

Nordic German Law Seminar 2020

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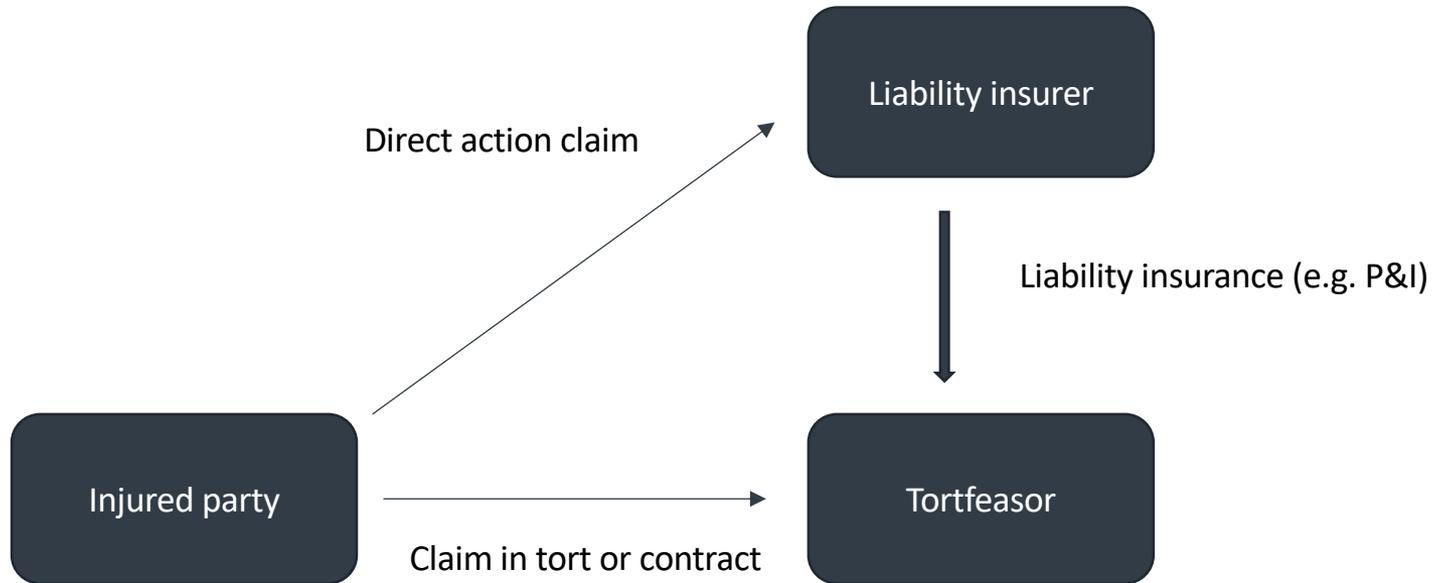
Hamburg, 9 March 2020

Marine Insurance - Direct action claims in Norway

A brief analysis of the «Stolt Commitment» case
Norman Hansen Meyer



Introduction – What is a direct action?



The Stolt Commitment case - facts

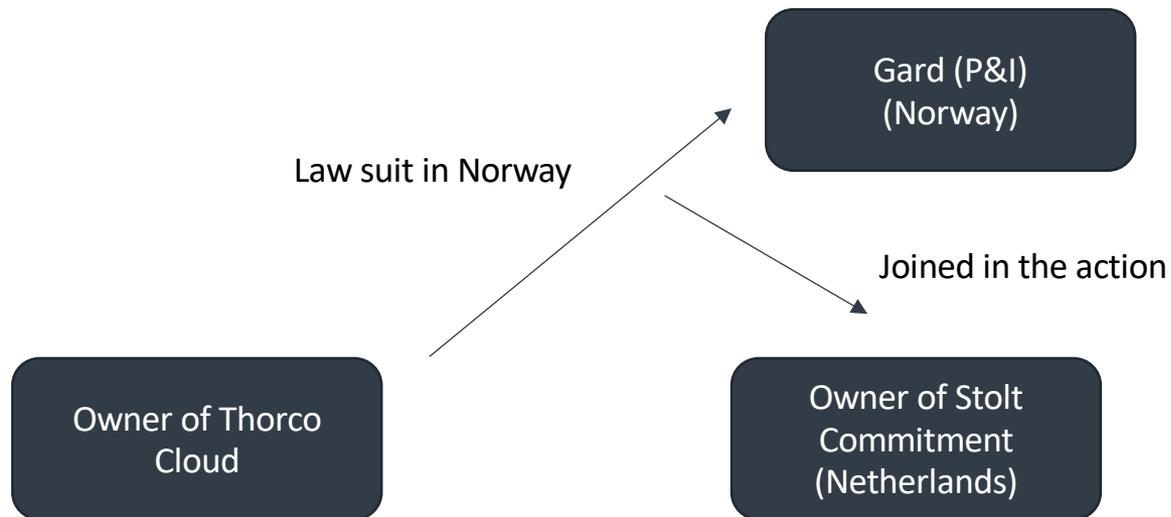


Stolt Commitment case - facts



Stolt Commitment case - facts

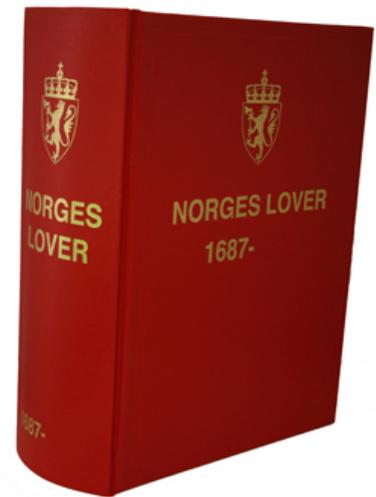
- Gard's domicile was the only factor connecting the dispute to Norway
- Is this sufficient nexus to establish jurisdiction against the owner of Stolt Commitment?



Stolt Commitment case - legal background

Position in Norway – direct action claims in marine insurance

- Norwegian Insurance Contracts Act («ICA») includes a right of direct action against the liability insurer
- In marine insurance the parties are **free to contract out** of the ICA including the right of direct action
- One exception from freedom of contract – There is always a right of direct action if the tortfeasor is «**insolvent**»



Stolt Commitment case - legal background

Position in Norway – jurisdiction

- Lugano convention incorporated in Norwegian law (corresponds with Brussel I convention)
- Art 2 (domicile as basis for jurisdiction)
- Lugano convention Section 3 (matters relating to insurance) – exclusive regulations, or in addition to Art. 2?
- Section 3 Art. 11 (2): The injured party may bring a direct action against the insurer where «such direct actions are permitted»



Stolt Commitment case - progress of the case

Should the claim against Gard (and Owner of Stolt C.) be dismissed?

