# Scrapping of ships

## – recirculation, welfare and environment – and criminal liability

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# 1. Introduction

According to Norwegian law, it is forbidden to sail or tow a ship from Norway to another country for scrapping – unless official permission is given.

In 2021, the Court of Appeal[1] sentenced a Norwegian shipowner – Mr. A[2] - to six months imprisonment, for having participated in a plan to send a LASH-carrier from Norway for scrapping on a beach in Pakistan without the required permission. The primary party was the owner of the LASH-carrier, a company domiciled in Singapore. This company was given a fine of NOK 7 million – which the company accepted.

This case – popularly called the Harrier-case because that was the name finally given to the LASH-carrier – is the theme of this article, to the extent covered by the Court of Appeal's decision. The facts of the case, as well as those of the pertinent regulations, are somewhat complicated; accordingly some simplifications are made.

1 LG-2021-7308, an appeal to the Supreme Court was not allowed hearing, HR-2022-1147.

2 In the publically accessible report, a number of names are anonymised. In this article the shipowner is named Mr. A and his shipping company Company X.

## 2. Some general remarks on scrapping and recirculation

When a ship no longer is used for its intended purpose, it is of course beneficial that the materials are taken care of: recirculated. For quite some time scrapping and recirculation have to a great extent been taking place on beaches in Bangladesh, India and Pakistan – with substantial benefits to those countries. It suffices to mention that production of steel from old materials requires only one third of the energy necessary for production from raw materials, and that the scrapping provides work for thousands. However, there is a dark side: working and safety conditions on the beaches may – to put it mildly – be miserable. Furthermore, there are huge pollution problems, e.g. regarding oils and asbestos.

# 3. The international reaction to welfare and pollution regarding scrapping – some basics[3]

The problems relating to scrapping and more generally of waste and pollution have been discussed internationally over a long period. As regards the scrapping of ships, there are two conventions of particular interest:

*(i) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, of 1989 (revised in 2019)*
*- with Technical Guidelines for Decommissioning of Ships (adopted by IMO, 2003); an d*
*(ii) the Hong Kong Convention for the safe and environmentally sound recirculation of ships, of 2009.*

*Of particular importance for Norway are the EU-rules that have been made part of our national law – in our con*

*(i) Waste Shipment Regulation (EU) No 1013/2006, based on the Basel Convention – often called the cross border regulation; and*
*(ii) Ship Recycling Regulation (EU) No 1257/2013, based on the Hong Kong Convention.*

**3 For an extensive overview, see Alla Pozdnakova:*Ship recycling regulation under international and EU law*, SIMPLY 2019 (= MarIus No. 535, 2020) pp. 53-79.**

# 4. The Norwegian legal regime

The relevant Norwegian rules are in the Pollution Act (Act 6/1981). Mr. A was sentenced for breach of Section 79 Subsection 3:

> *"With fines or imprisonment up to 2 years is sentenced he who deliberately or negligently imports or exports waste contrary to the rules on cross border forwarding of waste in regulations based on Sections 31 to 32."*

Pursuant to Section 31 of the Pollution Act, we have Regulations on Waste (Regulation 930/2004), that in Section 13-1 – with the title "rules on cross border forwarding of waste – states in Subsections 1 and 3:

> *"The EØS-agreement Attachment XX No 32c (Regulation (EU) No 1013/2006 ... on shipments of waste is applicable as a [Norwegian] Regulation with amendments and supplements according to Attachment XX, Protocol I to the Agreement and the Agreement in other respects.*
>
> *...*
>
> *For shipments of waste according to Article 37 of (EC) No 1013/2006 to countries that do not follow OECD Decision C (9239) [as amended], Regulation (EU) No 1418/2007 [as amended] applies."*

# 5. The facts of the case against Mr. A

The facts necessary for understanding the legal issues are as follows.

An old family-owned shipping company in West Norway – Company X – with Mr. A as its central person – bought in 2007 a LASH-carrier, built in 1989. The carrier had a length of 263 meters, a breadth of 37 meters, and the steel weight was 21 000 tonnes. The acquisition was not a success. The vessel was laid up in a fjord in Western Norway from 2007 to February 2017. For the greater part of this period, it was in so-called "lay up class", but nevertheless with substantial yearly costs for its owner. There were, of course, a number of plans for the use of the vessel and solving the related financial problems. These efforts require no mention in the present context, until in 2014-2015 a contact was established with Wirana, a Singapore domiciled company dominant in the scrapping business: "one of the largest cash buyers". The outcome of this was that the vessel was sold in 2015 to a Wirana company: Julia Shipping. However, the vessel was not physically transferred; it remained in the Norwegian fjord with the obligation on the seller to maintain the vessel to the standard required for a sea test.

Eventually an agreement was made, obligating Company X to rebuy the vessel. When this obligation was not fulfilled by Company X, there then followed a period of discussions on possible solutions. Parallel to these discussions, Julia Shipping started preparations for physically taking over the vessel, and in this process Company X and Mr. A gave important assistance. The outcome was that the rebuying obligation was not pursued.

