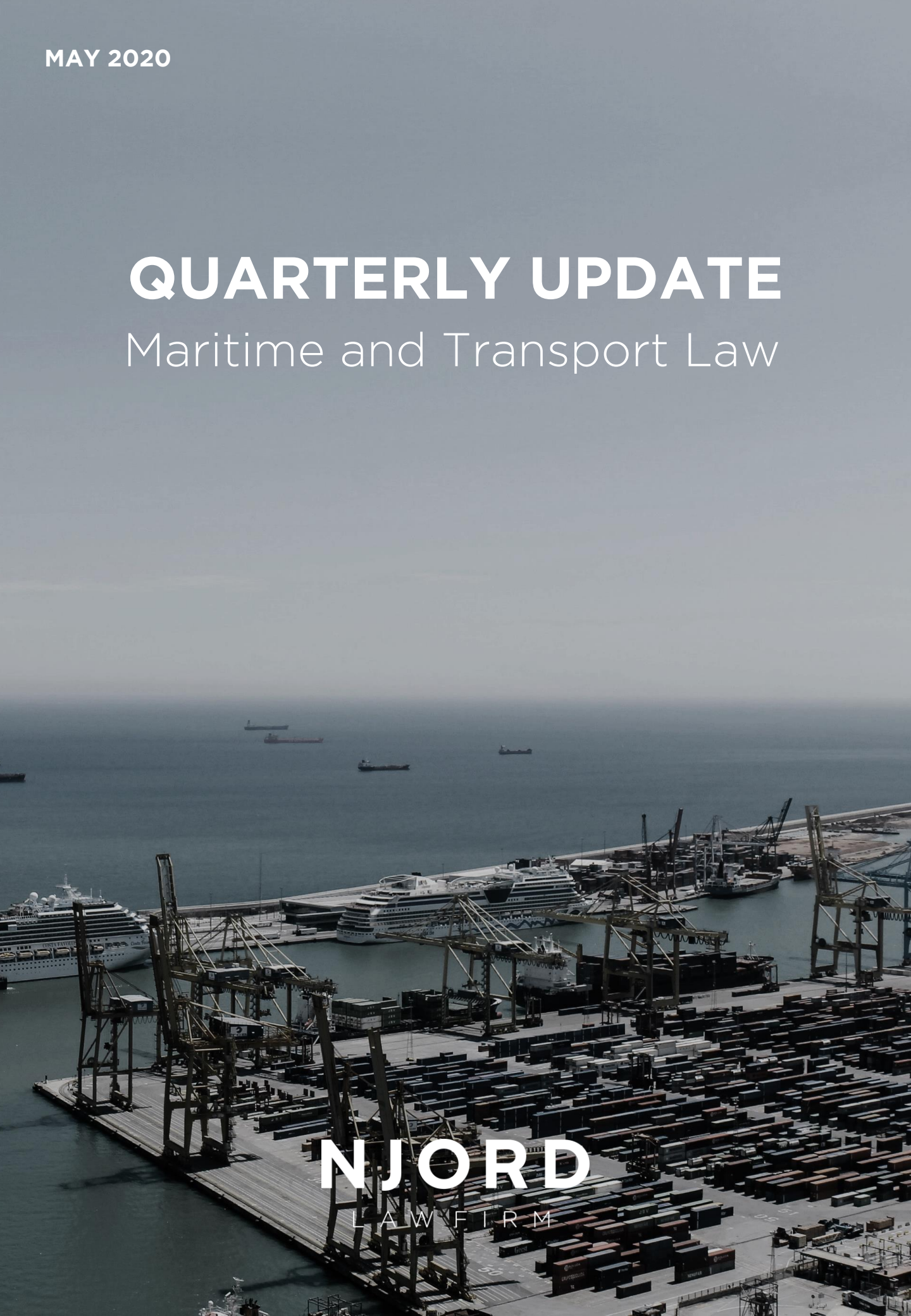
MAY 2020

QUARTERLY UPDATE

Maritime and Transport Law



NJORD

LAW FIRM

QUARTERLY UPDATE MAY 2020

STATUS OF THE TRANSPORT INDUSTRY

In this quarterly update, we obviously focus on the crisis created by COVID-19, which significantly has impacted the world in which we live.

Also, we revisit the Mobility Package and the Danish political agreement on contractual terms for the road transport sector, so that you can get to know the status of where we are and what lies ahead in that area.

There is no way of getting around the significant fines that are imposed on violators of the Road User Charge Act - here, in particular, we ask the question of whether the penalties are also passed correctly.

Finally, we have a lengthy post about the venue - in which country a case can be brought. It sounds a bit heavy, and it actually is - but paying close attention to the venue can be pivotal, a new and ground-breaking judgement the area shows.

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THE TRANSPORT INDUSTRY AMID CORONA TIMES

COVID-19 has significantly changed the transport industry - but in many different ways.

HAULIERS AND LOGISTICS

First and foremost, we have been able to see how the industry, especially the haulage industry and freight forwarders, has fought hard and worked intensively to ensure the food supply to the consumers. To support this, the Danish Transport Authority has on several occasions relaxed the rules on driving time and rest periods, permission to drive a van etc. to create better opportunities for the supply of goods to reach consumers.

> See the relaxations of the rules here

CONTAINER SHIPPING COMPANIES

Container shipping companies are facing major challenges - first, the market from Asia to Europe closed down when the crisis broke out in China. After this, China re-opened, and many goods were shipped, but while they were still in at sea, Europe shut down. Therefore, containers loaded with goods are left acting as storage, while containers with, e.g. protective equipment, alcohol, and medicines cannot get from the manufacturers to the consumers fast enough.

PRODUCT TANKERS

Product tankers, on the other hand, have had good times, as there is simply too much oil on the market, so the storage facilities are filled. Tankers have thereby become floating storage facilities while waiting for better times. This also means that fuel prices have plummeted, which can be of great benefit to the transport industry.

THE PORTS

The ports are affected very differently depending on the main activity of the port in question. If the port services cruise ships, everything is almost at a standstill. Similarly, if the port's main activity was in car logistics – not many cars are sold after the crisis broke out, so the new cars, which would otherwise be lined up in rows in the ports, are not taking up much room these days.

The above generates many issues, including legal ones, of course.

THE AVIATION AND TRAVEL INDUSTRY

The aviation and travel industry are especially facing challenges - planes are on the ground, and most countries have been shut down indefinitely, so trips are not being sold at the moment.

We have written an updated article about compensation and reimbursement of airfare when flights are cancelled. You can find the article in this quarterly update.

Also, we have written an updated article on the Danish relief package for the travel industry, which you will also find in the quarterly update.

FORCE MAJEURE?

One of the important and frequently asked questions is whether the outbreak of the pandemic and the subsequent orders and bans issued by governments in much of the world can be considered force majeure?

Unfortunately, the answer to this question is not clear. We wrote a news update about this at the beginning of the corona crisis with some general guidelines. Read them here

Then there are all the many retail questions: Manufacturers of goods are unable to deliver the goods, which were otherwise ordered under, for example, an extensive logistics agreement; the carriers are unable to carry out the transports, as various links of the logistics chain have broken; how is it possible to send and receive goods without the people involved in the process getting too close to each other, etc.

When answering the many questions, our best advice is always to look carefully at what the contracts say; what are the obligations of the parties and what does the actual force majeure clause in the contract state. Usually, not much attention has been paid to this clause. According to which country's law, will the question of force majeure must be considered – this can be crucial to the legal position. Finally, the time of the conclusion of the agreement is also important – did we all know about the coronavirus at the time, or was it not known at all yet? Likewise, the contracts may have deadlines within which challenges arising from the coronavirus must be notified to the parties of the agreement – any such deadlines must be observed. The deadlines may also be governed by legislation or otherwise by the law of the country to which the contract refers.

