

Wikborg Rein's Shipping Offshore

Update

1/2010



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CLEARER WATERS BUT DANGERS STILL AHEAD

These times are not easy for anyone in the shipping and offshore industry. Some appear willing to use any trick in the book to ease their pain, whilst others mobilise all stakeholders and look to share the pain based on their exposure and the ability to contribute to solutions. One of the main lessons from 2009 is that it is not possible to impose solutions and that a successful outcome requires trust between stakeholders and a willingness to reach a common understanding of risks and opportunities. Whilst our main task has been to assess the legal realities and to assist with the management of the risks faced by our clients, we have also found that our experience of many of the projects in distress has made it possible for us to contribute to finding balanced solutions. We sense that 2010 will bring more distress for some but there will also be new opportunities for those with funding, particularly where transactions are initiated due to re-priced asset values.

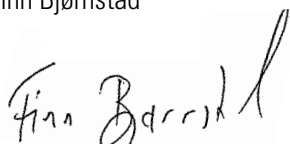


The activity in the offshore market will pick up in 2010, for example, we are already seeing Petrobras' investment plans starting to take shape. Petrobras is planning to invest more than USD170 billion through to 2013 with a total of 23 development and production projects already up and running. This is creating many interesting opportunities for our clients, some of whom are already positioning themselves to take a share in these projects. One example is BW Offshore who, together with its partners, secured in January this year a FPSO contract with the Papa Terra Joint Venture involving Petrobras and Chevron.

2010 is also going to be an exciting year for our shipping and offshore group with the addition of four new English law partners to our team and an expansion of our London office. We are moving to new premises from 1 March and our aim is to have 12 lawyers in the office by the end of 2010. The London office will be the centre for the development of our English law team. Today there are 65 lawyers in the Shipping and Offshore group and by the end of the year we expect to have 20 English qualified lawyers in the offices in Oslo, London and Singapore. Our experience is that clients turn to us first because of our in depth understanding of their business and the industries in which they operate. Given the international focus of that business we are now better positioned to add value to our clients by offering expertise in English law as an integral part of our service. We recognise that English law plays an important role in the shipping and offshore markets and the new partners that we have chosen will definitely add strength to our global team. The new partners are Simon Tatham, Clare Calnan, Rob Jardine-Brown and Chris Grieveson – they have together some 85 years of legal practice – and are already well known to many of our clients. We will during 2010 visit many of our clients to present our English law team and you may read more about this on page 7-9 of the Update.

The articles that we have chosen to include in this edition of the Update reflect the activities of our shipping and offshore group and I hope you will find these of interest. I would draw particular attention to the article concerning the grounding of the "Full City" on 31 July 2009. This is a case in which our group has been heavily involved. It was one of the first cases to be handled under the new procedures in Norway for the investigation of marine casualties. It is a matter of regret that this step forward also resulted in a traditional shipping nation such as Norway now being included in the list of those countries who are willing to engage in the criminalisation of seafarers.

Finn Bjørnstad



Head of Wikborg Rein's Shipping Offshore Group

INCREASED RISK OF CRIMINALISATION OF SEAFARERS IN NORWAY?

At the 2009 Annual Salvage & Wreck Removal Conference held in London in December the following incidents were highlighted to illustrate the increasing problem of criminalisation of seafarers: the “Hebei Spirit” in South Korea; the “Tasman Spirit” in Pakistan; the “Prestige” in Spain and the “Full City” in Norway.

DETENTION OF SEAFARERS FOLLOWING A MARINE CASUALTY	
“Prestige” -	Spain
“Tasman Spirit”	Pakistan
“Hebei Spirit”	Korea
“Full City”	Norway

Will the fact that a Certificate of Financial Responsibility for Wreck Removal costs is in place avoid the need to detain them?

New investigation system

To be included on this infamous list is unfortunate and embarrassing for a traditional seafarers’ nation of Norway’s calibre. The reasons for its inclusion most probably lie in the recent implementation of a new maritime investigation system in Norway.

Previously, maritime accidents in Norway were investigated by way of traditional maritime inquiries; in local courts with one judge and two expert assessors. The maritime inquiry conducted a general examination of the accident and its causes, and considered both safety at sea issues and the allocation of civil and criminal liability and normally, the questioning of witnesses would be lead by a maritime inspector; an experienced mariner with experience as master on merchant vessels.

From 1 July 2008, Norway implemented a new investigation system where the safety at sea aspects and the criminal investigation were separated. Following an international trend the new rules gave the Accident Investigation Board Norway (“AIBN”) the authority to investigate an accident for the purpose of identifying circumstances of importance to improve the general safety at sea. It was expressly stated that the AIBN should not distribute

criminal liability, and the responsibility of the criminal investigation was therefore transferred to the local police authority which has jurisdiction in the area where an accident occurs.

“Full City” – the first full test

In the early morning of 31 July 2009, the “Full City” started dragging anchor during bad weather and grounded near the small island S astein off Langesund; causing a substantial bunker oil spill. The “Full City” grounding is the first major maritime accident in Norwegian waters since the new investigation system entered into force.

The local police was quickly on the scene and conducted interviews with a number of crew members. Subsequently all 23 crew members were interviewed and no considerations were apparently made as to whether the various crew members had anything to add at all to the investigation or the importance of each individual’s testimony. Junior crew off duty at the time of the incident such as the mess boy, oilers and the cook were interviewed about the same issues as the senior officers; including issues completely outside their area of knowledge and competency. By comparison, the AIBN (and the representative from the flag state, Panama) only wanted to interview the Master, and the officers

and crew on duty at the relevant time.

Subsequently most crew members were also interviewed in court; presumably in order for the police to use their statements in any subsequent criminal trial. Throughout the various rounds of interviews the questions asked revealed that the police lacked relevant maritime competency and that they failed to obtain external assistance from personnel with such competency.

The police’s decision to interview all crewmembers, and re-interview a substantial number of the crew in court, meant that the crew was in fact detained in the Langesund area for a significant period of time after the casualty. The extensive detention of the crew is in violation of the IMO’s Guidelines on fair treatments of seafarers, which impose a duty on the coastal state to ensure that the crew members shall be re-embarked or repatriated without undue delay.

Virtual house arrest

While most crew members eventually were released and were repatriated to China, the Master and Third Officer (“3/O”) were, on 24 September 2009, preliminarily charged with violations of Section 152b of the Norwegian Criminal Code

1) Wikborg Rein has been assisting the owners and insurers of the “Full City”, as well as crew members not charged by the police.



PHOTO: © Kystverket

and various provisions in the Norwegian Ships Security Act. Section 152b of the Criminal Code is a general penal clause for serious environmental crime and is typically meant to cover crimes where a person takes a calculated risk which threatens the environment in order to achieve a personal gain. The provision requires minimum gross negligence and has mainly been applied in cases where the provision is breached by intent on the part of the defendant; but never in relation to a marine accident. We were therefore surprised to observe that the police relied on this penal clause in a common marine accident like dragging of anchor.

The severe maximum imprisonment sentence in Section 152b of 10 years was highlighted by the police during the lengthy process of detention where the Master and 3/O's passports and seaman's books were seized and only released after the matter had been brought twice to the Supreme Court. On 10 December 2010 the Supreme Court refused to overturn the appeal court's decision that the passports and seaman's books should be returned against bail since a continued seizure

would constitute a "disproportionate remedy". When finally they were allowed to return to China the two officers had been in virtual house arrest for four and a half months.

Interestingly, in the latest indictment dated 11 January 2010 the charge under Section 152b of the Criminal Code has been replaced by the much less severe provisions of the Environmental Act. The criminal trial is scheduled to start in April 2010.

The way forward

We sincerely hope that the unfortunate handling of the "Full City" case was caused by lack of individual and local knowledge and performance, rather than a signal of how the Norwegian police and lower courts will view criminalisation of seafarers in the years to come.

In any event, our experience with the "Full City" matter indicates that a revision is needed with regards to the criminal investigation following a maritime accident. The legal safeguards of seafarers and ship owners may be threatened if the

responsibility of a complicated maritime investigation is placed on local police authorities without the necessary competence and experience. In this respect, a proposal for instructions regarding the cooperation between the local police authorities and NMD in the event of a marine accident is currently subject to a public inquiry.

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LIMITATION OF LIABILITY CLAUSES NOT APPLICABLE FOR WILFUL BREACH OF IMPORTANT CONTRACT OBLIGATIONS

In a very recent Swedish arbitration award handled by Wikborg Rein, the tribunal decided that under Swedish law, a shipyard that consciously and deliberately disregarded its contractual obligations to meet a contractual completion date, shall not be allowed to rely on exemption of liability provisions in the contract as this would be unreasonable and contrary to Swedish law principles - as well under the laws of most other jurisdictions. The tribunal further held that lack of funds is no excuse for non performance, except when the debtor is subject to bankruptcy or similar proceedings. The buyer was granted damages for the losses caused due to the termination of the shipbuilding contracts.

Most shipbuilding contracts contain comprehensive regulations and limitations of the yard's liability for breach of contract. The regulations are often in a general form which prima facie makes such limitations applicable regardless of the nature of the breach of contract. However, under Norwegian law, as also recently confirmed under Swedish as well as under common law, a party may nevertheless be prevented from relying on limitation clauses. Limitation clauses limiting the yard's liability for breach of contract caused by own gross negligence and/or wilful misconduct will in most cases be considered to be unreasonable and not upheld by the courts.

The main principle in Norwegian law is the freedom of contract. Consequently, parties may agree the distribution of risk and liabilities, and exclude or limit liability for breach of contract. However, it has for decades been a recognized and acknowledged principle under Norwegian law that a party cannot rely on limitation of liability clauses, if important contractual obligations are breached by acts or omission amounting to gross negligence and/

or wilful misconduct by the party's own leading personnel/management.