- District Court (2016) Claim against Gard permitted
- Court of Appeal (2017) Claim against Gard permitted based on Lugano art 2 (domicile)
- Supreme Court (2018) Order of the Court of Appeal set aside. Lugano Art. 2 not applicable – Matters relating to insurance are exclusively governed by Section 3 and thus Art 11 (3). Court of Appeal erred in law.
- Court of Appeal (2019) Case against Gard (and Owner of Stolt C.) dismissed –Whether direct actions «are permitted» (ref Art. 11 (2)) must be determined based on Norwegian law - direct action claim not permitted in Norway – Owner of Stolt Commitment was not insolvent

Stolt Commitment case – To be heard by the Supreme Court

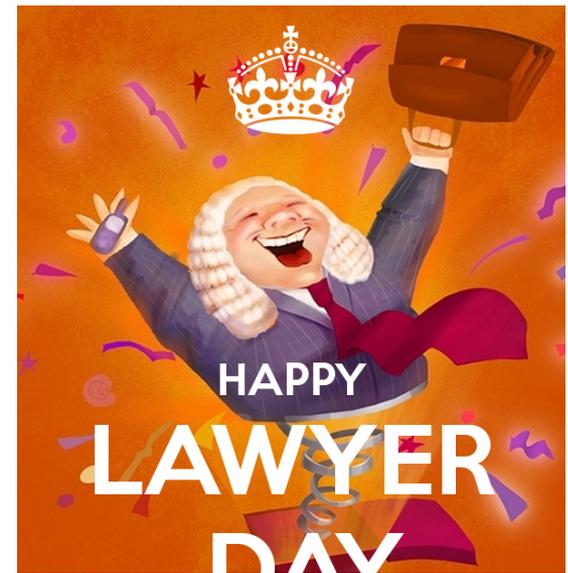
Questions to be heard before the Norwegian Supreme Court:

1. Art. 11 (2) – «Where such direct actions are permitted»
 - Indonesian law? Dutch law? Norwegian law?
2. If Norwegian law – Permitted in general or in this particular matter?
3. If permitted in this particular matter – must the Court make a preliminary assessment of whether the owner of Stolt C. was insolvent when proceedings were commenced? Or can the claimant merely allege «insolvency»

Consequences

Whenever the tortfeasor has P&I held with a Norwegian insurer (e.g. Skuld, Gard, Norwegian Hull Club),

is it sufficient to merely allege that the tortfeasor is «insolvent» in order to have the underlying claim heard by Norwegian courts (thereby inter alia benefiting from the Norwegian global limitation rules)?





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**Liability issues arising
under the *conditions of the
Nordic association of
freight forwarders (NSAB
2010)***

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Conditions of the Nordic association of freight forwarders (NSAB 2010)

- Introduced in 1919. Revised in 1959, 1974, 1985, 2000 and latest in 2010.
- Since 1959 an "agreed document" negotiated with the associations of freight forwarders on the one side and NHO, Norsk Industri (Norway), Svenskt Näringsliv (Sweden), ICC Finland og Finnish Shippers' Council (Finland) and Dansk Erhverv (Denmark) on the other side.
- Adopted and used by many nordic logistics services providers, including inter alia *DSV Panalpina, Kuehne + Nagel, Freja Transport, Scan Global, Blue Water Shipping, Damco and others.*
- Wide spread use in the Nordic region.

NSAB 2010 – Main substantive rules

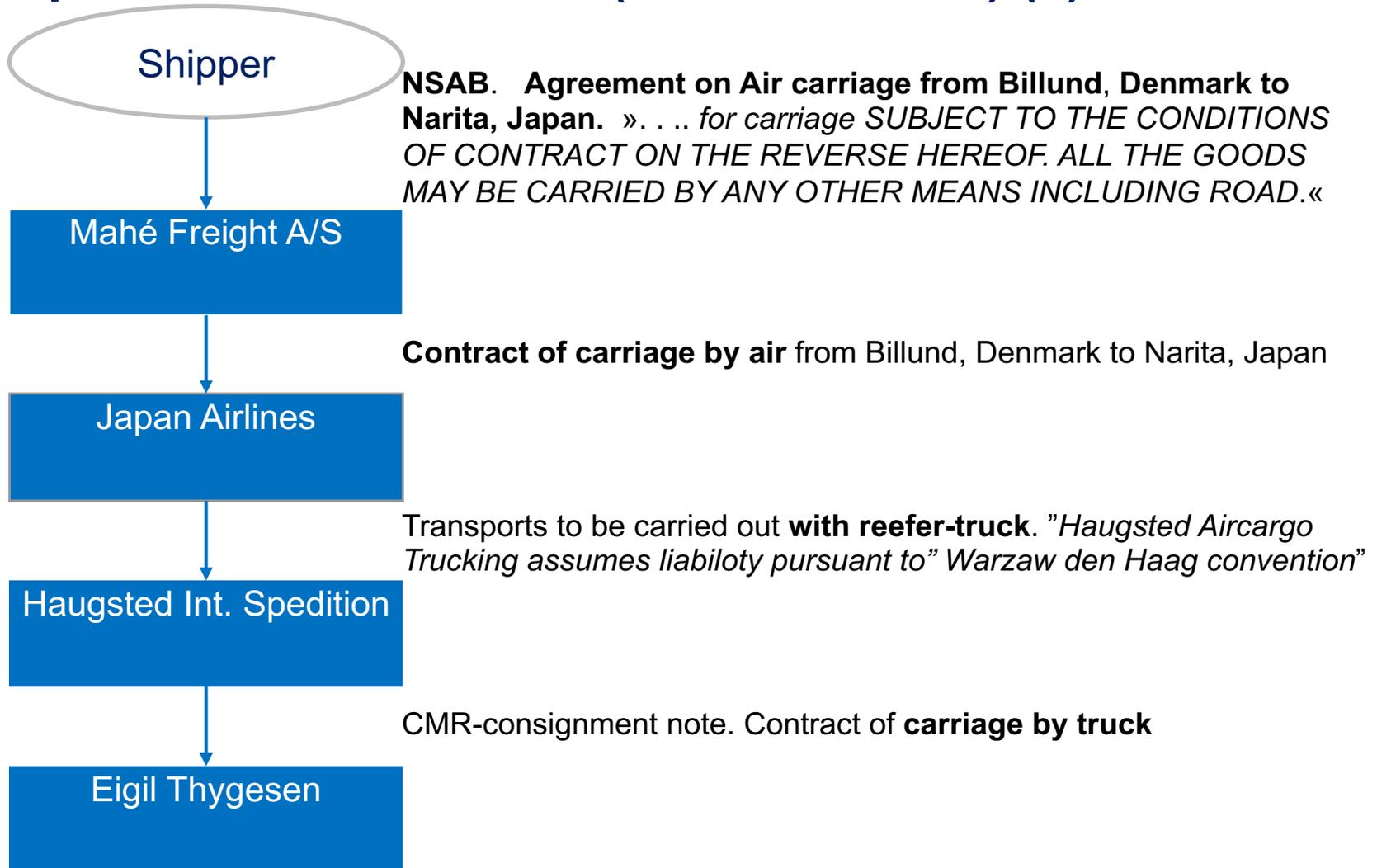
- NSAB 2010 (In total 29 provisions) provides a regulation of liability for certain types of breach of contracts for carriage and freight forwarding services.
- Liability for loss depreciation of or damage to goods whilst in the custody of the carrier. Basis of liability is very similar to the liability-system of the CMR-Convention.
- Vicarious liability for employees, sub-carriers and agents.
- Liability for loss resulting from depreciation, loss or damage to goods is limited to SDR 8.33 per kilo gross weight of the goods affected.
- For all other loss the freight forwarder's liability is limited to SDR 100,000 in respect of each assignment.
- Carrier's liability may fall outside the scope of the NSAB.