Fortunately, many pragmatic solutions exist right here and now, as everyone is working in different ways to make things work. But as the coronavirus obviously has no intentions of going away any time soon, more long-term solutions must be found. Many are working on identifying these.

THE MOBILITY PACKAGE AND THE DANISH PROPOSAL ON COLLECTIVE AGREEMENT TERMS FOR THE ROAD TRANSPORT SECTOR

The Mobility Package is now very close to the final adoption. The final adoption in the European Parliament is expected shortly.

Then what?

Continued

This means that, among other things, the amended rules on driving time and rest periods will apply 20 days after the Mobility Package is published in its final version in the Official Journal of the European Union. The amended rules on cabotage and posting will enter into force effect 18 months after the publication of the Mobility Package in the Official Journal.

> Read about Mobility Package in our Annual Report

The Danish political agreement on collective agreement terms for the road transport sector is also being negotiated by the Danish Parliament (Folketing). The bill was tabled on 29 April 2020 and is scheduled for the 1st reading on 7 May 2020. The amendment will in effect result in an obligation for all foreign hauliers to follow the same level of costs for the remuneration of drivers as if the hauliers were established in Denmark and have a Danish haulier license, or if the drivers carry out freight transport in Denmark as part of cabotage or part of combined transport.

For the Danish regulatory system to work, a new notification scheme for foreign transport companies must be ready, just as the part of the Mobility Package, that deals with rules on the posting of drivers, must be in force. According to the draft bill, the amendment act appears to enter into force on 1 January 2021- However, the entry into force of the said collective agreement rules is postponed by an additional six months from that date. ITD has suggested that the adoption of the bill will give 3F a de facto monopoly as regards the area of collective agreements, while DTL supports the new act.

ASSESSMENT OF FINES RELATED TO BREACHES OF CABOTAGE RULES AND THE ROAD USER CHARGE ACT

In this quarterly update, we have an article about the challenges related to assessing fines for breaches of the road user charge act. We have learned that the police and prosecution service, supported by a guideline from the tax authorities, have fixed a fine per breach – and if more breaches occur, the fine is assessed by merely multiplying the fixed fine per breach with the number of breaches.

Many may remember that this was also how fines for breaches of the rules on driving time and rest periods were assessed until an amendment act was adopted. Among other things, the amendment introduced a ceiling on the fines issued, and the drivers could, to a wide extent, retain their driving licenses for driving a regular car.

But what about the assessment of the fine – can police and prosecution service just multiply the number of breaches with the fixed fine? We do not consider this approach by police and prosecution service of simply multiplying the number of breaches to be justified; the penalty must be proportional to the severity of the offence. As the article about the Eurovignette shows, the courts have just ruled that prosecution service cannot merely multiply the two. Breaches and penalties must be considered as a whole so that there is a fair balance between them

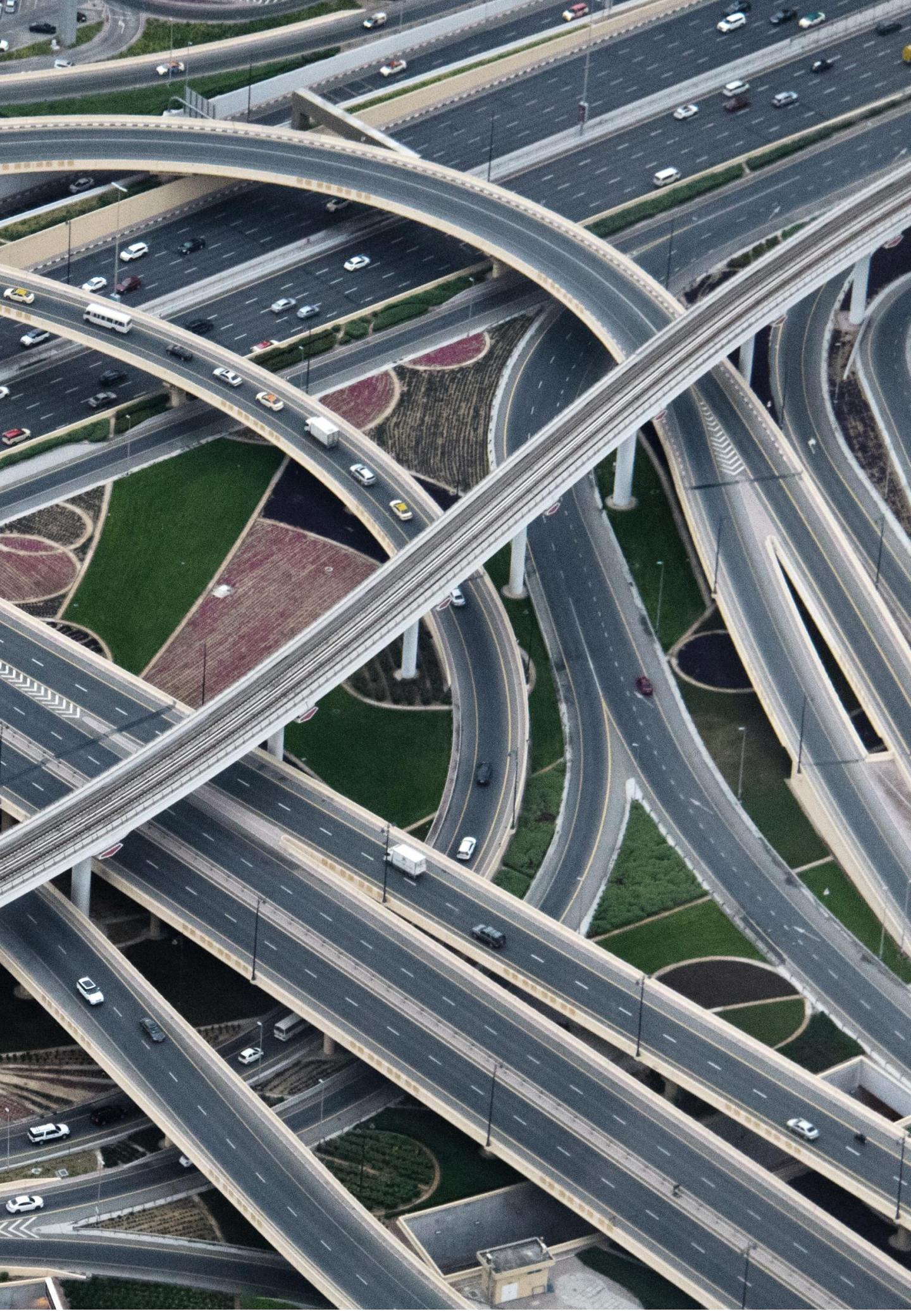
> Read more about this in this article

JURISDICTION - NEW AND VERY GROUND-BREAKING JUDGMENT

Jurisdiction – that is, the question about in which country a dispute can be brought between the parties is often something that does not have any significant focus when an agreement on transport or logistics is negotiated and concluded. Similarly, most people rarely think of divorce while looking forward to getting married. In both cases, however, it is very appropriate to get the details right before things get complicated.

A new and exciting Danish judgment evidences the importance of clear agreements on the jurisdiction, and we have written an article about it in this quarterly update. And for those particularly interested in an English-language article we have also written a very extensive legal review and link to the article.

- Happy reading!



ATTENTION

DANISH FOCUS ON THE EUROVIGNETTE

There have been stories in the Danish news recently about several fines being issued for failure to pay the Eurovignette tariffs. When the Danish police issue fines in cases of failure to pay this road user charge, they apply the tax authorities´ guidelines. The guidelines have recently been clarified after the Danish courts found in two separate cases that there was no legal authority for applying consecutive sentencing in cases of several instances of failure to pay the road user charge. The question, however, is whether the clarified guidelines adequately address the issues identified by the courts?

