

# Nordic German Law Seminar

Hotel Atlantic, Hamburg

30 November 2021



# Programme

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15.00 – 15.05: Welcome and introductions

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15.05 – 15.45: "The Finnish Average Adjuster", HPP Attorneys  
"Winter Navigation – Challenges", by HPP Attorneys

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15.45 – 16.20: "Jurisdiction Clauses in Contracts for Sea Carriage to and from Scandinavia – New Supreme Court Decision", by Jesper Windahl and Kasper H. Jepsen, WSCO  
"North Sea Energy Island", by Sandroos, WSCO

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16.20 – 16.50: Break, with coffee and snacks

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16.50 – 17.25: "Norwegian Offshore Wind Licensing Round", by Håkon Sandbekk, Selmer  
"New Rules on Bareboat Registration of Vessels in and out of Norway", by Norman Hansen Meyer, Selmer

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17.25 – 18.00: "The Greta Thunberg Effect on Shipping", by Per-Olov Håkansson, Morssing & Nycander  
"Pathological Arbitration Clauses", by Christer Söderlund, Morssing & Nycander

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18.00 – 19.00: Cocktail reception and canapées.

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# SPECIALISED IN THE ESSENTIAL

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**Nordic-German**

**Law Seminar**

30.11.2021

The Finnish

Average Adjuster

Matti Komonen

Nora Gahmberg-Hisinger



## Content of the presentation

- History
- Traditional duties of the Average Adjuster
- Law reform (focus on procedure and settlement of marine insurance disputes)
- Renewed law, Chapter 16a of the Finnish Maritime Code

# History

- The Average Adjuster is an old traditional part of the Nordic system of maritime law and insurance and is regulated in the respective national maritime codes.
- The Average Adjuster in Finland is an authority appointed by the Ministry of Transport and Communications and is performed on a part-time basis.
- Although the Finnish Average Adjuster institution turns 170 next year, the current Average Adjuster, Mr. Lauri Railas, is only the 10<sup>th</sup> appointed adjuster.
- The Average Adjuster must maintain an office open to the public.

# Statutory duties – previously and today

- ❑ The statutory duties of the Average Adjuster includes
  - marine insurance disputes
  - general and particular average adjustments
  - settlement of voyage charterparty disputes concerning distance freight
  - size and allocation of shipowners' general limitation of liability.

# Statutory duties, marine insurance

- ❑ The most important duty has been and still is to settle marine insurance disputes, both in practice and in quantitative terms.
- ❑ Marine insurance is last defined in the Finnish Insurance Contracts Act of 1933, but traditionally is understood to cover
  - the insurances of merchant vessels and shipping companies such as hull, P&I and BI,
  - fishing vessel insurance,
  - cargo insurance related to sea transport,
  - boat insurance.

# Need for law reform?

- Unnecessary relic or necessary institution which legislation had to be updated?
- Legislation for the Average Adjuster straddled in various laws and was difficult to perceive.
- There was little provision covering the Average Adjuster process; so
  - practice and needs shaped process over the years
  - partly personal-linked
  - the process had features of the court process and arbitration
- The legislation was outdated and did not meet modern standards.
- Questioned whether the Average Adjuster is a necessary authority.
- The Ministry of Transport and Communications prepared a government bill in March 2020
  - Aim to clarify the legislation.

## (Boat) insurers: no need!

- The proposal was mainly supported but also criticized by insurers.

### Criticism:

- Boat insurance to be excluded from the mandatory adjustment procedure.
- Boat insurance is mostly consumer insurance and there are already suitable dispute settlement solutions; the Finnish Financial Ombudsman Bureau (FINE) and its Insurance Complaints Board.
- The law reform was originally scheduled to take effect from the beginning of 2021.
- The outcome of the reform was a compromise on boat insurance and is in some respects legally ambiguous.

# New Chapter 16a of the Finnish Maritime Code

- The Act, new Chapter 16a, entered into force on 1 July 2021 (4.6.2021/480)
- Consequence; where the policyholder, insured or insurer wants an existing boat insurance contract to contain a condition under which disagreements relating to the boat insurance contract shall be determined by Average Adjuster, the parties shall agree this by 31 December 2021.

# Competence of the Average Adjuster

- Independent of parties within the shipping and insurance industry.
- Will still be appointed by the State Council.
- Conditions of competence:
  - higher degree in law (other than master's degree in international and comparative law,
  - certificate of competence as an Average Adjuster,
  - good knowledge of insurance and tort law, and of the tasks included in the position, knowledge of Finnish, Swedish and English needed for the task.
- Not a person who is bankrupt or whose competence of action has been restricted.
- Shall conduct his/her duties in an impartial and independent manner; subject to public servant's liability legislation (criminal & damages).
- If biased, has a deputy (ad hoc, not a permanent position).

# Statutory Duties

- Unless otherwise agreed (i.e. the parties may agree to settle matters and resolve them in any other way, for example by another Nordic average adjuster or arbitrator).
- As in previous legislation;
  - resolve marine insurance disputes,
  - resolve boat insurance disputes, if the insurance has been issued for a boat used by the trader for commercial purposes,
  - resolve matters concerning shipowner's general limitation of liability, distance freight under voyage charterparties and make general or particular average adjustments.
- As amended;
  - resolve consumer boat insurance disputes, if the insurance policy includes a reference to the Average Adjuster,
  - the insurer shall notify the policyholder or the insured of the possibility of including in the insurance contract a condition according to which disputes are solved by an indemnity adjustment given by the Average Adjuster,
  - to provide opinions in other matters related to boat insurance.

# Procedure

- Procedure is public (comparable to court proceedings in general courts).
  - Procedure, in accordance with the Finnish Arbitration Act.
  - A case is initiated by an application to the Average Adjuster.
- 
- The application interrupts the limitation of the debt pursuant to the Finnish Act on Limitation of Debts.
  - The decision shall include
    - 1) the date of the decision;
    - 2) the name of the parties;
    - 3) a statement of the demands and responses of the Parties with justifications;
    - 4) a list of the presented evidence;
    - 5) justifications,
    - 6) the provisions applied;
    - 7) 7) decision on costs.

## Fee and costs

- The Average Adjuster determines the amount of the compensation paid for his/her work and expenses.
- The insurer shall be obliged to pay the Average Adjuster's fee and costs, unless the claim by the insured person or policyholder has been manifestly unfounded.
- The compensation for the distribution of general average is paid by the parties.
- In other cases, the Average Adjuster determines how the cost liability is allocated between the parties pursuant to Finnish Code of Judicial Procedure
  - Main rule: the losing party pays.

# Appeal and Enforcement

- ❑ An appeal against the ruling of the Average Adjuster is lodged to the competent Maritime Court.
- ❑ Finland has two Maritime courts; Åland (Ahvenanmaa) and Helsinki.

