Choice of Forum in the Nordic Marine Insurance Plan

– Regulation and Practice[1]

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1. Introduction and overview

The topic of this article is the regulation of choice of forum in the Nordic Marine Insurance Plan of 2013 (NP)[3] and the use of arbitration as a method of dispute solution in the marine insurance market.

The NP is a Nordic marine insurance contract containing insurance conditions for vessels and covering all relevant types of insurance, except for P&I[4] insurance. The NP covers hull, loss of hire, war and builders risk insurance, and also contains special clauses for offshore installations and fishing vessels. The NP was launched in 2013,[5] based on the previous Norwegian Marine Insurance Plan of 1996, Version 2010 (NMIP).[6] The earlier NMIP contained a jurisdiction and choice of law clause in § 1-4, which referred disputes to the courts in the venue where the Norwegian leading insurer's[7] head office was located. The clause was upheld with the introduction of the NP in 2013, apart from a change from "Norwegian" claims leader to "Nordic" claims leader, and from "Norwegian" venue to "Nordic" venue. There was no jurisdiction clause for insurance contracted with a non-Nordic claims leader.

Although the NP has until now referred disputes to the ordinary court system, many disputes have been decided by arbitration. Section 2 of this article analyzes the use of arbitration vs. the ordinary court system as a forum in marine insurance disputes, while Section 3 analyzes the role of arbitration awards in marine insurance, based on NMIP/NP conditions.

The NP 2013 was amended in 2019, and the new version includes an arbitration clause. The purpose of the amendment of forum was first and foremost to resolve the situation where there was a non-Nordic claims leader, and where the previous NP had no relevant regulation. However,

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3 http://nordicplan.org/The-Plan/.

4 "Protection and indemnity", which is liability insurance for vessels.

5 http://nordicplan.org/Archive/The-Nordic-Marine-Insurance-Plan-of-2013/.

6 http://nordicplan.org/Documents/Archive/Plan-2010/Norwegian%20Plan%20of%201996,%20Version%202010%20-%20English.pdf.

7 The leading insurer is the insurer acting on behalf of several co-insurers, according to the regulation given in NP ch. 9.

arbitration as forum may of course also be agreed for Nordic claims leaders. The new regulation is presented in Section 4 below.

2. Arbitration versus court

2.1 The number of arbitration cases in marine insurance

It is not possible to give an exact figure for the number of arbitration cases in Nordic marine insurance. However, a good illustration of the number and the relationship between arbitration and court as chosen forum can be made by looking at cases referred to in the main text books on hull and loss of hire insurance, based on the NMIP/NP. As the NP is based on the previous MNIP, the references are mainly to Norwegian cases.

It appears that the use of arbitration in hull insurance began in around 1940. In Håndbok i kaskoforsikring by Sjur Brækhus and Alex Rein from 1993, the authors refer to judgments from 1908, but according to the table of judgments the first arbitration decision referred to is from 1939.[8] A separate arbitration court was established during the Second World War to decide on the distinction between war perils and marine perils (VKS)[9], and 34 of the cases from this court are referred to in the book. In addition to this, Brækhus (1993) refers to 5 ordinary arbitration cases between 1940 and 1950. For the period from 1950 to 1991 the book refers to 17 published arbitration cases. This means that the book cites a

[8] Brækhus, Sjur and Rein, Alex. *Håndbok i kaskoforsikring*, Oslo: Bergens Skibsassuranseforening et al., 1993, Table of cases on p. 645, ND 1941 p. 168 NV (Bims).

[9] VKS was established with reference to NMIP 1930 § 34 nr. 2 second paragraph, which stated that attribution of liability between the war risk insurer and the marine risk insurer should be decided by arbitration according to Lov 13. august 1915 nr. 6 om rettergangsmåten for tvistemål ch. 32, cf. Nilsson, Rud. *Grænsetilfælde mellem sø- og krigsforsikring*, Copenhagen: Andr. Fred. Høst og Søn, 1945, Preface.

total of 56 published arbitration cases. The total number of Nordic cases referred to is ca. 210. The book also refers to 6 unpublished cases.

The newer and English version of Handbook on Hull Insurance cites in total 58 published court cases, of which 14 are arbitration cases.[10]

A text book on loss of hire insurance by Haakon Stang Lund refers to 10 cases, of which 3 are arbitration cases.[11]

Around 25 % of the cases mentioned are therefore arbitration awards. Although the main bulk of cases are court cases, it appears that arbitration also plays a significant role.

2.2 Why arbitration

There are many reasons to choose arbitration to solve a dispute. A famous Norwegian arbitration judge, Sjur Brækhus, listed the following 5 reasons: 1. Expertise, 2. Time efficiency, 3. Confidentiality, 4. Cost efficiency, 5. Internationality.[12]

In relation to marine insurance, expertise may be an important motive for choosing arbitration. Insurance in general, and marine insurance, in particular, is a highly complicated and technical topic. This is particularly relevant in Norway. Even if insurance is classified as special contract law, there are few connecting lines between general contract law and insurance/marine insurance. It is typical of this that the two main books in Norway on general contract law/law of obligations[13] do not list insurance in their index and the third[14] only has two references.

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10 Wilhelmsen, Trine-Lise and Bull, Hans Jacob. *Handbook on Hull Insurance*, 2nd ed., Oslo: Gyldendal Juridisk, 2017, Table on judgements and rulings, pp. 404–405.

11 Lund, Haakon Stang. *Handbook on Loss of Hire Insurance*, 2nd ed., Oslo: Gyldendal akademisk, 2008, Table of cases on p. 161.

