

JULY 2019

QUARTERLY UPDATE

Maritime and Transport Law



NJORD
LAW FIRM

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Where does the transport industry stand?

In this quarterly update, we review the development within the first half of 2019 and look at the significant trends within the transport law.

COMPLIANCE AND REGULATION

So far, 2019 has been a lot about regulation and compliance – both within the transport industry with cabotage, sanctions and the GDPR, but also outside the industry in relation to the money laundering scandals in the banking world.

Successful compliance begins with a thorough understanding of the applicable rules supported by the right systems and work processes. The development within IT services that can handle different compliance matters happens at very high speed. In this context, it is essential to remember that ultimately, compliance is about people. Although the understanding and systems are in place, building a strong internal culture of compliance is critical. The implementation and rooting of compliance is one of the focus areas in the shipping companies' Experience Exchange Group for GDPR and compliance.

Together with a large Danish shipping company, NJORD Law Firm recently held the third workshop for the group.

NEW DANISH GOVERNMENT

Recent months have been marked by the political development in the form of the elections for the European Parliament and the Danish Parliament. The much-needed Mobility package was not finally adopted by previous European Parliament and the European Commission. Now, further work awaits the new Parliament rolling up their sleeves and getting to work and the appointment of a new European Commission.

"Social dumping" has, however, been an

important topic during the elections in Europe, and we expect that the Mobility package will relatively soon be on the agenda.

The Danish parliamentary election heralded a change of system, the consequences of which are closely monitored by the transport industry. Several industry organisations have aired their expectations of the new Danish government.

They all share an increased focus on

TOP 10

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environmental issues, which was one of the main themes in the Danish elections. Undoubtedly, CO2 neutrality and renewable energy will become more important in the future. This also applies to areas such as ship-breaking and discharge.

NEW MINISTERS FOR THE TRANSPORT INDUSTRY

On 27 June, it was announced that Benny Engelbrecht will be Minister for Transport and Simon Kollerup will be Minister for Industry in Mette Frederiksen's new Social Democratic government.

Simon Kollerup will take over a position where the political weight has been increasing in recent years. The Ministry has, among other things, played a crucial role in designing a range of business growth packages. Also, the Ministry makes important decisions about "Det Blå Danmark" (*The Blue Denmark*), which is a business stronghold of great importance to the Danish economy and employment.

Speaking to TV2, our new Minister for Transport, Benny Engelbrecht, says that the transport area is critical in relation to the green transition, and he is looking forward to turning the Ministry of Transport into a real green ministry.

From a legal perspective, several areas obviously need some love and care from a new government. An example of this is the challenges with the regulation of self-driving vehicles that has fallen behind the development in the industry and where Denmark has now been overtaken by other (Scandinavian) countries.

INTERNATIONAL PERSPECTIVE

Last but not least, Teresa May's resignation as British prime minister has increased the risk of a hard Brexit later this year, which will have severe consequences for the trade with Great Britain and the transport industry as well. The major trends within the transport law for the rest of the year will, therefore, depend on the political development in the coming months.

6. [Railroad transport: A golden mean](#)
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STATUS

Regulation of ship breaking

The regulation of ship breaking is undergoing changes. At the same time, the first half of 2019 has shown increased activity within the market for ship recycling, as the container shipping industry transitions into using ships of other sizes than hitherto. With all the hectic activity, it is important to focus on compliance with the complex rules of international ship breaking, not least because of the sanctions for non-compliance.

> NJORD monitors the latest news in the area, and our biannual report provides an excellent opportunity to take stock of the regulation.

The Recycling Regulation

Since 1 January 2019, it has been a requirement in the EU countries that ships registered in a European or an OECD country only be scrapped at yards approved by the EU authorities. The new rules on ship recycling are part of EU Regulation No 1257/2013 on ship recycling (the "Recycling Regulation"), which regulates the scrapping of ships in Europe.