This principle is now codified as a general rule in the Norwegian Contract Act § 36, providing that a contract may fully or partly be set aside or modified if it would be unreasonable or in conflict with good business practice to rely upon it. Similar provisions can be found in the Swedish and Danish contract acts, which generally coincide with the Norwegian provision, as the Contract Acts in Norway, Sweden and Denmark are a result of cooperation between these Scandinavian countries. Common law bases a similar result on different concepts such as repudiation and fundamental breach of contract.

The general rule applies also for professional parties, even where the parties' rights and obligations under the contract are regulated by comprehensive and well founded contract provisions, often based on agreed standard documents in accordance with relevant commercial custom. Both subjective faults of the person and the person's position within the company are viewed as important criteria when

evaluating whether or not it will be unreasonable to uphold a limitation of liability clause contained in a contract.

The principle that a party may not limit its liability for its own gross negligence and/or wilful misconduct has not been explicitly confirmed by any of the Scandinavian Supreme Courts or other decisive authorities, although legal theory for years clearly have advocated the existence of such a principle, and this has also been argued and adhered to in several Norwegian arbitration awards.

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DEVELOPMENTS IN ENGLISH LAW

The importance of English law in the shipping and offshore fields has been long recognised. It is also fair to say that this is an interesting time for English lawyers in the field of dispute resolution, as recent events have demonstrated.

With technical advancements and increased safety requirements there were many who thought that marine casualties would become more of a rarity. To some extent this is true but a combination of weather, human error and simple bad luck has meant that shipowners and their insurers continue to deal with accidents at sea. In recent years there has been an increased sensitivity of the seaborne states to marine incidents within their waters. This has led to a significant increase in political, administrative and regulatory intervention when casualties occur as was seen most recently in the case of "The Full City".

On the legal front the New Year has brought with it a new Lloyd's Panel of Arbitrators and a new Appeal Arbitrator for salvage arbitrations. The Controller of Agencies at Lloyds has appointed five new arbitrators. In a departure from the previous practice it has been decided that these arbitrators will also be permitted to act as advocates in salvage arbitrations. The new Appeal Arbitrator is Mr. Justice Nigel Teare who has been seconded to the role from the Admiralty Court. As the changes in the Lloyds Panel were in large part brought about in response to concerns expressed by arbitration users, it will be interesting to see how the new Panel operates in practice.

On the broader shipping front there have been some equally interesting developments. The number of arbitration appoint-

ments in London has increased dramatically reflecting the escalation in disputes caused by the market disruption. Disputes often bring with them opportunities to create new law as clients look to their legal advisors to find even more innovative ways to exercise legal remedies that either extricate a party from a particular problem or enable a party to effectively enforce their contractual rights.

For most lawyers, the first step when embarking on the litigation process is to seek security for the claim. An important weapon in this armoury was the attachment of electronic transfers of funds through the now infamous Rule B procedure in New York. The decision of the United States Court of Appeals for the Second Circuit in *Shipping Corporation of India -v- Jahldi Overseas Pte Ltd* put an immediate end to this type of Rule B attachment and with it the often most obvious means for a potential claimant to obtain security for its claim. The Second Circuit Appeal Court reversed previous decisions and held that electronic fund transfers routed through intermediary banks were not to be treated as property and thus not liable for attachment under the Rule B provisions. This decision is now being appealed to the Supreme Court and it remains to be seen whether that Court will endorse the view of the overworked Rule B judges in the lower Courts and uphold the Appeal Court's decision. As a result of this set back on Rule B lawyers have become increasingly imaginative in their

use of arrests and freezing injunctions in an attempt to find assets against which an award or judgment can be enforced.

Even in those cases where security cannot be found an increasing number of disputes continue to be litigated in London with both the Commercial Court judges and maritime arbitrators in London reporting a substantial increase in the number of claims being both brought and taken to a hearing. The disputes vary although a significant number continue to relate to failed deliveries under shipbuilding and offshore construction contracts and MOAs particularly on resale contracts for newbuildings. Charter commitments both long and short are also the subject of often substantial claims where the volatility of freight rates continue to play havoc with planned employment opportunities. When disputes arise close attention is often paid to contract wording which was often negotiated and agreed in very different market conditions. A reminder that the English Courts take a strict approach to the construction of contracts was delivered by the House of Lords in *Chartbrook Ltd -v- Persimmon and Others* (2009). Pre-contract negotiations are not admissible as an aid to the construction of a contract. As far as English law is concerned words are given their ordinary and natural meaning and the subjective intentions of the parties, however reasonable, are treated as only of limited assistance, if any at all. The English Courts and maritime arbitrators will follow this approach, even if this



results in an outcome which one or both parties to the contract did not intend, contemplate or foresee.

It was perhaps this rather strict approach to construction which influenced the Court of Appeal's decision in *Stocznia Gdynia SA –v- Gearbulk Holdings Ltd* in the early part of 2009 when it held that a Buyer's exercise of contractual termination rights under a shipbuilding contract did not displace any of the Buyer's rights to claim damages for the repudiation of the contract at common law. Contrary to what had long been thought, the termination of the contract by the Buyer and the demand for the repayment of the pre-paid instalments did not operate to affirm the contract, in fact quite the opposite. The Court of Appeal held that the commercial context and the contractual provisions made it clear that the obligation on the Builder to repay the instalments was intended to and did survive the termination of the contract, whether that termination occurred as the result of a contractual right or by the Buyer's acceptance of the Builder's repudiatory breach.

Looking forward to 2010 many expect the tough market conditions to continue. Along with market fluctuations and the continuing restrictions on finance ship-owners have to face up to the risk of piracy attacks in the Gulf of Aden as more ships are captured and ransom demands have to be negotiated and paid. The more recent attacks have brought with them new calls for armed guards to be placed on ships which may bring its own problems. Even once the ship is released and immediate crisis is over, further issues arise which need to be resolved including potential unsafe port claims, the payment of hire during the period of capture and the recovery of ransom payments as general average expenditure.

January 2010 also brought with it Council Directive 2005/33/EC which provides that vessels using European Community ports will no longer be permitted to burn fuel with a sulphur content greater than 0.1 percent. Many expect the implementation of this Directive to provide considerable scope for disputes between Owners and Charterers as arguments rage as to who

is bear the cost of converting vessels to comply with the requirements. Charterers will no doubt argue that this is a compliance issue and as such the costs of change fall on Owners. Owners in turn will say that whether a vessel trades at a particular port is an employment decision by Charterers and that any costs should be borne by them as part of the costs of operating the vessel.

The year ahead will certainly be an interesting one.

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WIKBORG REIN EXPANDS ENGLISH LAW CAPABILITY WITH NEW LONDON PARTNERS

Wikborg Rein has increased its global English law capability in the maritime sector with the recruitment of three new partners to its London office. Simon Tatham has joined from Bentleys, Stokes and Lowless to lead the team, while Clare Calnan and Rob Jardine-Brown have been recruited from Curtis, Davis Garrard.



Simon Tatham

Simon Tatham is a senior litigation solicitor focused on mediation, commercial litigation and arbitration in the shipping field. His particular areas of expertise include casualty management and the handling of collisions, salvage and towage, total losses, wreck removal operations, groundings, fire, pollution, cargo damage and cross-border litigation arising from such incidents. His experience includes recourse actions under charter parties, limitation of liability, insurance coverage, marine inquiries and investigations, and seafarer prosecutions.



Clare Calnan

Clare Calnan is also a senior lawyer with the benefit of many years' practice in this sector. Clare has a broad range of shipping and offshore expertise across all forms of dispute resolution. Her experience covers all aspects of ship construction, employment, operation and disposal, and she also has a particular interest in the long- and short-term sale and transportation of LNG. Clare's practice encompasses international trade, commodities, trade finance and

marine insurance. In the offshore sector, her focus is mainly on disputes relating to the construction and operation of offshore units, including FPSOs and drilling rigs.



Rob Jardine-Brown

Rob Jardine-Brown has extensive experience in the shipping and offshore sectors and in all forms of dispute resolution including mediation, commercial litigation and arbitration, with particular emphasis on disputes arising out of the construction, conversion and repair of all types of ships and offshore units.

The newly recruited partners join forces with the existing Norwegian legal team based in London led by Henrik Hagberg, a partner of Wikborg Rein who has wide experience of maritime law, international trade and marine insurance law. Hagberg says, "We are delighted to have recruited people of the quality of Simon, Clare and Rob as part of our international strategy to further strengthen the English law capability that Wikborg Rein can offer not only to Norwegian clients but also to international clients. By bringing into our London operation an English law team experienced in litigation and dispute resolution, we are responding to client demand. This

is a natural and important development of the firm's international shipping and offshore practice."

English law is the preferred choice of law for contracts in the international shipping and offshore markets. Norwegian operators, meanwhile, count among the most entrepreneurial, resilient and best-funded in Europe, indeed the world, and the success of Wikborg Rein's dedicated office in Singapore shows that those operators have spread their wings internationally. In this regard, Wikborg Rein plans to recruit further English law expertise in Singapore, as part of its expansion plans there.

Simon Tatham concludes, "Wikborg Rein has had a London office since 1987 and is a leading player. We are convinced that the time is right to develop an English law practice with London at its centre. This is a major step towards providing a truly one-stop shop to the firm's clients. That practice will integrate with the firm's English lawyers in Norway and Singapore to pool resources and know-how, and in the process provide a unique international practice."

In March, the London office of Wikborg Rein relocates into new premises near St Paul's Cathedral.

ASSIGNMENT AND NOVATION UNDER ENGLISH LAW

A party entering into a contract, may wish to include an option in that contract, or to bar the other party from having the option, to transfer its rights and/or obligations to a third party at some future point during the lifetime of such contract. Under English law, the two principal methods of achieving this are by way of "assignment" or "novation".

