Australia, France, Germany, Malta, Norway, Spain and the United States.[70] The conflict potential of this claim is reflected in the US determination to demonstrate its objection to the Libyan claim by exercising high-seas freedoms despite Libyan protests. In 1981 this dispute led to an incident where two Libyan aircraft were shot down by Unites States naval forces.

A 'historic' bay claim is also made by Italy with respect to the Gulf of Taranto. In 1977, through a Presidential Decree, a baseline was drawn across the outer points of this Gulf.[71] This claim has also elicited protests from a number of States, including the United Kingdom and the United States, who do not agree that the Gulf can be considered an 'historic' bay.[72]

IV. Delimitation of Mediterranean Maritime Jurisdictional Claims

1. By Agreement

a) Territorial Sea Boundary

UNCLOS contains provisions concerning the delimitation of the territorial sea, the exclusive economic zone and the continental shelf. With respect to the territorial sea, the Convention provides that:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.[73]

UNCLOS does not provide for the delimitation of the contiguous zone. However, parties to the 1958 *Convention on the Territorial Sea and the Contiguous Zone* are bound by Art. 24(3) which, failing agreement imposes the median line in the following manner:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured.

Analysis of Libya's Claim to the Gulf of Sidra, Ocean Development and Internal Law 13 (1983) 65.

70 See Limits (supra n. 27) No. 112, p. 11.

71 See Presidential Decree No. 816, of 26 April 1977 (Gazetta Ufficiale, No. 305, of 26 April 1977).

72 See Limits (supra n. 27) No. 112, p. 8.

73 See Art. 15. This provision is similar to Art. 12 of the 1958 *Convention on the Territorial Sea.*

There exist a number of agreements delimiting territorial sea boundaries in the Mediterranean. An early example is found in the *Treaty Concerning the Establishment of the Republic of Cyprus* of 1960.[74] The Treaty obliges Cyprus not to claim a territorial sea with respect to the two areas adjacent to the British 'sovereign base area' in Akrotiri and Dhekelia. In this respect boundaries were drawn enclosing the maritime zones adjacent to the said areas. The exceptional nature of this Treaty is reflected in the strong influence which political and security factors had exerted on the delimitation process. Consequently, only certain segments of the boundaries are based on equidistance.

It may be pertinent to refer to the maritime boundaries agreed to between Turkey and the former USSR in the Black Sea, bearing in mind that Turkey has a Mediterranean coast and has faced considerable jurisdictional problems in the Aegean Sea. In 1973 both States established a territorial sea boundary which departs from equidistance and seems to be influenced by the general direction of the land boundary.[75] In 1978 the parties agreed to delimit the continental shelf in the Black Sea 'based on the principles of equity, taking into consideration the relevant principles and norms of international law'.[76] The reference to equity is a reflection of the general Turkish position on maritime delimitation, particularly in respect to its delimitation problems in the Aegean. The 440.1 nautical-mile boundary, in fact, essentially employs equidistance modified due to geographic considerations.[77] Through an exchange of diplomatic notes, the parties agreed that this continental shelf boundary should also delimit their exclusive economic zones.[78]

It is submitted that the practice of these two States, the coasts of which surround a semi-enclosed sea, with their contrasting political and economic systems could serve as a useful model for the delimitation of maritime zones in the Mediterranean. While it is important to point out that the configuration of these coastlines did not provide any insurmountable problems, it is clear that the desire to consolidate their good neighbourliness and friendly co-operation prevailed. Furthermore, while there is no compelling reason to state that under international law the continental shelf boundary and that of the exclusive economic zone should be coincidental,[79] this practice confirms the view that the advantages of an identical boundary for the shelf and the zone could lead States to a single maritime boundary.

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74 Signed by Cyprus, Greece, Turkey and the United Kingdom on 16 August 1960; Limits (supra n. 27) No. 49, 1972.

75 See Limits (supra n. 27) No. 59, 1974.

76 See Agreement on the Delimitation of the Continental Shelf in the Black Sea, signed 23 June 1978; Limits (supra n. 27) No. 109, 1988.

77 Ibid.

78 Ibid.

79 See *Attard* (supra n. 51) 212–21.

In 1975 Italy and Yugoslavia established a territorial sea boundary which took into account the principles established by the 1958 *Territorial Sea Convention.*[80] It would seem that navigational considerations were taken into account when determining the boundary.[81] The boundary subsequently gave rise to fishing disputes and led to the creation of a common fishing zone in the Gulf of Trieste which was established through the exchange of diplomatic notes on 18 February 1983. The zone overlaps the territorial sea boundary.[82] In 1991 the Croatian Parliament declared that international agreements concluded and acceded to by the former Yugoslavia should apply to Croatia, provided that they did not conflict with the "Constitution and legal system."[83] In 1992 a Slovenian declaration that it acceded to the 1975 Treaty was noted with satisfaction by Italy.[84] The boundary delimiting the adjacent maritime zones of Slovenia and Croatia has not yet been settled.[85]

On 16 February 1984, France and Monaco signed a Maritime Delimitation Agreement.[86] This Agreement delimited the territorial seas and other maritime zones of the States. In Art. 2, the Agreement states that beyond the territorial sea of Monaco there is a delimited maritime area over which Monaco shall claim sovereign rights in accordance with international law. Given the exceptional relations between the States, France appears to have abandoned the method of exclusive application of equidistance; special provision is made to protect traditional fishing rights.[87]

In 1986 Italy and France concluded an agreement relating to the delimitation of maritime boundaries in the area of the Strait of Bonifacio.[88] This agreement delimits the opposite territorial seas in the area. Essentially, the boundary is based on equidistance;[89] due regard is, however, given to a previous agreement signed between the two States for the purpose of determining exclusive fishing zones for French and Italian fishermen, respectively, in the waters between Corsica and Sardinia.[90] It is noteworthy that the 1986 Agreement provides for the establishment of a common fishing zone 'by way of neighbourly agreement, to allow

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80 See Treaty signed on 10 November 1975. See Schedule III. See also *Forio*, Problemi della Frontiera Marittima nel Golfo di Trieste, Revista di Diritto Internazionale (1977) 467. Both States were parties to the 1958 Territorial Convention.

81 See Italian Yearbook of International Law (1976) 423.

82 See *Migliorino*, L'Accordo italo-jogoslavo del 1983 sull'istituzione di una Zona di Pesca nel Golfo di Trieste, Rivista di Diritto Internazionale (1987) 344.

83 See Constitutional Decision adopted by the Parliament of Croatia on 25 June 1991.

84 See Gazzetta Ufficiale, No. 211, of 8 September 1992.

85 See however further Section V below.

86 See *Charney/Alexander*, International Maritime Boundaries, Vol. II (1993) p. 1581.

87 Ibid p. 1582.

88 Signed on 28 November 1986. See LOSB (supra 19) No. 10, 1995.

89 See *Caffio*, L'Accordo di Delimitazione delle acque tra la Sardegna e la Corsica, Rivista Marittima 123 (July 1990) 13.

90 Signed 18 January 1908. It has also been suggested that, due to the strategic military relevance of the Strait of Bonificio , a secret 1972 agreement between Italy and the United States regulating the establishment of an American base for nuclear submarines on the island of La Maddalena may have influenced the course of the boundary; see International Maritime Boundaries, Vol. II (1993), p. 1572.

French and Italian coastal fishing vessels to continue their activities in the traditional fishing areas …'[91]

Croatia and Bosnia-Herzegovina signed a treaty establishing the State border between them on 30 July 1999. It is not yet into force but has provisional application from the said date and contains two sectors: the land boundary and the maritime boundary. Art. 4 paragraph 3 declares that the "boundary at sea" is a median line between the land territories of both States.[92] Effectively, due to the particular geographic characteristics of the area, this maritime boundary delimits the internal waters of Croatia and the territorial sea of Bosnia-Herzegovina.[93]

b) Continental Shelf Boundary

UNCLOS contains provisions relating to the delimitation of the exclusive economic zone[94] and the continental shelf.[95] The Convention provides that the delimitation of the exclusive economic zone or the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Art. 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.[96] This provision, which differs from Art. 6 of the 1958 *Convention on the Continental Shelf,*[97] has been criticized on the grounds that it does not offer any positive assistance to the parties to a dispute. As Judge Oda has aptly observed, it does not provide any specific designation of which principles and rules from the entire panoply of customary, general, positive, and conventional law are of particular significance.[98] It is therefore reasonable to expect that disputes concerning maritime zones will be primarily settled by recourse to the rules of customary international law,[99] even between parties to the 1982 UNCLOS.

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91 See Art. 2.

92 See International Maritime Boundaries, Vol. IV (2002) p. 2887.

93 Ibid p. 2888.

94 See Art. 74.

95 See Art. 83.

96 Ibid.

97 1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

98 See Tunisia/Libya Continental Shelf Judgment (1982) ICJ Reports, 18 at 246.

99 See generally, *Attard* (supra n. 51) 129 et seq., 211 et seq.

With respect to the delimitation of the continental shelf, practice in the Mediterranean has been varied and, at times, turbulent. Italy has been particularly successful in delimiting a number of maritime boundary agreements. In 1968, it signed a continental shelf agreement with the former Yugoslavia.[100] This agreed boundary adopts a median line which is modified in order to take into account the case of small islands lying in the delimitation area. A strict median line application would have resulted in a disproportionate division due to the random locations of these islands.[101]

Italy concluded an innovative continental shelf agreement with Tunisia in 1971.[102] The boundary is essentially a median line which takes into account islands, islets and low-tide elevations with the exceptions of Lampione, Lampedusa, Linosa and Pantelleria. These latter islands are closer to Tunisia and caused a modification of the equidistant boundary through the creation of semi-circles around them, the radius of which is 13 nautical miles (Lampione, which is uninhabited, has 12 nautical miles). Essentially therefore, these islands are granted a 12 nautical mile territorial sea and a 1 nautical mile continental shelf. It is generally understood that the Italian concession with respect to the continental shelf of these islands was part of a general agreement designed to resolve the serious fishing problems between the two countries.[103] Indeed, on 20 August 1971 the two States concluded a bilateral fishing agreement which allowed Italian fishing in Tunisian waters upon the payment of an annual fee.[104] It is noteworthy that in the Malta-Sicily Channel a provisional continental shelf boundary based on the median line seems to be respected by Malta and Italy.[105] Italy signed a continental shelf agreement with Spain in 1974.[106] The boundary, which is 137.19 nautical miles long, is based on equidistance.[107] Malta has declared that it is not bound by this agreement.[108]

In 1977 Italy signed a continental shelf agreement with Greece on the principle of the median line with 'mutually approved minor adjustments'.[109] Another continental shelf boundary based on equidistance was concluded between Italy and Albania. It would seem that in implementing the equidistance method, only some minor adjustments were made.[110] It is noteworthy that in all of Italy's agreements

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100 Signed 8 January 1968. See Limits (supra n. 27) No. 9, 1970.

101 See *Attard* (supra n. 51) 236; *Treves*, L'Accordo italo-jugoslavo per la Delimitazione della Piattaforma Continentale dell'Adriatico, Rivista della Navigazione (1969) 300.

102 Signed 20 August 1971; Limits (supra n. 27) No. 89.

103 See *Scovazzi*, La Pesca nelle acque Comprese fra Italia e Tunisia, Rivista del Diritto della Navigazione (1975) 731.

104 See International Maritime Boundaries, Vol. II (1993) 1612.

105 Ibid., para. 17.

106 19 February 1974; Limits (supra n. 27) No. 90, 1980.

107 Ibid. See also *de Azcarrga*, Espana Suscribe – con Francia e Italia – dos Convenios sobre Delimitacion de sus Plataformas Submarinas Comunes, Revista Espanola de Derecho International (1975) 131.

108 See *Leanza/Sico/Ciciriello*, Mediterranean Continental Shelf (1988) 1629.

109 See Limits (supra n. 27) No. 96.

110 *Francalanci/Scovazzi*, Lines in the Sea (1994) 232.

the boundaries ceased before reaching the meeting point of the other possible shelf boundaries with other neighbouring States.

On 8 August 1988, Libya and Tunisia signed an Agreement to Implement the Judgment of the International Court of Justice in the Tunisia-Libya Continental Shelf Case.[111] A similar Agreement, signed between Libya and Malta on 10 November 1986, implements the boundary decided by the Court in the 1985 Judgment in the Malta-Libya Continental Shelf Case.[112]

The latest Mediterranean continental shelf agreement was signed between Albania and Greece on 19 March 2009. Whilst the full text of the Agreement has not yet been released, the Greek Foreign Ministry announced that the Agreement delimited the continental shelf and other maritime zones based on international law.[113] It should be noted that the Agreement appears to have been met with criticism from some quarters in Albania.[114]

2. By Judicial Settlement

Two Mediterranean continental shelf boundary disputes were settled through their submission to the International Court of Justice. The first concerned the delimitation of the continental shelf boundary between Libya and Tunisia. In 1982 the International Court delivered its judgment wherein it took into account mainly the geographical situation and coastal configurations in achieving an equitable solution.[115] The method of equidistance was substantially disregarded by the International Court.[116] On 8 August 1988 the parties concluded a treaty which implemented the boundary proposed by the said judgment after the Tunisian request for a revision of the first judgment had been turned down by the Court.[117] On the same day the parties signed an agreement establishing the 'Seventh November Joint-Exploration Zone' which overlaps the agreed boundary.[118]

In the Malta-Libya dispute the Court delivered its judgment on 3 June 1985.[119] In this case the median line was employed as a provisional step in achieving a final boundary by shifting the line northwards through 18 minutes of latitude in Libya's favour.[120] The Court felt that, in the light of the relevant geographical circumstances of the case, its transposition was restricted by the meridians 13

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111 See International Maritime Boundaries, Vol. II (1993) 1679: the International Court judgment is discussed below in Section (b), see also *Attard* (supra n. 51) 234 et seq.

112 Ibid p. 1649: the International Court judgment is discussed below in Section (b), see also *Attard*, The 1985 Continental Shelf (Libyan Arab Jamahiriya/ Malta) Judgment, Id-Dritt (Law Journal) XIV (1989).

113 See <www.mfa.gr/www.mfa.gr/Articles/en-US/190309_P1605.htm>.

114 See <www.balkaninsight.com/en/main/news/18532>.

115 ICJ Reports (1982) 18.

116 See International Maritime Boundaries, Vol. II (1993) 1663−1677.

117 Ibid.

118 See *Bathurst*, Joint Development of Offshore Oil and Gas (1989) 64.

119 ICJ Reports (1985) para. 13.

120 Ibid., para. 62, see also The 1985 Continental Shelf (Libyan Arab Jamahirija/Malta Judgment: A Brief Analysis, in De Jure, Vol. 1, No. 3 (January 1989).

degrees 50 minutes and 15 degrees 10 minutes. The determination was made after Italy's application to intervene was rejected by the International Court,[121] which, however, decided that the judgment must be limited in geographical scope so as to leave the claims of Italy unaffected.[122] On 10 November 1986 Malta and Libya concluded an agreement implementing the judgment of the Court.[123]

V. Increased Mediterranean Jurisdictional Claims

It appears that the policy of self-restraint with respect to extensive maritime claims which prevailed in the Mediterranean is now changing.[124] This restraint was largely due to a number of factors, including the complexities of the delimitation of overlapping claims and the fact that the two major resources of paramount interest to Mediterranean States, that is, the non-living resources of the continental shelf and living resources were already covered by existing regimes and claims.[125] It would, however, seem that *inter alia* the dangers of over-fishing, the need to protect underwater archaeological heritage and environmental concerns are putting pressure on Mediterranean States to further their maritime jurisdictional claims.

On 26 August 1997 the Council of Ministers of Spain approved a decree which established a fishing protection area in the Mediterranean.[126] Under *Act 15 of 1978* Spain promulgated an exclusive economic zone applicable to the Spanish coasts facing the Atlantic Ocean and the Bay of Biscay.[127] The law provided for its future application to other areas of the Spanish coast. In fact, the 1997 Decree is a manifestation of this power and was motivated by the need to protect living resources outside the Spanish-Mediterranean territorial sea. Excessive fishing by foreigners has generated a situation of confrontation with Spanish fishermen, causing resentment and tension among the Mediterranean coastal communities of Spain. In the light of this, and in the absence of any effective international regulation, Spain established a zone adjacent to its Mediterranean territorial sea wherein it claimed sovereign rights for the purpose of conserving, managing and exploiting the living resources therein. The outer limit of the zone was based on equidistance.

Upon ratification of UNCLOS, the Egyptian government made a declaration which stated that from the date of ratification,[128] Egypt would start to exercise exclusive economic zone rights in the areas adjacent to its territorial sea in the

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121 ICJ Reports (1984) para. 3.
122 ICJ Reports (1985) para. 21.
123 See International Maritime Boundaries, Vol. II (1993) 1660 et seq.
124 See generally *Attard/Fenech*, The Law of the Sea and Jurisdictional Issues in the Mediterranean, in Naval Policy and Strategy in the Mediterranean, ed. by Hattendorf (2000) 344.
125 See supra I and II.
126 See Royal Decree 1375/1997, Official Bulletin of Parliament (26 August 1997).
127 See Law 15/1978 on the Exclusive Economic Zone, of 20 February 1978, 19 United Nations Legislative Series: National Legislation and Treaties relating to the Law of the Sea (1980) pp.250 ff.
128 26 August 1983.

Mediterranean and in the Red Sea.[129] The declaration also undertook to establish the outer limits of its exclusive economic zone in accordance with 'the rules, criteria and modalities laid down in the Convention'.[130] Furthermore, Egypt declared that it will take the necessary action and make the necessary arrangements to regulate all matters relating to the exclusive economic zone.[131] In 1990 Egypt issued a Presidential Decree establishing the baselines from which its territorial sea in the Mediterranean and the Red Sea is measured.[132] In 1997 the Egyptian National Maritime Committee commenced work towards the preparation of negotiations concerning the delimitation of the Egyptian exclusive economic zone in the Mediterranean and the Red Sea.

In 2003, Egypt and Cyprus agreed on an exclusive economic zone boundary.[133] It is interesting that the boundary of some 144 nautical miles employs equidistance as the method of delimitation.[134] At the time the treaty was concluded, both states had not formally established an exclusive economic zone.[135] As has been seen, the exclusive economic zone has to be declared before the coastal state can enjoy its rights.[136] In fact, despite its Declaration, no implementing legislation had been promulgated by Egypt.[137] Cyprus appears to have remedied the legal problem when in the Law of 1 April 2004 it proclaimed an exclusive economic zone with retroactive force dating back to 21 March 2003.

The Egypt-Cyprus Agreement provides for taking into account the interest of third parties by allowing certain agreed geographical coordinates to be amended in the light of future exclusive economic zone delimitation agreements with neighbouring states.[138] In fact, the Agreement obliges the parties to notify and consult each other if they engage in delimitation negotiations with neighbouring states which involve the said coordinates.[139]

The Agreement would appear to be a step forward in the delimitation of exclusive economic zone boundaries in the Mediterranean. However, not surprisingly, it was met with strong objections from Turkey which stated:

> the delimitation of the exclusive economic zone and the continental shelf in the Eastern Mediterranean, especially in areas falling beyond the western part of the longitude 32° 16' 18", also concerns Turkey's existing *ipso facto* and *ab initio* legal and sovereign rights, emanating from the established principles of international law ... the delimitation of the exclusive economic zone and the continental shelf beyond the western parts of the

[129] See LOSB (supra 19) No. 3, March 1984, p. 14.
[130] Ibid.
[131] Ibid.
[132] Ibid.
[133] See LOSB (supra 19) Vol. 52 (2003).
[134] Ibid.
[135] See International Maritime Boundaries, Vol. V (1995) 3917.
[136] See above Section II.4.
[137] See International Maritime Boundaries, Vol. V (1995) 3919. See below V.
[138] See Art. 1e.
[139] See Art. 2.

> longitude 32° 16' 18" should be effected by agreement between the related States of the region based on the principle of equity.[140]

In January 2007 Cyprus signed an Agreement on the Delimitation of the Exclusive Economic Zone with Lebanon.[141] It appears that this Agreement is based on equidistance.[142] On 17 December 2010 Cyprus and Israel signed an Agreement establishing a maritime boundary which divides their exclusive economic zone.[143] Although the Agreement has not been made public "it is likely that the new boundary is delimited along the equidistance line given the relatively simple geography of both coastlines".[144] Turkey has also objected to these Agreements.[145]

The "Erika" and "Prestige" ecological disasters led the French government to extend its jurisdiction in the Mediterranean by establishing an ecological protection zone off its Mediterranean coast. This zone was established through Law No. 2003-346 dated 15 April 2003 and implemented by Decree No. 2004-33 dated 8 January 2004.[146] The French legislation states that the jurisdiction exercised in the zone is similar to that authorized under the regime of the exclusive economic zone. It would appear that the French government has refrained from claiming a full exclusive economic zone in the Mediterranean and adopted, on a selective basis, powers granted under Art. 56 of UNCLOS. Given the proximity of its coasts to Italy and Spain, the outer limits of the French zone are of great interest. With respect to Italy, the 2004 Decree establishes a boundary which is roughly based on equidistance. However in the case of Spain, the French zone limit, not surprisingly, overlaps with the Spanish Fisheries Zone which, as seen above, has an outer limit based on equidistance.[147] The French Decree makes provision for the modification of the said boundaries in agreement with its neighbouring States.

It would appear that the French policy of extending its maritime jurisdiction in the Mediterranean will continue. On 23 August 2009 the French Minister of the Environment announced plans to declare the 70 nautical mile exclusive economic

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[140] LOSB No. 54 (supra n. 19) 127: Longitude 32° 16' 18" corresponds to the meridian passing through the westernmost point of the island of Cyprus. By this note, Turkey contended, in a geographical context different from the Aegean Sea, that certain types of delimitation should not be based on equidistance.

[141] See Press and Information Office Report, Government of Cyprus of 2010 <www.cyprus.gov.cy/moi/pio/pio.nsf/all/FE475A6A54F2F7B2C225757100257AD4?opendocument>.

[142] Ibid.; <www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/lbn_mzn79add1_2010.pdf>.

[143] See Boundary News Headlines, Durham University, International Boundaries Research Unit (11 January 2011).

[144] Ibid.

[145] Ibid., see also <www.jpost.com/Headlines/Article.aspx?id=200150>; even Egypt is considering the situation, see report of Foreign Ministry <www.almasryalyoum.com/en/print/278846>.

[146] See Journal Officiel de la Republique Francaise, 16 April 2003 and 10 January 2004, respectively.

[147] See above V; also *Scovazzi*, The Mediterranean Sea Maritime Boundaries" in International Maritime Boundaries, ed. by Colson/Smith, Vol. 5 (2005) 3481.

zone off its Mediterranean coast.[148] Whilst the French Minister referred to the institution of exclusive economic zones, it appears that the main reason behind this new initiative is the need to protect fishing in the said area which is facing dwindling fish stocks due to over-exploitation. It would seem that France may, in fact, be claiming an exclusive fishing zone similar to that adopted by Spain. Significantly, the French minister is reported to have declared that he hoped to see more States establish their exclusive economic zone within the framework of the 43 member Union for the Mediterranean "and for us to have a debate among ourselves for the total protection of the Mediterranean."[149]

On 22 November 2003, an Agreement on Provisional Arrangements Regarding Delimitation of the Maritime Boundaries between Algeria and Tunisia came into force.[150] This Agreement applies for a period of six years and is composed of two sectors of 53 and 30.5 nautical miles, respectively. The temporary nature of this Agreement illustrates that despite the problem concerning the role of a Tunisian island in the delimitation process, both parties in a spirit of cooperation agreed to a single maritime boundary which effectively delimits the territorial sea, the continental shelf and the Algerian fishing zone, on the one hand, and the Tunisian exclusive economic zone on the other.

In the Adriatic Sea, the breakdown of Yugoslavia has created a complex situation with regard to certain maritime boundaries. Some, as has been seen above, were inherited and accepted, but others continue to defy agreement. In particular the situation of Croatia, which attempted to establish an exclusive economic zone in the Adriatic without success due to international pressure,[151] is of interest. In 2003 Croatia declared an Ecological and Fisheries Protection Zone.[152] It appears that this legislative instrument was inspired by the 1997 Spanish Fisheries Decree and the 2004 French Ecological Protection Law. In the Croatian Zone authority was granted to exercise sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources as well as establishing jurisdiction with regard to marine scientific research and ensuring the protection and preservation of the marine environment. The Croatian Parliament reserved the right to proclaim, when deemed appropriate, other elements of the exclusive economic zone as established under Chapter IV of the Maritime Code.

The outer limit of the Ecological and Fisheries Protection Zone is to be determined between Croatia and its neighbours on the basis of agreement. However, pending such agreement Croatia established a temporary boundary following the continental shelf boundary established under the 1968 Continental Shelf Boundary Agreement between Yugoslavia and Italy; with respect to its adjacent coast the

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148 See <www.france24.com/en/20090824-france-exclusive-economic-zone-eez-mediterranean-fishing-environment-protection>.

149 Ibid.

150 See LOSB (supra 19) Vol. 52 (2003), the said Agreement was signed on 11 February 2002.

151 See *Vidas*, What is going on in the Adriatic Sea? in The UN Convention on the Law of the Sea, the European Union and the Rule of Law, ed. by Fridtjof Nansens Institutt (2008) 13.

152 See LOSB (supra 19) No. 53, p. 67.

temporary boundary followed the direction and continued from the provisional territorial sea boundary as defined in the 2002 Protocol on the Interim Regime along the Southern Border between Croatia and Serbia and Montenegro.[153] Not surprisingly, both Slovenia[154] and Italy[155] have protested against the Croatian claim.

Slovenia has reacted by claiming its own Ecological Protection Zone in 2005, asserting "sovereign rights relating to research and sustainable use, preservation and management of marine environment as well as its jurisdiction relating to scientific research and the preservation and protection of the marine environment in accordance with international law and obligations deriving from the European Union *acquis*."[156] The delimitation of the ecological protection zone is to be effected by agreement. The provisional boundary is determined as follows:

> ... towards the Italian Republic shall follow the delimitation line on the continental shelf as defined by the Agreement between the Government of the Socialist Federal Republic of Yugoslavia and the Government of the Italian Republic on the Delimitation of the Continental Shelf between the Two States of 8 January 1968 and shall run along the delimitation line on the continental shelf to the south of T5 point as defined by the Treaty between the Socialist Federal republic of Yugoslavia and the Italian Republic of 10 November 1975 with Annexes I to X.
> (2) The provisional external border of the ecological protection zone in the south shall run along the parallel 45 degrees and 10 minutes north latitude.[157]

The following year Italy reacted by promulgating Law 61 of the Establishment of an Ecological Protection Zone beyond the Outer Limit of the Territorial Sea.[158] In the zone, Italy claims the right to exercise:

> ... Its jurisdiction in the area of protection and conservation of the marine environment, including the archeological and historic heritage,[159] in compliance with the provisions of the aforementioned United Nations Convention on the Law of the Sea and the 2001 UNESCO Convention on the protection of the underwater cultural heritage, adopted in Paris on 2 November 2001, since the date of its entry into effect in Italy.
> 2. Inside the ecological protection zone the norms of Italian law, European Union law, and international treaties in effect in Italy for the prevention and repression of all types of marine pollution, including pollution from ships and water ballast, pollution from the sinking of trash, pollution from exploration activities and the exploiting of the sea bed, and pollution of atmospheric origin, will be applied also to ships flying foreign flags and persons of foreign nationality.[160]

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153 Ibid. p. 69.
154 See for example LOSB (supra 19) No. 53, p. 70; see *Grbec*, Extension of Coastal State Jurisdiction in the Mediterranean in Serving the Rule of International Maritime Law, Essays in Honour of David Joseph Attard, ed. by Martinez (2009).
155 See for example LOSB (supra 19) No. 64, p. 39.
156 See Art. 3 in "Ecological Protection Zone and Continental Shelf of the Republic of Slovenia Act, 22 October 2005", LOSB (supra 19) No. 60, p. 56.
157 See Art. 4, ibid.
158 8 February 2006, LOSB (supra 19) No. 61, p. 98.
159 Italy does not claim a contiguous zone.
160 See Art. 2, ibid.

The outer limits of the zone will be determined on the basis of agreement with the neighbouring States. However Law 61 establishes provisional outer limits, which are based on equidistance between Italian baselines and the State involved.[161]

In November 2009 Slovenia and Croatia signed an Agreement to resolve their maritime boundary dispute through *ad hoc* arbitration. The impetus to sign such an Agreement lies in the fact that in 2008 Slovenia blocked Croatia's membership negotiations with the European Union. Subsequent to the said Agreement, Slovenia withdrew its objection.[162] In June 2010 Slovenia submitted the Agreement to a national referendum which narrowly approved it.[163]

VI. Conclusion

It appears from the above examination of Mediterranean State practice that vast areas of the Mediterranean remain high seas – at least for the time being. Hence, the freedoms of the high seas, such as freedom of navigation or over-flight, continue to be enjoyed by all States. It is therefore difficult to accept the view that the Mediterranean Sea has become the Mare Nostrum of the littoral States.

Nevertheless economic, archaeological and environmental interests and pressures have led to the abandonment of the policy of self-restraint as Mediterranean States are rapidly expanding their maritime jurisdictional claims. In doing so, legislators have been careful to claim jurisdiction in conformity with UNCLOS, particularly Part V on the Exclusive Economic Zone. At times this practice has shown legislative astuteness and innovation which act to protect national interests within the limits imposed by the lawful rights of neighbouring States and of the international community. However, it should be borne in mind that certain maritime jurisdictional claims in the Mediterranean, ranging from the EEZ to the ecological protection zone, generally still face disputed limits and are not subject to the compulsory dispute provisions of the UNCLOS. This uncertainty and its accompanying conflict potential inhibits the full exploitation of marine resources and adds further pressures to existing Mediterranean tensions.

[161] See Art. 13, ibid.

[162] See <www.euractiv.com/en/enlargement/slovenia-croatia-pms-sign-border-arbitration-deal/article-187031>.

[163] See <www.ft.com/cms/s/0/18cf2722-7163-11df-8eec-00144feabdc0.html#axzz1C8q0ZT6T>.

Maritime Employment Contracts in the Conflict of Laws

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J. Basedow et al., *The Hamburg Lectures on Maritime Affairs 2009 & 2010,*
DOI 10.1007/978-3-642-27419-0_6,

I. Introduction

Maritime employment relationships very often possess cross-border elements: container vessels sail across the High Seas and ferry boats, fishing vessels and cruise ships regularly traverse waters attributable to different jurisdictions. Employment contracts arising out of newer usages of the oceans also have international elements, such as when employees are sent to construct offshore wind farms beyond national borders on the continental shelf. Thus the question arises regularly which law shall govern individual employment contracts of employees working in the maritime arena. Today's Hamburg Lecture on Maritime Affairs shall shed some light on this legal issue. The lecture, therefore, will first draw attention to the general legal framework for determination of the law applicable to individual employment contracts (II.). Due to time constraints, questions of collective labour law,[1] industrial action[2] and (private) insurance law[3] have to be left out. Similarly, issues of overriding mandatory rules[4] and the posting of workers[5] can be touched upon only briefly. After this general overview, the different connecting factors are described in more detail (III.-VI.). Time issues are also the reason why uniform labour law, such as the recently adopted Maritime Labour Convention 2006 providing wide-ranging rights and protection at work for seafarers, also cannot be dealt with in this lecture.

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1 For more details on the law applicable to collective labour law agreements see *Martiny*, in: Münchener Kommentar zum BGB (5th ed. 2010) Art. 8 Rom I-VO paras. 128–136.

2 The law applicable to non-contractual obligations arising out of industrial actions is governed by Article 9 Rome II Regulation (Regulation No. 864/2007, O.J. 2007 L 299/40).

3 The law applicable to (private) insurance contracts is governed by Article 7 Rome I Regulation.

4 For more details see *Plender/Wilderspin*, The European Private International Law of Obligations (3rd ed. 2009) paras. 12-001–12-054; *Freitag*, Eingriffsnormen (international zwingende Bestimmungen), Berücksichtigung ausländischer Devisenvorschriften, Formvorschriften in: Internationales Vertragsrecht, ed. by Reithmann/Martiny (7th ed. 2010) 345−419; see also *Taschner*, Arbeitsvertragsstatut und zwingende Bestimmungen nach dem Europäischen Schuldvertragsübereinkommen (2003) 181−269; *Liukkunen*, The Role of Mandatory Rules in International Labour Law: A Comparative Study in the Conflict of Laws (2004) 93–274 (the latter two authors discuss mandatory rules under the Rome Convention).

5 For more details see *Mankowski*, Employment Contracts under Art. 8 of the Rome I Regulation in: Rome I Regulation: The Law Applicable to Contractual Obligations in Europe, ed. by Ferrari/Leible (2009) 171, 185–189.