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SIGNIFICANT INCREASE IN THE NUMBER OF CASES REGARDING UNPAID ROAD USER CHARGE

According to Tungvognscenter Syd (a department of the Danish police devoted to heavy vehicles), there has been a substantial increase in the number of cases regarding failure to pay or invalid road user charge. This increase is partly due to more effective control of foreign vehicles' payment of the Eurovignette tariffs following an update of the Danish police's IT system. In respect of the large influx of this type of cases, it is relevant to consider how the police handle these cases.

THE DANISH POLICE'S APPROACH TO SENTENCING FOR UNPAID EUROVIGNETTE TARIFFS

When conducting control of heavy goods vehicles, the Danish police will investigate whether the Eurovignette tariff has been paid. Non-payment of the tariff triggers a fine of DKK 2,500 and this fine is issued to the haulier immediately during the road control. If no tariff has been paid, the police will sometimes investigate how many times the vehicle has used the tariffed road network without proper tariff payment. According to tax authorities´ guidelines, the usual fine of DKK 2,500 is to be multiplied with the number of times the vehicle has used the Danish roads without a valid tariff payment. In criminal law, this approach to sentencing is described as consecutive sentencing (in Danish: absolut kumulation).

CONSECUTIVE SENTENCING REQUIRES LEGAL AUTHORITY

The general rule for sentencing in Danish criminal justice is concurrent sentencing (in Danish: modereret kumulation). With concurrent sentencing the penalty for several offences of the same nature does not increase at the same rate as the number of offences. A total penalty is imposed instead considering the circumstances

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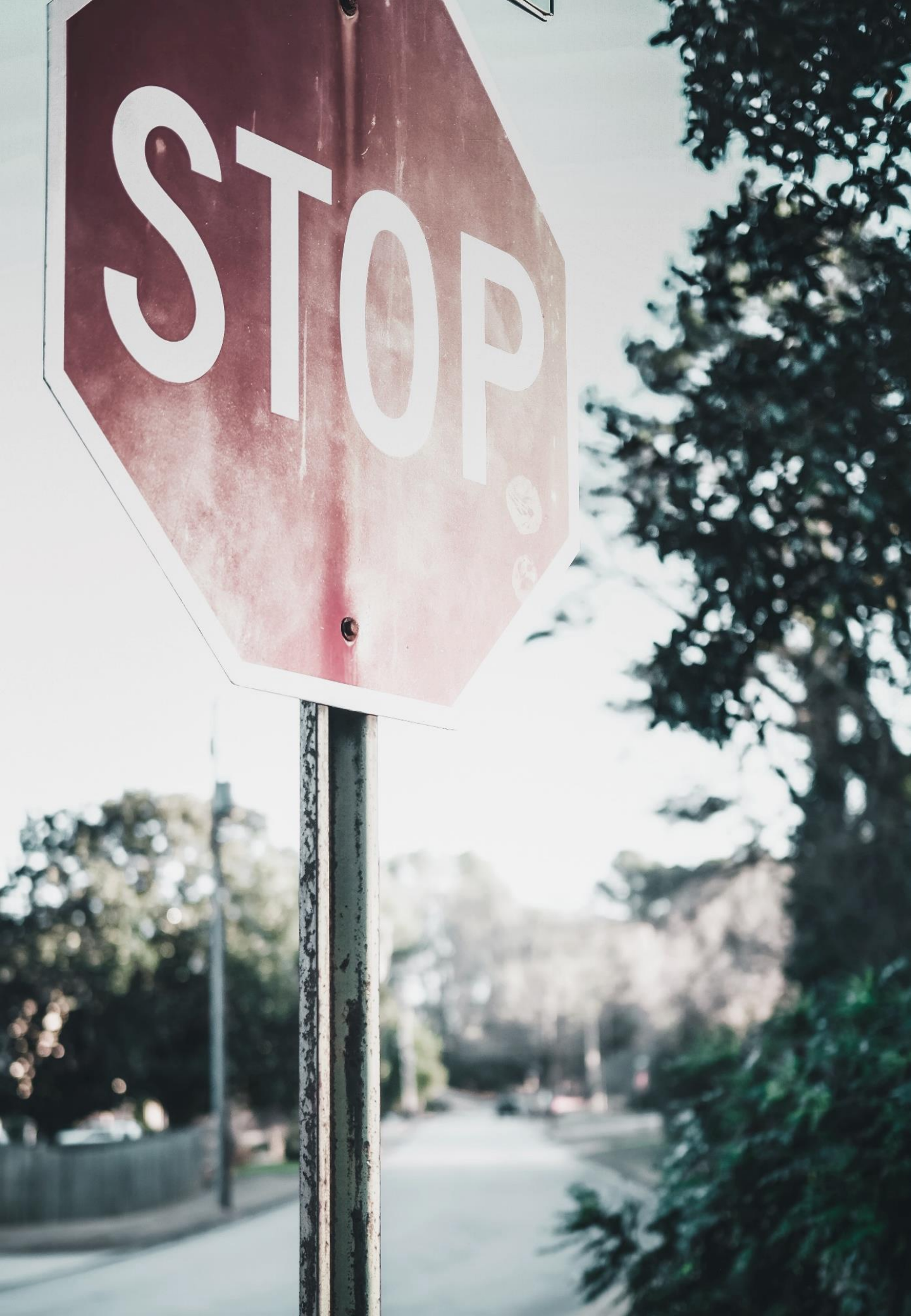

STOP

of the case, including the number of offences committed. The rationale is to ensure that the penalty is proportionate to the offences (the general principle of proportionality). Applying consecutive sentencing in Danish law often requires a particular and explicit legal authority.

Such a legal authority is found in the Danish Road Traffic Act because of the safety risk associated with offences under this act. However, in a judgment of 28 October 2019, the Eastern High Court stated that there is no equivalent legal authority for consecutive sentencing in cases of failure to pay the road user charge, which is governed by the Road Ticket Act. On 26 February 2020, the District Court of Roskilde issued a similar judgement in a different case in accordance with the Eastern High Court's statement.

DO THE TAX AUTHORITIES´ CLARIFIED GUIDELINES SOLVE THE PROBLEM?

In the tax authorities´ clarified guidelines of 25 March 2020, it is stated that the previous practice of consecutive sentencing for failure to pay road user charge had to be changed in the light of the two court judgements. Consequently, the current guidelines state that the total fine to a haulier should be reduced by one-third when handling cases of more than 10 offences. The tax authorities, however, maintain their recommendation that consecutive sentencing is applied in cases with up to 10 offences - despite the lack of legal authority.

NJORD LAW FIRM'S COMMENTS

It is NJORD Law Firm´s assessment that the Danish tax authorities´ new guidelines do not solve the problem with the police's sentencing in cases where a vehicle has been driving without paying the Eurovignette tariff several times within a shorter period. Although it is customary to apply consecutive sentencing when issuing fines to heavy goods vehicles for traffic violations under the Road Traffic Act, it is essential to note that this does not apply to other regulation of heavy goods vehicles where the same considerations related to safety risks do not apply. Because of the tax authorities´ guidelines, there is still a risk that Danish police will issue disproportionate fines for failure to pay road user charges.

At NJORD Law Firm, our transport team assists both Danish and foreign clients with fines and other criminal cases in the area of heavy goods vehicles. Contact us for more information.

ROOFTOP EVENT

YOUNGSHIP DENMARK

Thursday, 20 February 2020, NJORD had the pleasure of hosting this year's first YoungShip event.

Steffen Hebsgaard Muff, partner at NJORD Law Firm, opened the event by giving a professional presentation where he offered his view on the future of autonomous ships and the legal challenges these ships present. Steffen, among other things, addressed the legislation in the area, the latest trends, and provided a status of how far the relevant players have come with the technology.

