

# vogtwiig®

## maritime news

- **Armed guards on board Norwegian flagged ships**
- Piracy - special attention required for charter parties and other contracts?
- **Increased interest in the North East Passage as a shorter transport route to Asia –mandatory IMO-polar code in the pipeline**
- Norway accedes the Convention on International interests in Mobile Equipment (Cape Town 2001)
- **Bunker oil pollution damage – new and increased limits of liability as from 1 january 2010**
- Bunkersoljesøl – begrensningsreglene i Norge fra og med 2010

Dear Reader,

**On behalf of the Shipping and Offshore group in Vogt & Wiig, I am pleased to present the first edition of our Maritime Newsletter, where we focus on a number of topical issues in which our clients have expressed interest. As Vogt & Wiig possesses one of Norway's largest and strongest Shipping and Offshore legal teams, we are involved in a large number of disputes, casualties, transactions and related issues throughout the maritime sector. As a result we keep a close eye on Scandinavian and international developments within the sector - both legal and commercial.**

**In this first edition we share our experiences both with our Norwegian and international clients on issues affecting the maritime industry, and provide updates on recent regulations.**

Unfortunately, some of our clients have experienced piracy attacks and hijackings. Due to the enhanced piracy threat, both in the Indian Ocean off the Horn of Africa and West Africa, the issue of armed guards onboard the vessels has become a demand from several shipowners. Whilst some flag states continue to prohibit the arming of merchant vessels, the Norwegian government has been at the forefront in setting a legal framework and has recently implemented new regulations in this respect. The UK has announced it will also change its approach and permit armed guards. Piracy is also a more frequent issue when negotiating contractual and insurance arrangements, and a source for potential disputes. A more positive development, although fraught with environmental concerns, is the opening up of the North East Passage, with possible new trading routes through Arctic waters from Europe to Asia.

We are also proud to possess one of Norway's strongest teams within the Aviation sector amidst our Shipping and Offshore group, handling both a large number of Aviation acquisition, finance and lease transactions and ancillary transport issues within the Aviation sector.

We hope you will find this Maritime Newsletter of interest and provide a backdrop on some topical issues affecting the Maritime sector in autumn 2011. We consider our knowledge should be a resource for our clients which can complement the advice we provide in any specific assignment. We envisage this Maritime Newsletter, and future editions to come, should contribute to the debate about the direction of our industry, and both we and our clients can benefit from such knowledge sharing.

**Christine Rødsæther**  
Partner, Vogt & Wiig AS  
cr@vogtwiig.no



**“In this first edition we share our experiences on issues affecting the maritime industry, and provide updates on recent regulations.”**

# Armed guards on board Norwegian flagged ships

**The shipping trade is heavily affected by the increase in piracy attacks off the coast of Somalia and in the Indian Ocean. Norwegian shipowners have demanded political initiative and change of laws that better protects the vessel and its crew against pirate attacks. The cry for protection was met by the legislators who passed a regulation on 29 June 2011 allowing armed guards on board Norwegian vessels. However, the use of armed guards is a controversial measure to avoid piracy attacks.**

It is up to the individual flag state to allow the use of armed guards on board ships. There is no international law preventing this. Up until June this year, the use of armed guards was forbidden in Norway. Before passing the regulations, the Ministry of Trade and Industry issued an invitation to comment on the regulation on the use of armed guards on board ships registered in Norway. The regulations were passed on 29 June 2011 and entered into force on 1 July 2011. Following the implementation of the new regulations the Norwegian Maritime Directorate has issued provisional guidelines on the use of armed guards on board Norwegian ships based on the guidelines published by the International Maritime Organization (IMO). The guidelines are not exhaustive, but offer explanatory comments on relevant provisions of the Security Regulations and the Firearms Regulations. The guidelines recom-

mend shipowners to engage professional advisers to establish the scope of the legal rules which they are subject to under Norwegian law.

## Applicable rules and regulations

The use of armed guards on board Norwegian flagged vessels required adaptations and implementations in various regulations, hereunder the rules regulating security, anti-terrorism and anti-piracy (the Security Regulations) and the rules concerning firearms, firearm parts and ammunition (the Firearm Regulations). The Security Regulations is based on the Ship Security Act, Section 40 cf. section 39. These sections open up for implementation of preventive measures by way of regulations, with the objective to protect the vessel against “unlawful actions”.



**Writer:**

Maria Norum Resløyken  
mnr@vogtviig.no

### Armed guards - not the only means

The Ministry of Trade and Industry stresses that the use of armed guards shall be considered an addition to already implemented preventive measures as suggested in the Best Management Practice 4. This means that passive and other unarmed security measures cannot be replaced by armed guards on board the ship. The choice of using armed guards or not is left entirely up to the shipowner. The Security Regulations controls the use of armed guards in order to provide high professional and ethical standards.

### The choice of Private Security Companies

An issue when considering whether to allow the use of armed guards is what qualifications should be required when employing a private security company. Since there is no current international framework that regulates the qualifications of private security companies there are great concerns about industry “cowboys”. Companies that want to hire a private security company are required to complete a thorough risk assessment cf. Section 20 of the Security Regulations. The regulations impose requirements to provide the Norwegian Maritime Directorate with a statement of reason why there is a need for armed guards on board and an assessment of the suitability of the security company and their guards. Further, the Regulations require taking into account the IMO guidelines when selecting and using a private security company. Finally the Norwegian Maritime Directorate has the authority to decide that companies regarded as unsuitable are not permitted to be hired. If the armed guards are unqualified and not aware of the necessary precautions needed on board a ship, this can make an already bad situation worse. There has been examples where hired guards turn out to be unqualified teenagers that have never carried a weapon before.

