ANNUAL REPORT 2012

Nordisk Skibsrederforening
(NORDISK DEFENCE CLUB)

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THE MANAGING DIRECTOR'S COMMENTS

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Megatrends in the oil and gas industry; an active year on the production and interpretation of standard contracts, while Nordisk maintains its competitive edge with a strong transaction team.

The most momentous development in 2012 for the shipping industry was probably the advance in the technology of fracking, that is, the production of oil and gas from shale layers. This was not a new development in 2012, but with hindsight 2012 was probably the year when the real impact of fracking - particularly for extracting natural gas - showed on the market. The development of this technology, particularly in the United States, has changed the market tremendously. A few years ago the prediction was that the United States would steadily increase its imports of crude oil and natural gas. Facilities were constructed and ships were built to carry LNG to the United States. Suddenly the question is how much LNG the US will export.

In the US market this development has caused the price of LNG to drop and natural gas has become a relatively cheap energy source. From an environmental point of view, the exploitation of these huge new resources of oil and gas has caused concern. Not only is fracking expected to lead to increased

Georg Scheel, Managing Director

carbon dioxide emissions from fossil fuel, but it will also reduce incentives to develop more environmentally friendly ways of producing energy. In the short term, however, the increased use of natural gas in the United States has proved "environmentally friendly" in that the shift from coal to natural gas for generating electricity has reduced the nation's carbon footprint. For a given energy output, burning coal releases far more carbon dioxide than burning natural gas.

Onshore exploration for shale oil and gas has so far not had any significant impact on the price of crude oil. The exploration for, and development of, offshore oil fields is continuing at a rapid pace, despite the fact that the development of some offshore oil and gas fields has been put on hold, for example, the Shtokman field in the Barents Sea. Demand for offshore drilling rigs and the various types of vessels used in the offshore industry has continued to grow, but perhaps not as rapidly as some owners may have hoped. Even so, the markets are reasonably strong and optimistic about the future, with a number of newbuildings to be delivered. For the time being it seems as though the dark clouds hovering on the horizon in the offshore industry are more linked to a rapid increase in operating costs, for example in areas such as Brazil. The offshore market is not an international market like the blue-water shipping industry. Exploration for oil takes place within the jurisdictions of particular states – states that will have legal rights and the power to set the parameters for competition. Protective measures, such as requirements to use local suppliers and employees, have caused costs and salaries to rocket in many areas.

The shipping industry, accustomed as it is to international competition, may view these protectionist attitudes with scepticism. In this context, we should remember that when oil exploration started in the Norwegian sector of the North Sea, the Norwegians built their offshore industry with the assistance of a government that insisted that international oil companies operating in the Norwegian sector should "buy" Norwegian. This was not necessarily achieved by direct legal requirements, but showing "loyalty" to Norway was a crucial factor for the oil companies when it came to the allocation of new areas for oil exploration.

On the legal side there have been some noteworthy judgments in England that are commented on in *Round up of last year's noteworthy cases* on page 11. One case in particular caught us by surprise, namely the English High Court judgment in *The Union Power*. This case concerned a secondhand sale of a vessel based on *Saleform 1993*. We have been closely involved in the drafting of *Saleform*, in particular the 1987, 1993 and 2012 editions. The structure of *Saleform* is based on an "as is" sale, that is, the buyer gets what he sees (subject to a requirement for the vessel to be in class and "free of average damage affecting class"). Apart from the latter proviso, the sellers basically have no liability for defects. This has been the firm understanding in the market, and over the years we have handled a number of cases dealing with defects in vessels sold on *Saleform* terms. Since there has been a general understanding that the "as is" concept is inherent to *Saleform*, these cases have dealt with matters "coming to the sellers' knowledge prior to delivery" under S*aleform 1987*, or the question of whether a defect is average damage affecting class.

In its judgment in December 2012, the High Court held that a

term should be implied into *Saleform* whereby the vessel should be in a "satisfactory condition" (the phrase used in the English Sale of Goods Act). This legal point has not been raised by lawyers in any of the cases I am aware of, and it might have changed the outcome in a number of these cases had it been known that "satisfactory condition" should be implied. Many defects may not be average damage affecting class, but could nevertheless mean that the vessel was not in a "satisfactory condition". It seems that the judge was somewhat puzzled that the question of "satisfactory condition" as an implied term had not been decided by the courts before. He apparently did not consider the main reason for the lack of other judgments, namely that his own reasoning was contrary to the common understanding in the industry of the terms of *Saleform*. The judge was so sure of himself that he refused leave to appeal.

English judges generally have an extremely high level of legal knowledge, also in maritime matters. From time to time, however, we see judgments that are surprising and that go against what has been perceived to be the legal position by the market. While these judgments may be logical and well-reasoned from a legal point of view, a Norwegian court would normally give considerable more weight to information about the perception of the legal position in the market, and assume that the parties intended to make a contract in accordance with this general understanding. In England such commercial arguments seem to be of lesser importance, and the requirements for submitting evidence of a relevant market practice seem to be stricter than in Norway.

