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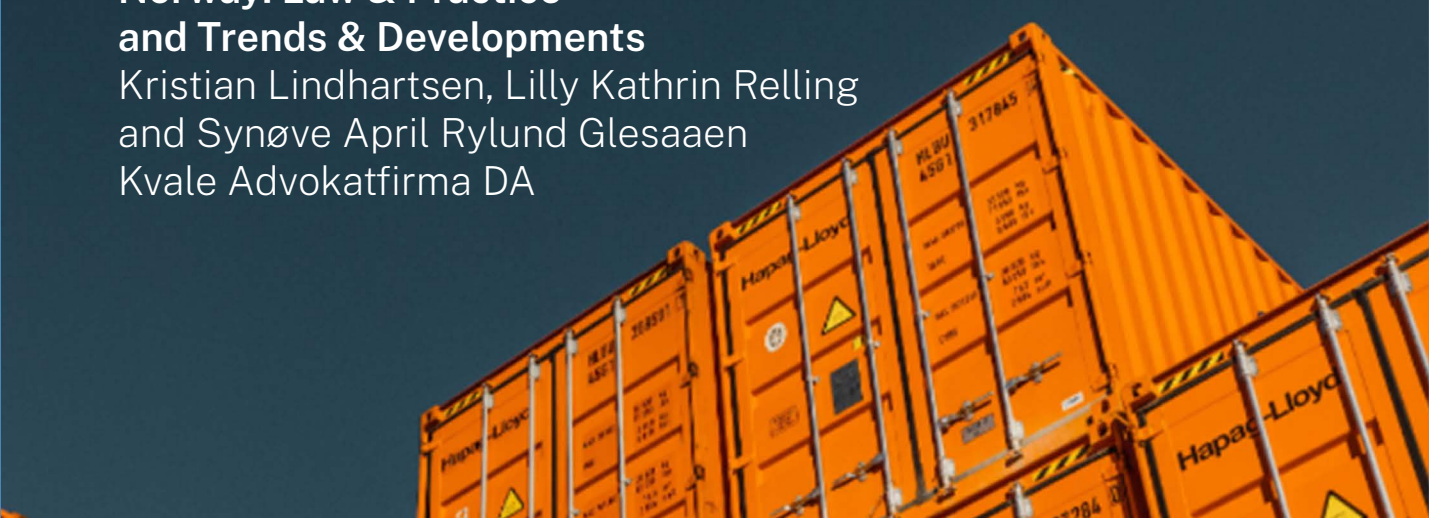
Norway: Law & Practice and Trends & Developments

Kristian Lindhartsen, Lilly Kathrin Relling and Synøve April Rylund Glesaaen
Kvale Advokatfirma DA



NORWAY

Law and Practice

Contributed by:
Kristian Lindhartsen, Lilly Kathrin Relling
and Synøve April Rylund Glesaaen
Kvale Advokatfirma DA

Contents

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Kvale Advokatfirma DA (Kvale) is a leading commercial law firm that has provided assistance to Norwegian and international businesses since 1988. It is particularly renowned for assisting some of Norway's largest companies with their most important and complicated cases. Kvale's lawyers have extensive experience in negotiations, dispute cases before the ordinary courts and arbitration. With a broad understanding of the shipping industry, the firm assists in all specialist areas of maritime law, ranging from purely private law disciplines such as charterparties and other maritime contract law, maritime casualties and maritime insurance to public law issues such as pollution liability and sanctions law. The team litigates cases before the ordinary courts and in arbitration. Kvale's extensive international network of contacts also enables it to assist clients with litigation assignments outside of Norway.

Authors

Kristian Lindhartsen is a partner at Kvale Advokatfirma and has a wide background in maritime law, with an emphasis on marine insurance disputes, including cover disputes and direct action matters. He also advises ship-owners and charterers on operational issues, such as those related to charterparties and other contracts of carriage, commercial agreements, collisions and other marine casualties. Kristian is experienced as a litigator in both ordinary courts and arbitration proceedings, including arrest and other asset securing, as well as international jurisdiction issues. He also works on vessel-related transactions, particularly sale/leaseback transactions of ships.

Lilly Kathrin Relling is a partner in Kvale's oil, gas and shipping department. She assists clients, both Norwegian and international, in commercial law matters, and has substantial experience advising participants within the shipping and offshore industry. She has broad experience advising on carrying out contracts, including charterparties, fabrication contracts and other commercial agreements. Ms Relling also has experience before the ordinary court and arbitration, including substantial experience with arrests and other asset securing. Relling is a member and National Representative of the global lawyers and in-house counsel network AIJA (International Association of Young Lawyers).

Contributed by: Kristian Lindhartsen, Lilly Kathrin Relling and Synøve April Rylund Glesaaen,
Kvale Advokatfirma DA

Synøve April Rylund Glesaaen is an associate affiliated with Kvale's maritime and energy department. She has a Master of Laws degree from the University of Bergen and an LLM from the University of Queensland. As part of the master's programme, she went on an exchange to the Università degli Studi di Torino. In Italy and Australia, she specialised in maritime law, international contracts, and international development. Glesaaen assists both Norwegian and international clients with disputes related to shipping and energy law. Additionally, she has extensive experience in advising on and drafting commercial contracts.

Kvale Advokatfirma DA

Haakon VII gate 10
P.O. Box 1752 Vika
N-0122 Oslo
Norway

Tel: +47 22 47 97 00
Fax: +47 21 05 85 85
Email: post@kvale.no
Web: www.kvale.no

KVALE

Contributed by: Kristian Lindhartsen, Lilly Kathrin Relling and Synøve April Rylund Glesaaen,
Kvale Advokatfirma DA

1. Maritime and Shipping Legislation and Regulation

1.1 Domestic Laws Establishing the Authorities of the Maritime and Shipping Courts

The ordinary courts in Norway have authority in all maritime disputes that are subject to Norwegian jurisdiction, unless the parties have agreed to arbitration. Norway does not have specialised courts (such as an Admiralty Court), so shipping and maritime-related disputes are submitted to and settled by the civil courts; this includes ship arrest, direct action claims, claims for salvage, cargo claims and charterparty claims, for example.

There are three instances in the Norwegian court system:

- the district courts;
- the courts of appeal; and
- the Supreme Court.

The relevant legislation for the courts that have jurisdiction in maritime law matters is thus the Norwegian Dispute Act (NDA) and the Norwegian Court of Law Act.

1.2 Port State Control

Norway is a signatory to the Memorandum of Understanding on Port State Control signed on 26 January 1982 (the "Paris MOU"). By utilising a database, results from previous inspections can be made available, enabling member states of the Paris MOU to review a vessel's risk category prior to entering a port.