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- ❑ The jurisdiction of the Åland Maritime Court is the province of Åland and the Helsinki Maritime Court covers the rest of Finland.
- ❑ Main rule concerning jurisdiction; the Maritime Court of the defendant's domicile.
- ❑ The appeal against the judgment of the Maritime Court is lodged directly to the Supreme Court if leave to appeal is granted.
- ❑ The decision/adjustment of the Average Adjuster is enforceable in the same manner as a judgment of a court of law.
  - Significant reform (nowhere else in the Nordic countries?)



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Winter navigation -  
challenges

30.11.2021

Nora Gahmberg-Hisinger

# Ice classes - comparison

- ❑ Finnish Swedish Ice classes 1A Super, 1A, 1B, 1C, II
- ❑ Russian maritime Register of Shipping (RS) Arctic Classes ICE 1, 2 and 3 -> Arc 4, 5, 6, 7, 8, 9,
- ❑ Polar Classes IACS (International Association of Classification Societies ) PC 1-7

RS	IACS	FS
ICE 1		II
ICE 2		1C
ICE 3	PC7	1B
ARC 4	PC6	1A
ARC 5	PC5	1A Super
ARC 6	PC4	
ARC 7	PC3	
ARC 8	PC2	
ARC 9	PC1	



# Risks when navigating in ice

- Poor visibility due to fog and heavy snowfall.
- Rapidly changing circumstances due to wind.
- Risk of colliding into the assisting icebreaker if the icebreaker stops rapidly because of thick ice.
- Risk of convoy collisions.
- Navigation difficult when the ice has moved navigation aids (buoys, marks).
- Risk of deviating from the official fairway as ice channel is not congruous with the official fairway.
- Ice pressing can also deform the hull, rudders, propellers.
- If the vessel becomes trapped in ice, the ice can move the vessel on to shallow water and ground it, ice easily moves 0,5-1 knots.
- Ice accumulation on the vessel – risk for crew, cargo and vessel itself.



# Icebreaker assistance

- ❑ Icebreaking services in the Baltic sea area are offered by the Governments of Finland and Sweden and managed by the Ice-breaking Division of Swedish Maritime Administration and the Winter Navigation Unit of Finnish Transport Infrastructure Agency in the countries' respective waters.
- ❑ The services are offered in accordance with 'Winter Navigation' rules and instructions published in both countries for every icebreaking season.
- ✓ Act on the Ice Classes of Ships and Icebreaker Assistance (1121/2005)
- ✓ Act on Criteria for Charges Payable to the State (150/1992)
- ✓ Regulations on the structural design and engine output required of vessels for navigation in ice



# Icebreaker assistance

- Master of the icebreaker who directs the escorting operation.
- Acquaintance with icebreaker signals necessary.

Convoys;

- ✓ Several vessels are assisted at the same time.
  - ✓ It is the master of the icebreaker who decides the sequence of the ships in the convoy and their distance apart.
- The icebreaking administrations and the operative icebreakers will not assume any liability for damages or losses in connection with the services provided. Furthermore, assistance and advice are offered to a vessel at its own risk. Vessels being assisted are solely responsible for their navigation.

# Liability in case of collision when assisted by icebreakers

Stockholms Tingsrätt/District Court of Stockholm T 13292-19, 2020-11-05

- ❑ Swedish Maritime Code Chapter 6, § 2 = Finnish Maritime Code Chapter 6, § 9 and § 10 (and COLREG 2,6,7, 8e, 18a)

*“The master shall ensure that the vessel is navigated and managed in a manner consistent with good seamanship. He shall keep himself informed of rules and regulations concerning shipping in force in waters where the ship will sail and in ports where she will call.”*

# Conclusion of the District Court

## ❑ First question

- ❑ Is there an industry practice applicable to collisions when vessels are sailing in a convoy after an icebreaker with the content that both parties would always stand for their own damages and losses resulting from a collision regardless of possible negligence on one or both vessels?
  
- District Court; No evidence presented which would support the existence of such a practice.

## ❑ Second question

- ❑ Whether the collision was caused by the negligence of vessel B and if vessel A had somehow contributed to the collision?
- Icebreaker had instructed vessel B to use maximum engine power, no other instructions were given.
- Vessel B had not followed these instructions.
- Vessel B had not kept sufficient distance to vessel A.
- Vessel B acted negligently.
  
- **Confirms that merchant vessels are solely responsible for their navigation even though they have been assisted by an icebreaker and that possible instructions from the icebreaker are adhered to at the vessel's own risk.**

# The Livanita

## Background

- Timechartered on the New York Produce to a Korean charterer for "one time charter trip via St. Petersburg [...]".
- Loaded steel in St. Petersburg in January 2003, weather turned extremely cold during the vessel's stay in port.
- Vessels were moved in convoys.
- Despite assistance from icebreakers, ice blocks left in the channel exposed the vessel to denting and damage.

# The Livanita - continued

- ❑ Main question; Could owners invoke an express safe port obligation when the relevant port was named in the charterparty?
- ❑ Charterers argued that the ice conditions became abnormal during the vessel's stay and therefore fell outside of the safe port obligation (English law).
- ❑ Owners argued that although conditions were severe, they were not "abnormal" in the legal sense.
- Arbitration award; St. Petersburg had been unsafe for the vessel and damages to the owners were awarded for their breach by the charterers of their safe port undertaking"
- ❑ Charterers appealed to the Commercial Court – could the owners invoke an express safe port obligation when the relevant port was named in the charterparty?
- Award was upheld "the fact that a port may customarily be affected by ice does not equate to that port being unsafe" and "no inherent inconsistency between a safe port warranty and a named loading and discharging port" hence existed.

# Is an ice channel a narrow channel or a fairway?

- ❑ According to Rule 9 of COLREGs (Narrow Channel) a vessel which is proceeding along the course of a narrow channel or fairway must keep as close to the outer limit of the channel or fairway which lies to its starboard side as is safe and practicable.
- The regulation does not state whether an ice channel should be regarded as a fairway or channel.
- ❑ The Maritime Court found in its well-grounded reasoning that an ice channel does not establish a separate fairway.
- ❑ The Maritime Court emphasized that vessels must always be conducted and navigated in accordance with good seamanship.



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THANK YOU FOR  
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HAVE A SAFE AND  
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CHRISTMAS!

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# **Nordic-German Law Seminar**

**30 November 2021**

*Jesper Windahl, Attorney, Partner*

*Kasper Hedegaard Jepsen, Associate*

**WSCO**

# The Merchant Shipping Act – Background

- The Nordic countries (Sweden, Norway, Finland and Denmark) have since 1892 adopted an (almost) identical Merchant Shipping Act: "Søloven".
- National case law is relevant in all Nordic countries ("Nordiske domme i Sjøfartsanliggender") - Journal of Nordic judgments in maritime cases has been published since 1900
- Nordic legal literature and Nordic legal seminars organized every second year by the "Nordic Institute of Maritime Law", University of Oslo,
- A new Merchant Shipping Act was adopted in 1994 in the Nordic countries which remains in force.

