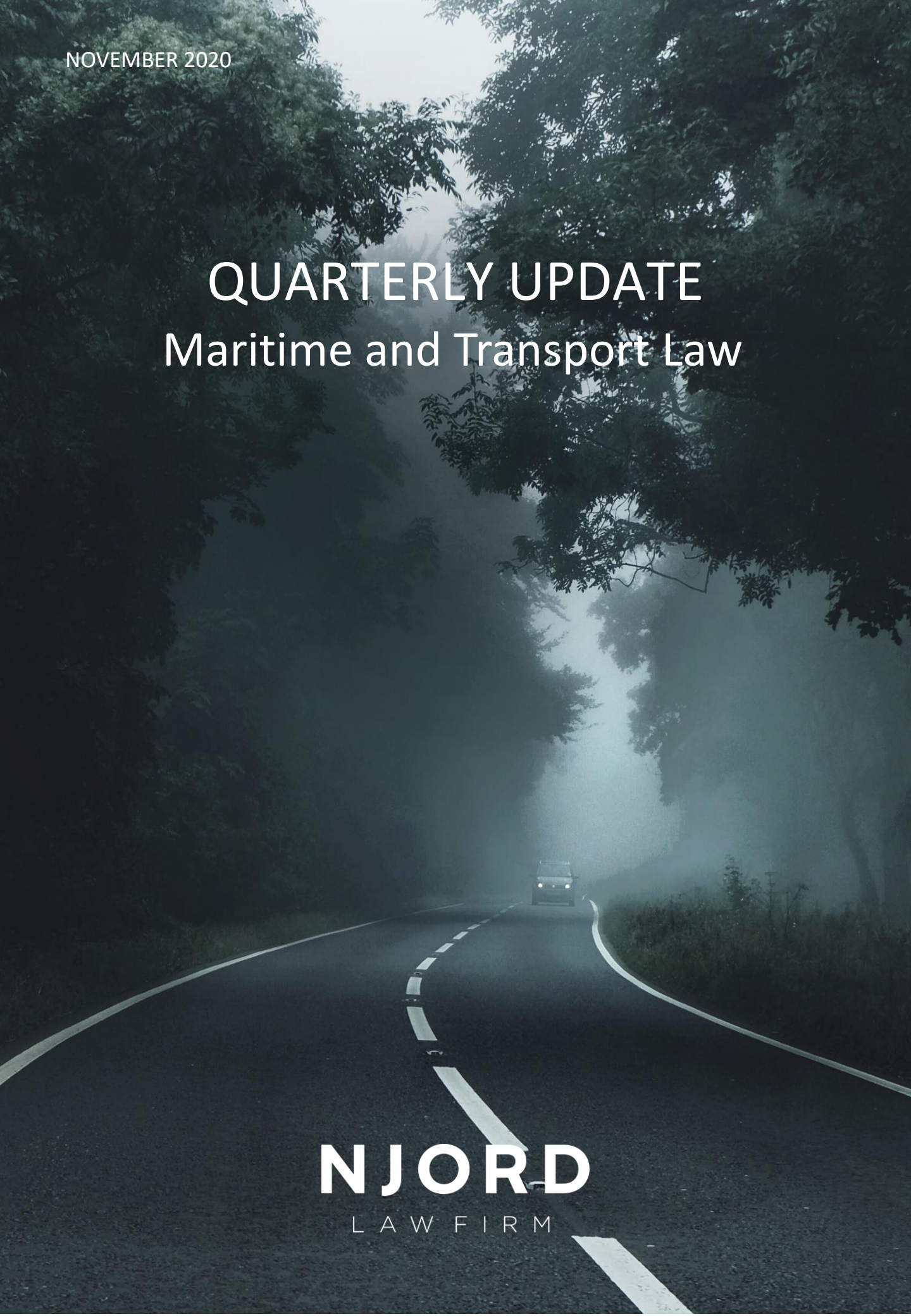
NOVEMBER 2020

QUARTERLY UPDATE

Maritime and Transport Law



NJORD

LAW FIRM

QUARTERLY UPDATE NOVEMBER 2020

WHAT ARE WE FOCUSSING ON?

In this quarterly update, we offer an **overview of the new rules** applicable to international road transport. This allows you to easily get an overview of the complicated rules in the Mobility Package and the specific national rules applicable in Denmark. We have also listed the dates for when the different rules will take effect and, as you can see, many rules have already come into force, while several are on the way, so it is about time to get updated and get the business adjusted.

Inspections of heavy-duty vehicles are something many transport companies have become acquainted with, be it in the form of company inspections or roadside inspections. In our quarterly update, we provide you with useful information about what rights and obligations you have when you become subject to an inspection.

We also review some recent good key judgments, which are useful to learn from. Also, we are introducing a shortlist of a few new judgments that are interesting – **Brief news from the courts**.

We have developed a **guide on bunker delivery contracts**, where we review typical contract terms that shipowners or charterers need to pay special attention to. As many bunker suppliers use standard terms in their contracts with shipowners or charterers, knowing what to pay special attention to is essential.

At NJORD, we completed the **merger with Brockstedt-Kaalund law firm** on 1 November 2020. Thus, NJORD will have a significant presence in Jutland, with offices in both Silkeborg and Århus. It is no secret that completing the merger in the middle of a corona pandemic has been a challenge. However, we have reached the goal, and we look forward to providing an even more comprehensive range of assistance to our clients, now that we have more than 260 employees in Denmark and the Baltics.

Written by Ulla Fabricius, Attorney at law (H) and Partner at NJORD Law Firm.
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BREXIT IS ON THE DOORSTEP –NOW WHAT?

It is not yet known whether there will be a "hard" or "soft" Brexit when the United Kingdom leaves the European Union on 1 January 2021. The United Kingdom's exit from the single market means that the free movement of people, goods, and services to and from the EU will change significantly for businesses on both sides.

From 29 September to 2 October, the European Commission held the ninth round of negotiations with the United Kingdom. The meeting noted a number of areas where positive progress was made, including trade in goods and services, as well as negotiations on aviation safety and coordination of social security.