Assignment

The term "assignment" is interpreted rather differently under the English common law system and the civil law jurisdictions of continental Europe and frequently leads to confusion in cross-border transactions.

Under English law, only the benefit of a contract, for example the right to receive payment or profits or the benefit of goods or services, may be assigned to a third party.

Such an assignment involves party A, the so-called 'assignor' transferring some or all of its rights under a contract with party B, the 'debtor', to party C, known as the 'assignee'. It is important to note that an assignment does not work by creating a new contract between the assignee and the debtor nor does it make the assignor a party to the original contract, therefore any obligations that party A owes to party B will **not** be transferred by an assignment under English law.

A validly created assignment can be either legal or equitable.

A legal assignment requires the provisions of s. 136 of the Law of Property Act 1925 to be met, namely that the assignment must be:

- i. in writing and signed by the assignor;
- ii. absolute (i.e. unconditional); and
- iii. notified in writing to any person(s) against whom the assignor could enforce the assigned rights.

There is no requirement for the consent of the debtor to be obtained, unless this is specifically stipulated in the contract.

An assignment that fails to comply with the provisions of s. 136 is not rendered invalid, rather, it is likely to operate as an equitable assignment.

However, given the following advantages of a legal assignment over an equitable assignment, equitable assignments are rarely encountered in practice:

- a. upon receiving notice of an assignment in writing from the assignor, the debtor is obliged to transfer the benefit of any goods, services or payment obligations previously owed to the assignor to the assignee; and
- b. it permits the assignee the autonomy to pursue any claim for its right(s) directly against the debtor, without the assignor having to be made party to such action (of great benefit if for example the assignor is reluctant to co-operate with any action).

Novation

The only means by which a party can effectively transfer all of its rights **and obligations** under a contract is by novation. A novation is an agreement by which one party's rights and obligations under a contract are cancelled and discharged whilst a third party assumes identical rights and obligations in its place. The contractual effect of this is to cancel the old contract between for example, party A and party B and replace it with a new contract between party B and party C (generally on the same terms and conditions as the pre-existing contract).

The primary difference between a novation and an assignment is that a novation fully transfers both the rights and obligations of one party to another, thus leaving the outgoing party with no further responsibility under the original contract. The disadvantage is that unlike with an assignment, the consent of all parties to the original contract is required.

The main differences between novation and assignment can therefore be summarised as follows:

- Only the benefit of the contract i.e. the rights can be transferred by way of assignment.
- Both rights and obligations are transferred by novation.



- In an assignment, the original contract remains in full force and effect, therefore the assignor remains liable to perform any remaining obligations thereunder.
- The contractual effect of novation is that the original contract is cancelled and a new contract is created in its place therefore absolving the outgoing party from any further responsibility.
- As assignment does not require the consent of the debtor unless stipulated in the contract.
- Novation requires the consent of all parties to be obtained.
- Assignment / Novation permitted / restricted by contract

Both the freedom to assign or novate or a restriction of the same on the part of one or both parties may be built into any contract at the drafting and negotiation stage.

Where a contract is silent on this point, it can be generally assumed that either party would be free to assign or novate; however, as a valid novation requires the consent of the debtor, this freedom is somewhat academic in this respect.

Often a contract may contain an absolute or qualified prohibition on assignment or novation, for example that there may be no assignment without the written consent of the third party. An assignment in breach of the prohibition will amount to a material breach of contract permitting the debtor to terminate the

original contract, even without the presence of a specific right of termination in such circumstances. Additionally, such an assignment will be unenforceable by the assignee against the debtor.

Where the restriction on assignment or novation is further qualified by stating that consent is not to be unreasonably withheld, an assignment will not be valid until after either the other contracting party gives its consent, or the courts decide that it is unreasonable to refuse consent. The English courts have expressly refrained from laying rigid rules as to what may be perceived a reasonably withheld consent, but left such questions to be answered having regard to the particular circumstances in each case. In certain cases, however, courts have indicated that when the proposed assignee lacks the capacity to perform the contract, the reasonableness in withholding consent was safely assumed.

Conclusion:

It is important when in the negotiation and drafting stage of a contract to consider whether the ability to assign or novate should be inserted on the part of both or either party. Whether it is possible to restrict these rights to that of one party alone depends on the respective bargaining power of the parties. In the event that such a clause is inserted:

1. A clear distinction between assignment of rights and transfer of contract (novation) is to be recommended;

2. Restrictions are often worded broadly, without providing the procedures and conditions by which contracts may be assigned or novated, e.g. what happens if one party does not respond to the other party's request for consent?. Consider building these procedures etc. into the relevant clause;
3. Open-ended criteria e.g., "shall not unreasonably be withheld" may prove flexible but are less certain. Objective parameters (e.g. financial capacity) are rather rigid but provide for more certainty.
4. Consider inserting carve-outs to the restriction e.g. the ability to freely assign or novate to subsidiary or affiliate companies.

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ENTER VILLAGE, FOLLOW CUSTOMS

Participants in the shipping and offshore business work under conditions of cultural diversity, and many have experienced the frustration of having to manage practices and customs of other cultures that seem both confusing and unpredictable. Obtaining an insight into these cultural differences can provide the individual or company with a competitive edge, and increases the possibility of it adopting an approach that maximises the potential for a positive outcome.

Cross-cultural business behaviour

The study of business cultures examines how cultural differences influence cross-cultural business relationships, and the various business cultures have traditionally been divided into fairly general classifications. It should therefore be noted that globalization has contributed to decreasing some of the classic differences set out below. Urban people in New York and Tokyo may now have fewer differences in values and lifestyles, compared to Japanese people living in the countryside and in the big cities. It should also be kept in mind that the values, market place and market philosophy may differ greatly within the boundaries of one country.

We will in the following article give a few brief examples of the general patterns seen in cross-cultural businesses .

Deal focused vs. Relationship focused

The greatest difference between business cultures is found between relationship focused cultures ("RF") and deal focused cultures ("DF"). While DF communities are fundamentally task-oriented, the RF societies are more people-oriented. Conflicts therefore often arise when DF people try to do business in RF markets.

Norwegians belong to a strongly deal-

focused culture, which makes us a part of a group consisting mainly of northern Europe, North America, Australia and New Zealand. People from DF cultures are relatively open to doing business with strangers as long as a business proposal is financially attractive. They discuss business from the initial meeting with their counter-party, and get to know each other during the negotiations.

Relationship-focused cultures on the other hand make up the majority of the world's markets, and include the Arab world, Africa, Latin America and most countries in the Asia/Pacific region. These are markets where business people primarily get things done through networks of personal contacts. RF people prefer to deal with people who can be trusted; family, friends and persons or groups well known to them. They are uncomfortable with doing business with strangers, especially strangers who also happen to be foreigners. Because of this, relationship-oriented companies typically want to know their prospective business partners well before doing business with them.

Harmony vs. Clarity

The RF and DF cultures also differ in the way they communicate, which is probably the most frequent cause of misun-

derstanding between people from DF and RF markets. While the priority of DF people is to be clearly understood, the RF people will try to maintain harmony and avoid embarrassing or offending others. Directness and frankness are equated with immaturity and naiveté - perhaps even arrogance. Many RF business people therefore find DF types pushy, aggressive and rudely blunt. In return people from DF cultures often consider their RF counterparts dilatory, vague and inscrutable.

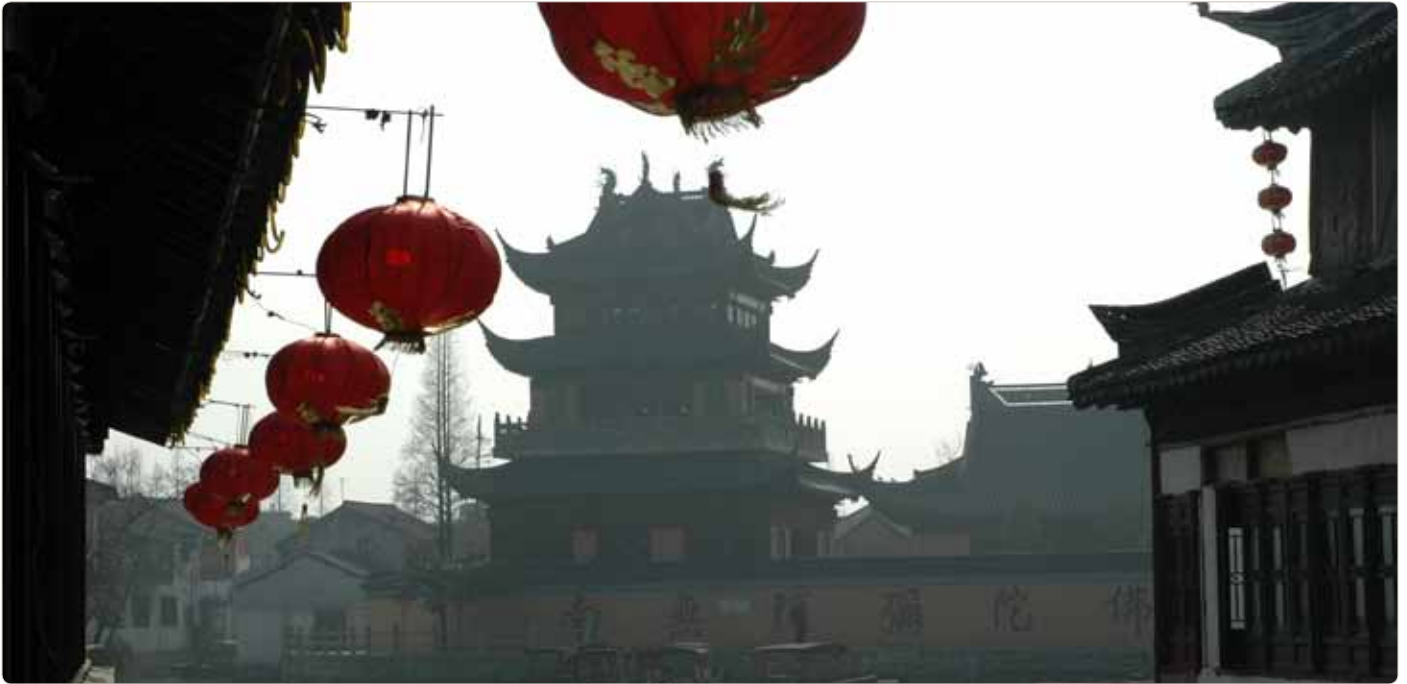
People from DF cultures further tend to have a legalistic approach when problems arise, looking to the executed contract, whereas RF people rely primarily on relationships to prevent difficulties and solve problems. The latter to the frustration of DF oriented lawyers.