According to section 21 of the Security Regulations the shipowner has a duty to notify the insurers. The provision re-



quires the shipowner to give reasonable notice to the insurers covering liability, losses, expenses or expenditure resulting from piracy, and to provide any information required by an individual insurer in order to clarify matters relating to its insurance policy. If the ship is insured in the Norwegian insurance market this would be the war risk insurer, whereas under the English insurance market this would be the marine risk insurer. The IMO guidelines also require the shipowner to investigate whether the private security company itself is insured. This is a good test to rule out industry “cowboys”.

### Use of force

The presence of armed guards on board a ship requires regulations concerning the storage of weapons and when weapons can be used. Use of force is permitted “when necessary to prevent or protect against acts of terrorism and piracy, cf. section 17. A fundamental question in this respect when having a private security company on board the ship is clarifying who has the final word of command. The Security Regulations establish that the master has the final command at all times, also in a situation where use of force is necessary. It is important to note that the chain of command is a mandatory rule of law that is not optional by contract. The industry has already seen examples of contracts used by private security companies that give the armed guards final word of command if the vessel is being attacked.

Further, it is stated that force, including the use of firearms, may only be employed against a threat which is direct, immediate, significant and otherwise unavoidable. The use of force must also be avoided wherever possible and when it is necessary it must be proportionate in view of the scope of the threat and the conditions otherwise. This means that other preventive measures must be attempted before use of force is implemented in order to be lawful. This is further emphasized by section 17, third paragraph which may trigger criminal liability under the General Civil Penal Code if the use of force is unlawful. Pursuant to section 24 the master shall approve arming and the implementation of procedures for the use of firearms “in each individual case”. However, pursuant to the guidelines the master may issue standing orders regarding the use of firearms in accordance with the established procedures in this regard, for example in connection with the night watch. Regardless of the masters command, each individual is responsible for ensuring that their use of firearms complies with section 17 and 22 of the Security Regulations.

### Firearms permit

According to Norwegian law persons holding a weapon need to have a firearms license. Shipowners that want to employ private security companies must apply for a firearms permit pursuant to section 23 a of the Firearms Regulations. The application can be made even if no contract has been signed with a specific

## Armed guards on board Norwegian flagged ships

security company. Pursuant to section 23 of the Firearms Regulations, shipowners can be granted a general, time-limited permit for holding firearms by hired security companies on board ISPS ships registered in Norway. The permit is made general meaning that the permit will not be linked to each individual firearm. The firearms permit is also linked to a geographical limit. The permit applies to ships in foreign waters which are sailing in, to or from an area subject to security level 2 or 3, but only when sailing south of 30 degrees north latitude. This means that the hired security company can only be brought on board the ship when sailing south of 30 degrees north latitude.

### Procedures

The Security Regulations requires the shipowner to establish procedures for the use of armed guards and firearms on board the ship, cf. section 22. Such procedures must also be established by the security company before embarking on the vessel, cf. section 20 second paragraph. The established procedures must be used and implemented by the master. The guidelines further stress the importance of these procedures being in place, in order to avoid any doubt in a situation when use of force can be necessary. Pursuant to the Firearms Regulations the firearms must be stored in a safe manner that prevents unauthorized

personnel to gain access to firearms. The crew is at no time authorized to access firearms on board the ship. In this respect it is relevant to note that the crew on board the ship is at no time allowed to handle firearms.