Port state control is regulated in domestic law under the Regulations of 24 November 2014 No 1458 on port state control. The controls are performed by the Norwegian Maritime Authority, which holds jurisdiction over foreign ships arriving in Norwegian ports. A vessel may be detained if it is considered a hazard to the environment or safety, has breached the Maritime Labour Convention or has working conditions that pose an obvious threat to the crew's safety.

If a pollution incident occurs, the Norwegian Coastal Administration (NCA) is responsible for the emergency response. The NCA is an agency of the Norwegian Ministry of Transport, and exercises authority pursuant to the Harbour and Fairways Act and the Pilotage Act, as well as parts of the Pollution Act. Section 17 of the Harbour and Fairways Act provides legal grounds for the authorities to order wreck removal where a wreck poses a danger or disadvantage for navigation in port.

1.3 Domestic Legislation Applicable to Ship Registration

Ship registration in Norway is divided into the Norwegian International Ship Register (NIS) and the Norwegian Ordinary Ship Register (NOR). Vessels owned by foreign entities can only register in NIS. The Norwegian Maritime Authority is in charge of registering vessels in both NIS and NOR, and holds jurisdiction over all vessels registered in Norway. It is also responsible for the registration of rights in ships in NIS. NOR is regulated by the Norwegian Maritime Code, while NIS is regulated by a special act called *Lov om norsk internasjonalt skipsregister* (the "NIS-law").

1.4 Requirements for Ownership of Vessels

For NOR, a vessel must be owned by a Norwegian or EEA person/entity.

Vessels with foreign ownership may register in NIS. The conditions for registration are set out in

Section 1 of the NIS-law. In order to be eligible for registration, the owner must satisfy the conditions for a vessel to be regarded as a Norwegian ship (even when the owner is a Norwegian national) contained in Section 1 of the Norwegian Maritime Code.

If these conditions are not met, the vessel can still register in NIS if the owner:

- is a limited company, public limited company or a limited partnership with its head office in Norway;
- is a ship-owning partnership, with a managing *reder* (person or company) who satisfies the provisions relating to managing *reder* (person or company) in Chapter 5 of the Norwegian Maritime Code; or
- has appointed a representative who is authorised to accept writs on its behalf, if the owner does not satisfy the two previous conditions. The representative must fulfil the nationality requirements for managing *reder* (person or company) as set out in Section 103 of the Norwegian Maritime Code.

If the vessel is registered in accordance with these options, it is a legal requirement that the vessel be operated by a Norwegian shipping company, which is understood to mean either its technical management (manning, outfitting, maintenance, etc) or its commercial operation (chartering, marketing, etc).

The vessel can also be operated wholly or partly from management offices abroad, assuming they are owned by a Norwegian shipping company with its head office in Norway.

The above requirements are in place to avoid NIS becoming a flag of convenience, and to ensure that a vessel can only be registered where the Norwegian authorities can exercise a certain level of control.

A vessel under construction in Norway, or a contract for the construction of a vessel in Norway, can be registered in a separate register, the Ship-Building Register (BYGG), which is a sub-division of NOR. Vessels under construction abroad cannot be registered in BYGG. The prerequisite is that the vessel is at least 10 m long. The application must be submitted by the owner (if the vessel is under construction) or by the buyer (if it is a ship-building contract).

1.5 Temporary Registration of Vessels

Bareboat registration in and out of the Norwegian ship registers has been permitted since 1 July 2020. Foreign vessels (both passenger and cargo ships) as well as drilling platforms and other mobile offshore units may be bareboat registered in NIS and NOR, while having permanent registration in another state. To be registered, a vessel must be at least 15 m long, and both the ship-owner and the mortgagee(s) must give their consent before permission to register is granted.

1.6 Registration of Mortgages

The registration of mortgages is under the administrative control of the Norwegian Maritime Authority, and the registration can be in either NOR, NIS or BYGG. Voluntarily established mortgages can only obtain legal protection through registration.

The registries include information about all registered rights in a vessel, as well as their priority. The registry will also contain information if it has been agreed that a sale or further mortgages are forbidden. As many mortgages include a clause prohibiting further mortgages, the mortgagee must either consent to registration of the new mortgage/right or sign the mortgage for deletion.

The amendment must be made in the original document.

The following document requirements are applicable:

- consent to the registration of a new mortgage/right requires specification of a new creditor, face value and currency;
- if the mortgagee/holder of the right is a company, the endorsement must be signed with a binding signature according to the certificate of company registration; and
- if the mortgagee/holder of the right is a foreign body, a Notary Public must confirm both the identity and the authority of the person signing the amendment. The Notary's signature is then to be legalised by a Norwegian Foreign Service Station or by the amendment of an Apostille.

It should also be noted that the new mortgage/right must be forwarded, in original, to the Department of Ship Registration with a binding signature in the following circumstances:

- if the mortgagor/holder of the right is a Norwegian registered company, it must be signed according to the certificate of company registration; and
- if the mortgagor/holder of the right is a foreign entity, a Notary Public has to confirm the identity and authority of the person signing. The signature of the Notary shall be legalised by a Norwegian Foreign Service Station or by the amendment of an Apostille.

The documents submitted must be originals, and should not be sent for deposit more than three weeks prior to scheduled registration (the sender must include a statement to that effect). The documents will be returned to sender without registration if there is no scheduled registration within three weeks.

1.7 Ship Ownership and Mortgages Registry

All three ship registries in Norway are open to the public, and are searchable by name and IMO number of the vessel on www.sdir.no. The information available to the public includes the full details of the owners of the vessel.

2. Marine Casualties and Owners' Liability

2.1 International Conventions: Pollution and Wreck Removal

While Norway is not a signatory to the 2007 Nairobi International Convention on the Removal of Wrecks, the Norwegian Parliament adopted legislation in 2018 to implement the Convention into Norwegian law once ratified. Chapter 10 of the Norwegian Maritime Code has already incorporated the Convention and will come into effect upon ratification. In the meantime, wreck removal is governed by the Norwegian Harbour and Fairways Act and the Norwegian Pollution Act, which give the authorities the necessary jurisdiction to order a wreck removal.

Norway is also party to the 1973/1978 MARPOL Convention as incorporated into Chapter 5 of the Norwegian Ship Safety and Security Act. Owners must also comply with the following Conventions (which have been incorporated into the Norwegian Maritime Code and the Norwegian Pollution Act):

- the 1976, 1992 and 2003 Protocol on the Establishment of an International Fund for Compensation for Oil Pollution Damage;

- the 1976 and 1992 International Convention on Civil Liability for Oil Pollution Damage; and
- the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage.