12 Brækhus, Sjur. «Voldgiftspraksis som rettskilde», *Den urett som ikke rammer deg selv. Festskrift til Anders Bratholm*, Oslo: Universitetsforl., 1990, p. 451 ff. See also Falkanger, Thor, Bull, Hans Jacob and Brautaset, Lasse. *Scandinavian Maritime Law: the Norwegian Perspective*, 4th ed., Oslo: Universitetsforl., 2017, p. 44.

13 Hagstrøm, Viggo. *Obligasjonsrett*, 2nd ed., Oslo: Universitetsforl., 2011 and Hov, Jo and Høgberg, Alf Petter. *Obligasjonsrett*, 2nd ed., Oslo: Universitetsforl., 2016.

14 Lilleholt, Kaare. *Kontraktsrett og obligasjonsrett*, Oslo: Cappelen Damm akademisk, 2017, Index on p. 699.

The explanation for this is that the services provided in the insurance contract are different from most other services and that the regulation of both the negotiation of the contract and breach of contract also departs from, for example, purchase contracts. Insurance and marine insurance are selective topics under the Master of Law education at the University of Oslo, and the mandatory topic of contract law gives a limited basis for understanding insurance contracts. It is therefore not to be expected that the ordinary court system shall have the necessary expertise to handle insurance claims. It is also difficult to build up such competence in the ordinary court system. For land based insurance claims, the organizations in the insurance sector have established a Complaint Board system, with departments for personal insurance and casualty insurance.[15] The result of this system is that very few cases are tried before the court. This also means that the courts do not gain much experience on insurance law.

The position is different in Finland and Sweden. Under Finnish[16] and Swedish law[17] any disputes under marine insurance contracts must be placed before the official Finnish/Swedish adjuster, before the matter can be brought before a Finnish/Swedish court. Thus, in such disputes which are governed by Finnish/Swedish law, the official adjuster will be mandatory at first instance. As the adjuster is an expert on marine insurance law and settlements, expertise in the first instance is secured.

Under the 2019 NP amendment, it was agreed that expertise was an important argument for choosing arbitration, in particular for Norway and Denmark. The committee discussed whether the new arbitration clause should apply to fishing vessels where the ordinary court system

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15 Cf. further Bull, Hans Jacob. *Forsikringsrett*, Oslo: Universitetsforl., 2008, p. 47 ff. and Wilhelmsen, Trine-Lise and Hagland, Birgitte. *Om erstatningsrett: med utgangspunkt i tekster av Peter Lødrup*, Oslo: Gyldendal Juridisk, 2018, pp. 35–36.

16 Section 1 of the Finnish Act of 16. January 1953 relating to official adjusters and the Regulation of 6. March 1936 relating to the activities of the adjusters, see also Commentary to the Nordic Marine Insurance Plan of 2013 – Version 2019 (2019) p. 24 ff. to Cl. 1-4 and p. 188, http://nordicplan.org/Documents/Nordic%20Plan%202013/Commentary%20to%20the%20Nordic%20Marine%20Insurance%20Plan%20of%202013%20-%20Version%202019.pdf.

17 The Swedish Maritime Code (1994:1009) Chapter 17, Section 9 and Swedish Administration of Justice Act, Chapter 10, Section 17, cf. Commentary (2019) p. 188.

may offer a less costly alternative, at least if a decision from a lower court is accepted. It was, however, argued that the quality of these decisions varied and that arbitration should therefore be included as an alternative.

The question of expertise is connected to the time efficiency of court proceedings. In general, greater trust is placed in higher courts than in lower courts. If the case is tried in a lower court with little expertise in insurance matters, the losing party will often want to appeal. Arbitration is a one instance procedure where the decision is binding unless there are reasons for claiming that the decision is not valid.[18] In the ordinary court system there are three instances, and it takes a lot of time to go through all of them in order to get a binding decision.

Time efficiency will normally also result in cost efficiency, but this will depend on the cost of the arbitration panel. This was a key issue with regard to the new regulation in NP Version 2019. As mentioned above, Sweden and Finland have mandatory first instance treatment before the official average adjuster.[19]The Swedish and Finnish ship owners therefore did not want a general arbitration clause, because they wanted to keep the system with the average adjuster for cost reasons.

The international character of the dispute may also provide a motive for arbitration. It should be noted that the companies organized under the Nordic Association of Marine Insurers (Cefor) in the period between 2012 and 2017 have insured 35.2 % of the world fleet. This share has been gradually expanding since 1987.[20] 38 % of this fleet is insured on NP conditions.[21] There are no statistics on the number of contracts with non-Nordic assureds, co-insurers or claims-leaders, but the NP is increasingly popular in the world market. In such contracts, the reference to the Nordic court system is not always convenient.

This was also a central issue in the NP discussions, illustrated by the fact that the arbitration clause as a starting point only applies to non-Nor-

18 Falkanger (2017) pp. 44–45.

19 Commentary (2019) p. 26.

20 Cefor. *2017 Annual Report* (2017) p. 32, https://cefor.no/globalassets/documents/about-cefor/annual-report/cefor-annual-report-2017.pdf.

21 Cefor (2017) p. 31.

dic claims leaders. As mentioned, the jurisdiction issue for non-Nordic claims leaders were not regulated until 2019. The market therefore felt it was necessary to regulate jurisdiction in this situation.[22] Furthermore, the NP is also used internationally with non-Nordic assureds and co-insurers. In such situations, it is an advantage to have a standard arbitration clause that the parties can fall back on if they are not comfortable with referring disputes to the venue of a Nordic claims-leader.