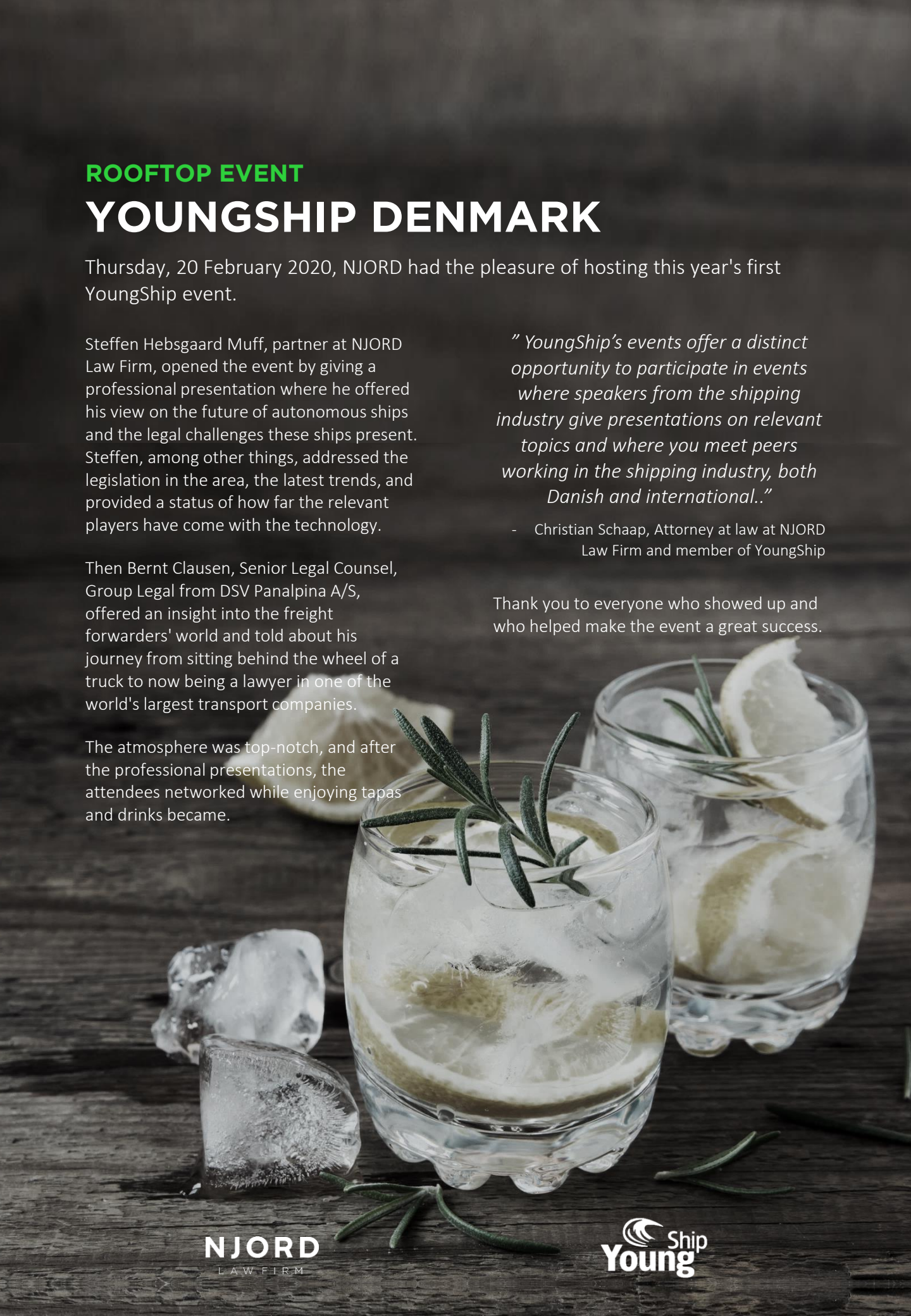
Then Bernt Clausen, Senior Legal Counsel, Group Legal from DSV Panalpina A/S, offered an insight into the freight forwarders' world and told about his journey from sitting behind the wheel of a truck to now being a lawyer in one of the world's largest transport companies.

The atmosphere was top-notch, and after the professional presentations, the attendees networked while enjoying tapas and drinks became.

" YoungShip's events offer a distinct opportunity to participate in events where speakers from the shipping industry give presentations on relevant topics and where you meet peers working in the shipping industry, both Danish and international.."

- Christian Schaap, Attorney at law at NJORD Law Firm and member of YoungShip

Thank you to everyone who showed up and who helped make the event a great success.



NJORD LAW FIRM

Young Ship

THE DANISH EASTERN HIGH COURT

NEW DANISH JUDGEMENT ON THE SCOPE OF THE RECAST BRUSSELS REGULATION

The Danish Eastern High Court recently upheld a decision from the Copenhagen City Court where the City Court found that the Recast Brussels Regulation did not apply between a freight forwarder and a Danish shipowner since the legal relationship of the freight forwarder and the shipowner did not have "international character". This meant that the shipowner could not rely on an agreed jurisdiction clause according to which the courts in England had exclusive jurisdiction.

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FACTS OF THE CASE

In accordance with a framework agreement, a Danish buyer instructed a Danish freight forwarder ("the Freight Forwarder") to transport goods from Shanghai to Copenhagen. The Freight Forwarder entered into a contract for the performance of the sea carriage from Shanghai to Copenhagen with a Danish shipowner ("the Shipowner"). English jurisdiction was agreed between the Freight Forwarder and the Shipowner as the Shipowner had referred to its standard conditions containing an English jurisdiction clause in the booking system and its sea waybills.

During the carriage to Denmark the ship encountered rough weather and lost several FCL containers in the Mediterranean Sea. The Danish buyer and its cargo insurance raised a claim of damages amounting to the value of the lost cargo against the Freight Forwarder at the Danish courts. The Freight Forwarder issued a third-party notice against the Shipowner and thus involved the Shipowner in the case. Referring to the English jurisdiction clause the Shipowner claimed for the dismissal of the case.

THE PARTIES' ARGUMENTS

The Freight Forwarder submitted that the Danish courts had jurisdiction as per the default position in Section 310(1) of the Danish Merchant Shipping Act ("MSA"). The Shipowner submitted that only the English courts had jurisdiction and relied on article 25 of the Recast Brussels Regulation, as this Regulation takes precedence over the MSA cf. Section 310(5) of the MSA.

It was decisive whether Recast Brussels Regulation applied to the agreement between the Freight Forwarder and the Shipowner as its application would entail English jurisdiction while its non-application would entail Danish jurisdiction. In accordance with the EU-Court's case 281.02 (Owusu) and the so-called Jernard Report no. C 59/79, a legal relationship must have an international element/international character before the Brussels Regulation 1968 is applicable. This is also assumed to apply with regard to the Recast Brussels Regulation.