2.2 International Conventions: Collision and Salvage

Norway has ratified the IMO International Convention on Salvage of 1989, which is incorporated into Chapter 16 of the Norwegian Maritime Code. Regulation on collisions can be found in Chapter 8, Sections 161–164. The regulation is based on the CMI Collision Convention of 1910, and applies the same fault-based division of liability – ie, the party at fault covers the losses or, if the collision was accidental, each party carries their own loss.

2.3 1976 Convention on Limitation of Liability for Maritime Claims

Norway has ratified the 1976 Convention on Limitation of Liability for Maritime Claims, with the subsequent amendments of the 1996 Protocol, with certain reservations. In accordance with Article 7.1(a) of the 1996 Protocol, Norway has reserved the right to exclude from limitation under the convention claims made in respect of the raising, removal, destruction or rendering harmless of a ship that is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and claims in respect of the removal, destruction or rendering harmless of the cargo of the ship.

The above-mentioned claims will be limited in accordance with Section 172a of the Norwegian Maritime Code, which has substantially higher limitation amounts than the 1996 Protocol. The ship-owner (which includes the disponent owner and the manager, as well as charterers and salvors) can rely on the limitations in Section 171 of the Norwegian Maritime Code.

2.4 Procedure and Requirements for Establishing a Limitation Fund

Under Norwegian law, a limitation fund can only be established after the creditors have initiated legal proceedings to pursue a claim that is subject to limitation, or after the creditors have filed a petition for arrest to temporarily secure such a claim. In such instances, the defendant may request the creation of a limitation fund at the court where the action has been brought. The courts have the authority to order a fund to be established. Once a fund is established, either by transfer of the limitation amount or by way of other security (such as an indemnity), the creditors are given a time limit within which to notify their claims.

The limitation fund can be created by all parties that are entitled to limitation under Section 171 of the Norwegian Maritime Code. This includes the ship-owner, the disponent owner, the manager, charterers and salvors, for example.

Pursuant to Section 232 of the Norwegian Maritime Code, the limitation fund amount is calculated on the basis of the vessel's tonnage and must also include interest calculated from the time of the incident until the establishment of the fund. This is in accordance with the provisions of the Convention on Limitation of Liability for Maritime Claims 1976 (as amended by the 1996 Protocol).

2.5 Seafarers' Safety and Owners' Liability

Norway ratified the Maritime Labour Convention on 10 February 2009 and it came into force on 20 August 2013. The convention is implemented in Norwegian law through the Ship Labour Act and the Ship Safety Act, along with their associated regulations.

The Ship Labour Act applies to workers who perform their duties on Norwegian vessels, with its primary objective being to ensure safe labour conditions, equal treatment, and the promotion of general welfare for the workers and the work environment. The Ship Safety Act applies to all Norwegian ships and extends to foreign ships within Norway's territorial waters, economic zone and continental shelf. The overarching objective of the Act is to safeguard life and health, the environment, and material values by facilitating good ship safety and safety management.

3. Cargo Claims

3.1 Bills of Lading

Although Norway is a signatory to the Hauge-Visby Rules (HVR), the Hamburg Rules and the Rotterdam Rules, only the HVR have been ratified.

The HVR have been implemented in the Norwegian Maritime Code, albeit with some modifications. For instance, the rules in the Norwegian legislation are more favourable to cargo owners than the HVR stipulates, unless they are expressly waived by the cargo owner. This relates to two categories of rules in particular:

- under the Norwegian Maritime Code, the owner is responsible for the goods from the time and place when the owner physically takes over the goods, as opposed to the tackle-to-tackle principle contained in the HVR; and
- Chapter 13 of the Norwegian Maritime Code applies special liability provisions for the carriage of deck cargo as well as livestock, which cannot be derogated from through agreement.

3.2 Title to Sue on a Bill of Lading

If the bill of lading is subject to Norwegian jurisdiction, any lawful holder of the bill of lading will have title to sue pursuant to the NDA. The prerequisite is that the claim is a legal claim that is based in law, contract or tort, and the claimant must have both a reasonable need to pursue the claim and an adequate connection with the dispute (such as legal or equitable interest).

3.3 Ship-Owners' Liability and Limitation of Liability for Cargo Damages

The key provisions governing ship-owners' liability for damage to cargo are Sections 275 and 276 of the Norwegian Maritime Code. As long as the goods are in the custody of the ship-owner or any of their contracted helpers, a reversed burden of proof of liability is applied. This means that the ship-owner is liable for damage to the cargo, unless they can prove that the loss or damage was not due to their own fault or neglect or that of any of their agents or servants. This also applies if the carriage is wholly or partially performed by a sub-carrier.

There are, however, certain exceptions. The carrier is not liable for damage or delays caused by nautical errors or fire (unless caused by the negligence of the carrier), unless the ship-owner has failed to take all reasonable steps to ensure that the vessel was seaworthy on departure.

Please note that the exceptions for navigational error and fire do not apply for domestic trade.

Furthermore, a carrier will not be liable for damage to animals if they acted with due care and the damage resulted from particular perils associated with the transportation of animals.

The ship-owners' liability is limited. Section 280 of the Norwegian Maritime Code states that the

carriers' liability is limited to 667 Special Drawing Rights (SDRs) for each unit or package of the goods, or 2 SDRs for each kilogram of the gross weight of the goods claimed for damage, delay or loss. In domestic trade, the carrier can limit the liability to 17 SDRs for each kilogram of the gross weight of the damaged or lost goods. Liability for delays in domestic trade shall not exceed the total freight under the transportation agreement.

It is also worth noting that a voyage charterer or time charterer must hold the carrier harmless if the bill of lading contains terms other than those stated in the charterparty, thereby increasing the liability of the carrier.

3.4 Misdeclaration of Cargo

In accordance with Section 301 of the Norwegian Maritime Code, the carrier can claim against the shipper for liability they have incurred as a result of misdeclared cargo.

However, the carrier cannot establish a claim against the shipper if they knew or should have known that the information was not correct. If a clean bill was issued against a Letter of Indemnity (LOI), for instance, the carrier loses its statutory right to claim against the shipper. The same will apply even if there is no explicit agreement to issue a clean bill, if the carrier had an incentive to inspect the cargo more closely or it was visible that the cargo was not in apparent good order.

In the judgment ND 1969 s.105 *Stockholm råd-husrätt*, Hood River Valley, which is part of the collection of Nordic Maritime Judgments, it was stated that the carrier must consider not only the state of the cargo but also the state of the packaging. Therefore, the courts would consider the carrier's overall knowledge about the cargo, the packaging and the transportation when considering a potential recourse claim against the shipper.