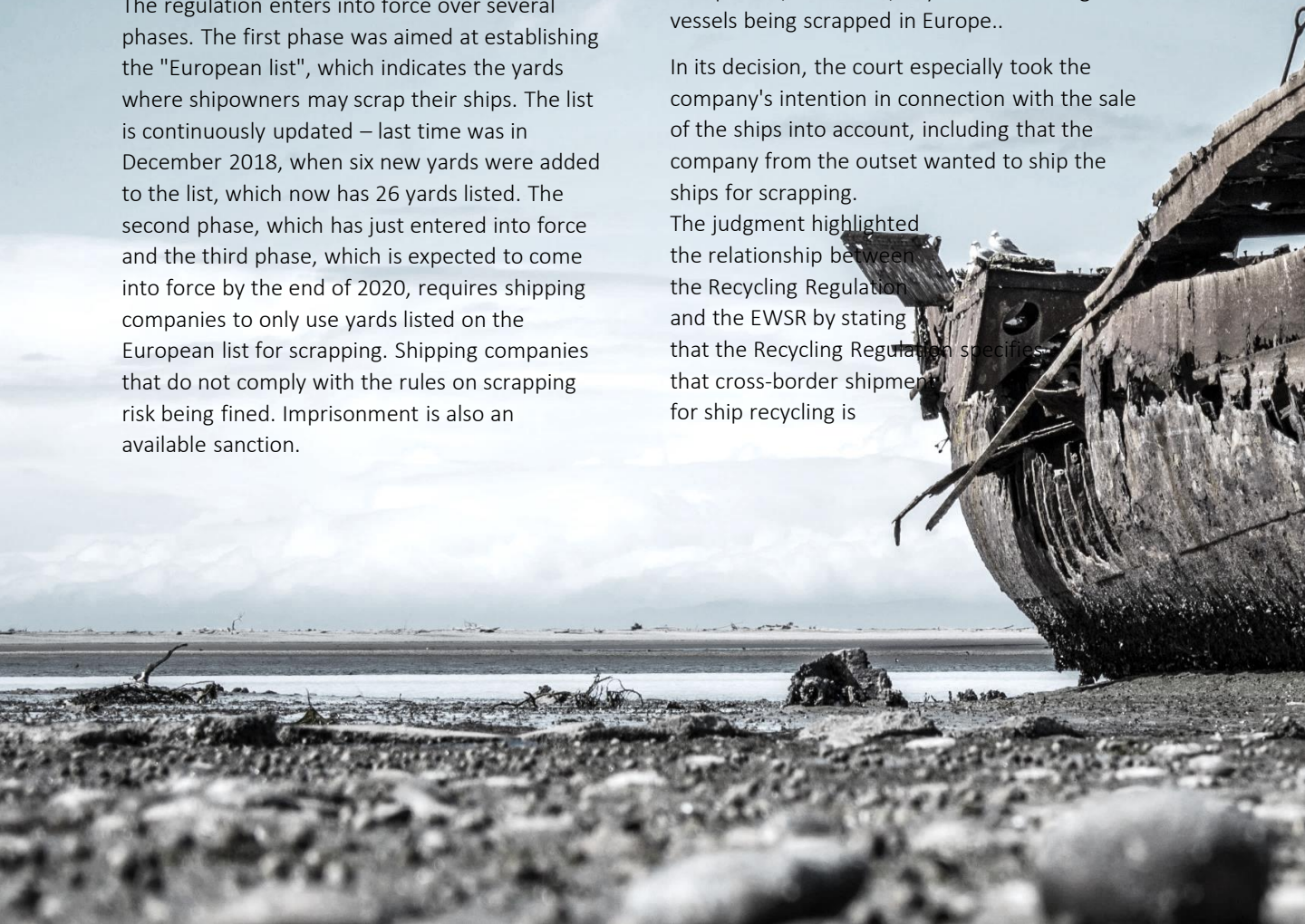
The regulation enters into force over several phases. The first phase was aimed at establishing the "European list", which indicates the yards where shipowners may scrap their ships. The list is continuously updated – last time was in December 2018, when six new yards were added to the list, which now has 26 yards listed. The second phase, which has just entered into force and the third phase, which is expected to come into force by the end of 2020, requires shipping companies to only use yards listed on the European list for scrapping. Shipping companies that do not comply with the rules on scrapping risk being fined. Imprisonment is also an available sanction.