The Brexit situation adds an additional complication to the international picture today, as it has created some uncertainty on the regulation on court jurisdiction and recognition and enforcement of judgments after Brexit.[23] The EU legislation on court jurisdiction and the recognition and enforcement of judgments in civil and commercial law is based on the revised Brussels I Regulation of 2012,[24] which is also applicable for Norway and Denmark through the Lugano Convention of 2007.[25] The UK is, however, not a signatory party to the Lugano Convention. Several EU States claimed that the Convention should be entered into as a "mixed agreement" with both EU and the member States as parties, but the EU Court of Justice rejected this approach.[26] It is thus uncertain to what extent agreements on jurisdiction will be respected in the UK, where there is a risk of parallel processes in the UK and an EU/EFTA State. It is, in addition, uncertain as to whether an English court decision will be recognized and enforced in the EU/EFTA States. It is also unclear what the legal basis for addressing this issue will be, once the UK is outside the scope of Brussel I Regulation and the Lugano Convention of 2007.

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22 Commentary (2019) pp. 24–25.

23 See to the following Commentary (2019) p. 25 and Fredriksen, Halvard Haukeland. "Brexit", *Tidsskrift for forretningsjus*, no. 1 (2016), pp. 3–9.

24 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [Brussels I Regulation], https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R1215&from=EN.

25 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007 and published in the Official Journal on 21 December 2007 (L339/3) [Lugano Convention of 2007].

26 Fredriksen (2016) p. 3.

This is primarily a problem when the insurance is effected with non-Nordic claims leaders, for whom jurisdiction in UK often is a natural choice, and it is uncertain to what extent an English court decision will be recognized and enforced in the EU and EFTA countries. This was one of the main reasons why the NP Version 2019 Cl. 1-4A sub-clause 2, cf. Cl. 1-4B refers disputes with non-Nordic claims leaders to arbitration, where recognition and enforcement is based on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).[27]

The Committee noted "that this may also be a problem for Nordic claims leaders in cases where there are co-insurers domiciled in UK, and the question will be enforcement of Nordic judgments against such co-insurers,"[28] but even so the Committee decided to keep ordinary court proceedings as the default rule in this situation.

The least relevant motive in marine insurance appears to be confidentiality. Confidentiality may be important for cases involving intellectual property and similar areas,[29] but this appears not to be an issue in marine insurance. It was not much discussed under the NP amendment, apart from pointing out the importance of publication of awards for future use as a legal source. The starting point, according to the Norwegian Arbitration Act § 5, is that the arbitration award is not confidential unless agreed,[30] and publication is generally a condition for it to have significance as a legal source. In particular, because the marine insurance expertise is limited and highly qualified lawyers are normally chosen as arbitration judges, it is important for the development of the contract that the awards are not made confidential. Confidentiality is therefore contradictory to

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27 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958 [New York Convention], https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf, cf. Commentary (2019) p. 25.

28 Commentary (2019) p. 25.

29 See on this issue in particular; Kaasen, Knut. "Voldgift og publisitet", *Tidsskrift for forretningsjus*, no. 2 (2016), pp. 139–151.

30 The Swedish and Danish Arbitration Acts do not contain a similar rule, cf. Lag om skiljeförfarande (1999:116) and Danish Act no. 553 of 24. June 2005 on Arbitration.

the way arbitration awards have been used in marine insurance text books and also to their use in the development of the NP, cf. below.

3. The role of arbitration awards in marine insurance

3.1 Some starting points

The general starting point in Norwegian legal methodology is that arbitration awards have little significance as a legal argument for interpretation.[31] It is however acknowledged that their significance can be substantial in areas regulated by standard agreements that include an arbitration clause. Examples given are shipbuilding contracts,[32] and to some extent onshore building contracts.[33]

The reference to shipbuilding contracts reflects the fact that arbitration in general is often used to resolve maritime law disputes. There are several reasons for this. First, it is often agreed, either before or after a dispute has arisen, that conflicts should be resolved through arbitration.[34] Second, many of the arbitration awards are published in "Nordiske Domme i Sjøfartsanliggende" (ND) (i.e. Scandinavian Maritime Decisions, published by Nordisk Defence Club).[35] This means that arbitration awards, similarly to ordinary court decisions, are published, and therefore easily accessible for future reference. Third, arbitration awards are frequently referred

[31] Eckhoff, Torstein. *Rettskildelære*, 5th ed. by Jan E. Helgesen, Oslo: Universitetsforl., 2001, p. 163.

[32] Eckhoff (2001) p. 163 and Brækhus, Sjur. "Rettslige problemer ved bygging av skip – belyst ved nyere voldgiftspraksis», *MarIus,* no. 54 (1980) pp. 1–23.

[33] Eckhoff (2001) p. 163 and Hagstrøm, Viggo and Bruserud, Hermann *Entrepriserett*, Oslo: Universitetsforl., 2014, p. 28.

[34] Falkanger (2017) pp. 35 and 43–44.

[35] Falkanger (2017) p. 35.

to in the text books on maritime law and marine insurance.[36] Brækhus argues that published arbitration practice should be given similar weight as judgments from the lower courts, that is to say, the city courts and appeal courts.[37]

In marine insurance regulated by the NP, it may however be argued that some arbitration awards have a much higher status. This is the case, even though there was no arbitration clause in the NP before 2019. The reason for this is the position of the Commentary and the extensive references in the Commentary to such awards. In rare cases, arbitration awards directly influence changes in the NP's wording. However, such awards are normally used to explain the interpretation of the wording. In the following, the position of the Commentary, as well as the significance of arbitration awards in supporting and defining this position is explained in 3.2. An example of direct influence from arbitration awards into the wording is given in 3.3, while examples of references to arbitration awards in the interpretation are provided in 3.4.