3.5 Time Bar for Filing Claims for Damaged or Lost Cargo

Under Norwegian law, the general time limit for filing a claim for damaged or lost cargo, or for incorrect information in a Bill of Lading, is one year from the time the goods were or should have been delivered (Section 501 (7) of the Norwegian Maritime Code).

For recourse claims related to damage to or loss of cargo, the deadline is one year from the time the original claim was paid or legal proceedings were instituted.

The limitation period can be extended by agreement between the parties after the incident occurred, for up to three years at a time.

4. Maritime Liens and Ship Arrests

4.1 Ship Arrests

Norway is party to the 1952 Arrest Convention, which is implemented in Chapter 4 of the Norwegian Maritime Code. Norway is also a signatory to the 1999 Arrest Convention, which came into force in 2011 but has not yet been ratified. The relevant acts for ship arrests in Norway are the Maritime Code and the NDA.

Under Norwegian law, the prerequisite for arrest of a ship is that the claim in question is defined as a maritime claim in accordance with Section 92 of the Norwegian Maritime Code. The provision exhaustively defines what constitutes a maritime claim and corresponds with Article 1 (1) of the 1952 Convention.

In addition, Norwegian law introduces a special requirement that there is a "genuine need for security" (Section 33-2 of the NDA). This goes beyond the 1952 Convention and means, in essence, that the claimant must establish that the debtor's behaviour indicates that the enforcement of the claim will be prejudiced or would have to take place outside of Norwegian jurisdiction if the court does not grant the arrest. The requirement will usually be found satisfied if the debtor has failed to pay a clear debt, failed to respond to reminders, taken steps to remove their assets from Norwegian jurisdiction, etc. However, it is underlined that this represents a complication in terms of obtaining a ship arrest in Norway.

4.2 Maritime Liens

Section 51 of the Norwegian Maritime Code provides an exhaustive list of the following claims that are protected as a maritime lien:

- wages and other sums due to the master and other persons employed on board in respect of their employment on the vessel;
- port, canal and other waterway dues and pilotage dues;
- damages in respect of loss of life or personal injury occurring in direct connection with the operation of the ship;
- damages in respect of loss of or damage to property, occurring in direct connection with the operation of the ship, provided the claim is not capable of being based on contract; and
- salvage reward, compensation for wreck removal, and general average contribution.

Maritime liens enjoy a special protection under Norwegian law, and the arrest of a ship is allowed irrespective of whether the requirement of "genuine need for security" (Section 33-2 of the NDA) is satisfied.

Norwegian law differentiates between maritime liens and maritime claims, with the latter category containing a broader array of claims. An arrest can be sought in respect of all maritime claims. However, for maritime claims that do not qualify for a maritime lien, the requirement of "genuine need for security" must also be satisfied.

4.3 Liability in Personam for Owners or Demise Charterers

Norwegian law generally requires that the owner of the ship must be the debtor of the maritime claim giving rise to the arrest, meaning Norwegian law does not acknowledge action "in rem". The exception is certain claims that are secured by a maritime lien, thus giving grounds for an arrest.

4.4 Unpaid Bunkers

The bunker supplier (both contractual and actual supplier) may apply for an arrest for a claim relating to bunkers supplied by them, provided that the debtor owns the vessel whose arrest is sought. If the bunkers in question were supplied to a charter (time charterer or bareboat charterer), an arrest can only be obtained on the bunkers actually delivered. The charterer does not have the authority to bind the vessel independently. In accordance with Section 33-2 of the NDA, the bunker supplier must prove a genuine need for security to achieve an arrest.

4.5 Arresting a Vessel

Arresting a ship in Norway is considered to be relatively straightforward, and can be arranged quickly and at a reasonable cost. It is not necessary for the claimant to provide any documents in their original form, and legal counsel does not

need to present a power of attorney from the claimant.

A security deposit from the arresting party can be required, which in accordance with Section 97 of the Norwegian Maritime Code must be at least equivalent to port dues for the next 14 days, as well as possibly also expected damages for wrongful arrest. If the arresting party is the public authority or the claim is question is a crew claim secured by a lien, the court can disregard the security requirement, at its own discretion.

4.6 Arresting Bunkers and Freight

Bunkers on board, claims for hire payment and claims for insurance proceeds and bank accounts can be arrested. The prerequisite is that the bunkers must be owned by the debtor – keeping in mind that the bunkers are normally owned by the charterers (not the owners) under a time charterparty.

4.7 Sister-Ship Arrest

The arrest of sister-ships is regulated in Section 93 (1) of the Norwegian Maritime Code, which states that only the ship in which the claim arose may be arrested. The exception is where the vessels are owned by the same legal entity, and that legal entity is the debtor for the relevant claim. However, it is not possible to arrest ships with associated ownership – ie, where two ship-owning companies have the same holding company or are otherwise part of the same corporate structure.

4.8 Other Ways of Obtaining Attachment Orders

To apply for a ship arrest is clearly the most commonly used procedure to obtain security for a claim against a vessel under Norwegian law. That being said, if the claimant has a binding decision against the debtor, they may proceed directly with an application for attachment of the debtor's vessel. In addition, the general right of detention/retention may also give a claimant security by way of physical possession of the vessel – eg, the yard's right to detain the vessel in its docks until its claims have been paid in full.

4.9 Releasing an Arrested Vessel

Under Section 3-4 of the Norwegian Enforcement Act and Sections 33-4, 33-5 and 32-12 of the NDA, only a cash deposit or an unconditional bank guarantee issued by a Norwegian financial institution is accepted as security.

Under the Norwegian Enforcement of Claims Act, LOIs issued by P&I (protection and indemnity) clubs are not security recognised by law. Nevertheless, a letter of undertaking may be sufficient security for the claimant to agree to release the vessel on a mutual basis. This is quite common in Norway.

4.10 Procedure for the Judicial Sale of Arrested Ships

Judicial sale proceedings are conditional upon the claimant having an enforceable claim in accordance with the rules of the Enforcement Act.

Chapters 11 and 12 of the Norwegian Enforcement Act establish the rules regulating a forced sale. In short, the claimant must have a final and binding court decision on the claim itself (the main proceedings) before proceeding with a judicial sale. The claimant must also obtain an attachment of the vessel. It is important to note that the claimant's claim has priority from the time of the arrest, even if the final judgment and the execution lien are established later (except where sale proceedings have not been commenced within one year of the arrest), so the

arrest may be an important tool for the claimant to establish priority.