Interplay between the NSAB 2015 and the transport conventions

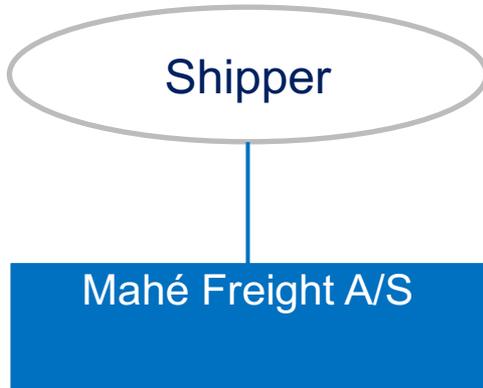
- "*Network liability clause*": NSAB 2015, Section 2:
- "If a certain mode of transport has been expressly agreed upon, or if it is proved that loss, depreciation, damage or delay has occurred whilst the goods were being carried by a particular means of transport, the freight forwarder shall be liable in accordance with the law applicable to such mode of transport..."

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Agreement on a certain mode of transport Danish Supreme Court decision (UfR 2008.1638) (1)



Agreement on a certain mode of transport Danish Supreme Court decision (UfR 2008.1638) (2)

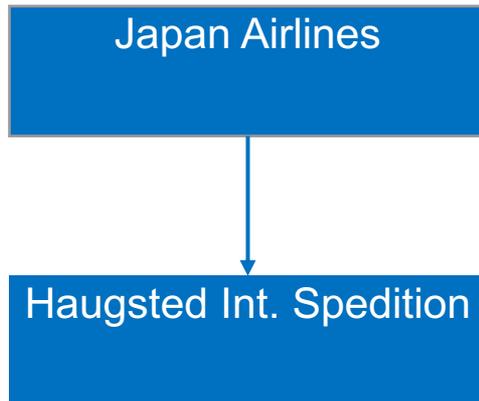


NSAB. Agreement on Air carriage from Billund, Denmark to Narita, Japan. » . . . for carriage *SUBJECT TO THE CONDITIONS OF CONTRACT ON THE REVERSE HEREOF. ALL THE GOODS MAY BE CARRIED BY ANY OTHER MEANS INCLUDING ROAD.*«

- *”Mahé Freight undertook as contracting carrier to transport the goods from Denmark to Japan. The contract is for air carriage and the Supreme Court finds that the transport as a whole is governed by the law of air-carriage.”*
- *”The Supreme court finds that the option included in the contract which permitted the carrier, at its discretion, to perform the transport by other means does not imply that the contract was not for the carriage by air. If such an option is exercised, it implies that the claimant may, in addition, invoke the liability rules applicable to the means by which the carriage was actually performed”.*

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Agreement on a certain mode of transport Danish Supreme Court decision (UfR 2008.1638) (3)



Transports to be carried out **with reefer-truck**. *"Haugsted Aircargo Trucking assumes liability pursuant to" Warsaw den Haag convention"*

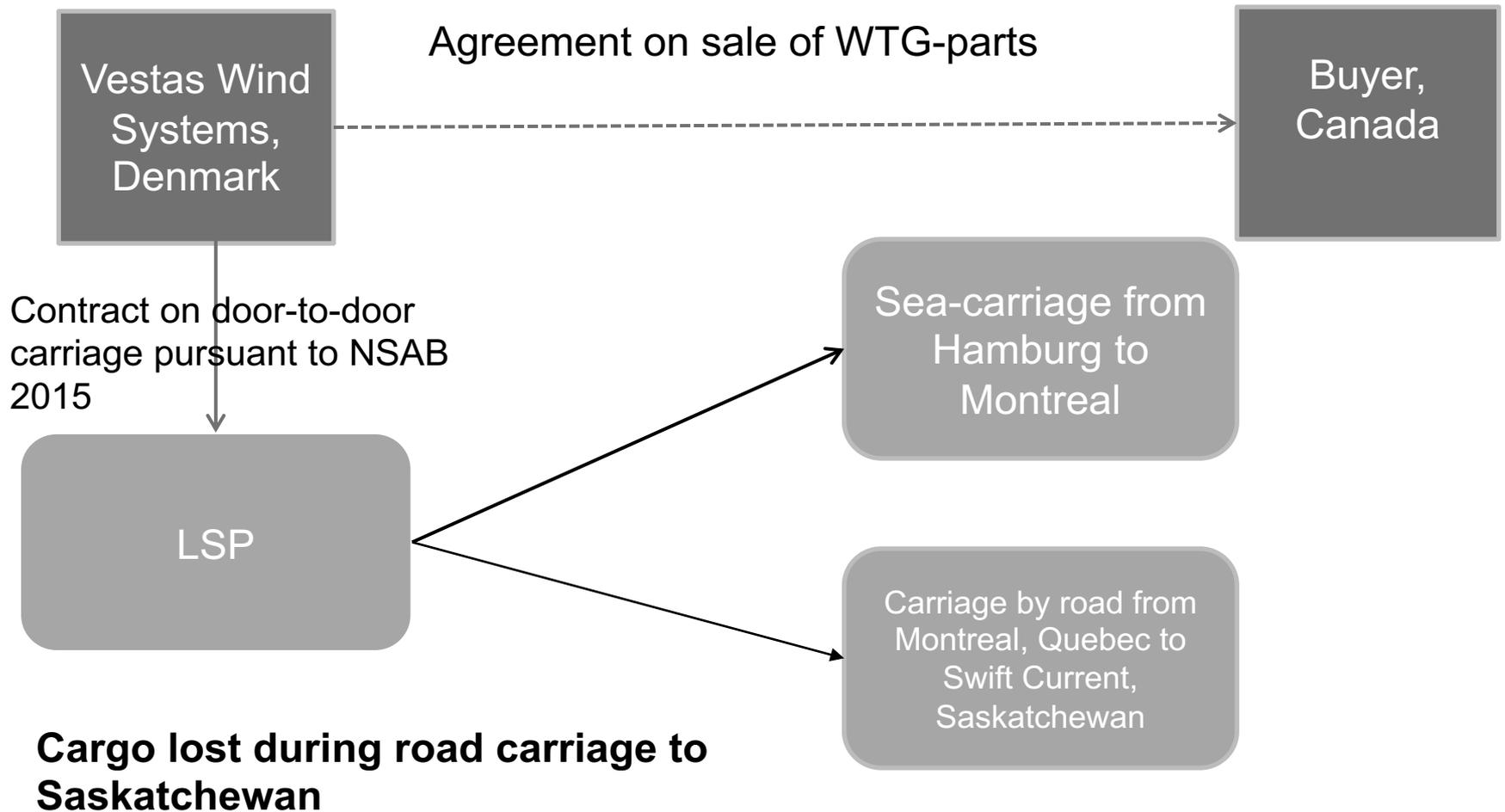
- *"The contract between Japan Airlines and Haugsted is for transport of goods (»air cargo«) by truck from Billund to Frankfurt, i.e. an agreement for international road carriage as defined in the CMR. The fact that Haugsted has assumed liability pursuant to "Warsaw den Haag convention" does not mean that the contract is for carriage by air."*