The report from the Board contains some reflections on the growth in the number of cases that we handle outside FD&D cover, and the corresponding increase in our income. In these cases we invoice members in accordance with the normal practices of private law firms in Oslo. These cases add valuable expertise and experience which will benefit the quality of our advice and assistance also in covered cases. We have also been heavily involved in drafting international standard contracts, such as BIMCO's *Newbuildcon*, the Norwegian *Standard Ship Building Contract* (which is also widely used in countries other than Norway), *Saleform, Barecon, Shipman, Poolcon*, and a number of other standard charterparties and charterparty clauses, such as *Supplytime* and a large number of BIMCO's standard clauses. As we inevitably also handle disputes arising from such contracts, this gives us a better understanding of the relative weight of arguments which can be advanced, as well as the interplay between these risks and the commercial realities of business transactions. In 2012 our Transactions Group received a number of requests to assist in cases relating to the sale and purchase of vessels, new projects, guarantees, financing, pool agreements and so on. We have been fortunate enough to be able to hire additional highly skilled lawyers who have made strong contributions within these fields.

Going forward I expect one of Nordisk's strongest competitive advantages will be our ability to combine our in-depth legal knowledge of standard maritime contracts with our ability to assist our members outside the scope of the FD&D cover. Partly this development makes us a very attractive employer for highly competent lawyers, while also giving us the experience and competence that enable us to evaluate legal problems in a broader commercial context. Our members benefit both from the enhanced quality of the legal advice provided and also the fact that the non-covered work contributes to the Association's financial strength.

PHOTO: COURTESY OF AWILCO

REPORT FROM THE BOARD

PHOTO: COURTESY OF AWILCO

Signs of optimism amidst commercial and environmental challenges for the industry. In the meantime the Nordisk case load stabilises.

The weak shipping markets continued in 2012. The exceptions were in the offshore industry and some specialised trades, such as LNG, where the rates were more satisfactory. Even in these markets the situation was mixed, with for example the offshore market in the North Sea much weaker than anticipated. Newbuilding prices have come down and some owners ordered newbuildings in the belief that prices have bottomed out. The high bunker prices stimulated owners to order more fuel-efficient vessels. This might prolong the overcapacity in the market. Given the weak economic growth in the western world, the upturn in the freight market may still be years ahead.

An inevitable result of the difficult freight market is that several players have been unable to fulfil their commitments. Trying to collect outstanding amounts from defaulting charterers seems to be the order of the day. We are well accustomed to handling these types of cases, the incidence of which follows normal shipping cycles. An obvious assumption might be that this would cause an increase in the number of cases, but this is not necessarily

so. There are several reasons for this apparent paradox. One reason is that, because of the low freight market, "time is not so expensive". Shorter delays, which in a high freight market might represent amounts of some significance, will in today's market give rise to claims of a value that is not worthwhile pursuing. Another factor is that if a charterer has no money, it will be futile to use money and resources to try to collect a claim. When time is cheap, there is less pressure to do things fast. This may in turn reduce mistakes and the number of ensuing disputes. These may be some of the factors that caused a downturn in the number of cases received in 2012, as noted below.

Among shipowners and operators, the environmental aspects of shipping seem to have been less in focus in 2012 compared to the position some years ago. This may be because low earnings have left shipping companies with fewer resources to expend on environmental improvements. It seems that the general downturn in the economies of the US and Western Europe has shifted attention away from environmental problems towards issues such as the lack of economic growth and unemployment. However, international regulations and requirements to reduce emissions from vessels will continue, causing challenges for the shipping industry in the years to come. In the meantime, there is much focus on slow steaming and economical speed to reduce fuel costs.

In January 2013 the Swedish government presented the long-awaited "Action Plan for Swedish Shipping". According to the Minister of Infrastructure, the action plan´s main objective is to strengthen Swedish shipping´s competiveness internationally. Among other things, the tonnage tax issue will once again be reviewed. On the positive side, the current system with subsidies will be somewhat expanded to include certain service vessels previously not included. In the view of the Swedish Shipowners´ Association, however, there is too little action in the action plan and it will not help cure the general negative trend affecting shipping in Sweden. In the meantime, the number of vessels flying the Swedish flag continues to fall.

The number of Finnish-flagged ships increased during 2012 thanks to the recently adopted tonnage tax regime. Several newbuildings came under the Finnish flag, both RoRo´s and bulkers. The first LNG-fuelled passenger ferry was delivered from STX Turku shipyard and is in service between Turku and Stockholm. The Finnish government was able to have its proposal for a new environmental subsidy decree approved by DG Comp by the end of the year. This will enable shipowners to apply for subsidies (up to 50% of investment costs) for the installation of sulphur-abatement technologies on board Finnish-flagged vessels.

Our Singapore office has continued the steady growth experienced over recent years. This growth relates both to the number of new cases and new members/vessels entered. In order to strengthen the Singapore office we continue to hire highly qualified lawyers with international law experience to support our members.

The number of new cases declined in the autumn of 2012. By the end of the year we had received 1,767 new cases, 245 fewer than in 2011. We hope that this decrease represents a step towards a more normal ratio between entered vessels and new cases.

The number of entered vessels fell slightly from 2,214 at the end of 2011 (which was the highest number in Nordisk's history) to 2,192 at the end of 2012. The corresponding GT was about 55.2 million, compared with 57 million at the end of 2011.

The average membership fee per entered unit was NOK 41,270, compared with NOK 39,440 in 2011. These figures include tonnage entered with Northern FD&D Company Ltd., a subsidiary of Northern Shipowners' Defence Club, Bermuda Ltd. The latter company is a mutual club that has substantially the same membership as the Association.