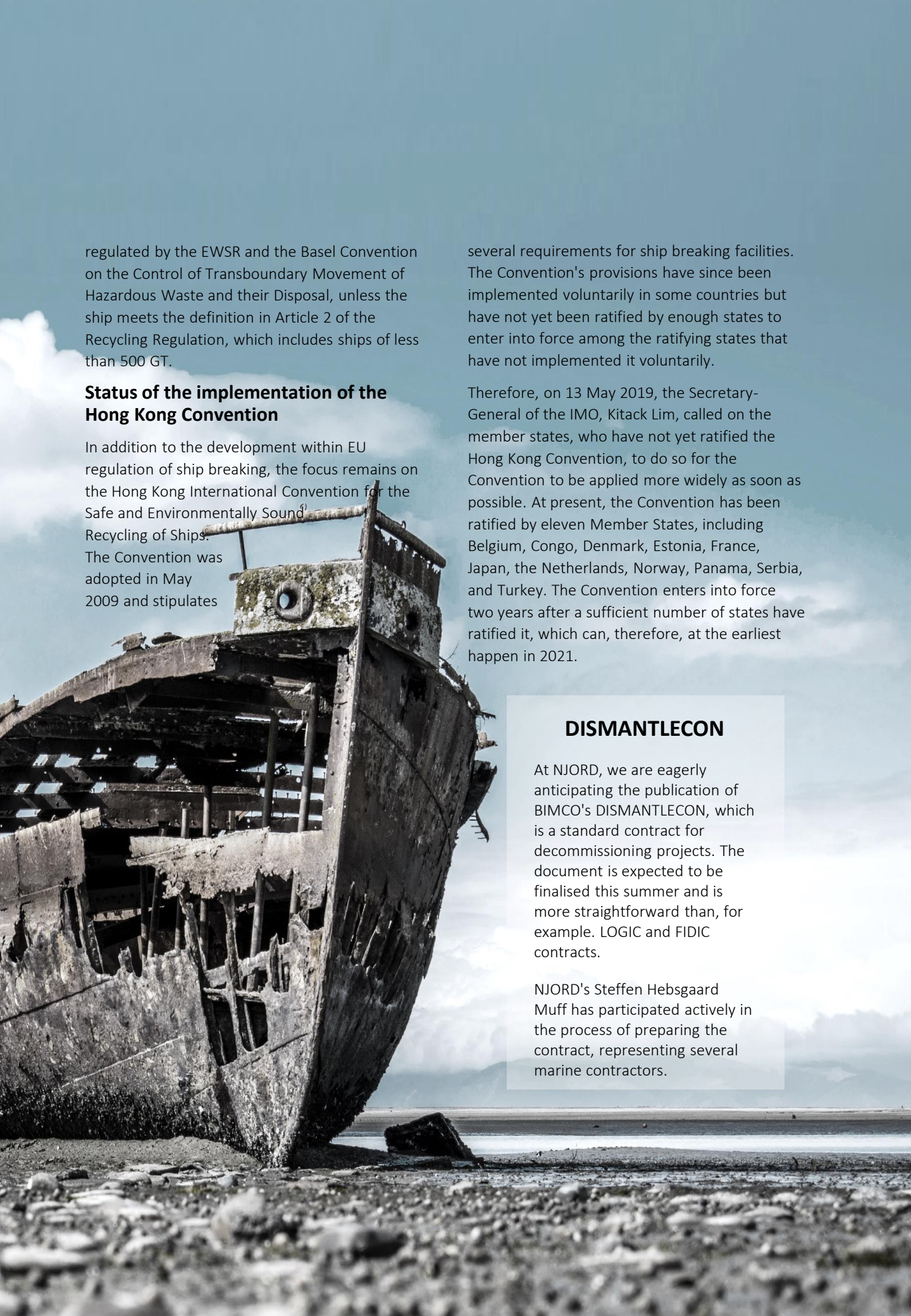
The Recycling Regulation in practice

The first case law on the Recycling Regulation has already been established. In March 2018, the Rotterdam District Court established that the Dutch shipping company Seatrade and its two directors had violated EU Regulation No 1013/2016 of 14 June 2006 on shipments of waste ("EWSR"). The decision has far-reaching implications for shipping companies based in Europe and, moreover, anyone considering their vessels being scrapped in Europe..

In its decision, the court especially took the company's intention in connection with the sale of the ships into account, including that the company from the outset wanted to ship the ships for scrapping.