II. Setting the stage

1. The recent Communitarization of private international law

a) From the Rome Convention to the Rome I Regulation

Traditionally, private international law is national law. A judge applies the rules of private international law of the forum. The steady growth of cross-border trade led, however, to a gradual harmonization of the rules on the law applicable to contractual obligations in Europe. A first step was the elaboration of the Rome Convention of 1980.[6] This multilateral convention applied to contracts in civil and commercial matters and contained in its Article 6 a special conflict rule for individual employment contracts.[7] The Rome Convention was ratified by all Member States of the – constantly growing – European Community (EC). International conventions are, however, very sluggish instruments for unifying private international law in an ever growing Community, as they require approval and ratification for each amendment of its rules by each signatory State. Back in 1980, such a convention was, however, the only means of unifying private international law in Europe, as the EC had no broad competences to enact regulations in this area of law. This changed at the end of the last century when the EC Member States conferred with the Treaty of Amsterdam the legislative competence on the Community to enact regulations in the field of private international law and international civil procedure.[8] After the Treaty of Lisbon[9] came into force in

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6 Convention on the law applicable to contractual obligations, O.J. 1980 L 266/1; for a consolidated version see O.J. 1998 C 27/34.

7 Article 6 Rome Convention entitled "Individual employment contracts" reads as follows:
"(1) Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.
(2) Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:
(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or
(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;
unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country".

8 On this development see *Basedow*, The Communitarization of the Conflict of Laws under the Treaty of Amsterdam, CML Rev 37 (2000) 687–708; *Remien*, European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice, CML Rev 21 (2001) 53–86.

9 Consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), O.J. 2008 C 115/13.

December 2009, these competences of the (now) European Union (EU) are laid down in Article 81 Treaty on the Functioning of the European Union (TFEU).

Based on the new competences in the area of private international law, the Union transformed the Rome Convention into a Community instrument by enacting the Rome I Regulation in 2008.[10] Despite calls to clarify controversial features of the Rome Convention and to introduce a special conflict rule for maritime employment contracts,[11] the EU legislature decided to keep the Rome Convention's conflict rule on employment contracts (Article 6), as general as it was, and to alter its wording only slightly.[12] The "new" conflict rule for individual employment contracts laid down in Article 8 Rome I Regulation thus very much resembles its predecessor, as its general structure has proved to be very useful.[13]

The Rome I Regulation is binding upon all EU Member States with the exception of Denmark.[14] It applies to contracts that have been concluded "after" 17 December 2009.[15] As the Regulation does not claim a retroactive effect, employment contracts concluded before that date are still governed by the rules of

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10 Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), O.J. 2008 L 177/6.

11 See *Max Planck Institute for Comparative and International Private Law*, Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations ("Rome I"), RabelsZ 71 (2007) 225, 294–297.

12 For an overview of the changes brought by the Rome I Regulation see *Mauer/Sadtler*, Die Vereinheitlichung des internationalen Arbeitsrechts durch die EG-Verordnung Rom I, RIW 2008, 544–548; *Deinert*, Neues Internationales Arbeitsvertragsrecht, RdA 2009, 144–154; *Mankowski* (supra n. 5) 171–216; *Wurmnest*, Das Neue Internationale Arbeitsrecht der Rom I-VO, EuZA 2009, 481–499.

13 Article 8 Rome I Regulation entitled "Individual employment contracts" reads as follows:
"(1) An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.
(2) To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.
(3) Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.
(4) Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply".

14 Article 1(4) Rome I Regulation. Danish courts thus continue to apply the Rome Convention to determine the law applicable to a contractual obligation.

15 Article 28 Rome I Regulation.

the Rome Convention.[16] Given that only recently concluded contracts fall in the Regulation's scope, it does not come as a surprise that neither the Bundesarbeitsgericht (the highest German court for employment matters) nor the European Court of Justice (ECJ) has ruled on Article 8 Rome I Regulation thus far.[17]

b) "Overarching" interpretation

The fact that there are hardly any judgments on the Rome I Regulation yet does not mean that the interpretation of its rules cannot rely on the case law of the ECJ. The EU has also transformed the Brussels Convention of 1968[18] into a Community instrument by enacting the Brussels I Regulation.[19] This Community instrument deals with jurisdiction and enforcement of judgments in civil and commercial matters. Article 19 Brussels I Regulation contains special jurisdiction rules regarding employment disputes with similar connecting factors as the Rome I Regulation. The basic notions of the Brussels I and the Rome I Regulation shall be, in principle, interpreted consistently as far as special needs of private international law do not demand the contrary.[20] Thus, the rich body of case law on jurisdiction matters in labour disputes must be considered when interpreting similar terms found in the Rome I Regulation.[21]

2. Structure of the conflict rules in force

a) Choice of law with safety valve

A cornerstone of international contract law is the principle of a free choice of law.[22] By their will the parties may determine the law that shall govern their

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16 *Wurmnest* (supra n. 12) 486; *Martiny*, Neuanfang im Europäischen Internationalen Vertragsrecht mit der Rom I-Verordnung, ZEuP 2010, 747, 754.

17 In a recent case the ECJ has, however, interpreted Article 6 Rome Convention also with a view of Article 8 Rome I Regulation, see ECJ 15 March 2011 – Case C-29/10, *Koelzsch v. Luxemburg*, n.y.r., para. 6.

18 Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (as amended), O.J. 1998 C 27/1.

19 Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2001 L 12/1.

20 *Wurmnest*, Internationales Arbeitsrecht in: Handwörterbuch des Europäischen Privatrechts, ed. by Basedow/Hopt/Zimmermann, Vol. I (2009) 91, 93; for a more general perspective see *Mankowski*, Internationale Zuständigkeit und anwendbares Recht – Parallelen und Divergenzen in: Festschrift für Andreas Heldrich zum 70. Geburtstag (2005) 867–897; *Würdinger*, Das Prinzip der Einheit der Schuldrechtsverordnungen im europäischen Internationalen Privat- und Verfahrensrecht, RabelsZ 75 (2011) 102–126.

21 With regard to the Rome Regulation the principle of such an "overarching" or "parallel" interpretation of the Brussels I and the Rome I Regulation in employment matters was recently expressly embraced by AG Trestenjak opinion of 16 December 2001 – Case C-29/10, *Koelzsch/Luxemburg*, n.y.r., paras. 69–83.

22 On the theoretical foundations of this maxim see *Basedow*, Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts, RabelsZ 75 (2011) 32−59.

contractual relationship. This principle prevails also with respect to employment contracts (Articles 3, 8(1) Rome I Regulation).[23] The law chosen by the parties answers, for example, the questions whether a contract was concluded and what kind of duties flow from it.[24] In turn, issues of public law, for example work safety or manning rules, cannot be chosen by the parties as private international law does not determine their application.[25]

It is important to note that the freedom to choose the applicable law is not limitless. To protect the employee as the potentially weaker party of the employment contract, the choice of law is restricted by the so-called "favorability principle" or "preferential law approach" (*Günstigkeitsprinzip*).[26] This principle, enshrined in Article 8(1) Rome I Regulation, shall ensure that an employee will always benefit from a certain minimum standard which cannot be derogated from to his detriment by a choice of law. It thus enables the parties to choose the law deemed best for their contractual arrangement. At the same time (potential) abuses by the employer are avoided by ensuring a certain minimum protection for the employee. The *Günstigkeitsprinzip* is rooted in the fear that an employer would often succeed in pushing through a legal order favourable to his needs, for example, by means of standard form contractual clauses.

The *Günstigkeitsprinzip* may lead to a "law mix". In principle, the chosen law applies. With regard to the rules that cannot be derogated from by agreement, however, i.e. with regard to internally mandatory rules, a judge has to examine whether the law ascertained according to Article 8(2)-(4) Rome I Regulation contains rules which are more favourable to the employee. If this is the case, the more favourable rules of the objectively applicable law govern the contract and not the rules of the chosen law.[27]

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[23] What types of contractual relationships may be regarded as individual employment contracts in the sense of Article 8 Rome I Regulation has to be assessed through an autonomous interpretation. In this respect, recourse can be made to the ECJ case law on Article 45 TFEU and Article 19 Brussels I Regulation. For more details see *Mankowski*, in: Europäisches Privat- und Zivilprozessrecht, ed. by Rauscher (3rd. ed. 2011) Art. 18 Brüssel I-VO paras. 3–8h; *Wurmnest* (supra n. 12) 484−485; but see *Plender/Wilderspin* (supra n. 4) para. 11-012 (arguing in favour of a characterization according to the *lex causae* as an autonomous construction of the concept of "individual employment contract" would encounter "serious practical difficulties"); for a critical assessment of recourse to (now) Article 45 TFEU see also *Knöfel*, Kommendes Internationales Arbeitsrecht – Der Vorschlag der Kommission der Europäischen Gemeinschaften vom 15.12.2005 für eine „Rom I"-Verordnung, RdA 2006, 269, 272−274.

[24] Cf. Article 12 Rome I Regulation.

[25] On the application of such public law rules see *von Bar/Mankowski*, Internationales Privatrecht, Vol. I (2nd ed. 2003) 230−235.

[26] For a critical assessment of the favourability principle see *Junker*, Internationales Arbeitsrecht in der geplanten Rom I-Verordnung, RIW 2006, 401, 405; a thorough analysis of the functioning of choice-of-law clauses in practice is provided by *Mankowski* (supra n. 5) 212−215.

[27] For details of the favourability principle and other restrictions on the freedom to choose the applicable law such as those flowing from Article 3 Rome I Regulation see *Martiny*, in: Münchener Kommentar zum BGB (supra n. 1) Art. 8 Rom I-VO paras. 38–44.

The comparison between the rules of the chosen law and the rules to be applied without a choice of law is often a very burdensome task. Moreover, cases featuring a 'targeted' choice of law, imposed upon the employee by his employer in order to afford minimal protection, have assumed no practical importance thus far. Rather, practice shows that often such clauses are written into the contract on demand of the employee, if the employee is in a leading position.[28] That abusive choice of law clauses have – apparently – only infrequently found use in practice does not mean that the time has come to abolish this protective device. Without it, employers – as "repeat players" – could indeed use choice-of-law-clauses to deprive their workers of beneficial laws, especially when contracts are made with employees in "lower" positions which do not possess much "bargaining power" vis-à-vis their employers.

b) Objectively applicable law and internationally mandatory rules

If the parties have not chosen the law that is to govern their contract, the law applicable is designated by Article 8(2)-(4) Rome I Regulation. In absence of a choice of law, one has to investigate as a first step whether the employee habitually works either "in" or "from" a single country or whether he regularly works in (two or more) different countries.

If the employee habitually carries out his or her work "in" or "from" one country in the sense of Article 8(2) Rome I Regulation, the law of this country applies (*lex loci laboris*). If the employee in turn does not habitually carry out his or her work in one single country, the contract is governed by the law of the place of business through which the employee was engaged by virtue of Article 8(3) Rome I Regulation. These rules are supplemented by an "escape clause" laid down in Article 8(4) Rome I Regulation. In exceptional cases the escape clause does allow a derogation from the law applicable by virtue of Article 8(2) and (3) Rome I Regulation, provided that the contract has a closer connection with the law of another State.

Finally, Article 9 of the Rome I Regulation makes it clear that overriding mandatory provisions of either the *lex fori* or the law of the country where the obligations arising out of the contract have to be performed apply irrespective of the law determined in accordance with Articles 3 or 8 Rome I Regulation. As Article 9(1) Rome I Regulation states, overriding mandatory provisions are provisions that are regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization.[29] Such internationally mandatory rules are, for example, the provisions on minimum wages laid down in the European Posting of Workers Directive.[30] The Directive sets out that an employee who temporarily performs work in another Member State cannot be

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28 *Junker* (supra n.26) 405.

29 For more details see the authors cited in footnote 4.

30 See Article 3(1)(c) Directive 96/71/EC of the European Parliament and the Council concerning the posting of workers in the framework of the provision of services, O.J. 2007 L 18/1.

denied particular minimum standards of employment protection of the legal order of the place where he performs the work as laid down by law or certain collective agreements. For example, if a Portuguese company posts workers – who are usually working on Portuguese building sites – to Germany to build quay walls in the port of Hamburg, the employer would have to pay the minimum wage according to German law, even if the employment contracts were generally governed by Portuguese law by virtue of Article 8 Rome I Regulation.[31]

So much for the general structure of the conflict rules for international employment contracts. The following parts of the lecture will explain in more detail the different connecting factors laid down in Article 8 Rome I Regulation.

III. Choice of law

According to Articles 3 and 8(1) Rome I Regulation, the parties to a contract may choose the law applicable to their contractual relationship expressly or impliedly. Moreover, the choice is not restricted to certain jurisdictions. Thus, a German ship owner and a German crew member sailing on a ship flying the German flag can, for example, choose English law to govern their contract.[32] As these principles were already accepted under the Rome Convention of 1980, the following parts of the lecture will focus on two side issues only: the question of an implied choice of law and the issue whether non-State law may be chosen.

1. Implied choice of law

Under the Rome Convention there was no agreement under which conditions an implied choice could be assumed. Some courts were very generous in assuming implied choices of the forum law – which is easier to apply for judges than foreign law. They therefore assumed a choice of law in favour of the *lex fori* if parties were litigating the matter entirely on grounds of that law.[33] This appraisal was rightly criticized: Parties litigating a matter on the basis of the *lex fori* often do not

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31 That the rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC is expressly mentioned in Recital 34 of the Rome I Regulation. This result can be achieved in two ways. On the one hand it can be argued that the provisions of Directive 96/71/EC are mandatory rules in the sense of Article 9 Rome I Regulation. On the other hand it can be argued that this Directive has priority by virtue of Article 23 Rome I Regulation. The latter approach is preferred by *Winkler v. Mohrenfels/Block*, Abschluss des Arbeitsvertrags und anwendbares Recht, in: Europäisches Arbeits- und Sozialrecht (EAS), ed. by Oetker/Preis (2010) B 3000 para. 162.

32 As mentioned above (II.2.b), in such a case, the crew member will, however, enjoy the protection of the internally mandatory provisions of German law as this law would govern the contract in the absence of a choice-of-law agreement by the parties by virtue of Article 8 Rome I Regulation.

33 See *Mankowski*, Die Rom I-Verordnung – Änderungen im europäischen IPR für Schuldverträge, IHR 2008, 133, 135 (with references to the case law).

know that a foreign law may be applicaple to their case as many legal advisors are not experts in the field of private international law.[34] To remind the courts that a choice-of-law agreement can only be assumed if there was a meeting of the minds on this matter, the EU legislature amended the choice-of-law provision. Article 8(1) Rome I Regulation therefore states that a choice can only be assumed if the will of the parties to choose a given law is "clearly demonstrated by the terms of the contract or the circumstances of the case". In comparison to the Rome Convention, the word "clearly" ("eindeutig", "clairement") was added by the European legislature to Article 8(1) Rome I Regulation.

So, under the Rome Regulation national judges have to act cautiously and are not to assume a choice of law light-heartedly. This raises the question, which factors may be legitimately considered in order to reach the finding that the parties impliedly chose the *lex fori* or another law. A strong indicator for an implied choice-of-law agreement is the inclusion of an exclusive jurisdiction agreement in the contract.[35] References in the contract to provisions of a national labour code are another accepted indicator.[36] By contrast, no implied choice can be inferred from the simple fact that the parties litigate their case before a court based on the *lex fori* as the parties may have simply overlooked the application of foreign law. Consequently, the judge should – as far as this is allowed by procedural law – advise the parties that the contract is governed by foreign law. Only if the parties maintain their argumentation based on the *lex fori* after the intervention of the judge may an implied choice of law be assumed.[37]

2. Non-State law

A choice of law under the Rome I Regulation is only valid if the parties opt for the law of a certain country. In other words, the choice is restricted to a "State-body of law" as it was already the case under the Rome Convention.[38] This prohibition rests on the theory that private international law has to determine a certain legal order to be applied to the case at hand and not single norms or sets of rules. Therefore, a choice of a "non-State body of rules", such as the general principles of law or the *lex mercatoria*, does not displace the objectively applicable law with

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34 See *Magnus/Mankowski*, The Green Paper on a Future Rome I Regulation – on the Road to a Renewed European Private International Law of Contracts, ZVglRWiss 103 (2004) 131, 156; *Roth*, Zur stillschweigenden Rechtswahl in einem künftigen EU-Gemeinschaftsinstrument über das internationale Schuldvertragsrecht in: Festschrift für Apostolos Georgiades (2006) 905, 911.

35 Cf. Recital 15 of the Rome I Regulation.

36 *Junker* (supra n.26) 404; *Wurmnest* (supra n. 12) 489.

37 *Leible/Lehmann,* Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht („Rom I"), RIW 2008, 528, 532; *Magnus*, Die Rom I-Verordnung, IPRax 2010, 27, 33.

38 *Plender/Wilderspin* (supra n. 4) para. 6-011; see also with regard to the Rome Convention *Lagarde*, Le nouveau droit international privé des contrats après l'entrée en vigeur de la Convention de Rome du 19 juin 1980, Rev. crit. dr. int. pr. 80 (1991) 287, 300.

its internally mandatory rules. The Rome I Regulation, however, does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.[39] As under the Rome Convention, non-State law may therefore apply to the contract by way of a *materiell-rechtliche Verweisung*, as far as the mandatory rules of the otherwise applicable law allow so.

The issue whether the choice of law should be enlarged to include non-State rules was disputed during the legislative process leading to the adoption of the Rome I Regulation. The proposal of the European Commission expressly allowed the parties to choose a non-State system of law.[40] In the course of the legislative process, this enlargement of the choice-of-law-principle was, however, abandoned. Thus, according to the majority view, under the law as it stands, it is not possible to choose as the applicable legal system rules which have been drafted by legal scholars or private entities, such as the Draft Common Frame of Reference (DCFR) or the UNIDROIT Principles of International Commercial Contracts.[41]

However, if a (supranational) European contract law were to be enacted by way of a regulation which allowed the parties to a contract to choose the rules of this regulation to govern their contractual relationship, also the parties to an employment contract could opt for the rules of such a (supranational) instrument.[42] Yet, as things stand right now, the forthcoming European Contract Law Regulation will not play a major role for employment contracts. The latest statements by the EU Commission indicate that this Regulation will primarily focus on consumer contract law and will not contain any rules on labour contracts.[43]

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39 Cf. Recital 13 of the Rome I Regulation.

40 See Article 3(2) of the Commission's Proposal, COM (2005) 650 final. In favour of the possibility to choose non-state law with certain restrictions *Max Planck Institute* (supra n. 11) 244−245; contra *Magnus/Mankowski* (supra n. 34) 152−153.

41 *Leible/Lehmann* (supra n. 37) 533; *Mankowski* (supra n. 33) 136; *Rühl,* Rechtswahlfreiheit im europäischen Kollisionsrecht in: Festschrift für Jan Kropholler zum 70. Geburtstag (2008) 187, 189−190; *Pfeiffer*, Neues Internationales Vertragsrecht: Zur Rom I-Verordnung, EuZW 2008, 622, 624; *Francq*, Le règlement « Rome I » sur la loi applicable aux obligations contractuelles, JDI 2009, 41, 51; *Wurmnest* (supra n. 12) 487; *Magnus* (supra n. 37) 33; but see *Metzger*, Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht (2009) 254−263 (arguing that under the Rome I Regulation a choice of certain sets of general principles is valid); a similar position is taken by *Heiss*, Party autonomy in: Rome I Regulation: The Law Applicable to Contractual Obligations in Europe, ed. by Ferrari/Leible (2009) 1, 11−12.

42 See Recital 14 of the Rome I Regulation.

43 See Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM (2010) 348 final; Commission Decision setting up the Expert Group on a Common Frame of Reference in the area of European contract law, O.J. 2010 L 105/109 (the Members of this expert group are mentioned in a press release of 21 May 2010, IP/10/595).

IV. Lex loci laboris I: The country "in which" the employee habitually works

1. General remarks

If the parties have not chosen the law applicable to their contract, one has to ask the question whether the employee works in or from one single country or whether he works in more than one country. If the employee works "in" or "from" one country, the law of that country governs the employment contract by virtue of Article 8(2) Rome I Regulation. An employee works in one country if he or she habitually performs the essential part of his or her duties vis-à-vis his or her employer in performance of the contract in one country only. In other words, the centre of gravity of the employment relationship must lie in a given State, so that the employment contract has the closest connection to that State.

It is important to note that a temporary posting of an employee who habitually works in one country to another country does not alter the *lex loci laboris*.[44] To determine whether a posting is of temporary nature, courts must look at the intention of the parties. Relevant factors are, in particular, the employee's *animus revertendi* and the employer's *animus retrahendi*.[45] There are no upper limits or presumptions beyond which a posting shall be deemed to be permanent. The introduction of any fixed period would be arbitrary and could prove to be too unflexible with regard to the necessities of modern employment relationships.[46] Thus, courts have to look at the intention of the parties when the posting takes place and cannot simply count the "months" which the employee works abroad.

In the next sections, these general rules will be applied to maritime employment contracts.

2. Employment in a maritime area over which a State enjoys full sovereignty or sovereign rights

Working "in" a given country traditionally means working in the territory over which a State enjoys full sovereignty. Certain maritime employment contracts can

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44 Article 8(2) sentence 2 Rome I Regulation.

45 *Mankowski* (supra n. 5) 185; see also *Knöfel* (supra n. 23) 275; *Wurmnest* (supra n. 12) 493.

46 Such limits or presumptions have, however, been called for (to no avail) by various commentators, see *Heilmann*, Das Arbeitsvertragsstatut (1991), 144 (arguing that an employment may not be regarded as temporary after the employee worked two years abroad); *Spickhoff*, in: Kommentar zum Bürgerlichen Gesetzbuch, ed. by Bamberger/Roth (2nd ed. 2008) Art. 30 EGBGB para. 22 (assuming the same after three years); concurring with the view taken here that such limits should be refuted *Max Planck Institute for Comparative and International Private Law*, Comments on the European Commission's Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization, RabelsZ 68 (2004) 1, 63; *Magnus/Mankowski* (supra n. 34) 171; *Schlachter*, Fortentwicklung des Kollisionsrechts der Arbeitsverträge, in: Das Grünbuch zum Internationalen Vertragsrecht, ed. by Leible (2004) 155, 156.

thus be linked to a given State without using special maritime connecting factors. Examples are work on or in inland waterways, internal waters as well as the territorial sea. In my opinion, one can also add work on the continental shelf and work in the Exclusive Economic Zone (EEZ) to this group of employment relationships, even though coastal States enjoy only a limited form of jurisdiction over these parts of the ocean under international law.

a) Inland waterways, internal waters, territorial sea

A State enjoys full sovereignty over its inland waterways,[47] its internal waters of the sea, i.e. all water and waterways on the landward side of the baseline (for example smaller bays and estuaries)[48] and also over its territorial sea, i.e. a corridor of usually 12 nautical miles measured from certain baselines on the coast.[49] Employment contracts of crew members of ships navigating only in waters which are under the full sovereignty of a given State are thus governed by the law of that State. If, for example, a German yacht owner employs a crew to sail his boat and the yacht is operating in Italian waters only, the employment contracts of the crew members are governed by Italian law, irrespective of the ship's flag. A temporary posting abroad does not alter this finding (Article 8(2) Rome I Regulation). Thus, if the ship owner in my example occasionally orders the crew to sail from Italy to the Côte d'Azur, this trip into French waters can be regarded as a temporary posting of the crew which does not change their habitual workplace located in Italy.

b) Continental shelf and EEZ

Employment contracts can also be given a territorial link to a given coastal State when the employees principally discharge their obligations to their employer on a fixed or floating installation positioned above the continental shelf or in the EEZ, for example on an oil-rig or on a drilling ship. The continental shelf and the Exclusive Economic Zone cover essentially the part of the ocean adjacent to the territorial sea of the coastal State up to 200 nautical miles into the ocean.[50] Under international law these zones do not form part of the national territory of the coastal State, yet the coastal State enjoys certain "sovereign rights" over these areas of the ocean.[51]

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47 *Churchill/Lowe*, The Law of the Sea (3rd ed. 1999) 71−81.

48 *Churchill/Lowe* (supra n. 47) 31.

49 *Churchill/Lowe* (supra n. 47) 79; *Lagoni*, Case Study of Germany in: Vessel-Source Pollution and Coastal State Jurisdiction, ed. by Franckx (2001) 255, 256–257; *Wurmnest*, Windige Geschäfte? – Zur Bestellung von Sicherungsrechten an Offshore-Windkraftanlagen, RabelsZ 71 (2008), 236, 240.

50 Details of the delimitation of these parts of the ocean are provided by *Churchill/Lowe* (supra n. 47) 141−198; *Lagoni*, Festlandsockel in: Handbuch des Seerechts, ed. by Graf Vitzthum (2006) 161–221; *Proelß*, Ausschließliche Wirtschaftszone (AWZ) in: Handbuch des Seerechts, ed. by Graf Vitzthum (2006) 222–264.

51 *Churchill/Lowe* (supra n. 47) 144–145, 165–169.

As fixed installations and structures located in these parts of the ocean, for example oil rigs or offshore-windparks, are subject to the exclusive jurisdiction of the coastal State by virtue of international law,[52] work on such installations can be regarded as being work "in" the coastal State pursuant to Article 8(2) Rome I Regulation. This interpretation is supported by the ECJ ruling in *Weber v. Universal Ogden Services* on the issue of jurisdiction in international employment disputes. In this case, the ECJ ruled that work carried out on fixed installations on or above the continental shelf is performed in the coastal State that has sovereign rights over this area of the ocean, so that the courts of this State have jurisdiction over contractual employment disputes.[53] This reasoning is also valid under Article 8 Rome I Regulation. Work on such installations is therefore work "in" the coastal State.

Work in the coastal State can further be assumed with respect to employment contracts performed on ships used for EEZ traffic (or traffic between the internal waters/territorial sea and the EEZ of one coastal State). Such employment relationships can be, for example, found on crane ships or service vessels. In the aforementioned *Weber v. Universal Ogden Services* case, the ECJ indicated that work performed on "floating installations" positioned over the continental shelf may be regarded as work in the coastal State.[54] Ships operating in these waters resemble floating installations to a certain extent. If one follows this reasoning, the employment contracts of crew members employed on ships travelling primarily in waters above the continental shelf or in the EEZ of one State are therefore governed by the law of the coastal State by virtue of Article 8(2) Rome I Regulation.[55]

c) Summary

Summing up, employment contracts that are habitually fulfilled either on ships crossing primarily territorial waters of one State, or on ships or installations that primarily serve or are stationed in the part of the ocean over which the coastal State enjoys exclusive sovereign rights are governed by the law of that coastal State. To reach this result, no recourse to special maritime connecting factors has to be made as a valid territorial connection can be construed.

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52 Cf. Articles 56, 65, 80 UNCLOS.

53 ECJ 27 February 2002 – Case C-37/00, *Weber v. Universal Ogden Services*, [2002] ECR. I-2013, para. 36.

54 ECJ 27 February 2002 – Case C-37/00, *Weber v. Universal Ogden Services*, [2002] ECR I-2013, para. 36.

55 *Mankowski* (supra n. 5) 171, 199; see also *Wurmnest*, The Law Applicable on the Continental Shelf and in the Exclusive Economic Zone: The German Perspective, Ocean Yearbook 25 (2011) 311, 337−338.

3. Seafarers on international routes

a) The dispute

It is obvious that a territorial connection is of little help when one has to determine the law applicable to employment contracts of seafarers sailing on international routes. In international traffic, ships regularly cross waters of various jurisdictions or are sailing in international waters over which no State has full sovereignty or even sovereign rights. Two simple examples shall demonstrate this point. Imagine a ferryboat serving the route Rostock/Germany and Hanko/Finland. This ship crosses the water of various coastal States. Besides German and Finnish waters, it may also cross Danish or Swedish waters. Imagine further a container vessel stopping at various ports between Asia and Europe. This ship is not only moving through waters over which various coastal States have jurisdiction, but also through parts of the ocean over which no State possesses sovereign rights.

The question which law shall govern such employment contracts is disputed. National courts in different EU Member States have applied different connecting factors under the Rome Convention. Article 9 Italian Codice della Navigazione[56] is based on the flag-State-rule. The same can be said about Article 5 French Code du travail maritime.[57] By contrast, the German Bundesarbeitsgericht[58] made reference to the law of the country with the closest connection to the case in accordance with Article 6(2) *in fine* Rome Convention (now: Article 8(4) Rome I Regulation). In the Netherlands, one can find judgments applying the law of the country whose flag the ship flies[59] as well as a verdict applying the law of the country in which the place of business is situated through which the seafarer was engaged.[60]

b) The flag-State-rule

The debate on the correct connecting factor for employment contracts of seafarers serving on international routes is to a certain extent driven by the aim to protect the employee as the potentially weaker party of a contractual relationship. In this context it is, however, important to note that both connecting factors laid down in Article 8 Rome I Regulation and presently used in European court practice (flag and engaging business) can be manipulated to establish artificial links to the

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56 Article 9 Codice della Navigazione states: "I contratti di lavoro della gente del mare, del personale navigante della navigazione interna e del personale di volo sono regolati dalla legge nazionale della nave o dell' aeromobile, salva, se la nave o l'aeromobile è di nazionalità straniera, la diversa volontà delle parti".

57 Article 5 Code du travail maritime states: "La présente loi est applicable aux engagements conclus pour tout service à accomplir à bord d'un navire français. Elle n'est pas applicable aux marins engagés en France pour servir sur un navire étranger".

58 BAG 3 May 1996, IPRax 1996, 416, 418.

59 Pres. Rb. Rotterdam 5 October 1995, NIPR 1996, 123 no. 94; Hof Arnheim 8 April 1997, NIPR 1998, 112 no. 100.

60 Rb. Rotterdam 8 March 1996, NIPR 1996, 584 no. 445.

detriment of the seafarer:[61] If the law of the flag State is applied as the general rule, ship owners can choose a flag of convenience for their vessels in order to have the lower protection standards of the flag State applied. In turn, if the law of the business through which the seafarer was engaged is applied, special employment agencies – so-called manning or crewing companies – can be deliberately incorporated by employers in countries with lower labour protection standards in order to engage crew members there. In other words, both scenarios – in exceptional cases – might require that the judge makes recourse to the escape clause laid down in Article 8(4) Rome I Regulation when the chosen connecting factor (be it the flag, be it the engaging business) has no strong connection with the employment relationship of the case at hand.

Nonetheless, I am of the opinion that the ship's flag should be made the general connecting factor for individual employment contracts of seafarers sailing on international routes. Three arguments speak in favour of this connecting factor:

First, applying the flag-rule as a sub-rule to determine the habitual workplace of the employee fits well in the structure of Article 8 Rome I Regulation.[62] Article 8(2) gives priority to the habitual place of work, i.e. to a connecting factor related to the environment of the employee's habitual work place, as the structure of Article 8 Rome I Regulation indicates that the place where the employee has been engaged is of a subsidiary nature. The ship itself can be considered as the place where crew members habitually carry out their work. They discharge their obligations towards their employer under their contract primarily on board the ship as they work most of the time on board and – if at all – very little in port.

A second argument in favour of the flag law can be inferred from international law. The United Nation Convention of the Law of the Sea of 1982 grants flag jurisdiction upon the States whose flag the ship flies.[63] These States may regulate the labour conditions on board of the ship.[64] Even though the ship is not a form of *territoire flottant* of a State[65] and flag sovereignty is not as powerful as proper territorial sovereignty, the flag nonetheless links the ship with a very certain State, since the flying of two different flags is proscribed.[66]

A third argument flows from the fact that also public law provisions relating to maritime employment, for example, manning rules, are primarily based on the flag-State-principle. Thus the application of the same legal system to private law provisions as well as public law and social security provisions also points towards the flag-State.[67]

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61 *Max Planck Institute* (supra n. 46) 65.
62 *Max Planck Institute* (supra n. 11) 297.
63 Cf. Article 91 UNCLOS.
64 Cf. Article 94(3) UNCLOS.
65 *Lagoni*, Anwendbarkeit von Arbeitsschutzvorschriften und Zuständigkeit der Arbeitsschutzbehörden auf Seeschiffen unter fremder Flagge (2009) 26–27.
66 *Max Planck Institute* (supra n. 11) 296; *Mankowski* (supra n. 5) 199–200.
67 *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) 484–485; *Junker* (supra n.26) 407; *Max Planck Institute* (supra n. 11) 296.