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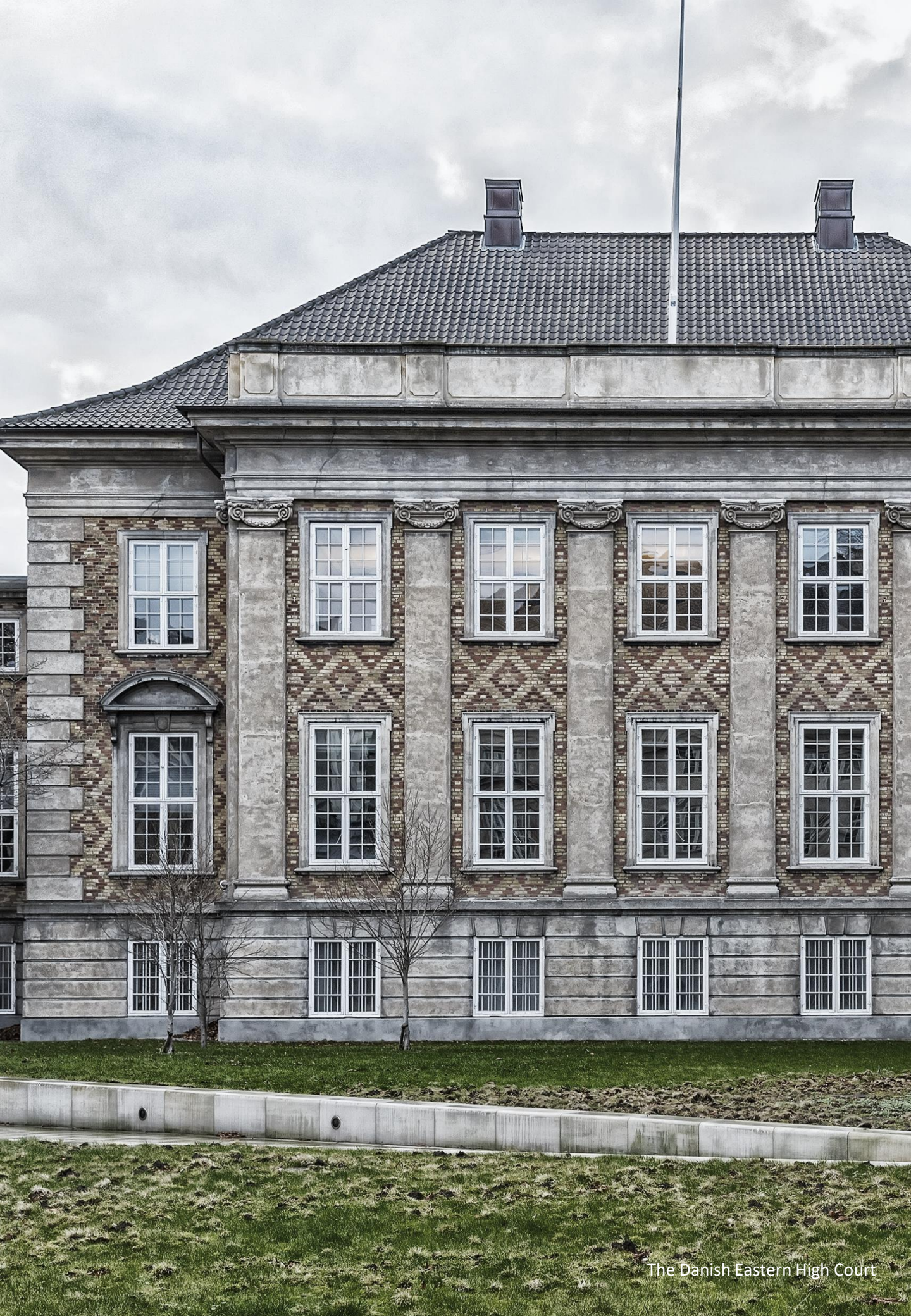


The Danish Eastern High Court

THE DECISIONS

The Copenhagen City Court had to decide whether the Recast Brussels Regulation was applicable, i.e. whether the case had international character. The Copenhagen City Court found that the case did not have international character as the court stated:

> "The fact that the Shipowner's general condition on the jurisdiction and choice of law refers to the English High Court of Justice in London and English law does not entail that this case is to be considered international. The fact that the transport commenced in Shanghai does also not entail that this case is to be considered international for the purpose of the application of the Recast Brussels Regulation."

The Shipowner was granted permission to appeal the decision and appealed the decision to the Danish Eastern High Court. Just as the City Court of Copenhagen, the Eastern High Court found that the legal relationship was not international. The Eastern High Court stated:

> "According to the submission of evidence the High Court concurs that the transport agreement in question for the carriage of goods from Shanghai to Denmark is not an international legal relationship. At the assessment the High Court attach importance to the fact that both [the Shipowner] and [the Freight Forwarder] are Danish companies with head office in Denmark and that the place of delivery for the goods is in Copenhagen where the recipient is [a Danish buyer] who is also domiciled in Denmark."

The Shipowner requested the Eastern High Court for a preliminary reference to the European Court of Justice regarding the scope of application of the Recast Brussels Regulation. However, this request was not followed by the Eastern High Court. Thus, it is uncertain whether the European Court of Justice would have reached the same result as the Eastern High Court. The Shipowner has applied for a leave to appeal to a third instance. If granted, the Danish Supreme Court will get an opportunity to consider the question.

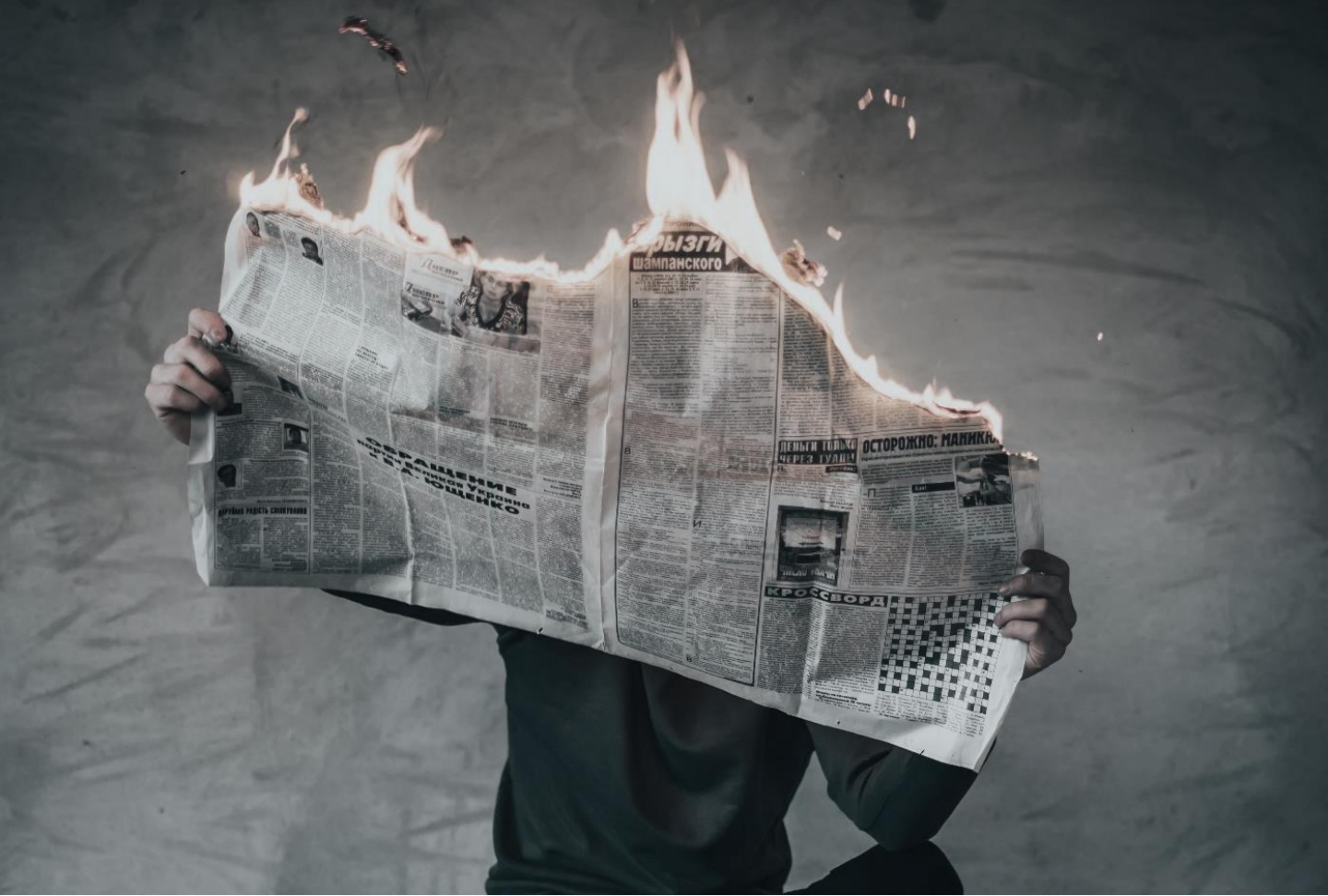
> Please see the following article dealing with the decisions in detail

TOP 5

THIS QUARTER'S MOST READ UPDATES

Here you will find the most read content of the quarter. Get updated on the important decisions and analyses – just as a lot of others have!