The judgment highlighted the relationship between the Recycling Regulation and the EWSR by stating that the Recycling Regulation specifies that cross-border shipment for ship recycling is





regulated by the EWSR and the Basel Convention on the Control of Transboundary Movement of Hazardous Waste and their Disposal, unless the ship meets the definition in Article 2 of the Recycling Regulation, which includes ships of less than 500 GT.

Status of the implementation of the Hong Kong Convention

In addition to the development within EU regulation of ship breaking, the focus remains on the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships. The Convention was adopted in May 2009 and stipulates

several requirements for ship breaking facilities. The Convention's provisions have since been implemented voluntarily in some countries but have not yet been ratified by enough states to enter into force among the ratifying states that have not implemented it voluntarily.

Therefore, on 13 May 2019, the Secretary-General of the IMO, Kitack Lim, called on the member states, who have not yet ratified the Hong Kong Convention, to do so for the Convention to be applied more widely as soon as possible. At present, the Convention has been ratified by eleven Member States, including Belgium, Congo, Denmark, Estonia, France, Japan, the Netherlands, Norway, Panama, Serbia, and Turkey. The Convention enters into force two years after a sufficient number of states have ratified it, which can, therefore, at the earliest happen in 2021.

DISMANTLECON

At NJORD, we are eagerly anticipating the publication of BIMCO's DISMANTLECON, which is a standard contract for decommissioning projects. The document is expected to be finalised this summer and is more straightforward than, for example, LOGIC and FIDIC contracts.

NJORD's Steffen Hebsgaard Muff has participated actively in the process of preparing the contract, representing several marine contractors.

MARIE STEEN MIKKELSEN

WISTA'S NEWEST BOARD MEMBER

Marie Steen Mikkelsen, assistant attorney at NJORD Law Firm's maritime and transport law team, has just been elected to the board of The Women's International Shipping and Trading Association (WISTA).

Focus on women in a male-dominated industry

In a highly male-dominated industry, WISTA is helping to create links between women in the maritime and transport industries. WISTA is an international organisation that enables more than 3,000 women to network. To Marie, this is a unique opportunity to meet other women who are passionate about the same area as her and to expand her network.

"I saw the opportunity to become a member of WISTA's board, and I had to seize it. It is a unique opportunity to get the chance to become part of a network with so many talented women, and this allows me to develop even more professionally because it is about much more than law."

- Marie Steen Mikkelsen

Why highlight women?

Marie has already begun working for WISTA, where the tasks are many and diverse. Among other things, Marie is going to be in charge of WISTA's digital marketing, but she is also going to work on getting more younger women to join the group and help bring people together.

"Maritime and transport is primarily a male-dominated world. Much like the top level of the law profession, it is an industry that is mainly represented by men. Usually, there is much more focus on highlighting men than women. Therefore, associations such as WISTA are important, as they help women network and get more of the limelight.."

- Marie Steen Mikkelsen

NJORD was the first priority

As an exchange student in Australia, Marie learned that maritime and transport law was her great interest. Learning new things, arguing and resolving international disputes is something that drives Marie.

Therefore, NJORD was her first priority when Marie applied for a position as an assistant attorney so that she could get the chance to work with Ulla, who has written "the Bible" on road transport.

According to Marie, NJORD is a workplace that stands out. There is a great focus on sparring and the educational process. You really have the opportunity to improve and specialize. Besides the academic, there is also an exceptional social cohesion, which has led to more close friendships.

At NJORD, we are proud that Marie has been elected to WISTA's board of directors, which we are confident will also help to develop NJORD's maritime and transport department.

Congratulations Marie!



At NJORD, I get to work with Ulla and Christian, who are leaders within maritime and transport law. This allows me to develop my professional skills and specialize in what I care about most.

Marie Steen Mikkelsen

Assistant attorney, NJORD Law Firm

ULLA FABRICIUS

CAN THE COOPERATION BETWEEN CARRIER AND HAULIER BE TOO CLOSE?

There is no doubt that the cooperation between a Danish transport company and a foreign haulier can become too close which may incur a risk of accomplice liability in cases about breaches of the cabotage rules and the rules on driving time and rest periods, tax law requirements, and requirements related to collective wage agreements' conditions on wages and terms of employment.