Recently, this principle was also embraced by the Bundesarbeitsgericht with respect to international jurisdiction under the Brussels I Regulation.[68] The case to be decided was my ferryboat example: The vessel "Superfast VIII" was sailing under the Greek flag between Germany and Finland. The crew members boarded the vessel usually in Rostock, served 14 days on board and usually disembarked in Rostock after their stint had come to an end. The lower court, the Landesarbeitsgericht Mecklenburg-Vorpommern, was of the opinion that the crew members worked "in" (or at least "from") Germany as they started and ended their stints in the port of Rostock.[69] This point of view was rightly rejected by the Bundesarbeitsgericht. It pointed out that the crew members of the ship worked most of the time on board of the ferry itself and not in Rostock or any other port.[70] The Bundesarbeitsgericht thus regarded the ship as the habitual work place of the crew and connected the employment relationship to the flag State – at least in cases in which the flag was not the only connection to the case. An exception – as indicated by the Court – could thus be made in cases in which the ship flies a flag of convenience.[71] But that was not the case as the employment relationship also had other connections to Greece: The ship owner had its registered seat there, and the ship's operator its place of business; moreover, the payments for the employees were effected from the employer's Greek office.[72] As result, the crew members habitually worked "in Greece" and therefore could not sue their employer before German courts.

Whereas the issue of the habitual workplace of the crew members was in my point of view rightly decided by the Bundesarbeitsgericht, the court disregarded EU law with regard to the reference proceeding to the ECJ. I think every student who attended a class in EU law will recall that the Court of Justice is to interpret ambiguous questions of EU law. National courts thus *may* and, in those instances where there is no judicial remedy under national law against their decisions, *must* refer preliminary questions to the ECJ by virtue of Article 267 TFEU. Exceptions from this duty exist in cases in which the ECJ has already decided a similar issue or in case of an *acte claire*.[73] Thus far, there has been no ECJ-decision on the habitual workplace of seafarers on international routes. Thus, the Bundesarbeitsgericht could only refrain from referring questions to the ECJ if the habitual place of work of the ferryboat crew – to quote from the *C.I.L.F.I.T.* case – was "so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be solved."[74]

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68 BAG 24. September 2009, RIW 2010, 232 = AP Nr. 1 zu Art 18 EuGVVO, with note *Mankowski*.

69 LAG Mecklenburg-Vorpommern 18 March 2008 – Case 1 Sa 57/07, paras. 64–80, available at juris.

70 BAG 24. September 2009, RIW 2010, 232, 235.

71 BAG 24. September 2009, RIW 2010, 232, 236.

72 BAG 24. September 2009, RIW 2010, 232, 233.

73 ECJ 6 October 1982 – Case 283/81, *C.I.L.F.I.T. v. Ministero della Sanità*, [1982] ECR 3145, para. 21.

74 ECJ 6 October 1982 – Case 283/81, *C.I.L.F.I.T. v. Ministero della Sanità*, [1982] ECR 3145, para. 16.

Is the answer to the question in which country the crew of the "Superfast VIII" had their habitual workplace obvious? Given that courts in different Member States have applied different connecting factors, I would argue that the matter was not entirely clear and the case should have been referred to the ECJ. It is telling that even the Bundesarbeitsgericht seems to share my view. The judges wrote that the connecting factor in employment relationships in international maritime traffic "is not apparent".[75] In other words, the issue was not evident and therefore a referral proceeding should have been initiated.[76]

Ironically, the lower court, the Landesarbeitsgericht Mecklenburg-Vorpommern, initiated such a proceeding in a parallel case but withdrew its request as the ECJ had no jurisdiction to answer the questions referred pursuant to Article 68 EC Treaty.[77] This provision restricted the right to initiate such proceedings in private law matters to Member State's courts against whose decisions there is no judicial remedy under national law. As appeal against the decision of the Landesarbeitsgericht to the Bundesarbeitsgericht was possible, the ECJ had no jurisdiction to take on the case. The consequence was an incorrect decision by the Landesarbeitsgericht which was fortunately corrected by the Bundesarbeitsgericht. Even though the case was in the end decided correctly, future lower courts which have to decide on the law applicable to employment contracts of seafarers sailing on international routes should initiate a preliminary ruling in order to give the ECJ the chance to rule on this matter. The Treaty of Lisbon has strengthened the power of the European Court to answer preliminary questions in private law matters. Under the new system, the ECJ can also answer preliminary questions referred by national courts against whose decisions an appeal can be lodged. This change of law enriches the chances that the ECJ will rule on the flag-State-principle sooner rather than later.

4. Secondary ship registers

If the flag-State-rule applies to contracts of seafarers on international shipping routes, the question arises how one should deal with ships that are registered in so-called secondary ship registers. Many countries have created special ship registers for merchant ships to offer ship owners an alternative to flagging out. Some States, such as the French Republic, have established registers in their overseas territories. These territories posses labour laws with lower standards of protection than the "mother country."[78] The ships logged in these registers fly, however, the mother country's flag. To find out the applicable law for crew members of ships logged in such secondary registers one has to consider Article 22 Rome I Regu-

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75 BAG 24. September 2009, RIW 2010, 232, 235 ("Die Anknüpfung von Arbeitsverhältnissen im internationalen Seeverkehr liegt [...] nicht auf der Hand").

76 Concurring *Temming*, jurisPR-ArbR 15/2010 Anm. 6; *Mankowski*, AP Nr. 1 zu Art. 18 EuGVVO, sub II 2.

77 See the order of the President of the ECJ of 4 December 2007 – Case C-413/07, *Haase v. Superfast Ferries,* available at <www.curia.eu.int>.

78 For an overview see *Taschner* (supra n. 4) 181−269, 137−139, 141−142.

lation. This rule provides that where a State comprises several territorial units, each of which has its own rules of law in respect to contractual obligations, each territorial unit shall be regarded as a country. In other words, the flag law of ships registered in such registers in overseas territory points to the law of that overseas territory.

Different from other European States, Germany has not created a secondary ship register on an island or some other part of its territory. The German international ship register (Internationales Schiffsregister) is not a proper secondary, i.e. alternative, register. It must be rather considered as a supplement to the German ship register allowing ship owners to employ seafarers domiciled outside the EU at conditions below German labour law standards. To ensure that the foreign law applies to employment contracts of such seafarers, the German legislature has enacted Section 21(4) Flaggenrechtsgesetz (FlagRG). This provision states that employment contracts of crew members without domicile or permanent residence in Europe working on board of a merchant ship registered in the German international ship register are not governed by German law just because the merchant vessel flies the German flag. Thus, courts may not apply the flag-state-principle, but instead have to determine the applicable law by applying the law of the country which has the closest connection to the case.

Section 21(4) FlagRG was regarded as a (national) statutory interpretation of the German incorporation of Article 6 Rome Convention.[79] After the adoption of the Rome I Regulation, the German legislature did not repeal this provision but decided to amend it. It now refers to Article 8 Rome I Convention, instead of Article 6 Rome Convention. Section 21(4) FlaggRG further states its rule shall only apply "subject to other legal rules of EU law".[80]

Whether Section 21(4) Flag Act is in line with the requirements of EU law is very doubtful.[81] EU regulations take primacy over national law. Thus, if Section 21 Flag Act were a conflict rule, Article 8 Rome I Regulation would take precedence over it. The majority view sees Section 21(4) FlagRG, however, not as

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79 See *Magnus,* in: Julius v. Staudingers Kommentar zum BGB (13. ed. 2002) Art. 30 EGBGB paras. 153–155 (with further references).

80 In its current version Section 21(4) FlagRG reads as follows: „Arbeitsverhältnisse von Besatzungsmitgliedern eines im Internationalen Seeschiffahrtsregister eingetragenen Kauffahrteischiffes, die im Inland keinen Wohnsitz oder ständigen Aufenthalt haben, unterliegen bei der Anwendung des Artikels 8 der Verordnung (EG) Nr. 593/2008 des Europäischen Parlaments und des Rates vom 17. Juni 2008 über das auf vertragliche Schuldverhältnisse anzuwendende Recht (Rom I) (ABl. L 177 vom 4.7.2008, S. 6) vorbehaltlich anderer Rechtsvorschriften der Europäischen Gemeinschaft nicht schon auf Grund der Tatsache, daß das Schiff die Bundesflagge führt, dem deutschen Recht […]".

81 A similar concern is raised with respect to national provisions designating the applicable law for arbitration proceedings relating to contractual obligations see *Mankowski*, Rom I-VO und Schiedsverfahren, RIW 2011, 30, 34−36. Some commentators are, however, of the opinion that Section 21(4) FlagRG does not infringe EU law, see *Winkler v. Mohrenfels/Block* (supra n. 31) B 3000 para. 135 (with further references).

a conflict rule but as a mere interpretation of Article 8 Rome I Regulation.[82] Yet, the power to interpret EU law lies also not with the Member States. Moreover, regulations are directly applicable in all Member States. To protect the uniform application of EU law and the principle of direct effect, the ECJ has ruled that Member States are precluded from taking steps which are intended to alter a regulation's scope or supplement its provisions unless the regulation explicitly allows the Member States to do so.[83] Of course, it is debatable whether Section 21(4) FlagRG is intended to alter or amend the Rome I Regulation. As the ECJ has not yet ruled on the private international law of secondary ship registers, we cannot judge this issue with certainty. But what we do know is that Section 21(4) FlagRG has not been confirmed by the ECJ. So, in my eyes the first German court seized with the interpretation of this provision should refer the issue to the ECJ. A preliminary ruling of the ECJ would clarify whether Section 21(4) FlagRG is compatible with Union law or not.

V. Lex loci laboris II: The country "from which" the employee habitually works

1. General issues

The most significant change made when the Rome convention was transformed into a Community instrument was the adoption of the so-called "base rule". Article 6(2) Rome Convention defined the *lex loci laboris* as the country "in which" the employee habitually worked. In turn, Article 8(2) Rome I Regulation also covers "work from" a given country. The Commission proposed this amendment to reflect the ECJ's broad interpretation of the habitual workplace under Article 19 Brussels I Regulation.[84] The ECJ coined a definition whereby the habitual workplace of the employee is in the country "*where, or from which*, taking account of all the circumstances of the case, he in fact performs the essential part of his duties vis-à-vis his employer."[85] In general, this case law aims at an enlargement of the habitual workplace to avoid recourse to the second-tier connecting factor of the employer's engaging place of business, which is deemed to be to "employer friendly".[86] Against this background, the ECJ had, for example, decided that commercial agents doing business in different countries may habitually work in one single country only, provided that certain factual circumstances are met. Work in one country can, for example, be assumed if commercial agents have an office in one country in which they work most of the time and to which they return

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82 See *Martiny*, in: Münchener Kommentar zum BGB (supra n. 1) Art. 8 Rom I-VO para. 82; *Winkler v. Mohrenfels/Block* (supra n. 31) B 3000 para. 135.

83 ECJ 18 February 1970 – Case 40/69, *Hauptzollamt Hamburg-Oberelbe v. Bollmann*, [1970] ECR 69, para. 4.

84 Commission's Proposal for a Rome I Regulation, COM (2005) 650 final, 7.

85 ECJ 27 February 2002 – Case C-37/00, *Herbert Weber v. Universal Ogden Services*, [2002] ECR I-2013, para. 49 (emphasis added).

86 *Mankowski* (supra n. 5) 178.

after their business trips abroad.[87] If, for example, the employee works eight months in his office in Germany and travels to various other countries for work purposes over the remaining four months of the year, he habitually works "in or from" Germany.

The "work from" criterion now codified in Article 8 Rome I Regulation is often referred to as the "base rule".[88] Its precise reach is far from clear. The ECJ has recently indicated with respect to Article 6 Rome Convention – yet also with an eye to Article 8 Rome I Regulation – that the habitual *locus laboris* has to be construed in a wide sense.[89]

I am of the opinion that an overly broad interpretation of the base rule is, however, not warranted, as it would blur the fundamental distinction between Article 8(2) and (3) Rome I Regulation. For example, a pilot of an airplane flying on international routes who checks the plane on the ground for several hours in the base country and then flies five days in between various other countries before returning to the base, does in my opinion not work *from* the base country. Rather, this employee works in various countries. This finding can be drawn from the fact that the amendment essentially had the purpose of codifying the ECJ case law on the Brussels I Regulation to ensure a parallel interpretation of the Brussels I and the Rome I Regulation. In its case law on the Brussels I Regulation, the ECJ has emphasized that the habitual workplace is usually in the country in which the employee spends at least "most of his working time" engaged on his employer's business.[90] In my pilot example, the pilot does not discharge such a considerable amount of work in the base country such that Art. 8(2) Rome I Regulation would not apply.[91] The law applicable to his contract must therefore be determined according to Article 8(3) Rome I Regulation. The connecting factor enshrined in Article 8(3) Rome I Regulation can in my pilot example, however, also lead to the law of the law of the base country if one argues that the employee was engaged by the base (see below VI).

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87 ECJ 9 January 1997 – Case C-383/95, *Rutten v. Cross Medical*, [1997] ECR I-57, paras. 23–27.

88 *Mankowski* (supra n. 5) 177.

89 ECJ 15 March 2011 – Case C-29/10, *Koelzsch v. Luxemburg*, n.y.r., paras. 43–47.

90 ECJ 27 February 2002 – Case C-37/00, *Weber v. Universal Ogden Services*, [2002] ECR I-2013, para. 50. In a recent case concerning Article 6 Rome Convention, the time factor was, however, not explicitly mentioned by the Court. The case concerned the law applicable to an employment contract of a truck driver serving international routes; see ECJ 15 March 2011 – Case C-29/10, *Koelzsch v. Luxemburg*, n.y.r., paras. 44–50.

91 The law applicable to contracts of the flying personnel on international routes is, however, disputed. Many commentators argue that flying personnel works "from the base state". For an overview of the approaches advanced see *Mankowski* (supra n. 5) 177−181; *Wurmnest* (supra n. 12) 495−497; *Winkler v. Mohrenfels/Block* (supra n. 31) B 3000 paras. 127–128 (all with further references).

2. Application to maritime employment contracts

If you agree on my narrow interpretation of the base rule under which "work from" a certain country can only be assumed if a considerable amount of work-time is effected in a given State, there is not much room for this rule in maritime employment relationships. Let me explain my interpretation using a recent case decided by the Austrian Supreme Court with regard to Article 19 Brussels I Regulation.[92] I modify the facts of the case slightly for my purposes: Imagine a hotel manager. He works on a cruise ship flying the German flag. The ship owner offers seven-day cruises on the Danube River. The cruise starts in Vienna/Austria and the ship stops in Bratislava/Slovakia, Passau/Germany and Budapest/Hungary. The duration of each stop is approximately one and a half days. The employees regularly board and de-board the vessel in Vienna.

Which law governs the employment contracts of the employees working on the cruise ship? In my opinion, the contracts are governed by German law. This follows from the flag-state-principle explained above: As the ship flies the German flag, the employees habitually work "in Germany". The base rule is not applicable as the ship's crew does not perform most of their duties vis-à-vis their employer in Austria. The fact that the crew members start each trip in Vienna and return to this port after seven days is in my eyes not sufficient to construe a close connection of their employment contracts with Austria.

Against this background, in the maritime context the base rule is of relevance in rather atypical work relationships. If, for example, a vessel transports goods between different Swedish ports for most of the year and for some months in the summer is dispatched to various ports of other countries, then one could say that the ship's crew members habitually "work from" Sweden so that their employment contracts are governed by Swedish law. In such a context, I would argue that the base rule even trumps the flag-state-principle. Thus, if in my example the vessel serving Swedish ports flies the Greek flag, Swedish and not Greek law applies to the contracts of the crew members working on that vessel.

VI. The place of business through which the employee was engaged

1. General remarks

Where the law applicable cannot be determined pursuant to Article 8(2) Rome I Regulation, the contract shall according to Article 8(3) Rome I Regulation be governed by the law of the country where the place of business through which the employee was engaged is situated. As often in the maritime context, a habitual workplace can be localized by taking recourse to the flag-rule; the engaging business comes into play only when the flag does not point to one single state. This is, for example, the case when employees regularly work shorter times on different ships flying flags of different countries as in such a situation the crew members

92 OGH 4 August 2009, EuLF 2010, II-14.

have habitual workplaces which can be attributed to different countries.[93] Moreover, the connecting factor of the engaging business may be of relevance for maritime employment contracts which are not "ship-based". Think, for example, of an engineer who supervises the construction of offshore wind parks located in different countries. If the engineer is constantly moving between the building sites in different countries, he or she does not work "in" or "from" a single country, so that the law applicable to his or her employment contract has to be determined pursuant to Article 8(3) Rome I Regulation.

2. Signature v. organizational integration

When applying Article 8(3) Rome I Regulation, the question arises how the connecting factor of the engaging business must be interpreted. Imagine that the engineer in my offshore wind farm example signs his contract of employment with a US employer established in San Francisco/USA and is then immediately transferred to a German subsidiary located in Hamburg. This subsidiary coordinates his various travels to the building sites located in different countries. Was the engineer engaged in California or in Germany?

A first possible interpretation relates to the conclusion of the contract as such, i.e. to the country in which the employee was recruited or where the contract was signed.[94] In my example the contract was concluded in San Francisco, so in the absence of a choice-of-law-clause it would be governed by Californian law.

The second interpretation would be to look at the business in which the employee is (after the contract was signed) organizationally integrated.[95] In my example, this would be the German subsidiary as the engineer's work was coordinated there. Under this solution, German law would govern his employment contract.

In my opinion the latter interpretation usually better reflects the closest connection of the employment contract with a given legal system. Just looking at the location of the signature opens the floodgate for employers to manipulate the engaging business to the detriment of the employee.[96] Conversely, opportunistically switching the place of business effectively administering the employee to his or her detriment usually carries a higher cost and can therefore be considered a more hypothetical threat.[97] In sum, the better arguments speak in favour of the second interpretation. If the signing of a contract is the sole contact of an employment relationship to a given country, the engaging business should therefore

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93 *Junker,* Internationales Arbeitsrecht im Konzern (1992) 188; *Mankowski* (supra n. 67) 495.

94 This interpretation is advocated by *Taschner* (supra n. 4) 122−124.

95 This interpretation is advocated by *Mankowski* (supra n. 5) 196−197; *Martiny*, in: Münchener Kommentar zum BGB (supra n. 1) Art. 8 Rom I-VO para. 65.

96 *Mankowski*, in: Europäisches Privat- und Zivilprozessrecht (supra n. 23) Art. 18 Brüssel I-VO para. 19.

97 *Mankowski*, in: Europäisches Privat- und Zivilprozessrecht (supra n. 23) Art. 18 Brüssel I-VO para. 19.

be the business in which the employee is integrated. The ECJ will have the chance to clarify this matter soon, as a Belgian court has asked the Court to interpret the reach of the connecting factor of the engaging business.[98]

VII. Conclusion

When enacting the Rome I Regulation, Community legislators neglected to use their chance to clarify the most disputed issues regarding the law applicable to employment contracts. Rather few amendments have been implemented into the wording of Article 8 Rome I Regulation, and their reach is not always clear. It is thus up to the ECJ to clarify matters. I propose the following interpretation of the Rome I Regulation:

1. An implied choice of law can usually be assumed when the parties refer in their contract to provisions of national law or have concluded an exclusive jurisdiction agreement. By contrast, the sole fact that the parties litigate on the basis of the *lex fori* cannot be taken as an indicator for a choice of law in favour of the forum's law (III.1.).

2. Maritime employment contracts having a strong connection to the territory of one State are governed by the law of that State pursuant to Article 8(2) Rome I Regulation. This is the case when the employee performs the essential part of his/her duties vis-à-vis the employer on a ship operating either in the territorial waters of one State or above the continental shelf/in the EEZ over which the coastal State has sovereign rights. Such employment relationships are governed by the law of the coastal State by virtue of the "territorial" connection of the employment contract to the coastal State; recourse to the flag-State-rule is not necessary (IV.2.).

3. In contrast, the law applicable to employment contracts of seafarers employed on international routes should be determined by virtue of the flag-State-rule. This rule may be regarded as a sub-rule for determining the *lex loci laboris* according to Article 8(2) Rome I Regulation. If, however, the flag is the only connection to the employment relationship, one has to make recourse to the escape clause enshrined in Article 8(4) Rome I Regulation in order to apply the law of the closest connection to the case (IV.3.).

4. It is doubtful whether Section 21(4) FlagRG comports with EU law. German courts should therefore initiate a preliminary proceeding to give the ECJ a chance to rule on the compatibility of this statutory interpretation with Union law (IV.4.).

5. The new "base rule" of Article 8(2) Rome I Regulation should be interpreted narrowly. Employees only work "from" a certain state if they perform an essential part of the work in that State. In the maritime context, this connection is rather the exception (V.2.).

6. The engaging business in the sense of Article 8(3) Rome I Regulation should be interpreted as the place of business in which the employee is integrated. This

98 Case C-384/10, *Voosgeerd v. Navimer*, O.J. 2010 C 317/14.

may be the same place of business where the employee signed his contract but need not be so in all cases (VI.2).

Environmental Pollution Liability and Insurance Law Ramifications in Light of the Deepwater Horizon Oil Spill

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* Special thanks are owed to Prof. Peter Kochenburger as well as to the Librarian of the Law Faculty and of the Insurance Law Center of the University of Connecticut, USA, for their invaluable assistance.

J. Basedow et al., *The Hamburg Lectures on Maritime Affairs 2009 & 2010,*
DOI 10.1007/978-3-642-27419-0_7, © Springer-Verlag Berlin Heidelberg 2012

The financial impact of the 20 April 2010 explosion and sinking of the "Deepwater Horizon" in the Gulf of Mexico is, in total, estimated to eclipse the financial impact of the Exxon Valdez oil spill of 1989 – which resulted in a $3.5 billion settlement and in $5 billion in legal and financial settlements. In spite of having managed to contain the "Deepwater Horizon" oil spill initially in July 2010, then again in August 2010 and finally in September 2010, the environmental liability and insurance law ramifications of the disaster continue, nevertheless, to loom large. Given the scope of the disaster, the claims involved will, inter alia, implicate property liability, environmental liability, marine insurance and business interruption insurance and loss of production income, comprehensive general liability, operator's extra expenses – incurred for the control of the well, physical damage, workers compensation and employers liability. Furthermore, the insurance loss is estimated to be spread throughout the insurance and reinsurance markets in London, the USA and Bermuda. This paper examines the liability arising out of environmental pollution and the consequences it bears on insurance in the light of the occurrence of the "Deepwater Horizon" oil spill. In doing so, it evaluates the environmental pollution liability regime and environmental pollution insurance coverage, whilst also projecting on potential future directions in both fields.

I. Introduction

Environmental pollution is here to stay. The modern way of living has allowed the threat of the occurrence of environmental pollution – at any time – to become more apparent than ever before and part of our everyday routine. Consequent to the occurrence of environmental pollution, a liability regime has also arisen.

It is widely acknowledged that the globalization of environmental risk poses a mounting challenge to policy makers and that, nevertheless, the rules of responsibility for harm production remain underdeveloped. In spite of the negotiation and implementation of numerous international environmental agreements, those

agreements lack detailed provisions stipulating the responsibility of state and non-state actors for environmental damage. This shortcoming relates to the means of estimating the liability owed for environmental harm across national boundaries.[1] Most multilateral environmental treaties stipulate that signatory parties should act in accordance with the principle of state responsibility for environmental damage, however the nature of liability and compensation provisions are not prescribed.[2]

State practice overall reveals a widespread reluctance to pursue environmental liability through inter-state claims and a preference for increasing the importance of private liability attached to operators of risk-bearing activities as the main mechanism for advancing environmental liability. This move towards a compensation regime regarding liability for environmental damage driven by private actors has made civil liability treaties the preferred vehicle for rule development in this area.[3]

The civil liability regime for marine oil pollution was the first of these regimes to broaden compensation obligations beyond personal injury and property damage provisions to environmental impairment, and it has served as a model for liability rule development for the carriage of dangerous goods, the maritime carriage of hazardous and noxious substances and revisions to civil liability provisions for nuclear damage. Moreover, the method of compensation entitlement under this regime, i.e. strict liability without the need to prove negligence, has become the norm for pollution damage liability rules elsewhere. And, it has also been rationalised as an effective and equitable means of incorporating the "polluter pays" principle into the field of environmental liability.[4]

Democratic accountability for trans-national harm production requires the effective and equitable treatment of the claims of affected publics.[5] For oil

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1 Principle 13 of the 1992 Rio Declaration on Environment and Development registered this failing, calling on states to cooperate in developing liability and compensation rules for environmental damage caused by activities within and beyond their areas of territorial jurisdiction and control; see *Mason*, Transnational Compensation for Oil Pollution Damage: Examining Changing Spatialities of Environmental Liability, LSE Research Papers in Environmental and Spatial Analysis (RPESA), no. 69, Department of Geography and Environment, London School of Economics and Political Science (2002) p. 1–3.

2 The 1972 Convention on International Liability for Damage Caused by Space Objects remains one of the few treaties with explicit state liability obligations – rules which supported a successful claim by Canada against the USSR for the clean-up of radioactive debris following the break-up of a Soviet satellite over Canadian territory in 1979, see *Mason* (supra n. 1) p. 1–3.

3 *Mason* (supra n. 1) p. 1–3.

4 *Mason* (supra n. 1) 1–3. See *Sandvik/Suikkari*, Harm and Reparation in International Treaty Regimes: An Overview, in Harm to the Environment: the Right to Compensation and the Assessment of Damages, ed. by Wetterstein (1997) p. 57–71, 64–65.

5 *Mason* (supra n. 1) 1–3. See generally *Mason*, Transnational Environmental Obligations: Locating New Spaces of Accountability in a Post-Westphalian Global Order, Transactions of the Institute of British Geographers 26/4 (2001) 407–409; *Renn/Klinke*, Public Participation Across Borders, in Trans-Boundary Risk Management, ed. by Linnerooth-Bayer et al. (2001) 1–3.

pollution liability, this relates above all to claims for compensation. The changing spatialities of environmental liability are evident in the implementation of legal rules under the relevant international conventions.[6] It is, however, doubtful whether, the environmental liability rules currently in force are sufficient to meet claims for compensation from representatives of affected publics. Moreover, the existence of international oil pollution liability rules raises the issue of the standing of state and non-state actors, not only as potential claimants but also as participants collectively shaping norm application.[7]

Given the above considerations, what remains to be explored is: a) the extent to which the marine oil pollution civil liability regime is satisfactory and adequate as a vehicle for transnational environmental accountability, b) the extent to which the marine oil pollution civil liability regime's overarching framework of legal obligations serves the interests of those national and non-national publics suffering trans-boundary injury from ship-source or off-shore installation facilities' oil spills, and c) the extent to which the available insurance options can meet the demands of the assured and other potential claimants.[8]

Following the explosion at the Deepwater Horizon drilling platform in the Gulf of Mexico on 20 April 2010, the ruptured well was reported to have been leaking between 1.47 and 2.52 million gallons of oil a day,[9] thus[10] not only far surpassing the 1989 Exxon Valdez oil disaster, but[11] making it the largest environmental disaster in US history.[12] Businesses have suffered,[13] and will continue to suffer, significant losses due to property damage and economic losses.[14] Municipalities may also experience decreased tax revenues due to business closures. In short, the combined economic impact of oil-spill-related losses for businesses and communities is estimated to be in the billions.[15] The oil spill has also instigated short- and long- term uncertainty for residents and businesses along the Gulf Coast.[16]

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6 Specifically, the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention), as both amended by the 1992 Protocols (United Nations International Maritime Organisation (IMO), 1996). See *Mason* (supra n. 1) p. 1–3.

7 *Mason* (supra n. 1) p. 1–3.

8 *Mason* (supra n. 1) p. 1–3.

9 *Kellner et al.*, Insurance Coverage Issues for Third-Party Businesses and Municipalities with Losses Due to the Oil Rig Explosion in the Gulf of Mexico, Insurance Coverage Alert, Dickstein Shapiro LLP, May 2010.

10 As per US government estimates.

11 Having also contaminated the Gulf and the adjacent shore-lands.

12 *Kellner et al.* (supra n. 9).

13 Especially those in the tourism, fishing, and catering industries; see *Kellner et al.* (supra n. 9).

14 Business losses for the Florida tourism industry alone are projected to reach $3 billion, see *Kellner et al.* (supra n. 9).

15 *Kellner et al.* (supra n. 9).

16 Vacation and beachfront property owners have seen significant losses from the tar-contaminated beaches and long strands of boom which are now the central focal point

Given the tremendous financial need expected to arise for businesses and communities trying to respond to the disaster and recover from its impact, a valuable resource available in the form of insurance can play an important role in helping them recover from this disaster. This insurance may provide coverage not only for physical damage to and loss of property, but also for financial losses arising from an inability to conduct business – either at all or at the same levels as before – the extra expenses incurred in dealing with the effects of a disaster, including expenses incurred in advance to minimise any damages and losses, and the costs incurred in establishing the extent of any losses. Several types of insurance might respond to pay for losses stemming from the oil spill, including insurance policies for first-party property, "business interruption" and loss of production income insurance, D&O insurance, event cancellation insurance, trade disruption insurance, environmental liability insurance, marine insurance, comprehensive general liability insurance, insurance for operator's extra expenses – occurred for the control of the well – physical damage insurance, workers compensation and employers liability insurance.[17]

II. Setting the Scene – The Incident

1. Facts

On 20 April 2010, the Deepwater Horizon, a semi-submersible mobile offshore drilling rig owned and operated by Transocean Ltd., caught fire and sank in the Gulf of Mexico, off the shores of Louisiana.[18] The rig was drilling a prospect known as Macondo, some 50 miles off the coast of Louisiana, in 5,000 feet of water. BP Plc – along with its partners Anadarko Petroleum Corp. and Mitsui Oil Exploration Co. – acquired the prospect in 2008 in a sale of leases run by the US government's Minerals Management Services. The well had been drilled to 18,000 feet when a blow-out occurred. The explosion and fire that followed killed 11 of the 126-man crew. A day-and-a-half later the rig collapsed into the sea and sank, and oil began to spread across the surface of the water, eventually making landfall to the north-east.[19] BP, being the majority stakeholder in the Macondo oil well, has largely been identified with the spill. Anadarko Petroleum Corp. and Mitsui Oil Exploration Co. own 25% and 10% stakes in the well, respectively, and may share in the cost of responding to the oil spill. The oil platform was being leased by Transocean Ltd. to BP Plc. and now sits on the sea floor at over 5,000 feet below sea level. Prior to the explosion on 20 April 2010, Halliburton Co. had been

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of beachfront views. The closing of many commercial and sport fisheries has created enormous financial setbacks for local economies; see *Kellner et al.* (supra n. 9).

17 *Kellner et al.* (supra n. 9).

18 *Kotula*, Insurance, Pollution Exclusions, and the Deepwater Horizon Gulf of Mexico Oil Spill, <www.lexisnexis.com/Community/emergingissues/blogs/gulf_oil_spill.aspx> accessed on Sept. 10, 2010.

19 *Focus Magazine*, Macondo: Assessing the Implications, Oil and Energy Trends, Focus Magazine 35 (2010) p. 3.

engaged in cementing operations on the well, and cementing operations have previously been associated with other oil well accidents. The explosion and fire occurred in spite of the existence of specialised oil spill prevention equipment – called a blowout preventer (BOP) – i.e. a failsafe protection against an ongoing oil spill, manufactured by Cameron International Corp.[20] and especially designed to avert this type of disaster.[21] The failure of the BOP left the well unsecured and leaking from the marine riser. BP Plc set up an escrow account of $20 billion to meet an unspecified number of claims for consequential losses arising from the oil spill.[22] The amount of oil and gas, escaping from the subsurface well has been estimated to have been in the range of 35,000-60,000 barrels of oil a day, making the incident the largest oil spill in US history.[23] The Macondo oil well, initially sealed in mid-July 2010, 87 days after the incident occurred, was further sealed in early August 2010, having reached the amount of 4.1 million spilled barrels of oil, and finally cemented on 19 September 2010. However, the termination of the oil spillage does not, necessarily, entail a simultaneous end to the legal aspects of the incident. The imposition of fines, the adjudication of class action law suits by the thousands of victims, the cleansing and environmental rehabilitation operations are only some of the consequences of the oil spillage. It is highly possible that, in order to meet the above and other claim demands, BP Plc. may have to sell further assets in addition to those which are already planned for sale and are being estimated at a value of $30 billion.[24]

2. Reasoning

No single factor caused the Macondo well tragedy. Rather, a sequence of failures involving a number of different parties led to the explosion and fire which, in turn, led to 11 human fatalities and has also caused widespread pollution. A report, released by BP Plc to the public on 8 September 2010, has concluded that decisions made by "multiple companies and work teams" contributed to the accident

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20 *Kotula* (supra n. 18).

21 Blowouts occur during offshore drilling operations when pressure exceeds the weight of the drilling fluid in the well, which results in an uncontrolled flow of oil. The oil flow could result in loss of the property at the drill site; see *King*, Deepwater Horizon Oil Spill Disaster: Risk, Recovery, and Insurance Implications, Congressional Research Service, 7-5700, available at <www.crs.gov>, R41320 (12 July 2010) 3.

22 *Focus Magazine* (supra n. 19).