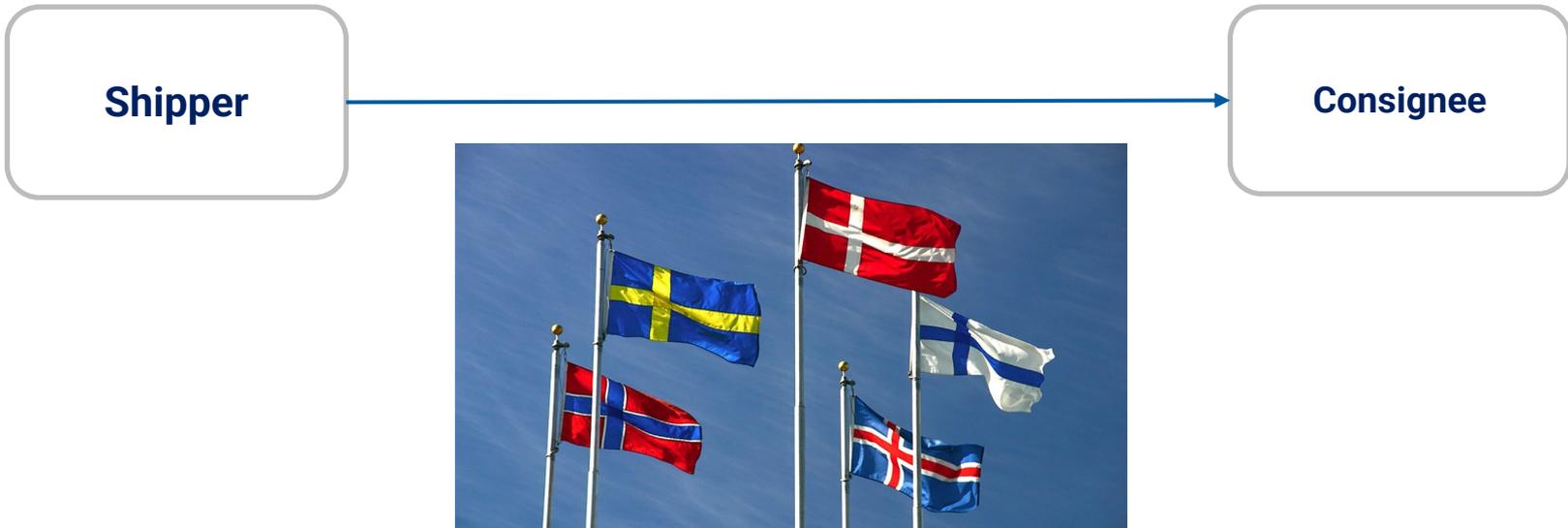
## The Merchant Shipping Act S. 310

Any prior agreement which restricts the plaintiff's right to have disputes regarding carriage of goods pursuant to this part decided by civil legal proceedings shall be void to the extent that it restricts the plaintiff's right, at his option, to institute an action with a court at one of the following places:

- 1) the principle place of business, or in the absence thereof, the habitual residence of the defendant, or
- 2) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made, or
- 3) the place where the goods were delivered for carriage pursuant to in the contract of carriage, or
- 4) the agreed or actual place where the goods were delivered from carriage by the carrier.

Subsections 1 shall not apply if neither the agreed place of delivery nor the actual place of delivery ... is situated in Denmark, Finland, Norway or Sweden, or if otherwise is laid down in Brussels I-regulation.

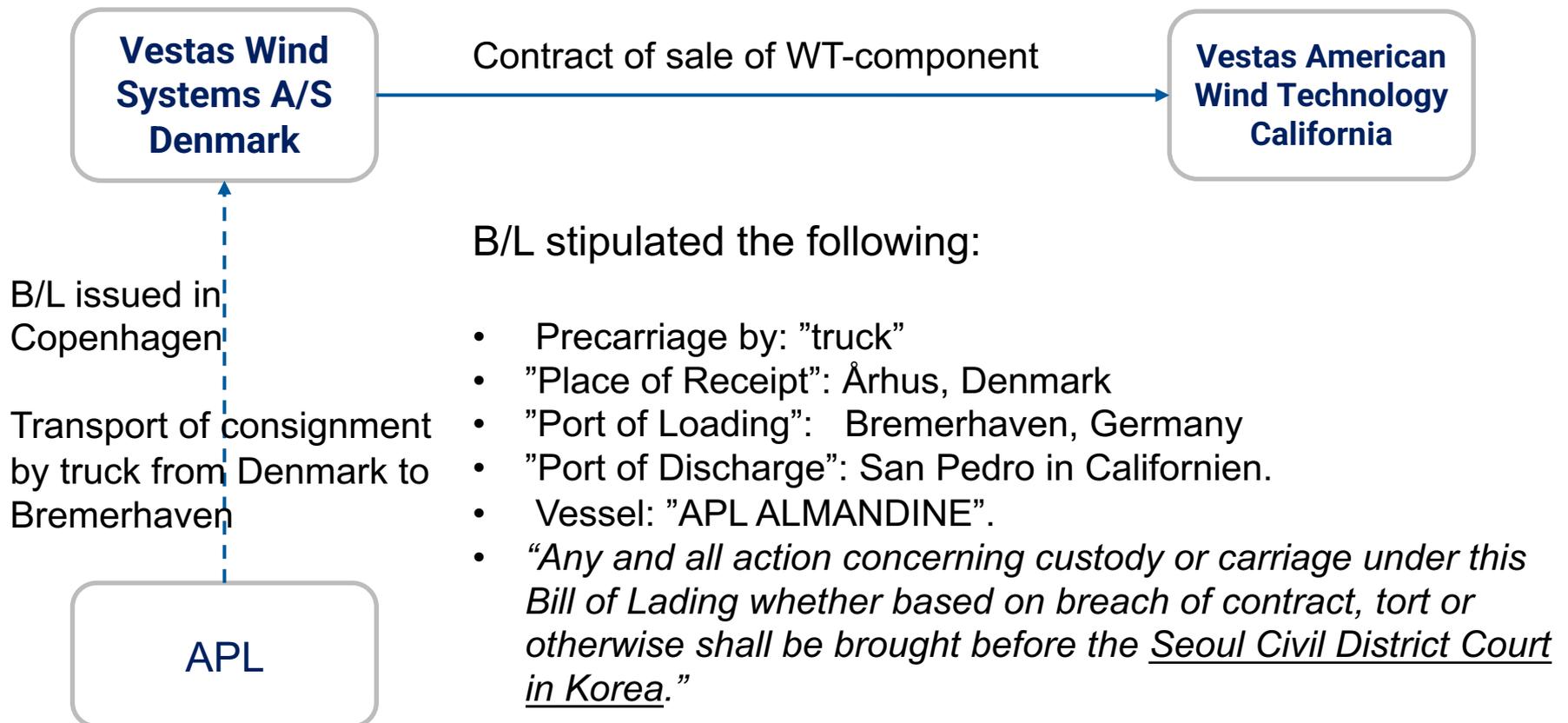
# The Nordic Merchant Shipping Act



Mandatory Nordic jurisdiction over all disputes resulting from inter alia damage to or loss of cargo shipped under a B/L, Waybill or other transport document for carriage by sea in cases where:

- The consignment is taken over for carriage in a Nordic country
- The consignment is delivered from carriage in a Nordic country.
- Multimodal transport ?
- Port of loading ? / discharge ? **WSCO**

# The Danish Maritime and Commercial Court's decision of 4 January 2007 (case no. S 28/04)



## The Danish Maritime and Commercial Court's decision of 4 January 2007 (case no. S 28/04)

- *S. 310 of the Merchant Shipping Act was introduced in 1994. It follows from the travaux préparatoires of S. 310 [...] that the legislator with the wording of the section wanted to "ensure that claimants have a right of Nordic jurisdiction in cases where through bills of lading or combined transport documents are issued for transport to or from the Nordics", provided that a single contract of carriage has been entered into. It further follows explicit that proceedings may, in cases of transshipment in a port outside the Nordic countries, be brought in the Nordic countries irrespective whether the first leg of the transport is performed by ship or other means of transport."*

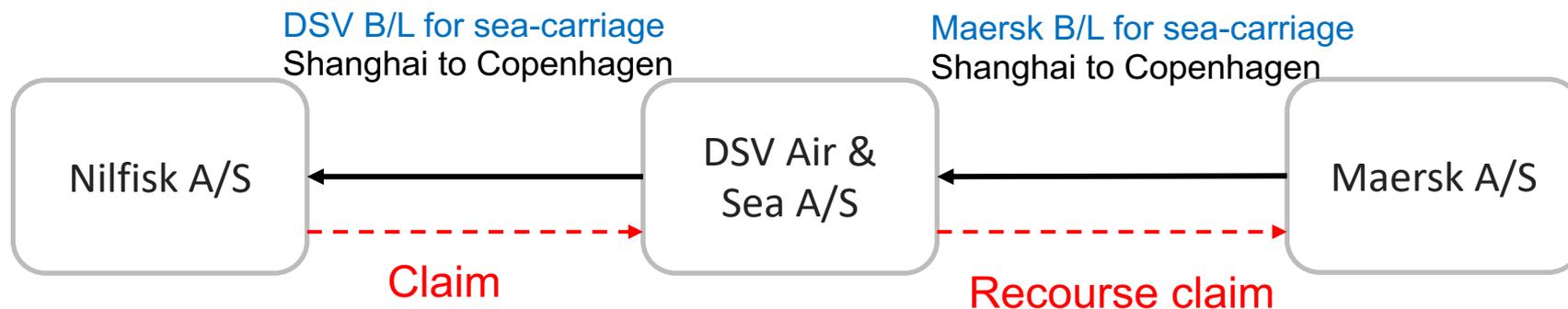
# New court decision of 9 September 2021 by the Supreme Court of Denmark

- **The Court's decision:**
  - Can a jurisdiction clause in a bill of lading be set aside under the Danish Merchant Shipping Act (DMSA) section 310(1) and when does the recast EU Brussels Regulation apply?
- **Why is the decision interesting?**
  - Interpretation of DMSA rules regarding jurisdiction.
    - Potential influence on agreements of transportation by sea, where UK jurisdiction is commonly decided in the shipping company's general terms and conditions.
  - Interpretation of the term "international character" (Recast EU Brussels Regulation application).
  - Does the decision have influence on other type of contractual relations?
  - How does "Brexit" influence jurisdiction clauses?

## Recast EU Brussels Regulation – Article 25

- *If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. [...]*

## Factual circumstances of the case



### Bill of lading – Terms and conditions:

- “All disputes arising hereunder shall be determined by the English High Court of Justice in London”
- “Port of discharge: Copenhagen”

### Maersk B/L:

- Shipper: DSV Air & Sea Co. Ltd., China
- Consignee: DSV Air & Sea A/S
- Signed by: Mærsk (China) Shipping Co. Ltd as agents to Maersk A/S

# The parties arguments

**DSV:** Legal proceedings should be commenced in Copenhagen regardless of the jurisdiction clause in the B/L

- Both were Danish companies domiciled in Denmark;
- The claim arose out of a contract of carriage with an agreed place of delivery in Denmark;
- The agreement was governed by the Merchant Shipping Act and its rules on jurisdiction,
- The recast EU Brussels Regulation was inapplicable as the matter at dispute was not an international case as it had no international aspects and no particular connection to London.

**Maersk:** The jurisdiction clause are to be respected under the recast EU Brussel Regulation as the legal dispute has "international character"

- The container had been shipped from China;
- The contract of carriage had been entered into in China and the waybill had been issued in China by the shipping line's Chinese subsidiary to the freight forwarder's Chinese subsidiary;
- The containers had been lost in the Mediterranean Sea.

## The court's decision:

The Supreme Court of Denmark found that the dispute had an “international character”. The jurisdiction agreement between the parties could therefore not be set aside after the DMSA section 310(1) since the recast EU Brussels Regulation applied.

*“Maersk and DSV are both professional companies which operates within the field of international transport of freight and the present dispute between the parties regards lost freight during transport from Shanghai to Copenhagen. According to the bill of lading the agreement of transport was concluded between two Chinese companies, DSV Chinese subsidiary, and Maersk’s Chinese subsidiary, last mentioned acting as agent for Maersk.*

*On this basis the Supreme Court of Denmark after an overall assessment finds that the present dispute between Maersk and DSV has such an “international character”, that the recast EU Brussels Regulation is applicable, including article 25 regard jurisdiction agreements.*

## The recast EU Brussels Regulation applicability

- It follows from the Supreme Court of Denmark's decision that legal proceeding regarding claims for damaged goods, where legal proceeding is filed in Denmark according to the DMSA can have "international character", even though both the consignee as stated in the bill of lading and the shipping company are Danish companies.
- Since a dispute's "International character" are essential to whether the recast EU Brussels Regulation applies the Court's decision can be used as a basis for interpretation of other type of disputes with "international character".

## ”Brexit”

- After “Brexit” the recast EU Brussels Regulation does not apply in future court proceedings regarding the validity of jurisdiction agreements referring to the UK courts.
- In a contractual relation between a party in a EU-member state and a company with domicile in UK, the recast EU Brussels Regulations applicability would rely on, whether the court agreed in the jurisdiction agreement, would be placed in a EU-member state. If this is the case, the jurisdiction agreement would be valid under article 25.
- .