Rigid-Time vs. Fluid-Time Cultures

A Norwegian need not travel further than the south of Europe to realize that people look at time and scheduling quite differently in other parts of the world.

In rigid-time (monochronic) societies promptness and punctuality is emphasized. Business meetings are rarely interrupted, and events are clearly scheduled. The fluid-time (polychronic) cultures are in direct contrast to this, and emphasize the

1) Ref. Gesteland: Cross-cultural Business Behaviour, 4th edition 2006. 2) Tan Joo Seng and Elizabeth Nk Lim: Strategies for effective cross-cultural negotiations, Singapore 2004.



involvement of people and completion of transactions rather than following a strict schedule. People are therefore less concerned about being punctual and are not particularly concerned with deadlines.

Informal vs. Formal Cultures

Problems may also occur when informal business people from relatively egalitarian cultures, like the Norwegian, cross paths with more formal counterparts from hierarchical societies, as cheerful informality offends high-ranking people from hierarchical cultures.

Strongly hierarchical cultures also tend to ascribe status according to age, gender and organizational rank. Business people who have a somewhat lower status under these categories may therefore find themselves at a disadvantage in hierarchical cultures such as Japan, South Korea and Saudi Arabia. Hence, one should not send junior staff to Japan if the goal is to negotiate and conclude a deal that requires the involvement of a relatively higher ranked employee of the Japanese counterparty.

The golden rules

So what is a Norwegian businessman to do when travelling abroad to negotiate

a deal? Two main rules apply to international business behaviour:

1. The seller must adapt to the buyer

Thorough knowledge of international business customs and practices is especially important for exporters. The same rule would also apply if you are a buyer in an international transaction – given that you're interested in negotiating the best possible deal.

2. The visitor is expected to observe local customs

The advice is not to copy local behaviour, but to be yourself while at the same time being aware of local sensitivities, and generally honouring local customs, habits and traditions. The Chinese have a proverb that expresses this in fewer words: *Ru xiang sui su* – Enter village, follow customs.

While taking the above into account, one should at the same time remember that cross-cultural business behaviour is about more than just how foreigners close deals. It involves looking at all factors that can influence the negotiations. One of the biggest challenges in such an exercise is to understand and accept how other

cultures view your own culture.

Wikborg Rein have extensive experience from and established offices in some jurisdictions where such cultural challenges exist, i.e. China, Japan and Singapore. For a further insight into the cultural differences between your own country and the country you are visiting, see http://www.geert-hofstede.com/hofstede_dimensions.php

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WR OFFSHORE TEAM



Wikborg Rein's traditional strength in the Offshore Industry has developed in recent years into an extensive offshore practice serving all sectors of the industry. The WR offshore team, based throughout the Norwegian and international offices, has accrued significant experience across the industry. The team acts for a broad range of clients including owners, suppliers, insurers, financiers (debt and equity) and shipyards. It has acquired a broad knowledge and understanding of the industry by working closely with these clients.

On the non-contentious side, the team has wide experience with offshore transactions involving a broad range of vessels (including jack-up and semi-submersible

drilling rigs, FPSO, FLNG, seismic and supply), fixed installations and equipment. This includes i.a. construction contracts (EPC/EPC(I)), conversion, repair, maintenance and classification contracts, service agreements, operation & management agreements, pre-bid agreements and bid submissions and offshore charter parties. The team has considerable experience in offshore standard contracts, oil company 'templates' and project specific drafting in all relevant jurisdictions in Europe, West Africa, Asia, Oceania and the Americas. Most recently the team has advised in connection with offshore projects in the US Gulf, Brazil and Indonesia.

On the contentious side, we have exten-

sive dispute resolution and litigation experience before Norwegian courts and arbitration tribunals, and also before UK courts and arbitration tribunals following the strengthening of our English law capacity in London.

The WR offshore team is further complemented by our Shipping Offshore and Energy & Natural Resources departments.

The WR Offshore team includes *Finn Bjørnstad, Bernhard Haukali, Jon Heimset, Clare Calnan, Rob Jardine-Brown, Oddbjørn Slinning, Eirik Thomassen, Christian James-Olsen, Guy Leonard, Ena Aarseth Barder, Martine Dysvik, Morten Valen Eide and Joyce Jacobsen.*

RISK ALLOCATION IN MOBILE DRILLING RIG CONTRACTS

Mobile drilling rig contracts are usually entered into between an “operator”; normally an oil company, and the owner, or disponent owner, of a mobile offshore unit as “contractor”. The contractor under a drilling contract provides the drilling unit and appurtenant equipment, personnel and expertise in order to drill wells.

In this article we will focus on some of the most important contractual risk allocation provisions in daywork contracts for the utilization of mobile drilling rigs; specifically: (1) the rate system, (2) indemnity provisions and (3) liability for breach of contract.

The rate system

In daywork contracts, the contractor is entitled to a daily fee per operating day. The daily rates are normally deemed to be fully inclusive of all contractor's costs for the complete performance of the drilling services. It is therefore important that reimbursable elements and services not included in the rates are identified. A clear rate system, in combination with a clear definition of company provided equipment and services, is essential in drilling contracts, and will have an important influence on the contractual risk allocation.

The most common rates included in drilling contracts are:

Operating rate: This is a standard rate payable to the contractor throughout the contract period, (save where other specified rates are applicable). It will generally apply from a defined commencement date for the services until completion of the services. Other contractual rates are

normally set as a percentage of the operating rate.

Standby rate: This rate is payable to the contractor when the drilling services are delayed. Standby rate often embraces a wide range of situations, including waiting on company equipment and services, delays in the services due to contractor, and delays which are caused by risks outside the contractor's control (i.e. adverse weather conditions).

Mobilisation/Demobilisation rate/fee:

Such rates are either given as lump sum fees or rates payable while the rig is moving to and from the drilling site. Such clauses often require careful drafting, as we often see that the commencement date (and application of the rate system as such), is linked to the unit being at the site ready to commence the drilling services. The time period for the application of mobilisation and demobilisation fees must then be specifically considered.

Repair rate: This is the applicable rate during repair of contractor's equipment. This rate is regulated differently from contract to contract and must take into account both the scope and duration of the contract. An agreed time period for repair

and maintenance per month is normally remunerated at full operating rate.

Force Majeure rate: This rate will apply whenever a force majeure situation occurs as per relevant contractual provisions. We often see that the company provided services are not rendered during periods of force majeure, which implies that in addition to a lower rate during force majeure periods, the contractor must pay for required services such as marine and helicopter transportation to and from the drilling unit.

Zero rate: This rate applies when the contractor is unable to perform the services under the contract for instance due to breakdown or other default on the part of the contractor. Required periodic surveys during the contract period are events which will often fall within the definition of zero rate.

For a contractor, it is important that the operating rate is applicable as often as possible, and that the application of other rates is clearly restricted.

Indemnity provisions

Indemnity provisions in drilling contracts are normally based on the knock-for-knock

principle, which means that each party will be responsible for loss or damage to its own equipment, and death of or injury to its personnel. This principle has proven favourable in offshore contracts, contributing to straightforward risk schemes and also making insurance easier and cheaper, and risk exposure foreseeable. If exceptions from the knock-for-knock principle are made, it is important to consider the consequences.

Indemnities normally regulated in drilling contracts are:

Property and personnel: Liability for loss of, or damage to, the parties' property and personnel usually follows the knock-for-knock principle. Nevertheless, this principle will often be excluded in case of wilful misconduct or gross negligence, and in such cases it will be the negligent party who will be liable for the loss or damage caused to the innocent party.

Third party liability: Each party will generally be liable for damage to, or loss of, third party property, and injuries to third party personnel. However, the distribution of third party liabilities varies from contract to contract.

Pollution liability: It is common that pollution liability is allocated based on the source of the pollution. This implies that a contractor will normally be liable for pollution originating from its own drilling equipment, while the operator will be liable for pollution having its origin in the reservoir, well, facility, pipeline, or any other subsea or surface structures.

Well and reservoir: Liability for damage to a well and reservoir is usually allocated to the operator since it is only possible for operators to obtain insurance coverage for such loss. Contractors should do their utmost to avoid facing liability connected to these risks due to the enormous potential

exposure they may otherwise face.

Down hole equipment: Responsibility for contractor's down hole equipment is normally allocated to the operator, who will be responsible for the cost of replacement of such equipment. Exceptions exist in cases of normal wear and tear, or of negligence on the part of a contractor.

Liability for re-drilling due to lost or damaged well hole: This varies from contract to contract and must be carefully considered by the contractor in each case.

Liability for breach of contract

Drilling contracts normally include provisions regarding breach of contract. There are two main scenarios that trigger liability for breach of contract: i) delay in the work carried out; and (ii) non-performance/default of any of contractor's obligations.