### Reporting of incidents

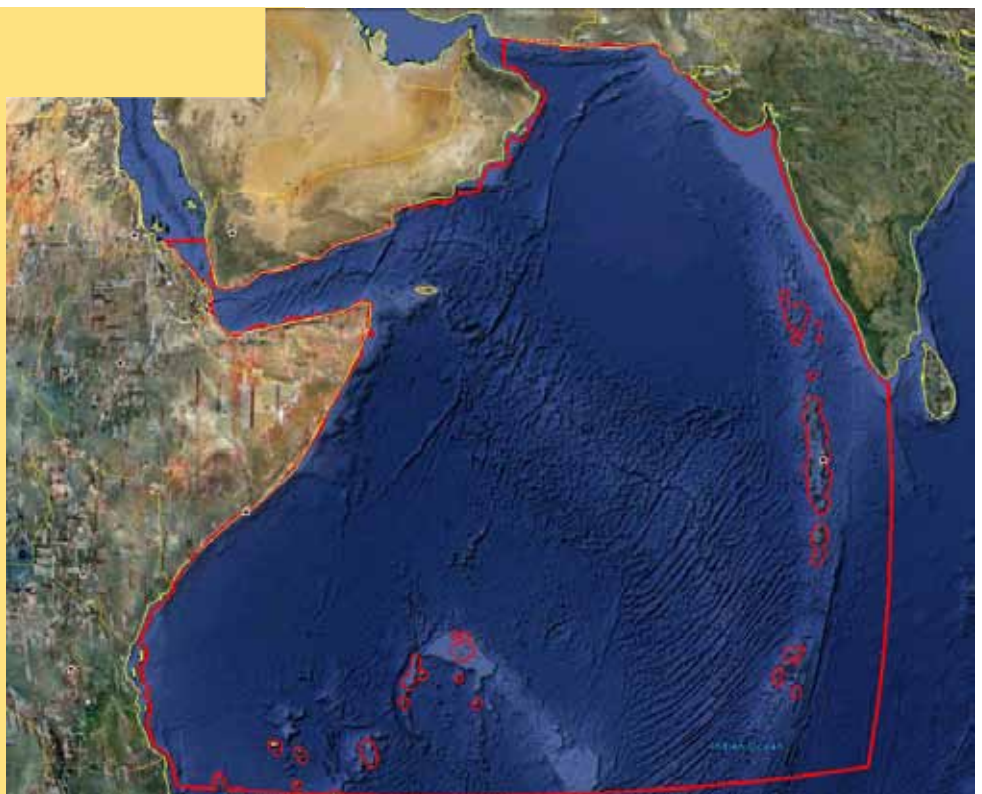
If there has been a situation that has led to the use of force, this incident must be reported to the Norwegian Maritime Directorate within 72 hours. The report shall describe the incident and specify the persons involved and the use of force. If there is a reason to believe that the use of force has resulted in personal injury or death, a report shall be made immediately to the Norwegian National Criminal Investigation Service (Kripos). The master would be responsible for the reporting although this is not made explicit by the provision, cf. section 18.

### Consequences?

The debate on the use of armed guards and the role of the private security companies will continue. However, the biggest question of all is how this will affect the crew on board the ship. At this stage it we do not know how the pirates will react to the use of weapons. Weapons on board the ships will at least increase the risk of brutal behavior from the pirates. However, we have

yet to see a ship with armed guards on board being successfully hijacked. Reported numbers from the Norwegian Shipowners` Association and the Norwegian Maritime Directorate indicates that 20-25% of Norwegian flagged vessel have already hired armed guards. In the end, it would be illusory to believe that this is the long term solution to the piracy problem. A solution to the piracy problem is dependent on stability on shore in Somalia.

**On 16 December 2010, the Joint War Committee announced that the entire Indian Ocean is now included as a “listed area” (Hull War, Strikes, Terrorism and Related Perils Listed Areas).**



# Piracy – special attention required for charter parties and other contracts?

**The increased threat of piracy attacks has drawn attention to the need for special clauses/revision of various contract terms.**

## Charterparties

The high frequency of acts of piracy off the Horn of Africa and more wide ranging attacks in the Indian Ocean has keyed the area to be designated an additional premium “War Risk” area. In general terms, a time charterer cannot direct the Vessel to any port, place, area or zone where the vessel could be reasonably expected to be exposed to such War Risk, without first obtaining the owners’ written consent. In some voyage charters the owners may refuse to perform to enter the load or discharge port or may require the charterers to nominate another safe port. The owners will be free to give their consent or withhold it as the owners will have a reasonable interest in protecting their vessels from piracy attacks. It need be underlined that very different considerations may apply if the vessel is trading under a time or a voyage charter.

It should be underlined that the standard form of a number of charter parties do not expressly cover the situation, and BIMCO and other strong market participants such as Shell have created their own recommended clauses for dealing with acts of piracy and terrorism. Owners should pay extra attention to the standard part of the charter used and make sure his interest in respect of an act of piracy is covered (to the extent possible in the course of commercial negotiations). Unfortunately, despite the high publicity, we still see charters are entered into by a recap referring to a previous standard charter without paying too much attention to the terms of the standard form. The owners should first check how trading areas, war risk

insurance and piracy are regulated.

We have in recent months seen an increased focus on these clauses. The charterers want to have as much freedom as possible to trade the vessel, and prefer specifically to clarify that passage through Gulf of Aden and the Indian Ocean is always permitted. Some owners want to restrict such trading. Both parties have to assess the recommended vessel routing suggested by authorities in calculating the time and cost of the performing voyage. Most commonly the owners see the charterers’ need and focus on including provisions in respect of additional insurance coverage falling to be for the charterers’ account. Additional factors for owners include seaworthiness issues linked to compliance with Best Management Practice, on hire/off hire clauses, crew war risk bonuses and liability issues arising from placing weapons on board ships.

Difficulties can arise where a charter is entered into with full knowledge of the current situation, but without clarifying how owners can exercise their discretion to refuse to proceed into an unsafe area. A charterer will in such situation argue that the owner had to be very aware of the situation and must be deemed to have allowed trading through Gulf of Aden/Indian Ocean since no reservations were made. This will be a strong argument if the vessel was already trading through Gulf of Aden/Indian Ocean or the owner had to understand that this would be a part of the vessel’s intended trade. Counter arguments from the owner could be that the vessel was supposed to have another trading area but the charterer later changed the trading area, or that the acts of piracy and risk have significantly increased since the date the charter was entered into. Factually this is easier to demonstrate in the context of port risks. In any event, we strongly recommend both charterers and owners



## Piracy - special attention required for charter parties and other contracts?

to address the issue when negotiating the charter and specify any restrictions/requirements in the charter. This is a situation known to the parties and should not be overlooked or left to the very general standard provisions.