23 See *Deepwater Horizon Unified Command*, U.S. Scientific Team Draws on New Data, Multiple Scientific Methodologies to Reach Updated Estimate of Oil Flows from BP's Well, available at <www.deepwaterhorizonresponse.com/go/doc/2931/661583> 15 June 2010, accessed on 10 September 2010). See also *Winter*, USGS Director Quietly Wages Fearless War on Oil Spill, The New York Times, available at <www.nytimes.com/gwire/2010/06/16/16greenwire-usgs-director-quietly-wages-fearless-war-on-oi-83792.html> (16 June 2010, accessed on 10 September 2010). See also *King* (supra n. 21).

24 *Kathimerini Newspaper*, End of Oil Spill and Beginning of Compensations?, Issue of 14 August 2010.

which arose from "a complex and interlinked series of mechanical failures, human judgments, engineering design, operational implementation and team interfaces."[25]

It has been found that: a) the cement and shoe track barriers at the bottom of the Macondo well failed to contain hydrocarbons within the reservoir and allowed gas and liquids to flow up the production casing; b) results of the negative pressure test were incorrectly accepted by BP Plc. and Transocean Ltd.; c) for more than 40 minutes, the Transocean rig crew failed to recognise and act on the influx of hydrocarbons into the well until it was too late; d) the well-flow caused gas to be vented directly onto the rig, and this flow of gas created a potential for ignition; e) even after the explosion and fire the rig's blow-out preventer on the sea-bed should have activated automatically to seal the well but failed to do so because critical components of it were not working. Based on its key findings, the investigation team has proposed a total of 25 recommendations designed to prevent a recurrence of such an accident. The company has also expressed that it expects a number of the investigation report's findings to be considered relevant to the oil industry more generally and also for some of the recommendations to be widely adopted.[26]

III. The Environmental (Marine – Oil) Pollution Liability Regime

The marine oil pollution liability regime has been developed via the various conventions, resolutions and codes that the United Nations International Maritime Organisation (IMO) has enacted. The 1973/78 International Convention for the Prevention of Pollution from Ships (MARPOL) stands as the core treaty in this area.[27] MARPOL followed as one of the consequential measures adopted after the Torrey Canyon oil disaster of 1967.[28] However, the immensity of the Exxon Valdez incident in 1989 prompted the imposition of further measures; hence, the Oil Pollution Act 1990 (OPA) was enacted in the USA. in 1990, which imposed stronger duties of care on ship-owners and also included a right of action against operators. Not least, it also shifted the burden of accountability, i.e. liability, towards the harm producer. However, it is the International Convention on Civil Liability for Oil Pollution (CLC) 1992 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution

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25 See BP Releases Report on Causes of Gulf of Mexico Tragedy, available at <www.bp.com/genericarticle.do?categoryId=2012968&contentId=7064893> (accessed 15 September 2010).

26 See BP Releases Report on Causes of Gulf of Mexico Tragedy (supra n. 25).

27 Its Annex I, concerned with oil pollution, contains detailed technical provisions designed to eliminate intentional discharges. MARPOL is credited as instrumental in significantly reducing discharges from marine transportation; see *Mason* (supra n. 1) p. 4.

28 *Mason* (supra n. 1) p. 4.

Damage (Fund) 1992, in force as of 1996, which have set the current terms of application of claims for compensation within contracting states.[29]

1. The International Framework

The international regime for the compensation of pollution damage caused by oil spills from tankers is based on two treaties adopted under the auspices of the IMO, the CLC 1992 and the Fund 1992 Conventions, which replace two corresponding Conventions adopted in 1969 and 1971, respectively.[30]

Article I(6) of the CLC 1969 defined pollution damage as "loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever, such escape or discharge may occur, and includes the cost of preventive measures and further loss of damage caused by preventive measures". While it was clear from the beginning that this wording covered economic losses connected with property damage or personal injury, the absence of any reference to environmental damage left this aspect to the interpretation of national courts in accordance with the laws that have implementated the CLC.[31] However, due to some destabilising liberal court rulings on damage, the environmental damage article I(6) of the CLC 1992 was transformed and hence pollution damages was defined as: "a) loss or damage caused outside the ship by contamination resulting from the escape or discharge from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than losses of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken and b) the costs of preventive measures and further loss of damage caused by preventive measures".[32] As a system of economic compensation for oil spill damage, the recovery of environmental reinstatement costs under the CLC/Fund Conventions' regime has turned on whether they are deemed acceptable according to international rules.[33]

The existence of a spatial delimitation of oil pollution liability under the international conventions has always deferred to the sovereign rights of contracting parties, for both the CLC 1969 (Article II) and the Fund Convention 1971 (Article

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29 *Mason* (supra n. 1) p. 6–7. See generally *Little/Hamilton*, Compensation for Catastrophic Oil Spills: A Trans-Atlantic Comparison (1997) 4 LMCLQ 554–557; *Gauci*, Protection of the Marine Environment Through the International Ship-Source Oil Pollution Compensation Regimes, Review of European Community and International Environmental Law 8-I (1999) 29–36.

30 *Jacobsson*, The International Oil Pollution Compensation Funds and the International Regime of Compensation for Oil Pollution Damage, in Pollution of the Sea – Prevention and Compensation, ed. by Basedow/Magnus (2007) 138–150, 138–139.

31 *Mason* (supra n. 1) p. 7–8. See generally *Wetterstein*, Trends in Maritime Environmental Impairment Liability (1994) LMCLQ 230–247.

32 *Mason* (supra n. 1) p. 7. See generally *International Maritime Organisation*, Civil Liability for Oil Pollution Damage: Texts of Conventions on Liability and Compensation for Oil Pollution Damage (1996).

33 *Mason* (supra n. 1) p. 8.

3) apply only to pollution damage caused or impacting on the territory, including the territorial sea, of member states. However, the broadening of the geographical scope of the liability conventions was considered essential and was reinforced by an international agreement, which clarified that the liability Conventions cover measures – wherever taken – to prevent oil pollution damage within a territorial sea or EEZ.[34] As incorporated into CLC 1992 (Article II) and the Fund Convention 1992 (Article 3), the oil pollution liability conventions are geographically defined as applying exclusively: a) to pollution damage caused: i) in the territory, including the territorial sea, of a Contracting State, and ii) in the EEZ of a Contracting State, established in accordance with international law, or, if a Contracting State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; and b) to preventive measures – wherever taken – to prevent or minimise such damage.[35]

The CLC 1992 lays down the principle of strict liability for ship-owners and creates a system of compulsory liability insurance. Ship-owners are normally entitled to limit their liability to an amount which is linked to the tonnage of the ship. The CLC also set up the International Oil Pollution Compensation Fund which provides additional compensation to victims when compensation under the 1992 CLC is inadequate.[36] The 1992 Fund accepts claims in relation to loss of earnings suffered by the owners or users of property contaminated as a result of a spill (i.e. consequential loss). An important group of claims comprises those relating to "pure economic loss", i.e. loss of earnings sustained by persons whose property has not been polluted. In order to qualify for compensation, a sufficient causal link between the contamination and the loss or damage sustained by the claimant must exist.[37]

The strict marine oil pollution civil liability model, which was imposed by the CLC 1992 and the Fund 1992 Conventions, has been further extended to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, (HN) 1996 and the International Convention on Liability for Bunker Oil Pollution Damage, (BOPD) 2001.[38] Both Conventions broadly share the environmental reinstatement provisions and jurisdictional scope of CLC 1992. Significantly, though, the BOPD Convention 2001, which covers fuel oil spills from vessels other than tankers,

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34 *Mason* (supra n. 1) p. 11–12. See generally *International Maritime Organisation* (supra n. 32) 48, 69.

35 *Mason* (supra n. 1) p. 11–12. See generally *International Maritime Organisation* (supra n. 32) 48, 69.

36 *Jacobsson* (supra n. 30).

37 *Jacobsson* (supra n. 30)141.

38 *Mason* (supra n. 1) p. 20. See generally *Little*, The Hazardous and Noxious Substances Convention: A New Horizon in the Regulation of Marine Pollution (1998) LMCLQ 554–567. See also *Wren*, The Hazardous and Noxious Substances Convention, in Nordquist, in Current Maritime Issues and the International Maritime Organisation, ed. by Moore (1999) 335–349.

breaks with the liability channelling provisions of the CLC 1992 by exposing operators and charterers as well as registered owners to compensation claims, all with rights of limitation. This notable shift to multiple liabilities suggests pressure from the US and the European Commission on IMO to conform more with the existing American liability norms in this area of oil pollution, and it also reflects the need to make up for the absence of a second tier of supplementary compensation – as under the Fund Convention.[39]

2. The Position in the USA

a) Previous Response to Oil Spill Incidents – Similarities and Differences

Nearly twenty years of litigation followed the Exxon Valdez spill, and there was not a single case, but many. By understanding some of the history of the Exxon Valdez cases, one can better appreciate the legal ramifications of the Deepwater Horizon case. At the same time, the many differences between the two spills suggest that history will not repeat itself:[40] a) OPA (invoked in response to the Deepwater Horizon) was enacted after and, more specifically, in response to the Exxon Valdez. While the elements of the liability claim against responsible parties under OPA are similar to those asserted under the Clean Water Act, which applied in the Exxon Valdez case, OPA allows plaintiffs to potentially recover a broader range of compensatory damages, including: damages to real or personal property; subsistence use; federal, state, and local tax revenues; lost profits and earning capacity; and the cost of providing additional public services resulting from the spill. In that sense, the law is more complex now than it was at the time of the Exxon Valdez spill, and it involves more parties as well as more and different potential claims. There is also very little case law decided under it; b) the causation issues in the Exxon Valdez case were far simpler than in the present spill. There was no question as to the cause of the 1989 spill into Prince William Sound – a tanker hit a reef. In the case of the Deepwater Horizon, by contrast, press reports and briefings by BP Plc. point to a chain of events, each of which may have contributed to the explosion and to the still mounting damages; c) unlike the Clean Water Act, OPA expressly allows for contribution claims among responsible parties that were not available under the Clean Water Act. Therefore, BP Plc., as the primary party responding to the spill, may have statutory claims that it will choose to assert against other responsible parties at some future time; d) the Exxon Valdez case involved a single state (Alaska) and the federal government (and Alaska native corporations). By comparison, several states have already become involved in the Deepwater Horizon spill (including Louisiana, Mississippi

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[39] See *Mason* (supra n. 1) p. 20. See generally Wu, Liability and Compensation for Bunker Pollution (2001).

[40] *Marten*, Fighting the Last War: The Relevance (and Irrelevance) of the Exxon Valdez Oil Tanker Spill to the Deepwater Horizon Oil Rig Spill, available at <www.lexisnexis.com/Community/emergingissues/blogs/gulf_oil_spill.aspx> (accessed on 10 September 2010).

and Alabama), raising potential jurisdictional questions and possible conflicting claims among the governmental plaintiffs; e) in oil spill cases, one of the potentially largest claims the government can bring is for natural resource damages. In order to do so, however, the government has to establish a "baseline" of pre-spill conditions. This is much more difficult to do in some of the ports and commercial areas along the Gulf Coast that are already impacted by hydrocarbons, as opposed to the relatively pristine waters of Alaska's Prince William Sound.[41]

b) Legal Framework under US Law for Environmental Pollution Liability

The USA has an explicit oil spill liability mechanism to address the Deepwater Horizon incident. In 1990, Congress enacted OPA to strengthen safety and environmental practices in the offshore energy exploration and production business, to create a system of so-called "financial responsibility laws"[42] and to place limitations on liability. The offshore facility rule, authorised by OPA, applies to facilities "in, on or under" navigable waters. Offshore facility liability limits are based on calculations of a "worst-case" oil spill discharge.[43]

Under OPA, BP Plc., as lessee of the drilling area, is responsible for removal and government response costs, property and natural resource damages and economic losses resulting from the oil spill.[44] Although liable for all removal costs, current law limits an offshore facility's liability for economic and natural resources damages to $ 75 million per incident. Damages in excess of the cap could be paid by the Oil Spill Liability Trust Fund, which is financed primarily through a fee on domestic and imported crude oil. Lease holders of a "Covered Offshore Facility" (COF) must demonstrate a minimum amount of "Oil Spill Financial Responsibility" (OSFR) of $ 35 million per 35,000 barrels of "worst case oil-spill discharge" up to a maximum of $ 150 million for COF located on the "Outer Continental Shelf" (OCS) and $ 10 million in state waters. OSFR can be demonstrated in various ways, including surety bonds, guarantees, letters of credit and, in some cases, self-insurance, but the most common method is by means of an insurance certificate.[45] BP Plc.'s liability limit up to $ 75 million is subject to an exception for gross negligence or wilful misconduct. On the other hand, OPA does not limit the liability of Transocean Ltd., Halliburton Co. or Cameron International Corp.. Nor does OPA limit actions for contribution or contractual

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41 *Marten* (supra n. 40).

42 Together with compulsory liability insurance combined with strict liability standards, see *King* (supra n. 21).

43 *Boyd*, Compensation for Oil Pollution Damages: The American Oil Pollution Act as an Example for Global Solutions?, in Prevention and Compensation of Marine Pollution Damage: Recent Developments in Europe, China and the US, ed. by Faure/Hu (2006) 137–163, 157–159.

44 *Cessna*, Insurance Implications of the Deepwater Horizon Disaster, available at <www.insurancelawanddisputesblog.com/2010/05/insurance-implications-of-the-deepwater-horizon-disaster> (accessed on 10 September 2010).

45 *King* (supra n. 21).

indemnification.[46] Coastal business owners also have a better prospect of recovering economic losses from BP under OPA.[47] Legislative measures[48] currently seek to raise the limit of environmental liability on responsible parties from an oil spill from the current $ 75 million, in some cases abolishing the limit altogether.[49] Notwithstanding the above efforts, the moratorium on deepwater oil and gas drilling, imposed by the Obama administration in July 2010 in response to the Deepwater Horizon oil spill was lifted on 12 October 2010, six weeks ahead of schedule. The US government considered it as "appropriate" that deepwater oil and gas drilling resume, provided that operators certify compliance with all existing rules and requirements, including those that recently went into effect, and demonstrate the availability of adequate blow-out containment resources. The recent safety rules include the Drilling Safety Rule, issued on 30 September 2010 under an emergency rule-making process, which strengthens requirements for safety equipment, well control systems, and blow-out prevention practices on offshore oil and gas operations. Following the lift of the moratorium, on 21 October 2010, Chevron Ltd., one of the top leaseholders in the Gulf of Mexico, sanctioned development of a prospect, namely the "Jack/St. Malo" project, scheduled to operate in the Lower Tertiary trend in the deepwater of the US part of the Gulf of Mexico. The "Jack/St. Malo" fields are estimated to contain hydrocarbon deposits able to produce combined total recoverable resources in excess of 500 million oil-equivalent barrels. Although on the one hand the pained efforts of the petroleum industry to gain permits and resume drilling operations are understandable, on the other hand it is highly important to ensure that the added safeguards put in place will actually be followed and will lead to responsible operations. In this regard, the quick resumption of operations in the area justifies the scepticism that exists whilst the US government continues to build on the reforms already implemented.

3. The European Response towards a Legal Framework for Environmental Pollution Liability

The environment is increasingly being viewed and understood as a whole. It is now known that polluting substances can move between different media.[50] The holism of the natural world contrasts sharply with the existing environmental legislation, organizational structures and administrative procedures in all EU

46 *Cessna* (supra n. 44).
47 *Cessna* (supra n. 44).
48 S. 3305, H.R. 5214, H.R. 5629.
49 *King* (supra n. 21).
50 This can mean, for instance, that the solution to a water pollution problem,may entail the intensification of an air or soil pollution problem. The control policies that successfully solved local air and water problems may contribute to a waste problem on land as the air and water pollutants are collected and dumped into landfills. Also, the dilution of air pollutants are deposited; see *Bohne*, Issues and Research Objectives, in The Quest for Environmental Regulatory Integration in the European Union: Integrated Pollution Prevention and Control, Environmental Impact Assessment and Major Accident Prevention, ed. by Bohne (2006) 9–13.

member states. This is why the need for an integrated approach to the protection of the environment as a whole has been accepted as a political principle by the European institutions and all national governments. The main obstacle in adapting regulatory objectives, structures and procedures to the holism of the natural world is the problem of incommensurability of environmental goods.[51]

In addition, the development of methods and criteria for a cross-media assessment of environmental effects on the environment as a whole is very controversial. Proponents of integrated environmental policies acknowledge these difficulties of integrated decision-making but tend to downplay the practical implications of integrated environmental policies for regulatory systems in terms of legislation and implementation. Lack of information and knowledge regarding dose-effect relationships, synergetic and antagonistic effects as well as the interactions among the elements of environmental systems add to the methodological problems posed by the incommensurability of environmental goods.[52] While there seems to be no open opposition to integrated environmental policies, sceptics emphasise that a scientifically tenable assessment of environmental cross-media effects is not really feasible in practice. Therefore, they tend to take a "wait and see" approach. However, one should keep in mind that the incommensurability of public goods does not constitute a decision situation which is unique to environmental policies. What is needed is a legislative and administrative framework along with guidance by the competent authorities to increase the likelihood of reasoned integrated decisions in environmental protection.[53] Consistent with the above, the EU is not only working as a driving force in the international arena to promote more stringent environment policies, but has moreover recognised the ineffectiveness of previous EU laws. As a result it has striven to keep Community laws in line with the international regimes.

Prevention and compensation are two sides of the same coin. However, prevention cannot always be successful, and unavoidably the issue of how to adequately compensate the victims arises.[54] The sufficiency of the compensation regime is not only to be evaluated in terms of the amount of compensation, but, rather, in terms of the types of damages that are covered by the regime. Thus, the European Commission purports that if damage types are to be extended, the amounts available for compensation should be raised accordingly. Hence, a substantial increase of financial limits is to be justified by the expanding definition of the damage to be covered.[55]

The EU originally took the point of view that marine oil pollution was an international problem better solved at the international level. Hence, the EU

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51 This means that there is no common denominator for the assessment of chemical, physical and biological impacts on air, water, land, flora, fauna, human health and cultural assets; see *Bohne* (supra n. 50).

52 See *Bohne* (supra n. 50) 9.

53 See *Bohne* (supra n. 50) 9–10.

54 *Hui*, Recent Developments in the EU Marine Oil Pollution Regime, in Prevention and Compensation of Marine Pollution Damage: Recent Developments in Europe, China and the US, ed. by Faure/Hu (2006) 1, 21–23.

55 *Hui* (supra n. 54) 21.

counted on its Member States to ratify the various international conventions aimed at the promotion of maritime safety. The international regime established under the CLC and Fund Conventions, as amended, covered pollution damage, including preventative measures and, to a limited extent, environmental damage *per se* for accidents occurring in the coastal waters (up to 200 miles) of the States.[56] Despite the more stringent rules entailed in the international Conventions, lack of implementation throughout the world has resulted in a scarcity of overall international monitoring, sanctions and courts and has left the IMO with no real auditing authority as to the observance by countries of the relevant rules.[57]

This prompted the EU to include international standards in the EU legislation and to also check for compliance. Directive 2004/35/EC was, indeed, the first EC legislation whose main objectives included the application of the "polluter pay" principle. Although it established a common framework for liability with a view to preventing and remedying damage to animals, plants, natural habitats and water resources as well as damage affecting the land, this liability scheme, nevertheless, applies only to certain specified occupational activities and to other activities in cases where the operator is at fault or negligent. In addition, as per the Directive's liability regime, the public authorities are responsible for ensuring that the operators responsible take or finance the necessary preventive or remedial measures themselves. Moreover, although the European Commission considered that the introduction of rules at Community level in this respect would enhance the implementation of the "polluter pay" principle and, hence, in this way also extend the scope of the definition of pollution damage, the ultimately adopted EU Environmental Liability Directive 2004/35/EC has explicitly excluded marine oil pollution damage.[58]

However, the EU is currently deliberating on the need for common legislation for offshore oil and gas platforms, reducing the risk of an environmental disaster in European waters. Following the Deepwater Horizon incident, the Commission has taken a hard look at EU safety and environmental standards for the oil industry and has found that although safety standards are generally high, there are nevertheless gaps in legislation, mostly due to differing standards between countries and that the rules often vary from company to company. Thus, and given these shortcomings, introducing common rules across the EU would help prevent oil spills at sea, protecting people and the environment. And if an accident did happen, the rules would ensure that the companies responsible will manage the response and pay for the cleanup.

In view of the above-acknowledged facts, and in light of the US government lifting the moratorium on deepwater oil and gas drilling on 12 October 2010, the European Commission, on 13 October 2010, adopted the Communication "Facing the Challenge of the Safety of Offshore oil and Gas Activities contemplating new EU standards, including criteria for granting drilling permits, supervision of the rigs and safety control mechanisms. The legislative proposal is aimed at creating

56 See *Hui* (supra n. 54) 23.
57 *Hui* (supra n. 54) 21.
58 *Hui* (supra n. 54) 21.

prevention, response and financial liability standards and also alternative ways of better addressing international response and measures.[59]

The new rules would raise standards to the highest level possible, requiring:

- companies seeking drilling permits to have response plans in case spills occur. They would have to prove they have the means to pay for the cleanup and environmental damage.
- national authorities' oversight of safety inspections to be evaluated by independent experts.
- equipment for oil platforms and mobile offshore drilling rigs, in particular blow out preventers, to meet the highest safety standards.
- companies to clean up and pay for environmental damage to water and sea life up to 200 miles (322 km) from the coast. The current limit is 12 miles (19 km).

The EU will also negotiate with neighbouring countries to set similar standards for oil drilling and extraction companies. Individuals living in coastal areas will benefit from the greater protection of their livelihoods and the environment. And common EU rules and standards would help the oil industry – companies would not have to deal with different sets of standards depending on where they drill. The legislation is set to be proposed in early 2011.[60]

IV. The Environmental Pollution Insurance Regime – Response to the Deepwater Horizon Oil Spill

1. Evolution of Environmental Insurance – From Past to Present

In the early 1940s, property and casualty insurers began aggressively marketing "Comprehensive General Liability" (CGL) insurance, which, unlike earlier policies written to cover specific risks, generally covered all liabilities arising out of an insured's operations unless specifically excluded. These policies covered liability arising out of accidental or unexpected and unintended property damage or bodily injury that happened during the policy period, even if a claim was not made until long after the policy period. Because early CGL policies did not exclude liability arising out of pollution, pollution claims were covered subject to other terms and conditions of each policy.[61] Beginning in the early 1970s, property and casualty insurers began to include the so-called "qualified" pollution exclusion in their policies, which excluded "bodily injury or property damage arising out of the discharge, dispersal, release or escape of ... contaminants or pollutants" unless "such discharge, dispersal, release or escape is sudden and

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59 See DG Energy, Press Release of 13 October 2010, Offshore Oil & Gas Platforms Standards, available at <http://ec.europa.eu/energy/oil/offshore/standards_en.htm> (accessed on 14 October 2010).

60 See DG Energy (supra n. 59).

61 See *Plumer/Lathrop/Suomela*, Insurance For Environmental Claims, New Appleman on Insurance: Current Critical Issues in Insurance Law, Spring 2010, 33, 33–34.

accidental."[62] Around 1986, insurers began including the so-called "absolute" pollution exclusion in CGL policies, which excluded coverage for pollution claims whether or not they were sudden and accidental.[63] However, by the mid-1980s, as claim expenses quickly outpaced premium revenues, insurers either ceased issuing "Environmental Insurance Liability" coverage (EIL), or policyholders stopped buying EIL coverage because it had become prohibitively expensive.[64] In the late 1990s, new environmental insurance products began to appear on the market. These second generation environmental insurance products include "Pollution Legal Liability Insurance", "Cleanup Cost Cap Insurance", and a number of more specialised products, such as "Contractors Pollution Liability Insurance", "Commercial Real Estate Pollution Legal Liability Insurance", and "Contaminated Property Development Insurance".[65]

Initially, CGL policies would typically promise to provide coverage for "all sums which the insured shall become legally obligated to pay as damages because of ... property damage to which this insurance applies, caused by an occurrence" and defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in ... property damage neither expected nor intended from the standpoint of the insured."[66] Such policies typically excluded coverage for "property damage to ... property owned or occupied by or rented to the insured" and, gradually added pollution exclusions.[67] Finally, the policies required notice to the insurer of an occurrence "as soon as practicable".[68] Modern

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62 See, e.g., ISO 1973 Standard Form for CGL Policy; *Plumer/Lathrop/Suomela* (supra n. 61) 33–34.

63 See, e.g., ISO 1986 Standard Form for CGL Policy; *Plumer/Lathrop/Suomela* (supra n. 61) 33–34.

64 *Waeger*, Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, Current Insurance Policies for Insuring Against Environmental Risks, 2008, SN050 ALI-ABA 339, 342–343; see *Plumer/Lathrop/Suomela* (supra n. 61) 33–34.

65 See *Plumer/Lathrop/Suomela* (supra n. 61) 33–34.

66 See ISO 1973 Standard Form for CGL Policy; see also *Plumer/Lathrop/Suomela* (supra n. 61) 34.

67 See ISO 1973 Standard Form for CGL Policy; see also *Plumer/Lathrop/Suomela* (supra n. 61) 34.

68 See ISO 1973 Standard Form for CGL Policy; in the context of environmental claims, these policy provisions have spawned decades of litigation regarding (1) whether environmental cleanup costs constitute "damages" (e.g. *Johnson Controls, Inc. v Employers Ins. of Wausau*, 665 N.W.2d 257 [Wis. 2003]; *City of Edgerton v General Gas. Co. of Wis.*, 517 N.W.2d 463 [Wis. 1994]), (2) whether compliance with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or analogous state laws constitute sufficient legal compulsion for CGL coverage to apply (e.g. *Weyerhaeuser Co. v Aetna Cas. & Sur. Co.,* 874 P.2d 142, 147–53 [Wash. 1994]); (3) which policies are "triggered" by the continuous injurious process of environmental contamination (e.g. *Montrose Chem. Corp. v Admiral Ins. Co.,* 913 P.2d 878 [Cal. 1995]); (4) whether "sudden" in the "sudden and accidental" pollution exclusion means temporally abrupt or unexpected (e.g. *Queen City Farms, Inc. v Central Nat'l Ins. Co. of Omaha,* 882 P.2d 703, 718–719 [Wash. 1994]); (5) whether

environmental coverage differs from historical CGL coverage in several important respects. Most fundamentally, CGL policies provide broad coverage for all risks not expressly excluded and do not expressly identify environmental claims as a covered risk. Environmental insurance, on the other hand, is written expressly to cover environmental claims. Thus, while the insurance industry historically has argued – contrary to all evidence – that environmental claims were never intended to be covered under CGL policies, such arguments clearly are not available to defeat claims made under modern environmental coverage policies. With regard to environmental insurance, the issue simply is whether each particular environmental claim falls within the scope of the environmental coverage that was purchased. Second, unlike CGL policies which cover accidents or occurrences that happened during the policy period regardless of when the claim is made, modern environmental coverage is typically "claims made." In theory, this means that a policyholder may have coverage under a modern claims-made environmental insurance policy and a historical CGL policy for the same claim if the alleged property damage occurred during the CGL policy period and the claim was made during the claims-made policy period.[69] Typically, however, modern environmental policies have multi-year policy periods, often as many as 10 or more years.[70] Another feature of modern environmental policies is that they typically restrict coverage based on the location, time and source of the liability. For example, different types of coverage will apply (and must be purchased separately) for "on-site" and "off-site" conditions. And different coverage may apply (and often must be purchased separately) to pollution that begins before the policy period as compared to pollution that begins during the policy period. Additionally, some policies only cover "sudden" pollution events (which the policies define to mean "abrupt"), and some policies require that the pollution be discovered within a defined period of time (*e.g.*, within 72 hours of the event), and have very short

"expected or intended" refers to the act causing the damage (i.e. the disposal of waste) or the resulting damage (i.e. the contamination caused by the disposed waste) (e.g. *Overton v Consolidated Ins. Co.*, 38 P.3d 322, 325 [Wash. 2002]); (6) whether the exclusion for "property damage to ... property owned or occupied by or rented to the insured" applies once groundwater – which is owned by the state – is or imminently will be contaminated (e.g. *Olds-Olympic, Inc. v Commercial Union Ins. Co.*, 129 Wash. 2d 464, 478–80 [1996]); (7) whether failure to comply with the notice provision bars coverage if the insurer has not been prejudiced (e.g. *Pfizer, Inc. v Employers Ins. of Wausau,* 154 N.J. 187 [1998]); and (8) how damages should be allocated among multiple insurers with varying limits at different attachment points, each of which promised to pay "all sums which the insured shall become legally obligated to pay" (e.g. *Plastics Engineering Co. v Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 627 [Wis. 2009]). These same issues, and perhaps new ones, will continue to arise as policyholders seek coverage under historical CGL policies for second generation environmental claims, including claims for sediment cleanup, natural resources damages and trans-boundary pollution; see *Plumer/Lathrop/Suomela* (supra n. 61) 34.

69 See *Plumer/Lathrop/Suomela* (supra n. 61) 34–35.

70 E.g. Steadfast Insurance Company Environmental Impairment Liability Insurance Policy, Form U-EIL-D-100-B CW (8/99); see *Plumer/Lathrop/Suomela* (supra n. 61) 34–35.

reporting periods (*e.g.*, 30 days) in order for coverage to apply. Finally, different types of coverage must be purchased to address potential on-site clean-up versus other third-party liability.[71]

2. The Present Case Scenario

The key players and insurance coverage which is in place include BP Plc.[72], Anadarko Petroleum Corp.[73], Mitsui Oil Exploration Co.[74], Transocean Ltd.[75], Cameron International Corp.[76] and Halliburton Co.[77]. The loss is a major event for the offshore energy insurance and reinsurance market.

Companies with exposure to the Deepwater Horizon oil rig are, according to reports, insured for losses totaling $ 1.4 billion to $ 3.5 billion. Litigation, D&O liability and workers compensation losses may bring the total insured loss in the range of $ 4 to 6 billion. But, likely limits on lawsuits via the $ 20 billion fund could reduce chances for large liability awards. Moreover, the risks are also well-syndicated, with the insured loss spreading across a broad range of insurers and reinsurers on a global scale. The operating group for Deepwater Horizon is a joint venture led by BP. Since BP Plc., which owns 65% of the Deepwater Horizon consortium, self-insures, a large portion of the losses will not hit the insurance industry. Lawsuits against equipment manufacturers, suppliers and sub-contractors, and business interruption claims, will likely increase the amount of the total insured losses. BP Plc. stated it will assume liability for all legitimate

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71 See *Plumer/Lathrop/Suomela* (supra n. 61) 36.

72 With a 65% interest in the *Deepwater Horizon* joint venture, *BP Plc.* says it is self-insured. *BP*'s captive (*Jupiter Insurance Ltd*) has $ 6 billion in capital, but does not purchase outside reinsurance protection. Jupiter's *per occurrence* limit on physical damage and business interruption is $ 700 million and is not expected to cover environmental clean-up costs or third party liability. *BP Shipping* purchases $1 billion of marine liability pollution insurance through mutual insurance associations (P&I clubs), but it is unclear if this coverage will respond; see *Plumer/Lathrop/Suomela* (supra n. 61) 34–35.

73 With a 25% interest in the *Deepwater Horizon* joint venture, *Andarko Petroleum Corp.* is believed to have a $100 million owner's extra expense policy (covering re-drilling, re-gaining control of well, etc.); see *Plumer/Lathrop/Suomela* (supra n. 61) 34–35.

74 With a 10% interest in the *Deepwater Horizon* joint venture, *Mitsui Oil Exploration Co.* is believed to have a $ 45 million owner's extra expense policy; see *Plumer/Lathrop/Suomela* (supra n. 61) 34–35.

75 *Transocean Ltd.*, the drilling contractor is believed to have $560 million of physical damage insurance, which is highly syndicated. Insurers have already paid out over $400 million to-date under this coverage. In addition, *Transocean Ltd.* carries some $ 950 million in third party liability insurance; see *Plumer/Lathrop/Suomela* (supra n. 61) 34–35.

76 The manufacturer of the blowout preventer that failed on the rig has a $ 500 million liability insurance policy; see *Plumer/Lathrop/Suomela* (supra n. 61) 34–35.