The Board is pleased that the

Association is maintaining its high level of entries despite the turbulent times for shipping. The Association's financial statement for 2012 shows a surplus of NOK 4,493,063. Several important factors have contributed to the Association's strong financial result in 2012. One important factor is the growth in the fees earned in cases we handle outside the FD&D cover. Such activities increase the knowledge base of the Association and the income helps us to limit increases in membership fees. Contrary to most other players in the business, the Association did not impose a general increase in its membership fees for 2013.

The Association's equity was NOK 47,593,499, but the financial statements do not allocate funds to cover future costs of ongoing cases. The Association's resources, apart from fixed assets, are generally held in equities and in bank and money-market funds. Financial strength and liquidity are ensured through management and insurance agreements with the Bermuda companies. The aggregate equity/retained earnings of these companies and the Association were NOK 180,096,400. The reserves in the Bermuda companies to cover future costs were USD 11,391,377. Due to the reinsurance agreement between the Association and the Bermuda companies and the financial strength of these companies, we have satisfactory reserves to cover the Association's potential future obligations in ongoing cases. In addition the Association has reinsurance cover on the Lloyd's market against the possibility of particularly high expenditure in individual cases.

The Association's financial resources, as well as the skills and experience of its employees, together with its stable membership base, make the Association well positioned for future growth. The Association has continued to recruit young, very well qualified lawyers, including lawyers with experience from UK maritime law. The Association's lawyers have unique expertise in maritime matters, and continually strive to improve the service provided to our members.

The Board would like to take this opportunity to thank the Association's management and staff for their excellent work during the past year.

Nils P. Dyvik, Chairman

OSLO, 31 DECEMBER 2012
15 MARCH 2013

NILS P. DYVIK
Styreformann

JAN HÅKON PETTERSEN

HANS NORÉN

THOMAS FRANCK

STAFFAN CARLSON

TRYGVE SEGLEM

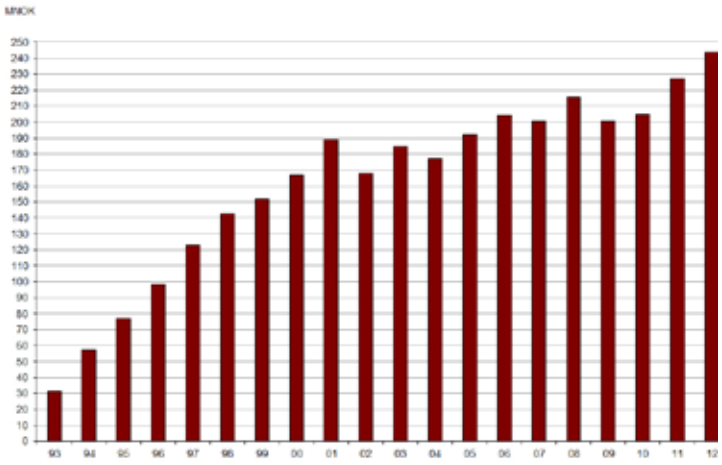
HANS PETER JEBSEN

TERJE SØRENSEN

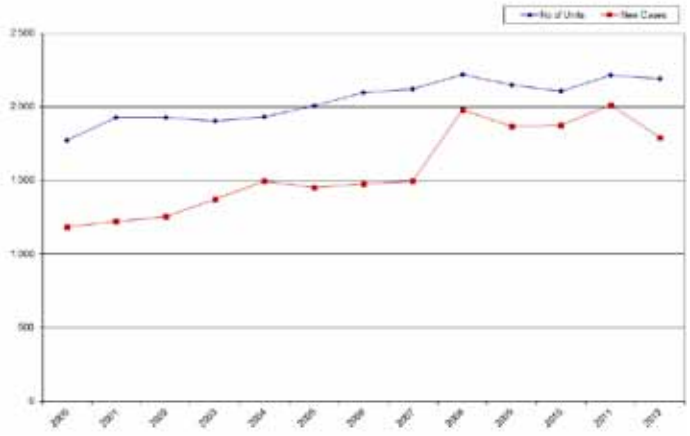
GEORG SCHEEL
Adm. direktør

KEY STATISTICS

Total reserves available for payment of claims



Number of units entered vs. number of cases



Average premium per entered unit

NEWS FROM OUR SINGAPORE OFFICE

Changes are afoot in the Singapore office.

By Tom Pullin

Magne Andersen will return to the Oslo office after more than four years of valuable service in East Asia. His role will be filled by Ian Fisher who will join the Singapore team in June 2013. Ian is an English-qualified solicitor with more than 10 years' experience. He was most recently a partner based in the Singapore office of K&L Gates, a leading global law firm. Ian previously worked in London for Ince & Co and in the London, Tokyo and Singapore offices of DLA Piper.

Tom Pullin joined the office in September 2012 from Stephenson Harwood in London. In addition, Norman Hansen Meyer, from our Oslo office, will join us in September 2013, initially for a period of three years.

In order to house the growing Singapore team, the office will move to new premises in July 2013.

Singapore handled 325 new cases in 2012, up from 317 in 2011. We have also taken on a number of new members reflecting Nordisk's growing presence in Singapore.

As the number of lawyers in the Singapore office has increased, so has the depth of experience, particularly in English law. As a result the Singapore office now handles an increasing variety of cases, both transactional and litigious. The Singapore office has conducted a greater number of arbitrations in 2012, both in London and

Singapore. The office, however, remains closely integrated with the Oslo office.