Another question that should be considered is to specify clearly if the vessel will go off hire or remain on hire if hijacked. For a bareboat charter, the vessel will normally stay on hire. For a time charter a recent English judgment (MV “Saldahna”) ruled that the vessel remained on hire, but the judgment was linked to specific wording in that contract (NYPE). If the charterer insists on being permitted to trade the Gulf of Aden/Indian Ocean it may be a reasonable requirement to clearly state that the vessel will remain on hire if hijacked. It could also be considered to add provisions on who will cover the additional costs as a consequence of a hijacking; i.e. in a bareboat charter the bareboat charterers will handle the hijacking through his insurance company. However, the owner will most likely also incur some cost for legal advisors and also additional fees for the mortgagee’s professional advisors which will be chargeable to the owner. Whilst it is hard to argue that the hijacking is a default of the charterers, these additional costs are likely to be reimbursed by the charterer as a consequence of an implied indemnity for following charterer’s orders. A provision stating that the charterer will indemnify the owner for any reasonable costs in relation to such hijacking is recommended (unless already covered by more general indemnifications).

### Bills of lading

Duties are owed to cargo interests under contracts of carriage carried under negotiable documents such as bills of lading. This may affect the owner or charterer, dependent on which is considered the Carrier under the bill. A number of standard bill of lading forms are in existence, often containing “liberties” permitting the Carrier to deviate or discharge cargo other than at the named port in the event the Master determines the voyage to be unsafe. Charterparties

frequently permit the charterer to select the form of bill of lading to be issued which will then bind the owner, or the owner undertakes to issue bills of lading “as presented”. Care should be taken when negotiating new charterparties to ensure that where possible bills are only permitted to be issued in a form which preserves the carrier’s rights to deviate in case of unsafety. The form of bills of lading may also be regulated by agreements between seller and buyer which will themselves contain force majeure provisions.

### Financing agreements

We have also seen that the banks financing the vessels have an increased focus on acts of piracy. After all, an important part of their security is the mortgage over the vessel, and this security is jeopardized if the vessel is hijacked. We have seen in many loan agreements that the definition of “Total Loss” includes hijacking where a vessel is hijacked for a period of more than 30 days. The result is that the loan is accelerated and shall be repaid within a period of 90 – 180 days. Such provisions do not comply with reality. A hijacking will very often last for more than 30 days. The current average delay in obtaining the release of a pirate hijacked vessel is around 180 days. The English courts have concluded that the vessel will not be considered an actual total loss under insurance policies as the ransom demand indicates an intention to return the vessel to its owner. In such situation, the owner risks that the loan is accelerated and must be repaid, while no payments will be received under the insurances. Under certain Loss of Hire insurances under the Norwegian Plan, detentions of vessel for 6 or 12 months may be treated as constructive total losses, so it is prudent to check not only the insurance terms, but also the type of cover. It would be in the best interest of the owner to have the requirements in the loan agreement brought in conformity with the insurance terms.

Also, most loan agreements have an extensive list of covenants. Usually

there is a general provision to trade the vessel in accordance with insurance requirements. However, the banks should consider adding additional covenants for trading in piracy infested areas, such as compliance with Best Management Practice and requirements for additional insurances with a specification of these always subject to approval by the banks. An Owner is under an obligation to notify underwriters if his vessel is trading in an additional premium war risk area, and notification to the lender can be made at the same time. On the other hand, an owner trading regularly through Gulf of Aden/Indian Ocean cannot every time run to the bank for permission or review of additional insurances, and the banks most likely would not wish to administer such additional follow up of the vessel’s trade. Inclusion of certain requirements will, however, raise attention to these matters.

An important matter to consider for an owner is also to ensure that his charters are back-to-back with the requirements under the loan agreement/mortgage on these issues.



**Writer:**  
Erlend Lous  
erlend.lous@vogtwiig.no



**Co-writer:** Adrian Moylan  
adrian.moylan@vogtwiig.no



# Increased interest in the North East Passage as a shorter transport route to Asia – mandatory IMO-polar code in the pipeline

*As the ice cover is rapidly decreasing in the Arctic, and the shipping industry is facing challenges due to the piracy threat in the Indian Ocean and general instability in the Middle East, Russian authorities have registered an augmented interest in the North East Passage. The interest is sparked by what appears as a clear strategy from Russian authorities to promote their “Northern Sea Route”. However, there is currently no mandatory international instrument that addresses the specific challenges related to the vulnerable environment, the ice conditions and the general lack of infrastructure in polar waters.*

September 2010 Tschudi Shipping Company performed a successful passage from Kirkenes, Norway to Lianyungang China, assisted by Russian atomic ice breakers. The Norwegian based shipping company

estimated that the MV “Nordic Barents” travelled half the distance and saved 17.5 days and 500 mt of fuel compared with a passage through the Suez Canal. Even though the North East Passage does not represent a full year alternative, and it requires assistance and cooperation with Russian authorities, the route seems to offer an interesting option. According to Tschudi Shipping, what offers the most commercially interesting opportunity is however not the entire route, but transshipments between Russian and Asian ports.