3.2 The position of the Commentary to the Nordic Plan

The NP is an agreed document based on more than 150 years of tradition and supplemented by an extensive published Commentary. The Plan and Commentary are continuously developed through a systematic negotiation process that takes place every third year.[38] The method of construction is more similar to legislation than to ordinary contracts, and the Commentary may be compared to preparatory documents to legislation. Norwegian preparatory documents are given significant weight as a legal source for interpretation of legislation.[39] Based on a comparison between the processes, it can be argued that similar weight

[36] See table of cases in Falkanger (2017) p. 703 ff., Brækhus (1993) p. 645 ff., Wilhelmsen (2017) pp. 404–405 and Stang Lund (2008) p. 161.

[37] Brækhus (1990) p. 459.

[38] See further Wilhelmsen (2017) p. 26 ff.

[39] Eckhoff (2001) p. 65 ff.

should be given to the Commentary.[40] This view is supported by the following remark in the Commentary itself:[41]

> "The Plan does not contain any explicit reference to the Commentary and its significance as a basis for resolving disputes. … Nevertheless the Commentary shall still carry more weight as a legal source than is normally the case with the Traveau Preparatoire of statutes. The Commentary as a whole has been thoroughly discussed and approved by the Nordic Revision Committee, and it must therefore be regarded as an integral component of the standard contract which the Plan constitutes".

The attitude stated in the Commentary has been accepted by the Norwegian Supreme Court.[42] This means that if the Commentary refers to arbitration cases for the interpretation of the conditions in the NP, the arbitration award is given the same weight as the Commentary itself, because the Plan Committee supports the award.

Another important element in giving the Commentary significance is that if the wording of a clause has caused interpretation problems when applied in practice, the Plan Committee has tried to solve this by providing explanations to the commentary, without changing its wording.[43] This approach may even result in an extension of the cover compared to the previous interpretation of the commentary, without any change in its wording. The approach was accepted in ND 2000 p. 442 NA (*Sitakathrine*):

> In this case, the question was whether *Sitakathrine's* liability for damage to the towage vessel *Bayan* was covered by *Sitakathrine*'s hull- or P&I-insurance. The hull insurer is according to Cl. 13-1 sub-clause 1 liable for "loss which is a result of liability imposed on

40 Brækhus (1993) p. 8 and Wilhelmsen (2017) p. 27.

41 Commentary (2019) p. 25 to Cl. 1-4.

42 ND 1998 p. 216 NSC (*Ocean Blessing*), ND 1990 p. 194 NSC (*Brødrenes Prøve),* ND 1969 p. 126 NSC (*Grethe Solheim*), ND 1956 p. 920 NSC (*Bandeirante*), ND 1956 p. 937 NSC (*Pan)*, cf. Wilhelmsen (2017) p. 27.

43 A list is given in the The Nordic Marine Insurance Plan of 2013 – Version 2016 (2016), Preface, http://archive.nordicplan.org/The-Plan/ and NP Version 2019, Preface.

> the assured due to collision or striking by the ship, its accessories, equipment or cargo, or by a tug used by the ship." The damage was sustained when *Sitakathrine* pulled *Bayan* so that *Bayan* was jammed between the towage and a port installation where a beam punctuated *Bayan's* side. The wording of Cl. 13-1 was identical to the wording in the previous NMIP 1964[44], but the Commentary was different. The hull insurer argued that the NMIP 1964 made a distinction between "striking" and "pulling" and that the hull insurer was not liable for damage caused by "pulling". Even though the Commentary stated that "To simplify matters between the hull insurer and the P&I insurer, however, the hull insurer should cover all liability for collision damage which the tow may incur under a towage contract on ordinary terms",[45] this statement was too unclear and unscrutinised to be given any weight. The court concluded however, that the 1996 NMIP § 13-1 sub-clause 1, if read in light of comments in the Commentary, extended the scope of cover for the hull insurance compared to the 1964 NMIP and included damage to a towage vessel due to collision with a third party, even if this did not follow clearly from the wording of the clause.

In the later NP revision of 2003, this award was included in the Commentary to § 13-1 with the marked new words (the emphasis is provided in the NP and Commentary to signal new wording):[46]

> "To simplify matters between the hull insurer and the P&I insurer, however, the hull insurer **shall** cover all liability for collision damage which the tow may incur under a towage contract on ordinary terms, **cf. ND 2000.442 NV SITAKATHRINE**. The wording "caused through collision or striking" must therefore also include liability for damage to the tug resulting from its collision with a third party."

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44 The Norwegian Marine Insurance Plan of 1964, http://www.nordicplan.org/Documents/Archive/Plan%201964/NMIP1964-eng.pdf.

45 Commentary to the Norwegian Marine Insurance Plan of 1996 – Version 1997 (1997), p. 203, http://nordicplan.org/Documents/Archive/Plan%201996/Commentary%20NMIP%201996%20-%20Version%201997.pdf.

46 Commentary to the Norwegian Marine Insurance Plan of 1996 -- Version 2003 (2003), p. 284, http://www.nordicplan.org/Documents/Archive/Plan-2003/PlanVer03EngMot(rev).pdf.

At this stage, the Committee only made a reference to the award. During the Nordic Plan amendment in 2013 however, the Committee found it necessary to provide a further explanation:[47]

> "The **Cl. 13-1** also includes the assured's liability towards the tug if the ship collides with it. **The** hull insurer shall, **therefore,** cover all liability for collision damage which the tow may incur under a towage contract on ordinary terms. **In the 1996 version of the Commentary this intention was expressed in a way that caused practiconers to be unsure whether the previous practice really was to be abolished. Hence, the matter was tried before arbitrators,** cf. ND 2000.442 NV SITAKATHRINE. **The arbitrators decided unanimously that the Commentary in sufficiently clear terms bindingly determined that the previous practice should no longer be followed.** The wording "caused through collision or striking" means therefore **that the hull insurer shall also cover the insured vessel's** liability for damage to the tug resulting from its collision with a third party."