Delay in the performance of the work can be caused by many different reasons: Adverse weather conditions, break-down of equipment, personnel strikes etc. Normally these situations are addressed through the rate system, but often, the contract also provides for liquidated damages and termination of the contract if the delay exceeds certain agreed period of time.

Non-performance of contractual obligations will normally give the operator a claim for damages and termination rights, particularly where such breach relates to a material contractual obligation.

Liability for breach of contract is not always fully regulated in the drilling contracts, and it is not unusual to find that the contracts refer to background law remedies. This makes the possible liability more difficult to estimate, and the contractor should in general try to avoid such references. If the parties nevertheless wish

to maintain their rights under background law as well, they should clearly state in the contract that contractual damages are without prejudice to damages and/or remedies available according to the governing law of the contract.

Cap on the aggregate liability

Contractors may be exposed to major claims, and therefore a cap should be set on their total aggregate contractual liability to ensure that the risk is predictable and acceptable. Often contractors would be able to negotiate a limitation amount of about 15-25 percent of the total contract price.

There are many other contractual provisions that may have an impact on the risk exposure of the contractual parties. The contract should therefore be thoroughly examined to identify other clauses which may affect the allocation of risk between the parties.

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INSURANCE: APPLICATION OF ONE OR MORE DEDUCTIBLE

The question of whether one or several deductibles shall apply to an insurance claim depends normally on whether the physical damage or loss can be regarded as one or several insurance events.

Insurance contracts governed by Norwegian law are regulated by the Norwegian Insurance Contract Act of 1989 ("ICA"). Several provisions in the ICA are mandatory to the benefit of the assured only. However, for marine insurance, insurance in connection with the offshore industry and insurance related to larger companies, the ICA rules are non-mandatory, cf. ICA § 1-3. Hence, the ICA will only be directly applicable insofar as the parties to a marine or offshore insurance have not otherwise agreed, in which case the ICA provisions will [automatically?] be included in the insurance contract.

Pursuant to general Norwegian insurance principles as laid down by case law and adjusting practice, including practice in connection with the Norwegian Marine Insurance Plan, the question of whether a damage or loss should be regarded as one or several insurance events or occurrences must be decided on a case-by-case basis.

A situation where one and the same peril materialises several times causing a variety of damage is in practice normally regarded as one occurrence with only one deductible. An typical example might be where a vessel, due to negligent navigation, collides with several different fish farms. However, if the assured could have

avoided the subsequent damage, the assured's negligence may be regarded as a new and independent cause that breaks the chain of causation from the initial peril with the consequence that several deductibles are triggered. This corresponds with the deductible's preventive objective, i.e. that it shall motivate the assured to act in a diligent manner and focus on loss prevention.

On the other hand, if the same peril materialises several times and the insured could not have avoided the subsequent damage, all the damage will normally be regarded as one occurrence with only one deductible.

A common example of such a situation in marine insurance is a vessel that suffers heavy weather damage during a storm. Even though different parts of the vessel suffer damage at different times during the storm, all the heavy weather damage would be regarded as a consequence of the same peril, and thus also regarded as one occurrence or insurance event with only one deductible. The situation will be similar for a vessel that, during a passage in icy conditions, suffers damage to the hull, propulsion and rudder at clearly separable occasions.

In the "NH Sunvictor" case (Rt 1974 page

410), the vessel's machinery stopped as the cooling water intake was clogged with ice during a trip from Montreal to Quebec and the vessel grounded and suffered damage. During the refloating operation the vessel suffered further damage, and sustained further ice damage during the remaining part of the trip to Quebec during which she was escorted by two tugs. The Norwegian Supreme Court regarded the sequence of damage as resulting from the same peril and decided that only one deductible should apply.

It follows from the above that the most important issue when deciding whether to apply one or more deductibles is whether the damage occurred was caused by the same peril, but if the assured had the opportunity to discover the peril and avoid further damage, then the assured's omission in this regard will warrant a new deductible.

The commentary to the Norwegian Marine Insurance Plan 1996 version 2007 provides certain questions/guidelines for the distinction between one or several "casualties". We also consider these relevant under general Norwegian insurance law when deciding whether one or more insurance events has occurred. These are the following:

PHOTO: © Milia Varela-Choucino



1. *Is there a close connection in terms of location and time between the successive incidents of damage, or are the new accidents of a totally independent nature?*
2. *What possibilities did the assured have of averting the last damage?*
3. *Does the initial damage or its cause entail an increased risk of new damage, or is the last incident a result of a "generally prevailing risk of damage" which would have occurred with the same effect independently of the first damage or its cause?*

If an error in design of subsea equipment causes various damage to a cable while laying, then the deciding factor for the number of deductibles will be whether the assured at some stage had the opportunity to prevent the further damage from

occurring. If it was not possible for the assured to discover the equipment problems and prevent further damage from being caused, then it is likely that only one deductible will apply. On the other hand, if the subsea equipment was returned to the surface and/or it took considerable time between the occurrence of the different incidents of damage, it is likely that several deductibles will apply as the assured should have discovered the problems.

The question of whether one or more insurance events have occurred is also relevant to the question of whether an insurance claim shall be limited by one or more insurance amounts, and/or whether the claim as such shall be limited to one or more limitation amounts. It is commonly held that the decision may not be the same in these latter situations as the above-mentioned purpose of the deduct-

ible is no longer relevant for the interpretation.

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RECYCLING OF SHIPS – NEW INTERNATIONAL CONVENTION

The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships was agreed on 15 May 2009 (the “Hong Kong Convention”). The Hong Kong Convention is expected to influence requirements for ships and for ship recycling facilities. Companies involved in recycling, construction, repair, design, classification and operation of vessels are therefore likely to be affected by the Hong Kong Convention.

Introduction and Background

Prior to the adoption of the Hong Kong Convention, transportation of a vessel for the purpose of scrapping was prohibited if the state where the scrapping was supposed to take place did not have an environmentally sound management under the Basel Convention of 1989.

The new Hong Kong Convention is intended to apply to new build and existing vessels flying the flag of a State Party (i.e. a state being party to the Convention) and to ship recycling facilities operating under the jurisdiction of a State Party. A ship is defined widely, including all vessels of 500 GT or above of any type operating, or having operated, in the marine environment and includes submersibles, floating crafts, floating platforms, self elevating platforms, Floating Storage Units and Floating Production Storage and Offloading Units together with vessels stripped of equipment or under tow.

The Convention enters into force 24 months after the date where 15 states have ratified or signed without a reservation for ratification, the combined merchant fleet of such states constitutes not less than 40 per cent of the gross tonnage of the world’s merchant shipping, and the combined maximum annual ship recycling

volume of such states during the preceding 10 years constitutes not less than 3 per cent of the gross tonnage of the combined merchant shipping of the same states. The Norwegian Government has indicated that it deems a rapid entry into force as important and that Norway will initiate the necessary preparations for Norway’s ratification.

Main principles affecting a State Party’s vessels

The Hong Kong Convention is intended to regulate the whole cycle of a vessel’s life. State Parties will be obliged to prohibit or restrict the installation or use of hazardous materials in vessels flying their flag and the provisions will therefore have an effect on the design, construction, survey, certification, operation and recycling of vessels.

As a consequence, shipowners can expect their vessels to be subject to various new surveys during a vessel’s operational life. An initial survey will be carried out before a vessel goes into service or before an International Certificate on Inventory of Hazardous Materials (as further described below) is issued and thereafter a renewal survey will have to be carried out at intervals not exceeding five years. Where a vessel undergoes significant structural

modifications, an additional survey will be required to ensure that the vessel still complies with the Hong Kong Convention. Finally, a final survey will be carried out before a vessel is taken out of service and recycled, to ensure that the ship recycling facility, the Inventory of Hazardous Materials, and the Ship Recycling Plan (a ship-specific plan developed by the ship recycling facility prior to recycling of the ship in accordance with the relevant guidelines) complies with the Hong Kong Convention.

International Inventory of Hazardous Materials Certificate

Vessels will be required to hold an International Certificate on Inventory of Hazardous Materials which must be kept updated throughout a vessel’s operational life. The certificate will be issued by the government of a State Party, or by organisations which have been authorised to do so, for example, a classification society. The Inventory of Hazardous Materials is intended to identify hazardous materials defined in the Hong Kong Convention, their location within the vessel and their approximate quantities contained in the vessel’s structure or equipment. Certain specified hazardous materials shall be absolutely prohibited in the construction of new vessels and an International Certifi-



cate on Inventory of Hazardous Materials will not be issued unless it can be proved that no such materials have been used in the vessel's construction.

It is intended that existing vessels must comply with the requirements as far as practicable not later than five years after the Hong Kong Convention enters into force, or before being recycled, if this takes place at an earlier time. Existing vessels must therefore develop an Inventory identifying the relevant hazardous materials and prepare a plan describing the visual/sampling check by which the Inventory of Hazardous Materials is developed in accordance with the developed guidelines.

Enforcement by State Parties

State Parties will be obliged to require vessels flying their flag, or operating under their authority, to comply with the requirements established by the Hong Kong Convention. This also applies to ship recycling facilities under its jurisdiction, which i.a. means that the recycling facilities will be obliged to develop procedures for workers' safety and protection of the environment.

Among the specific duties to be imposed on State Parties is the obligation to en-

sure that vessels are subject to survey and certification in accordance with the regulations set out in the Hong Kong Convention's annexes. Ship recycling facilities must also be authorised pursuant to the Hong Kong Convention.