It is not yet possible to determine the extent to which the United Kingdom's exit from the Union will affect businesses, as negotiations for an agreement are still ongoing. However, there are several changes that will be inevitable, despite the outcome of the United Kingdom's ongoing negotiations with the EU on a "soft" or "hard" Brexit.

Therefore, the European Commission has drawn up a checklist of Brexit preparations for companies doing business with the United Kingdom. The checklist contains, among others, sections on aviation and road transport companies, and highlights many key issues to be addressed before the end of the year.

> The checklist can be found here.

Danish Freight Forwarders held their annual conference on 11 November 2020 with a special focus on Brexit, so there was also useful information to be found there.

25-HOUR PARKING – IS THE DANISH RESTRICTION LEGAL?

The European Commission considers that Denmark's 25-hour limit on public truck parking lots violates the freedom to exchange transport services.

However, Denmark is of the opposite opinion, as the Danish Government does not consider it a public task to make parking facilities available for long-term parking.

Also, the Danish Government states that there is already a wide range of public (as well as private) alternatives to truck parking at the rest areas along the motorway network, where unlimited parking is available.

Thus, the Danish Government does not share the Commission's assessment that the introduction of a 25-hour limit on public truck parking lots goes beyond what is necessary and appropriate to achieve the objective – to ensure more capacity on motorway rest areas.

Denmark, therefore, considers that it is the sole competence of the Member States to establish parking rules, that the Danish fixed-term parking rule does not have a direct or indirect discriminatory effect and is justified by legitimate purposes of general interest and that the parking rule is proportional.

It will be interesting to see whether the case now ends up before the European Court of Justice.

STATUS OF THE CASE OF THE ROMANIAN DRIVER WHO WANTS DANISH WAGES

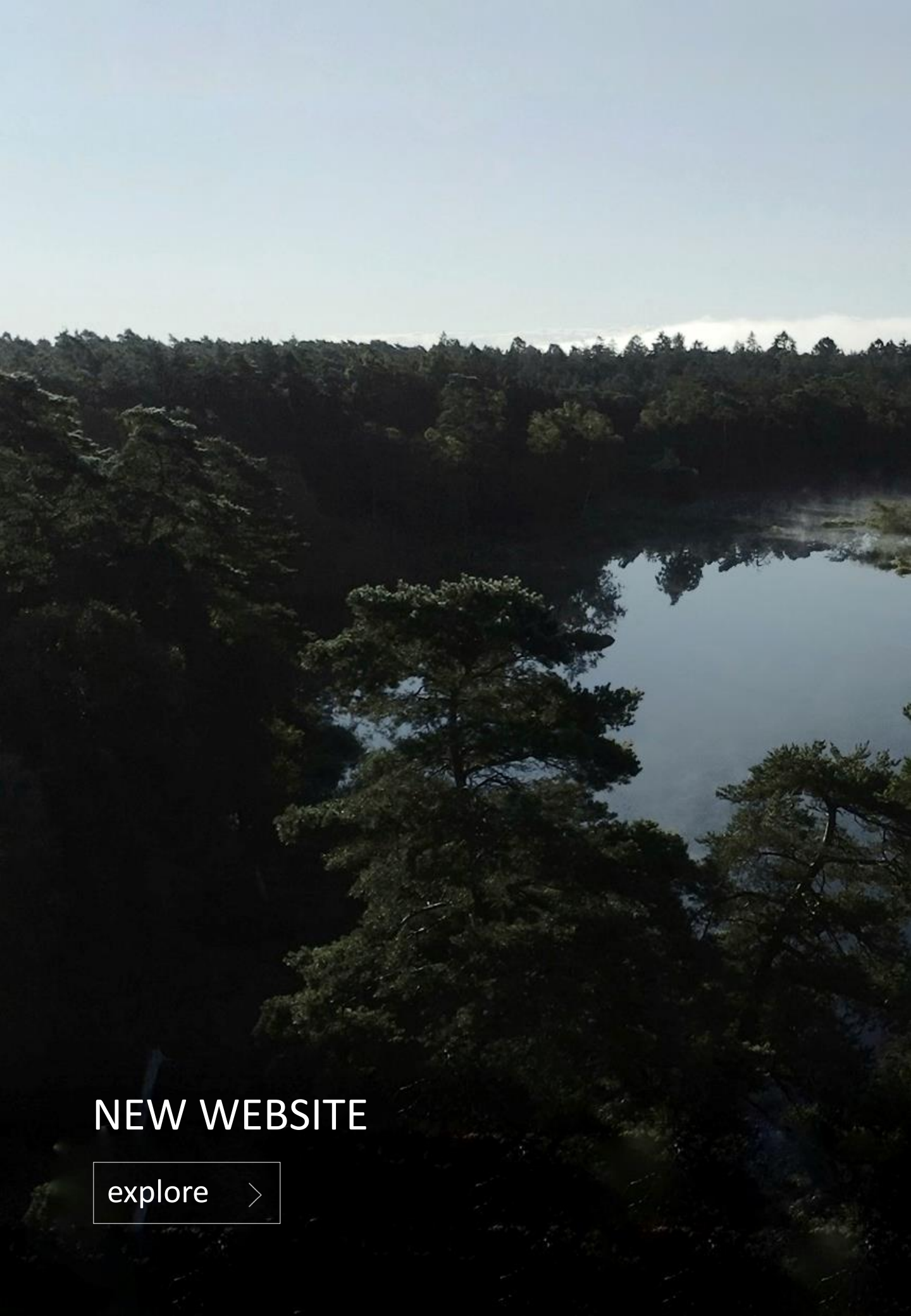
As many may recall, a Romanian driver brought an action against his Slovak haulier in the Danish courts demanding Danish collective pay and conditions of employment. The driver referred to the fact that he always started and ended his tours in Denmark, where he also received consignment notes.

We have previously written about the case:
> Danish salary for Romanian driver?

> The case of the Romanian driver's salary and terms of employment continues before the Danish courts.

The case is being heard in court these days. Therefore, we can expect a judgment from the first instance before the end of the year! We will brief you as soon as we receive the judgment at NJORD.