In the summer months of 2011, the Russian authorities have made several other steps to promote the North East Passage as a viable alternative transport route to Asia. Representatives from all the permanent members of the Arctic Council, including Norwegian State Secretary Erik Lahnstein, were

in August 2011 invited by high level Russian authorities to participate on a five day stretch along the “Northern Sea Route” on the ice breaker “Yamal”. Later in the month, some 120 000 MT of oil were transferred through an STS operation in Sarnesfjorden, Norway to the tanker “Vladimir Tikhanov”. The 162000 DWT supertanker, will be the largest tanker to have ever passed through the North East Passage on its way to port in Thailand.

Nevertheless, while shipping in the Indian Ocean struggles with security issues, safety and environmental impacts are the main concerns related to Arctic shipping. The Secretary-General of the IMO Mr. Efthimios E. Mitropoulos recently marked the expansion of new areas by the promulgation of navigational warnings (NAVAREAs) in the Arctic, and stated the following concerning the challenges

## Increased interest in the North East Passage as a shorter transport route to Asia – mandatory IMO-polar code in the pipeline

related to shipping in these waters: *“The opening up of the Arctic will be a double-edged sword. Depending on your perspective, it represents either a world of new business opportunities or, on the other hand, an unwelcome extension of the human footprint into areas still, at the moment, predominantly pristine.”*

The ongoing process in the IMO in developing a mandatory code for Ships operating in Polar Waters (the Polar Code) will be of particular importance for shipping in polar waters. Norway, represented by the Norwegian Maritime Directorate, heads the correspondence group set up to develop the code. However, a mandatory code is not expected to be in force before 2015.

The Polar Code is meant to apply to all new SOLAS-vessels operating in the Arctic as well as the Antarctic. An open question is how these additional requirements will relate to the classification societies' ice-class standards. Additionally, one issue that is expected to raise some controversy is to what extent the Polar Code will apply to existing ships, forcing the operators to make technical adaptations to continue operating in polar waters. Insofar it is also undecided whether the Polar Code will apply also to non-SOLAS ships, such as for instance fishing vessels. It should also be mentioned

that one of the main challenges when operating in polar waters is the great distance to shorebased SAR and contingency facilities. It is thus reason to believe that the Polar Code could impose stricter requirements on the contingency equipment on board.

A passage through the North East Passage will further not only have to rely on international legislation, as Russian Coastal state rules will have to be taken into consideration when transiting in its territorial and internal waters. A federal draft law concerning *“state regulation of commercial navigation on the route in the waters of the Northern Sea Route”* is currently under consideration. The proposal lays down the main requirements for sailing along the route, in particular to strictly forbid the discharge of environmentally harmful substances in the area. UNCLOS (United Nations Convention on the Law of the Sea) article 21 allows to a certain extent the coastal state to adopt laws and regulations in relation to the preservation of the environment. From a shipping point of view it would be of considerable interest if the international flag state legislation and the Russian coastal state legislation are harmonized.



**Writer:**

Birger Gjelsten Veum  
birger.gjelsten.veum@vogtviig.no

## Nye regler for omlastning av olje, såkalte skip-til-skip-operasjoner (STS-operasjoner) i Norsk Økonomisk Sone

Som følge av et IMO har vedtatt et nytt kapittel 8 til vedlegg I i MARPOL (den internasjonale konvensjon om hindring av forurensning fra skip) er det blitt vedtatt nye regler for STS-operasjoner i Norsk Økonomisk sone. Reglene trådte i kraft fra 1. januar 2011.

Reglene gjelder for oljetankskip fra 150 bruttotonn og oppover og krever bl.a. at oljetankskip som er involvert i STS-operasjoner skal ha en plan for

gjennomføringen av operasjonen som er godkjent av Sjøfartsdirektoratet. I tillegg skal Kystverket varsles om STS-operasjoner minst 48 timer før operasjonens planlagte start. Reglene er implementert i norsk rett gjennom forskrift 22. desember 2010 nr. 1798 om endring i forskrift om hindring av forurensning fra skip og forskrift 20. desember 2010 nr. 1782 om meldeplikt for oljetankere over 150 bruttotonn som skal foreta

STS-operasjoner i Norges økonomiske sone. Hjemmelslover er henholdsvis skipsikkerhetsloven og lov om havner og farvann.

*Kilder:*

[www.sjofartsdir.no](http://www.sjofartsdir.no)  
[www.kystverket.no](http://www.kystverket.no)

**Norway accedes to the  
Convention on International  
Interests in Mobile Equipment  
(Cape Town 2001)**



The Cape Town Convention on International Interests in Mobile Equipment of 16th November 2001 and the Protocol on Matters Specific to Aircraft Equipment (collectively the “CTC”) establishes an international procedure for the registration of mortgages and other similar security rights in mobile equipment where the objective is to establish a satisfactory process to record international security interest over mobile equipment which relocates cross-border and to achieve international legal protection for such security interests by recording the interest in an International Registry. The term “Mobile equipment” refers to three categories of mobile equipment; aircraft equipment, railway rolling stock and space equipment (as of today there are no protocol covering space equipment, but this is in the making).