Interplay between the NSAB 2015 and the transport conventions

- "Network liability clause": NSAB 2015, Section 2:
- "If a certain mode of transport has been expressly agreed upon, or if it is proved that loss, depreciation, damage or delay has occurred whilst the goods were being carried by a particular means of transport, the freight forwarder shall be liable in accordance with the law applicable to such mode of transport..."

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Loss occurs whilst the goods is being carried by particular means ?



Interplay between the NSAB 2015 and the transport conventions

- “If a certain mode of transport has been expressly agreed upon, or if it is proved that loss, depreciation, damage or delay has occurred whilst the goods were being carried by a particular means of transport, the freight forwarder shall be liable in accordance with the law applicable to such mode of transport...”
- *How* is it determined which law is applicable ?
- Unresolved in Danish law: Danish court hesitant to interpret or apply the provision.
- Differing decisions in other Nordic countries

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Thank you

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Arbitration and Illegality

CHRISTER SÖDERLUND

HAMBURG, 9 MARCH 2020

ADVOKATFIRMAN
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Illegality comes in many guises

A business venture
with an illegal
purpose

A business venture
procured by illegal
means

A commercial
dispute propped up
by illegal (e.g.
fabricated) evidence

Counsel and advisors of the
opposite party

In-house counsel of the
opposite party

Arbitrators

Fact witnesses and experts

**Illegality
may involve
several
actors**

Examples of cases of alleged illegality (1)

- The state alleged that the claimant had bribed the government.
- The alleged bribe was the refurbishment, in mid-1995, of the President's guest residence, used to accommodate official visitors to the nation's capital.
- Permit a government to raise a defence based on its own bribery?? Rather, the tribunal concluded that this one-off gesture was more akin to a "sponsorship or good-will bestowal of the sort commonly made by companies". The tribunal relied on the OECD Bribery Convention.
- No proven link between the advantage conferred (the refurbishment in 1995) and the alleged advantage received (the 1999 agreement).
- No particular official received any benefit from the refurbishment.
- The tribunal considered that it is important "in a world where corporate sponsorship is not merely tolerated but is an accepted part of the system of funding public events and facilities", to maintain a clear distinction between sponsorship and bribery.

Sistem Mühendislik İn aat Sanayi ve Ticaret A v. Kyrgyz Republic, ICSID Case No. ARB(AF)/06/1

Examples of cases of alleged illegality (2)

- Granting of an airport concession facilitated by a "donation" to the president of Kenya, Daniel arap Moi of Kenya (president in the period 1978 – 2002).
- The claimant argued that such a donation was in line with lawful business practices in Kenya, while Kenya described it as a bribe.
- The tribunal declared that "the Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of *ex turpi causa non oritur actio*".
- The tribunal dismissed the case, whether on jurisdictional or merits grounds is not clear.

World Duty Free v Kenya, ICSID Case No. ARB/00/7

Anatomy of a sham contract (cont'd)

2. Compensation. [REDACTED] shall pay [REDACTED] a fee, do to [REDACTED] services. The fee amount shall be as follows:

1. The Phase I..... 350,000.00 US \$.
2. The Phase II..... 200,000.00 US \$.

3. Payment. The fee payment to [REDACTED] shall be done within 15 (fifteen) working days after [REDACTED] receives Invoice by [REDACTED]. [REDACTED] shall pay [REDACTED] in accordance with the fee schedule described in paragraph 2. The payment shall be done to [REDACTED] in :

Account [REDACTED]
Bank of America,
[REDACTED] Main Street
[REDACTED] USA

4. Nondisclosure. [REDACTED] and [REDACTED] mutually agree to consider any information or data received from each other as confidential, and therefore not to reveal, distribute or transmit this information to any individual, corporation or entities without written permission of the other party.

5. Indemnification. (a) [REDACTED] agrees to accept and be responsible for its own acts or omissions of its employees, agents or contractors and nothing in this Contract shall be interpreted or construed to place any such responsibility for the acts or omissions of the [REDACTED] its employees, agents, or contractors onto the [REDACTED] Corporation.

(b) [REDACTED] agrees to accept and be responsible for its own acts or omissions of its employees, agents, or contractors and nothing in this Contract shall be interpreted or construed to place any such responsibility for the acts or omissions of the [REDACTED] its employees, agents, or contractors onto the [REDACTED] a Corporation.

6. Arbitration. Any claim or controversy arising out of or relating to this contract, or of the breach thereof, shall be submitted to International Arbitration Commission in Stchoim Sweden.

Boilerplate galore

7. Waiver. The failure of either party to require performance of any of the provisions of this Contract shall not be construed as waiver of any such right or provision or the right to insist upon future performance of any such provision, and the obligations of the parties hereunder shall remain in full force and effect.

8. Assignment and benefit. This Contract shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns. Neither party shall have the right to assign its rights or obligations under this Contract without the prior written consent of the other party which shall not be unreasonably withheld. Each party shall remain responsible for the actions or omissions of its assignee.

9. Notices. All notices required or permitted hereunder shall be in writing and shall be deemed given when delivered in person or sent by U.S./Switzerland Postal Service certified, registered, or express mail, postage prepaid (the date of the postmark stamped on the envelope by the U.S./Switzerland Postal Service shall control), to the parties at their respective addresses set forth at the beginning of this Contract, or such other address as any party may have designated by previous notice.