In some ways, the time has caught up with the case, as the EU has long recognised that the road transport sector is unique, and therefore on 15 July 2020 has adopted a new directive (2020/1057) on exactly this, because *"it is necessary to establish sector-specific rules reflecting the particularities of the highly mobile workforce in the road transport sector and providing a balance between the social protection of drivers and the freedom of operators to provide cross-border services."*, cf. consideration (7) of the preamble. A directive that comes into force in February 2022 and which would make legal proceedings like this superfluous.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WATER DAMAGE TO A SHIPMENT OF SHOES WHEN EXTINGUISHING A FIRE

SHIPOWNER AND FREIGHT FORWARDER ARE LIABLE FOR NOT DECLARIN GENERAL AVERAGE

In a recent judgment, the Maritime and Commercial Court found that a freight forwarder and a shipowner were liable for general average contribution to the cargo owner. A fire involved during the carriage and a consignment of shoes suffered damaged by water used for firefighting. The fire constituted a general average event. The shipowner failed to inform the cargo owner of the fire, which prevented the cargo owner from protecting its interests in relation to the fire.

The freight forwarder was liable for the shipowner's failure to inform the cargo owner but was to be indemnified by the shipowner as the shipowner was ultimately liable.

Written by Christian Schaap, Attorney at law at NJORD Law Firm.
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THE FACTS OF THE CASE

A shoe company wanted a batch of shoes transported from Thailand to Hamburg, Germany. An agreement was, therefore, concluded with a freight forwarder, which subsequently subcontracted the transport to a shipping company which would carry out the transport by sea.

During the transport to Germany, two of the ship's containers caught fire. The crew onboard managed to put out the fire. On receipt of the shoes, when opening the container, the cargo owner discovered that a large part of the batch of shoes had been damaged by water used to put out the fire.

The cargo owner received compensation from its cargo insurance company, which then subrogated to the cargo owner's right against the freight forwarder and the shipowner. The cargo insurer instituted legal proceedings against both the freight forwarder and the shipowner.

THE DISPUTE OF IN THE CASE

The case concerned whether the cargo insurer was entitled to compensation calculated as either of the value of the damaged shoes or, alternatively, the value corresponding to the general average contribution which the cargo owner would have received if general average had been declared as a result of the fire.

The cargo insurer's claim for compensation under the Danish Merchant Shipping Act's liability rules corresponding to the value of the damaged shoes was rejected by the freight forwarder and the shipowner on the grounds of the fire exception in the Danish Merchant Shipping Act. The cargo insurer then claimed that the freight forwarder and the shipowner should pay the cargo owner's claim for so-called general average contribution, as the loss of shoes was incurred for the preservation of the ship and cargo on board the vessel.

In short, the principle of general average is that if sensible and proportionate steps are taken whereby the values of a ship are deliberately sacrificed in order to save all the other values on the ship from a common danger, the one whose values have been sacrificed is entitled to a contribution from all those whose values were saved.

THE ARTICLE CONTINUES

The cargo insurer considered that the shipowner was liable for failure to declare general average and for not having secured general average contributions from the remaining cargo interests. Alternatively, the cargo insurer considered that the shipowner was liable for failing to inform the cargo owner of the extinguishing of the fire, which prevented the cargo owner from protecting its rights in the case. The cargo insurer argued that the freight forwarder was liable for the shipowner's omission(s) under NSAB 2015, which had been agreed between the cargo owner and the freight forwarder.

Both the freight forwarder and the shipowner denied that they had an obligation to declare general average and/or had an obligation to notify the cargo owner of the fire onboard the vessel. The freight forwarder and the shipowner argued that the fire did not constitute a common danger and therefore, the conditions for general average were not met.

If the fire posed a common danger, the shipping company denied that the shipowner had had a duty to declare the general average, as the cargo owner should have declared general average when the ship arrived at the port of Germany. The freight forwarder and the shipowner argued that, at the time of the action, the cargo owner had forfeited the right to declare general average, including because the claim of the cargo insurer was time-barred. Finally, the freight forwarder refused to be vicariously liable for the shipowner's failure to declare general average and/or the shipowner's failure to report the fire to the recipient.

THE DECISION OF THE COURT

The Maritime and Commercial Court found that this was a case of general average, as the fire could have spread and thus posed a danger to the rest of the cargo. The court held that the shipowner did not have an obligation to declare general average but that the shipowner had an obligation to safeguard the interests of the cargo owner, i.e. to inform the cargo owner of the fire. Due to the shipowner's failure to inform the cargo owner about the fire, the shipowner had acted negligently, as the shipowner's failure had prevented the cargo owner to protect its interests.

The Maritime and Commercial Court found that the claim of the cargo insurer was not subject to the 1-year limitation period in the Danish Merchant Shipping Act but was instead subject to the general 3-year limitation period, so the claim was not time-barred.

The Maritime and Commercial Court found that the freight forwarder, as a contracting carrier, was liable for the shipowner's failure to inform. Therefore, the freight forwarder and the shipowner were jointly and severally liable to the cargo insurer. However, the freight forwarder had filed a claim against the shipowner, whereby the shipowner were to indemnify the freight forwarder for any amount the freight forwarder was ordered by the court to pay to the cargo insurer. The freight forwarder was successful in this claim, as the shipowner was the party ultimately responsible for the loss incurred.

NJORD'S COMMENTS

The judgment states that the shipowner is not obliged to declare general average, but that the shipowner has an obligation to inform the cargo owner of general average events so that the cargo owner can protect its interests as a result. However, the judgment does not indicate what the cargo owner could have done to protect its interests. Under Section 465 of the Danish Merchant Shipping Act, the starting point is that the shipowner can declare general average. Alternatively, if the shipowner had informed the cargo owner of the fire, in accordance with the shipowner's "information duty" it is not clear what the cargo owner could have done to protect its interests (i.e. obtain general average contributions).

The judgment goes on to state that claims for general average contributions are subject to the general statute of limitations.

Finally, the judgment states that the liability clause in section 3(b)(1) of NSAB 2015 makes the freight forwarder liable for the shipowner's failure to inform the recipient of the general average event (the fire on the ship). It can be argued that such liability goes beyond what follows from section 2 and sections 15-21 of NSAB 2015, while it can also be argued that such liability is consistent with the general rules of liability since the omission in the present case had a close link to the performance of the contract. NJORD Law Firm will follow the development of the legal area. If you have any questions or comments about the judgment, please feel free to contact us.