A sea test was satisfactory, and on February 20, 2017, the vessel sailed with a Julia Shipping crew – apparently bound for docking in Dubai. A month earlier, the vessel had been registered in Comoros and given the name Tide Carrier. Two days after departure, the vessel had broken down and was towed into the Norwegian port of Farsund. A number of difficulties arose during the stay in Farsund, but they are outside the scope of this article. It is sufficient to mention that the authorities declared that the vessel was not allowed to leave Norway without permission. Eventually such permission was granted; the vessel was renamed Harrier, towed to Turkey, and scrapped there.

# 6. The criminal law issues

## 6.1. Overview

The indictment was essentially based on this: Wirana/Julia Shipping had tried to give the impression that the vessel left Norway for docking and upgrading for commercial activities, while the intention was in fact to have the vessel scrapped in Pakistan. To this deception, Mr. A had contributed in an unacceptable manner, cf. the Penal Code (Act 28/2005) Section 15:[4]

> *"A penal provision also applies to any person who contributes to the violation, unless otherwise provided".*

The decision of the Court of Appeal has three parts:

(i) basic offence: the evidence and legal regime.
(ii) Mr. A's contribution: the evidence legal regime,
(iii) assessment of the punishment.

## 6.2. The main offence – the evidence

The main offender was Wirana, and as mentioned in the introduction, the company had accepted the imposed fine. Nevertheless, the Court then sought to determine whether the prerequisite existed for a conviction of Mr. A for contribution.[5]

On the question of Wirana's criminal liability, a comprehensive number of facts had been presented. The Court discussed the material in detail way and concluded that when the vessel sailed from Norway with a Julia Shipping crew on board, it had been decided by Wirana that the vessel's destination was "Gadani in Pakistan for scrapping on the beach there". In order to avoid the rules mentioned in no. 4 above, a cover story had been made up by Wirana.

## 6.3. The main offence – the legal regime

Mr. A presented three objections to the rules on which the prosecutor based his case. The first and second ones were that the vessel was not properly included in the restrictive waste regulations. The third objection was that if the intention of the lawmaker was as the prosecutor argued, the Norwegian rules did not comply with the general requirement for clarity and accessibility.

### 6.3.1. Was the Harrier "waste" in respect of the rules referred to by the prosecutor?

The Court stated that the Pollution Act Section 79 Subsection 3 is based upon (EU) No 1013/2006, a view which implies that we have an EU conformal waste concept. Consequently, it was necessary to decide whether the vessel was within the waste definition of the EU Regulation. If yes, the next step would be to determine whether it was included in the national rules. The Court concluded that, in view of the Preamble of the EU Regulation No 35 on "sound management of ship dismantling", as well as the reference in Article 2 No. 1 to two Directives, it found "without doubt that the vessel is included" as "waste".

Regarding incorporation, the Court stated that the definition of waste in the Pollution Act Section 27 was amended in 2016 and given a wording similar to the EU definition. Based on general linguistic interpretation of the text, the Court stated that it included ships due to be scrapped.

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4 An unofficial translation found on Lovdata.

5 At the end of the evidentiary discussion, the Court remarked, «It has also been taken into consideration that Wirana has accepted the fine."

The conclusion was that when the attempt was made to export the vessel from Norway, it was "waste", according to the Pollution Act Section 79 Subsection 3, because Wirana wanted to have it scrapped in Pakistan – a country outside the scope of the OECD decision.

### 6.3.2. Clarity and access

The general requirement for a guilty verdict is that the punishable offence is formulated in a sufficiently clear way and is reasonably accessible. Thus, the Supreme Court has stated that the requirement is that

> *"the relevant provision must be accessible to the public It has also to be so clearly formulated that in most instances there will be no doubt whether an act is a breach of the stipulation, and that it is possible to foresee that punishment may be a consequence of breaching the rule" (HR-2020-955, Section 22).*

In another case the Supreme Court said:

> *"The requirement of clearness implies that the courts when construing and applying punishment stipulations have to ensure that punishment is not decided outside the situations covered by wording" (HR-2020-2019, Section 16).*

The Court of Appeal stated that the starting point is that the possibility of punishment under the Pollution Act Section 79 Subsection 3, cf. Section 27 Subsection 1 must appear clearly to some degree. On this point, there is, in (the Norwegian) Regulations on Waste Section 13-1, reference to the EU Cross Border Regulation. The Court's comment is that the reference

> *"is considered possible to follow for every law seeking person, and quite unproblematic to follow for a business person engaged in a specific and special sector as handling of very big vessels as waste".*

However, the Court considered the EU Cross Border Regulation Sections 35, 36 and 37 to be complex and only accessible with difficulty, but this has to be considered

> *"in light of the fact that the law and the EU Regulation clearly state that export of waste may be prohibited and punishable, and that this is further regulated in the Regulation, that has been included in the Norwegian Regulation. The person engaged in waste handling of big vessels who finds that the legal regime is not easily accessible has a strong reason and ability to ask for legal assistance.*
>
> *If this is done, any person will be informed that it is beyond doubt that these provisions include the vessel as being waste and the planned export."*

The conclusion was that the requirements regarding clearness and accessibility had been met.