Arbitration in Singapore

Singapore and Hong Kong continue to dominate the Asian arbitration scene. Singapore is investing considerable time and resources to raise the international profile of Singapore arbitration. Each of Singapore's two main arbitration bodies, the Singapore Chamber of Maritime Arbitration (SCMA), and the Singapore International Arbitration Centre (SIAC), have recently made important announcements:

SCMA

In what is being touted by the SCMA as a major stride towards becoming a genuine alternative to London arbitration, Singapore arbitration is now included as an option in BIMCO's standard dispute resolution clause.

In response, the SCMA has released a new SCMA BIMCO Arbitration Clause and has made some welcome amendments to the procedure for appointing arbitrators. The appointment procedure previously had proved to be a lengthy process, particularly where one party failed to respond to a notice of arbitration. The time limits for responding to arbitration notices and calls to appoint an arbitrator have been shortened from 30 to 14 days to enable a claimant to get arbitration off the ground more quickly.

SIAC

The SIAC has recently announced wide-ranging amendments to its rules in the form of the newly published 2013 Rules (5th Edition).

By far the most significant change brought about by this latest update is the introduction of a "Court of Arbitration" which will be responsible for appointing arbitrators and also for ruling on jurisdictional challenges. This change moves the SIAC closer in structure to other institutional arbitration bodies such as the ICC, or the LCIA in London. Whilst this will no doubt be a welcome change for many industries, given the relatively high costs and levels of bureaucracy compared to LMAA/SCMA arbitration, it is perhaps unlikely to increase the SIAC's appeal within the maritime industry.

The SIAC claims to be the fastest-growing arbitral institution in the world. It received 235 new cases in 2012 compared to just 64 in 2002.

As mentioned, the institutional nature of the SIAC is unlikely to appeal to many in the maritime industry. However, the SCMA is now seen by many as a viable alternative to the more familiar LMAA.

In truth, however, Singapore has a way to go until it is seen as a genuine challenger to London arbitration. The SCMA has only handled 66 cases since 2009 (although the numbers of cases have increased year on year, with 10 cases already having been commenced in the first quarter of 2013). Singapore does not yet have the depth of experience of the London arbitration market and although many London-based arbitrators will accept SCMA appointments, instructing an arbitrator in London rather defeats the purpose of having the seat of the arbitration in Singapore.

However, the London arbitration market clearly cannot be complacent. Currently, more than 40% of the world's shipping tonnage is owned or controlled by Asian interests and the Singapore arbitration scene is developing apace. As the depth of experience grows, so too will the maritime industry's confidence in that system.

Indonesian Cabotage Rules

The confusion in relation to the Indonesian cabotage rules continues.

The cabotage rules, introduced in 2008, became effective in 2011. The effect of these rules was to restrict access to the Indonesian domestic coastal trade by requiring Indonesian ownership of vessels operating in domestic sea transportation.

This was a major problem for the rapidly developing Indonesian oil and gas industry as very few of the specialist vessels used in that industry are Indonesian owned. The Indonesian government promptly issued a temporary amendment to the cabotage rules in 2011. This allowed foreign vessels to apply for an exemption and, thereby, to operate in Indonesian domestic waters. However, these exemptions were granted sparingly and always on a temporary basis.

Under the legislation as currently drafted, any exemptions issued will expire between 2013 and 2015. After expiry, the cabotage principle will apply to all vessels.

As many current domestic oil and

gas projects will extend beyond the expiry of the exemptions, the industry is keen for news as to whether the Indonesian government plans to issue a further amendment to permit foreign vessels to continue to trade in Indonesian waters. Unless changes are made, many of the foreign vessels employed in the domestic oil and gas industry will be unable to complete the projects for which they are currently employed. No news, however, is forthcoming. The latest reports suggest that a governmental task force will be set up "soon" to look at this issue. For now, the industry waits…

Australia – Choice of law

The widely reported change to the recognition of foreign arbitration clauses in export contracts in Australia seems set to be resolved soon.

The change was (seemingly unintentionally) brought about by the introduction of the Australian COGSA. Sections 11(1)(a) and 11(2)(b) of COGSA which relate specifically to export cargo state:

1. All parties to: (a) a sea carriage document relating to the carriage of goods from any place in Australia to any place outside Australia…are taken to have intended to contract according to the laws in force at the place of shipment…

2. An agreement (whether made in Australia or elsewhere) has no effect so far as it purports to: … (b) preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of a bill of lading or a document mentioned in subsection (1).

In *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696, the Federal Court of Australia refused to enforce a London arbitration award obtained by vessel owners against an Australian charterer under a voyage charter on the grounds that the foreign jurisdiction clause, pursuant to which the London arbitration proceedings had been commenced, was unenforceable by reason of section 11 COGSA.

This, slightly surprising, conclusion centred on the interpretation of the words "*a sea carriage document relating to the carriage of goods*". The judge found that this description included (voyage) charterparties and that, therefore, section 11 COGSA applied to the charterparty in question.

However, this view is not shared by all. In a recent Nordisk case heard in the Supreme Court of South Australia, *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd [2012] SASC 50*, the judge found that the charterparty was not "*a sea carriage document relating to the carriage of goods*", as COGSA only deals with the rights of persons holding bills of lading or similar instruments, not charterparties. The judge found, in interpreting section 11 of COGSA, that regard should be given to the amended Hague Rules set out in Schedule 1A of COGSA, which draws a distinction between charterparties and "sea carriage documents".