State Parties must also establish a set of national laws which prohibit violation of the Hong Kong Convention and provide sanctions for such violations. Moreover, vessels may be subject to investigation when they enter the ports or offshore terminals of a State Party to verify whether such vessel has a valid International Certificate on Inventory of Hazardous Materials or an International Ready for Recycling Certificate or if there is sufficient evidence that a vessel is operating or has operated in violation with the provisions of the Hong Kong Convention. A violating vessel may be warned, detained, dismissed, or excluded from the State Party's ports. However, State Parties shall have a duty to ensure that vessels are not unduly detained or delayed, and vessel owners will be entitled to compensation for any loss or damage suffered as a consequence of such detention or delay.

Scrapping of vessels

A vessel which is to be scrapped must be issued with an International Ready for

Recycling Certificate before scrapping can commence. The shipowner must therefore notify the flag state's administration in ample time to enable the required survey and certification to take place.

Moreover, a State Party's vessels can only be recycled at recycling facilities which are authorised under the Hong Kong Convention as being fully authorised to carry out all aspects of the recycling set out to be conducted by the recycling facility in the Ship Recycling Plan. An authorised ship recycling facility shall only accept vessels that comply with the Hong Kong Convention. These requirements will therefore limit the shipowners' options with respect to the choice of scrapping location.

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COMPULSORY INSURANCE FOR SHIPOWNERS

In March 2009, the European Parliament passed the Third Maritime Safety Package. As part of the EU's measures to increase maritime safety, one directive and one regulation introducing compulsory liability insurance for shipowners were adopted on 23 April 2009: Directive 2009/20/EC on the insurance of shipowners for maritime claims and Regulation 2009/392 on the liability of carriers of passengers by sea in the event of accidents. Both fall within the scope of the European Economic Area agreement, and will therefore be incorporated into Norwegian law.

Compulsory insurance against maritime claims

On 23 April 2009, the EU adopted *Directive 2009/20/EC (the "Directive")*, which introduces compulsory insurance against maritime claims for all vessels flying the flag of an EU member state, and for all vessels calling at EU ports. The levels of required insurance must cover the limitation amounts under the 1996 Protocol of the 1976 Convention on Limitation of Liability for Maritime Claims which all EU member states have committed themselves to ratifying. The Directive is expected to take effect from 1 January 2012.

The limitation regime of the 1996 Protocol has already been introduced in Norway, but until now shipowners have not been obliged to have insurance covering these limitation amounts in place and in practice most Norwegian vessels and vessels entering Norwegian ports are insured, but the coverage under the insurance may be lower than the limitation amounts under the 1996 Protocol.

That said, vessels flying Norwegian flag or

entering Norwegian ports, are obliged to have insurance cover in accordance with the Bunker Oil Convention of 2001 and the 1992 Protocol to the Convention Fund for Compensation for Oil Pollution Damage.

Strengthening the rights of passengers

The EU and its member states are to accede to the 2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (1974) (the "Athens Conventions"). Pursuant to *Regulation 2009/392/EC (the "Regulation")*, adopted on 23 April 2009, the provisions under the 2002 Protocol to the Athens Convention will be made effective within the EU no later than 31 December 2012.

The 2002 Protocol introduced strict liability for maritime operators in case of death or personal injury to passengers caused by a maritime casualty. The operators are also obliged to make a non-returnable advanced payment in the event of death or personal injury to a passenger to cover the immediate economic needs for the pas-

senger or next of kin. The Regulation provides that passengers must be provided with information about these rights latest at the time of departure.

The 2002 Protocol covers only international transport, however, the EU aims to extend the coverage to domestic transport as well. In the meantime, EU member states are free to apply the provisions of the 2002 Protocol on domestic transports from the effective date of the Regulation in 2012.

The Regulation also introduces compulsory insurance for vessels flying the flag of a member state, which depart from or are destined for a member state's port, and where the contract of carriage is made in a member state. The insurance shall cover the operators' liability pursuant to the 2002 Protocol to the Athens Convention.

The Regulation also provides for direct action by the passenger against the insurer, which should have the effect of making claiming under the compulsory insurances easier.



PHOTO: © iStockPhoto

Effect of the compulsory insurance scheme

All vessels caught by the Directive or the Regulation must carry an insurance certificate onboard the vessel confirming that they are adequately insured to the appropriate levels. Each member state will be responsible for ensuring that vessels flying its flag, or entering its ports, have the appropriate insurance cover.

Whilst it is uncertain what impact the introduction of compulsory insurance cover will have on the maritime industry, the EU expects that the compulsory insurance scheme will have the effect of removing substandard vessels from the European fleet and from European waters, as insur-

ance companies will be inclined to refuse to insure high risk vessels.

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NORWEGIAN AUTHORITIES' RIGHTS TO ORDER WRECK REMOVAL ARE EXPANDED IN NEW HARBOUR ACT

On 1 January 2010, the new Act Relating to Harbours and Fairways of 17 April 2009 no. 19 (the "New Harbour Act") entered into force, replacing the Act of 8 June 1984 no. 54 (the "Old Harbour Act"). Previously, Norwegian authorities had a statutory right to order wreck removal out of regard for safe navigation and the protection of the environment. Under the New Harbour Act, the right of the authorities to order wreck removal has been expanded.

Introduction

The main objective of the New Harbour Act is to establish a legal framework that in light of new challenges faced by the shipping industry, will contribute to the development of Norwegian ports into national and international logistic hubs and to develop effective and safe transport of goods and persons by sea in Norwegian waters.

This article sets out new statutory rights given to Norwegian authorities for wreck removal in Norwegian waters pursuant to the New Harbour Act.

The legal position up until now

Previously the Norwegian authorities had a statutory right to order removal of wrecks only in the following circumstances: (i) to ensure safe navigation (pursuant to the Old Harbour Act, Section 18, third paragraph) and (ii) where such wreck posed an environmental threat pursuant to the Norwegian Pollution Act of 13 March 1981 no. 6 (the "Pollution Act").

The Pollution Act remains in force, including its rules regarding wreck removal.

Key provisions of the New Harbour Act

The primary provision of the New Harbour Act which expands the authorities' rights of wreck removal is set out in Section 35, first paragraph, which provides that;

"The Authorities can pursuant to the act order that those responsible for a vessel, vehicle, or object having been sunken, stranded, or left abandoned, shall clean up or remove the vessel etc. within a specified time-limit when necessary due to the navigability, safe traffic, or other use or management of the waters. If the order pursuant to the first sentence is not complied with within the designated time-limit, those responsible may instead be ordered to pay the reasonable expenses of a third party employed by the Authorities to carry out such clean-up or removal." (our translation and emphasis)

In comparison with the Old Harbour Act, this provision greatly expands the right of the authorities to order wreck removal

Examples of situations where owners of vessels may now be ordered to remove wrecks include, amongst other things,

where wrecks are hindering transport by sea or other traffic in the relevant fairway or constitute a hindrance or inconvenience in the operation of harbours. Further, regard for other businesses in the immediate coastal area, as well as regard for other groups with a relevant interest in the area, may give the authorities sufficient grounds for a wreck removal order, including, for example where a wreck hinders pipe laying.

A further expansion of the authorities' rights in relation to wreck removal is found in Section 35, second paragraph;

"The registered owner or the actual owner of the vessel, vehicle or object at the time that the vessel etc. sank, or was stranded or left abandoned, and/or at the time when the order for wreck removal was given, is regarded as responsible pursuant to this provision." (our translation and emphasis)

Previously, the only person/entity subject to the wreck removal orders of the authorities was the owner of the vessel at the time when it sank or was stranded or abandoned. With the New Harbour Act,



this provision is widened so as to also include any subsequent owner who holds title at the time when the order to remove the wreck is given. This new provision corresponds with existing rules regarding wreck removal found in the Pollution Act. Section 2 of the New Harbour Act governs the geographical scope of the act and may also possibly widen the rights of the authorities with respect to wreck removals. This provision corresponds with previous provisions in the Old Harbour Act, except that the third paragraph sets out that the scope of the New Harbour Act may be widened by the King in Council to also include the Norwegian Economic Zone.

Consequently, the authorities' right to order wreck removal may not only be widened with respect to the reasons on which they can base a wreck removal order, but also with respect to the geographical area in which they are entitled to give such orders.

Future relevant legislation

In May 2007, the International Convention

on the Removal of Wrecks was adopted by the International Maritime Organisation. Norway actively contributed during the negotiation and drafting of this convention which applies to wrecks situated in a country's economic zone, and establishes a legal basis for states to remove wrecks that constitute a danger. The convention has not yet entered into force.

Conclusion

Owners of vessels that operate in Norwegian coastal waters may, if a grounding or other casualty occurs, find themselves subject to a wreck removal order in more situations than before, as Section 35 of the New Harbour Act gives the authorities several new valid reasons for ordering wreck removal.

In addition, any subsequent owner who takes title after the occurrence of a grounding or other casualty and holds title at the time the removal order is issued may also be held responsible by the authorities who can now choose to issue the

wreck removal order towards the previous owner, the existing owner or towards both.

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INCREASED LIMITATION AMOUNTS FOR CLEAN UP COSTS FOLLOWING MARINE ACCIDENTS ENTER INTO FORCE

As of 1 January 2010, increased limitation amounts for limitation of liability for wreck removal and other clean-up costs following maritime casualties, will enter into force in Norway.

Claims regarding wreck removal and other clean-up costs following maritime casualties are generally subject to limitation in accordance with the Convention on Limitation of Liability for Maritime Claims of 1976 ("LLMC 1976"), as amended by its 1996 Protocol ("LLMC 1996"). However, when adopting the LLMC 1996, Norway made a reservation excluding such claims from Norway's obligations under the convention. Norway is thus free to regulate the limitation of claims regarding clean-up measures following maritime casualties.