1. Coronavirus – is it force majeure?
2. Understand the ban on assemblies of more than ten people
3. No compensation when a flight is cancelled due to COVID-19
4. Focus on the Eurovignette
5. Claims for compensation for lost goods did not suspend the limitation period for customs claims



COVID-19

THE DANISH PARLIAMENT HAS ADOPTED A RELIEF PACKAGE FOR TRAVEL INDUSTRY

The travel industry is under extreme pressure due to the travel restrictions caused by COVID-19. Therefore, the Danish Parliament has adopted a relief package to help the travel industry through the crisis.

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On 26 March 2020, the Danish Parliament adopted a relief package to strengthen the Travel Guarantee Fund. The relief package ensures that all package tour customers can receive reimbursement from the Travel Guarantee Fund if the package tour could not be completed because the Ministry of Foreign Affairs of Denmark advises against all unnecessary travel worldwide due to COVID-19.

Normally, the Travel Guarantee Fund only covers cases where a travel provider has gone bankrupt. With the relief package, the Danish Parliament has passed an amendment to the Travel Guarantee Fund Act, which extends the purpose of the Travel Guarantee Fund in extraordinary situations where significant parts of the travel industry are affected.

Now, in extraordinary situations, the Travel Guarantee Fund can reimburse the price of the package tour, even if the travel provider has not gone bankrupt. The Travel Guarantee Fund is obligated to reimburse the price of the package tour when a traveller has agreed on a package tour with a travel provider who was registered with the Fund at the time of the agreement. If the travel provider was not registered with the Fund at the time of the agreement, the traveller will not be entitled to reimbursement from the Travel Guarantee Fund.

REIMBURSEMENT OF THE PRICE OF THE PACKAGE TOUR

The definition of a 'package tour' is a journey consisting of at least two travel services, including transport, accommodation, tourist services, or car rental. A package tour lasting less than 24 hours is only covered by the Travel Guarantee Fund if it includes accommodation – no matter what the price is. A cruise will be considered a package tour in itself.

The amending act only covers package tours cancelled by the travel provider or the traveller. Thus, if the traveller has only purchased 'flight-only' travel from the travel provider, the traveller is not entitled to get the payment reimbursed

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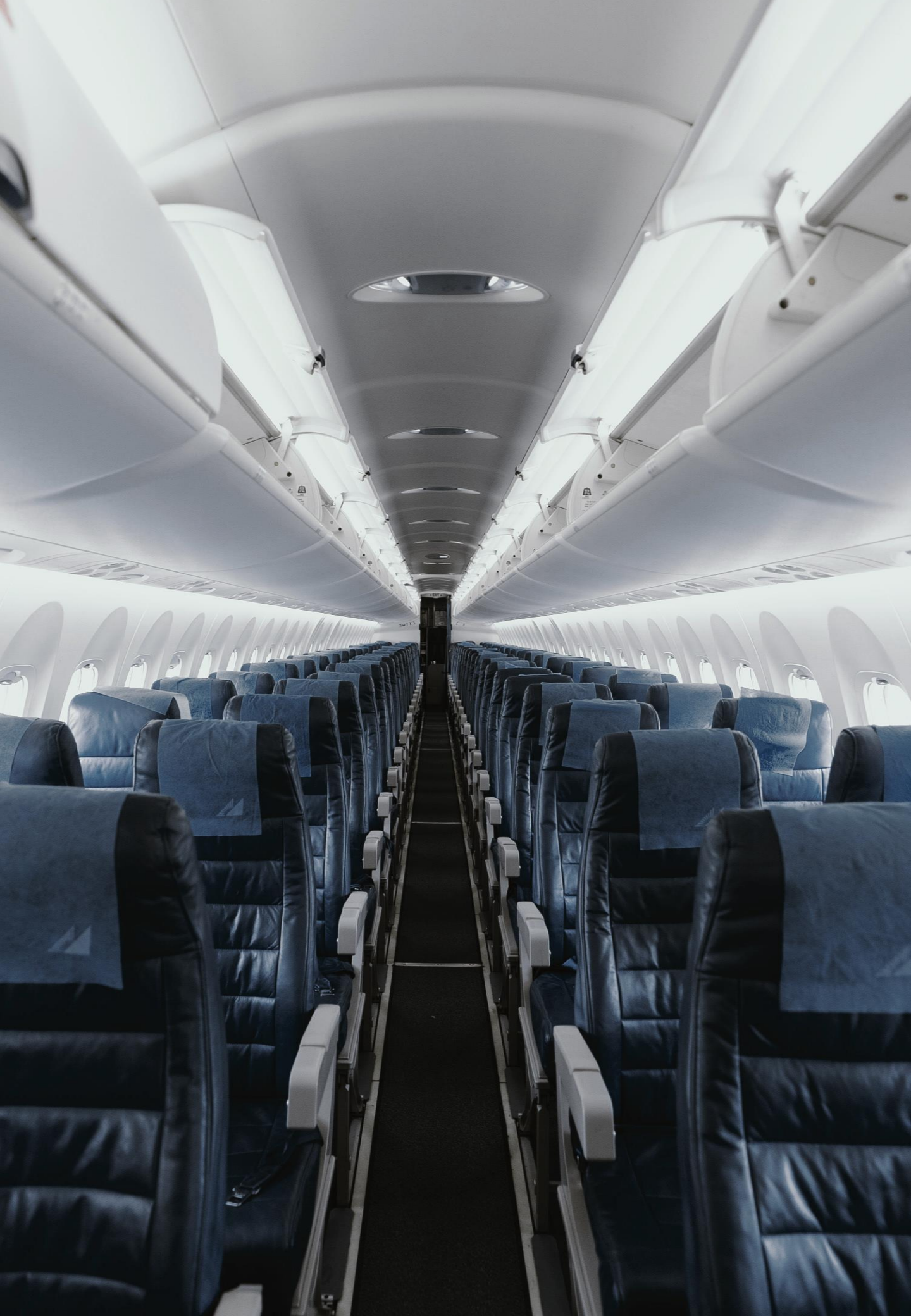


by the Travel Guarantee Fund. The Travel Guarantee Fund only covers 'flight-only' travel in the event of an airline's bankruptcy.

Once the traveller has paid for the package tour, the Package Travel Act obliges the travel provider to refund the package price if the tour is cancelled due to exceptional situations such as COVID-19.

With the amendment of the Travel Guarantee Fund Act, travel providers have the opportunity to request the Travel Guarantee Fund to reimburse the price of the package tours which could not be completed due to the Ministry of Foreign Affairs' travel restrictions due to COVID-19. As the travel restrictions do not apply to travels in Denmark, it is not possible to apply for reimbursement from the Travel Guarantee Fund for package tours that take place exclusively in Denmark.

If transit through another country occurs, for example, through Sweden to go to Bornholm, the Travel Guarantee Fund will reimburse the package tour.

At this time, it is only possible to apply for reimbursement for departures between 13 March 2020 and 13 April 2020, which have been cancelled, because on 13 March 2020 the Ministry of Foreign Affairs advised against all non-essential travel worldwide. If the traveller cancelled the package tour before the Ministry of Foreign Affairs changed its travel restrictions on 13 March 2020, the Travel Guarantee Fund will not reimburse the payment.

The Travel Guarantee Fund will cover cancelled package tours with departure dates before 13 March 2020 if the Ministry of Foreign Affairs already advised against unnecessary travel to the specific destination before this date.

As the Ministry of Foreign Affairs has extended the period when unnecessary travel is not advised because of COVID-19, it is expected that the Travel Guarantee Fund at a later date will make it possible to apply for reimbursement for cancelled package tours with departures after 13 April 2020 until 10 May 2020. A bill addressing this is currently being fast-tracked by the Parliament.