Whilst the Federal Court decision has been widely criticised for its implications, most see it as a result of ambiguity in the legislation, rather than an error by the judge. Nevertheless, the case has been appealed and a judgment is expected imminently. That decision is widely anticipated to follow the reasoning of the judge in the Nordisk case and overturn the Federal Court decision, thereby re-confirming the enforceability of foreign jurisdiction clauses.

Irrespective of the judgment, it is unlikely that the calls within Australia for an amendment to COGSA will be silenced.

ROUND UP OF LAST YEAR'S NOTEWORTHY CASES

The shipping industry continues to be affected by international events and the world economic downturn. Below we focus on some of the noteworthy arbitration awards and judgments in 2012.

By Scarlett Henwood and Anders Evje

Introduction

In 2012 two decisions were handed down by the English courts in shipping cases, the principles of which are applicable to both voyage charters and time charters. There were also a number of decisions specific to voyage charters, including one dealing with who bears the risk of early redelivery under a time charter and one dealing with the meaning of "as is" in the context of the secondhand sale of ships, which is the issue of much debate in the industry.

We shall deal first with those decisions which apply across the maritime industry followed by a look at those specifically related to particular types of contract.

Meaning of "Consent not to be unreasonably withheld"

In our *Medlemsblad No. 574*, we looked at a non-shipping case (*Portland Capital Technology Funds and other companies v 3M UK Holdings Ltd and another company* [2011] EWCH 2895 (Comm.)) where the expression "consent not to be unreasonably withheld" was considered, on the basis that the principles laid down by the court (which were a clarification and re-affirmation of previous principles) would also be applicable to maritime

PHOTO: EIDESVIK OFFSHORE ASA

contracts containing this phrase.

At the end of 2012, the expression was considered in a shipping case, *The Falkonera* ([2012] EWCH 3678 (Comm.)) and reference to the Portland Capital case, and some of the principles stated therein, was made. *The Falkonera* was a VLCC on charter from the claimant owners to the defendant charterers for a single voyage to carry crude oil from Yemen to the Far East. The charterparty provided that the charterers were entitled to carry out ship-to-ship ("STS") transfers, but that the owners had the right to pre-approve the intended STS vessel, such approval not to be unreasonably withheld. It also stated that any STS operations were to be carried out in accordance with the current OCIMF STS guide (the "Guide"). The charterers chose to discharge in Malaysia by way of STS and nominated two other VLCCs, which they were using as floating storage units. The owners withheld their consent on three different occasions for a number of reasons, including the fact that (1) they had had a previous bad experience with another of their VLCCs and a previous VLCC-to-VLCC STS transfer, (2) the Guide did not have a section dealing with VLCC-to-VLCC STS transfers and therefore such transfers were (in owners' view) not allowed under the charterparty, and (3) there were various technical and practical difficulties which they could not reasonably overcome.

The court held that the following factors were relevant when assessing the owners' conduct:

- The question of reasonableness must necessarily depend on the circumstances existing at the time of the withholding of consent.
- The test is an objective one, i.e., it looks at the reasonableness of the refusal from the viewpoint of a reasonable person in a similar situation.
- Refusal of consent is not allowed by reason of something "*wholly extraneous and completely dissociated from the subject matter of the contract*".
- The burden of proof is on the person claiming that the withholding is unreasonable.
- In some cases it is necessary to consider the conduct of the party whose consent is required over a period of time, for example, if the party refuses to give consent to the same request more than once.

On the basis of the above, the court held that the owners would only be in breach if no reasonable shipowner could have regarded their concerns as a sufficient reason to decline approval. Applying the principles to the facts, the court held that the owners had been unreasonable in withholding their consent. The previous bad experience that owners had suffered was something

wholly extraneous to the charterparty between the owners and the charterers and therefore could not be a reason for refusal. As to the other reasons and concerns put forward by the owners, the court held that these would all have been capable of being dealt with by proper planning and therefore were not sufficient reasons to decline approval.

The principles assessed to be relevant by the court in this case are not entirely in line with those from *Portland Capital*. It therefore seems that the legal framework within which the court will assess the reasonableness of a party's actions is not yet set in stone. The owners are seeking leave to appeal the *Falkonera* case, so this may not be the last word on the point.

In light of these cases, our recommendation is that when negotiating charterparties and other contracts in which this expression is to be used, if there are particular grounds for refusal that the parties agree at the outset are to be considered reasonable or unreasonable, then these should be spelt out in the contractual wording itself. This should help avoid the uncertainty involved in having the Court later on assess the reasonableness of a party's actions.

Performance warranties – the perils of slow steaming

With rising bunker costs, there is an increasingly common practice of slow steaming in order to reduce the consumption of bunkers. Indeed it is now becoming usual to see a provision for "ecospeed" inserted into the charterparty. This is not always the case, however, and in the case of *Bulk Ship Union SA v Clipper Bulk Shipping Ltd (The "Pearl C")* [2012] 2 Lloyds Rep. 533, the Court confirmed that where an owner under a time charter unilaterally decides to slow steam, he will be liable for any resulting loss of time.