## 6.4. Mr. A's contribution

### 6.4.1. The factual contribution

The indictment was based upon the physical contribution to reactivation of the vessel of Mr. A and/or his inducement to others to participate in the process. In order to evaluate the facts, it was necessary to open with some introductory remarks on what punishable contribution is. The Court of Appeal quoted from the Supreme Court:

> *"Neither is it required that the acts of the contributor have been necessary for the result. It is sufficient that there is a contributory causal relation … Precisely what is required, may in some instances be doubtful. As in the general*

> *stipulation in the Penal Code of 2005 Section 15, the Penal Code of 1902 Section 162 Subsection 5, a precise lower limit for what can be accepted as an act of contribution is not expressed. In doubt it may be decisive whether the act in question is of such a character and have such dimensions that it is natural to attach penal liability thereto … " (HR.2020-1681 Section 14).*

In deciding whether Mr. A's acts came within the Penal Code Section 15, the Court of Appeal could not agree.

The majority (5 of 7) gave a detailed description of Mr. A's participation in preparing the vessel for the sea voyage and summed up in this way:

> *"The Court of Appeal's majority finds that the acts which it is proven that the defendant has performed and caused others to perform, are in a contributory causal relation to the attempt to export the vessel. They were not a necessary condition for the export of the vessel, but there is a near connection between the extensive support given and the attempt to export the vessel. The contributory acts caused in fact that the vessel was made ready considerably quicker and at a considerably lower price, compared to what would have been the situation if Wirana/Julia Shipping had had to perform all work using its own employees and external suppliers. The contributory acts are therefore at the outset, of such a character, extent and penal worthiness, that it is natural and necessary to apply penal sanction thereto. There is, however, a connection between this consideration and the general limitation on what is punishable [Norwegian: rettsstridsbegrensningen], to which the majority will revert."*

The minority (2 judges) meant that it had not been proven, "beyond reasonable doubt", that the contribution from the Norwegian side in preparing the unlawful export was given by Mr. A personally.

### 6.4.2. The requirement of "intention"

The Penal Code Section 21 says that the criminal legislation "only applies to intentional offences unless otherwise provided". Accordingly, the majority discussed whether this requirement was satisfied, and the conclusion was that the explanation given by Mr. A was not accepted. The majority concluded that Mr. A must have known that Wirana's intention was to have the vessel scrapped in a country outside the OECD regulation – most probably also with knowledge that such export was not allowed.

### 6.4.3. The reservation regarding "respectable and daily" acts of contribution

Mr. A also pleaded that his acts of contribution were so "respectable and daily" that they were not a punishable breach of law.

The Court explained that contributory acts often have a "more normal and innocent character" than the acts described in main penal stipulation, implying that such contributory acts are not punishable. The decision depends upon an evaluation of the degree of freedom that the contributor shall be allowed, without trespassing on other freedoms that the relevant punishment stipulation protects. The guideline is whether the act of contribution represents "an unacceptable risk and is qualified blameworthy".

In this case the acts of contribution were – when considered in isolation – ordinary and legal. But here Mr. A and his company had a

> *"long-lasting and close connection to the vessel, good knowledge of the concrete scrapping and the problems connected to such unlawful export of waste …Even though the contribution consists of isolate seen ordinary and lawful acts, they*

*are, due to the character and closeness to the main offence, clearly blameworthy and punishable".*

## 6.5. The assessment of the punishment

Until January 1, 2015, a fine was the only sanction available for breach of the Pollution Act Section 79 Subsection 3. However, the lawmaker held that cross border transport of waste was such a serious environmental problem, that imprisonment up to 2 years was introduced as an additional available sanction.

The Court's starting point was that the appropriate punishment for Mr. A's contribution was 9 months imprisonment, but because of extenuating circumstances (i.a., the time elapsed from 2016/2017 to the date of decision) the periodof imprisonment was set at 6 months.

# 7. Some concluding remarks

From the facts presented in the judgment, it is not difficult for the reader to follow the reasoning that led to Mr. A's imprisonment for his contribution to the unlawful export of the vessel for beaching in Pakistan. Obviously, the people involved were aware of the problems with scrapping there, and if they did not know the exact rules, they – including Mr. A – were clearly blameworthy for not clarifying whether the planned export was lawful.

The aspect that calls for some additional remarks concern the complexity of the rules that may give rise to problems for other people, without the same background to those involved in the *Harrier* case. It is sufficient to recall that the Pollution Act Section 79 refers to Section 31 and 32 of the same Act, and that Section 31 empowers further regulation, which at that time meant Regulation 930/2004. In that Regulation Section 13-1, we have a further reference to a number of EU documents. These EU documents are not easily "digested". The technique now indicated is not in line with the traditional Norwegian way of promulgating rules that are punishable if not followed. However, over recent years, this tradition has been deviated from at an increasing speed – in order to implement EU rules. Such implementation is challenging, but the present writer is of the opinion that "a fair balance" has not so far been struck.