77 The service provider to *Deepwater Horizon* has liability insurance in excess of $ 1 billion; see *Plumer/Lathrop/Suomela* (supra n. 61) 34–35.

claims caused by the oil spill. Accordingly, primary liability for clean up costs will be with the BP Plc. consortium.[78]

3. Possible Types of Insurance Coverage and Claims to Arise

Several types of insurance might respond to pay for losses stemming from the oil spill, including insurance policies for: first-party property insurance coverage[79] (including "business interruption" insurance coverage,[80] loss of production income insurance coverage and "operator's extra expenses" insurance coverage[81] – occurred for the control of the well); D&O liability insurance coverage;[82] event cancellation liability insurance coverage;[83] trade disruption insurance coverage,[84] comprehensive general liability insurance coverage, physical damage insurance coverage, workers compensation insurance coverage or employers liability insurance coverage. In addition insurance may be provided for mitigation costs.[85]

The extent of property damage from the Gulf oil spill is so far unclear. First-party property policies protect a policyholder's place of operations and inventory and provide coverage for lost or damaged property. Many property insurance policies are sold on an "all risk" basis, meaning that they cover losses to real property caused by any peril not expressly excluded. Because of the breadth of coverage afforded by an "all risk" policy, once a policyholder shows that it has suffered a loss the burden of proof shifts to the insurer to show that the loss is not covered. By comparison, a second type of property insurance – a "named peril" policy – covers only those perils expressly listed. Both types of policies may contain exclusions to coverage. It is important to carefully review all aspects of a policy to determine if coverage for the specific loss is clearly excluded.[86] The likely issues to arise under first-party property insurance policies revolve around the basic elements of first-party coverage, i.e. (1) the existence of a covered

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78 On 1 June 2010, the US Attorney General said federal authorities have opened criminal and civil investigations into the spill. As of 9 August 2010, BP says that the cost of the response totals $ 6.1 billion. Former *BP* CEO Tony Hayward had insisted that other parties besides BP may be responsible for costs and liabilities arising from the oil spill and that those parties are expected to live up to their obligations. However, *Anadarko Petroleum Corp.* is accusing *BP Plc.* of gross negligence.

79 The extent of property damage from the Gulf oil spill so far is unclear; see *Kellner et al.* (supra n. 9).

80 In addition to covering property damage, many property policies also provide some or all of the coverage designed to help the policyholder recover for other losses caused by the oil spill. In order to be implicated, policies typically require damage by a covered peril to property; see *Kellner et al.* (supra n. 9).

81 See *Kellner et al.* (supra n. 9).

82 See *Kellner et al.* (supra n. 9).

83 See *Kellner et al.* (supra n. 9).

84 See *Kellner et al.* (supra n. 9).

85 E.g., companies may purchase equipment, such as booms, in an effort to protect property from contamination; see *Kellner et al.* (supra n. 9).

86 See *Kellner et al.* (supra n. 9).

property, (2) the existence of a sustained physical loss or damage, and (3) the loss having occurred as a result of a covered peril. Physical loss or damage has been defined in case law as well.

In Columbiaknit, Inc. v Affiliated FM Insurance Co.,[87] it was stated that:

> "…the requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses …intangible or incorporeal, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property."

In Trinity Industries, Inc. v Insurance Co. of North America[88] it was stated that:

> "…the language 'physical loss or damage' strongly implies that there was an initial satisfactory state that was changed by some external event into an unsatisfactory state".

The actual coating by oil can constitute contamination and can itself also constitute physical loss or damage. In the case of boats, docks, other seaside structures or dwellings that come into contact with oil from the spill, it is likely that such contamination will rise to the level of physical loss or damage if there is enough oil on the property to require its removal.[89]

"Business Interruption" insurance coverage reimburses the policyholder for the amount of gross earnings minus normal expenses (i.e. its profits) that the policyholder would have earned but for the interruption of the policyholder's business. Such coverage may be implicated, for example, for businesses in the fishing industry which are forced to cease operations due to contamination. In the context of municipalities, this coverage may be implicated if the municipality experiences a decrease in tax revenue (e.g. the city of Biloxi, Mississippi obtained reimbursement for millions of dollars of lost tax revenue when Hurricane Katrina caused casinos to shut down and Biloxi experienced an ensuing loss of tax revenue). Business interruption coverage requires that an "interruption" result from damage to covered real or personal property (e.g. policyholders, for example, have obtained reimbursement under such coverage when widespread disasters such as Hurricane Katrina and the 9/11 terrorist attacks caused business interruptions). In particular, the typical elements of a business interruption claim entail: (i) the existence of an actual loss of business income, (ii) the actual loss being due to the necessary suspension of operations, (iii) its occurrence during the period of restoration, and (iv) the suspension of operations resulting from physical loss to covered property caused by a covered cause of loss. The typical elements of a contingent business interruption claim entail: (i) the existence of business income loss or extra expense incurred due to impairment of the insured's operations, (ii) the property of the dependent business sustaining damage at the dependent business premises, and (iii) the impairment of the insured's operations being caused by

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87 *Columbiaknit, Inc. v Affiliated FM Insurance Co.*, 1999 U.S. Dist. LEXIS 11873 at 9 (D. Or. 1999).

88 *Trinity Industries, Inc. v Insurance Co. of North America,* 916 F.2d 267,270-71 (5th Cir. 1990).

89 See *Kellner et al.* (supra n. 9).

direct physical loss or damage to property of a dependent business at a dependent business premises.[90] Business interruption losses may not be as high as expected due to a number of mitigating factors, such as damage[91], pollution[92], civil action[93], or due to subrogation factors.[94]

In addition to traditional liability and business interruption insurance, specialty spill-related or other environmental cleanup coverage is available domestically, generally on a surplus or specialty market basis. Numerous off-shore international underwriting syndicates, including the London Market, will likely face large claims as well. However, many companies have been known to accept large portions of major oil-spill risk themselves through the use of large "self-insured retentions" and/or of so-called "fronting policies". In addition, captive insurance programs are often used by sophisticated policyholders to, inter alia, provide various tax benefits, direct claim-handling and potential direct access to re-insurance markets.[95]

"Extra Expense" insurance coverage provides indemnity to the policyholder for the reasonable and necessary increased costs of conducting its business operations due to property damage caused by an insured peril. In the present case, one example of such expense would be increased costs of raw materials and transportation as a result of the oil slick (e.g. a restaurant might obtain seafood from Asia or Latin America due to a lack of supply from the Gulf).[96]

"D&O" policies may provide defence and indemnity coverage for companies and their directors and officers who face claims regarding their preparation for, or response to, the crisis. For example, claims may be made against directors and officers for failure to have proper procedures and plans in place for dealing with the oil spill.[97]

"Event Cancellation" policies are designed to compensate policyholders for losses arising out of the cancellation, interruption or postponement of specified events. These policies typically specify that coverage is triggered if the cancellation, interruption or postponement is caused by factors that are beyond the

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90 See *Kellner et al.* (supra n. 9).

91 "Business Interruption" losses may not be triggered for many third parties because the coverage typically responds in the event of physical damage from a covered peril; see *Nevius*, Insurance Implications of the Gulf Oil Spill, available at <www.lexisnexis.com/Community/emergingissues/blogs/gulf_oil_spill.aspx> (accessed on 10 September 2010).

92 Usually excluded as a covered peril in admitted market policies; see *Nevius* (supra n. 91).

93 Civil authorities may limit access to an area after a disaster, forcing an industry to shut down, but losses are only covered if they arise out of a covered peril; see *Nevius* (supra n. 91).

94 Insurers may try to recover losses by suing the *BP Consortium*, if the cause was pollution, but this would imply paying losses first and then suing *BP Consortium* which could be a long, drawn out and costly litigation process; see *Nevius* (supra n. 91).

95 *Nevius* (supra n. 91).

96 See *Kellner et al.* (supra n. 9).

97 See *Kellner et al.* (supra n. 9).

policyholder's control. They typically insure a wide range of events, including concerts, sporting events, conventions, conferences, exhibitions and trade shows. These policies have provided coverage, for example, when a policyholder incurred losses arising out of the cancellation of music concerts in the aftermath of the 9/11 terrorist attacks.[98]

"Trade Disruption" policies are designed to protect against loss of earnings and extra expenses caused by disruption in the supply chain, even when there is no physical loss or damage to the policyholder's assets. This coverage was designed specifically for businesses that depend on global supply chains.[99]

BP Plc is reported to be self-insured or insured under a program issued by a captive insurance company, Jupiter Insurance Ltd., which is said to have retained its BP liabilities with no reinsurance. Anadarko Petroleum Corporation is reported to have cover for $ 178 million for expenses beyond a deductible of $ 15 million. No information is available concerning Mitsui Oil Exploration Corporation's potential cover. Transocean Ltd. reportedly has cover for the total loss of the Deepwater Horizon oil platform and wreck removal to the extent it may be required, with the reported total insured value of the platform at $ 560 million.[100]

Because the platform now lies over 5,000 feet below sea level, it is possible that only limited wreck removal may ultimately be required. However, if more substantial wreck removal were to be required, then the wreck removal costs could be quite significant. Transocean Ltd. also reportedly carries $ 950 million of third-party liability coverage beyond specified policy deductibles. The extent of Halliburton Corporation's potential cover has not been reported. Cameron International Corporation reportedly has $ 500 million. in liability insurance. It will take a full investigation to determine which of these players may have liability for the explosion, well rupture and oil spill, and perhaps even more time before we learn whether the insurance coverage reportedly carried by these companies is applicable. It is possible that some of the coverage issues may be determined under Louisiana law, which would potentially apply under the federal Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333, as the Macondo oil well lies off the coast of Louisiana. While the insurance contracts held by the players in the incident are sure to vary, many of the issues likely to be encountered will require a deep understanding of the insurance issues that have been encountered in countless other pollution claims.[101]

Claims against BP Plc. offer a unique intersection of environmental, tort, administrative, maritime and insurance law. In addition to the environmental remedies provided by OPA, it essentially insures every US citizen and business against economic loss caused by discharge of oil by a private party in US waters. Even if each claimant pursues different routes of recovery, OPA will, never-

98 See *Kellner et al.* (supra n. 9).
99 See *Kellner et al.* (supra n. 9).
100 *Kotula* (supra n. 18).
101 *Kotula* (supra n. 18).

theless, be common to all.[102] Since OPA has never been applied in a large scale disaster such as this, there is very little case law on the areas of recovery and valuation that will be at issue. The litigation in response to the Exxon Valdez disaster did not fall under OPA and the state statutes promulgated in accordance with it,[103] so we are entering relatively uncharted territory. Especially in the areas of subsistence use and economic loss without accompanying property damage, the "BP oil spill litigation" will become precedent. As OPA essentially provides insurance for all who suffer economic damage caused by a discharge of oil into US water, the amount of recovery one can achieve may likely depend upon whether the injured party seeks recovery from BP Plc., by claim or lawsuit, or from the Oil Spill Liability Trust Fund.[104]

In addition, as the likely scale of clean-up costs and third-party damages will be vast, Congressional review of clean-up and damage compensation mechanisms has been prompted, as well as Congressional review of ways to facilitate future oil spill prevention, response and recovery. A key element is the role of insurance in ensuring that costs of spills can be financed, while at the same time enabling the continued effective and responsible functioning of offshore energy exploration and production, as well as protecting related economic interests.[105] Legislative measures[106] currently seek to raise the limit of environmental liability on responsible parties from an oil spill from the current $ 75 million, in some cases abolishing the limit altogether. The offshore energy insurance market currently has a finite capacity of liability insurance, including coverage for offshore oil pollution spills in US waters, somewhere in the range of $ 1.25 to 1.5 billion. Some of the alternative risk transfer mechanisms include "reinsurance sidecars", catastrophe bonds and derivative financial instruments that securitise insurance risk. These alternative risk transfer mechanisms turn an insurance policy or reinsurance contract into a financial security that is then transferred to investors in the capital markets. These risk financing options could in theory provide the added capital needed in the insurance marketplace to cover the higher liability and associated OSFR limits.[107]

V. Coverage Disputes under Modern Environmental Coverage

There is a large body of case law developed over nearly 30 years regarding coverage for pollution claims under historical CGL policies. There is a compara-

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[102] *Merlin*, Understanding the Valuation Issues, HB Litigation Conferences: Conference "Oil in the Gulf – Litigation and Insurance Coverage", Atlanta, USA (June 2010) p. 1.

[103] See, *Tex.Nat.Res.Code Ann*. § 40.002(d) ("The legislature declares that it is the intent of this chapter to support and complement the Oil Pollution Act of 1990."), 30 *La.Rev.Stat*. § 2453(B) ("The legislature declares that it is the intent of this Chapter to support and complement the Oil Pollution Act of 1990"); see *Merlin* (supra n. 102) 1.

[104] *Merlin* (supra n. 102) 1.

[105] *King* (supra n. 21).

[106] S. 3305, H.R. 5214, H.R. 5629.

[107] *King* (supra n. 21).

tively small body of case law regarding disputes under modern environmental policies, and the issues, like the policies, tend to be more individualised. The litigated issues under modern pollution coverage have been whether the particular claim is one the specific pollution policy was intended to cover.[108]

1. What Must Happen during the Policy Period?

Because modern environmental coverage is claims-made, insurers may take the position that the relevant claim – which varies depending upon the particular coverage implicated – did not happen during the policy period. In *Alan Corp. v International Surplus Lines Ins. Co*.,[109] the insurer, ISLIC, issued a pollution liability policy covering third party claims for property damage or bodily injury arising out of a pollution incident if the pollution incident and the third party claim both occurred during the policy period. The policy covered "reasonable and necessary cleanup costs incurred by the insured in the discharge of a legal obligation validly imposed through governmental action which is initiated during the policy period." ISLIC denied coverage for Alan Corp.'s clean-up costs because, although the pollution incident occurred during the policy period, the governmental action was not initiated until after the policy period. The court upheld ISLIC's denial of coverage.[110]

2. Known Conditions

As a general principle, liability insurance does not cover a specific loss that a policyholder knows to be in existence prior to the inception of the policy ("known loss"). In the environmental insurance context, insurers issue coverage where: (i) the loss is known, but the extent of the loss is not (cost cap); or (ii) the liability causing event has already happened but the policyholder simply does not know the extent of contamination. Once a claim is made, the insurer will sometimes nonetheless contend that the policyholder knew of the contamination but failed adequately to disclose it.

D.C. Operating Co., LLC v Indian Harbor Insurance Co[111] highlights an issue likely to arise when claims are made under modern pollution coverage. In many instances, policyholders purchase pollution coverage precisely because the detection of contamination at a site suggests that there may be more as yet undetected contamination. Policyholders must examine the language of their policies closely before purchasing it to ensure that insurers have not attempted to exclude the entire risk for which the policyholder seeks coverage and will pay a premium.

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108 *Plumer/Lathrop/Suomela* (supra n. 61) 37.

109 *Alan Corp. v International Surplus Lines Ins. Co*., 823 F. Supp. 33 (D. Mass. 1993).

110 *Alan Corp. v International Surplus Lines Ins. Co.*, 823 F. Supp. 33 (D. Mass. 1993) at 39; see *Plumer/Lathrop/Suomela* (supra n. 61) 37.

111 *D.C. Operating Co., LLC v Indian Harbor Insurance Co*, Decision and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss the Complaint, No. 07-CV-0116 (S.D.N.Y. Mar. 27, 2007).

Policyholders also must be cognizant of the risk of pollution insurers conducting "post-claim underwriting", relying on statements from historical site assessments – reviewed by the insurer for the first time after a claim is made – to contend that the policyholder did not disclose important information in its application. An example of this is *John R. McKenzie Jobber, Inc. v Mid-Continent Casualty Co.*[112] Policyholders are likely to encounter similar arguments from their insurers when making claims under policies covering sites at which there has been a history of environmental investigations and even past remediation. The purpose of environmental assessment reports is to identify potential contamination that may exist at a site. Thus, such reports are likely to be fertile ground for statements that an insurer may seek to use against the policyholder after a claim is made, even if the insurer failed to review these same reports during the underwriting process.[113]

One of the few decisions that has addressed these issues in detail is *Viacom International, Inc. v Admiral Ins. Co.*,[114] which involved 47 environmental sites located in 17 states and more than 80 insurance policies issued between 1948 and 1986. In the first phase of the litigation, which focused on sites in Pennsylvania and Illinois, the insured (*Viacom*) contended that under Pennsylvania's vertical allocation rule, it was entitled to select the EIL policies to pay their full limits first. After the EIL policies were exhausted, damages would then be allocated vertically to each successive layer of CGL policies covering the same policy periods as the EIL policies. The court agreed that *Viacom* was entitled under Pennsylvania law to select the EIL policies to pay first, and then vertically exhaust successive layers of CGL coverage during the same policy periods; it held, however, that the EIL insurers were entitled to seek contribution or set-offs from the CGL insurers. As *Viacom International, Inc. v Admiral Ins. Co.*[115] illustrates, policyholders may be able to trigger current and historical CGL policies to cover the same claims. Which policies are available and to what extent will depend upon the applicable policy language, such as the "other insurance" provisions in the policies, as well as which state's allocation rules will apply. In *Viacom International, Inc. v Admiral Ins. Co.*,[116] the court interpreted a somewhat unusual "other insurance" provision in the Environmental Insurance Liability (EIL) policies which allowed the policyholder to treat the EIL coverage as either primary or supplemental to other applicable insurance.[117] Modern pollution policies often have "other insurance" provisions that attempt to limit the coverage available to the same claims or occurrences. For example, some provisions state that if the same claim or

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[112] *John R. McKenzie Jobber, Inc. v Mid-Continent Casualty Co.*, No. 07-214, 2007 U.S. Dist. LEXIS 84169 (M.D. Fla. Nov. 14, 2007).

[113] See *Plumer/Lathrop/Suomela* (supra n. 61) 37–38.

[114] *Viacom International, Inc. v Admiral Ins. Co.*, No. L-1739-99 (N.J. Super. Ct. App. Div. April 21, 2006) (reprinted in 19-9 Mealey's Poll. Liab. Rep. 21 [2006]).

[115] *Viacom International, Inc. v Admiral Ins. Co.*, No. L-1739-99 (N.J. Super. Ct. App. Div. April 21, 2006).

[116] *Viacom International, Inc. v Admiral Ins. Co.*, No. L-1739-99 (N.J. Super. Ct. App. Div. April 21, 2006).

[117] *Viacom International, Inc. v Admiral Ins. Co.*, No. L-1739-99 (N.J. Super. Ct. App. Div. April 21, 2006) at 35.

occurrence implicates more than one type of coverage, it will be subject to the highest applicable limit and the highest applicable deductible.[118] These provisions, however, will have to be reconciled with potentially conflicting "other insurance" provisions in historical CGL policies, many of which purport to make them supplemental to any other applicable insurance.[119]

3. Claims Implicating Current and Historical Policies

Pollution claims may implicate multiple types of coverage – within the same policy – and may implicate multiple policies, including both historical occurrence policies and current claims-made pollution coverage. When the same claims implicate both historical CGL policies and current claims-made pollution coverage, a number of complex allocation issues arise. How these issues will be resolved will depend upon the specific policy language in the current claims-made policy as well as the law regarding allocation in the relevant jurisdiction.[120]

Courts, or the parties in private negotiations, will resolve such instances of "duelling" policy language and determine applicable jurisdiction provisions as well as the difficult issue of allocation between the current claims-made pollution policy and historical CGL policies.[121]

4. Marine Insurance Coverage

The offshore energy insurance market provides coverage for offshore oil and gas exploration and production business operations. Because the offshore exploration business is conducted in bodies of water, the offshore energy insurance market is closely associated with the marine insurance industry. Thus, marine insurance is considered to be a component of the offshore energy insurance market. Operators of vessels, including MODUs like the Deepwater Horizon oil rig, face multiple property and liability loss exposure, for which marine insurance is used as cover. Marine insurance coverage is available for vessels and their cargoes for both property and liability risk exposure.[122]

5. Typical Offshore Energy Insurance Coverage

The main types of insurance coverage commonly used in the offshore energy insurance market that are relevant to the Deepwater Horizon incident include: (1) offshore physical damage coverage for physical damage or loss to offshore fixed platforms, pipelines and production and accommodation facilities. This coverage provides post-loss financing for any direct physical loss of or damage to fixed

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118 E.g. Zurich Z Link-Commercial General and Pollution Liability Policy, Form STF-GLP-100-C-W (08/04/08); see *Plumer/Lathrop/Suomela* (supra n. 61) 37–38.

119 See *Plumer/Lathrop/Suomela* (supra n. 61) 37–38.

120 See *Plumer/Lathrop/Suomela* (supra n. 61) 38.

121 See *Plumer/Lathrop/Suomela* (supra n. 61) 38.

122 *King* (supra n. 21) 8.

offshore drilling, production and accommodation facilities, including (i) offshore energy drilling, production and accommodation facilities; 25 (ii) pipelines; (iii) sub-sea equipment; and (iv) offshore loading. All risks are covered unless specifically excluded, but such risks are covered in OEE policies. For example, oil wells and expenses in connection with regaining control of the well after a blow-out and re-drilling are typically excluded.[123] (2) Operator's Extra Expense (OEE). This covers the costs of well blow-out and indemnifies the offshore facility operator for third-party bodily injury claims, damage to and loss of third-party property, and the cost of clean up and legal defence expenses as a result of a blow-out. OEE covers evacuation expenses, the removal of wreckage and making wells safe, and the property of others in the insured's care, custody and control. Coverage may also include the re-drilling of a well after a blow-out to the original depth and comparable condition prior to the loss, as well as the legal expenses emanating from an incident such as the sinking of a rig or an oil spill. The oil pollution incident must be sudden and accidental and the occurrence must have taken place during the period when insurance coverage is in force. Also, the incident must become known to the insured within 90 days and the insured must report the claim to the underwriter within 180 days. OEE is sold as a "Combined Single Limit of Liability" and covers actual costs or expenses incurred in regaining control of an unintended subsurface flow of oil. The operator is responsible for damage to drilling equipment as determined by the "Operating Agreement" between the operator of the rig and the drilling contractor listing the risks the operator will cover. Under these agreements the drilling contractor is typically held harmless with respect to pollution liability for underground resources and liability for damage to operator's property or injury to operator's personnel arising out of the employee/employer relationship.[124] (3) Excess Liability insurance. This coverage is purchased in layers that attach in excess of a certain $ limit. A typical operator would have many layers of excess liability that add up to a certain aggregate level of protection. Although excess liability coverage is purchased as an additional layer of coverage in excess of the OEE policy, it is subject to its own terms and conditions. Thus, whereas OEE covers pollution-related third-party bodily injury and third-party property loss or damage or loss of use on a strict liability basis, the excess liability insurance policy excludes pollution from wells. The policy generally has a limited "buy back," which requires the pollution event to be sudden, accidental and unintended and subject to strict discovery and reporting requirements. The offshore energy facility operator must purchase specific "pollution endorsements" that override the pollution exclusion provision in the excess liability policy. A point of note is that the use of pollution endorsements could have the effect of reducing overall insurance capacity for clean up of pollution from wells because the insurer is potentially liable for higher levels of third-party liability on each policy.[125] (4) Business interruption. This coverage indemnifies the insured for lost net income

[123] See *King* (supra n. 21) 10–12.
[124] See *King* (supra n. 21) 10–12.
[125] See *King* (supra n. 21) 10–12.

that would have been earned had the damage not occurred, as well as for refunding fixed expenses incurred during the period of indemnity. Contingent business insurance coverage provides payments for damages based upon income lost due to damage to upstream facilities, e.g. processing plants, trunklines and refineries, which are owned by third parties but upon which the insured's income depended. This coverage is usually written in conjunction with offshore physical damage coverage on standardised forms published by Insurance Services Office, Inc. or on other versions that resemble the ISO form. Because of the standardization in contract language, there tends to be more predictability in claim payments and, therefore, reduced potential litigation over contract interpretation. Companies filing a business interruption insurance claim must show that their business operation sustained actual direct physical loss of or damage to the insured property. Without this proof, the BI claim could be denied because, as many experts agree, the consequences of an oil spill can be far-reaching without any need for the oil itself to actually reach those affected,[126] and (5) workers compensation. This provides coverage for claims arising out of employee injuries or deaths incurred while the employees act in the line of duty.[127]

Protection and Indemnity (P&I) insurance sold by P&I clubs also provides insurance coverage with respect to third-party liability protection for owners and operators of vessels. However, P&I policies often do not offer coverage to indemnify offshore energy facilities for oil pollution damages, and supplemental pollution liability insurance must be obtained under a separate marine policy.[128]

6. Compensating Oil Pollution Victims

Hazards faced by the offshore oil and gas exploration and production industry[129] can, inter alia, cause liability for marine oil pollution. Such liability is governed by OPA and by any number of stricter statutes in individual US states. The main sources of funds for compensating victims of offshore oil pollution damages include: (1) Oil pollution compensation funds. The International Tanker Owners Pollution Federation (ITOPF), established following the 1967 *Torrey Canyon* grounding and oil spill, administers a voluntary fund that offers compensation to parties affected by oil spills. The USA is not a party to the ITOPF and oil spills that occur in the USA are covered under OPA. In the event claims for oil spill and related damages are not paid by the responsible party, the claimant may file a claim directly to the Oil Spill Liability Trust Fund (OSLTF) or file a lawsuit in court. The fund is currently authorised to provide up to $ 1 billion per oil pollution incident. If offshore energy insurance capacity is scarce or expensive, another

[126] See *King* (supra n. 21) 10–12.

[127] This provides coverage for claims arising out of employee injuries or deaths incurred while the employees act in the line of duty; see *King* (supra n. 21) 10–12.

[128] *King* (supra n. 21) 10–12.

[129] E.g. blowouts, explosions, oil spills and fires, as well as hazards associated with marine operation, such as collision, grounding and damage or loss from severe weather; see *King* (supra n. 21) 10–12.

option could be for the government to create mandatory insurance pooling arrangements to which all participants in drilling activities contribute in proportion to their involvement in drilling activities. Operators who benefit from oil and gas exploration and production would bear risk and implement stronger safety and environmental controls to reduce losses.[130] (2) Commercial insurance. The offshore oil and gas exploration and production business has the potential to affect third parties who may be physically injured or whose property may be damaged or both. The most prompt and effective compensation for pollution victims is thought to be compulsory insurance on a strict liability basis. Given the high level of risk associated with oil and gas exploration and limited insurance and reinsurance capacity for these risks, oil companies usually join together, pool their financial resources and establish a wholly owned affiliate company called a captive insurance company that is established to exclusively underwrite the risks of the parent company or group of companies in an industry or trade association.[131] (3) Federal disaster insurance and (4) tort law. Another way to compensate for damage caused by offshore oil pollution is through state tort liability, i.e. through a private lawsuit brought by an injured part against the entity proximately causing the injury. Liability insurance may be used to distribute the costs imposed under the tort or other liability system when a court determines that an entity is liable. Torts that are potentially implicated by such damage include negligence, trespass, private nuisance and perhaps strict liability for abnormally dangerous activities (breach of contract is a separate area of law; a breach of contract is not a tort). Although the compensation of an injured party pursuant to a court judgment may not reverse the environmental damage done, or even completely redress the economic harm, it can play four important roles in the mitigation of future offshore oil and gas pollution damages.[132]

VI. Potential Future Policy Considerations

In the aftermath of the Deepwater Horizon incident, one issue that Congress may wish to consider is the willingness of the global offshore energy insurance market to participate in the OSFR program. Commercial insurance companies might be concerned about the proposal to remove the liability limits under OPA and also the proposal to increase the OSFR requirement to some higher, not yet determined level. If insurers were willing to continue to participate, another question might be whether the new limit of liability is supported by the availability of insurance coverage on adequate terms and conditions in the global commercial insurance market for offshore energy facilities given: (1) the insurability of future offshore oil spill hazards; and (2) the impact of the global financial market crisis on the

[130] See *King* (supra n. 21) 12–13.
[131] See *King* (supra n. 21) 12–13.
[132] See *King* (supra n. 21) 14.

insurance market's capacity for underwriting "catastrophe" or "peak" risks, including oil spill damages.[133]

1. Potential New Liability Limits and Potential New Insurance Capacity

Congress has been called upon to reconcile two policy issues: (1) the desire to both remove the limitations of liability for operators of offshore energy facilities for economic losses caused by oil pollution damage as well as raise the criteria for demonstrating OSFR; and (2) the limited capacity of offshore energy insurance and reinsurance to cover loss of well control, costs to re-drill a blown-out well, and pollution liability facing operators of offshore energy facilities. Several congressional hearings were held to consider these issues and to determine whether offshore energy facility operators of any size will be able to obtain sufficient amounts of insurance at acceptable prices in order to demonstrate evidence of financial responsibility under new, yet to be proposed, OPA insurance requirements. Concerns have been expressed that the higher limits of liability on parties responsible for oil spills and the corresponding insurance requirement could lead to the domination of drilling activity by major oil companies if many smaller oil firms and their investors are not able or willing to expose themselves to such liability. It would appear that the energy insurance market currently has a finite amount of available insurance, including coverage for offshore oil pollution spills in US waters, which now stands in the range of $ 1.25 to 1.5 billion. The "working capacity" or the dollar amount that an insurer will typically commit to any single risk, for "control of well" (COW) risks is in the range of $ 600 to 750 million on a stand alone basis. The working capacity for Oil Spill Financial Responsibility Certification is allegedly no more than $ 200 million.[134]

2. Future Insurability of Offshore Oil Spill Perils

Large-scale disasters, such as the 9/11 terrorist attacks, Hurricane Katrina and the Deepwater Horizon oil spill, may prove instructive. As a major source of post-disaster recovery financing, commercial insurance companies have been called upon to pay for catastrophe-related losses; in some cases beyond their contractual policy obligation. For example, after the 9/11 terrorist attacks insurers faced pressure to interpret policy language liberally with respect to war risk coverage and the number of occurrences. After some negotiation between private insurers and reinsurers, legislators and other industry participants, which led to the passage of a pre-disaster risk financing scheme, i.e. the Terrorism Risk Insurance Act, insurers agreed to pay claims related to the 9/11 incident. Insurers did not charge an additional premium to cover that risk. In other notable examples, in particular after the Hurricane Katrina incident, the courts reinterpreted some water exclusion provisions in homeowners' policies, resulting in expanded coverage for water

[133] *King* (supra n. 21) 15–20.
[134] *King* (supra n. 21) 15–20.

damage. Consideration of coverage expansion, through the reinterpretation of insurance contract language by the courts, could affect the availability of insurance for offshore energy facilities going forward.[135]

3. On the Future Availability of Offshore Energy Insurance for Oil Spills

In the aftermath of the Deepwater Horizon incident, offshore energy insurance underwriters have begun to reassess their risk exposures in response to newly perceived operational risks involving blowouts, fires, explosions, lost control of wells and other non-hurricane risks. Insurance experts expect offshore energy insurance rates to increase in the short term as a result of the perception of greater potential risk exposure. Changes in the insurance market will likely not be driven by the operator's exposure to windstorm damages; rather, they will be driven by reassessments of operational risks. Coverage for drilling contractors and control-of-well expenses are the areas most likely to be targeted by underwriters for rate increases.