In June 2005, the Norwegian Parliament passed an act that introduced a separate limitation regime for claims relating to clean-up measures following maritime

casualties. Compared to LLMC 1996, the new limitation regime significantly increased the limitation amounts. It was believed that the higher limitation level imposed by this regime would in each case exceed the sum of the clean-up costs.

On 12 January 2007, the MS "Server" grounded off Fedje in Norway, and subsequently broke in two. With a gross tonnage of 19,864, the vessel's limitation amount for claims related to clean-up measures following the casualty was, according to the newly adopted regime, about 24.9 million SDR. The total costs for the clean-up operation exceeded this amount. After realising that the clean-up operation could have been even more costly, the Norwegian authorities under-

stood that the newly adopted levels of liability would not necessarily exceed the costs in all conceivable cases.

The grounding of the vessel "Full City" off Langesund in Norway on 31 July 2009, again raised the question of whether the limitation amounts were sufficient to cover the clean-up costs in all conceivable cases. With a gross tonnage of 15,873, the limitation amount for the clean-up measures was about 23 million SDR, and it remains to be seen whether this will be enough to cover all claims.

To ensure coverage of the Norwegian authorities and other parties' clean-up costs in the event of a serious casualty, a proposal to increase the limitation amounts

Gross tonnage	LLMC 1976 (mill SDR)	LLMC 1996 (mill SDR)	Previous limits (mill SDR)	Limits as from 1 January 2010 (mill SDR)
1,000	0.25	1	2	2
6,000	1.1	2.6	12	24
20,000	3.4	8.2	25	54
70,000	10.1	24.2	50	104



PHOTO: © Kystverket

for vessels with a gross tonnage exceeding 2,000 was put forward by the Norwegian Department of Justice in February 2008. The proposal was adopted by the Norwegian Parliament in Act no. 37 of 12 June 2009. The new rules increase the current limitation amounts with the aim to ensure that the costs in all conceivable incidents are covered, without implementing an unlimited liability for clean-up costs following maritime casualties. The new limitation amounts are about twice as high as the current limits (see examples below) and will be applicable for incidents that occur after 1 January 2010.

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NORWAY SIGNS THE ROTTERDAM RULES

A ceremony for the signing of the Rotterdam Rules was held on 23 September 2009 in Rotterdam, the Netherlands. Norway and fifteen other states signed the rules during the ceremony. Five other states have subsequently signed the rules, resulting in a total of 20 signatories.

The Rotterdam Rules will enter into force one year after the twentieth instrument of ratification, acceptance, approval or accession has been deposited. It is not therefore expected that the rules will enter into force in the near future. However, the fact that [many] major shipping nations have already signed the rules may lead to other states signing and subsequently ratifying the rules.

An incorporation of the Rotterdam Rules into national law in Norway will require amendments to the existing Norwegian Maritime Code. Norwegian maritime law has previously been based on cooperation between the Nordic countries. Since Denmark was the only other country among the Nordic countries signing the rules, it may take some time before a Norwegian ratification can be expected.

Application to pre- and on-carriage

The Rotterdam Rules constitute a development from the Hague, Hague-Visby and Hamburg Rules since they regulate the carriage of goods not only during the sea voyage but also during a connecting or previous transportation on land.

The Convention will apply to contracts of carriage where the place of receipt and the place of delivery are in different states and the port of loading and the port of discharge in the same sea carriage are in different states. In addition the place

of receipt, port of loading, place of delivery or the port of discharge has to be in a Contracting State. The carrier will be liable from the time the carrier receives the goods for carriage until the time the goods are delivered.

However, where loss, damage or delay occurs during the carrier's period of responsibility but before loading onto a ship or after discharge from the ship (i.e. where the carrier's role extends beyond sea carriage), the provisions in the Rotterdam Rules will not prevail over provisions of other international instruments.

Electronic Transport Records

The new convention has also been adjusted to technological developments such as the use of electronic transport records. Chapter 3 in the Convention relates to electronic transport records and provides that anything that must be contained in a transport document under the Convention may be recorded in an electronic transport record if the issuance and subsequent use of such record has been approved by the carrier and the shipper. The issuance and use of such electronic transport records will have the same effect as the issuance and use of a regular transport document.

However, electronic transport records can only be used if procedures are developed for key features connected to such records. The procedures must establish a

system for the issuance and transfer to an intended holder, and provide assurance that the negotiable electronic transport record retains its integrity. Moreover, a system for the identification of the rightful holder and proof that delivery to the holder has taken place must also be set out in such procedures.

The use of electronic transport records may result in reduced paperwork for the carrier and reduced time spent in port. This may save costs.

It is therefore expected that a ratification and incorporation of the Rotterdam Rules under Norwegian law will result in changes in the substantial law. Commercial parties should ensure that their contractual instruments are adapted so as to comply with the new rules when they enter into force.

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THE LUGANO CONVENTION 2007 ENTERED INTO FORCE ON 1 JANUARY 2010

On 30 October 2007, the European Community, Denmark, Iceland, Norway and Switzerland, signed the “new Lugano Convention” (the “Lugano Convention 2007”). The Lugano Convention 2007 regulates international jurisdiction, recognition and enforcement of judgments in civil and commercial matters. When entering into force, it will replace the existing Lugano Convention of 1988 (the “Lugano Convention”).

Background

The Lugano Convention was signed in Lugano on 16 September 1988 by the member states of the European Community and the European Free Trade Association (“EFTA”). The convention was based on the Brussels Convention of 1968 and its purpose was to extend the uniform rules on jurisdiction and enforcement found in the Brussels Convention to the EFTA states. The Brussels Convention was revised and replaced by the Council Regulation (EC) No 44/2001 (the “Brussels I Regulation”), which entered into force on 1 March 2002.

Overview of the Lugano Convention 2007

The Lugano Convention 2007 will not apply to tax, customs or administrative matters or to the status and legal capacity of natural persons, rights in property arising out of matrimonial relationships, wills and succession, bankruptcy or composition, social security or arbitration.

The Lugano Convention 2007 follows the

present legal framework of the Brussels I Regulation. The more substantive revisions are related to the regulation of jurisdiction for consumer contracts, special jurisdiction in company law, lis pendens, consolidation of related actions, and exequatur proceedings.

The European Community was regarded exclusively competent to conclude the Lugano Convention 2007 on behalf of the EC-countries which are part of the internal judicial co-operation. This meant that Switzerland, Norway and Iceland only needed to negotiate with one single contracting party – the European Community, whilst the EC member states, apart from Denmark which is not part of the internal judicial co-operation, enjoyed observer status.

According to the Lugano Convention 2007, persons domiciled in a state bound by the Convention may be sued in that state, whatever their nationality. It also provides for special rules of jurisdiction in certain matters; for instance in contractual mat-

ters, tort, insurance, consumer contracts and individual contracts of employment.

The European Court of Justice is the superior court with respect to the interpretation of the Lugano Convention 2007.

Implementation

The Lugano Convention was implemented in Norwegian law as an ad hoc act. The Lugano Convention 2007 will however be implemented directly through the relevant articles in the Norwegian Civil Procedures Act. With regard to enforcement, the implementation is deemed satisfactory by a general reference to international agreements and conventions in the Norwegian Enforcement of Judgments Act.

Status regarding entering into force

The Convention will come into force on the first day after the sixth month has passed since the European Community and at least one other contracting party have deposited their ratification documents.



PHOTO: ©

The European Community deposited its ratification documents on 18 May 2009, and Norway did the same on 1 July 2009. Denmark deposited its documents on 24 September 2009. Consequently, the Lugano Convention 2007 is in force between Norway, Denmark and the European Community from 1 January 2010. The Lugano Convention 2007 has not been ratified by the other contracting parties to date, and hence the Lugano Convention from 1988 will remain in force for Iceland and Switzerland.

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THE USE OF «POTENTIAL VARIATION ORDERS» – A POTENTIAL TRAP

“Potential Variation Orders” or “Possible Variation Orders” is an expression sometimes used by contractors during performance of work under a “variation order regime” contract. However, such expressions are often “contractual misnomers” as they are rarely based on contractual terms. Even though notifying its contract counter-party of possible variation orders may from a contractor’s perspective seem to be a proper and well intentioned course of action, the usage of such a non-contractual process may trap a contractor in relation to i.a. time-bar.

Construction contracts that apply the principle of variation orders as the basis for a contractor’s right to claim additional payment, often impose on a contractor the following two obligations:

1. *The claim must be sent and presented on a prescribed form, sometimes also to be expressly identified as a Variation Order Request (“VOR”); and*
2. *The VOR must be sent to the company without undue delay after the contractor has discovered the factual basis giving rise to the claim for additional payment (e.g. change in the scope of work or company default).*

Failing to meet either requirement will in principle result in a contractor losing his claim for additional payment for the relevant item, regardless of how just or valid the basis for the claim may have been. Such strict requirements in relation to contractor claims may seem unnecessarily formal in practice, and perhaps for this

reason, contractors often adopt a practice outside of the scope of the contract terms, whereby claims are put forward through e.g. “Potential Variation Orders” or “Possible Variation Orders” (hereinafter a “PVO”). What, if any, legal implication do such PVOs have?

When a PVO is later followed-up by a VOR, the company may argue that the claim is time-barred since the VOR was not issued without undue delay. The frequent counter argument from contractors is that the company received notice of the claim through the PVO without undue delay and, in any event, did not protest to this procedure for giving notices.

Taking the latter counter argument first; in principle, the company does not have to consider or respond to a claim if not put forward by a VOR. Hence, if PVOs are listed in a monthly report or similar correspondence from the contractor, this does not trigger an obligation on the company’s

side to respond. The company’s contractual obligation to respond is only triggered through the receipt of a VOR. Moreover, the mere failure to respond to a PVO is hardly sufficient to give basis for an argument that a mutually agreed practice has been established.