In *The Pearl C*, the owners had chartered the vessel to the charterers on an amended NYPE form for a period of about 9 to 12 months. The charterparty contained an on-delivery performance warranty of about 13 knots (in ballast and laden) in good weather conditions. It also incorporated the Hague-Visby Rules via the Clause Paramount, in particular, the Article IV Rule 2 "*Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (a) act, neglect or default of the master, mariner … or the servants of the carrier in the navigation or management of the ship*". The charterers withheld hire on the basis of underperformance of the vessel contending (1) the vessel had failed to meet her warranty on delivery, (2) the owners had failed to maintain the vessel in breach of clause 1, (3) the vessel had failed to proceed with utmost despatch in breach of clause 8, and/or (4) they were entitled to deduct time by way of off-hire under part 1 of the off-hire clause, clause 15: "I*n the event of loss of time from deficiency (…) accident or default of the master, Officers or crew or (…) breakdown of, or damages to hull, machinery or equipment (…) of the Vessel (…) or by any other similar cause preventing the full working of the Vessel, the payment of hire and overtime shall cease for the time thereby lost (…)*". The deduction pursuant to the off-hire clause would also mean that there would be no right for the owners to set off the savings in bunkers from the loss-of-time claim (a right which is only applicable to a damages claim).

The tribunal ruled against charterers in respect of bases (1) and (2) but in charterers' favour on both the failure to proceed with due despatch and off-hire (bases (3) and (4)). Part of the ruling was a factual finding that there was no defect in the hull/machinery of the vessel and no fouling, such that the only logical reason the vessel proceeded slower than the warranted speed must have been due to a deliberate decision of the master/crew.

The owners appealed contending (1) in relation to clauses 8 and 15, that the tribunal had erred in using the on-delivery warranty as the benchmark speed against which to measure the vessel's actual speed, as they had effectively turned the on-delivery warranty into a continuing warranty which could not be correct, (2) in relation to clause 15,

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underperformance resulting in reduced speed could not fall within the first part of clause 15 because reduction in speed was exclusively governed by part 2 of the clause: "*and if upon the voyage the speed be reduced by defect in, or breakdown of, any part of her hull, machinery or equipment the time so lost and the cost of any extra fuel consumed in consequence thereof shall be deducted from hire*"; and the second part of the clause was not engaged because the tribunal did not find any defect in, or breakdown of, the vessel's hull, machinery or equipment, and (3) even if there was underperformance, and a breach of clause 8 or off-hire under clause 15, owners were excused by Article IV Rule 2 of the Hague-Visby Rules on the basis it was an act, neglect or default of the master and/or crew in the navigation or management of the ship.

In relation to (1), the court held that there had been no error by the tribunal in using the on-delivery only warranted speed as a benchmark for the later performance of the vessel. As regards (2), the court rejected the owners' argument and held that such a situation could fall within part 1 of clause 15 as it was loss of time due to an act of the master and/or crew, i.e., the deliberate decision of the master to slow steam. Finally, dealing with owners' argument (3), the court held that the exemption of Article IV Rule 2 could not apply where there was a deliberate decision not to proceed with utmost despatch (as opposed to a negligent error in the management or navigation of the ship). As such, it upheld the tribunal's decision.

Whilst the particular facts of this case are somewhat unusual, in our view, the principles laid down in it, in particular the use of an on-delivery warranty as a benchmark against which to measure a vessel's actual later performance, are applicable to all such types of performance case. It is also clear that an owner under a time charter should take care only to slow steam if instructed to do so. Not all charterparties will give rise to speed claims which are covered by the off-hire clause and, therefore, they will be brought by way of a damages claim only. As such, as long as there is a causal link between the slow steaming of the vessel and the saving in bunkers, the amount saved in bunkers can be off-set against the loss-of-time claim.

Early redelivery

As the state of the market continues to be bad, it is increasingly the case that charterers who have chartered a vessel on a longer-term time charter wish to redeliver early. Until 2012, it was not clear what an owner's options were in the face of a charterer's statement that a vessel would be redelivered earlier than permitted under the charterparty: would he have to accept the early redelivery, seek alternative employment and claim damages for any loss, or could he refuse to accept the redelivery and continue to claim hire? However, the English Court provided guidance on the topic in *Isabella Shipowner SA v Shagang Shipping Co Ltd (The "Aquafaith"),* [2012] 2 Lloyd's Rep. 542 and it now seems that, in certain circumstances at least, an owner will be entitled to refuse redelivery and affirm the charterparty, claiming hire for the balance of the period.

The vessel was chartered on an amended NYPE form dated 19 September 2006 for 59-61 months. Charterers were not entitled to redeliver before the minimum 59-month period, which expired on 10 November 2011. In the event, on 6 July 2011 the charterers stated that they would be redelivering the vessel at the end of the current voyage. The owners refused to accept this intended early redelivery, but the charterers followed through and purported to redeliver the vessel on 9 August 2011, 94 days early.

The owners commenced arbitration and sought a partial final award confirming their entitlement to refuse the early redelivery, affirm the charterparty, and claim the balance of hire from charterers. The charterers argued that owners could not affirm the char-

terparty because (1) a charterparty was not a contract which the owners could complete without the cooperation of the charterers, and (2) the owners had no legitimate interest in performing the contract rather than accepting the redelivery and claiming damages.