The proposed increase in the limit of liability required under OPA carries at least four consequences in the offshore energy insurance and reinsurance market: (1) Some insurance market experts have asserted that the global commercial insurance capacity for third-party liability insurance, "operators' extra expense" (OEE) and "excess liabilities" coverage, which is currently available to meet OSFR requirements, is approximately $ 1.5 billion. This amount is likely to be far below the OSFR associated with the new unlimited liability limits. Insurers have pointed out that the strict liability standard with direct access to the insurer serves to further limit overall industry capacity. The reason is that the insurer cannot control claims payment with contract terms and conditions. Moreover, the OEE coverage, as currently structured, provides a combined single limit for well control, well re-drilling after a blow-out, and sudden and accidental seepage and pollution clean-up. This means prioritising the single limit, for example, by first using the insurance proceeds to hire a well control expert to retake control of the well and, if necessary and funds remain, drill a new well, with the balance of the OEE insurance limits used for pollution cleanup and containment of oil spills.[136] (2) Given basic economic supply-demand principles and the fallout from what may be the largest oil spill in US history to date, most insurance market experts expect the supply of insurance coverage for the new OSFR to only be available at a high premium, if coverage is available at all. The imposition of higher strict liability limits for large-scale oil pollution could have the effect of greatly increasing the demand for liability insurance protection. This situation could multiply the challenges insurers might have in evaluating risk exposures, defining reasonable limits for the coverage and calculating insurance prices. Operators may find themselves assuming or retaining higher levels of self-insurance, which might affect the BOEMRE's offshore oil and gas lease bidding and ultimately the

[135] *King* (supra n. 21) 15–20.
[136] *King* (supra n. 21) 15–20.

royalties earned for the US Treasury. (3) If the past is an indication of the future, private commercial insurers may be reluctant to commit financial capital in underwriting unknown new risks in the post-Deepwater Horizon environment until there is greater clarity as to the legislative and legal climate. Insurers would want to collect the necessary data for evaluation of risks associated with a certain severity of loss and insurability; recalculate rates, policy terms and conditions; and set limitations. Conduct of these normal activities, at least in the short term, will be affected by the uncertainty of the losses associated with the recent Gulf of Mexico oil spill. OPA's oil spill financial responsibility rule is a pre-disaster risk financing strategy that, in the wake of the Deepwater Horizon incident, could come under intense pressure because of capital shortages in the offshore energy insurance and reinsurance market. From an insurer's perspective, one issue that may arise is the potential for future massive environmental-related, i.e. strict liability, damages which leads to the question of whether offshore oil pollution will be insurable or insurable only with government support. Given the magnitude of the losses and the uncertainty about future profitability in the energy insurance business, a "hard" energy insurance market involving scarcity of coverage and high prices may emerge following the *Deepwater Horizon* incident. Prior to this event, the third-party pollution liability market was thought to be in a "soft" phase where rates were low as a result of an oversupply in capacity.[137] (4) Many insurance market experts would likely support a more efficient pre-disaster risk financing approach to managing and financing large-scale oil spill disasters. The availability of alternative sources of insurance capacity for spreading financial risks associated with oil spills, perhaps through "reinsurance sidecars",[138] catastrophe bonds ("CAT bonds") or energy insurance financial futures and options (i.e. derivative financial instruments that securitise insurance risk, turning an insurance policy or reinsurance contract into a security), could provide the added capital needed in the insurance marketplace to cover the higher liability and associated OSFR limits.[139] A reinsurance sidecar is a limited-life reinsurance company that is established to provide property catastrophe (quota-share) reinsurance for the upper layers of an insurance contract or the worst-case-oil-spill event.[140] The option of the use of a "reinsurance sidecar" is considered optimal as by the use of a "sidecar special purpose vehicle", a ceding insurer or reinsurer can transfer oil spill risks to a newly licensed reinsurance company that assumes risk, collects premiums and pays claims losses to the ceding insurer or reinsurer via a reinsurance agreement. The sidecar issues fully collateralised debt to its investors. Reinsurers typically create sidecars by transferring policies and premiums to a special purpose reinsurer (SPR) that uses them as collateral for bonds, loans and equity. This allows the sidecar to diversify (or spread) individual reinsurers' risk among the global reinsurance marketplace. Proceeds from the security offering, as well as premium and investment income, are transferred to a collateral trust, which

[137] See *King* (supra n. 21) 15–20.
[138] See *King* (supra n. 21) 15–20.
[139] See *King* (supra n. 21) 15–20.
[140] See *King* (supra n. 21) 15–20.

invests the proceeds and disburses funds to the ceding insurer or reinsurer on behalf of the sidecar to pay claims. Funds are also disbursed to the holding company, via the sidecar, to pay interest on debt and dividends, if any, to the shareholders. Sidecar payouts are determined via the reinsurance agreement contract between the ceding company and the sidecar and are triggered by the loss experience of the ceding company. Hedge funds, private equity investors and other institutional investors provide the bulk of the funds via equity and debt financing to capitalise these unusual insurance investment vehicles. Thus, capital market investors have been able to gain access to the lucrative post-Katrina reinsurance business without having any underwriting experience. Investors agree to invest the funds for two to three years and typically earn a 20% to 30% return, or even more, on their investment. The reinsurer receives a commission. Investors receive interest and dividend payments from the collateral trust when the sidecar expires, assuming that all of the capital has not been used to meet claims.[141]

4. Potential Effects on Domestic Offshore Energy Production

The future of offshore oil and gas exploration and production in the Gulf of Mexico, an important source of energy for the US, could be affected by the imposition of higher liability limits. Some maintain that quantifying the impact of OPA's higher liability limit requires a rigorous analysis due to the many variables that affect the economics of offshore oil and gas development, such as the price/demand of oil and natural gas, rig availability, discoveries, regulatory requirements and capital availability for the Gulf of Mexico, among other things. Increasing the liability cap for oil spills may change the landscape of offshore leasing activity. Arguments have been made that if a new cap were applied retroactively, it might cause current operators who are unable or unwilling to meet the new insurance requirements to relinquish their leases. This may cause a sharp decline in shallow water production since smaller operators operate in such conditions. In the deepwater regions that are already dominated by the majors or large-scale independents, production could be affected if those lessees could not find buyers in the lease resale market after they have optimised their production. If there are no qualified buyers, the initial lease holder may relinquish the lease early. With a higher oil spill liability cap at the lease sale level, one would likely expect to have fewer bidders and less competitive lease sales, which could result in lower "bonus bids" offered for the leases according to economists at the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE). Small independent involvement in the OCS allegedly declined after the 2005 hurricane season because of the higher costs to operate in the OCS. As costs become higher and as shallow water offers fewer opportunities, small-scale independent involvement may continue to decline unless the small operators are willing and able to take equity positions in the larger and more expensive deepwater operations.[142]

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[141] See *King* (supra n. 21) 15–20.
[142] *King* (supra n. 21) 15–20.

VII. A Global Solution?

In combination with liability law, financial responsibility rules foster the internalization of social costs by polluters, by ensuring that firms possess the resources needed to compensate society for environmental costs. Two financial assurance rules govern marine oil and hazardous waste operations. There are four types of allowable mechanisms that can be used to demonstrate the existence of coverage: insurance, surety bond, self-insurance and financial guaranty. All four mechanisms exist to guarantee that liabilities can be satisfied up to the statutory coverage requirements. Insurance and surety bonds are financial commitments purchased by third parties guaranteeing payment of claims arising from the liability of the purchaser. Self-insurance allows relatively deep-pocketed companies to satisfy the coverage requirement by demonstrating sufficient financial strength. A financial guaranty or indemnity agreement allows another firm, like a parent corporation, to satisfy the coverage requirement. An important policy question is whether financial assurance for environmental liability should be made mandatory. This question is easily answered in the affirmative if we accept that the existence of political opposition to mandatory financial responsibility serves as a proof that insurance is unlikely to be provided voluntarily.[143] Financial responsibility rules are an important compliment to liability law, particularly because marine accidents can in an instant create multi-million dollar liabilities, and, thus, regulations should exist to ensure that such liabilities will in fact be internalised by a polluter.[144]

VIII. Critique – Discussion

1. Critique on the Environmental Pollution Liability Regime

The ramifications of the explosion, fire and subsequent oil spill from the well which was drilled for BP Plc. by Transocean Ltd. in the Gulf of Mexico go well beyond BP and have already led to a moratorium on drilling in the Gulf of Mexico which potentially could also slow down or even prevent exploration in other offshore areas across the world.[145] As efforts have proceeded to contain the current spill, the likely scale of clean-up costs and third party bodily injury and property damages has prompted congressional consideration of (1) environmental damage; (2) the allocation of the cost of oil pollution clean-up; (3) disaster victim compensation; and (4) future oil spill prevention, response and recovery.[146] A key element is the limit on liability for operators of offshore energy facilities and the amount of third-party liability insurance that is available from the commercial insurance market to meet operators' demand for coverage to satisfy existing

[143] *Boyd* (supra n. 21) 157–159.
[144] *Boyd* (supra n. 21) 159.
[145] *Focus Magazine* (supra n. 19).
[146] *King* (supra n. 21) Introduction, 1.

governmental requirements. Without the ability to spread risk broadly through risk diversification,[147] the United States' supply of oil and gas – as well as US government royalty payments from the sale of offshore oil and gas – could become impaired.[148] By statute, modern environmental policy has sought to control oil pollution discharge into navigable waters or upon adjoining shorelines. Federal agencies implement these statutes or laws through regulations, rules, administrative orders, memoranda and programs.[149] Major oil spills in the past[150] have influenced the development of ocean energy policy and, ultimately, prompted the enactment of OPA.[151] Although liable for all removal costs, current law limits an offshore facility's liability for economic and natural resources damages to $ 75 million per incident. Liability limits would not apply if the incident was "proximately caused by" the "gross negligence or wilful misconduct of" or "the violation of an applicable Federal safety, construction, or operating regulation"[152] for, if one of these circumstances is determined to have occurred, the liability would then be unlimited.[153] The existence of an impressive number of conventions on pollution damage has not necessarily broadened our knowledge on casual links which are necessary in this respect, although science continues to expand the factual basis of knowledge. Notwithstanding the above remark, where sufficiently plausible results are offered, and reasonable grounds for concern exist, action should be taken, be it legal, economic or otherwise. Especially in relation to the protection of the marine environment, less than full conviction with respect to causation must sometimes be sufficient to justify measures adopted as well as any other form of response – otherwise a successful reaction may come too late. However, this realization by no means entails that an adequate response to marine pollution is necessarily the full prohibition of a certain activity.[154] Preventive measures limited in time or space should also be considered, including the application of the said "precautionary" principle.[155]

Maritime affairs and activities are international by nature. So are the perils embodied in their sphere. Their international nature requires, in turn, international cooperation. This is further justified by the simple realization that there is almost

147 E.g., insurance or alternative risk transfer mechanisms such as risk securitization; see *King* (supra n. 21) Introduction, 1.

148 *King* (supra n. 21) Introduction, 1.

149 *King* (supra n. 21) Introduction, 1.

150 Including the super-tanker Torrey Canyon (1967), the Santa Barbara channel oil spill off the California shore (1969) and the Exxon Valdez oil spill in Alaska (1989); see *King* (supra n. 21) Introduction, 1.

151 OPA established a comprehensive prevention, response, liability and compensation regime to deal with oil pollution caused by vessels and offshore energy exploration and production facilities within US navigable waters (P.L. 101–380; 104 Stat. 484); see *King* (supra n. 21) Introduction.

152 33 U.S.C. § 2704(c); see *King* (supra n. 21) Introduction.

153 *King* (supra n. 21) Introduction, 1.

154 *Magnus*, Closing Remarks, in Pollution of the Sea – Prevention and Compensation, ed. by Basedow/Magnus (2007) 181.

155 *Magnus* (supra n. 154) 181–182.

no local activity that does not affect distant regions via the medium of water. Thus, due to the foresight of global implications, global rules are also required. In effect, all measures reasonably expected to effectively protect the marine environment against dangers of serious concern should be taken.[156] International law, i.e. the United Nations Convention on the Law of the Sea (LOSC), grants jurisdiction not only to the flag States but also to the port States, even when the discharge has taken place outside national boundaries. Although the international network of technical safety, control management and compensation has been greatly improved, the international regime on marine pollution nevertheless aims mainly and rather solely at compensating victims. Thus, the international liability regime should be opened up to reforms to promulgate the establishment of a well-functioning legal regime of compensation, funding solutions and liability rules.[157] In mentioning legal rules that focus on the liability of the actors involved and thereby also promoting the prevention of marine pollution, there can equally be a need to discuss the role of criminal law. However, the international framework is ambivalent. On the one hand, LOSC strengthens the jurisdiction of the port States by giving them the right to commence criminal investigations and initiate proceedings in relation to any sea discharge from a vessel, even outside their internal waters, territorial sea or exclusive economic zone. However, with the exception of the case of wilful and serious act of pollution in the territorial sea, only monetary penalties can be imposed with respect to violations by ships flying a foreign flag. Current maritime insurance practices cover monetary penalties including sanctions of a penal nature related to pollution offences. At the same time, the flag State has a broad jurisdictional mandate and is not limited to imposing financial penalties. On the side of the flag State, a political willingness to prosecute is often lacking. Moreover, port and coastal States are often encouraged to warp international law by widening the exceptions so as to be effective at punishing the persons responsible for the pollution. However, imposing criminal sanctions on individuals has proven to be rather limited and inadequate on the global level in the said context. The agenda of criminal law should steer global players towards adequate risk management and thus also to the adoption of adequate corporate liability measures. Thus, marine incidents polluting the environment have to be seen under a new perspective for what they really are i.e. social disturbances via marine pollution, inside or outside territorial waters, which under certain circumstances fall under the liability of those entities that have encouraged the incident and have typically benefited from the incident or the circumstances concerned.[158] A broad spectrum of sanctions available, such as those adopted following the Exxon Valdez incident in 1989, include settlements, compensation, restitution, fines and judicial directives restricting entrepreneurial freedom and aiming to improve sea

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156 *Magnus* (supra n. 154) 182.

157 *Heine*, Marine (Oil) Pollution: Prevention and Protection by Criminal Law – International Perspectives, Corporate And/Or Individual Criminal Liability, in Prevention and Compensation of Marine Pollution Damage: Recent Developments in Europe, China and the US, ed. by Faure/Hu (2006) 41, 54.

158 *Heine* (supra n. 157) 55.

installations and marine tanker safety. Even sharper weapons available to criminal law include judicial termination, closure of an enterprise or confiscation of property.[159]

2. Critique on the Environmental Insurance Regime

Following the explosion and sinking of the "Deepwater Horizon" in the Gulf of Mexico, we should expect to see another dynamic at work in the claims picture. On the one hand, the litigation and insurance claims arising out of the BP explosion are merely the opening scenes of a very long play. On the other hand, it is one we have all seen before.[160] When an insured is faced with a potential or actual environmental liability, it should first determine the universe of insurance potentially available to help cover the liability. Similarly, insurers receiving notice of environmental insurance claims from their policyholders should determine whether there is other insurance that may also respond to the same risk. Consideration should also be given to a company's historic insurance portfolio and the portfolio of any predecessor or affiliated companies involved in the operations or transactions giving rise to liability. Policy archaeology may be necessary to identify or locate any missing policy evidence. A party may also consider whether obtaining additional or new environmental insurance could assist in handling environmental liability. If remediation is necessary, a "cost-cap" environmental insurance policy may be a useful tool in limiting the insured's exposure to cost overruns.[161]

With regard to the global energy insurance market, the Deepwater Horizon loss is a major event, described by many even as a "market-changing" one. However, other voices contend that while energy insurers have been unsettled by the loss, capacity has not constricted and price increases are likely to be modest unless further major losses occur.[162] Although many argue that energy insurance rates for

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[159] However, the actors concerned might try to escape corporate criminal liability via the use of methods such as the so-called "one ship corporations" that can organise their own insolvency or corporate dissolution. However, even in such a case, corporate criminal liability may be useful for piercing the corporate veil; see *Heine* (supra n. 157) 56.

[160] *Maniloff*, Deepwater Horizon Oil Spill May Be Insurance Claims Gusher, available at <www.lexisnexis.com/Community/emergingissues/blogs/gulf_oil_spill.aspx> (accessed on 10 September 2010).

[161] *Anderson/Beck/Merrigan*, Understanding Environmental Insurance, in New Appleman Insurance Law Practice Guide, Vol. 4: Separate Lines of Insurance, ed. by Thomas/Martinez/Mayerson/Richmond (2010) § 42–02.

[162] As of 26 May 2010, Lloyd's estimates net claims from Deepwater Horizon loss at between $ 300 and $ 600 million, see Richard Ward, Lloyd's CEO: "These figures are our estimate of the market's total exposure… The event in the Gulf of Mexico is still developing", see Towers Watson August 2010; Marsh Energy Monitor July 2010; Willis Energy Market Review (EMR) newsletter May-June 2010; Wall Street Journal 05/25/10; Credit Suisse Research Note 05/11/10.

offshore accounts will rise and terms and conditions will tighten,[163] some analysts argue – especially in light of the existing capacity levels – that the event will not lead to a sustained hard market in offshore energy insurance.[164]

Notwithstanding the above, many firms involved in offshore activities are already reviewing their current insurance programs; they are seeking to top up their cover and are looking at terms and conditions. Furthermore, analysts predict that the purchase of business interruption coverage resulting from pollution will grow. Concerns remain that if the USA raises the liability cap under OPA for offshore facilities to $ 10 billion from $ 75 million, insurance capacity will be insufficient and more energy companies will have to self-insure. Another concern is the potential reduction in reinsurance capacity. In the wake of the loss, re-insurers' management may be starting to question the necessity of writing offshore business which could impact energy insurers at year-end renewals. However, following the Deepwater Horizon oil spill and against the backdrop of critical voices in the USA administration claiming that there is not enough insurance capacity available, Munich Re has indicated[165] that it has plans to increase the amount of insurance to be sold to oil-rig operators in the Gulf of Mexico.[166]

IX. Conclusions

Six months after the 20 April 2010 Deepwater Horizon explosion, the environment and economy of the entire northern Gulf of Mexico region remain in a state of uncertainty, with overturned livelihoods, out-of-work fishermen, reluctant tourists, widespread emotional anguish and untold damage to the sea and its shores. It could be years before the spill's true effects are understood.

There is definitely one lesson to be learned from the experience of the Deepwater Horizon loss, namely the realization that our natural capital assets and other public goods are far too valuable to be put at such high risk from private interests. We need better – and not necessarily more – regulation and strong incentives to protect these assets against actions putting them at risk. The above

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163 MarketScout CEO Richard Kerr predicts 15% to 25% rate increases for rigs operating in shallow water and up to 50% rate increases for operations further out to sea, see Towers Watson August 2010; Marsh Energy Monitor July 2010; Willis Energy Market Review (EMR) newsletter May-June 2010; Wall Street Journal 05/25/10; Credit Suisse Research Note 05/11/10.

164 Towers Watson August 2010; Marsh Energy Monitor July 2010; Willis Energy Market Review (EMR) newsletter May-June 2010; Wall Street Journal 05/25/10; Credit Suisse Research Note 05/11/10.

165 At the 2010 annual conference of reinsurers in Monte Carlo; see *Crowly*, Munich Re to Offer $20 Billion Drilling Cover After Gulf of Mexico Spill, available at <www.bloomberg.com/news/print/2010-09-12/munich-re-to-offer-20-billion-drilling-cover-after-gulf-of-mexico-spill.html> (accessed 16 September 2010).

166 The Munich-based company is planning to sell operators as much as $ 20 billion of liability cover that will pay third-party claims should a disaster occur; see *Crowly* (supra n. 165).

realizations have also been clearly reflected in recent statements of US President Barack Obama.[167]

While the demand of the US president's administration for a trust fund to compensate injured parties was rather appropriate, it nevertheless arrived only after the actual incident occurred. The US government has reopened about ninety per cent of the Gulf's federal waters to fishing, and it claims that all seafood caught in the newly opened areas is safe to eat. Yet the commercial fishing industry remains in turmoil, suffering from an acute image problem. Additionally, the US government maintains much of the oil is now gone from the Gulf of Mexico. But independent researchers say they are discovering significant amounts of crude below the sea's surface, including on the ocean floor. Meanwhile, the six months since the spill began have brought many changes to the offshore drilling industry. The federal government swiftly imposed new regulations on the business following the spill. It recently lifted a moratorium on deep water drilling in the Gulf. The danger of a future catastrophe persists as oil companies continue to drill in deep water even though many measures that could help head off future spills – better cap-and-siphon containment systems to choke off leaks, for instance, or more thorough testing and analysis to prevent blowouts – are not yet in place.

Common assets' trusts and new financial instruments like assurance bonds would be better able to shift risk incentives and prevent disasters like the Deepwater Horizon. Our entire society is taking far too many risks with public assets whose real value we are only now beginning to recognise. By shifting the financial burden of those risks onto the private interests who benefit from them, we can establish the right incentives, shift investment to less risky, more productive pursuits and create a more sustainable and desirable future.

Notwithstanding the Deepwater Horizon incident, the escape of toxic sludge from a reservoir at an aluminium processing plant in Hungary, in early October 2010, further highlights the need to better protect our natural capital assets and to establish a mechanism of secured financial response, possibly but not exclusively via shifting the financial burden of risks related to public assets onto the private interests who benefit from them.

BP Plc.'s report on the causes of the accident that led to the loss of the Deepwater Horizon rig and the biggest oil spill in American history describes a litany of mistakes. Had this sequence of errors been interrupted, catastrophe might have been averted. Some of those mistakes, the report concludes, were BP's. But,

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[167] President Barack Obama has recently stated: "For too long, for a decade or more, there has been a cozy relationship between the oil companies and the federal agency that permits them to drill. It seems as if permits were too often issued based on little more than assurances of safety from the oil companies. That cannot and will not happen anymore. To borrow an old phrase, we will trust but we will verify" (available at <www.whitehouse.gov/blog/2010/05/14/relentless-efforts-stop-leak-and-contain-damage>); and again Barack Obama stated: "If we refuse to take into account the full cost of our fossil fuel-addiction – if we don't factor in the environmental costs and national security costs and true economic costs – we will have missed our best chance to seize a clean energy future" (available at <www.whitehouse.gov/blog/2010/05/14/relentless-efforts-stop-leak-and-contain-damage>).

the report also points at Halliburton Co., which worked on the cement seal at the bottom of the well, and Transocean Ltd, which owned and ran the rig and maintained the BOP which so significantly failed to live up to its name.[168] Thus, it seems that the stakes are high. If BP Plc. is found to have been grossly negligent in its role as operator, the fines it faces would increase by billions of dollars and its chances of recouping money from its junior partners in the project, Anadarko Petroleum Corporation and Mitsui Oil Exploration Co, would be reduced. BP Plc's report implies such a finding is unlikely. But it makes a protracted, reputation-damaging series of suits and countersuits between the companies involved seem almost inevitable. Halliburton Co. has already quickly pointed to "substantial omissions and inaccuracies" in the report. Transocean Ltd., too, rejected it as self-serving and pointed to flaws in the well's design as well as to BP's management of the project.

The report of BP Plc. concludes that the most criticised well-design choice, known as a long string, was a reasonable one and did not lead to the failure. Other reports from Transocean Ltd. and the various boards of investigation may differ, as may outcomes in the courts and in Congress.[169] However, one thing is certain: private interests need to be actively involved in the allocation of the financial burden of the risks involved.

[168] The Economist, *BP and the Gulf Disaster –The Case for the Defence*, 9 September 2010, available at <www.economist.com/node/16996781> (accessed 16 September 2010).

[169] The Economist (supra n. 168).

Remedying of Environmental Damage Caused by Shipping

Peter Wetterstein

I. Introduction

This article deals with the obligation to remedy environmental damage caused by shipping. The concept of "remediation" extends further than to a mere removal of oil and other pollutants. Remediation embodies an effort to repair or replenish the environment to its previous state,[1] or if this is not feasible, to provide for so-called alternative restoration. The definition of "remedial measures" in Article 2.11 of the EU Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage[2] may serve as an example:

[1] See e.g. *de la Rue/Anderson*, Shipping and the Environment: Law and Practice (1998) 504. See also *de La Fayette*, The Concept of Environmental Damage in International Liability Regimes, in Environmental Damage in International and Comparative Law – Problems of Definition and Valuation, ed. by Bowman/Boyle (2002) 184, who speaks of three successive stages: "'preventive measures' taken before any damage has occurred, to prevent or control the release of a hazardous substance; measures for the removal or cleaning up of the hazardous substance; and measures for reinstatement or restoration of the affected environment or natural resource".

[2] The Directive entered into force on 30 April 2004 and became fully binding on 30 April 2007. Only four Member States (Italy, Lithuania, Latvia and Hungary) met the transposition deadline.

J. Basedow et al., *The Hamburg Lectures on Maritime Affairs 2009 & 2010,*
DOI 10.1007/978-3-642-27419-0_8,

> "'remedial measures' means any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services as foreseen in Annex II."[3]

The notion of "environmental damage" is more difficult to define. The international instruments and national laws dealing with liability for environmental impairment contain differing specifications of "environmental damage". Therefore, it is not possible in this article to use a specific definition.

The issues relevant for this article are dealt with in the following order: environmental liabilities for States under international public law treaties, primarily the UNCLOS,[4] are briefly mentioned in Chapter 2, followed in Chapter 3 by a presentation of and some comments on remedying obligations arising under civil liability conventions. In Chapter 4 the Nordic laws on environmental impairment liability are mentioned, and Chapter 5 contains a presentation of the interesting remedial obligations introduced into the EU area by Directive 2004/35. The important issues concerning conflict of laws are discussed in Chapter 6 and, finally, in Chapter 7 follow some conclusions and suggestions *de lege ferenda*.

II. Environmental liabilities under Part XII of UNCLOS 1982

The UNCLOS attempts for the first time to provide a global framework for the rational exploitation and conservation of the resources in seas and oceans and the protection of the environment.[5] In order to achieve this aim the Convention contains many restrictions and limitations on the free use of the seas – especially with regard to protecting the marine environment.[6]

The general obligation concerning protection and preservation of the marine environment is written into Article 192: "States have the obligation to protect and preserve the maritime environment". More specifically, according to Article 194, States shall take *all measures* that are necessary to prevent, reduce and control pollution of the marine environment (including pollution from vessels, instal-

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3 Cf. also § 2706(d)(1) of the US OPA (Oil Pollution Act) 1990 (33 USC): "The measure of natural resource damages under section 2702(b)(2)(A) of this title is – (A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources".

4 UN Convention on the Law of the Sea, 1982.

5 For the development of international law leading to the adoption of UNCLOS, see e.g. *Birnie/Boyle/Redgwell*, International Law & the Environment (2009) 379 et seq.

6 As stated by *Birnie/Boyle/Redgwell* (supra n. 5) 383: "The articles of the 1982 UNCLOS on the marine environment represent the outcome of a process of international lawmaking which has effected a number of fundamental changes in the international law of the sea. Of these perhaps the most important here is that pollution can no longer be regarded as an implicit freedom of the seas; rather, its diligent control from all sources is a matter of comprehensive legal obligation affecting the marine environment as a whole, and not simply the interests of other states".

lations and devices).[7] In addition, States shall *co-operate* on a global basis and, as appropriate, on a regional basis, for the protection and preservation of the marine environment, taking into account *characteristic regional features* (Article 197).

Articles 204 and 206 of UNCLOS contain provisions on the monitoring of the risks or effects of pollution and the assessment of potential effects of activities, and Section 5 contains provisions on the obligation of States to adopt *international* rules and *national* legislation to prevent, reduce and control pollution of the marine environment. Regarding pollution from sea-bed activities and from vessels, reference is made to Articles 208 and 211.[8]

However, neither UNCLOS nor the *other* international treaties on preventing, reducing and controlling marine pollution (e.g., the MARPOL Convention[9] 1973/78, the OPRC Convention[10] 1990, the OSPAR Convention[11] 1992, and the Helsinki Convention[12] 1992) provide for remedying responsibilities and the allocation of liability in relation to environmental damage caused by ships. Therefore, interest turns to the civil liability conventions.

III. Remedying of environmental damage – civil liability conventions

Under the 1992 Civil Liability Convention (CLC)[13] there is *strict* liability (with some exceptions[14]) of the registered owner of a vessel,[15] constructed or adapted for the carriage of *persistent* oil[16] as bulk cargo, which causes pollution damage in a Contracting State or within its economic zone (or within an area corresponding to such a zone). In respect of a vessel capable of carrying both oil and other

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7 This duty of due diligence extends to the marine environment as a whole, including the high seas, and it covers all sources of marine pollution, including land-based and shipping/offshore activities. See more in detail *Birnie/Boyle/Redgwell* (supra n. 5) 387 et seq.

8 As regards regulation of vessel pollution, see *Birnie/Boyle/Redgwell* (supra n. 5) 400 et seq.

9 International Convention for the Prevention of Pollution from Ships. The entry into force of MARPOL has substantially reduced operational pollution from all types of vessels, see *Birnie/Boyle/Redgwell* (supra n. 5) 412 with references.

10 International Convention on Oil Pollution Preparedness, Response and Co-operation.

11 Paris Convention for the Protection of the Marine Environment.

12 Convention on the Protection of the Marine Environment of the Baltic Sea Area.

13 International Convention on Civil Liability for Oil Pollution Damage.

14 Exceptions to liability are acts of war, an exceptional and irresistible natural phenomenon, and damage caused wholly by a third party acting with intent to cause damage or by the fault or negligence of any government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function. For more details, see *Wetterstein*, Redarens miljöskadeansvar (2004) 77 et seq.

15 If the vessel is not registered, liability falls on the person who owns the vessel.

16 Persistent hydrocarbon mineral oils are, for instance, crude oil, fuel oil, heavy diesel oil and lubricating oil (Art. 1[5]). Transportation of *non-persistent* oil and other substances (gases, gasolines, kerosenes, distillates, chemicals, etc.) is thus not covered under the CLC.

cargoes (so-called combination carriers or oil/bulk/ore ships, OBOS), the Convention shall be applicable only when the vessel is carrying persistent oil as bulk cargo and to voyages following such carriage. However, the provisions shall not apply if it is shown that the vessel has no residue on board from the carriage of persistent oil in bulk.

There are similar liability provisions in the 2001 Bunker Convention.[17] However, this Convention is applicable to "any seagoing vessel and seaborne craft, of any type whatsoever",[18] and the liable person for bunker spills[19] is the "shipowner", who is defined as "the owner, including the registered owner, bare boat charterer, manager and operator of the ship".[20] Where more than one person is liable, their liability is joint and several.[21]

As regards compensable damage, there are corresponding rules in both Conventions. "Pollution damage" is defined in the CLC (Article 1.6, cf. Article 1.9 of the Bunker Convention) as follows:

> "(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, *provided that compensation for impairment of the environment* other than loss of profit from such impairment *shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken*; (my italics)
>
> (b) the costs of preventive measures and further loss or damage caused by preventive measures".[22]

In addition to personal injuries, property damage and economic losses,[23] damage to the environment *per se*, that is, the "unowned" environment (natural habitats, species of flora and fauna, air, water and soil, etc.),[24] is thus covered by the

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17 International Convention on Civil Liability for Bunker Oil Pollution Damage. The Bunker Convention expressly excludes pollution damage as defined in the CLC, "whether or not compensation is payable in respect of it under that Convention" (Art. 4[1]). The Bunker Convention thus governs mainly dry cargo vessels and vessels that transport HNS-cargo (see, *infra*).

18 Art. 1(1). The intention has been to include every type of floating craft with bunker oil on board. See *Hoftvedt*, Bunkersoljekonvensjonen: En sammenligning med sjøloven § 208, MarIus Nr. 289 (2002) 19.

19 Bunker oil is defined as "any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil" (Art. 1[5]).

20 Art. 1(3).

21 On the "shipowner's" liability, see *Wetterstein* (supra n. 14) 116.

22 The Convention applies to damage and costs caused by preventive measures, wherever they are taken, designed to prevent or mitigate such damage through pollution, which due to the incident constitutes a threat to a Contracting State or its economic zone. On preventive measures and recoverable costs, see *Wetterstein* (supra n. 14) 208 et seq.

23 The wording of the definition cited above makes it clear that loss of profit from impairment of the environment is recoverable – also when the loss is unrelated to damage to the claimant's property (pure economic loss). Consequently, in the case of a pollution incident affecting a coastline, both fishermen losing income and hoteliers, restaurateurs, and shopkeepers who obtain their income from tourists at seaside resorts are in principle able to recover – provided that they are able to prove that they have

definition – although the coverage is rather restricted. The notion of "pollution damage" addresses mainly property damage and economic losses, that is, the focus is more on the protection of individual (private) rights than of public rights.[25] Compensation for damage to the environment (other than loss of profit) is expressly limited to "costs of reasonable measures of reinstatement actually undertaken or to be undertaken".[26] In other words, compensation shall be based on *actual* costs of restoration, that is, speculative costs are not compensated. In addition, the undertaken (or planned) measures shall be *reasonable*.[27]

It should be emphasized, that the definition of "pollution damage" is insufficient in cases where restoration of the environment to its previous state is not possible or where it would appear to be unreasonably costly. The CLC (and the Bunker Convention) seems not to have accepted the idea of so-called *alternative restoration*, that is, it does not oblige the shipowner to acquire "equivalent resources and habitat"[28] when restoration of the environment is not possible (cf. "complementary" remediation under the EU Directive 2004/35, *infra*, under V.).[29] Nor does it require the shipowner to compensate for environmental values that are lost during the period of the restoration (*interim losses*, cf. "compensatory" remediation under the EU Directive 2004/35, *infra*, under V.), which can be very time-consuming.

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suffered loss of profit as a result of such contamination. On compensating pure economic loss under the CLC, see *Wetterstein* (supra n. 14) 135 et seq.

24 On this, see *Wetterstein*, A Proprietary or Possessory Interest: A Conditio Sine Qua Non for Claiming Damages for Environmental Impairment?', in Harm to the Environment – The Right to Compensation and the Assessment of Damages, ed. by Wetterstein (1997) 30 et seq. See also infra n. 59.

25 See the reference supra in n. 24.

26 The main purpose of this specification was to promote a uniform interpretation of the oil pollution damage concept. See *Wetterstein* (supra n. 14) 178.

27 On the criteria for awarding compensation, see *Wetterstein* (supra n. 14) 179 et seq.

28 Regarding these concepts and the alternative restoration, see *Sandvik*, Miljöskadeansvar (2002) 390.

29 It may be noted, however, that the IOPC (International Oil Pollution Compensation) Fund has somewhat rewritten the requirements for compensation of restoration costs: "In view of the fact that it is virtually impossible to bring a damaged site back to the same ecological state that would have existed had the oil spill not occurred, the aim of any reasonable measures of reinstatement should be to re-establish a biological community in which the organisms characteristic of that community at the time of the incident are present and are functioning normally. Reinstatement measures taken at *some distance from, but still within the general vicinity of, the damaged area may be acceptable, so long as it can be demonstrated that they would actually enhance the recovery of the damaged components of the environment* (my italics). This link between the measures and the damaged components is essential for consistency with the definition of pollution damage in the 1992 Conventions" (Fund's Claims Manual [2008] 35). This entails a minor extension in relation to the Claims Manual's text from the year 2000, but a real improvement requires a re-drafting of the pollution damage concept in the CLC.