10. Severability. The provisions of this Contract are severable. If any provision is deemed invalid or unenforceable by a court of competent jurisdiction, it shall not affect the applicability or validity of any other provision of this Contract, but rather such provision shall be amended by court to the extent necessary to render it valid and enforceable.

11. Captions. The captions of the various sections of this Contract have been inserted for convenience of reference only and shall not affect the interpretation of this Contract.

12. Language Construction. The language in all parts of this Contract shall in all cases be simply construed according to its fair and intended meaning and not for or against any party hereto.

13. Number, Gender. Whenever the context so requires, the singular number shall include the plural and the plural shall include singular, and the gender of any pronoun shall include the other genders.

Boilerplate galore (cont'd)

14. Counterparts. This Contract may be executed simultaneously in two or more counterparts each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

15. Entire Contract This Contract including the cover page and any exhibits attached hereto shall constitute the entire Contract between the parties with respect to its subject matter and supersedes and cancels all prior Contracts between them on the subject, whether written, oral or implied. No modification, amendment or waiver of this Contract, or any of its provisions, shall be binding on any party unless evidenced by a written instrument duly executed by the parties.

16. Conformity. In the event any provision of this Contract is found to conflict with future adopted federal or legislation the parties shall negotiate in good faith and implement appropriate amendments hereto, consistent with the intents and purposes hereof, not later than 30 days after the passage of such legislation unless this Contract terminates under its terms prior to the effective date of such legislation.

17. Governing Law. This Contract shall be governed by and construed in accordance with the International laws.

████████ Corporation

By: _____

████████
President

Date: _____

████████ Project Engineering

By: _____

████████
President

Date: 20.9.17

Thank you!



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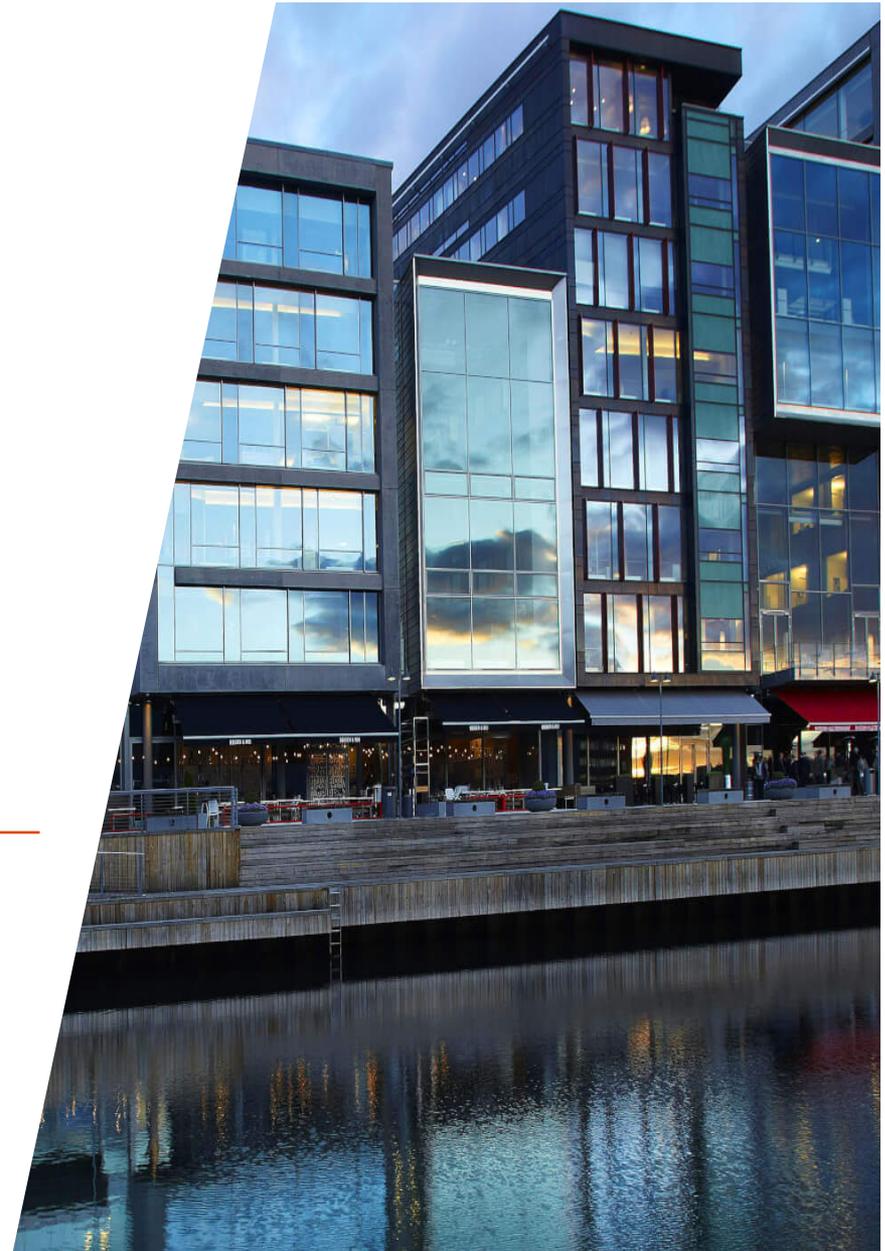
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Offshore wind in Norway

Nordic – German Law Seminar

Hamburg, 9 March 2020



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DEVELOPMENT AND
DIGITALISATION