The process illustrates how new arbitration cases may be included in the Commentary in its next renewal after the award has been made, and are thus given significant weight in the future interpretation of the actual clause. It also means that the new explanation of the content of the wording in the Commentary is accepted, even if this departs from previous practice.

On the other hand, ND 1978 p. 139 NA *(Stolt Condor)* defined some limits to the relevance of the Commentary. The case concerned the concept of deliberation, according to the 1964 NMIP § 68.

> The arbitration judge states on p. 15 that the commentaries must be treated as binding for the interpretation to the extent that they concern specific solutions agreed upon by the Plan Committee, but which were difficult to incorporate in an express or precise manner in the text of the Plan. However, the commentaries cannot be inter-

[47] Commentary to the Nordic Marine Insurance Plan of 2013 – Version 2013 (2013), p. 306, http://www.nordicplan.org/Documents/Archive/Plan%202013/Commentary%20to%20the%20NMIP%20of%202013.pdf.

> preted in the same literal way if they concern more general reflections or interpretations. In such instances the commentaries can only be given weight to the extent that they seem persuasive to the person who is to make the interpretation. For instance, if the Commentary, when commenting upon a clause, instead of just repeating the text in the clause, refers to it by rewriting the clause, such rewriting cannot be interpreted as a legal text.[48]

3.3 Arbitration cases results in new wording in the Plan

Arbitration decisions may directly influence the development of the conditions set out in the Plan. A recent example is the amendment of the insurance for intervention by State power contained in the NP Version 2019. The regulation of State intervention in the previous NP was, in broad terms, that all State interventions were excluded from the insurance against marine perils in Cl. 2-8 (b), whereas "capture at sea, confiscation and other similar interventions by a foreign State power" were covered as a war risk peril by Cl. 2-9 sub-clause 1 (b). In the 2019 Version, the exclusion in Cl. 2-8 (b) is changed to "capture at sea, confiscation, expropriation and other similar interventions by own State power provided any such intervention is made for the furtherance of an overriding national political objective", and the cover in Cl. 2-9 sub-clause 1 (b) is changed to "capture at sea, confiscation, expropriation and other similar interventions by a foreign State power, provided any such intervention is made for the furtherance of an overriding national or supranational political objective". The condition "for the furtherance of an overriding national political objective" is based on four arbitration cases relating to the war risk cover for interventions by foreign State power under the NMIP 1964 and the NP 2013 Version 2016: the *Germa Lionel* award 11. June 1985 (unpublished), ND 1988 p. 275 NA (*Chemical Ruby*), a case that was settled (the *Wildrake* case), and ND 2016 p. 251 (*Sira*).[49]

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[48] Wilhelmsen (2017) pp. 28–29

[49] Commentary (2019) p. 58.

The interaction between the wording in the clause, the Commentary and arbitration awards is well illustrated by this process:

The starting point was the war risk cover for "capture at sea, condemnation in prize, confiscation, requisition for title or use and other similar measures taken by alien State authorities" in NMIP 1964 § 16 (b). There was no reference to political goals in the wording or Commentary, but the Commentary stated that interventions made to enforce police or customs regulations were outside the scope of the provision.[50]

This provision was interpreted in the *Germa Lionel* award 11. June 1985 (unpublished) and ND 1988 p. 275 NA (*Chemical Ruby*), where the court discussed the distinction between interventions to enforce police and customs regulation and interventions covered by NMIP 1964 § 16 (b). In *Germa Lionel*, the court found that the interventions went far beyond interventions as part of enforcing police and customs regulation.[51] In ND 1988 p. 275 NA (*Chemical Ruby*) the court stated that in order to be covered as a "similar intervention", the intervention must be motivated by an overriding political goal.[52]

In the *Wildrake* case,[53] the average adjuster discussed the concept of capture at sea, and found that the capture took place in a time of crisis, under war-like circumstances, and with a political goal. The capture, and the way in which it was performed, went far outside normal police and customs procedures and could therefore not be seen as an intervention for this purpose. The capture at sea therefore constituted a war peril.

Under the 1996 amendment to the NMIP, the wording of the war risk cover was basically upheld and the Commentary repeated that the cover for "other similar interventions" did not include interventions that were made as part of the enforcement of police and customs regulation.[54] The

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50 Commentary to the Norwegian Marine Insurance Plan of 1964 (1964), p. 19, http://www.nordicplan.org/Documents/Archive/Plan%201964/Plan1964Commentary.pdf.

51 Brækhus (1993) p. 74 and Wilhelmsen (2017) p. 97.

52 Brækhus (1993) pp. 74–75 and Wilhelmsen (2017) p. 97.

53 Brækhus (1993) p. 75 and Wilhelmsen (2017) p. 94.

54 Commentary to the Norwegian Marine Insurance Plan of 1996 – Version 1999 (1999) p. 30, http://www.nordicplan.org/Documents/Archive/Plan%201999/Commentary%20NMIP%201996,%20Version%201999%20-%20english.pdf.

Commentary thereafter discussed the difficult borderline that could arise and referred to the *Germa Lionel, Chemical Ruby* and *Wildrake* cases, as well as the discussion of these cases in Brækhus Rein.[55] It states that:

> "These decisions show that cover under the war-risk insurance is contingent on the shipowner being divested of the right of disposal of the ship, the authorities clearly exceeding the measures necessary in order to enforce police and customs legislation, and the intervention being motivated by overall political objectives."