Norway acceded to the CTC on 16th October 2010. The accession was made through the adoption of the Act on International Security Rights in Mobile Equipment (Lov om internasjonale sikkerhetsretter i mobilt løstøre nr. 58/2010). The CTC and the Act on International Security Rights in Mobile Equipment entered into force in Norway on April 1st 2011. This means that Norway now has implemented an international instrument which the financial institutions that provides financing to the aviation industry would benefit directly from. The accession will mean that the financial institutions will be able to record their interests in the aircraft and more importantly the engines on the aircraft in an international registry which is recognized by all ratifying and contracting states to the CTC. Prior to the accession and the entering

into force of the CTC such international recordation of interest in aircraft and aircraft engines were not possible as the Norwegian Civil Aviation Register is not open for recording of title to engines on aircraft, only title to the aircraft as a whole. Since the aircraft engine is one of the most expensive parts of the aircraft and this part will be shifted between aircraft in operation, it is important for the financing institutions to be able to record their title to and interest in the engines themselves as well as the aircraft. With the accession to the CTC this is now made possible and it will provide Norwegian airlines with the same kind of credit facilities/financing terms which have been available for airlines in the contracting states for some time.

The International Registry for the recordation of such mobile equipment is today located in Dublin, Ireland (<https://www.internationalregistry.aero/>). The priority of security interests recorded are being determined on a “first to file”-basis.

The CTC will on certain issues be in conflict with Norwegian law with respect to the Norwegian Mortgages and Pledges Act, the Enforcement Act and the Aviation Act. Due to this the Norwegian Parliament has adopted new provisions to the effected legislation which entered into force at the same time as the CTC.

If further information on the CTC please contact:

Mr. Ingar Fuglevåg or Ms. Camilla Flatum, phone: +47 22 31 32 00 or email: [ingar.fuglevag@vogtviig.no](mailto:ingar.fuglevag@vogtviig.no), [camilla.flatum@vogtviig.no](mailto:camilla.flatum@vogtviig.no).



**Writer:**

Camilla Flatum  
[camilla.flatum@vogtviig.no](mailto:camilla.flatum@vogtviig.no)

# Bunker oil pollution damage – new and increased limits of liability as from 1 January 2010



**Writer:**

Tage Brigte A. Skoghøy  
tage.skoghoy@vogtwiig.no

On 1 January 2010 new rules on limitation of liability for bunker oil pollution damage entered into force in Norway, ref. the Norwegian Maritime Code (“NMC”) Section 175a. Norway has significantly increased the shipowners’ liability limits applicable to claims in respect of (1) the raising, removal, destruction or rendering harmless a ship which has sunk, stranded, abandoned or wrecked, as well as everything that is or has been on board the ship, (2) the removal, destruction or rendering harmless the ship’s cargo, and (3) measures taken to avert or minimize losses for which liability would be limited pursuant to the above mentioned, including losses caused by such measures, ref. Section 172a. The Norwegian limits were already before the amendment significantly higher than the limits pursuant to the Convention on Limitation of Liability for Maritime Claims (“LLMC”), 1976, as amended, article 6 (1) (b).

The limit of liability for claims comprised by the NMC Section 172a, is SDR 2.000.000 for vessels with tonnage not exceeding 1000 tons. For vessels with tonnage exceeding 1000 tons, the limit is increased (i) for every ton from 1.001 to 2.000 tons, by 2.000 SDR, (ii) for every ton from 2.001 to 10.000 tons, by 5.000 SDR,

and (iii) for every ton exceeding 10.001 tons, by 1.000 SDR. Accordingly, the owner of the vessel “Godafoss” (14,664 tons) which ran aground off the Norwegian coast 17th February 2011, had the right to limit his liability for claims specified in Section 172a to about SDR 49 millions. By comparison, the owner of the vessel “Full City” (15,873 tons) which ran aground off the Norwegian coast 31st July 2009, before the entering into force of the new and increased limitation limits, were liable for equivalent claims only up to about SDR 23 millions. Further, the limits pursuant to the LLMC article 6 no. 1 (b) would entitle the shipowners in the groundings of the vessels “Full City” and “Godafoss” to limit their liability to about SDR 6 millions, i.e. about 12,5 % of the Norwegian limits as per today. In addition to the quantitative differences, the LLMC limit shall cover not only the claims specified in article 2 no. 1 (d) and (e) (the NMC Section 172a), but also claims relating to property damage and uncovered claims for loss of life or personal injury.

The differences in the limitation rules make visible the importance of choice of law. The shipowner may invoke the limitation rules applicable in the jurisdiction where legal proceedings are initiated against him. Notwithstanding the creditors’ right to choose the forum for initiating legal proceedings against the shipowner, of course subject to the relevant choice of law, the shipowner may force the application of the limitation rules of his domicile by not invoking the limitation rules before enforcement proceedings are initiated at his domicile. However, within the EU/EEA, the Brussels I regulation and Lugano Convention prevents this result by establishing that judgments given in one of the EU/EEA country shall be recognized and enforceable in the other EU/EEA countries. In my view, the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 to some extent also prevents such a result between its member states.