178
EMPLOYEES

135
LAWYERS INCL.
PARTNERS

5
FINANCIAL ANALYST
AND TRANSACTION
SUPPORT

85
FEMALES

93
MEN

Strategic Business Partner



INTERNATIONALLY
RECOGNISED
CORPORATE
DEPARTMENT



RENOWNED
EXPERTISE IN
TRADE, INDUSTRY
AND TECHNOLOGY

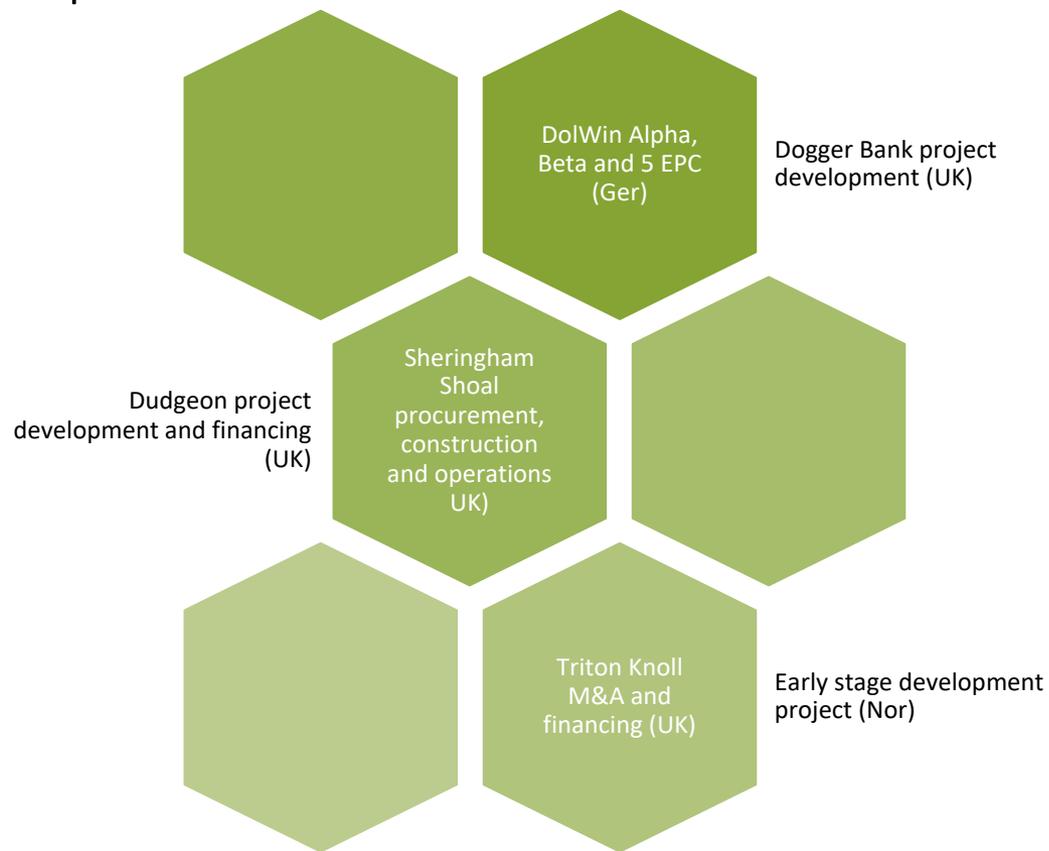


NORWAY'S
LARGEST IN
ENERGY



TOP RANKED
REAL ESTATE
DEPARTMENT

Our offshore wind experience



German capital has played a significant role in Norwegian wind



Stadtwerke München

Onshore wind portfolio
Trondheim and
Gudbrandsdalen



Onshore wind portfolio
Bjerkreim/west Norway



Onshore wind portfolio
north Norway



Asset management,
equity investments



Onshore wind portfolio
mid Norway



Project financing



Project financing and
credit support



Project financing

First license round in Norway expected this year

Areas



- **Utsira Nord:** West of Haugesund. Average depth 267 meters, suitable solely for floating wind power technology. Assumed capacity 500 - 1500 MW, based on existing grid capacity. Potential for more than 1500 MW with increased capacity in the transmission grid.
- **Sandskallen – Sørøya Nord:** In the Barents Sea, northwest of Hammerfest. Average depth 89 meters, but the variation in depth is such that the area can be suitable for both bottom-fixed and floating technology. Assumed capacity 100 - 300 MW, based on existing grid capacity in the area with considerable restrictions southbound.
- **Sørlige Nordsjø II:** Close to the Danish/Uk sector with proximity to European power markets. By far the largest area, and therefore better suited for adaptation to conflicting interests. There are however several petroleum licenses in the area. Depth 53 - 70 meters, suitable for bottom-fixed technology. Assumed capacity 1000 - 2000 MW, but up to 3 – 5 GW if connected to UK/continent.

Proposed consenting process

- Opening of areas for pre-notification (exp. Q1 2020)
- Pre-notification submissions (exp. until YE 2020)
 - Concept and layout
 - Proposal for impact assessment program
- Assessment phase
 - Public consultations
 - Decision on impact assessment program
- Pre-consenting phase
 - Exclusivity within the «project area»
- Consent application (within 2 yrs from final IAP)
- Detail plan (within 2 yrs from consent)
- Commissioning deadline (within 3 yrs from approved detail plan)
- Operational phase (30 yrs)
- Decommissioning



Photo: Bonheur ASA

A closer look at Sørlige Nordsjø 2



Regulatory overview

Licensing and consents

- Offshore wind projects require a consent under the Ocean Energy Act
 - No seabed lease fee will be introduced in the first round
- Onshore part of grid connection requires a consent under the Energy Act
- Export license for cross-border interconnectors
- Trading license for wholesale of electricity

Grid connection

- Statnett (the Norwegian TSO) must have a controlling ownership interest in any point-to-point interconnectors
- Offshore projects will build, own and operate their own grid connection
- Export cable to Norway will be categorized as production radial
- Any reinforcements in the distribution or transmission network will trigger a mandatory investment contribution
- Connections cross border - uncertain status

Tax and support regimes

- Current Electricity Certificate regime will be phased out end of 2021, as well as green depreciation rules
- Government body Enova provides investment support to demonstration/technology enabling projects
- Currently expected that future offshore projects will be unsubsidized
- Tax regime similar to petroleum tax has been debated



Photo: Equinor ASA



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Decommissioning of Offshore Facilities – the Tyra Case and the Vindeby Case

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Bo Sandroos

Nordic-German Law Seminar 2020



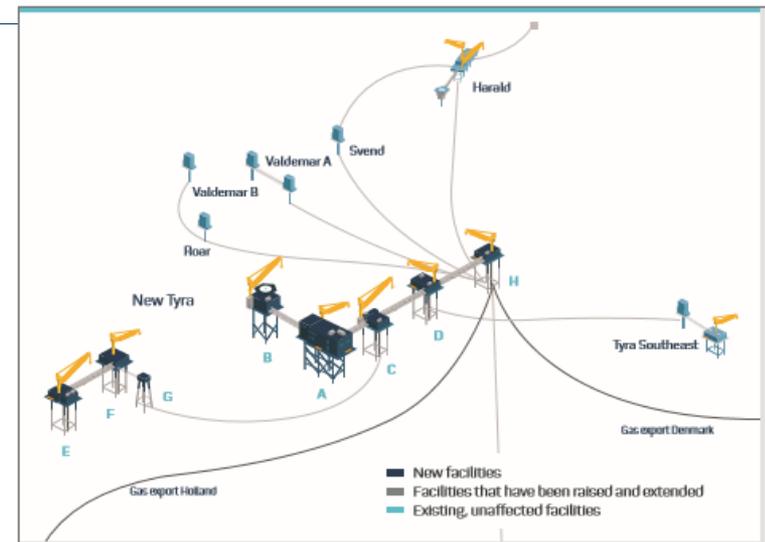
Intro

- Denmark is in a transition from fossil fuels (oil and gas) to renewable sources of energy
 - In both production and consumption
- Dynamic scenarios in offshore energy