The Travel Guarantee Fund reimburses the amount paid by the traveller to the travel provider if the package tour is cancelled by the travel provider or the traveller due to the Ministry of Foreign Affairs' travel restrictions.

THE CONDITIONS FOR REIMBURSEMENT FROM THE TRAVEL GUARANTEE FUND ARE:

- The travel provider was registered with the Travel Guarantee Fund when the agreement was concluded and has provided its guarantee to the Travel Guarantee Fund
- The travel must be a package tour (containing more than one travel service)
- The traveller must have prepaid an amount for the package tour
- The package tour was cancelled due to the Ministry of Foreign Affairs' travel restrictions because of COVID-19
- The package tour includes travelling to or through another country than Denmark
- The traveller was to depart between 13 March and 13 April 2020 (this period is expected to be extended until 10 May 2020)
- The package tour was cancelled after the Ministry of Foreign Affairs changed its travel restrictions on 13 March 2020. The Fund will not cover package tours cancelled by the traveller before this date

- The cancellations may not be covered by the travel provider's travel insurance. If this is the case, the insurance company will have to cover

Any prepaid amount related to cancelled package tours during the period when the Ministry of Foreign Affairs has advised against unnecessary travel may be reimbursed by the Travel Guarantee Fund to the traveller if the traveller has not yet had the amount refunded by the travel provider. In cases where the travel provider has already refunded the prepaid amount to the traveller, the Fund may reimburse the travel provider the amount. If the travel provider has issued a voucher or gift card, the Fund may reimburse the prepaid amount to the traveller in return for a cancellation of the voucher or gift card. However, the Travel Guarantee Fund does not cover package tours where the departure date has been postponed to a later date.

With the amendment to the act, the Danish Parliament has passed a state guarantee of DKK 1.5 billion to the Travel Guarantee Fund to cover the reimbursement of cancelled package tours due to COVID-19. This loan is to be repaid to the Danish state by the Fund. This will be accomplished by the Fund's registered members paying a wealth-building contribution. The contribution is determined by the board of the Travel Guarantee Fund as a percentage of the revenue of each travel provider. It is, thus, only a loan to the travel service providers, which, in the long term, has to repay the loan to the Danish state.

In order to have the Travel Guarantee Fund reimburse the price of the package tour, the travel providers must send the relevant information to the Fund. The Travel Guarantee Fund must have the information by 15 May 2020.

NEW BILL AMENDING THE RELIEF PACKAGE

On 28 April 2020, a bill was tabled which proposes to extend the relief package up until and including 10 May 2020 because of the Ministry of Foreign Affairs' extension of the travel restrictions. However, the bill does not include an increase in the state guarantee. Thus, the extension of the scheme must be covered by the state guarantee of DKK 1.5 billion.

Also, the bill contains a proposal to amend the repayment model set out in the law. The proposal entails that the individual travel provider is liable for two-thirds of the amount which the travel provider has drawn on the guarantee. The last third is borne collectively by the members of the Travel Guarantee Fund by the wealth-building contributions.

The bill includes an amended model of the travel providers repayment of the loan. The amended model aims to achieve a better balance which more closely reflects the individual travel provider's draws on the state guarantee while maintaining a smaller collective repayment. If the bill is adopted, the new repayment model will only apply to reimbursement related to the period after 13 April 2020 up until and including 10 May 2020.

The bill for an extension of the relief package, including an amendment of the repayment model, is undergoing a fast-tracked procedure in the Parliament and is expected to be adopted shortly.

NO REIMBURSEMENT FOR SINGLE TRAVEL SERVICES

So far, the Danish Parliament has not adopted a relief package for travel providers or airlines that

Fortsættes

have sold a hotel stay or flight-only ticket. In these situations, it is not a package tour covered by the Package Travel Act. The Travel Guarantee Fund, therefore, does not cover reimbursement of such cancelled tours..

With the interpretative guidelines on Regulation 261/2004 on aircraft cancellation of 18 March 2020, the European Commission found that cancellations due to travel restrictions by authorities due to COVID-19 are an extraordinary circumstance, relieving the airline of its obligation to pay compensation in connection with the cancellation. However, the European Commission has not exempted airlines from fulfilling their obligations concerning the rest of the Regulation, including offering reimbursement of the price of the ticket price or re-routing.

If the travel provider has purchased a flight-only with an airline as part of a package tour, the travel provider may still be entitled to have the ticket reimbursed from the airline, as the travel provider still has to repay the price of the package tour to the Travel Guarantee Fund by paying the wealth-building contribution. Neither the Package Tours Act, the Travel Guarantee Fund nor the amending act suspends the trading conditions that apply between the airline and the travel provider. Therefore, if it is stated in the airline's trading conditions that the air carrier may claim the price of the airfare reimbursed upon the airline's cancellation, this still applies. However, if the airline has not cancelled the flight, the travel provider probably will not be able to claim a refund. This depends on the specifics of the agreement between the airline and the travel provider.

MAY THE TRAVEL PROVIDER OFFER A VOUCHER OR GIFT CARD?

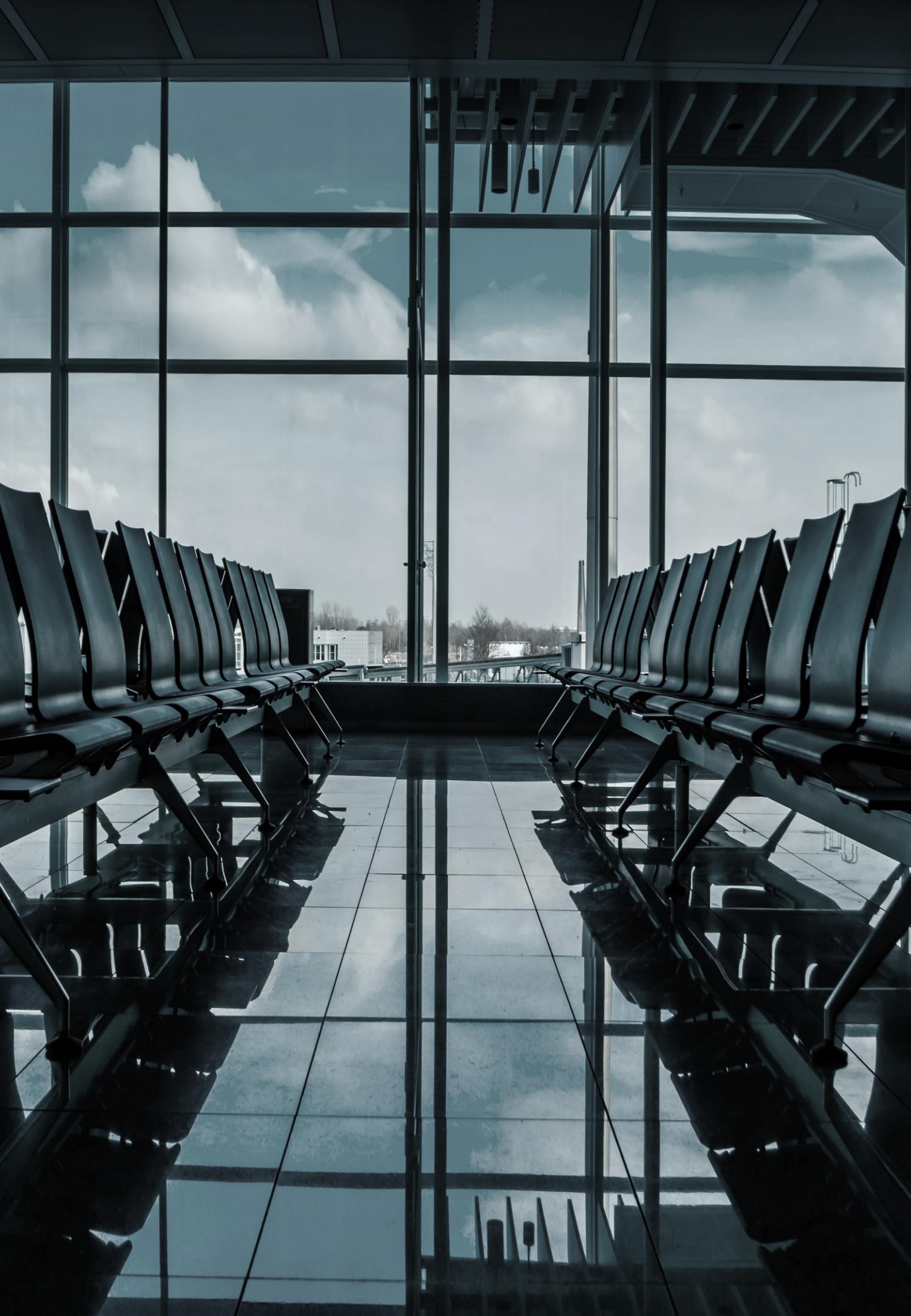
Many travel providers and airlines choose to offer travellers a voucher or gift card for later use.