Neither is the contractor’s first counter argument likely to be favourably considered by a court. Since the contractual terms explicitly governs how to present a claim (i.e. through a VOR), a claim put forward by way of a PVO will not be sufficient to interrupt the limitation period. A court would instead likely enforce the contract wording and acknowledge the objective the formal procedure represents namely that given the huge amount of communication and documentation exchanged between the parties during complex construction projects, formal procedures for presenting claims for additional payments provide predictability and cost control.



Accordingly, the contractor will be left arguing that the claim was not time-barred as the VOR was put forward without undue delay after he had received knowledge of the circumstances giving basis to the claim. Normally, it is difficult to specifically determine when this limitation period commences, which is open for discussions and uncertainty, with a risk for both parties. However, if a PVO had been issued earlier, the contractor risks that this notice is used against him as supporting evidence for the fact that at the latest at the time of giving the PVO, the contractor had sufficient knowledge to send a VOR. In our experience, the company's argument is likely to be accepted by a court and accordingly the contractor's practice of sending PVOs could in fact represent a trap in relation to time-bar.

With risk of time-bar in mind, why do contractors issue PVOs? The main answers

seem to be that amongst many contractors there seems to be a common misunderstanding that a VOR has to include a finalized claim and therefore should only be sent when this has been established. Thus, the contractor will often establish a practice where the PVO is issued as a preliminary notice, and only followed-up by a VOR once the claim has been established. Nevertheless, the formal procedure generally set out in the contract is that the VOR shall be the first notice and, if necessary, to be followed by a claim estimate in due course thereafter. Accordingly, a practice with PVOs should not be applied or should at least be used with caution, unless founded in the contract or otherwise has been explicitly agreed as an accepted procedure.

Lastly, it is important to bear in mind that if PVOs are accepted, control over the total project costs/total project value may

be difficult and discussions/disputes postponed, instead of being discussed and solved as they arise.

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THE SHIPPING CUP 2009

On Saturday 24 October 2009, the Shipping Cup 2009 kicked off for the second year in a row. This year almost 150 people from 16 different Oslo based shipping companies participated in the fierce fight to be No. 1. Given the steadily increasing interest in the Cup, hosts Wikborg Rein and Assuranceforeningen Skuld P&I look forward to hosting the Cup again in October next year.

The Cup was held at the Ekeberg Sports Centre just outside Oslo, and after all matches had been played only Pareto Private Equity and Wikborg Rein's own team still had an unsettled score. Pareto Private Equity, led by coach Christian Dechsling, won the final 3-0 and was handed the 1st prize at the subsequent banquet held at fashionable Emil & Samuel in downtown Oslo.

Hosts Wikborg Rein and Skuld P&I wish to thank all the participants in this year's Cup, and hope that all teams will come back to join in next year's football and festivities



Marcus Lindfors of Skuld (far left) and Torgeir Hovden of Wikborg Rein (far right) handed over the 1st and 2nd prize to team leaders Christian Dechsling (Pareto Private Equity) and Knut H. Leinaes (Wikborg Rein).



The victorious Fredrik Sommernes, Fredrik Melfald and Patrick Kartevoll of Pareto Private Equity. In the background: Hilde Øverås of Wikborg Rein.

Cheerleaders Thea Skistad, Nina Kjellberg and Hedda Lund no doubt gave Marsh AS' players a moral boost.





WR MARITIME EMERGENCY RESPONSE TEAM - AVAILABLE 24/7 AROUND THE WORLD

Wikborg Rein's Maritime Emergency Response Team is led by partners with extensive experience in the practical and legal issues associated with casualties and other maritime emergencies. The team assists insurers and owners in connection with a wide range of incidents including collisions, groundings, capsizings, fires, allisions and pollution throughout the globe and particularly in Europe, Asia and Africa. With lawyers located in Europe and Asia, team members can be on site on very short notice. The team benefits from a network of local lawyers and technical experts who join when required.

The Maritime Emergency Response Team is led by Morten Lund Mathisen and is regularly instructed in high-profile cases. During the last years the team has handled casualties, including:

- "West Atlas" – drilling rig involved in blowout and subsequent fire in the southern Timor Sea off Australia; wreck removal
- "Full City" – bulk carrier grounding off Langesund, Norway; oil pollution and refloating
- "Crete Cement" – laden cement carrier grounded and beached in the Oslo Fjord; refloating and sale of vessel
- "Bourbon Dolphin" – anchor handling tug supply vessel capsizing off Shetland; sinking, total loss and casualties
- "Repubblica di Genova" – laden ro-ro/container ship capsizing in the port of Antwerp, Belgium; re-floating, sale of vessel and cargo claims
- "Server" – bulk carrier grounding off Bergen, Norway; oil pollution and wreck removal
- "Fjord Champion" – oil tanker grounding off Søgne, Norway; fire and salvage
- "Hyundai No. 105" – laden car carrier colliding with the VLCC "Kaminesan" in the Singapore Strait; sinking, wreck removal and cargo claims
- "Rocknes" – laden bulk carrier grounding and capsizing off Bergen, Norway; oil pollution, sinking, re-floating and casualties
- "Panam Serena" – Chemical tanker exploding and catching fire in Porto Torres, Sardinia, Italy; total loss, terminal claims, sale of vessel and casualties
- "Vans Princess" – laden ro-ro vessel grounding off Tartous, Syria; total loss, oil pollution and cargo claims
- "Tricolor" – laden car carrier colliding with the container ship "Kariba" in the English Channel, sinking, wreck removal and cargo claims
- "Hual Europe" – laden car carrier grounding off Tokyo Bay, Japan; fire, oil pollution, wreck removal and cargo claims
- "Amorgos" – bulk carrier grounding off Taiwan; sinking and oil pollution
- "Norwegian Dream" – cruise ship colliding with the container ship "Ever Decent" in the English channel; fire, salvage, personal injury and cargo claims

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PERSONNEL NEWS IN THE SHIPPING OFFSHORE GROUP

Øyvind Axe has been promoted to Partner, and **Geir Sviggum** has been promoted to Resident Partner at the Shanghai office. **Henrik Hagberg** has relocated from the Oslo to the London office. **Henrik Hagberg** and **Lars Inge Ørstavik** have been confirmed as Equity Partners of Wikborg Rein. **Simon Tatham, Clare Calnan** and **Robert Jardine-Brown** have joined Wikborg Rein as partners at the London office. **June Ho** has joined as new director of the Pan Asia Law Corporation, after having worked with several law firms in Singapore and London. **Torgeir Willumsen** has taken over as Japan Representative and has also been promoted to Senior Associate. **Kristoffer Larsen Rognvik** returns to the Bergen office after having been Japan Representative at the Kobe office throughout 2009. **Richard Bjerk, Terje Fiskerstrand, Aksel Joachim Hageler, Oddbjørn Slinning** and **Eirik Thomassen** have been promoted to Senior Lawyers. **Ena Barder, Hågen Hansen, Erik Hoffmann-Dahl** and **Vidar Løhre** have been promoted to Senior Associates. **Erik Hoffmann-Dahl** has returned to the Bergen office after having been stationed at the London office and having had a leave of absence to work at DnB Nor. **Martine C. Dysvik** has relocated from the Oslo to the Singapore office, and **Anja Kallestad** has relocated from the Bergen to the London office. **Jonathan Page** has joined the Oslo office as a Senior Associate after having worked at Clyde & Co LLP in London and Tokyo. **Øystein Djuv-Stiansen** has joined the Oslo office after having worked at the chemical shipping company Oddfjell SE in Bergen. **Nina M. Hanevold** has joined the Oslo office after obtaining a law degree at the University of Oslo, an LLM in international legal studies from New York University and an LLB in law and politics from the University of Edinburgh. **Yannis Litinas** has joined the Oslo office after having worked as an attorney at Deverakis Law Office in Athens. **Trine Svalestad** has joined the Bergen office after obtaining a law degree at the University of Bergen. **Ingvild Grindeland Andersen** has a one year leave of absence in order to take up the position as deputy judge. **Hilde Lund** has transferred from the Shipping Offshore Group to the Trade, Industry and Public Sector Group. **Fredrik Berg** and **Birgitte Karlsen** have left Wikborg Rein to pursue other challenges.

This Update is produced by Wikborg Rein. It provides a summary of the legal issues, but is not intended to give specific legal advice. The situations described may not apply to your circumstances. If you require legal advice or have questions or comments, please contact your usual contact person at Wikborg Rein or any of the contact persons mentioned herein. The information in this Update may not be reproduced without the written permission of Wikborg Rein.

WIKBORG REIN'S SHIPPING OFFSHORE GROUP

Wikborg Rein's Shipping Offshore Group is Norway's leading maritime practice with more than 60 lawyers in one of the country's largest and leading law firms. With offices in Norway's major commercial centres, Oslo and Bergen, and offices overseas in London, Singapore, Shanghai and Kobe, Wikborg Rein has a strong international profile. We serve clients across the full range of shipping, transport and offshore activities, including marine insurers, ship owners, offshore companies, shipyards, equipment providers, ship brokers and agents, shipping banks as well as companies related to freight forwarding and land transportation.



OUR ASSISTANCE INCLUDES

- Registration of ships, choice of flag and registration;
- Control and classification of ships;
- Building and repair contracts for ships and rigs;
- Sale and purchase of ships;
- Ship finance, lien and mortgage;
- Organisation and management of shipowners (corporate law, tax etc.);
- Casualty work, including owner's liability, limitation of liability, liability for oil spill and collisions, maritime inquiry and other public law issues;
- The law of chartering, including bills of lading and charterparties;
- Cargo claims;
- Crew matters;
- Arrest, salvage and general average;
- Maritime insurance, including hull & machinery and P&I claims and interpretation of club rules;
- Freight forwarding and land transportation

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