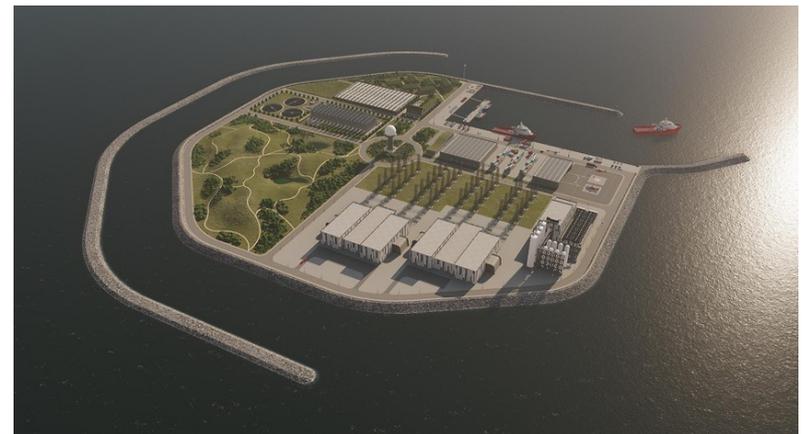
# A future North Sea energy island

Bo Sandroos, lawyer, partner, WSCO

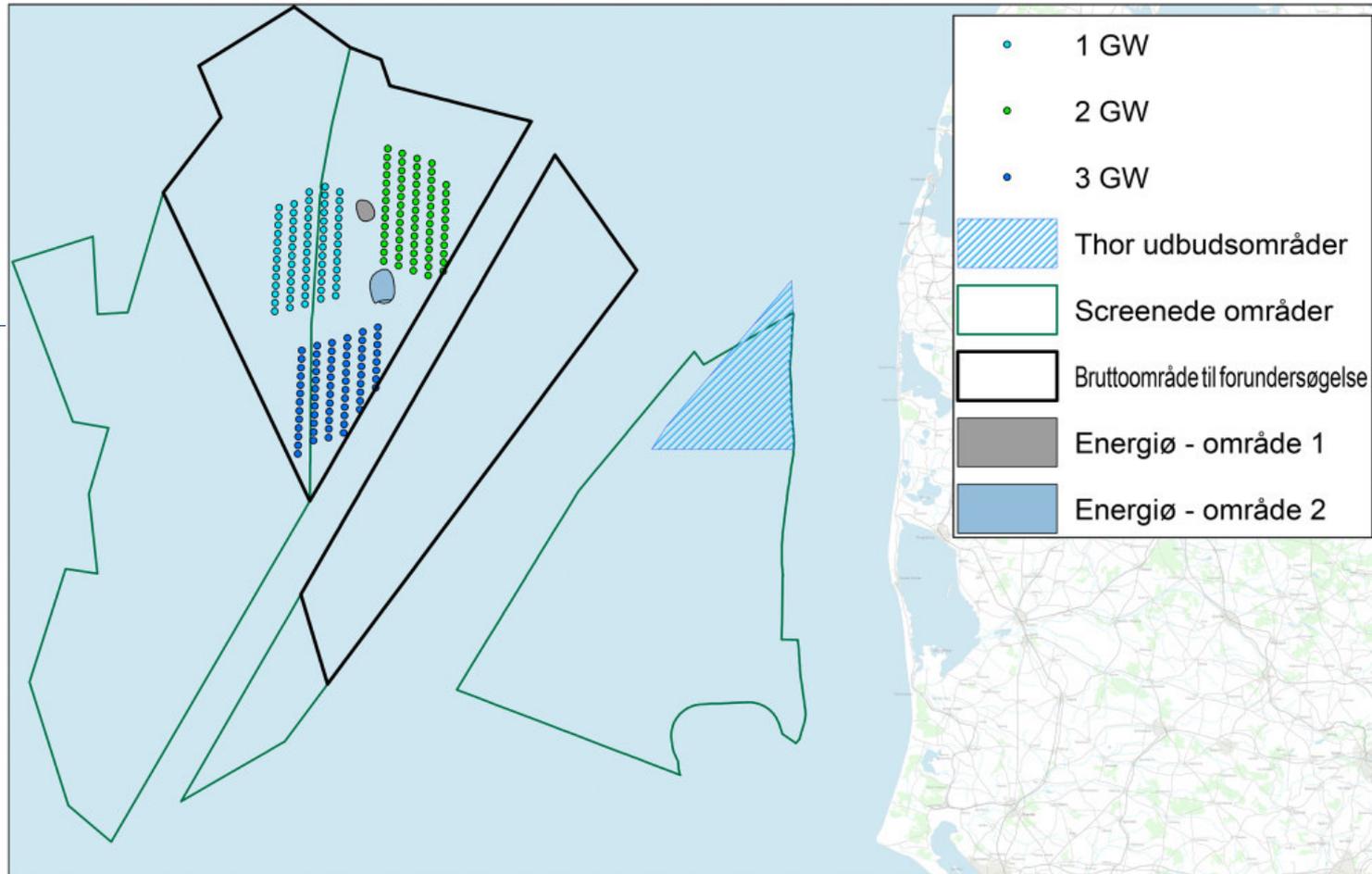


# The energy island – purpose and background

- Support the goal of 70% reduction of greenhouse gasses (in 2030)
  - Process facilities for offshore wind, PtX, other
  - Center for development of new technologies
  - Facilitate cross-border electricity trade
- 
- EU: from 12 GW offshore wind today to 60 GW in 2030 (300 GW in 2050).
  - DK potential of offshore wind is appr. 27,3 GW



# Areas in the Eastern part of the North Sea



WSCO

# Island activities



## Offshore Wind

UP TO 10 GIGAWATTS OF OFFSHORE WIND

Initially, the island will be able to accommodate 3 GW of offshore wind. Over time, the island will connect up to 10 GW.

The island will help enable the electrification of Danish society and allow the electricity consumption of Danish households and companies to be covered by green electricity.



## HVDC Transmission

HIGH VOLTAGE DIRECT CURRENT TRANSMISSION

High-Voltage Direct Current (HVDC) technology will be used to bundle energy from several windfarms and transport this to Denmark.

The electricity from the energy islands can also be exported to our neighboring countries and thus contribute to the green transition in Europe.



## Harbour Facilities

OPERATION AND MAINTENANCE FACILITIES

The island will include a harbour which can be used to support offshore wind farm installation and optimize operations and maintenance (O&M) activities as well as other co-use options.



## Future Innovation

ENABLE FUTURE TECHNOLOGIES AND INNOVATION

In the long run, energy sources must be able to connect technologies that can store or convert this green power into, for example, green fuels (through so-called "Power-to-X").



# Time plan (unofficial)

2021-22	Strategic environmental assessment of island and wind farm(s)	
Q2-2021	Market dialogue re ownership, construction and tender	
Q1-2022	Market dialogue re tender process and conditions	
Mid-2022	Final decision to tender the project	"Year 1"
<hr/>		
2022-24	Environmental impact assessment of project onshore	
2023-24	Environmental impact assessment of island	
<hr/>		
2025	Award of concession agreement and permit for energy island	"Year 3"
2028-31	Environmental impact assessment of wind farm(s)	
<hr/>		
2031	Establishment permit for wind farm(s)	"Year 9"
2033	Island and wind farms in operation	

# Status I – tender process initiated

- Market dialogue on preliminary surveys
  - Geophysics, geotechnical, environmental
- Market dialogue(s) on establishment and ownership etc.