END OF ARTICLE

EMPLOYEE NEWS

RISING STAR

BIG CONGRATULATIONS TO OUR ICELANDIC STAR

Guðrún has been named Rising Star on the new Icelandic list, which highlights 40 Icelandic "vonarstjörnur" who do particularly well in the business world abroad.

Guðrún Ólöf Olsen is 28 years old and has worked at NJORD Law Firm since 2015. Among other things, she specialises in competition law, EU law, and dispute resolution. Currently, she is an important part of our team pursuing two of the largest litigations in the history of Denmark. Guðrún is one of the few who has admission to practise law in both Iceland and Denmark and can, therefore, help to resolve legal disputes before the courts in both countries. She is also one of the founders and a board member of KATLA - an association of Icelandic women in the labour market in Denmark.

At NJORD we congratulate Guðrún on the appointment, which is well deserved!

> READ THE ARTICLE ON MEDIUM.COM

TWO NEW LAWYERS

MARIE STEEN MIKKELSEN AND JOHANNE HANSTED

We are pleased to report that NJORD's Maritime and Transport Law Team has been strengthened by two new lawyers. Both Marie Steen Mikkelsen and Johanne Hansted have been admitted to the bar and can now call themselves lawyers.

Marie has been an assistant attorney with NJORDs Maritime and Transport Law Team since 2017 and is primarily handling maritime and transport law. Marie looks forward to taking on more responsibility at NJORD, where litigation that Marie is passionate about will become a bigger part of her everyday life.

Johanne joined NJORD's Maritime and Transport team at the beginning of 2019 and works primarily with air transport. On our website, Johanne keeps you updated on the latest news in the air transport industry, where right now, due to corona, changes often occur.

We congratulate Marie and Johanne and welcome them in our department as lawyers.

INSPECTIONS OF TRANSPORT COMPANIES

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THE DANISH TRANSPORT AUTHORITY'S REGULATORY CONTROL

The Danish Transport Authority performs regulatory control of transport companies that are established in Denmark and have been issued transport permits in Denmark under the Danish Act on Freight Driving. The Danish Transport Authority can select transport companies to audit the company's compliance with the permit requirements for freight driving, driving and rest periods, use of tachograph, diagram sheets, driving license, etc. The Danish Transport Authority's audits can be a visit to the transport company's address or a request for the transport company to submit specific documentation.

POLICE CHECKS - RIGHTS AND DUTIES

In cooperation with the Danish Transport Authority, the Danish police monitor whether transport companies and drivers comply with the rules on driving and rest periods, the fitting-out and use of the vehicle's technical equipment, driving with hazardous goods, cabotage, road user charges, parking conditions, etc.

Police checks will often take place on country roads as regular heavy-duty vehicle checks. In certain situations, the police may also carry out targeted checks targeting a specific company or person. If this occurs, the police may visit the transport company to interrogate employees and/or with a search warrant to access specific material and data held by the company.

As a transport company, it makes sense to have prepared in advance for how to handle audits and checks. This is not least because there may be a requirement for documentation to be presented immediately in connection with the stop and check by the police. Also, actual preparation for police's heavy vehicle checks will ease the check – both for the company/the driver concerned and for the police.

When a company prepares a police check plan, it is first and foremost relevant to know what information/documentation the police will be asking for, and you need to be aware where this documentation can be found. Certain types of documentation will be available in the vehicle (e.g. data from the tachograph), while other forms of documentation will require a call from the driver concerned to a vehicle dispatcher or master driver at the office. In case of a police check, a driver needs to know which employee he or she can contact to access the documentation requested by the police.

Another key element of any form of police check is that to know in advance what you, as a company and as a driver, have the right to inform the police of and hand over to the police.

The police will often conduct interrogations as they are conducting a heavy-duty vehicle check if there are grounds for issuing fines or otherwise bringing charges for violations of the rules governing heavy vehicles.

In most cases, speaking to the police and making statements during a police check should not cause any concerns. However, there is generally no obligation to speak to the police other than an obligation to disclose your name, address, and date of birth, cf. Section 750 of the Danish Administration of Justice Act, and in certain cases it may be advantageous to exercise this right, especially if one does not agree with the conclusions drawn by the police in the course of the inspection. The same right applies if the police show up at the company's address to question management or employees. Finally, it is also important that a person who has been questioned gets to read the police interrogation report after the questioning. If the person questioned finds that the report misrepresents anything, the report should be corrected. There is no obligation to sign an interrogation report and, of course, you should not do so if you do not think that the report clearly reproduces what has been explained.

For foreign transport companies, who risk having a vehicle seized as security for payment of a fine, it is important to know that they have the right to have the legality of a seizure tried by a court hearing within 24 hours.

It is also especially important to consider whether the driver should be questioned at all during a police check if an interpreter is not present. Foreign drivers who have been questioned without an interpreter regularly find it difficult to recognise the content of the police interrogation report, as they have not understood questions and have not been able to express themselves clearly. Here it is particularly important that the driver does not sign the interrogation report if it is written in a language that the driver does not fully understand.

At NJORD we work closely with several Danish transport companies, who can contact us if, in connection with a check either on the road or at the company, questions or uncertainties arise about what the company and employees have the right and obligation to do. Likewise, we assist in obtaining an overview of the documentation that the police typically request and which there will be an obligation to hand over.

BRIEF NEWS FROM THE COURTS

1 WHEN YOU HAVE ORDERED A REGULAR CARRIAGE OF PACKAGED GOODS WITH A TARP TRAILER, THAT IS WHAT YOU GET.

A wine merchant wanted a supply of exclusive champagne transported from France to Denmark hired a Danish carrier. The agreement covered 1,176 bottles of champagne, and the value of the transport amounted to EUR 69,150.42. According to the "price sheet" of the order, the offer did not include goods that were particularly theft-prone. The agreement was to be carried out as a regular carriage of packaged goods in a tarp trailer, which, moreover, was customary in the contractual relationship between the parties, who had also previously cooperated. The transport was subcontracted to a haulier who parked the trailer in a parking lot in France. The parking lot was illuminated but not secured, nor did it have video surveillance. As the driver took rest in the cab, part of the cargo (seven pallets of champagne) was stolen from the trailer. Also, white foam powder was sprayed from a fire extinguisher over the four remaining pallets of champagne.