In accordance with Sections 11-20 and 11-21 of the Enforcement Act, all claims with higher priority than the claimant's claim will be covered in full before the claimant receives any funds. This means that the court cannot accept a bid unless it is sufficient to cover all claims with a higher priority than that of the claimants. The sale proceeds shall be distributed in the following order:

- court fees and the court-appointed administrator's remuneration;
- costs in connection with the accession that the buyer shall not cover itself, such as document and registration fees (unless the buyer has agreed to cover such fees);
- maritime liens – in the order and priority contained in Sections 51 and 52 of the Norwegian Maritime Code;
- mortgages, similar registered encumbrances based in contract and enforcement liens (including interest); and
- unsecured debts.

4.11 Insolvency Laws Applied by Maritime Courts

Under Norwegian law, insolvency is regulated by the Debt Negotiation and Bankruptcy Act (the DNB-Act) and the Recovery Act. The Mortgage Act and the Norwegian Maritime Code are also important when considering the priority of claims.

Parts of the DNB-Act build on the same principles as the US "Chapter 11" procedure, but it does not go as far in providing the court with flexibility to steer the process to a result that is seen as being acceptable by all involved. As the Norwegian court system does not have specialised courts, bankruptcy proceedings would be submitted to the civil courts. Please see **4.10 Procedure for the Judicial Sale of Arrested Ships** regarding the judicial sale of a vessel.

4.12 Damages in the Event of Wrongful Arrest of a Vessel

A claimant may be held strictly liable for all of the defendant's economic loss if the claim did not exist at the time of arrest (Section 32-11 of the NDA). Furthermore, a claimant who gives wrongful or misleading information concerning the grounds for the arrest, by negligence or intent, will be liable for the losses incurred.

5. Passenger Claims

5.1 Laws and Conventions Applicable to the Resolution of Passenger Claims

Maritime passenger claims are regulated by Chapter 15 of the Norwegian Maritime Code, in Sections 405–432. These provisions are based on the 1974 Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea (PAL), the EEA Agreement Appendix XIII No 56x (Regulation EC No 392/2009), the 2002 Athens Protocol and the EEA Agreement Appendix XIII No 56y.

The limitations of liability for personal injury, death or luggage claims are included in Chapter 15 of the Norwegian Maritime Code, and are based on the 1974 Athens Conventions. The time limit is two years from the end of the voyage, or the time that the voyage ought to have ended. Limitation in passenger claims is regulated in Chapter 9 of the Norwegian Maritime Code. The limit is 250,000 SDRs, multiplied by the number of passengers that the vessel is registered as being allowed to carry. Claims for indemnities for personal injury of a passenger

is recognised as a maritime lien in accordance with the Norwegian Maritime Code Section 51.

6. Enforcement of Law and Jurisdiction and Arbitration Clauses

6.1 Enforcement of Law and Jurisdiction Clauses Stated in Bills of Lading

The starting point under Norwegian law is that the parties are free to enter into agreements concerning dispute resolution. In accordance with the Section 4-6 of the NDA, the jurisdiction clauses in bills of lading will therefore be recognised and enforced.

However, Section 310 of the Norwegian Maritime Code provides some limitations in this regard, establishing certain rights for the claimant.

In accordance with Section 310, the claimant has certain rights when bringing a claim that is related to the carriage of cargo, in terms of where to pursue the claim.

The provision states that a jurisdiction agreement that limits the claimant's rights may be invalid if it concerns restrictions on bringing an action at the place where:

- the claimant's principal place of business is situated, or the claimant's place of residence if there is no principal place of business;
- the contract of carriage was concluded, provided the defendant has a place of business or an agent through whom the contract was concluded;
- the receipt for carriage in accordance with the contract of carriage was issued; or
- delivery was agreed or actually occurred in accordance with the contract of carriage.

If the agreement in a bill of lading concerns any of the above scenarios, the court may find that the agreement is not valid, in accordance with Section 310.

6.2 Enforcement of Law and Arbitration Clauses Incorporated Into a Bill of Lading

In accordance with Section 310 of the Norwegian Maritime Code, if a bill of lading is issued pursuant to a charterparty that contains a law and arbitration clause, but the bill of lading itself does not expressly state that the provision is binding on the holder of the bill of lading, said clause cannot be invoked against the holder of a bill of lading – assuming the holder has acquired it in good faith.

Therefore, the arbitration clause must be sufficiently specific when incorporated into the bill of lading in order for the court to recognise it; a general reference to the charterparty will not be sufficient.

6.3 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Norway is a party to the 1958 New York Convention, which has been incorporated in the Norwegian Arbitration Act 2004 and the Norwegian Enforcement Act. Additionally, any bilateral agreement in place between Norway and the jurisdiction in question will be applicable when determining the recognition and enforcement of arbitral awards.

6.4 Arrest of Vessels Subject to Foreign Arbitration or Jurisdiction

In accordance with Section 96 of the Norwegian Maritime Code, arrest of a vessel can be granted to secure a claim in Norway, which may be pursued in a foreign jurisdiction through either arbitration or court proceedings. That being said,

the requirements for arrest – ie, that there is a "genuine need for security", as per Section 33-2 of the NDA – must still be satisfied.

6.5 Domestic Arbitration Institutes

The Nordic Offshore and Maritime Arbitration Association (NOMA) is a joint Nordic initiative, which was established in 2017. NOMA has established separate rules for arbitration based on UNCITRAL Arbitration Rules, as well as Best Practice Guidelines and fast-track rules. The Nordic Marine Insurance Plan is a commonly used standard contract for hull and machinery insurance, and has included NOMA as the standard solution for dispute resolution. Nevertheless, ad hoc arbitration remains the most common way of solving a maritime dispute that is referred to arbitration.

6.6 Remedies Where Proceedings Are Commenced in Breach of Foreign Jurisdiction or Arbitration Clauses

In accordance with the NDA, the court is obliged to consider whether the claim in question falls within its jurisdiction. If the parties have agreed on a foreign jurisdiction or arbitration, the court will reject the claim. As a consequence, the key defence where proceedings are commenced in breach of a foreign jurisdiction or arbitration clause would be to present the jurisdiction/arbitration clause to the relevant Norwegian court, and explain why the dispute in question is covered by the wording of the clause.

7. Ship-Owner's Income Tax Relief

7.1 Ship-Owner's Income Tax Relief

The main tax incentive is the tonnage tax regime, which makes it possible to operate in Norway without being subject to corporate tax on operating income. The European Free Trade Association Surveillance Authority has approved the continuation of the Norwegian Tonnage Tax (NTT) regime until 31 December 2026. The Norwegian regime is in line with EU-based regimes.