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Political agreement of 1 September 2021. Eight key elements

1. One tender covering both co-ownership and construction of the island
2. Ownership model
3. Zones and size of the Energy Island
4. Business model for the Transmission zone
5. Business model for the Innovation zone
6. The economic system around the Energy Island
7. Responsible co-owner and investment screening
8. Award criteria

# Status II – proposal for Danish Act on energy island

- Minister is granted powers to design and establish the energy island in the North Sea as an artificial island
- The powers include granting establishment permit for the island on the basis of a concluded tender process
- Political discussion in Danish parliament is ongoing

# Other activities in the Baltic Sea and the North Sea



Bornholm is Denmark's energy island No. 2 (likely commissioned first)

The TSO's (transmission system owners) of the North Sea countries are working on a North Sea wind power hub concept



# Legal and commercial challenges for the energy island project

- Ownership and corporate governance
  - Financing and economics
    - Decisive factors: production costs, demand for electricity, bottlenecks in the transmission system
  - Tendering and contracts
    - Time schedule – weather window(s)
    - The investor, contractor and supplier markets
  - Health, safety and environment
    - HSE rules and regulations. Process of environmental approvals
-

# Norwegian Offshore Wind Licensing Round

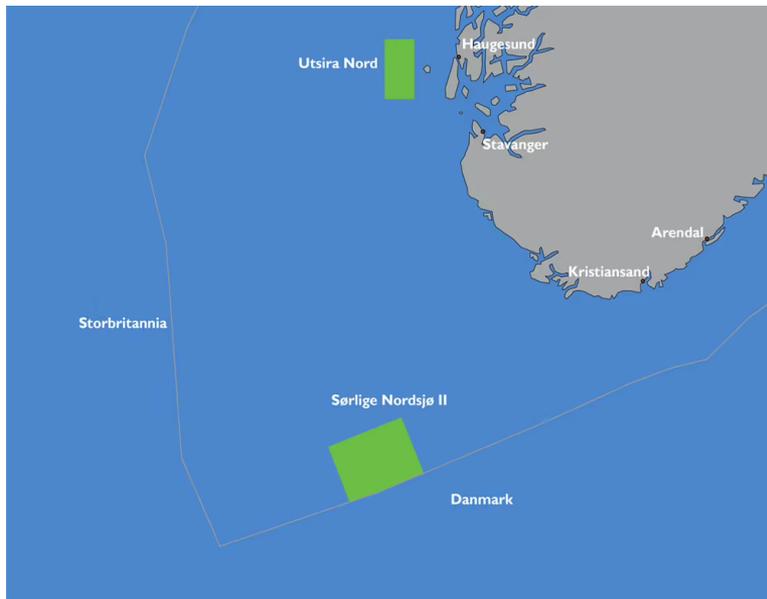
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Håkon Sandbekk



# First offshore wind license round in Norway

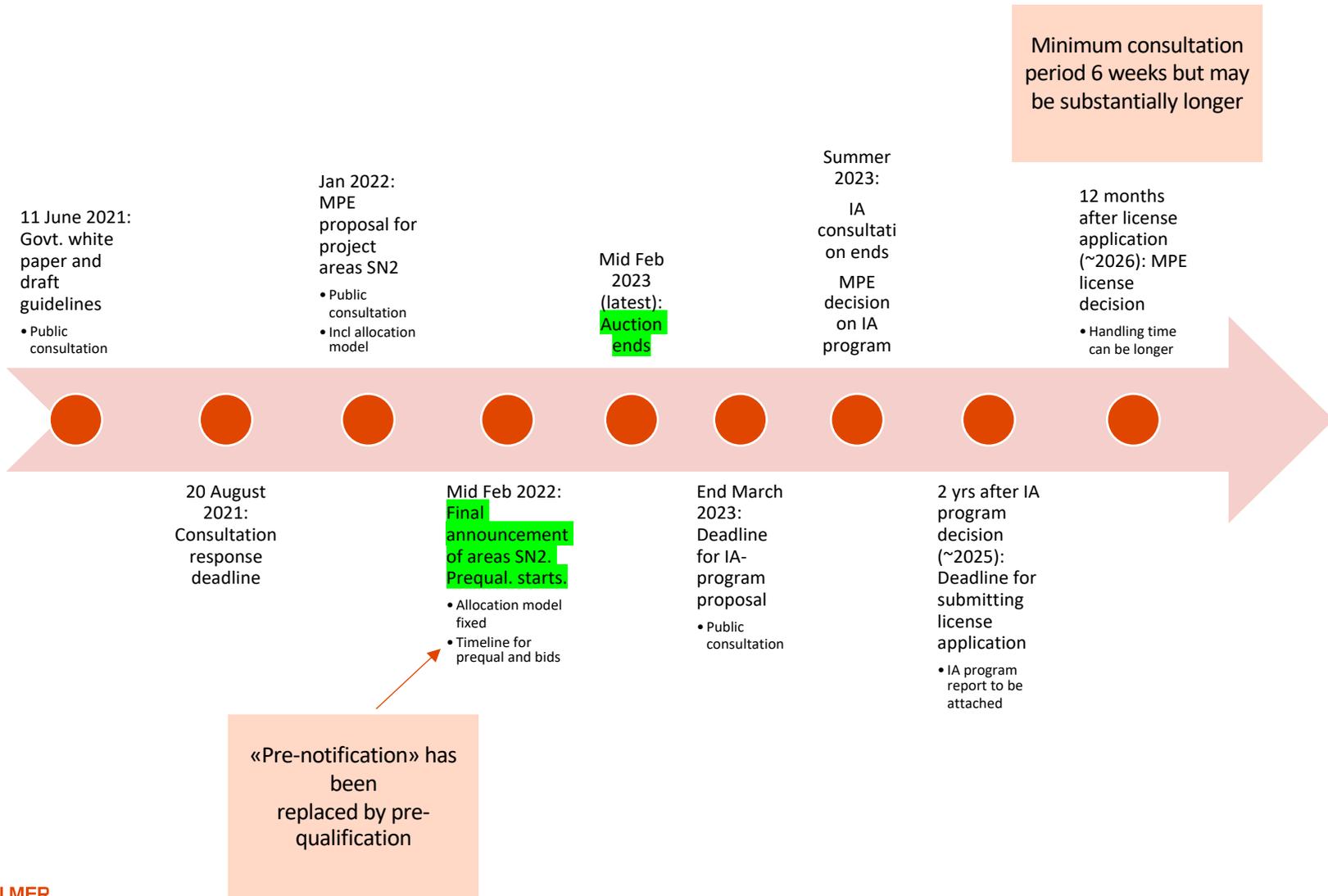
## Two areas open for application



## Key features

- Combined capacity 4.5 GW
- Strong political backing
- Only floating projects will be eligible for government grants
- "Hybrid" concept will be a key enabler
- Regulatory framework still in the making
- Additional zones will be announced in 2024