The wine merchant demanded full compensation for the stolen pallets of champagne, and he also claimed that the remaining champagne was impaired. The merchant's view was that the carrier knew or should have known that the champagne was theft-prone, as this wine merchant was known for the sale of costly champagne. According to one of the documents in the carrier's possession, the shipment in question was very expensive. Therefore, it was grossly negligent to park at a rest area that had not been particularly secured.

The Danish Maritime and Commercial Court ruled that, as agreed, the transport had been carried out as a regular carriage of packaged goods in a tarp trailer, which was also customary in the parties' cooperation relationships. As a result, the carrier could not be said to have acted grossly negligently in choosing a rest area that had not been particularly secured.

The Maritime and Commercial Court, thus, focuses on the agreement concluded by the parties and also denies that the carrier was otherwise aware that the champagne was expensive or that it was grossly negligent that the carrier was not aware of it.

The judgment must be regarded as consistent with the case-law of the Supreme Court, in particular, in the judgment U 2012.115 H, which also concerned theft in connection with the transport of very expensive wine. In that case, a pallet of wine was stolen when the driver rested at a rest area that was fully illuminated. The trailer was a so-called flower trailer, and it was unlocked. In assessing whether the carrier had been grossly negligent, the Supreme Court emphasised the agreement of the parties, i.e. the type of transport purchased by the buyer. Also, the Supreme Court held that it had not been proved that the carrier was aware that the wine was expensive or that it was grossly negligent that the carrier was not aware of it.

In short: *You get what you have ordered and paid for.*

WATER DAMAGE TO TOYS DURING MULTIMODAL TRANSPORT – WHICH RULES APPLY?

2

During a multimodal transport from China to the Czech Republic, water damage was caused to a load of toys, as water had penetrated the container from below. In the course of the proceedings, the court had to decide whether the carrier was liable for this water damage or, rather, according to which the rules of transport law the liability and, in particular, the compensation were to be assessed.

The agreement between the toy manufacturer and the freight forwarder referred to NSAB 2000 and stated that the freight forwarder was liable as a carrier under sections 16 to 23 for any damage to the goods that may occur from the time the goods were taken over for transport until delivery. Undoubtedly, liability had been established.

Therefore, the question was whether the network provision of section 23 of NSAB 2000 could lead to the toy manufacturer being able to make use of the more favourable rules of the Danish Merchant Shipping Act in relation to the calculation of the compensation?

The Danish Maritime and Commercial Court ruled that to use the network provision, the toy manufacturer had to prove where the water damage had occurred. The toy manufacturer was unable to do so, and as a result, the toy manufacturer could not apply the rules of the Danish Merchant Shipping Act. Instead, the toy manufacturer had to settle for the liability limitation of 8.33 SDRs per kilo in NSAB 2000, while at the same time the court ruled that the toy manufacturer had not proved that there was gross negligence on the part of the freight forwarder.

ROAD TRANSPORT

OVERVIEW OF THE NEW RULES FOR INTERNATIONAL TRANSPORT COMPANIES

We have previously written about the many new rules for hauliers and transport companies about, for instance, driving and rest periods, posting and collective agreements. The rules are from both the EU in the Mobility Package and new national rules. The many new rules of the game are difficult to keep track of. Therefore, we have prepared an overview of some of the key requirements in the new regulation in this quarterly update.

In this quarterly update, we focus on the transport companies that provide international transport services - both the Danish transport companies that export from and import to Denmark, and the non-resident transport companies that drive with import, export, transit or other to, from, or in Denmark. These transport companies should have already come a long way in preparing a plan for how to adapt to the rules of their business.

Written by Marie Steen Mikkelsen, *Attorney at law at NJORD Law Firm.*
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THE MOBILITY PACKAGE

DRIVING AND REST PERIODS	*Regulation (EU) 2020/1054 of the European Parliament and of the Council of 15 July 2020 amending Regulation (EC) No 561/2006 as regards minimum requirements on maximum daily and weekly driving times, minimum breaks and daily and weekly rest periods and Regulation (EU) No 165/2014 as regards positioning by means of tachographs.*
NEW CALCULATION OF THE DRIVER'S WEEKLY REST PERIODS	Within a four-week reference period, it is possible: a) to take one reduced rest period of at least 24 hours, to be compensated by adding it to another rest period at the latest before the end of the third week of the reference period. b) Also, *international drivers* operating outside their Member State of residence or the Member State of establishment of the transport company can take two consecutive reduced rest periods followed by two regular weekly rest periods. The reduced rest periods must be compensated for during the first regular weekly rest period. The rule entered into force on 20 August 2020.

TAKING RESTS	The case-law of the European Court of Justice has been upheld in the Driving and Rest Period Regulation. It is now stated directly in the Regulation that it is illegal to take regular weekly rest or other rest of more than 45 hours in the vehicle. The rule entered into force **on 20 August 2020.**
DRIVERS MUST RETURN HOME	Going forward, transport companies have a duty to ensure that drivers return to their place of residence *at least every four weeks* or the operational centre of the transport company in the Member State of establishment. *International drivers* who have held two consecutive reduced weekly rests, the requirement to return already applies before the third – extended – weekly rest. The rule entered into force on **20 August 2020**.
THE CONTROL PERIOD	The control period is extended from 28 days to 56 days. The control period covers the period during which transport companies are obliged to keep records and data on driving and rest periods, etc. Also, this period the checks by the authorities is based on. The new control period will enter into force on **31 December 2024.** The control period shall be extended at the same time as new intelligent tachographs are to be installed. These must be able to automatically register every time the vehicle crosses a border.