# Bunkersoljesøl – begrensningsreglene i Norge fra og med 2010

## 1. Innledning

De fleste kyststater opplever fra tid til annen skipsforlis som resulterer i oljesøl. Også for Norges del er eksemplene mange. Blant dem kan nevnes "Leros Strength", "Green Ålesund", "Rocknes", "Server", "Full City" og sist "Godafoss". "Godafoss" var et containerskip som 17. februar 2011 grunnstøtte på Kvern skjær utenfor Hvaler. Skipet hadde ca. 800 m<sup>3</sup> tung bunkersolje, og ca. 168 m<sup>3</sup> diesel, om bord. Store mengder olje ble tatt opp av sjøen før den traff land, men en del har tilgriset kystlinjer i både Østfold, Vestfold, Aust-Agder, Vest-Agder og Telemark. Havariet av bulkskipet "Full City" året

før, natt til 31. juli 2009, medførte at om lag 120 km av kystlinjen mellom Larvik og Grimstad ble tilgriset med tung bunkersolje. Skipet hadde ca. 1 000 tonn tung bunkersolje og ca. 120 tonn marin diesel om bord. Opprydningskostnadene ble i begge tilfeller betydelige – som ved alle havarier og oljesøl av en viss størrelse.

Kyststatene setter gjerne store ressurser inn ved slike havarier, for å begrense skadevirkningene. Ansvar for opprydningskostnadene og forurensningsskade som måtte oppstå, påhviler imidlertid redersiden (skipets eier, befrakter, disponent, assurandør). På grunn av risikoen for, og omfanget

av, skade innen redervirksomheten, har redersiden rett til å begrense sitt ansvar i mange henseender. Begrensingsretten innebærer at redersiden kun kan holdes ansvarlig opp til et gitt beløp, og at kyststatene og øvrige skadelidte derfor må dekke den overskytende andel av skaden/tapet selv. Retten til å begrense ansvaret har solide røtter langt tilbake i tid. Utviklingen over de siste årtiene er imidlertid at de typer krav som kan begrenses, er blitt redusert, samtidig som begrensingsbeløpene er hevet utover det en inflasjonsjustering skulle tilsi. Et omfattende internasjonalt samarbeid har ført til at en har beveget seg tilbake nærmere utgangspunktet om at den ansvarlige selv skal dekke tapet. Rederen skal likevel fremdeles beskyttes mot katastrofene – det virkelig omfattende ansvaret. Norge har gått i forveien, og vesentlig høynet begrensingsbeløpet for krav knyttet til vrakfjerning, opprydningstiltak mv. etter bunkersoljesøl, med virkning fra 1. januar 2010. Lovendringen fikk betydning ved grunnstøtingen av "Godafoss".

I denne artikkelen vil jeg gi en kort introduksjon over gjeldende ansvarsbegrensingsregler, både i Norge, i Norden og enkelte utvalgte

kyststater. Videre vil jeg kort skissere utfordringene knyttet til lovvalg. Utfordringene kommer på spissen da begrensingsregler og –beløp varierer fra land til land. Ved et havari på norskekysten er det viktig for staten og øvrige skadelidte å sikre at redersiden holdes ansvarlig etter norske begrensingsregler, og unngå at redersiden gis anledning til å begrense ansvaret til lavere beløp.

## 2. Ansvar for forurensningsskade forårsaket av bunkersoljesøl

Skipsrederens har et objektivt ansvar, altså uavhengig av skyld, for forurensningsskade forårsaket av bunkersoljesøl. Ansvaret for slik forurensningsskade reguleres i Norge av sjøloven kapittel 10 I, og det objektive ansvaret følger av sjøloven § 183. Reglene er basert på Bunkerskonvensjonen 2001. Som nevnt ovenfor, har imidlertid redersiden rett til å begrense ansvaret. Begrensingsretten ved bunkersoljesøl er fastslått i sjøloven § 185, mens begrensingsreglene følger av sjøloven kapittel 9. Begrensingsreglene er basert på Begrensingskonvensjonen av 1976 (LLMC) og tilleggsprotokollen av 1996, som Norge har tiltrådt. Etter konvensjonen er imidlertid

hver medlemsstat gitt kompetanse til å fravike begrensingsreglene for krav knyttet til vrakfjerning, opprydningstiltak mv. Dette har Norge gjort, og som nevnt har Norge innført høyere ansvarsgrenser for slike krav.

Begrensingsbeløpet beror på skipets vekt (bruttotonnasje), og er altså ikke knyttet til selve havariet eller størrelsen på oljesølet eller lignende. Jo større og tyngre skipet er, desto høyere blir ansvarsbeløpet. Etter norsk rett er redersiden ansvarlig for SDR 2 millioner for skipets første 1 000 tonn, se sjøloven § 175a. Dette gjelder selv om skipet har en bruttotonnasje på under 1 000 tonn. Er skipet større, er rederen ansvarlig for ytterligere SDR 2 000,- for hvert tonn fra 1 001 til 2 000 tonn. Er skipet også tyngre enn 2 000 tonn, er rederen ansvarlig for ytterligere SDR 5 000,- fra 2 001 til 10 000 tonn. For skip med bruttotonnasje på over 10 000 tonn, svarer rederen for SDR 1 000,- for hvert tonn fra 10 001 tonn. SDR består av et gjennomsnitt av valutaenhetene euro, yen, GBP og USD. Den 10. mars 2011 utgjorde SDR 1 NOK 8,846270.