The Norwegian tonnage tax regime provides a final exemption from tax on qualifying shipping income. Net financial income is subject to 22% tax. The shipping company needs to opt for the tonnage tax regime in its tax return, or all net income will be taxed at 22% (the ordinary rate).

A tonnage taxed company may only perform activities related to the operation of the company's qualifying ships. As a starting point, other business activities are not permitted by a company that is covered by the regime. However, the permitted activities include strategic and commercial management as well as day-to-day technical operations and maintenance for group-related companies outside the tonnage tax regime. This also includes activities in group-related foreign companies and CFCs. In addition, a specified number of ancillary activities are within the scope of the tonnage tax regime.

The following requirements need to be met for a company to qualify under the tonnage tax regime.

- The shipping company must be registered in Norway or the EEA.
- The minimum requirement for assets is primarily ownership of a qualifying vessel or ownership of at least 3% in a company or chain of companies owning such a vessel. There is a required ratio of owned vessels to chartered-in vessels, and certain restrictions to the chartering out of vessels on bareboat to external parties. There is also a restriction as to what assets the company may own.

- The company must comply with flag requirements.

8. Implications of Non-performance, the IMO 2020, Trade Sanctions and the War in Ukraine

8.1 Non-performance of a Shipping Contract

The wording of the specific force majeure clause is decisive for whether certain events, such as global illness, epidemics or pandemics, constitute force majeure. The standard boilerplate clauses included in contracts that predate 2020 are unlikely to cover COVID-19, while newer contracts will likely have regulation covering such events.

Under Norwegian law, the starting point is that professional parties entering into agreements are responsible for their contractual obligations. Therefore, if they have agreed to a contractual obligation, they must fulfil said obligation. If the contract is subject to Norwegian law, the Norwegian Sale of Goods Act may be applicable, under which certain force majeure-like events may give grounds to exemption of liability for economic loss caused by a breach of contract.

For the exception to become applicable, it must be shown that the breach was caused by a hindrance that was outside the control of the defaulting party, and that the defaulting party could not reasonably be expected to have foreseen the hindrance at the time of entering into the contract, nor avoid or remedy the consequences of it.

The decisive factor is the actual effect the hinderance has, rather than the nature of the hinderance in question. When considering whether the breach would be considered a force majeure event, the following should be considered:

- review the contract or statute applicable;
- consider the underlying cause for the hinderance;
- foreseeability requirement (was the hinderance foreseeable?);
- formalities connected to invoking force majeure; and
- mitigation/remedy.

The Norwegian court of appeal (*Gulating Lagmanssrett* ref. LF-2021-146849) handled a case during the pandemic regarding this current problem. The case concerned a contract of delivery of salmon, which had to be cancelled due to the COVID-19 pandemic. The issue was whether the cancellation was a breach of contract or whether the pandemic constituted a force majeure event, thereby giving contractual grounds for the cancellation. The court found that this qualified as a breach of contract, as the event was not within the force majeure clause, and the non-performing party was liable for the loss.

8.2 Enforcement of the IMO 2020 Rule Relating to Limitation on the Sulphur Content of Fuel Oil

The International Convention for the Prevention of Pollution from Ships (MARPOL) Annex VI and the EU Sulphur Directive (Directive EU 2016/802) have been implemented in Norwegian law.

Norwegian waters up to longitude 62 degrees are part of the North Sea emission control area (ECA), designated in MARPOL, with a 0.10% limit to SOx and particulate matter emissions. On 1 March 2019, the 0.10% limit was extended to also cover the Norwegian world heritage area, which includes the fjords north of this area, as set out in the Regulations of 30 May 2012

No 488 on environmental safety for ships and mobile offshore units. Outside an established ECA, the applicable limit is 0.5%.

Specific requirements have also been introduced on passenger ships sailing on a route to or from harbours in the EEA that are located in Norwegian territorial waters or exclusive economic zones, with an applicable limit of 1.5%.

Multiple sanctions are available if a breach is established, including orders, fines and withdrawal of permits. The vessel also risks detention, and the party inducing the breach may risk prison if there are serious breaches as a result of gross negligence or wilful misconduct.

8.3 Trade Sanctions

In general, any sanction introduced by the UN or the EU will be incorporated into Norwegian law. The Law on Sanctions allows for UN sanctions, sanctions introduced by other intergovernmental organisations and sanctions aimed at maintaining peace and security that have broad international support to be incorporated into domestic law. This gives the Parliament the necessary legal grounds to implement sanctions introduced internationally into domestic law.

EU sanctions are not included in the EEA Agreement, and the Norwegian State has therefore decided to implement these as a political decision, albeit with some exceptions. For instance, Norway has an exception that allows for Russian fishing vessels to call at Norwegian ports. The prohibition on Russian vessels calling at Norwegian ports does not apply to Svalbard, due to special considerations connected to the Svalbard Treaty.

There is very limited case law on the consequences of the imposed sanctions against Russia in Norwegian law. However, one exception is the court case brought by ship-owners Havila Kystruten. The vessel, Havila Capella, was operated by Kystruten, but financed through a Hong Kong leasing company that was owned by Russian financing firm GTLK, which itself was owned by the Russian Ministry of Transport. Due to the financial leasing agreement, GTLK was listed as the formal owner of Capella. Following the increasingly strict sanctions on Russia, the insurance company terminated the vessel's insurance. While the Norwegian Ministry of Foreign Affairs granted a dispensation from the sanctions for the use of the vessel, it did not grant a dispensation for the insurance of the vessel. In its rejection, it was stated that a dispensation would entail money being placed at the Russian owner's disposal.

In order to operate the vessel, Kystruten therefore brought the issue to court, seeking arrest in the vessel to obtain ownership thereof. The court was also asked to consider whether the vessel should be subjected to forced use. In June 2022, Hordaland County Court decided to grant Havila Kystruten both arrest and forced use for a period of up to two years, giving Havila Kystruten the possibility to insure the vessel and operate it as normal.

8.4 The War in Ukraine

The Norwegian Ship-Owners' Association has reported that the war in Ukraine has had a significant impact on the Norwegian shipping industry, and has resulted in increased costs, delivery and supply complications, security risks, and reduced availability of seafarers.

Further, the Russian invasion has largely disrupted the maritime routes from Ukraine via the Black Sea, inevitably causing delays and cancellations. Consequently, numerous freight and

transport contracts have been rendered unfulfillable. Given these challenges, most affected businesses have opted for voluntary contract revisions or sought freight and transport agreements with alternative entities. At this time, there has not been any substantive case law in Norway on non-performance of shipping contracts due to the war in Ukraine.