The tribunal agreed with the charterers, but the court overturned the tribunal's decision and found in favour of the owners. As regards issue (1) above, the court considered the case law and stated that the key question was whether the owners could earn hire under the charterparty without the need for charterers to do anything. The answer to this question was yes. If the charterers failed to give any orders, the vessel would simply remain at charterers' disposal waiting for orders. If she ran out of bunkers, then the owners could supply more bunkers for charterers' account. In short, in order to complete their side of the bargain and earn hire, the owners did not need the charterers to do anything.

As regards issue (2), the court considered the Court of Appeal cases on "legitimate interest". In light of the authorities, the court concluded that an innocent party would only have no legitimate interest in maintaining the contract if damages were an adequate remedy and his insistence on maintaining the contract could be described as "wholly unreasonable", "extremely unreasonable" or, even, "perverse".

Applying these principles to the facts, the court held that with only 94 days left of a five-year time charter in a difficult market, where finding a substitute charter for the remaining period was impossible and trading on the spot market was difficult, it would be impossible to characterise the owners' stance in wishing to keep the charterparty alive in order to earn hire as unreasonable, let alone wholly unreasonable or perverse.

At present it is unclear at what point an owner *would* be required to accept redelivery of the vessel, mitigate his losses and claim damages. It remains to be seen if further guidance is provided in future cases.

Laytime exception clauses

The overriding principle under English law is that exception clauses with ambiguous wording will be interpreted against the party relying on the clause. The two cases we mention below show how the courts interpret laytime exception clauses.

In the first case, *Carboex SA v Louis Dreyfus Commodities Suisse SA*, [2012] 2 Lloyd's Rep 379, a nationwide haulage strike in Spain meant that no coal was removed from the terminal at the discharge port, which accordingly became congested. The chartered vessels waited at the port during the strike, but the strike ended before the vessels berthed and did not cause any interruption to the actual discharge process. Clause 9 of the charterparty read: "*In case of strikes … which prevent or delay the discharging, such time is not to count unless the vessel is already on demurrage.*" The owners argued that the exception clause did not apply, inter alia because the relevant cargo operations were not prevented or delayed by the strike. The Court of Appeal did not agree and held in favour of the charterers. The Court of Appeal held that clause 9 is "*clearly intended to transfer the risk of some delay caused by strikes"* and that there is "*nothing in the language of the clause itself to indicate that its operation was restricted to time lost while the vessel was alongside the berth*".

In the second case, *ED & F Man Sugar Ltd v Unicargo Transportgesellshaft Mbh (The "Ladytramp")*, [2012] 1 Lloyd's Rep 206, there was, prior to the vessel's arrival at the load port, a fire at the terminal normally used by the charterers. The fire destroyed the conveyor-belt system linking the terminal to the warehouse and the charterers ended up using a different terminal. Clause 28 of the charterparty read: "*In the event that whilst at or off the loading place the loading of the vessel is prevented or delayed by any of the following occurrences: … mechanical breakdowns at mechanical loading plants … governmental inter-*

ferences … time so lost shall not count as laytime." The charterers argued that they were able to rely on the exception clause and that no demurrage accrued. The High Court ruled in favour of the owners. First, the destruction of the conveyor belt by fire was not "*mechanical breakdowns at mechanical loading plants*". Secondly, the decision of the port authorities/the terminal to reschedule loading and discharging operations because of the fire was not "*government interferences*".

Demurrage where receivers refuse to discharge cargo

In *DGM Commodities Corp v Sea Metropolitan S.A. (The "Andra")*, [2012] 2 Lloyd's Rep 587, a vessel was chartered for the carriage of a cargo of frozen chicken legs from the United States to St. Petersburg. On 8 April during discharge it was discovered that some of the cargo was contaminated by gasoil. The vessel completed discharge on 14 April except for the cargo in the hold where the damaged cargo was located. On 15 April the receivers demanded a cash settlement in relation to the damaged cargo. The owners offered security in the form of a letter of undertaking from their P&I club whilst the receivers insisted on receiving a cash settlement as a condition for allowing discharge of the damaged cargo. On 21 April the local veterinary service imposed an order suspending the movement of cargo following an inspection on board the vessel. Half a year later, on 21 October, the owners and the receivers finally reached agreement for the damaged cargo to be re-exported on the vessel on the payment by the owners of a cash settlement. On 13 November the veterinary service gave permission for the re-export of the cargo and the vessel sailed from St. Petersburg on 25 November.

The owners claimed demurrage whilst the charterers argued that the charterparty had been frustrated due to the severe delay.

The High Court concluded that the delay caused by the veterinary service order as such was of a frustrating character, but nevertheless ruled in favour of the owners because the charterers were vicariously liable for the acts of the receivers. The High Court held that "*the frustrating event, namely the continued existence of the April order of the Veterinary Service, was itself caused by the conduct of the receivers in failing to discharge the cargo for so long as they were maintaining an unjustified attempt to be paid US$2 million"*. The High Court further held that "*as between the charterers and receivers, it was the receivers' obligation to discharge the cargo"* and *"the receivers were the agents or delegates of the charterers and the charterers remained responsible"*. Owners' claim for demurrage for the period of delay (approximately six months) accordingly succeeded, with the exception of certain days lost in April/May due to the cargo being damaged for reasons that owners were held responsible for.

This case illustrates that charterers typically will be responsible for failure to discharge. Although the veterinary service order in itself was a frustrating event, the actual cause of the delay was charterers' failure to complete the discharge operations.