We have continuously issued updates on the various challenges that trouble an industry so much that it demands a common European framework on how the road transport sector should adapt in a socially responsible manner, which at the same time creates a level playing field. Many have put their trust in the Mobility Package, but that package is currently on hold pending the new EU Parliament and the Commission to be finally in place to be able to commence work. Similarly, there are still large and small issues within the Mobility Package, which must be resolved before the industry has a clear framework for its work.

FROM A HELICOPTER VIEW

Seen slightly from above, the challenges facing the road transport sector are somewhat identical to those other transport sectors have either overcome or are still in the middle of handling.

Years ago, maritime transport went through a significant change, as it became evident that Denmark could not keep the ships under the Danish flag because they were not competitive on the international market. The Danish shipping companies thus flagged-out the fleet to be able to compete. However, this development was reversed when Denmark received an international ship register (DIS), which made it possible to employ foreign labour on the DIS registered ships that sailed internationally.

This allowed us to keep the Danish ships, which in turn became competitive. Since then, this measure has also been followed by tax measures such as the tonnage tax scheme.

Today, both the air transport and road transport area are in the midst of the challenges. We saw the EU ruling in the Ryanair case, where the pilots demanded better pay and terms of employment, and here the pilots were successful with their claim, that the deciding factor when establishing the pilots' place of work was where the aeroplanes had their "home base".

Similarly, the Eastern High Court has also placed decisive importance on the so-called "home base principle" in the case about the Romanian driver who has brought an action against his Slovak employer in Denmark. The High Court was thus of the opinion that the vehicles had their "home base" in Kastrup in Denmark because this was where the vehicles started and finished – and the drivers switched – after tours.

Consequently, a case about wage and conditions of employment between the Romanian driver and the Slovak haulier now continues before the courts in Denmark, where the driver demands Danish pay and terms of employment. This even though there is a considerable difference between air and road transport; many will probably argue there is no "home base" for vehicles, as they are in constant motion – unless you as a starting point look at where the vehicle is registered and not where it is physically. This takes us back to maritime transport, where the deciding factor is the registration of the ship.



WHAT DO WE DO WHILE WE WAIT?

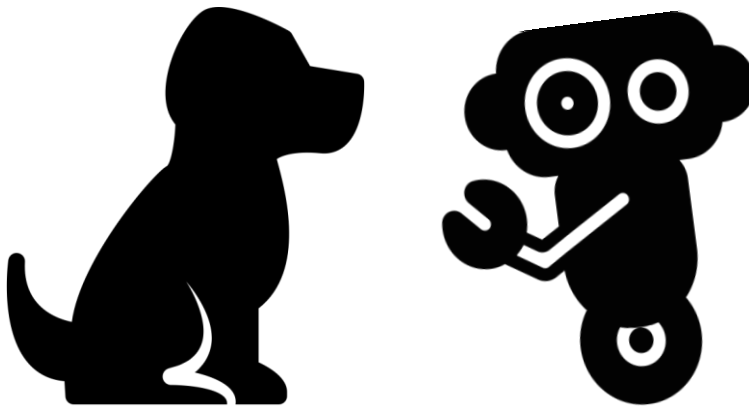
What do we do as we await a clear and uniform framework for work in Europe for the road transport sector?

As mentioned earlier, having the following in mind is advisable:

- How closely associated is the foreign haulier and the drivers of the Danish transport company?
- Are the management identical and who exercises the daily management of the drivers?
- Who carries the risk and responsibility for the work?
- Do the drivers start and end their tours with the Danish carrier?
- Are the drivers primarily in Denmark, for example?
- Are the Danish haulier's vehicles used for carrying out the transports?
- Do the vehicles have a terminal to which they always return and where the drivers switch?

If the cooperation has become a bit too close, it might be prudent to review the cooperation and get tightened up, so that the carrier, on the one hand, and the haulier and his drivers on the other hand do not intertwine. And then we look to Brussels and hope for a proper and transparent framework for the future work so that the road transport profession can survive in Denmark the same way that the maritime sector succeeded years ago.

NJORD LAW FIRM NEW TECH



EPISODE 2.0

What's the difference between a dog and a robot?

See the latest video in our NewTech series, where Steffen Hebsgaard Muff gives you the answer.