 - One of the world leaders in offshore wind. Ambitious roadmap → an additional 2,4 GW by 2030
 - Plans for "energy island(s) in the North Sea (10 GW), Baltic Sea (5 GW)
 - Uncertainty regarding the future of oil and gas (8th licensing round being held back)
- Still, major projects in both segments are ongoing
 - Denmark's largest gas field is being re-developed
 - And Denmark's first offshore wind park (1991) has been de-commissioned

The first case: Tyra

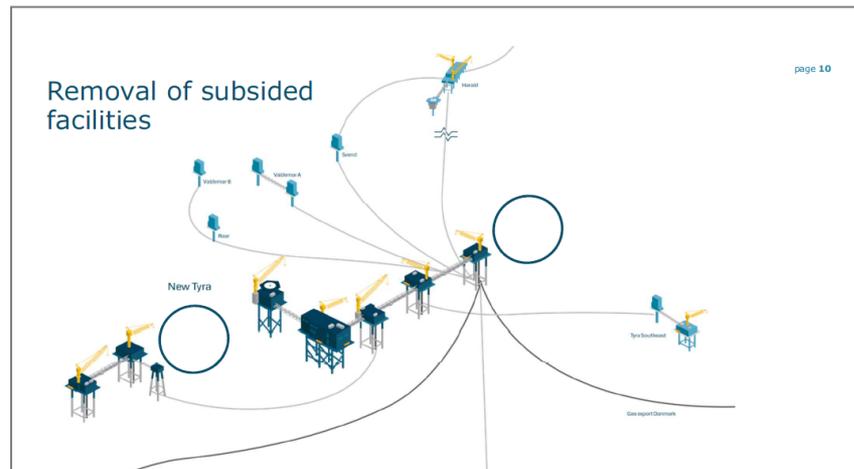
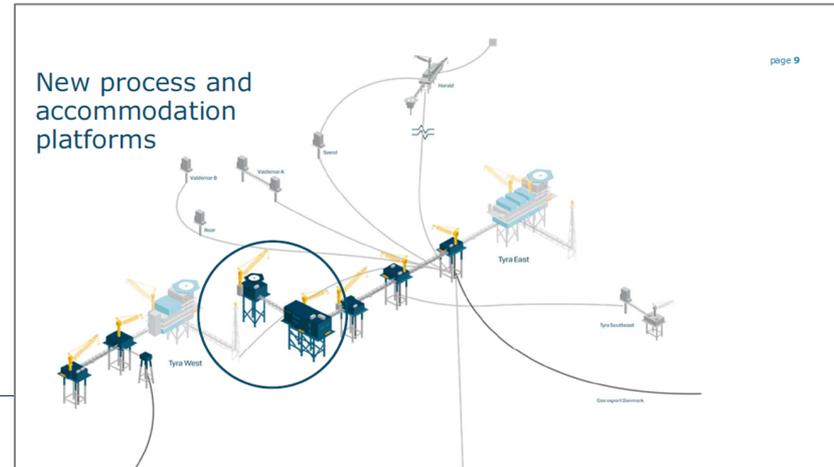
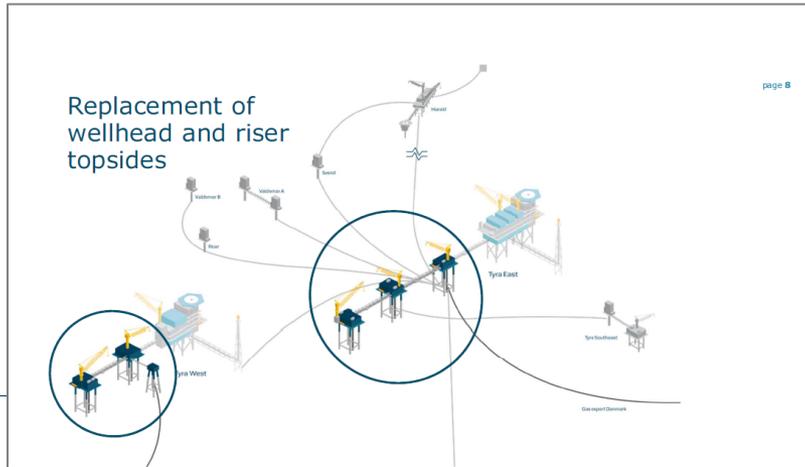
- The field was discovered in 1968 and production began in 1984
- Provides more than 90% of Denmark's natural gas production
- Subsidence discovered 2016
 - Over the last 30 years the field had subsided more than 5 metres
 - Safety and operational issue
- New license terms agreed March 2017
 - Government agreement
 - Special tax incentive 2017-2025
- FID by DUC partners in December 2017