# (Proposed) timeline until license award

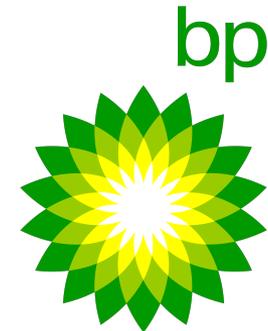


# International participation

RWE



Ørsted

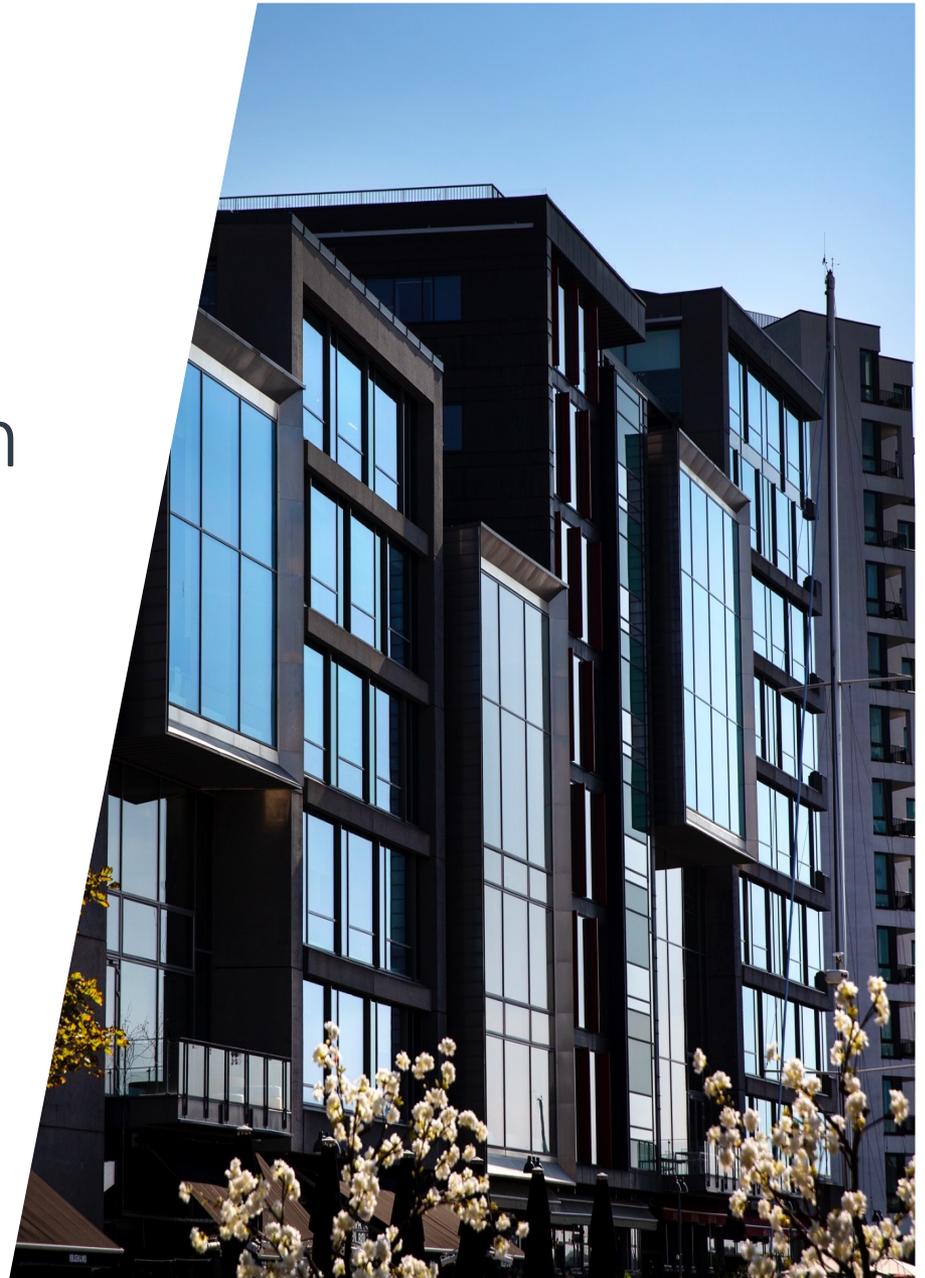


Green  
Investment  
Group

# Bareboat registration in & out of Norway

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Norman Hansen Meyer



# Background

- New rules applied from 1 July 2020:
  - Vessels registered in NOR (Norwegian Ordinary Ship Register) and NIS (Norwegian International Ship Register) were allowed to **bareboat register out**
  - Vessels registered in foreign ship registries were allowed to **bareboat register into** NOR or NIS
- Why?
  - All major registries already offered bareboat registration
  - Prevent permanent flagging-out from NOR & NIS
  - Sale & lease back transactions



# Main concept under new rules

- The **private law** functions are kept with the primary registry / registry of the bareboat owner
- The **public law** functions are held with the bareboat registry / registry of the bareboat charterer

## Primary Registry

- Registered ownership
  - Mortgage
- Other encumbrances

## Bareboat registry

- Flag state control
- Nationality

# Bareboat registration into NIS / NOR

- NIS / NOR approval is subject to:
  - written consent from registered owner and mortgagees
  - Documentation showing that the primary registry approves that the vessel is bareboat registered in NIS / NOR
- Bareboat charterer must fulfill the NIS / NOR ownership requirements
- Bareboat registration limited to the period of the bareboat CP (in any event max 10 years)
- Bareboat registration discharged inter alia upon termination or expiry of the bareboat CP or if required by the registered owner



# Bareboat registration out of NIS / NOR

- NIS / NOR approval is subject to:
  - Written consent from registered owner and mortgagees
  - Documentation showing that the intended bareboat registry will accept the vessel's bareboat registration
- The vessel is not considered Norwegian while bareboat registered in the foreign registry
- New mortgages and other legal rights in the vessel can be registered in NIS / NOR despite existing bareboat registration
- NIS / NOR approval is withdrawn upon termination / expiry of the bareboat CP or if bareboat registration is no longer approved by the bareboat registry



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# Per-Olov Håkanson

The Greta Thunberg Effect on Shipping

Nordic German Law Seminar 2021

# Pathological arbitration clauses

**CHRISTER SÖDERLUND**

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HAMBURG, 30 NOVEMBER 2021

ADVOKATFIRMAN  
MORSSING & NYCANDER

EST. 1880

# Dealing with pathological arbitration clauses

The risk of contending with pathological arbitration clauses is negligible, but should not be neglected. The risk varies depending on context:

- Arbitration clauses in agreed forms
- Arbitration clauses in offered "General Conditions"
- Arbitration clauses in negotiated contracts

## Poorly drafted arbitration clauses represent challenges to

- Party representation
- (Potential) arbitrators
- National courts

## An example of a pathological arbitration clause

### Article 16 - Resolving the Disputes

All disputes in connection with this agreement or its execution, shall be settled friendly through negotiations by both parties. In case of any possible disagreements that might surface among the parties during the implementation of the contract will be resolved by the Courts of International Arbitration in the third countries in accordance with the International Arbitration Law. All the expenditures for the lawyers and costs shall be paid by the parties itself. The decision of the International Arbitration is the final and binds both parties

Статья 16 - Разрешение споров  
Все разногласия, возникающие в связи с исполнением и разрешением настоящего соглашения, разрешаются мирным путем путем переговоров между сторонами. В случае возникновения любых возможных разногласий между сторонами в процессе исполнения договора будут разрешены в третейских судах Международного арбитража в третьих странах в соответствии с Законом о международном арбитраже. Все расходы на адвокатов и другие издержки оплачиваются сторонами самостоятельно. Решение Международного арбитража является окончательным и обязательным для обеих сторон.