ULLA FABRICIUS

DOUBTS ABOUT DANISH ROAD TOLL AFTER GERMAN EU JUDGEMENT

A new EU Judgement establishes that road tolls exclusively for foreign motorists cannot be imposed. This may leave a DKK 300 million hole in the Danish Treasury.

In 2017, the now departing VLAK government and the Danish People's Party agreed to finance, among other things, lower registration fees on cars, cheaper BroBizz and a motorway extension with proceeds from a new road toll exclusively for foreign drivers - inspired by the German vignette model.

Here, foreigners have to pay to use the German federal roads - including the motorways - while German motorists are compensated via the motor vehicle weight fees.

Therefore, Denmark began planning and changing taxes and fees based on the German model. The registration fee was reduced, the BroBizz became cheaper, and the construction of a motorway extension on West Funen commenced. But now, an EU judgement stating that the German model is in breach of EU law might put an end to the Danish project and thus leave a gaping hole in the Danish treasury.

According to Ulla Fabricius, attorney at law and partner at NJORD Law Firm and specialist in transport law, the judgment means that:

Denmark must reconsider.

If you intend to introduce a toll that, in a similar way, compensates the Danish cars through, for example, lower car taxes, then it is discriminatory, and you are not allowed to do so. You cannot introduce anything as skew as the German model. Danish and foreign drivers must be treated the same way.

- Ulla Fabricius

[➤ Read the full article in Jyllands-Posten](#)



UPDATE

A mortgage on a floating wind turbine?

Substantial investments are currently made in floating offshore wind turbines (Floating offshore wind turbines "FTUs"), which can be located in deep waters. The technology is particularly interesting to ensure the development of offshore wind in areas that do not have a large coastal area with low depths. However, the legal status of the FTUs is uncertain.

FTUs in the register of shipping?

Considering the legal position today, it should be considered to register the FTU in the register of shipping for several reasons. The Danish rules in this area are inadequate, so it may not be the best solution to register them in Denmark.

Today, establishing a security is not an issue against ordinary, bottom-fixed offshore wind turbines, but the FTUs are not subject to the same regulation as, unlike the fixed windmills, they do not constitute an artificial island. Also, with floating units, it is even doubtful which country's law apply to the FTUs if any at all. In fact, there is the possibility that unregistered FTUs will be viewed the same way as non-flagged ships.

As such, they will not have the protection afforded by a flag state, and any state can, therefore, in principle, assume jurisdiction over them. For obvious reasons, this is not acceptable as a consequence would be that, for instance, warships would have to protect a wind farm off the coast of Japan to prevent it from being seized by the Chinese.

Protection of Property

Similarly, the missing protection of the property rights provided by a jurisdiction will lead to it being practically impossible to finance

construction, etc. An excellent alternative to deploying warships is to register the FTUs in a register of shipping. The FTU and its ownership will then be protected, and it will also allow the existing ship mortgage system to be used to record securities in ships.

A major question then is:

Can FTUs be classified as ships?

No uniform definition of "ship" exists. As a starting point, an object should not be considered as a ship unless it can independently navigate and thus has some kind of propulsion system.

However, the individual nations have quite a great deal of freedom when defining a "ship". Thus, several registers allow registering of the FTUs. Examples are "Hywind demo" and "WindFloat" under the Portuguese flag. What is also interesting here is that both the FTUs that are not just off the coast of Portugal.

The Danish maritime law does not consider whether the FTUs are ships and can be registered in the register of shipping. It appears that barges, cutters, dredger, floating cranes and the like are considered ships, whereas floating docks, cable drums, floating containers and other similar equipment are not.



If you look at the wording of the provision, the FTUs are most reminiscent of what is described as ships. However, as the starting point is that an object is not a ship, this is certainly not a safe conclusion.

That is why we need clarification. A clarification that can also take into account the development of the new "ocean economy", where several floating structures covering a wide variety of functions are likely to be in international waters, including international waters near Denmark.

In this context, it would be possible to introduce a differentiated system whereby these offshore assets, for example, could get their own register and at the same time decide what regulation is to be applied to these assets. Part of the maritime legislation will be relevant to apply, but there will also be large parts where it would be appropriate to apply the general rules or to issue new regulations.

Due to the lack of clarity in Danish law, it is currently more advisable to register FTUs in another register, for example, in Portugal or Norway.