The borderline between "measures necessary in order to enforce police and customs legislation", and the "intervention being motivated by overall political objectives", was then discussed in ND 2016 p. 251 (*Sira*).[56] This case concerned the vessel *Sira* which was detained in Lagos, Nigeria from 1. February to 31. March, and the question was whether this was covered by the war risk insurer. The arbitrator summarized the legal sources and concluded that (my translation):

> "For the intervention to be covered under the war risk insurance, the intervention must be made for the furtherance of overriding political goals. Such interventions are interventions typical for war and times of crises, and can often be explained by foreign policy considerations. The reason for the intervention may be a warranted or not warranted suspicion that the ship has breached rules to protect the security of the State involved. It is not decisive that the general political situation in the State involved has been contributory to the intervention.
>
> A State intervention which is tied to regulation or control of normal commerce and shipping is not covered by war risk insurance. Relevant interventions will first and foremost be tied to breach of or suspicion of breach of customs, currency, or police legislation. It is normally not decisive if such intervention due to its duration represents misuse of power. However, this can be different if the misuse of power takes the form of a regular police act or similar act, but in

[55] Commentary (1999) p. 30.

[56] Wilhelmsen (2017) pp. 98–99.

> reality is part of an action motivated primarily by overriding political objectives."

Most of the cases mentioned here, as well as the statements in the Commentary, concerned the expression "other similar interventions", but the *Sira* case held (obiter) that a similar requirement should also be applied for the specific interventions mentioned. The Plan Committee agreed that this was a natural solution, in particular because the cover under Cl. 2-8 (b) for interventions by own State power was widened substantially at the same time. However, to avoid uncertainty, this requirement is now expressed directly in the wording.

3.4 Arbitration Awards referred to in the Commentary as being relevant for its interpretation

The Commentary often refers to arbitration awards when explaining how certain clauses shall be interpreted. As a result of such reference, the award is given the same legal significance for the interpretation as the Commentary itself. Important cases are:

> According to Cl. 2-9 sub-clause 1 (c) the war risk insurance covers "sabotage", which according to the Commentary "presupposes that the action pursues a specific political, social or similar goal, see ND 1990.140 NV PETER WESSEL, where the court based its decision on the assumption that the costs of interrupting the ship's voyage etc. in connection with a bomb threat must be covered by the hull insurer against marine perils as costs of measures to avert or minimise the loss. The external circumstances of the threat clearly indicated that this was an act that had no background in political, social or similar circumstances".[57]

> Cl. 2-13 regulates combination of perils and states that if "the loss has been caused by a combination of different perils, and one or

[57] Commentary (2019) p. 60.

more of these perils are not covered by the insurance, the loss shall be apportioned over the individual perils according to the influence each of them must be assumed to have had on the occurrence and extent of the loss, and the insurer shall only be liable for that part of the loss which is attributable to the perils covered by the insurance". The Commentary here refers to case law concerning the rule of apportionment from 1930 until the revision of the NMIP in 1996 and how this is discussed in Brækhus, Sjur and Rein, Alex. Håndbok i kaskoforsikring (Handbook of Hull Insurance), Oslo: Bergens Skibsassuranseforening et al., 1993, pp. 262 et seq.[58] Brækhus (1993) analyses a vast number of cases, hereunder ca. 20 arbitration cases from the Second World War. The Commentary further states that "These criteria are still relevant" and refers in particular to ND 1942.360 VKS KARMØY II as an example of assigning a weight of 0% to one peril and a weight of 100% to another.[59] Further, the Commentary states that "If the loss is a result of a combination of two objective causes in a causal chain in the sense that a new cause interferes in the course of events after a casualty has occurred and results in a further loss, the first cause – i.e. the casualty – shall carry the most weight, cf. ND 1941.378 NV VESLEKARI…".[60]

Cl. 2-14 regulates the insurer's liability when there is a combination of marine perils and war perils, and states that the liability shall be attributed to the dominant cause. If none of the causes appears to be dominant, the loss shall be "deemed to have had equal influence on the occurrence and extent of the loss". The Commentary has the following comment on when to apply the first and second sentences respectively: "The use of the term "dominant cause" shows, however, that a relatively considerable predominance is required in order to characterize a peril as the "dominant cause". It is not sufficient to reach the conclusion – perhaps under doubt – that one peril is slightly more dominant than the other; it is precisely the arbitrary choice between two causes which carry approximately the same weight that should be avoided. On the other hand, a 60/40 apportionment should probably constitute the upper limit for an

58 Commentary (2019) p. 80 ff.
59 Commentary (2019) pp. 83–84.
60 Commentary (2019) p. 84.

equal distribution. If we get close to 66%, one of the groups of perils is after all considered twice as "heavy" as the other, cf. Brækhus/Rein: Håndbok i kaskoforsikring (Handbook of Hull Insurance), pp. 269 et seq., which also reviews a number of judgments from World War II in relation to these guidelines".[61] In addition to several arbitration awards from the war, Brækhus (1993) includes two more recent arbitration awards, one being unpublished.[62]

Also, according to the Commentary, "an exception must, like the solution under the 1964 Plan, be made as regards the situation where there is a combination of several causes in a causal chain: as regards repair costs, only the perils that materialized before the casualty in question, and which have had a bearing on the physical damage sustained by the ship, shall be taken into consideration. By contrast, the increase in the cost of repairs caused by the war situation shall not be taken into consideration, regardless of whether the price increase was a fact at the time of the casualty or did not occur until later (cf. ND 1943.417 NV HAARFAGRE). Otherwise the war-risk insurer might be held liable to pay 50% of the repairs of a strictly marine casualty, provided that the increase in prices of repairs has been sufficient."[63]