ACCESS TO THE ROAD TRANSPORT INDUSTRY AND TO THE MARKET	*Regulation No 2020/1055 of the European Parliament and of the Council amending Regulations Nos 1071/2009 and No 1024/2012 with a view to adapting them to developments in the road transport sector.*
EXTENSION OF *THE REQUIREMENTS CONCERNING GOOD REPUTE*	In future, the good repute requirement, which national authorities have to take into account when issuing and maintaining haulier permits, will include: • serious infringements of national tax rules; • rules on the protection of workers, including the rules on cabotage and posting; The extended requirements concerning good repute will enter into force on **21 February 2022.**

THE ARTICLE CONTINUES

REQUIREMENTS FOR THE *OPERATIONAL CENTRE* OF TRANSPORT COMPANIES IN THE ESTABLISHMENT MEMBER STATE	In the future, greater requirements will be imposed on the link between the transport companies and the Member State in which the transport company is established. The stricter requirements will enter into force **on 21 February 2022**.
RETURN OF VEHICLES TO THE OPERATIONAL CENTRE	In the future, transport companies MUST ENSURE that all vehicles in the transport company's fleet return to the operational centre in the Member State of establishment no later than *every 8 weeks.* The rule will enter into force **on 21 February 2022**.
CABOTAGE	In the future, a *waiting period of* 4 days will apply after the end of cabotage in a host Member State. During the waiting period, the carrier cannot return and perform cabotage operations in the same host Member State. The rule will enter into force **on 21 February 2022**.

POSTING	*Regulation No 2020/1057 of the European Parliament and of the Council laying down specific rules with regard to Directive 96/71 and Directive 2006/22 as regards enforcement requirements and Regulation No 1024/2012.*
THE POSTING RULES APPLY WHEN: THE POSTING RULES DO NOT APPLY WHEN:	Drivers carry out *cabotage, cross trade and the road part* of combined transport in a host Member State (i.e. in a Member State other than where they are employed). Drivers who carry out bilateral trips and transit, where the trip either starts or ends in the Member State of establishment, will not be subject to the posting rules. The new sector-specific posting rules for the road transport industry will enter into force **on 2 February 2022**.

NATIONAL REQUIREMENTS

COSTS AND WAGES BASED ON COLLECTIVE AGREEMENTS	Act on amending the Act on Freight Driving, Act on Busses, Act on the Labour Court and Professional Arbitration Courts, and Act on the Posting of Workers, etc.
DANISH TRANSPORT COMPANIES	Danish transport companies, who have been granted a haulier permit under the Act on Freight Driving, must in the future follow a cost level which does not deviate unequivocally or significantly from the overall cost level of the collective agreements for drivers concluded by the most representative labour market partners subject to the Act on Freight Driving Denmark and applicable throughout the territory of Denmark. The rule shall enter into force on **1 January 2021** for the issue of new haulier permits**.** For existing haulier permits, the rule will not enter into force until **1 July 2021**.
NON-RESIDENT TRANSPORT COMPANIES	Non-resident transport companies must pay a certain *minimum wage* to drivers who carry out either cabotage or the part of combined transport in Denmark. The Minister for Transport will determine the minimum wage after consulting the labour market partners and based on relevant wage provisions in collective agreements, which will guide the overall cost level of Danish transport companies under the Act on Freight Driving. The minimum wage requirement is set out in a new Section 8c of Act on the Posting of Workers, which comes into force on **1 January 2021.**

END OF ARTICLE

THE MERGER IS A REALITY

The merger between NJORD and Brockstedt-Kaalund was completed on 1 November 2020.

NJORD Law Firm is now Denmark's eighth-largest law firm, with approximately 60 new employees and a large, specialised office in Silkeborg.

We celebrated this by launching our new website, which houses our entire joint business.

NEW WEBSITE

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TYPICAL CONTRACT TERMS

WHAT SHOULD SHIPOWNER OR CHARTERER PAY PARTICULAR ATTENTION TO IN BUNKER DELIVERY AGREEMENTS?

The bunker oil market is characterised, among other things, by the fact that it is often the bunker supplier who has a significant influence on the contractual terms to be applied to a contract for the supply of bunker oil. However, there are also cases where there is room for negotiation of the terms of the contract.

Below are some of the key provisions that you, as a buyer, need to pay particular attention to when concluding a bunker delivery agreement. This can ensure that, as a buyer, you are better off in case of a dispute concerning the supplied bunker oil.

Written by Christian Schaap, Attorney at law at NJORD Law Firm.
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In recent years, particular attention has been paid to cases where poor bunker oil (the Houston problem) is delivered, where too little bunker oil is delivered (the so-called cappuccino method) and to the cases caused by the bankruptcy of OW Bunker. The latter illustrated the challenges you can run into as a buyer when buying the bunker oil subject to a reservation of property from an intermediary who goes bankrupt.

Back in 2018, many received poor-quality bunker oil from Houston, Panama, and Singapore in particular, causing damage to many ship engines. It was also a prevalent practice years ago that bunker suppliers, when delivering bunker oil, blew compressed air through the hose connected to the ship's tank. This caused the bunker oil to bubble/foam so that it took up more room (the cappuccino effect). Therefore, the measurements in the tanks showed that the tank was fuller than it really was. After a few days in which the foam disappeared, the meters showed the actual amount of bunker oil in the tank, which was less than the agreed quantity. Finally, the OW Bunker cases have recently shown that the bankruptcy of a bunker supplier can have intrusive consequences for a shipowner, who may be faced with a claim for payment of the same bunkers twice.

The Houston problem, the delivery using the cappuccino method, and the bankruptcy of OW Bunker, all gave rise to numerous disputes that have been handled by courts around the world. The judgements show a picture of several contract terms that recur in the bunker delivery contract. Some of these terms of the agreement, as a buyer of bunker oil, one should pay particular attention to, and in some cases, one should avoid accepting them.

THE ARTICLE CONTINUES


ATTENTIE

BUNKER STANDARD TERMS

Bunker delivery contracts will often be negotiated based on the bunker supplier's standard terms. In 2015, however, BIMCO's first set of standard terms for the purchase of bunker oil was published. The terms were never used in general throughout the industry, and many bunker suppliers considered the terms to be too "buyer-friendly". In 2018, BIMCO released a 2018 version of the terms for the purchase of bunker oil. These terms are also used as a starting point in contract negotiation, during which the bunker supplier and shipowner/charterer often agree to specific changes and adjustments to the terms.

Characteristic of many bunker delivery contracts is that the choice of law often points to, e.g. the general maritime law of the United States of America, that sampling and quality testing conditions often favour the supplier's sampling and quality testing, that notice and limitation periods are short, and the supplier's liability is often very limited. Below we take a closer look at these typical clauses.