Both the CLC and the Bunker Convention have entered into force and most EU Member States have ratified them and implemented their rules into national law.[30] However, the HNS Convention,[31] which was adopted in 1996, has not yet entered into force.[32] Like the CLC, the HNS Convention imposes *strict* liability on the registered owner of a vessel, but the latter Convention applies to "any sea-going vessel and sea-borne craft, of any type whatsoever"[33] carrying HNS substances (in the main, such substances are chemicals, oil, LNG and LPG).[34] Thus the HNS Convention covers oil transports not falling under the CLC. And as that Convention only applies to loss or damage caused by *contamination*, the HNS Convention covers also loss or damage caused by oil fires and explosions. But the latter Convention does not cover pollution damage resulting from bunker emissions.

The HNS Convention defines "damage" as including loss of life or personal injury, loss of or damage to property outside the ship carrying HNS substances, loss or damage by contamination of the environment, and the costs of preventive measures as well as further loss or damage caused by them. The definition makes it clear that claims for damage to the environment are admissible, but they are restricted, as under the CLC, to "costs of reasonable measures of reinstatement actually undertaken or to be undertaken" (Article 1.6).

The civil liability conventions mentioned above apply, in accordance with their rules on scope of application (both geographical and substantive), to environmental damage caused in the sea areas. However, as seen, the definition of "pollution damage" in the CLC and Bunker Conventions (cf. also "damage" under the HNS Convention) does not fulfil the criteria of "remediation" used in this article

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30 E.g. Finland has implemented the rules of the Conventions into Chapters 10 and 10 a of the Finnish Maritime Code (674/1994).

31 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.

32 The entry into force requirements for the HNS Convention (Art. 46) have not been met, since four specific issues have proved controversial. These were the contributing requirements for packaged HNS, identifying who should contribute to the LNG account, the failure of states to submit contributing cargo reports and defining "hazardous and noxious substances". Consequently, a Focus Group was set up by the IOPC Funds to examine the controversial issues and prepare a draft Protocol to amend the text of the original HNS Convention. The draft Protocol was refined at the meetings of the IMO (International Maritime Organization) Legal Committee, and the text was subsequently adopted by the Plenary Session of the Diplomatic Conference on 30 April 2010. The 1996 Convention and the 2010 Protocol shall, as between the parties to the Protocol, be read and interpreted as one single instrument. Regarding the Protocol, see *Shaw*, IMO Diplomatic Conference adopts HNS Protocol (30 April 2010), The Journal of International Maritime Law 2010, 76 et seq.

33 Art. 1(1).

34 The substances covered are defined by reference to existing lists of hazardous substances in IMO conventions and codes (Art. 1[5]). As these lists and codes are amended, the HNS Convention will be tacitly amended as well – with the exception of HNS cargoes carried in packaged form (these are listed in the 1996 IMDG Code), see *Shaw* (supra n. 32) 78 et seq. Currently there are more then 6,000 HNS substances.

as a starting point (see, *supra*, under I.). These Conventions have not – at least not explicitly[35] – accepted the idea of *alternative restoration* when primary restoration of the environment is not possible. Nor do they require the shipowner to compensate for environmental values that are lost during the period of the restoration (*interim losses*). But before turning to the EU Directive 2004/35, I will shortly mention the Nordic laws on environmental impairment liability, since some of these are significant for the issues covered by this article.

IV. Remedying of environmental damage – Nordic laws

In all the Nordic countries there are general laws on environmental impairment liability which to a varying degree are relevant also for persons involved in shipping activities. In general, these rules impose strict liability on the operator of an environmentally harmful activity. The *Finnish* EDCA (Environmental Damage Compensation Act 1994/737) and the *Swedish* Environmental Code (1998:808) Chapter 32,[36] cover activities performed on a "specific area"/"real property", thus excluding pollution from *moving* vessels.[37] But ships may be involved in port activities, such as loading/unloading, bunkering operations, and service, repair and maintenance causing environmental[38] damage and thereby incurring liability under these laws.

The *Norwegian* Forurensningsloven (Act of 13 March 1981 No. 6 Relating to Protection against Pollution and Relating to Waste, Chapter 8) applies to pollution[39] and waste in the external environment. The compensation rules of the Act are, however, more comprehensive than the Finnish EDCA and the Swedish Environmental Code, Chapter 32. They are not restricted to pollution from real property and, consequently, the rules are applicable also to pollution caused by

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35 But see supra n. 29.

36 While the Finnish EDCA imposes strict liability on the operator, i.e., the person who carries on the activity causing the environmental damage (§ 7), the Swedish Code lays strict liability upon the owner of real property, or of site leasehold rights, who carries on a hazardous activity or permits it to be carried on. The same liability pertains to others who carry on, or permit to be carried on, such hazardous activities and who use such a property in their business or in public service activities (§ 6).

37 For more details, see *Wetterstein* (supra n. 14) 91 and *idem*, The Liability of Salvors, in Shipwrecks in International and National Law, ed. by Rak/Wetterstein (2008) 79 et seq.

38 The "environment" is not defined in these laws, but the damage should be caused to the surroundings through pollution of air, water or land, noise, vibration or other comparable disturbance (§§ 1, 3 of Chapter 32 in the Swedish Environmental Code, cf. § 1 of the Finnish EDCA).

39 "Pollution" is defined as "1. the introduction to air, water, or into the ground of solid matter, fluid, or gas; 2. noise and vibrations; 3. light and other radiation to the extent determined by the pollution control authority; 4. temperature modification which causes or may cause damage or disamenity to the environment. Pollution also means whatever may cause previous pollution to lead to increased damage or disamenity, or which together with environmental impacts as listed in subparagraphs 1 to 4, causes or may cause damage or disamenity to the environment" (§ 6).

means of transport, for instance, vessels.[40] Since also Forurensningsloven targets the operator of an activity causing pollution damage (§ 55), strict liability under the Act may thus hit the person who bears vicarious liability under Norwegian (and also other Nordic) maritime law, that is the "redare".[41]

The *Danish* Act of 17 June 2008 on Damage to the Environment ("miljøskadeloven"; Lov om undersøgelse, forebyggelse og afhjaelpning af miljøskader) contains provisions partly implementing the EU Directive 2004/35. Consequently, the Act embraces concepts of "environmental damage", "occupational activities" and "remedial measures" essentially resembling those of the Directive.[42] The Act covers also *shipping* (and offshore) activities, and the "operator" (cf. "redare") of the ship causing environmental damage is strictly liable for the costs of preventive and remedial actions needed.[43] In Chapter V, *infra*, I will deal more in detail with the Directive 2004/35.

Regarding the topical question of *remedying of environmental damage*, the Nordic countries have implemented the "pollution damage" concept of the CLC and the Bunker Conventions into their national rules on oil pollution liability. Regarding this notion reference is made to what was said under III., *supra*. Apart from the oil pollution liability, there are no other common notions of compensable "environmental damage". The situation will, of course, slightly change when the Nordic countries ratify the HNS Convention.

The general Finnish, Swedish and Norwegian laws on environmental impairment liability mentioned above provide compensation for infringement of both private (i.e., personal injury and loss of life, property damage, and economic losses) and public rights.[44] Thus the public authorities[45] are authorized to claim *reasonable* costs[46] of restoration of the environment to its previous state from the person(s) liable (with the exception of the Swedish Environmental Code, Chapter 32[47]), but *alternative restoration* is mentioned only in the explanatory notes to the Norwegian Forurensningsloven.[48] Finally, all the Acts lack provisions on compen-

40 But the broad application is limited by special legislation and may also be restricted by contract (§ 53).

41 See *Wetterstein* (supra n. 14) 54 with references.

42 See especially §§ 5–9, 14, 22–23.

43 For more details, see Miljøskadelovens skadebegreb, Vejledning fra Miljøstyrelsen Nr. 4 (2008) 55 et seq.

44 On "public rights", see *Wetterstein* (supra n. 24) 30 et seq., 43 et seq.

45 "Public authorities" comprises both state and municipal authorities performing environmental protection.

46 The question of reasonableness is determined by reference, inter alia, to the disturbance or the risk of disturbance and the benefit of the restoration measures. On the question of reasonableness, see *Wetterstein* (supra n. 14) 193 et seq. with references.

47 The Environmental Code, Chapter 32 does not cover restoration costs for damage to the environment *per se*, but Chapter 10 of the Code contains basically public law provisions regarding the obligation to clean up and decontaminate (aftercare) polluted land and water areas. See e.g. *Darpö*, The New Contaminated Land Regime in Sweden: Features and Principles, Environmental Liability 2000, 46 et seq.

48 The possibility of claiming costs for the procurement of an *equivalent area* is mentioned in Ot prp Nr. 33 (1988–1989) 50.

sation for *interim losses* of natural resources and/or services. Hence these Acts comprise significant differences in relation to the EU Directive 2004/35. But as Members of the EU, the Nordic countries (and also Norway[49]) have implemented the Directive into national law.

V. EU Directive 2004/35

EU Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage covers environmental damage and imminent threat of such damage[50] caused by any of the occupational activities[51] listed in Annex III. These activities include, *inter alia*, the manufacture, use, storage, processing and transport of dangerous or polluting substances and goods (including waste).[52] Thus the Directive is of relevance for *shipping* activities covered by this article.[53] If there is an emission or incident causing "environmental damage", the provisions of the Directive (as implemented into EU Member State law) may be applicable.

The *operator*[54] of the activities listed in Annex III shall bear the costs for the preventive and remedial actions taken pursuant to the Directive (Article 8.1, strict liability with some exceptions[55]).[56] According to Article 8.2, the competent

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49 See infra n. 53.

50 According to Art. 2(9) "imminent threat of damage" means "a sufficient likelihood that environmental damage will occur in the near future".

51 In the Directive "occupational activity" means "any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character" (Art. 2[7]).

52 Regarding the activities listed in Annex III, see *Wetterstein*, The EU Directive 2004/35 on Environmental Liability and Its Impact on Shipping, in Sopimus, Vastuu, Velvoite – Juhlajulkaisu Ari Saarnilehto 1947 -21/11 -2007 (2007) 442 et seq.

53 Obviously, the EU Member States are obliged to implement the Directive into national law, but also Norway is bound by the Directive in accordance with its obligations under the EEA Agreement. The Directives 79/409/EEC (the Birds Directive) and 92/43/EEC (the Habitats Directive) are, however, not incorporated into the EEA Agreement. See EEA Agreement, Annex XX, at p. 4 et seq. See also St.prp. Nr. 62 (2008–2009) 2, 4.

54 In Art. 2(6) "operator" is defined as "any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity". On the writing "operates or controls", see e.g., Statens offentliga utredningar (SOU) 2006:39. Ett utvidgat miljöansvar. Delbetänkande av Miljöansvarsutredningen (2006) 103 et seq.

55 The Directive does not cover environmental damage or an imminent threat of such damage caused by an act of armed conflict, hostilities, civil war or insurrection, or caused by a natural phenomenon of exceptional, inevitable and irresistible character. Furthermore, the operator is free of liability when he can prove that the environmental damage or imminent threat of such damage "(a) was caused by a third party and occurred despite the fact that appropriate safety measures were in place; or (b) resulted

authority shall recover, *inter alia*, via security measures, the costs it has incurred.[57] Occupational activities other than those mentioned in Annex III are subject to a fault-based regime (Article 3.1 (b)).[58] However, such liability covers only damage and an imminent threat of damage to "protected species and natural habitats" (see, *infra*).

The Directive has accepted the principle of liability for damage to the environment *per se* (natural habitats, species of flora and fauna, etc.).[59] The environmental liability under the Directive is *exclusively* a liability vis-à-vis the public, that is, it aims at protecting public rights. It gives the competent authorities power to require that the preventive actions and remedial measures[60] are taken by

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from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities" (Art. 4[1] and 8[3]). There are also defences introduced via transposition, e.g., permit defence and state of the art defence (Art. 8[4]). For criticism regarding the permit defence, see *Stavang*, Two challenges for the ECJ when examining the Environmental Liability Directive, Environmental Liability 2010, 198 et seq.

56 See from the practice of the European Court of Justice (ECJ) *Raffinerie Mediterranee (ERG) SpA and others v Ministero Dello Sviluppo Economico and others (ENI Divisione Exploration and Production SpA, Intervening)* (Case C-378/08) [2010] 3 C.M.L.R. 167.

57 On the role and obligations of the authorities, see e.g. *Nesterowicz*, The application of the Environmental Liability Directive to damage caused by pollution from ships, (2007) LMCLQ 113, 115 et seq.

58 A number of Member States, e.g., Denmark, Finland, Latvia, Lithuania and Sweden, included further activities not mentioned in Annex III in the scope of strict liability. See COM(2010) 581 final (Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Under Art. 14(2) of Directive 2004/35/CE on the environmental liability with regard to the prevention and remedying of environmental damage), at p. 4.

59 The question of compensating environmental damage challenges traditional rules and concepts of tort law. Traditional liability rules are normally concerned with proprietary or other *private* (individual) rights, as opposed to *public* (collective) rights, e.g., the right to use recreational areas. The general opinion seems to have been that the goods of nature are common property (*res communis omnium*) and that nobody has individual rights to them. A country's natural spaces, resources and environment, its animal and plant species, and the biological diversity and balance of which they form a part are elements of a common, national heritage. Their protection, restoration, management, etc. are of general interest, and thus the private citizen cannot normally act as a plaintiff to recover environmental damages. Instead, public authorities have been authorized to act as plaintiffs. However, in cases of property damage with an ecological dimension, individual interests are naturally involved. Here the basic notion of damage is still property damage, but compensation for lost ecological values (infringed public rights) may also be claimed. See *Wetterstein* (supra n. 24) 30 et seq.

60 According to Recital 24 in the preamble to Directive 2004/35: "Competent authorities should be in charge of specific tasks entailing appropriate administrative discretion, namely the duty to assess the significance of the damage and to determine which remedial measures should be taken". See also Art. 11(2).

the operator[61] and, if needed, to take these measures themselves.[62] The Directive *does not* apply to cases of personal injury, damage to private property or to any economic loss and does not affect any right regarding these types of damage. Thus it does not grant private victims any right of compensation. This is a significant limitation of the Directive's scope.

The notion of *environmental damage* covers a) *damage to protected species and natural habitats*,[63] which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status[64] of such habitats or species,[65] b) *water damage*, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned,[66] and c) *land damage*, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro organisms.[67] In the Directive *damage* has been defined as "a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly" (Article 2.2).[68]

"Preventive measures" and "remedial measures" should be undertaken either by the operator or by competent authorities. The former notion is rather "traditional", that is, it comprises all measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimizing that damage.[69] The latter term of "remedial measures" is of greater interest. The definition reads:

> "'remedial measures' means any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or

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61 For the liability mechanism to be effective, there needs to be one or more identifiable polluters, the damage should be concrete and quantifiable, and a causal link should be established between the damage and the identified polluter(s). Recital 13 in the preamble to Directive 2004/35.

62 See Articles 5–6.

63 "Protected species and natural habitats" is explained in Art. 2(3). Reference is made to the Birds Directive 79/409/EEC (2009/147/EC) and the Habitats Directive 92/43/EEC.

64 For the concept of "conservation status", see Art. 2(4).

65 The significance of such adverse effects is to be assessed with reference to the baseline condition, considering the criteria set out in Annex I to the Directive. "'Baseline condition' means the condition at the time of the damage of the natural resources and services that would have existed had the environmental damage not occurred, estimated on the basis of the best information available" (Art. 2[14]).

66 With the exception of adverse effects covered by Art. 4(7) of Directive 2000/60/EC.

67 See Art. 2(1).

68 "Natural resource" means protected species and natural habitats, water, and land (Art. 2[12]) and according to Art. 2.13, "'services' and 'natural resource services' mean the functions performed by a natural resource for the benefit of another natural resource or the public". On the conceptual issue "impairment of a natural resource service", cf. *Wetterstein* (supra n. 24) 48 et seq.

69 See Art. 2(10).

> impaired services, or to provide an equivalent alternative to those resources or services as foreseen in Annex II."[70]

Remedying of environmental damage, in relation to *protected species and natural habitats* and *water*, is achieved through the restoration of the environment to its baseline condition.[71] Remediation is divided into "primary remediation", "complementary remediation" and "compensatory remediation". These concepts are defined in Annex II as follows:

> "(a) 'Primary' remediation is any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition;
>
> (b) 'Complementary' remediation is any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation *does not result in fully restoring* (my italics) the damaged natural resources and/or services;
>
> (c) 'Compensatory' remediation is any action taken to compensate for *interim losses* (my italics) of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect."

Remediation of *land* damage aims at ensuring, "as a minimum, that the relevant contaminants are removed, controlled, contained or diminished so that the contaminated land, taking account of its current use or approved future use at the time of the damage, no longer poses any significant risk of adversely affecting human health" (Annex II,2).

As can be seen from the cited definitions, the Directive aims at fully restoring/compensating damage caused to natural resources and/or services. When primary remediation does not result in fully restoring the environment, complementary remediation will be undertaken. The purpose of the latter remediation is to "provide a *similar level of natural resources and/or services, including, as appropriate, at an alternative site* (my italics), as would have been provided if the damaged site had been returned to its baseline condition".[72] Furthermore, if possible and appropriate, the alternative site should be geographically linked to the damaged site, taking into account the interests of the affected population.[73] In

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70 Art. 2(11).

71 Restoring the damaged natural resources is the best method of preserving the environment. Situations giving rise to claims for restoration might be exemplified by the discharge of toxic substances into watercourses and sea areas causing damage to fish and other wildlife. When possible, restoration can be made on the site where the resources were harmed. Restoration measures needed after such an incident might include restocking the waters with young fish, replanting new flora and cleaning the water and banks. But there are also problems involved in restoring and replacing natural resources: the determination of the baseline to which resources are to be restored, the often huge expenses involved, the time it takes for the ecosystem to resemble superficially its original condition (if at all possible), etc. See *Wetterstein* (supra n. 14) 170 et seq. with references.

72 Annex II, 1.1.2.

73 Annex II, 1.1.2. Complementary remediation can be used when the environment is so badly damaged that it cannot be restored in the particular location, or if complete restoration would take a very long period of time. As an example, if the damaged environment provides an essential ecological service, such as serving as a breeding

addition to these explicit provisions on alternative restoration, compensatory remediation shall be undertaken to compensate for the *interim loss* of natural resources and services pending recovery.[74] This compensation "consists of additional improvements to protected natural habitats and species or water at either the damaged site or at an alternative site". However, it does not provide financial compensation to members of the public.[75]

Regarding the complex issue of the identification of complementary and compensatory remedial measures,[76] I briefly mention that when determining the scale of these remedial measures, the use of *resource-to-resource equivalence approaches* shall be considered first.[77] If it is not possible to use these equivalence approaches, then *alternative valuation techniques* shall be used. The competent authority may prescribe the method, for instance, *monetary valuation*, to determine the extent of the necessary complementary and compensatory remedial measures.[78] As regards the choice of the remedial options when applying the Directive,[79] I restrict myself to references.[80]

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ground or a habitat for a species requiring protection or a resting place for migratory birds or animals, then the environmentally useful remedy would be to provide an equivalent environment nearby. This could involve the acquisition and modification of a specific area of land or sea. See *de La Fayette* (supra n. 1) 187.

74 According to Annex II, 1(d), "interim losses" means "losses which result from the fact that the damaged natural resources and/or services are not able to perform their ecological functions or provide services to other natural resources or to the public until the primary or complementary measures have taken effect". *Aiking/Brans/Ozdemiroglu*, Industrial risk and natural resources: The EU Environmental Liability Directive as a watershed?, Environmental Liability 2010, 7, mention as an example, that if a spill of chemicals results in significant damage to a number of acres of wetland and natural recovery is the most appropriate option here, then during the recovery period some wetland services will be lost or impaired.

75 Annex II, 1.1.3.

76 The Commission mentions in its report COM(2010) 581 final, at p. 5, that the competent authorities judged that the most difficult issues were the complex technical requirements linked to the *economic* evaluation of damaged natural resources/services and environmental remediation *methods*. See also infra n. 80.

77 These equivalence approaches are described in Annex II, 1.2.2 as follows: "Under these approaches, actions that provide natural resources and/or services of the *same type, quality and quantity* as those damaged shall be considered first. Where this is not possible, then alternative natural resources and/or services shall be provided. For example, a reduction in quality could be offset by an increase in the quantity of remedial measures" (my italics). For more information and details, see *Wetterstein*, Ekonomiskt ansvar enligt EG:s miljöskadedirektiv, Tidskrift utgiven av Juridiska Föreningen i Finland 2007, 468 et seq. with references, and *Aiking/Brans/Ozdemiroglu* (supra n. 74) 4 et seq.

78 Further, according to Annex II, 1.2.3, "[i]f valuation of the lost resources and/or services is practicable, but valuation of the replacement natural resources and/or services cannot be performed within a reasonable time-frame or at a reasonable cost, then the competent authority may choose remedial measures whose *cost is equivalent* to the estimated monetary value of the lost natural resources and/or services" (my italics). For more details, see reference in n. 77, *supra*. It should also be noted that to help

The EU Directive has thus approved the idea of so-called *alternative restoration* and also accepted that *interim losses* of natural resources and/or services should be compensated.[81] And as the Directive is a minimum Directive,[82] actors

implement Annex II, the EU Commission sponsored research on economic evaluation methodologies that can be used. The REMEDE project (Resource Equivalency Methods for Assessing Environmental Damage in the EU) has developed a tool-kit with methods for estimating remediation costs as well as case-studies to be used as examples. Regarding case studies, see also *Aiking/Brans/Ozdemiroglu* (supra n. 74) 7 et seq. The Commission will develop further interpretation guidance on the application of the Directive, in particular possible guidelines at EU level on its Annex II. Also Member States (e.g., the Netherlands, UK) have developed guidelines for environmental damage assessment and remediation methods.

79 It should be noted that the guidelines in Annex II have been introduced to ensure, *inter alia*, that the liable operator is not confronted with disproportionately costly remediation measures. Only reasonable remediation measures are to be taken, thereby considering, e.g., the costs of implementing the various remediation options, the likelihood of success of the various options, and the extent to which each option prevents future damage and avoids collateral damage as a result of implementing the option, see *Aiking/Brans/Ozdemiroglu* (supra n. 74) 6.

80 See Annex II, 1.3 and further *Wetterstein* (supra n. 77) 468 et seq. At a more general level it can be said that assessing damages for injury to, or destruction of, natural resources touches upon one of the most topical and major general problems of the whole environmental impairment liability question. Considerable difficulties are involved in evaluating damage to water areas etc. when it comes to the cost of restoration not yet undertaken or compensation for lost natural resources. The assessment of damages to compensate the public fully may require that a monetary value be placed on an injury that, in some respects, has no monetary value. But placing a monetary value on natural objects, including living animals, aesthetic views, and water purity, may be essential if one is to protect natural resources fully. Consequently, different economic techniques and principles have been evolved for evaluating environmental damage, and as *Cross*, Natural Resource Damage Valuation, Vanderbilt Law Review 1989, 270 et seq., notes: "… use of these economic principles can provide an essential weapon for future protection of the environment. Internalizing external environmental costs through the market can deter future ecological destruction, as well as remedy some acts of past destruction. Therefore, accurately determining the value of natural resources is important for preserving the nature. To preserve the environment effectively, valuation must be as complete and accurate as possible". For an overview of the valuation problems and methods regarding US law, see *Force*, Damages Recoverable for Injury or Destruction of Natural Resources Caused by Pollution, Benedict's Maritime Bulletin, Second Quarter 2010, 71 et seq.

81 The EU Directive appears to have been influenced by the legislation in the US, especially the Oil Pollution Act (OPA) of 1990, which arguably includes the most onerous oil spill liability and compensation provisions in the world. See further *Wetterstein* (supra n. 14) 199 et seq. with references. See also infra VII.

82 Member States may maintain or enact more stringent provisions in relation to the prevention and remedying of environmental damage (Recital 29 in the preamble to the Directive and Art. 16). And the Directive shall apply without prejudice to more stringent Community legislation regulating the operation of any of the activities falling

fulfilling the *operator*-requisite and carrying out activities covered by the Directive could be subject to extensive environmental liability.[83]

However, the EU Directive contains in Article 4.2 and Annex IV exceptions for environmental damage (or the imminent threat thereof) arising from an incident in respect of which liability or compensation falls within the scope of, *inter alia*, the 1992 CLC, the 1996 HNS Convention and the 2001 Bunker Convention. The Conventions should be in force in the Member State concerned.[84] Thus, this exception considerably restricts the effects of the Directive regarding pollution damage caused by shipping and will do it even more when the HNS Convention and its Protocol of 2010 enter into force and are implemented into national law.[85]

The survey has shown that there may be (at least) three differing obligations regarding restoration/remedying of environmental damage: 1) in accordance with the civil liability conventions, 2) under the national legislation implementing EU Directive 2004/35, and 3) according to national laws on environmental impairment liability, for instance, the Nordic laws mentioned under IV., *supra*. This is, of course, an unhappy situation for both the judiciaries of EU coastal states and the shipowners/-operators and their insurers. Better harmonization and greater legal predictability is called for.

Furthermore, as environmental damage caused by shipping activities often concerns more than one state, for instance, oil pollution affecting many states, the

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within the scope of the Directive and to Community legislation containing rules on conflicts of jurisdiction (Art. 3[2]). See also, infra n. 87.

83 However, so far the effects of the Directive seem to have been rather limited. The Commission with the support of government experts identified 16 cases treated under the Directive at the beginning of 2010 and estimates that the total number of cases across the EU may now be around 50. Some interesting findings: most cases related to damage to *water* and *land*, and only a limited number to protected species and natural habitats; in most cases *primary remediation* measures were applied immediately, whereas none of the cases reported included information about *complementary* or *compensatory* remediation; the total of known remediation costs ranged between EUR 12 000 and EUR 250 000; the duration of environmental recovery varied in the range of one week to three years; and the activities involved were almost exclusively listed in Annex III of the Directive. See COM(2010) 581 final, at p. 5.

84 The EU legislator excluded *wholly* the application of the Directive to any aspect of damage covered by these Conventions. See also *Nesterowicz* (supra n. 57) 108, 118.

85 But *all* environmental damage that may arise in connection with the operation of a vessel (outside the coverage of the CLC and Bunker Conventions) will not be covered by the HNS Convention, and fixing the borderline between that Convention and other liability in the case of, for instance, port functions, such as the loading and unloading of vessel's cargo, could be problematic. Cf. *Wetterstein* (supra n. 14) 112 et seq. Furthermore, for the HNS system to apply, the damage must be caused by HNS substances (according to Art. 1[6], "caused by the hazardous or noxious nature of the substances") which are carried as *cargo*. And there are harmful substances carried by sea which fall outside the HNS Convention (e.g., some radioactive materials and MHB goods, including coal, wood chips, and metal sulphide concentrates). Nor is the Convention applicable to warships and other public vessels used only on governmental non-commercial service (Art. 4[4]).

question of the applicable national law becomes topical. Although the aim of both the civil liability conventions and the EU Directive is to harmonize national laws,[86] there still remain differences between EU states (and Norway) as regards the implementation and application of EU law and international instruments.[87] And also other laws on environmental impairment liability differ between states.

The outcome of a matter concerning the obligation to remedy environmental damage is thus dependent on the legal norms applied by the court/authority seized with the case (and this is of importance for the choice of *forum* where the case is to be tried[88]). The question of the applicable law is determined by private international law rules in the country of the court.[89]

VI. Choice of applicable law

1. General

In cases of environmental damage many countries apply the principle of *lex loci delicti commissi*, that is, the legal norms pertaining in the country where the *event* giving rise to the damage occurred shall be applied when it comes to claims for damages. However, there have been varying interpretations/applications of this

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[86] In Recital 3 of the preamble to Directive 2004/35 it is mentioned as an objective of the Directive "to establish a common framework for the prevention and remedying of environmental damage at reasonable cost to society".

[87] As regards EU Directive 2004/35, it should ne noted that differences also result from the fact that final decision on crucial elements of the liability regime, such as the scope of the regime or the insertion of a permit and/or a state-of-the-art defence, or the decision on obligatory insurance, have been passed on to the Member States. *De Smedt*, Is Harmonisation Always Effective? The Implementation of the Environmental Liability Directive, European Energy and Environmental Law Review 2009, 2 et seq., has studied the implementation of the Directive in Member States and concludes: "It appears that the implementation of the ELD [EU Directive 2004/35] divers and ranges from a minimum implementation to a stringent environmental liability regime that significantly goes further than what is required by the Directive. The ELD did offer the opportunity to go beyond the basic provisions of the Directive.... The majority of the Member States, however, did not go beyond the minimum requirements. Indeed, the majority of the Member States does not extend the scope of the Directive, does not oblige financial guarantees and allows for a permit and/or state-of-the-art defence, without subsidiary state liability" (at p. 13). The Commission has since studied the implementation and states that "[t]he framework character of the Directive resulted in a *broad divergence* on several key implementing provisions amongst the Member States". For the details, see COM(2010) 581 final, at p. 3 et seq.

[88] In this article I will not deal with questions relating to choice of forum and the jurisdiction of courts. On these issues, see e.g., *Wetterstein* (supra n. 14) 426 et seq. with references, and *idem*, Pollution from vessels – jurisdiction and law, MarIus No. 352, 2005.

[89] *Wetterstein* (supra n. 14) 462. It should be stressed that the question of choice of law relates to the *substantive* law rules, while the *procedural* questions generally are covered by the *lex fori*.

principle.[90] Opinions have been expressed, for instance, in the Nordic countries,[91] that the person suffering damage should be able to choose between the legal rules of the country of event and the country of *effect*, according to which is more advantageous to him.[92] Now this question has been solved (for EU Member States) in the Rome II Regulation,[93] see *infra*, which also applies to vessels/ offshore installations causing environmental damage.

Regarding *oil pollution*, it is to be noted that the 1992 CLC lacks provisions on the applicable law. Such rules seem to have been unnecessary in view of the provisions on the scope of application (Articles I-II) and court jurisdiction (Article IX(1)).[94] Consequently, national law is relevant. For instance, in the Nordic countries the rules on liability for oil pollution are applied as *lex fori*.[95] Also the 2001 Bunker Convention lacks provisions on applicable law. But as the Bunker Convention entered into force on 21 November 2008, and thus after the Rome II Regulation was adopted,[96] the provisions of the Regulation apply to bunker spills.[97] And when the 1996 HNS Convention[98] and its Protocol of 2010 enter into force, the Regulation is likewise applicable.

The international rules on *limitation of liability* may also be of relevance when considering remedying obligations. The Convention on Limitation of Liability for Maritime Claims (LLMC) 1976/96[99] provides that the Convention shall apply "whenever any person referred to in article 1 seeks to limit his liability before the Court of a State Party…" (Article 15.1) and there is an explicit reference to the *lex fori* in Article 14 (concerning the constitution and distribution of a limitation

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90 See e.g., the overview in *Wetterstein*, Damage from International Disasters in the Light of Tort and Insurance law, in: General Reports – International Association for Insurance Law (1990) 35 et seq.

91 See *Wetterstein* (supra n. 14) 463 et seq. with references.

92 Application of the law of the country of event is an advantage for the tortfeasor and his insurer since he does not then need to observe rules of liability in other countries. For an injured party in another country the application of the laws of the country of damage would appear more natural since he is more familiar with that country's legal system and its rules. It is also possible that the rules of the latter country are more advantageous to him. The solution of allowing the injured party to choose between legislation in the country of event and the country of damage would promote both the preventive and the reparative function of compensation. See *Siesby*, Laerebog i international privatret – Almindelig del og formueret (1983) 184. It is another matter that considerable difficulty – and expense – may be involved in carrying out a comparative analysis needed to demonstrate which laws are more advantageous.

93 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). The Regulation was adopted on 11 July 2007 and entered into force on 20 August 2007.

94 See *Tulokas*, Öljyvahingoista: erityisesti aluksista aiheutuvien vahinkojen korvaamisen kannalta (1978) 129 et seq.

95 As regards Finland, see *Wetterstein* (supra n. 14) 465 et seq.

96 See supra n. 93.

97 Art. 28 of the Regulation.

98 The HNS Convention covers to some extent also oil transports. See Art. 1(5).

99 The Convention was adopted in 1976, but was amended by a Protocol in 1996.

fund). Furthermore, as the LLMC only covers *limitation* of liability, questions of the shipowner's environmental impairment *liability* may be governed by other rules. But the *lex loci delicti commissi*-principle mentioned above and the choice of law rules of the Rome II Regulation often lead to the application of the same national law.[100]

2. The Rome II Regulation

The Rome II Regulation on the law applicable to non-contractual obligations[101] is binding for EU Member States[102] and it has *universal* application, that is, any law designated by the Regulation (*lex causae*) shall be applied whether or not it is the law of a Member State (Article 3). But the respondent must be sued in a Member State (cf. the Brussels I Regulation[103]) – the domicile of the parties or the place where the damage occurred is irrelevant.