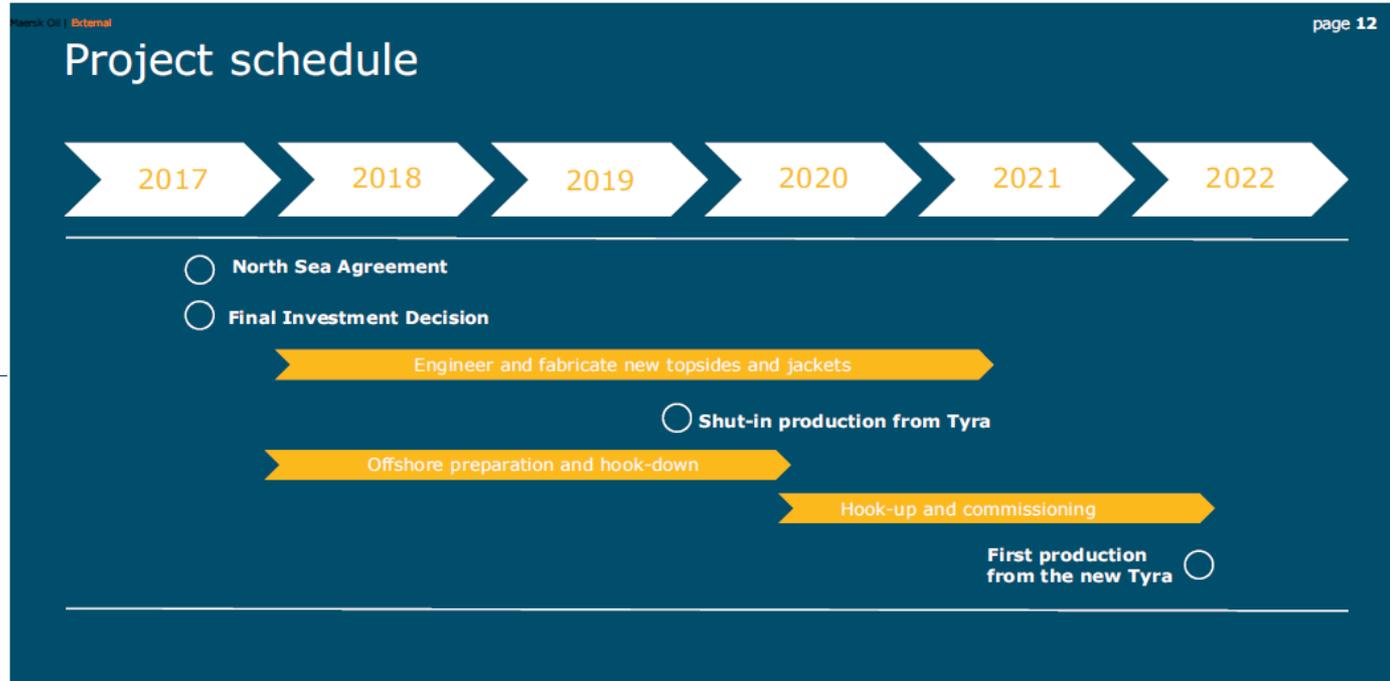
Legal basis

- The decommissioning of offshore installations is based on the rules in IMO Resolution A.672 and OSPAR Decision 98/3
- Section 32a of the Danish Subsoil Act
 - Any application for approvals of e.g. field development plans under the Act must be accompanied by a plan for the decommissioning of the installations covered by the application
 - Danish Energy Agency approval
 - Similar rules set forth in the applicable licence and JOA
 - Detailed guidelines issued 2018
- Focus is on health and safety, environment and financial security

Three distinct operations



Operator's project schedule



The transmission system owner, Energinet:

“The offshore Tyra gas field in the North Sea is shut down from September 2019 to Summer 2022.

During this period, consumers in Denmark and Sweden will primarily get their gas supply from Germany and biogas fed into the gas system combined with gas from the Danish gas storage facilities.”

Danish offshore wind – at a glance

First offshore wind farm established 1991

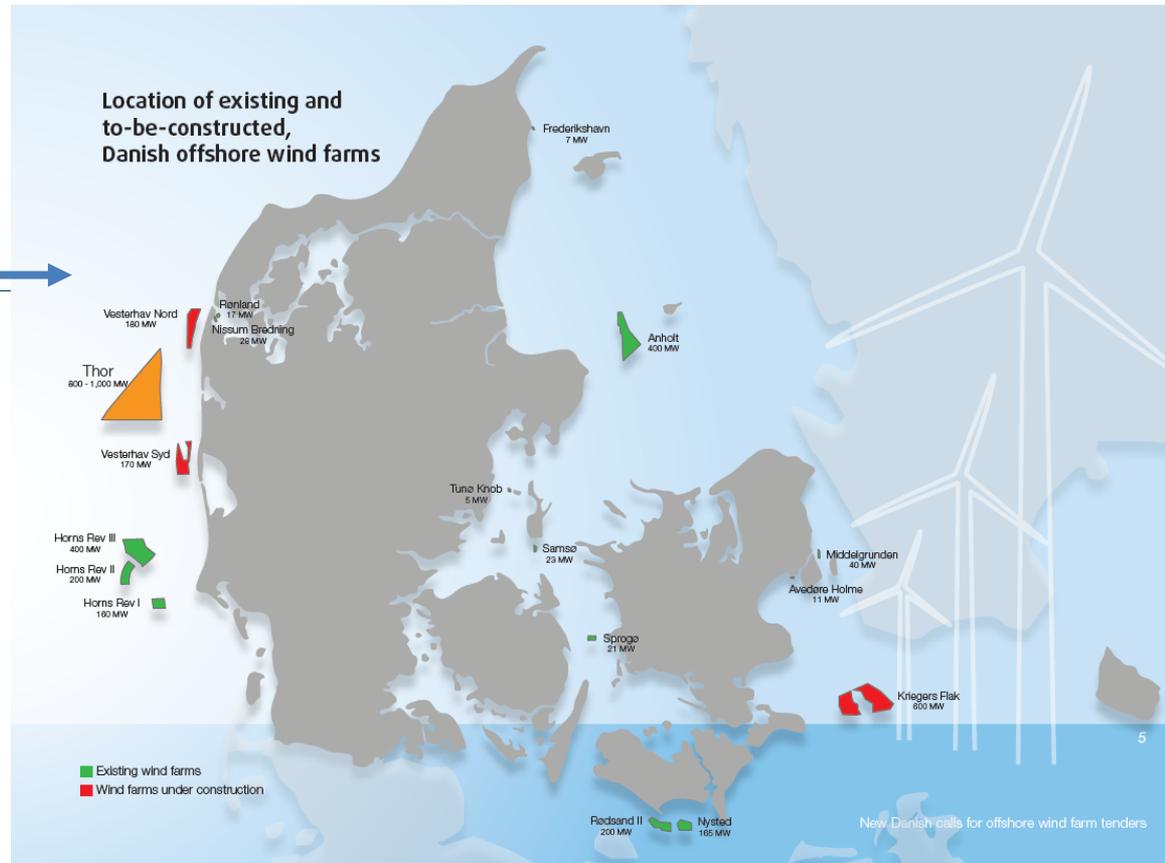
Today 15 established offshore wind farms with combined capacity of 1,699 MW

Plans for 3 wind farms each of 800-1,000 MW to be tendered 2019, -21 and -23

Existing farms and advanced projects

Other projects:

- Omø Syd 200 - 320 MW
- Jammerland Bugt 120 - 240 MW
- Mejl Flak – 60 - 120 MW
- Lillebælt Syd
- Frederikshavn Havv. 21,6-72 MW
- Aflandshage 250 MW
- Nordre Flint 160 MW
- Kadet Banke 504-864 MW
- Paludan Flak 154 – 228 MW
- Treå Møllebugt 434 - 720 MW



Legal basis

- Section 25(3) of the Danish Act on Promotion of Renewable Energy + section 22 a (2) of the Act on Electricity Supply
 - Approvals for establishment of wind farms can be made conditional on rules for removal, including financial security
 - Danish Energy Agency approval

- Detailed rules are today set forth in the establishment permit and the power production permit
- Focus is on health and safety, environment and financial security

Phased decommissioning at Vindeby

- First removal of one blade
- Then removal of nacelle
- Finally removal of tower
- Removal of foundations (gravity based concrete)
- Removal of inter-array cables and export cable



Status today – and what will the future hold?

- Oil and gas
 - The future contingent on the oil price (demand)
 - Continued operations expected
 - Refurbishments/re-developments
 - Removals to increase
- Wind
 - Massive development of offshore wind
 - Farther offshore
 - Larger facilities
 - Larger installation vessels
 - Energy islands
 - Estimates are that 2 GW must be removed by 2035
 - Increased focus on re-development, recycling etc.



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