AVOID ADOPTION OF "THE GENERAL MARITIME LAW OF THE UNITED STATES OF AMERICA"

US maritime law rules place the bunker supplier in a better position than the supplier is in most other countries, as US maritime law rules give a bunker supplier a maritime lien for its payment claim for bunker oil delivered to the ship. Therefore, it is recommended that a more neutral choice of law be agreed. Under Danish law, a bunker supplier's claim for payment for bunker oil is a general maritime requirement listed in Section 91(11) of the Merchant Shipping Act. It is a condition of arrest here that the shipowner is liable for the bunker supplier's claims, cf. Section 93(4) of the Merchant Shipping Act.

Under Danish law, there is no presumption that a charterer, when ordering bunker oil, binds the shipowner, cf. e.g. ND1958.380, which is why the necessary liability will generally not exist.

However, under the US Maritime Lien Act, there is a presumption that the shipowner is bound by a charterer's order of bunker oil. This gives the bunker supplier better access to arrest and forcibly sell the ship to which bunker oil has been delivered unless payment is made by the owner of the ship. This legal position has, for example, been seen in the US decisions (M/V Harmony) as well as the Canadian (M/V Lanner), from which it can be inferred that these courts largely accept that the charterer's agreement with the bunker supplier, including the conflict of laws agreement, results in the bunker supplier having a maritime lien in the ship for its payment claim and that the shipowner must respect the bunker supplier's right, including the ranking. Thus, the shipowner risks ending up being liable for payment of the bunker oil bill if the shipowner wants to avert a forced sale. A Danish court will hardly be as inclined to let a conflict-of-law agreement between a bunker supplier and a time charterer bind a shipowner, with the result that the shipowner must respect the bunker supplier's maritime lien.

AGREE ON THE SPECIFICATIONS OF THE BUNKER OIL

It is important to agree on the specifications of the bunker oil to be received, including whether the bunker oil must meet IMO's 2020 sulphur requirements, any relevant ISO standard, and/or MARPOL Annex VI. It is not recommended that specification descriptions are included in the agreement that cannot be objectively measured, such as the pumpable oil.

SAMPLING AND QUALITY TESTING

When supplying bunker oil, samples of the bunker oil are taken to check its quality. Often bunker delivery contracts contain a clause under which only the result of the seller's sampling shall be taken into account when determining whether the bunker oil is of the agreed quality. Here it can be agreed that both the bunker supplier and the buyer's sampling shall be taken into account when determining whether the

the bunker oil has the agreed quality and the sulphur content and that samples in the case of disagreements may be submitted to an independent expert, agreed to in advance in the agreement. The actual process of sampling and quality testing should be described as accurately as possible in the contract.

TIME LIMITATION AND NOTICE

If the contract is subject to English law, a court will most likely uphold a clause giving the buyer a short limitation period, cf., for example, a recent English decision "Tricon Energy Ltd. V MTM Trading", where according to a clause in an agreement between a shipowner and a charterer that claims for demurrage became obsolete 90 days from the occurrence of the claim. The same result will not necessarily be the case under Danish law. In a recent decision from the Maritime and Commercial Court regarding a claim for compensation for off-spec bunker oil, the court concluded that the following clause: "TIME BAR: Quality complaints time-barred after 30 days", was a notice and not a limitation provision.

It is recommended that any buyer as far as possible, avoids short notice and limitation periods. This can, for instance, be achieved by a clause that gives the buyer, for instance, 30 days to give notice about the bunker oil calculated from the time when the bunker oil is put to use, and a limitation period of, for instance, 90 days, which is also calculated from the time of use.

LIMITATIONS OF LIABILITY

The bunker supplier will often limit the liability in the bunker delivery contract to the invoice price of the delivered bunker oil. As the damage caused by off-spec bunker oil often amounts to a higher amount than the invoice value of the oil, it is recommended, as far as possible, that the limitation of liability be revised upwards. In any case, the liability limitations should apply both for the benefit of the buyer and the bunker supplier, and not just the latter.

MAKE SURE THE BUNKER SUPPLIER HAS BUSINESS AND PRODUCT LIABILITY INSURANCE

It is recommended that any shipowner or charterer has a clause inserted in the bunker delivery contract according to which the bunker supplier must document adequate insurance. This provides a better assurance of payment of a valid claim for damages against the bunker supplier.

OW BUNKER - COMPETING CLAIMS

The conflict in the so-called OW Bunker case (Res Cogitans), handled by the English Supreme Court in the wake of OW Bunker's bankruptcy, was, in short, that OW Bunker sold bunker oil on credit and with reservation of property to a shipowner. To fulfil the agreement with the shipowner, OW Bunker purchased oil from physical bunker suppliers. These purchases were on credit. The shipowner received the bunker oil from one of the physical bunker suppliers who delivered the bunker oil. When OW Bunker went bankrupt, OW Bunker had not received payment from the shipowner, just as the physical bunker supplier had not been paid by OW Bunker. The Res Cogitans case resulted in the shipowner having to pay into OW Bunker's bankruptcy estate. Other shipowners, who were part of a similar set-up, therefore paid to OW Bunker's bankruptcy estate. However, the shipowners were met with claims in particular in the United States and the United Arab Emirates from the physical bunker suppliers, who also wanted payment from the shipowners, believing they had maritime liens their claims.

Neither the US courts nor the courts in the United Arab Emirates found that the shipowner was also obliged to pay the physical suppliers for bunker oil. To avoid the risk of competing claims, the shipowner or charterer can ensure in the agreement that the bunker supplier guarantees that it has paid for the bunker oil it sells to the shipowner/charterer and that the shipowner/charterer has the right to demand documentation for such payment before the shipowner/charterer is obliged to pay the bunker supplier.

THE ARTICLE CONTINUES

COMMENTS

If a buyer of the bunker oil wants to minimise the risk of unpleasant surprises, the buyer should carefully review and, if possible, adjust the relevant terms and conditions. This is often easier when entering into long-term framework agreements. If you have any questions or comments about the article, please contact the author and/or NJORD Law Firms Maritime and Transport Department.

END OF ARTICLE

SHIPOWNERS' CLUB GUIDE

THE DIVISION OF LIABILITY FOR DAMAGE VESSELS MAY CAUSE

The Shipowners' Club has published a guide that provides an overview of the liability for property damage caused by vessels in offshore-related operations.