9. Additional Maritime or Shipping Issues

9.1 Other Jurisdiction-Specific Shipping and Maritime Issues

In March 2022, the Court of Appeal rendered a decision in which a ship-owner was found guilty of attempting to participate in illegal beaching of a vessel in Pakistan. The ship-owner was sentenced to six months in prison for violating the Pollution Act.

This is the first time that a private person has been sentenced for illegal beaching in Norway, and illustrates the Norwegian court's stance on environmental crime.

Trends and Developments

Contributed by:
Kristian Lindhartsen, Lilly Relling
and Synøve April Rylund Glesaaen
Kvale Advokatfirma DA

Kvale Advokatfirma DA (Kvale) is a leading commercial law firm that has provided assistance to Norwegian and international businesses since 1988. It is particularly renowned for assisting some of Norway's largest companies with their most important and complicated cases. Kvale's lawyers have extensive experience in negotiations, dispute cases before the ordinary courts and arbitration. With a broad understanding of the shipping industry, the firm assists in all specialist areas of maritime law, ranging from purely private law disciplines such as charterparties and other maritime contract law, maritime casualties and maritime insurance to public law issues such as pollution liability and sanctions law. The team litigates cases before the ordinary courts and in arbitration. Kvale's extensive international network of contacts also enables it to assist clients with litigation assignments outside of Norway.

Authors

Kristian Lindhartsen is a partner at Kvale Advokatfirma and has a wide background in maritime law, with an emphasis on marine insurance disputes, including cover disputes and direct action matters. He also advises ship-owners and charterers on operational issues, such as those related to charterparties and other contracts of carriage, commercial agreements, collisions and other marine casualties. Kristian is experienced as a litigator in both ordinary courts and arbitration proceedings, including arrest and other asset securing, as well as international jurisdiction issues. He also works on vessel-related transactions, particularly sale/leaseback transactions of ships.

Lilly Relling is a partner in Kvale's oil, gas and shipping department. She assists clients, both Norwegian and international, in commercial law matters, and has substantial experience advising participants within the shipping and offshore industry. She has broad experience advising on carrying out contracts, including charterparties, fabrication contracts and other commercial agreements. Ms Relling also has experience before the ordinary court and arbitration, including substantial experience with arrests and other asset securing. Relling is a member and National Representative of the global lawyers and in-house counsel network AIJA (International Association of Young Lawyers).

Contributed by: Kristian Lindhartsen, Lilly Relling and Synøve April Rylund Glesaaen,
Kvale Advokatfirma DA

Synøve April Rylund Glesaaen is an associate affiliated with Kvale's maritime and energy department. She has a Master of Laws degree from the University of Bergen and an LLM from the University of Queensland. As part of the master's programme, she went on an exchange to the Università degli Studi di Torino. In Italy and Australia, she specialised in maritime law, international contracts, and international development. Glesaaen assists both Norwegian and international clients with disputes related to shipping and energy law. Additionally, she has extensive experience in advising on and drafting commercial contracts.

Kvale Advokatfirma DA

Haakon VIIs gate 10,
PO. Box 1752 Vika,
0122 Oslo
Norway

Tel: +47 22 47 97 00
Fax: +47 21 05 85 85
Email: post @kvale.no
Web: www.kvale.no

KVALE

Contributed by: Kristian Lindhartsen, Lilly Relling and Synøve April Rylund Glesaaen,
Kvale Advokatfirma DA

Introduction

Over the past year, the Norwegian maritime sector has witnessed a number of court cases that have provided valuable insights and guidance on various aspects of maritime law. These cases, adjudicated by both the Supreme Court and the Court of Appeal, have addressed key issues and have set important precedents for the maritime sector in Norway.

This chapter will summarise three recent court cases in the maritime sector. These cases delve into critical issues such as the currency exchange for payouts from global limitation funds, the allocation of responsibility for a ship's stability and ballast during a shipyard contract, and the requirements for compensation for trouble and hindrance in intricate ship-building projects.

Additionally, it was decided in December that Norway, as a part of the EEA, will implement the new climate quota directive from the EU for maritime transport. This development is part of a broader effort across the EU and Norway to promote a green shipping industry, and it underscores the growing importance of environmental considerations in maritime law and policy.

Key Norwegian Maritime Litigation

Currency exchange for global limitation fund – HR-2023-1157-A

Following the Shipwreck of MS Server in 2007, the district court that heard the case constituted a global limitation fund in accordance with Section 177 of the Norwegian Maritime Code, at the request of the ship-owner and manager. The liability amount of approximately NOK226 million was paid on 29 June 2012, which is also considered the day the fund was established in accordance with Section 234 of the Norwegian Maritime Code. There was an additional NOK115 million provided in security to cover interest and costs. After the establishment of the fund, the insurance company Gard claimed reimbursement for several additional costs for the removal of part of the wreck. These costs were settled in foreign currency, and would have amounted to approximately NOK41.3 million if the currency conversion had been done at the time of the establishment of the fund in 2012, and NOK53 million if the currency conversion had instead been done at the time the individual claims were paid out by Gard.

The question was not regulated in the Norwegian Maritime Code nor the London Convention. The preparatory works to the Norwegian Maritime Code leave it to the court to decide individual questions that are not resolved by the legislation. In Section 6-5 of the Satisfaction of Claims Act it is stated that in the case of claims to a bankruptcy, the exchange rate of the day on which the petition for opening debt negotiations was received by the district court is the one that should apply. The Supreme Court found that an analogy to this rule could not be applied to a global limitation fund for several reasons:

- unlike bankruptcy, the size of the available funds is not dependent on the size of the claims but the tonnage of the ships (Section 175a, Norwegian Maritime Code);
- there is therefore no need to know the immediate size of the claims at the time of the fund establishment;
- claims calculated for dividends in bankruptcy usually arise before bankruptcy opening, but this is not always the case in limitation funds; and
- conversion at the time of fund establishment can give arbitrary results and is not in accordance with the rules of calculation in tort law.

Consequently, the Supreme Court ruled that the conversion rate from the relevant foreign currency to Norwegian kroner should be established at the time each individual claim was paid, rather than at the time the fund was established.

The Supreme Court has now clarified a practically important issue for insurers' recovery actions: an insurer will be subject to an arbitration agreement between the assured and a third party as long as the claim would have been subject to arbitration if brought by the assured.