Cl. 2-15 states that certain losses are deemed to be caused entirely by war perils, hereunder "loss arising when the vessel is damaged through the use of arms or other implements of war for war purposes". According to the Commentary, there "may sometimes be some doubt as to what constitutes an "implement of war", see, for example, ND 1946.225 NV ANNFIN (damage by collision with a submarine in action deemed to be "war damage" pursuant to the corresponding provision in Cl. 42 (2) of the 1930 Plan), ND 1944.33 NV VESTRA (damage caused by the paravane on the warship with which the ship collided, not deemed to be "war damage") and ND 1947.465 NV ROGALAND (damage resulting from the blowing up of explosives which another vessel was carrying to German fortifications, not deemed to be "war damage")."[64]

61 Commentary (2019) p. 86.

62 Award 30. June 1987 (*Nova – Magnum*) and ND 1989 p. 263 NV (*Scan Partner*).

63 Commentary (2019) p. 86.

64 Commentary (2019) pp. 87–88.

Cl. 4-7 regulates compensation of the costs of measures to avert or minimise loss. A major problem in applying these rules is distinguishing between the measures which are in the nature of measures to avert or minimise a loss for which the insurer is liable, and the measures which the assured must take for his own account as part of the general obligation to safeguard and preserve the object insured. The Commentary provides an outline of this distinction, and stateshereunder:

"(3) Only losses which the assured has suffered as a result of an intentional act by the assured or others will be recoverable as costs of measures to avert or minimise loss. ... However, at any rate for particular measures to avert or minimise loss, it must be sufficient that the intent comprises the actual action that caused the damage. It is thus not necessary that the person in question realized that the act entailed a risk of damage, nor that the intent comprised all or parts of the loss that occurred, cf. ND 1978.139 NV STOLT CONDOR and ND 1981.329 NV LINTIND."[65]

Cl. 10-1 sub-clause 1 defines the objects covered by hull insurance. Sub-clause 1 (a) and (b) distinguishes between "vessel", "equipment" and "spare parts". According to the Commentary, the "prerequisite for covering equipment and spare parts under the ship's hull insurance is nevertheless that they are normally on board, cf. the term "on board", which indicates that the object in question shall be on board for an indefinite or prolonged period of time. Objects brought on board while the ship is in port and taken ashore when the ship is leaving, such as a fork-lift truck to be used during loading and discharging, are therefore not covered whilst on board, cf. ND 1972.302 NV BALBLOM, notwithstanding the fact that the object is used only on board this one particular ship".[66] A similar reference to this award is made in regard to Cl. 10-2.[67]

Cl. 13-1 sub-clause 1 defines the hull insurer's liability for collision and striking, whereas exclusions are listed in sub-clause 2(a) – (h). Sub-clause 2 (h) excludes liability for loss caused by the vessel's use

65 Commentary (2019) p. 159.
66 Commentary (2019) p. 252.
67 Commentary (2019) p. 255.

of anchor, mooring lines, etc. If the casualty results partly in damage caused by striking which is covered, and partly in damage caused by the use of an object as mentioned in sub-clause 2 (h), the total damage must, according to the Commentary, be divided between the hull insurer and the P&I insurer. The Commentary further states that "If, however, striking damage is a direct result of the use of an object referred to in sub-clause 2 (h), the damage must be covered entirely by the P&I insurer, cf. ND 1976.263 NV MOSPRINCE/BIAKH.".[68] The Commentary also refers to this award in relation to the wording "by the ship's use of", and states that this "presupposes that the relevant object is used in accordance with its purpose. Mooring lines must be used to moor the ship, not e.g. to secure deck cargo. However, if the object has been used according to its purpose, it must be deemed to be in use from the time preparations for use commence and until the use is completed, cf. ND 1976.263 NV MOSPRINCE/BIAKH.".[69]

The Commentary also comments upon the relationship between the exclusion in (h) and using the mentioned objects in connection with measures to avert or minimise loss in the hull insurer's interest. This is outside the scope of (h): "In such cases, the rules in Cl. 4-7 et seq. will prevail, and liability will (wholly or in part, cf. the general average rules) have to be borne by the hull insurer. Thus, if the ship picks up a cable while using the anchor in order to avoid running aground, the hull insurer will be liable for covering the assured's liability, cf. ND 1981.329 NV LINTIND, in contrast to ND 1969.1 NV MIDNATSOL".[70]

Clause 15-11 regulates war risk insurance for intervention by a foreign State power and piracy. Sub-clause 2 states that the assured is entitled to total loss compensation if the ship is taken from him due to pirates or "similar unlawful interventions". According to the Commentary, this encompasses first and foremost mutiny and war-motivated theft, cf. ND 1945 p. 53 NV (IGLAND). Ordinary theft is covered by the marine perils insurer.[71]

68 Commentary (2019) p. 330.
69 Commentary (2019) p. 330.
70 Commentary (2019) p. 330.
71 Commentary (2019) p. 344.

Even though the NP has not previously contained an arbitration clause, these examples illustrate that several disputes has been resolved by arbitration and thereafter included in the Commentary as guiding lines for its interpretation. The references also illustrate the importance of publication in ND.[72]

4. The arbitration Clause in NP 2013 Version 2019

NP 2013 Version 2019 contains a clause on jurisdiction and choice of law in Cl. 1-4A and an arbitration clause in Cl. 1-4B. If insurance based on the NP is effected with a Nordic claims leader, the starting point is that legal proceedings may only be instituted before the courts in the venue where the head office of the claims leader is located, cf. Cl. 1-4A sub-clause 1. However, sub-clause 2 states that:

> If insurance based on this Plan is effected with a non-Nordic claims leader, it is agreed that Clause 1-4B on arbitration applies.