The Danish Competition and Consumer Authority accepts that travel providers and airlines issue vouchers or gift cards to travellers. However, travellers must be able to choose for themselves if they want to accept this solution.

It is, therefore, not prohibited under Danish legislation to offer vouchers or gift cards for later use. However, travel providers and airlines must be aware that the period of the voucher or gift card must be reasonable. As a rule, the voucher or gift card must be valid for at least three years. A voucher or gift card only valid for a shorter period may be offered, if the traveller receives the full amount paid for the original travel if the voucher or gift card is not used within the period.

NJORD is a specialist in maritime and transport law, including package tours and flight delays. Feel free to contact our attorneys if you want to know more about aviation law or other transportation law.

You can stay up to date by following us on LinkedIn, as well as signing up for our newsletter on our website



NO COMPENSATION WHEN A FLIGHT IS CANCELLED DUE TO COVID-19

The COVID-19 outbreak has hit the air carriers particularly hard due to the containment measures of the public authorities, such as travel restrictions, lockdowns, and quarantine zones. The EU Commission has, therefore, issued an interpretative guideline to help with the interpretation of regulation (EC) No 261/2004 regarding EU passenger rights in the context of the developing situation with COVID-19.

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According to the Regulation mentioned above, the passengers have the right to a fixed sum compensation when their flight is cancelled. This does not apply to cancellations made more than 14 days in advance or where the cancellation is caused by 'extraordinary circumstances' that could not have been avoided even if all reasonable measures had been taken.

In the interpretative guideline, the Commission considers that public authorities take measures intended to contain the COVID-19 pandemic, such measures are by their nature and origin not inherent in the normal exercise of the activity of carriers and are outside their actual control. This means that passengers are not entitled to compensation if the flight is cancelled due to COVID-19 restrictions.

The Regulation does not recognise a separate category of ´particularly extraordinary' events, beyond the 'extraordinary circumstances' as referred to above. Even though the current situation with the COVID-19 pandemic seems particularly extraordinary the air carrier is not exempted from all of its obligations under the Regulation.

That means, even if the passengers are not entitled to any compensation when the flight is cancelled due to COVID-19 restrictions, the passengers still have the right to reimbursement or rerouting as well as the right to care.

THE RIGHT TO REIMBURSEMENT OR REROUTING

When a flight is cancelled the operating air carrier is obliged to offer the passengers the choice among:

1. reimbursement (refund),
2. rerouting at the earliest opportunity, or
3. rerouting at a later date at the passenger's convenience.

During the current COVID-19 outbreak, it may be impossible for the air carrier to offer the

passengers rerouting at the earliest opportunity within reasonable time. It might even be impossible for the air carriers to give an estimate as to when it again will be able to fly to certain destinations if a country has closed all air traffic. Therefore, passengers may risk being considerably delayed if they choose to be rerouted at the earliest opportunity.

In situations where the passengers insist on being rerouted at the earliest opportunity, the air carrier must inform passengers about the delays and/or uncertainties involved in them choosing rerouting instead of reimbursement. Should a passenger, nonetheless, choose to be rerouted at the earliest opportunity, the air carrier has fulfilled its information obligation if it has communicated on its initiative, as soon as possible and in good time, the flight available for rerouting.

THE RIGHT TO CARE

According to the Regulation, the operating air carrier must also offer care to the passengers, who are affected by a flight cancellation. This consist of meals and refreshments in a reasonable relation to the waiting time, hotel accommodation if necessary, and transport to the place of accommodation. However, if the passenger chooses reimbursement or rerouting at a later date at the passenger's convenience, the right to care ends.

As mentioned above, the Regulation does not recognise a seperate category of 'particularly extraordinary' event. Therefore, the air carrier is not exempted from its obligation to offer care to the passengers, even during a long period.

A 'particularly extraordinary' event was also the reason for the cancellation of the flight in case C-12/11 (McDonagh). The passenger stranded in an airport when the passenger's flight was cancelled due to the closure of a part of European airspace because of the eruption of the Eyjafjallajökull volcano in Iceland back in 2010. The EU Court of Justice found that the operating air carrier was required to provide care to the passengers, who find themselves in a particularly vulnerable state in that they are forced to remain at an airport for several days.

The Regulation intends to ensure that adequate care is provided in particular to passengers waiting for rerouting. In case C-12/11 (McDonagh) the EU Court of Justice concluded, that sanctions should not be imposed on air carriers when they can prove that they have undertaken their best endeavours to comply with their obligations under the Regulation taking into consideration the particular circumstances linked to the events and the principle of proportionality. However, the national courts can apply sanctions if they consider that an air carrier has taken advantage of such events to evade its obligations under the Regulation.

OUR COMMENTS

The interpretative guidelines leave some questions unanswered. It will be up to the national courts to interpret and establish the extent of the air carriers' obligations under regulation 261/2004 in the light of the COVID-19 pandemic. At NJORD Law firm, we are expert in aviation law and flight delays. We monitor COVID-19 situation closely, and we are ready to answer any questions about flight cancellations due to COVID-19 or aviation law in general.

> The Impact Lawyers also posted this article

THE DANISH TRANSLATION

INCOTERMS 2020 IN DANISH

Ulla Fabricius, partner at NJORD Law Firm, is the leader of the Danish ICC drafting group and has been responsible for the Danish adaptation and translation into Danish of Incoterms® 2020, assisted by Christian Schaap and Liselotte Rigtrup.

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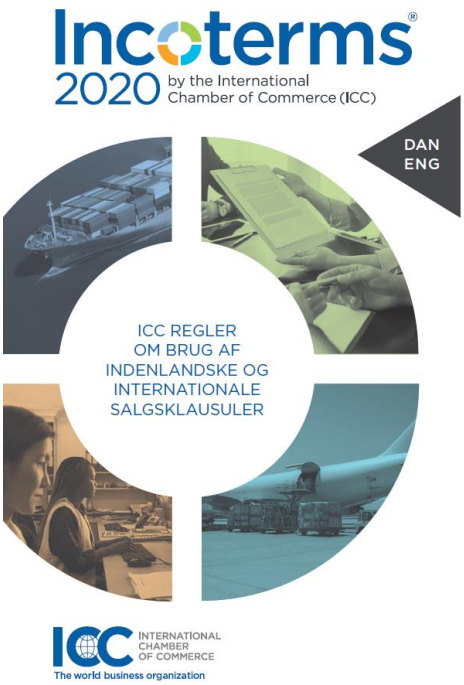

SEMINAR

We did not complete many seminars before COVID-19 led to the cancellation of all seminars.

But we will return with new seminars when we are beyond COVID-19.

> Check ICC's calendar here

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