Responsibility for ship during shipyard launch – LH-2022-40602

A Russian fishing vessel capsized and sank in March 2021 during a launch at the shipyard after completed repairs. The insufficient ballasting caused the ship to list to starboard, leading to water overflow from the ballast tank, which worsened the tilt and resulted in the ship capsizing.

The main question in the case for the Court of Appeal was which of the parties were responsible for the ship being properly ballasted and seaworthy at the launch from the shipyard. This was both a question of which obligations were set out in the Ship Safety Act and whether the responsibility could be, and was, contractually transferred.

The Ship Owner argued that the captain's obligations set out in the Ship Safety Act and Section 131 of the Maritime Act do not apply when the ship is in dock, and the shipyard was responsible for the ship from takeover to the completed undocking. Furthermore, the ship-owner argued that the responsibility for the ship's stability was delegated under the repair contract and taken over at docking. The ship did not have stability problems at delivery.

First, the Court found that the Captain was responsible for the ship's stability and ballasting during docking, landing, and launching after a shipyard stay (Sections 12 and 19 of the Ship Safety Act). The shipmaster is also responsible for ensuring the ship's ballast tanks are properly closed to ensure safety and prevent threats to life, health, environment, and material values.

Second, the Court ruled that the captain's responsibility for the ship's stability and ballasting, as per the Ship Safety Act, remained applicable during docking, landing, and launching after a workshop stay. There was no evidence found that this responsibility was delegated in the repair agreement. Thus, it was clear that the captain was responsible for the ship's ballasting and stability during the launch.

The Court also examined whether the submersion of the ship was carried out with sufficient care and whether the shipyard had contributed to the damage.

The Court found it evident that the shipyard contributed to the damage by neglecting general safety measures. They had failed to implement what is considered an ordinary self-check related to the ship's condition before launch. This would have clarified that the ship was not ready for launch. Consequently, the Court found that the shipyard contributed to the damage and the compensation was reduced by 20%. The appeal to the Supreme Court was denied, and the Court of Appeal's judgment is therefore final and binding.

The case serves as a reminder of the importance of clear allocation of responsibilities and adherence to safety measures in the maritime sector. The Court of Appeal's ruling underscores the captain's ongoing responsibility for the safety of

the ship, as well as the shipyard's duty to conduct thorough safety checks where expected and mitigate losses for their clients.

Additional remuneration in ship building contract – LG-2022-95897

The ship-building project of "Cetus" and "Seihaust" required 5,600 extra hours of work due to poor organisation by the shipyard. The insufficient organisation resulted in loss of efficiency, continuity, and steady progress. The contractor demanded remuneration for additional expenses, as well as compensation for the trouble and hinderance caused by the shipyard.

First, the Court of Appeal evaluated the additional charges. They interpreted that the contract requires additional work to be clarified in advance, and since the disputed additional work was not notified, the contractor was not entitled to claim additional remuneration for this work. This conclusion aligns with the evolving trends in fabrication and construction contracts, where notification clauses are increasingly viewed as preclusive.

Second, the Court evaluated whether the entrepreneur was entitled to a compensation of NOK4,121,625 for the trouble and hinderance caused by the poor organisation. Trouble and hindrance is a type of legal claim within Norwegian contract law. The core of the term is that the contractor, during the execution of the contract, has incurred additional costs due to (i) circumstances on the builder's side that have reduced productivity or (ii) disturbances to other work at the contractor's. The claim therefore deals with derived consequences and financial loss, for which the builder is responsible.

The contract did not have any provisions regulating claims for additional remuneration for trouble and hindrance. In accordance with the contractual loyalty obligation, the contractor should keep the builder informed of any extra costs incurred and additional costs beyond the fixed price. Such notification is necessary for the builder to be able to intervene and reorganise to prevent unnecessary waiting, difficult access, and similar issues. For the builder to have the opportunity to secure evidence, it is necessary that it be made aware of what will be claimed as far as possible on an ongoing basis.

Several factors were considered in this case: the significant delay of the ships, the unclear start date for the work, the contractor's lack of available manpower, increased costs due to delays, and the shipyard's failure to co-ordinate the project. The Court referred to a previous Supreme Court ruling, HR-2019-1225-A, which sets strict requirements for evidence of trouble and hindrance that can provide a basis for additional remuneration. Considering these requirements, the Court concluded that the rushing and lack of co-ordination from the shipyard's side were significant enough to warrant a claim for additional remuneration, resulting in an award of NOK1 million.

The case highlights the importance of clear communication and co-ordination in contractual relationships, particularly in complex projects such as ship-building. It underscores the necessity for contractors to keep builders informed about any extra costs expected to be incurred and to secure sufficient evidence of any claims made.

The ETS Implemented for Norwegian Shipping

Starting from 1 January 2024, emissions from maritime transport will be incorporated into the EU's climate quota system. It was decided on 8 December 2023 that the inclusion of the ship-

Contributed by: Kristian Lindhartsen, Lilly Relling and Synøve April Rylund Glesaaen,
Kvale Advokatfirma DA

ping industry in the EU Emissions Trading System (ETS) will also apply to the European Economic Area (EEA). As a result, this Directive will come into force across all EU and EEA countries from the start of 2024, marking a significant step in the regulation of emissions within the maritime sector.

The new ETS directive will cover emissions from ships with a gross tonnage of 5,000 or more that transport passengers or cargo for commercial purposes, and which travel within, or to and from a port within, the EEA and EU. For the applicable ships, 100% of the emissions from journeys within the EEA/EU, and 50% of the emissions from journeys to and from the EEA/EU, shall be reported and compensated for.

The "ship operator" is the responsible party under the Directive. The ship-owner will be the assumed ship operator, unless the obligation has been transferred by agreement to another party with technical operational responsibility for the ship. The ship operator holds several responsibilities, including the settlement of quotas, the submission of monitoring plans for all associated ships to the administering authority, and the reporting of emission data at the level of both individual ships and the company as a whole. In the event of non-compliance, the ship operator will be subject to penalties and sanctions. The first deadline for the emissions reports will be 31 March 2025.

A portion of the revenues from the ETS will be directed towards the EU Innovation Fund, while a substantial part of the quota income will be redistributed to member countries. For EU nations, it has been mandated that all ETS proceeds should be reinvested into green energy initiatives and climate action. Norway is exempt from this earmarking due to certain modifications in the EEA agreement. While it remains uncertain exactly how the proceeds will be used in Norway, it is expected that funds will be directed towards climate initiatives, in line with the EU's intentions.

The new ETS Directive is part of a broader effort across the EU and Norway to promote a green shipping industry. The implementation of this initiative will not only ensure equal competitive conditions in the EU but will also provide further incentives for the development and adoption of green technologies that reduce emissions.

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