The general purpose of the Regulation is to unify choice of law rules for non-contractual obligations within its scope and thereby to improve the predictability of solutions regarding the applicable law. Therefore, an *autonomous* interpretation of the Regulation's rules and concepts is needed, and according to some commentators, "[s]uch interpretation will likely have regard to the Regulation's origins, objectives and scheme".[104]

Article 1.1 of the Regulation defines its scope: "[the] Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters". The limitation of the Regulation's scope to "civil and commercial matters"[105] is also emphasized by the second sentence of the said

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[100] See *Wetterstein*, Rom II-förordningen och sjöfarten, Tidskrift utgiven av Juridiska Föreningen i Finland 2010, 113 et seq., 130 et seq.

[101] See supra n. 93.

[102] With the exception of Denmark (Art. 1[4]), EU Member States must apply the Rome II Regulation to proceedings commenced after 11 January 2009, and in those proceedings, its rules apply to events giving rise to damage occurring after 20 August 2007 (Art. 31–32).

[103] Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. Given the complementarily between this Regulation and the Rome II Regulation, the universal nature of the latter is necessary for the proper functioning of the internal market as avoiding distortions of competition between Community litigants. See COM(2003) 427 final (Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ["Rome II"]), at p. 9 et seq.

[104] See *Rushworth/Scott*, Rome II: Choice of law for non-contractual obligations, 2008 LMCLQ 275.

[105] *Dickinson*, The Rome II Regulation: The Law Applicable to Non-Contractual Obligations (2008) 261, comments on the notion of "civil and commercial matters" as follows: "This reference to 'civil and commercial matters' reflects the terminology used in the Brussels I Regime and the Rome I Regulation. Given that the substantive scope of the Rome II Regulation is intended to be consistent with the Brussels I Regulation and the Rome I Regime, it cannot be doubted that an autonomous meaning must be given to this concept in accordance with the case law of the Court of Justice in relation

Article, that is, the Regulation shall not apply, in particular, "to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority" (*acta iure imperii*). Furthermore, Article 1.2 excludes a number of civil and commercial matters from the Regulation's scope.[106] These being exceptions, the exclusions have to be interpreted strictly.[107]

As regards "non-contractual obligations", the Rome II Regulation states that for the purposes of the Regulation, "damage shall cover any consequence arising out of tort/delict, unjust enrichment, negotiorum gestio or culpa in contrahendo" (Article 2.1). The Regulation applies also to non-contractual obligations that are likely to arise (Article 2.2). However, as the concept of a non-contractual obligation varies from one Member State to another, "non-contractual obligation" should be understood as an autonomous concept.[108] And since Recital 7 requires the Regulation's substantive scope and its provisions to be consistent with the Brussels I Regulation and "the instruments dealing with the law applicable to contractual obligations", the case law of the ECJ in relation to the Brussels I-regime, as well as to the Rome I Regulation, will guide the interpretation of "non-contractual obligations" in the context of the Rome II Regulation.[109]

In addition to non-contractual obligations arising from land based activities, the Rome II Regulation covers emissions and incidents in a state's *sea territory*, that is, basically its internal waters, territorial sea and the exclusive economic zone (EEZ).[110] However, the Regulation determines only the *choice* of the applicable law, whereas the content and scope of application of that law is dependent upon the coastal state's jurisdictional competence to prescribe and enforce legislation, which is restricted regarding the continental self and the EEZ.[111] On the *high seas*,

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to the Brussels I Regime, as well as any future case law concerning the Rome I Regulation …. In its case law on the Brussels Convention, the ECJ has emphasized that the concept of 'civil and commercial matters' has two aspects, focusing on (1) the parties to the action, and (2) the basis and nature of the action and the detailed rules underlying it". See further, *idem*, p. 261 et seq.

106 On the exclusions, see e.g. *Rushworth/Scott* (supra n. 104) 276.

107 COM(2003) 427 final, at p. 9.

108 Recital 11. The concept covers also obligations arising out of strict liability.

109 For more details, see *Rushworth/Scott* (supra n. 104) 299 et seq.

110 Following the enlargement with Bulgaria and Romania, joining in 2007, the 27 Member States of the EU now have a 70,000 km coastline along two oceans and four seas: the Atlantic and Arctic Oceans, the Baltic Sea, the North Sea, the Mediterranean and the Black Sea. See *Nengye/Maes*, The European Union's role in the prevention of vessel-source pollution and its internal influence, The Journal of International Maritime Law 2009, 411.

111 On the continental self and in the EEZ the UNCLOS grants the coastal state jurisdiction over activities related to the exploration and exploitation of natural resources above and on the sea-bed and in the subsoil. See UNCLOS Art. 56, 57, 76, 77. Regarding international shipping in the EEZ, the prescriptive jurisdiction of the coastal state is normally limited to "generally accepted international rules and standards established through the competent international organization" (UNCLOS Art. 211[5]). Such international rules and standards are e.g., MARPOL 73/78 and other relevant IMO conventions. See also Art. 211(6) on coastal state jurisdiction within "special areas" of the

the flag state has exclusive jurisdiction over ships flying its flag "save in exceptional cases expressly provided for in [UNCLOS]".[112] However, as this jurisdictional competence only refers to the "internal relations between the various interests involved in the maritime venture and to external relations [for instance, collisions] between vessels of the same nationality",[113] other external effects of acts committed on the high seas are problematic and often lead to the application of the *lex fori*.[114]

The general rule of the Rome II Regulation is *lex loci damni*:

> "Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur" (Article 4.1).[115]

Thus the law applicable should be determined on the basis of where the *damage occurs*, irrespective of the country or countries in which the indirect consequences could occur.[116] Accordingly, in cases of personal injury or property damage, the country in which the damage occurs should be the country where the injury was

EEZ. For more details on these issues, see *Ringbom*, The EU Maritime Safety Policy and International Law (2008) 389 et seq. with references. Thus where, e.g., a foreign vessel collides with solid installations such as windmills or drilling rigs on the coastal state's EEZ, the *lex loci damni* applies in accordance with the Rome II Regulation. And as the CLC, Bunker and HNS Conventions apply to pollution damage caused in the EEZ, the Rome II Regulation will be applicable also to such damage, see, *infra*.

112 UNCLOS Art. 92(1). On these exceptions, see *Ringbom*, The EU's Exercise of Port and Coastal State Jurisdiction, Scandinavian Institute of Maritime Law Yearbook 2006, 206 et seq.

113 *Basedow*, Rome II at Sea – General Aspects of Maritime Torts, Rabels Zeitschrift für ausländishes und internationales Privatrecht 2010, 136.

114 As the effects strike the high seas, and are thus outside any sphere of sovereignty, there is no effective private law to apply. I can mainly agree with *Basedow* (supra n. 113), when he states, at p. 135: "In the cases under review, that place [the place where the damage occurred] is located in *mare liberum* or *terra nullius*, which has two consequences: First, there is no forum delicti under Art. 5 no. 3 of the Brussels Convention or the Brussels I Regulation, and the competent court will usually be the one of general jurisdiction under Art. 2 or the court of the country where the vessel was arrested. Second, if that conclusion is drawn for jurisdiction under Art. 5 no. 3 Brussels I, it should equally be drawn in respect of the applicable law".

115 The scope of the applicable law is written into Art. 15. On this, see e.g. *Dickinson* (supra n. 105) 568 et seq., and *Rushworth/Scott* (supra n. 104) 294.

116 In COM(2003) 427 final, at p. 11 is stated: "The place or places where indirect damage, if any, was sustained are not relevant for determining the applicable law. In the event of a traffic accident, for example, the place of the direct damage is the place where the collision occurs, irrespective of financial or non-material damage sustained in another country". Regarding the indirect consequences of the event giving rise to damage, see *Dickinson* (supra n. 105) 313 et seq., and *Rushworth/Scott* (supra n. 104) 278 et seq.

sustained or the property was damaged.[117] In most cases this means the country where the person suffering damage has his/her habitual residence. According to Recital 16 of the preamble to the Regulation, "[a] connection with the country where the direct damage occurred (lex loci damni) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability". The modern approach in tort law is to more efficiently safeguard the victim's right to compensation ("the victim's approach").[118]

There are two important exceptions to the main rule in Article 4.1. First, where the person claimed to be liable and the person sustaining damage both have their habitual residence[119] in the same country at the time when the damage occurs, the law of that country shall apply, that is, the *lex domicili communis* (Article 4.2).[120] Second, there is an "escape clause" in Article 4.3: "Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply".[121] This provision aims to bring a degree of flexibility, enabling a court to adapt the rigid main rule to an individual case so as to apply the law that reflects the "centre of gravity" of the situation. However, since the

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[117] Recital 17 in the preamble to the Regulation. Consequently, where a single incident causes damage to occur in multiple states, Art. 4.1 applies the law of each state to the damage that occurs there.

[118] See *Wetterstein* (supra n. 90) 8, 71, and *idem* (supra n. 14) 8 et seq.

[119] Regarding "habitual residence", see Art. 23 of the Rome II Regulation, and *Dickinson* (supra n. 105) 140 et seq.

[120] According to COM(2003) 427 final, at p. 12, "[t]his is the solution adopted by virtually all the Member States, either by means of a special rule or by the rule concerning connecting factors applied in the courts. It reflects the legitimate expectations of the two parties".

[121] In the paragraph is further stated that "[a] manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question". Art. 4(3) may thus have significance especially regarding "internal torts" (i.e., torts committed on board a vessel but without external effects). I can basically agree with *Basedow* (supra n. 113) 120, when he states: "The prevalence, under Art. 4 (3), of the law governing the pre-existing relationship would rather appear as the basic rule for what has here been called internal torts of the maritime venture. Since that pre-existing relationship will often be of a contractual nature, the Rome I Regulation on the law applicable to contractual obligations gains significance for non-contractual liability, too. Even where contract does not affect the law applicable to the tort, an internal tort occurring aboard a vessel is much more linked to this particular maritime venture than to the vessel's position on the high seas or in the territorial waters of any state. The maritime venture should in those instances be considered as the pre-existing factual relationship for the purposes of Art. 4 (3)". It is submitted that the same line of reasoning applies to solid installations, e.g., artificial islands and drilling rigs, on a coastal state's continental self or the EEZ, whereas in case of external effects of the tort, the *lex loci damni* or Art. 7 of the Rome II Regulation may come into play.

clause generates a degree of unpredictability regarding the applicable law, it must remain exceptional.[122]

Regarding damage caused by shipping activities, the main rule, *lex loci damni*, implies an important specification in relation to the *lex loci delicti commissi*-principle: the (substantive) law of the country in which the damage occurs is applicable irrespective of where the event giving rise to the damage occurred. It is thus not possible for the person claiming damages to choose between the law of the country of effect and the law of the country of event (with the exception of environmental damage, see, *infra*). And as the focus of this article is on environmental damage, the two exceptions to the main rule mentioned above are of minor importance.[123]

The Rome II Regulation contains also some special rules of relevance for shipping (and offshore) activities. The most important rule in the present context is the one included in Article 7: the law applicable to a non-contractual obligation arising out of *environmental damage*[124] or damage sustained by persons or property as a result of such damage shall be the *lex loci damni*, unless the person seeking compensation for damage chooses to base his/her claim on the law of the country in which the event giving rise to the damage occurred.[125] This possibility to choose the applicable law resembles the earlier mentioned (under VI.1., *supra*)

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122 COM(2003) 427 final, at p. 12.

123 A practical situation where Art. 4.2 (*lex domicili communis*) could apply is when two vessels carrying the same flag collide in another state's sea territory. As an example from Nordic court practice, see the *Irma/Mignon*-case, ND 1923, 289, decided by the Supreme Court of Norway: Norwegian law was applied to a collision between two Norwegian flagged vessels in British territorial waters. However, if such a collision would cause damage also *outside* the vessels, the law of the place of the collision (as *lex loci damni*) would apply. And in case of environmental damage, Art. 7 would be relevant.

124 See Recital 24 of the preamble to the Regulation.

125 The motive for this rule is to be found in Art. 191 of the Treaty on the Functioning of the European Union (TFEU) which embraces, inter alia, the "polluter pays" principle. In COM(2003) 427 final is stated, at p. 19 et seq.: "[the] exclusive connection to the place where the damage is sustained would also mean that a victim in a low-protection country would not enjoy the higher level of protection available in neighbouring countries. Considering the Union's more general objectives in environmental matters, the point is not only to respect the victim's legitimate interests but also to establish a legislative policy that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other torts or delicts, generally derives an economic benefit from his harmful activity. Applying exclusively the law of the place where the damage is sustained could give an operator an incentive to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighbouring country's laxer rules. This solution would be contrary to the underlying philosophy of the European substantive law of the environment and the 'polluter pays' principle". Regarding the "polluter pays" principle and shipping, reference may be made to *Wetterstein*, Complete freedom of the seas or the polluter pays for everything – how far should we go in order to protect the environment?', Environmental Liability 2009, 86 et seq.

Nordic opinions regarding the interpretation of the *lex loci delicti commissi*-principle. However, a claimant who chooses the law of the event cannot refer to the exceptions in Article 4.2-3.

According to Recital 24 of the preamble to the Regulation, "environmental damage" should be understood "as meaning adverse change in a natural resource, such as water, land, or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms". This definition covers essentially the corresponding definition in Article 2 of the EU Directive 2004/35 (*supra*, under V.). Thus Article 7 of the Rome II Regulation may be relevant also for liability under the Directive.[126] But it should be noted that the public law character of the Directive and its restriction to remedial measures claimed by the authorities might hamper the application of the Rome II Regulation as it concerns only "civil and commercial matters". I have recommended, however, referring to the objective of the Regulation as being a unifying instrument within the EU,[127] that it should be given a broad application.[128]

Finally, some comments are needed on the relationship between the Rome II Regulation and the civil liability conventions mentioned earlier (under III., *supra*). According to Article 28.1 of the Regulation, it shall not prejudice the application of international conventions to which one or more Member States are parties *at the time when the Regulation is adopted* and which lay down conflict of law rules relating to non-contractual obligations. As the 1992 CLC entered into force on 30 May 1996 and the Rome II Regulation was adopted on 11 July 2007, uncertainty may arise regarding the applicability of the Regulation to oil pollution damage covered under the Convention. But the EU is not a contracting party to the Convention and, as the Convention lacks *explicit* provisions on applicable law, I would argue that the Regulation is applicable also to oil pollution damage.[129]

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126 The Directive lacks rules on conflict of laws (Recital 10).

127 See supra n. 104.

128 See *Wetterstein* (supra n. 100) 122, 132 et seq.

129 But *Basedow* (supra n. 113) 128 submits that such an approach "is mistaken". Referring to its Art. 1(1), he states that the Rome II Regulation shall apply "in situations involving a conflict of laws". And that to the extent uniform law conventions are applicable, there is no conflict of laws, and therefore the Rome II Regulation including its Art. 28 is inapplicable. However, I would argue that the Regulation lacks a specification of the expression "in situations involving a conflict of laws" (Art. 1[1]), and therefore reference should be made to common understandings of "conflict of laws". My understanding, with reference to legal literature, is that the said expression mainly covers a "trans-boundary legal relationship" with connections to more than one legal system, *Wetterstein* (supra n. 100) 116. Furthermore, the concept of "applicable law" (*lex causae*) embraces not only the written legal norms (as when implementing international conventions into national law), but also national "sources of law" like the *travaux préparatoires*, court practice, legal literature, etc., of the chosen legal system. There should be a "loyal application" of that system. See e.g., *Jänterä-Jareborg*, Svensk domstol och utländsk rätt (1997) 47, 300 et seq. Therefore, in addition to varying implementations, there may be nationally differing interpretations and applications also of national laws based on uniform law conventions. Thus the choice of law

Namely, I am hesitant as to whether the rules on court jurisdiction and scope of application in the CLC can be interpreted as being conflict of law rules in accordance with Article 28.1 of the Regulation.[130]

Substantially, the application of the Regulation to oil pollution damage would mean that the rule in Article 7 would apply. However, as the CLC-States regularly apply *lex fori*, the amendment would not be very dramatic.[131] Furthermore, the recommended solution would harmonize with the position of the Bunker and HNS Conventions, which are covered by the Regulation. The Bunker Convention entered into force on 21 November 2008 and the HNS Convention has not yet entered into force.

Regarding limitation of liability, the *lex fori*-provisions of the LLMC mentioned above (under VI.1.) apply, but questions of environmental impairment *liability* (basis of liability, compensable damage, causation, etc.) fall under the Rome II Regulation.

VII. Concluding remarks and some suggestions *de lege ferenda*

My focus when dealing with the topic "Remedying of Environmental Damage Caused by Shipping" has been primarily on civil liability. As seen, there are differing rules on environmental liability, including remedying of environmental damage, and especially regarding the notion of "environmental damage". Most EU States have ratified the CLC and Bunker Conventions and will probably accede to the HNS Convention (and the 2010 Protocol). The "pollution damage" definition of these Conventions embraces primary restoration and may be interpreted to allow alternative restoration to a limited extent, but it does not compensate the public for "interim losses" of natural resources. In this respect the EU Directive goes further, covering also "compensatory" remediation – provided, of course, that the damage falls under the scope of the Directive. Cf. also the US OPA, *infra*.

However, to uphold a distinction between vessels covered by the Conventions and other shipping regarding restoration obligations seems untenable. Whereas the Conventions do not provide sufficient compensation for damage to the environment and do not satisfy modern environmental needs of reparation,[132] the Directive has embraced, *inter alia*, the "polluter pays"-principle[133] and is more

question remains relevant. Cf. also *Basedow* (supra n. 113) 129 regarding "filling of gaps" in uniform law conventions.

130 Cf. *Basedow* (supra n. 113) 127.

131 For the discussion see *Wetterstein* (supra n. 100) 129 et seq.

132 I can agree with *de La Fayette* (supra n. 1) 183 (and others) stating that "it appears to be unjust, to say the least, for polluters to have to pay for clean-up costs in the case of minor damage, but to pay nothing at all if the damage is so severe that the environment cannot be restored".

133 In Recital 2 of the preamble to Directive 2004/35 is stated: "The prevention and remedying of environmental damage should be implemented through the furtherance of the 'polluter pays' principle, as indicated in the Treaty and in line with the principle of sustainable development. The fundamental principle of this Directive should therefore

progressive concerning remediation of the environment than the liability Conventions. It would be useful if the various rules that call for environmental damage recovery could apply a unified definition of "environmental damage" and harmonized remedying obligations.

Consequently, specifications should be made in the texts of the Conventions. An explicit obligation should be imposed on the shipowner to effect alternative restoration, that is, to acquire "equivalent resources and habitat", when restoration of the environment is not fully possible (cf. "complementary remediation" in the EU Directive).[134] In that way also preventive aims could be achieved in the form of various environmental protection measures.[135] And even if restoration at a reasonable cost were to be possible, there should be a duty for the shipowner to compensate for the environmental values that are lost during the period of restoration (cf. "compensatory remediation" in the EU Directive). Recovery should capture the full value of the harm done to the environment,[136] including lost use values.[137]

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be that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimize the risks of environmental damage so that their exposure to financial liabilities is reduced". From the practice of the ECJ, see e.g., *Raffinerie Mediterranee (ERG) SpA and others v Ministero Dello Sviluppo Economico and others (ENI Divisione Exploration and Production SpA, intervening)* (C-378/08) [2010] 3 C.M.L.R. 167, and *Re ERG II: Raffinerie Mediterranee (ERG) SpA and others v Ministero Dello Sviluppo Economico and others (ENI Divisone Exploration and Production SpA, intervening)* (Joined Cases C-379/08 and C-380/08) [2010] 3 C.M.L.R. 220. The cases are commented on by *Fogleman*, The European Court of Justice rules on the Environmental Liability Directive, Environmental Liability 2010, 39 et seq. However, the "polluter pays" principle reaches further than the international liability conventions in protecting the marine environment, see *Wetterstein* (supra n. 125) 87 et seq. with references.

134 Cf. also *Schoenbaum*, Environmental Damages in the Common Law: An Overview, Environmental Damage in the Legal Systems of the Nordic Countries and Germany, in Environmental Damage in International and Comparative Law. Problems of Definition and Valuation, ed. by Bowman/Boyle (2002) 221 et seq.

135 Cf. *Sandvik* (supra n. 28) 401 et seq.

136 For the discussion, see Wetterstein in Bowman/Boyle (supra n. 134) at p. 234 f., 239, 241 f., and *idem* (supra n. 14) 195 et seq. Also the "polluter pays"-principle presupposes proper cost allocation, i.e., *all* costs and expenses of the damage caused should be internalized in the costs of the polluting activity (cf. production costs). This may also further preventive goals, see *idem* (supra n. 125) 87 with references. As regards prevention, reference is also made to *Stavang* (supra n. 55) 200, who emphasizes that compensable harm need to fully reflect actual harm, otherwise accident costs will not be fully internalized and the potential injurer will choose a level of precaution lower than the optimal.

137 Diminution of use valuation is based upon the reduction in the level of services the damaged resources provided to another resource or to the public (e.g., fishing) as a result of the discharge or release. It does not address any private economic damages related to the indirect economic effects on individuals, businesses, etc. See further *Wetterstein*, Environmental Impairment Liability in Admiralty: A Note on Com-

These proposed amendments would also bring the civil liability Conventions closer to the compensation system under the US Oil Pollution Act of 1990 (OPA),[138] which appears to have influenced the content of the EU Directive.[139] Such amendments would thus further efforts for international uniformity.[140]

According to the OPA, compensation to the ecosystem covers not only the costs of removal (that is, the costs of cleaning up spilled oil) but also "the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources".[141] Also "the diminution in value of those natural resources pending restoration" is recoverable.[142] In 1996 the National Oceanic and Atmospheric Administration (NOAA) promulgated regulations for the assessment of natural resource damages, that is, the Natural Resource Damage Assessment (NRDA) Regulations.[143] These Regulations, which include references to welfare economics concepts and valuation techniques, emphasize "restoration-based measures" for primary restoration[144] and for compensating interim losses of natural resources and services that occur from the date of the incident until recovery.[145] And while waiting for more detailed EU guidelines (from the EU Commission[146] or other organ), the Regulations, and also other advances made in this field in the US,[147] could to some extent[148] provide guidance regarding the

pensable Damage under US Law (1992) 168 et seq. with references, and *Sandvik*, Miljöskadestånd – några utvecklingstrender i miljöskaderätten, Juridisk Tidskrift vid Stockholms universitet (1996–97) 404 et seq.

138 Pub.L. No. 101–380, 104 Stat. 486 (codified at 33 USC §§ 2701–20, 2731–37, 2751–53, 2761). Under OPA, strict, joint and several liability is imposed up to statutory limits against any person owning, operating or demise chartering a vessel from which oil is discharged or which poses a substantial threat of discharge into navigable waters of the United States. See *Wetterstein* (supra n. 137) 76.

139 See supra n. 81.

140 Considering that one-fourth of all seaborne oil goes to the US, it would be important that the international compensation regime as far as possible resembles the OPA.

141 33 USC § 2706 (d)(1)(A): "'[N]atural resources' includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government".

142 33 USC § 2706 (d)(1)(B).

143 61 Fed.Reg. 440–510 (1996). These regulations lay out a three-stage procedure for assessing injuries resulting from oil spills and for developing and implementing plans to restore damaged resources, i.e., the "Preassessment Phase", the "Restoration Planning Phase" and the "Restoration Implementation Phase". See *de la Rue/Anderson*, Shipping and the Environment (2009) 517 et seq., and *Force* (supra n. 80) 79 et seq.

144 "Primary restoration" is "any action, including natural recovery, that returns injured natural resources and services to baseline" (15 CFR § 990.30).

145 For more details, see *Force* (supra n. 80) 80 et seq.

146 See supra n. 78.

147 See e.g. *Burlington*, Valuing Natural Resource Damages: A Transatlantic Lesson, in Environmental Liability in the EU. The 2004 Directive compared with US and Member State Law, ed. by Betlem/Brans (2006) 217 et seq. It should be noted that the US Department of the Interior has promulgated regulations similar to the NOAA rules to

complex tasks of evaluating damage to natural resources, identification of remedial measures and choice of reasonable remedial options under the EU Directive.

It may be difficult, however, to obtain the suggested specifications within the IMO. The nearly 170 states presently represented in that organization differ substantially in their view of the development of environmental liability law, not to mention their differences in political, social and economic development. The compromises achieved at the diplomatic conferences often do not satisfy countries with a more progressive view of the need to develop the environmental impairment liability systems[149] – this seems to be the main reason why the United States has remained outside the international regime for compensation of oil pollution damage.[150]

It should be noted, however, that Member States shall report to the Commission on the experience gained in the application of the EU Directive by 30 April 2013 at the latest. On that basis, the Commission shall submit a report to the European Parliament and to the Council before 30 April 2014, which shall include any appropriate proposals for amendment.[151] At least the following issues should, in my opinion, be re-examined:

1) *The exception from the Directive's scope of application granted to the civil liability conventions*. Abolishing this exception would mean that the Directive's remedying obligations apply also to environmental damage now covered by the

implement the natural resource damages provisions in CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act of 1980, amended by the Superfund Amendments and Reauthorization Act of 1986). See *Force* (supra n. 80) 76 et seq., 80 et seq.

148 A cautious approach is recommended, since some of the US valuation methods are controversial – this concerns especially the "contingent valuation" (CV) technique, which is designed to capture non-economic values and translate them into a dollar figure. See *Force* (supra n. 80) 74.

149 So far the EU has built its liability (and compensation) legislation mainly on the basis of IMO Conventions and/or Resolutions. I can agree with opinions expressed that the EU has greater chance of more detailed, effective and faster legislation being adopted than the IMO, which lacks capacity to impose rules on states. The IMO can only rely on states ratifying conventions, while the EU may impose binding rules on its Member States through its institutions. For instance, in the aftermath of the *Erika* (1999) and *Prestige* (2002) accidents, the Commission decided that the normal framework for international action on maritime safety under the auspices of the IMO fell short of what was needed to tackle the causes of such disasters effectively. Consequently, The EU has adopted a series of regulations on the prevention of vessel-source pollution, e.g., the Erika III package (Third Maritime Safety Package). See also *Nengye/Maes* (supra n. 110) 417, 422. But voices have also been raised for IMO being the proper and competent forum for amending and updating international rules and standards, see e.g., *Khee-Jin Tan*, The EU Ship-Source Pollution Directive and coastal state jurisdiction over ships, (2009) LMCLQ 485 et seq.

150 See *Wetterstein* (supra n. 137) 75 et seq.

151 Art. 18(1–2).

conventions[152] – but, of course, only within the scope of the Directive. Consequently, all private claims, such as claims for personal injury, property damage, economic loss, etc., would still be covered by the conventions. Only requests presented by competent authorities for "remedial measures" would fall under the Directive. Furthermore, these obligations would fall on the "operator" of the vessel, that is, the person who usually possesses the operative control of the maritime transport. Hence, the liability systems would better square with the "polluter pays" principle adopted in EU law. The risks connected with transports of oil and other hazardous substances ought to be better reflected in liability for other involved actors besides the shipowner, who often does not even have control over the transport.[153]

2) *The limitation of the Directive's coverage to waters that are subject to the Water Framework Directive*. As the latter Directive only extends to "coastal waters"[154] and the territorial sea as regards "damage to water", an extension of the environmental Directive's scope to fully cover[155] territorial waters and the EEZ,[156] like in the civil liability conventions, should be considered.[157] Such a widening of the coverage would enhance the protection of the sea areas and strengthen the application of the "polluter pays" principle.

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[152] The EU is not a contracting party to the civil liability conventions and these are thus to be considered as national law. In Case C-188/07 *Commune de Mesquer v Total France SA, Total International Ltd*, the ECJ states, *inter alia*, that "[c]ontrary to the arguments put forward by the Total companies at the hearing, the Community is not bound by the Liability Convention or the Fund Convention. In the first place, the Community has not acceded to those international instruments and, in the second place, it cannot be regarded as having taken the place of its Member States, if only because not all of them are parties to those conventions…" (paragraph 85). Cf. also more generally Case 812/79 *Burgoa* (Judgment of 14 October 1980), especially paragraph 9.

[153] For the discussion, see *Wetterstein* (supra n. 125) 98.

[154] In the Water Framework Directive 2000/60/EC "'Coastal water'" means "surface water on the landward side of a line, every point of which is at a distance of one nautical mile on the seaward side from the nearest point of the baseline from which the breadth of territorial waters is measured, extending where appropriate up to the outer limit of transitional waters" (Art. 2[7]).

[155] Even though the EU Directive already covers protected marine species and Natura 2000 sites in a Member State's territorial sea, EEZ and Continental Self.

[156] Taking into account the EU's obligations under UNCLOS. Cf. supra n. 111. It may be added that a further extension of remedying obligations would seem rather inappropriate, since even if pollution of the high seas can be seen as impairment of the "unowned" environment, who would be the person (authority) claiming remediation (cf. the definition supra under I.) and how should it be done? Therefore, focus should be on preventive and mitigating measures in the form of both IMO conventions (MARPOL 1973/78, SOLAS 1974 etc.) and codes (e.g., the IMDG Code), and regional and national rules, comprising, inter alia, penal sanctions. An example of this is Directive 2005/35/EC on ship-source pollution, which, according to Art. 3(1), shall apply also to discharges of polluting substances in the high seas.

[157] See infra n. 163.

3) *The rather high damage thresholds under the Directive*. The damage thresholds that trigger liability under the EU Directive are set at very high level, which is hard to establish. I have especially in mind the threshold of "significant adverse effects" regarding damage to protected species, natural habitats and water. Such a vague notion is open to differing interpretations[158] and thus hampers efforts to harmonize legislation within the EU. Furthermore, as environmental damage that is covered by the Directive is not damage to biodiversity, water or soil *in general*, an extension to more a general coverage of danger to human health and harm to the environment (especially risks to water, air, soil, and fauna and flora) ought to be discussed.[159] This would bring the Directive more in conformity with national laws, international instruments – and also other EU legislation.[160]

4) *Compulsory financial security*. There are currently no provisions for compulsory financial security in the Directive. This is being reviewed by the Commission,[161] and since mandatory requirements for insurance have been accepted both in EU law (e.g., Directive 2009/20/EC) and in the civil liability conventions, I find it highly desirable that some form of compulsory financial security is introduced also regarding the remedying obligations under Directive 2004/35.

National laws on environmental impairment liability having an impact on shipping and offshore activities should also be better harmonized – as shown, between the Nordic countries there already exist fundamental differences. In addition to the varying implementations, interpretations and applications of international and EU instruments, such differences increase the significance of conflict of law rules.

Finally, as this survey also has revealed, there is no international instrument dealing with liability for environmental damage (including remedying obligations) caused by oil rigs or other offshore installations.[162] Considering especially the *Deepwater Horizon*-accident in the Gulf of Mexico in April 2010, it is obvious that such an instrument, embracing also provisions for financial guarantees, is badly needed.[163]

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158 Cf. *Aiking/Brans/Ozdemiroglu* (supra n. 74) 5.

159 Although fourteen Member States have decided to extend the scope of the Directive to include species and habitats protected under national or regional protection schemes in all or part of their jurisdiction, see COM(2010) 581 final at p. 4, a harmonizing extension at EU-level is still needed.

160 See *Luk/Ryrie*, Legal background paper: Environmental Regulation of Oil Rigs in EU Waters and Potential Accidents, ClientEarth 2010, 11.

161 See COM(2010) 581 final, at p. 7 et seq.

162 The EU Commission counts over 1,000 offshore installations in the North-East Atlantic. Europolitics Environment No. 798 (2010) 15.

163 It should be noted that the EU Commission states that clear provisions are needed as to the responsibility for clean-up as well as the ultimate liability for any damage caused. Also of interest is that the Commission promises to propose amendments to Directive 2004/35/EC to cover environmental damage to *all waters*, and, further, that MEPs call on the Commission to explore the merits of setting up an EU-wide insurance scheme or emergency fund to cover risks. See Europolitics Environment No. 798 (2010) 15 et seq.

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J. Basedow et al., *The Hamburg Lectures on Maritime Affairs 2009 & 2010,*
DOI 10.1007/978-3-642-27419-0, © Springer-Verlag Berlin Heidelberg 2012

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At present, *Prof. Dr. Dr. h.c. Jürgen Basedow* and *Prof. Dr. Ulrich Magnus* serve as speakers of the Research School.