Skipet "Godafoss" hadde en bruttotonnasje på 14 664 tonn. Rederen kunne i "Godafoss" saken begrense ansvaret for opprydningskostnadene



## Bunkersoljesøl - begrensingsreglene i Norge fra og med 2010

til ca. NOK 430,5 millioner (SDR 48,67 millioner), jf. sjøloven § 175a. Beløpet beregnes etter sjøloven § 175a som følger:

Ansvarsgrensen for de første 1000 tonn:	SDR 2 000 000,-
For hvert tonn fra 1001 til 2000 tonn, SDR 2000:	SDR 2 000 000,-
For hvert tonn fra 2001 til 10 000 tonn, SDR 5000:	SDR 40 000 000,-
For hvert tonn over 10 001 tonn, SDR 1000:	SDR 4 664 000,-
Sum (for skipet "Godafoss" - bruttotonnasje på 14 664 tonn):	SDR 48 664 000,-

Skipet "Full City", som hadde en bruttotonnasje på 15 873, grunnstøtte og lekket ut bunkersolje før lovendringen trådte i kraft 1. januar 2010. Rederen for "Full City" kunne således begrense ansvaret etter de tidligere reglene, til ca. NOK 203,1 millioner (SDR 22,96 millioner), altså til under halvparten av dagens nivå.

I Danmark, Finland og Sverige, og i andre land hvor ikke Begrensingskonvensjonens begrensingsbeløp er fraveket for opprydningskrav, er ansvarsbeløpene betydelig lavere. I disse jurisdiksjonene ville rederen i "Godafoss" saken kunne begrenset ansvaret til ca. NOK 53,7 millioner (SDR 6,07 millioner), jf. LLMC art. 6 (1) (b).

Selv om forbehold etter LLMC art. 18 er tatt, er ikke nødvendigvis ansvarsgrensene høynet – de kan også være lavere. Til illustrasjon, ville rederens ansvar for opprydningskostnadene etter grunnstøtingen av "Godafoss" etter nederlandsk rett kunne begrenses til ca. NOK 28,1 millioner (SDR 3,18 millioner). Etter belgiske rettsregler vil rederens ansvar kunne begrenses til tilnærmet samme beløp.

Det er således store forskjeller med hensyn til begrensingsbeløpene til tross for at reglene har vært og er gjenstand for et omfattende internasjonalt samarbeid. Ansvarsbeløpet i henhold til de øvrige nordiske landenes lovgivning utgjør i "Godafoss" saken kun 12,5 % av den norske grensen etter sjøloven §

175a, og etter nederlandsk og belgisk rett kun 6,5 %. Det er ikke bare forskjeller mellom land hva gjelder begrensingsbeløpene, men også hvilke krav som faller inn under de ulike beløpene. Ansvarsbeløpet etter norsk rett, sjøloven § 175a, gjelder alle krav knyttet til vrakfjerning, opprydning og andre tiltak som faller inn under § 172a, som er forårsaket av *samme skadehendelse*. Person- og tingsskadekrav mv. konkurrerer ikke om dette begrensingsbeløpet, men vil være undergitt begrensning etter egne regler i sjøloven § 175, jf. § 172. Begrensingskonvensjonens begrensingsregler innebærer derimot, i tillegg til at begrensingsbeløpene er lavere, at kyststatenes krav knyttet til opprydningstiltak konkurrerer om begrensingsbeløpet med eventuelle tingsskadekrav mv., se LLMC art. 6 (1) (b).

### 3. Lovvalgutfordringer

Ulikhetene mellom statenes ansvarsregler innebærer at spørsmål knyttet til lovvalg er av stor betydning for partene. Dette er viktig for partene å være oppmerksom på. Selv om kreditorene, i praksis først og fremst kyststatene, er tillagt retten til å velge forum, kan redersiden påberope de ansvarsbegrensingsreglene som gjelder i enhver jurisdiksjon (land) hvor det rettes krav mot rederen etter en slik hendelse. Det innebærer at rederen ofte kan "tvinge" frem anvendelsen av hans hjemstedsjurisdiksjons ansvarsbegrensingsregler om han venter passivt til kravet fremmes mot ham i hjemlandet. Det er således ikke gitt at kyststatene får inndrevet kostnadene

forbundet med opprydningstiltak mv., i alle fall ikke i samme grad som etter skadestedets regler.

Innenfor EØS-/EU-området har imidlertid Luganokonvensjonen og Brussel I-forordningen regler som begrenser denne følgen mellom medlemsstatene. Også reglene i Bunkerskonvensjonen vil etter mitt syn i tilnærmet samme grad hindre et slikt resultat medlemsstatene imellom. Dette bedrer Norge som kyststat sine muligheter til å få inndrevet krav mot redersiden i henhold til norske, høye ansvarsbegrensingsregler.



**Writer:**

Tage Brigte A. Skoghøy  
tage.skoghoy@vogtwiig.no

---

**vogtwiig®**

**Bergen**  
Christies gate 3A  
P.O. Box 1213 Sentrum  
N-5811 Bergen  
Norway  
tel.: +47 55 56 82 00

**Oslo**  
Roald Amundsens gate 6  
P.O. Box 1503 Vika  
N-0117 Oslo  
Norway  
tel.: +47 22 31 32 00

**Trondheim**  
Brattørkaia 17B  
P.O. Box 1280 Pirsenteret  
N-7462 Trondheim  
Norway  
tel.: +47 73 84 58 00

**Singapore**  
1 North Bridge Road  
#06-26 High Street Centre  
179094 Singapore  
Republic of Singapore  
tel.: +65 65 33 59 17

---