Therefore, for non-Nordic claims leaders, the main rule is that disputes are referred to arbitration. For Nordic claims leaders, a reference to this clause must be made in writing within the insurance contract. The arbitration clause in 1-4B has the following wording:

> If the parties have agreed in writing that disputes shall be referred to arbitration, the following applies instead of Cl. 1-4A:
>
> Any dispute arising out of or in connection with this insurance contract, including any disputes regarding the existence, breach,

[72] There are examples of references to unpublished cases, cf. above on Cl. 2-8 and 2-9 and Cl. 2-14, and also the reference to Arbitration Award 8. May 2009 (*Bulford Dolphin*) in regard to Cl. 15-16, see Commentary (2019) p. 349.

> termination or validity hereof, shall be finally settled by arbitration under the rules of arbitration procedure adopted by the Nordic Offshore and Maritime Arbitration Association (Nordic Arbitration) and in force at the time when such arbitration proceedings are commenced. Nordic Arbitration's Best Practice Guidelines shall be taken into account.
>
> If insurance based on this Plan is effected with a Nordic claims leader, the place of arbitration shall be the place where the head office of the claims leader is located at the time of the conclusion of the contract. The law of this place shall be applied exclusively.
>
> If insurance based on this Plan is effected with a non-Nordic claims leader, the place of arbitration shall be Oslo if another place is not agreed. Norwegian law shall be applied exclusively. If the parties have agreed to arbitration in another Nordic country, the law of the place of arbitration shall be applied exclusively. If the parties have agreed to arbitration in a non-Nordic country, Norwegian law shall be applied exclusively.
>
> Any changes in the terms of the agreement set out in sub-clauses 2, 3 and 4 must be in writing.

The question of arbitration was first raised in the Revision Committee in relation to non-Nordic claims leaders, where there was previously no rule on jurisdiction in the NP. As the parties were not always careful to regulate the issue in the individual contract, the issue was not clarified when disputes occurred. It was also agreed that the question of jurisdiction should take into consideration the uncertainty created by the pending Brexit discussions, cf. more on this above under Section 2.2. For non-Nordic claims leaders jurisdiction in UK is often a natural choice, and the Committee wished to avoid this uncertainty.

The question of arbitration is however also relevant for Nordic claims leaders, and many Nordic insurers operate with arbitration clauses in the individual insurance contracts. In particular in Norway, arbitration has also been used as a conflict solution method in many cases and for many years, cf. further above in Sections 2 and 3. Even so, it was agreed to keep

the ordinary court system as a main rule for Nordic claims leaders. The principal reasons were first, the Swedish and Finnish system with average adjustment as a first mandatory step in the conflict solution system, cf. above in Section 2.2, and secondly, that if the parties wanted to switch to arbitration it was easy to do so in the policy.

The arbitration cases referred to in Section 3 above are ad hoc arbitration, not tied to any arbitration institution, such as for instance the Oslo Chamber of Commerce,[73] the Swedish Chamber of Commerce Arbitration Institute[74] or the Danish Institute of Arbitration.[75] Since 2014, however, the Nordic maritime law market has strived to establish a Nordic arbitration association to solve conflicts within the maritime and offshore sectors. The main point was to offer an arbitration system that was based on Nordic procedural rules, legal culture and tradition, in order to compete with arbitration in London based on UK procedural rules and tradition. The initiative was hosted by the Nordic Maritime Law Associations and several law firms and ship owner companies, and it resulted in the Nordic Maritime and Offshore Arbitration Association being established in 2017.[76] The Committee felt it was convenient to refer arbitration to this association. Cl. 1-4B sub-clause 2 is therefore taken from the Nordic Offshore and Maritime Arbitration Association's (Nordic Arbitration) arbitration clause sub-clause 1 and 3. It should be noted that the NP, contrary to many other maritime law contracts, has rejected influence from the Anglo American market and has instead upheld traditional Nordic contract regulation on major marine insurance issues that are contrary to the dominant UK conditions. Thus, it is of utmost importance that the dispute resolution regime stems from the same legal background and culture.

It follows from sub-clause 3, that if insurance based on the NP is effected with a Nordic claims leader, the place of arbitration shall be the place where the head office of the claims leader is located at the time of the

73 https://www.chamber.no/

74 https://sccinstitute.com/

75 https://voldgiftsinstituttet.dk/en/

76 https://www.nordicarbitration.org/

conclusion of the contract, and, from sub-clause 4, that for a non-Nordic claims leader, the place of arbitration shall be Oslo, if another place is not agreed.

Cl. I-4B does not address the question of confidentiality. This was, as previously mentioned, not much discussed during the negotiations, apart from emphasizing the importance of publication. It follows from Section 3 above that publication is indeed very important for the development of the NP.

5. Summary and conclusion

This article has examined the use of arbitration in Norwegian/Nordic marine insurance and the importance of arbitration awards in the development of the NP. It demonstrates that arbitration is both an important method for dispute resolutions and a significant factor for interpretation of the NP and development of the regulation. It also illustrates the importance of publication of arbitration awards.

The establishment of the Nordic Maritime and Offshore Arbitration Association is an important added factor in the further development of a Nordic marine insurance contract and dispute resolution system. The NP has maintained the Nordic material regulation of marine insurance issues that, on many questions, depart from the dominant UK conditions, and the Nordic marine insurance contract is developed based on Nordic background law and with the Nordic Insurance Acts as background legislations. Seen in this context, it is important that the dispute resolution system is also in keeping with the traditional Nordic legal methodology and culture.