# The unfathomable clause

basis of good will and mutual understanding.

13.2. In case of impossibility of the sanction of the arisen disagreements during negotiations, disputes between the Parties will be resolved in the European court of Stockholm, according to Rules of procedure in this court which decisions are final and obligatory for both parties.

14. THE ORDER OF CANCELLATION OF

## Is this a reference to arbitration at all?

### ARTICLE 10 - APPLICABLE LAW

This contract shall be governed by the laws of the International Court of Commerce in Paris, France.

### ARTICLE 11 - AMENDMENT

## Which institution is identified?

Disputes under this agreement shall be resolved by arbitration according to the Rules of the International Chamber of Commerce in Stockholm, Sweden.

## Is this sufficient?

Tvister i anledning av detta avtal skall avgöras enligt lagen om skiljeförfarande.

*Translation: Disputes relating to this contract shall be resolved according to the law on arbitration*

# Near-fatal arbitration clauses

## 8. Disputes

Should any dispute regarding this contract arise, both parties agree to solve the dispute in a friendly way. If such regulation is not possible, arbitrage should be made **by the court of Swedish Chamber of Commerce and Industry**, Stockholm. Both parties agree to acknowledge the decision taken by this court.

.....

## 10. Arbitration

All disputes or differences, which may arise out of this contact or in connection with it, will be settled by means of the negotiations. If that is not possible, any such disputes are to be settled – with exception of jurisdiction of ordinary courts – in **the Swedish Arbitration Commission**, Stockholm, under the rules of this commission, the award of which shall be final and binding upon the parties.

.....

## 10. Arbitration

All disputes and differences which can arise out of the present Contract or in connection with it with exception of recourse to legal courts of law are to be submitted for settlement to the **Foreign Trade Arbitration Commission at the Chamber of Commerce and Industry in Stockholm**, Sweden, in accordance with Rules of Procedure of the above Commission. The Arbitration Award shall be final and binding upon both Parties.

# Near-fatal arbitration clauses (cont'd)

## 8. ARBITRATION

The Parties undertake necessary steps in order for whatever disputed questions, differences or claims which may arise out of / or concern the present contract to be settled by way of mutual consultations.

In the event where the Parties do not reach agreement on the relevant questions these shall be subject to review in the Arbitration Court of Stockholm (Sweden) with the exception of jurisdiction of general courts in accordance with the UNCITRAL 1976 arbitral procedure.

The Arbitral tribunal should be composed of three arbitrators:

- Competent organ
- The Stockholm Chamber of Commerce
- Swedish substantive law.

.....

## 10. Arbitration

All disputes and differences which can arise out of the present Contract or in connection with it with exception of recourse to legal courts of law are to be submitted for settlement to the **Foreign Trade Arbitration Commission at the Chamber of Commerce and Industry in Stockholm**, Sweden, in accordance with Rules of Procedure of the above Commission. The Arbitration Award shall be final and binding upon both Parties.

# Arbitration or court proceedings?

Any controversy arising out of the performance of the present contract shall necessary be submitted to arbitration under the rules of...; in case of disagreement between the arbitrators chosen by the parties, it is agreed that the dispute shall be submitted to State Courts. <sup>1)</sup>

[...]

In case of dispute, the parties undertake to submit to arbitration but in case of litigation the Tribunal de la Seine shall have exclusive jurisdiction. <sup>2)</sup>

*Quotes from*

*1) International Trade Centre UNCTAD/WTO. 2001. Arbitration and alternative dispute resolution: How to settle international business disputes.*

*2) Lew, J. 1987. Contemporary problems in international arbitration Dordrecht. Martinus Nijhoff Publisher.*

## So – what to do?

Avoid unnecessary hassle – use an institutional model clause and stipulate

- International arbitration
- Named arbitral institution
- Place
- Language
- Applicable law
- Number of arbitrators (optional)

# Use the model clause recommended by the arbitral institution!

## Dispute resolution

Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

*Recommended additions:*

The arbitral tribunal shall be composed of three arbitrators/a sole arbitrator.

The seat of arbitration shall be [...].

The language to be used in the arbitral proceedings shall be [...].

This contract shall be governed by the substantive law of [...].

NOTE – This example is taken from the website of the Arbitration Institute of the Stockholm Chamber of Commerce

## Tailor-made additions for specific needs (SCC)

- Rules for expedited arbitrations
- Combined clause – Rules for expedited arbitrations as first choice
- Combined clause – Value based
- Model clause – SCC Express
- Model mediation clause
- Model mediation clause – combined clause

## **May an arbitral institution administer an arbitration according to the rules of another arbitral institution?**

In one case, the Singapore Court of Appeal upheld a pathological hybrid arbitration clause which had provided that

*“Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore and the official language shall be English ...”*

The Court of Appeal in that case had taken cognizance of the fact that the SIAC was able and willing, for that particular case, to conduct a hybrid arbitration, applying the ICC rules.

*Insignia Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936

## A corollary to the Insignia case

An Award under the SCC, given on 21 October 2013, was based on an arbitration agreement of the following tenor:

(Annex B to the agreement)

Arbitration rules	Cl. 66 of the SC International Chamber of Commerce (ICC); Paris Court of Arbitration
Court of arbitration	Cl. 66 of the SC Chamber of Commerce and Industry, Stockholm
Number of arbitrators	Cl. 66 of the SC; Three (3)
Language of arbitration	Cl. 66 of the SC; English, official, and Russian, unofficial translation
Place of arbitration	Cl. 66 of the SC Stockholm, Sweden

## **A corollary to the Insignia case (cont'd)**

The Award was challenged by the respondent (unsuccessful) party but was upheld by the Stockholm Appellate Court in a judgment of 23 January 2015 (Case no T 2454-14).

## The principle of separability may save the arbitration agreement

Sojuznefteexport was a foreign trade organization established under the laws of the former Union of Soviet Socialist Republics. In 1976, Sojuznefteexport entered into various agreements to sell quantities of oil to JOC Oil Limited, a Bermuda company. The purchase agreements incorporated Sojuznefteexport's standard conditions, which contained a reference to arbitration.

Sojuznefteexport was not properly represented (two signatures) to sign a foreign trade contract – so JOC Oil challenged the Tribunal's jurisdiction.

*JOC Oil v. Sojuznefteexport* - Award in Case No. 109/1980 of 9 July 1984 XVIII Y.B. Comm. Arb. 92 (1993)

# Thank you!



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