Perspective on the development of an international FTU regulatory system

A development where FTUs are registered in certain states may, however, have inexpedient consequences in several situations.

For example, it is unlikely that the state which has contributed with subsidies will find it appropriate if another state is entitled to tax the returns on the FTUs. For this and other reasons, the nation that receives the electricity may want to assume jurisdiction over the FTUs, but this may not necessarily be possible without issues.

So even if the framework of the current rules on ship mortgage can be applied to funding in the short term, it will still be a while before we have a fully-fledged international system. We will get one, and in the meantime, we can, with some forethought, make the existing rules work well enough for the funding of projects to be established.



NJORD ROOFTOP EVENT

Summer Business Networking

Thursday, 6 June, NJORD hosted the MDC's annual Summer Business Network event. More than 100 people were gathered on our rooftop terrace, and everyone was in a great mood

Merete Klint gave this year's PowerTalk, explaining how a focus on interactions can improve your performance as a team. Merete gave us the example: "Imagine that your organisation is an orchestra and that one of the musicians is playing out of tune. Surely not optimal?"

*Collaboration and interaction
are the keys to success*

You may have the best employees, but if they can't collaborate and work together, you won't get the results that your organisation or your team has the potential to achieve.

3 TAKE-AWAYS

Merete came up with three tips to help make sure you have the best collaboration within your team.

1. Always see your job as part of something bigger. You and your colleagues affect each other, and if you make a mistake or are delayed, it will not only affect your own work but your colleagues' ability to perform their tasks.

Your customers don't know if you or your colleague made a mistake. They only know they haven't received the service they expected. Like a concert, the audience probably can't hear whether the guitar or the keyboard is off-key, but they can hear that it doesn't sound right.

2. Solve one task during the day and consider which of your colleagues' tasks are essential to whether you can solve your task and which of your colleagues' tasks depends on your assignment. Then you know what information you need to solve your task, and you have a more accurate knowledge of what your colleagues need from you to solve theirs. When everyone knows their roles, it becomes much easier to solve tasks effectively.

3. Listen. You have to listen to what's going on around you. What do your customers say – directly and indirectly? What are your colleagues saying and what do they need? How can you adapt to situations to ensure that you solve your tasks as smoothly as possible? This is both for your own sake, for the sake of the customer and for the overall performance of the organisation.



Thank you to everyone who came!





THE EXPERIENCE EXCHANGE GROUP

GDPR and compliance for shipping companies

In collaboration with NJORD's specialised personal data team, NJORD's maritime and transport team has started a group where shipowners can exchange experiences. The group focuses on the GDPR requirements imposed on Danish shipping companies.

GDPR-COMPLIANCE PACKAGE

In an interdisciplinary collaboration, NJORD's two teams have prepared a full compliance package for Danish shipping companies, which can be used in both national and international contexts. The users of the compliance package have been invited to participate in a number of workshops where they can learn about the GDPR rules specifically in relation to the industry, share knowledge and get specific legal advice.

STRONG SUPPORT FROM THE INDUSTRY

The experience exchange group has received great support and positive feedback from the industry. Several have reported that the group has managed to create a greater overview of how to deal with the new GDPR rules as an international shipping company and how it has really been rewarding to network and share knowledge with other shipping companies.

KNOWLEDGE SHARING AT WORKSHOPS

So far, three workshops have been held.

The first workshop was on 19 September 2018 and was about "lessons learned", knowledge sharing, how the shipping companies in practice had to deal with the GDPR rules, and what actions they had to focus on in the rest of 2018.

The second workshop was on 29 January 2019. This taught shipowners how they should respond in the event of a breach of security, and which rules should be kept in mind when sending data to the United States.

The latest workshop was held on 13 June 2019 in collaboration with D/S NORDEN. This session was about how to comply with compliance to be prepared for the first annual review and how to deal with the new regulations on smart contracts and drones.

We thank you for the great support and look forward to many more meetings.

An aerial photograph of a boat's wake in the ocean, showing a long, straight path of white foam and churning water leading towards the horizon under a clear sky.

SIGN UP FOR THE GROUP

[Read more about the Personal Data Compliance Package here](#)

If you want to become a member of the Experience Exchange Group, please contact Christian Benedictsen-Nislev.

Send an email to cbn@njordlaw.com

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