Property damage is a usual risk related to offshore projects; whether the property belongs to oneself, a contractual party or a third party. Therefore, it is relevant that, when entering into contracts, you regulate and get an overview of the risk you take as part of the contract, including whether you have the necessary insurance coverage.

Shipowners' Club guide can be found below, where you can see the division of liability in some of the typical standard contracts used in connection with ships operations in offshore projects.

Contract	Liability
Supplytime (1989, 2005, 2017) & Windtime 2013	Claims by parties covered by the knock for knock flow to the Owner or Charterer respectively, including damage to their own property. In respect of claims from parties not covered by the knock for knock, the contract is silent, so these claims will lie where they fall, except where the damage is caused by or to the tow, in which case they are for the Charterers' account.
Towcon & Towhire (1985/2008)	The Tugowner is liable for any damage caused to the tug as well as to third party property contacted by the tug. Respectively, the Hirer is responsible for any damage caused to the tow and to third party property contacted by the tow.
UKSTC 1986	The Hirer is liable for any damage to third party property, the tow or the tug (provided the tug is seaworthy and the claims occur during towage).
Wreckhire/fixed/ staged (1999/2010)	The wreck owner is liable for damage to their vessel and the Contractor is liable for damage to their vessels. The contract is silent on claims from third parties, so these will lie where they fall.
LOF 2020	The Contractors are contractually obliged not to unnecessarily damage, abandon or sacrifice any property on the vessel being salved. Otherwise, the contract is silent on liability for damage to the salvage tugs, salved vessel or third party property, so the normal rules on negligence (but with due consideration of the context) will apply to claims between the parties.
Bargehire (1994/2008)	The Charterers are obliged to repair any damage to the vessel occurring during the charterparty. They also indemnify the Owners against all damage to third party property caused by the barge. However, by default the insurance provisions require the owners to place H&M and P&I insurance, which the Charterers may be able to use to cover such claims (subject to bearing the deductible).
Projectcon 2006	The tug and barge owners are liable for any damage or loss caused to their vessels. They are also liable for any cargo on board of their vessels which is not the subject of the charter. The tug and barge charterers are liable for any damage, loss, delay and wreck removal of cargo which is the subject of the charter. They are also liable for any loss or damage caused to the property of their group members. In respect of claims from parties not covered by the knock for knock, the contract is silent, so these claims will lie where they fall.

NEW JUDGMENTS FROM THE EASTERN AND THE WESTERN HIGH COURTS

AIRLINES MUST BE ABLE TO DEMONSTRATE THAT THEY HAVE DONE EVERYTHING POSSIBLE TO REDUCE THE DELAY

New rulings from both the Eastern and Western High Court stress the importance of the airline being able to not only demonstrate that the delay or cancellation is due to exceptional circumstances. The airline must also be able to demonstrate that the airline has done what was possible to reduce the delay.

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THE RIGHTS OF THE AIR PASSENGER

As a rule, the airline is obliged to pay compensation to the airline passenger if the airline cancels the flight or if the flight is delayed by more than three hours.

The airline is exempt from paying compensation if it can demonstrate that the delay or cancellation was due to exceptional circumstances which could not have been avoided even if all reasonable measures had been taken.

Also, the airline must be able to demonstrate that the passenger was offered re-routing at the earliest opportunity unless the passenger chose to get the price of the ticket refunded.

The Eastern and the Western High Court have both recently ruled in a number of cases where a great deal of attention was again placed on whether the airlines had lifted the burden of proof that they had done what was possible to reduce the delay, including re-routing at the earliest opportunity.

In several of the cases, the High Courts agreed with the airlines that the delay or cancellation was due to exceptional circumstances. However, several airlines were nevertheless ordered to pay compensation to passengers, as the High Courts found that the airlines had not done what was possible to reduce the delay.

THE AIRLINE'S BURDEN OF PROOF

We have summarised what the High Courts emphasised when assessing whether the airline had lifted the burden of proof that the airline had complied with its obligation to reduce the delay in individual cases. Here we have concluded that it is the responsibility of the airline to adequately document

- Whether and when the passenger had been notified of the cancellation or the longer delay
- That the air passenger was given a choice between re-routing or refund

THE ARTICLE CONTINUES

- That the airline has offered the passenger re-routing at the earliest opportunity, possibly via other airlines, via alternative routes, or via a nearby airport
- What the passenger chose, including that it was, in fact, the passenger's choice and not the airline's decision
- That the airline has investigated but not found it possible to reschedule the trip to other flights flown by other airlines, possibly via alternative routes or nearby airports, including documenting that the airline has contacted other airlines inquiring about available capacity
- That the airline did not have available spare aircraft as well as crew standby
- That it was not possible to deploy replacement aircraft or charter a flight from other airlines

The above list is not exhaustive but provides a clear picture of what the High Courts considered reasonable for airlines to be able to document in the individual cases. Therefore, it is not sufficient that the airline has actually made all these attempts to reduce the delay. Airlines may still lose the case.

The High Courts also found that if there was a discrepancy between the parties' explanations, the airline would be to the detriment of the airline if it was unable to provide sufficient documentation of what actually happened at the airport that day. This is a difficult burden of proof to lift. The airlines are even challenged by the fact that many passengers choose to find alternative routes without first consulting the airlines, whether it was possible to reschedule the trip with their help. Thereafter, the airlines are met with both a claim for compensation and a claim for compensation for the cost of a new flight ticket purchased at their own expense.

The above are only examples of the documentation that the High Courts have taken into account when assessing whether the airline has fulfilled its obligation in relation to reducing the delay and arranging for the rescheduling of the trip at the first given opportunity. Also, great demands are made on the airline to be able to document that exceptional circumstances were the reason why the particular aircraft in question was cancelled or delayed.

END OF ARTICLE

TOP 5

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2. New EU judgment on social security for drivers
3. Flight cancellations: Do passengers always have the right to reimbursement when the air carrier has cancelled the flight due to the COVID-19 pandemic?
4. Aviation: The travellers right to reimbursement when the air ticket is part of a package tour
5. Flight cancellations: 12 air carriers have received orders from the Danish Authorities

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