Off-hire – loss of time

An interesting decision handed down in 2012 concerning the concept and interpretation of "loss of time" in a time charter was *Minerva Navigation Inc v Oceana Shipping AG (The "Athena")*, [2012] EWHC 3608 (Comm.).

The vessel loaded a cargo of wheat for carriage to Syria and bills of lading were issued showing discharge ports in Syria. The vessel sailed to Syria where the cargo was rejected. The charterers gave instructions for the goods to be carried to a substitute port – Benghazi, Libya. The change in discharge port obliged the charterers to return the original bills of lading in order for them to be reissued with a different destination. The owners were not obliged to deliver the cargo until the problems with the original bills of lading were resolved. Due to a problem with returning the original bills of lading, it took some time to resolve this matter.

The instructions given by the charterers on 19 January were as follows: "*Upon arrival please anchor at road port Benghazi and* [await] *our further instructions."* Contrary to these orders, the vessel sailed to international waters just off Libya and drifted there between 19 and 30 January in order to await resolution of the problems with the returning of the original bills of lading. On 30 January the problems were resolved and the vessel proceeded to port as ordered.

The off-hire clause read: "… *in the event of loss of time from … default of master … or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost …*".

The question was whether under clause 15 the vessel was off-hire where there had been a net loss of time in relation to the service immediately required of the vessel, since the vessel had not sailed to Benghazi as ordered, or whether it was in addition necessary for there to have been a net loss of time to the adventure overall, since the owners in any event were entitled to await resolution of the problems with the original bills of lading.

The High Court was bound by the arbitrators' finding of fact that even if the vessel had sailed directly to Benghazi as ordered the same problems with the returning of the original bills

of lading would have existed and would not have been resolved any earlier than 30 January.

The High Court held in favour of the owners: "*I consider that clause 15 in the present case permitted charterers to deduct time for the duration of the off-hire event, but only to the extent that there was a net loss of time to the chartered service. For this purpose it is not sufficient for charterers merely to show that, as regards the service immediately required, there was a net loss of time. The ordinary meaning of "time lost thereby" involves consideration of the chartered service …. not merely the duration of the off-hire event but also to the extent to which time was in fact lost to the chartered service."*

Saleform 93 – satisfactory quality

The general perception of sales made pursuant to *Saleform 93* (and previous versions of *Saleform*) under English law has been that they were "as is" sales, meaning that the vessel was taken over and accepted in the condition that she was in at the time of the buyer's pre-delivery inspection. Accordingly the buyer would not have any claim against the seller if it later turned out that the vessel had defects, i.e., if after delivery it turned out that the vessel was not of satisfactory quality.

In a judgment handed down in 2012, *Dalmare Spa v Union Maritime Ltd (The "Union Power")*, [2012] EWHC 3537 (Comm.), the High Court held that when a vessel is sold pursuant to the terms of Saleform 93, there is an implied term of the contract that the vessel shall be of satisfactory quality. This requirement follows from the English Sale of Goods Act 1979, although the parties may agree that the implied term concerning satisfactory quality shall not apply. The judge held that the following wording in Saleform 93 was not sufficiently clear to exclude the implication of the term: "*The vessel shall be delivered and taken over as she was at the time of inspection, fair wear and tear excepted.*" Accordingly, since the vessel upon delivery was not of satisfactory quality, the buyer's claim for damages succeeded in full.

Sellers need to be aware of this judgment. The sales contract must contain clear wording if the statutory implied term concerning satisfactory quality is to be excluded. Alternatively, we recommend using the new Saleform 2012 which includes an entire agreement clause that may be sufficient to exclude the application of the English Sale of Goods Act 1979, although there is already some debate as to whether the wording of the entire agreement clause is sufficiently clear to avoid the problem.

GUARANTEES

On-demand bonds and true guarantees – what is the difference? Review of two recent court cases.

By Ylva MacDowall Hayler

While the obligation to pay under a so-called on-demand bond (Norwegian: "*påkravsgaranti*") is entirely independent of the underlying contract, a true guarantee (Norwegian: "*selvskyldnerkausjon*") is accessory to the underlying contract, meaning that the guarantor has a secondary obligation to pay (or perform) in the event that the principal debtor under the underlying contract defaults on its obligations.

The two recent cases *Wuhan Guoyu Logistics Group Co. Ltd. & Another v Emporiki Bank of Greece ([2012] EWCA Civ 1629) ("Wuhan v Emporiki")* and *Norsk Tillitsman v Silvercoin Industries AS (Rt. 2012 p. 1267) (the "Silvercoin case")* illustrate the importance of clarifying what type of instrument to require, or issue, as security for the counterparty´s (or subsidiary´s) fulfilment of its obligations under, for example, a charterparty or a shipbuilding contract. They also illustrate the difficulty of drawing a clear distinction between on-demand bonds and true guarantees.

Guarantees and on-demand bonds under English law – the general principles

According to English law, the guarantor under a true guarantee undertakes to ensure that the principal debtor performs its obligations under the underlying contract, a so-called "see to it"

obligation. The guarantor´s obligation falls due as soon as the principal debtor fails to make payment, or otherwise defaults, under the underlying contract. This means that the beneficiary can enforce the guarantee without any need first to give the guarantor a formal notice of default or demand. It is however both possible and common to include a stipulation in the guarantee to the effect that a notice of default must be given, or a demand made, before the beneficiary can enforce the guarantee. If the guarantee contains such a stipulation, the guarantor´s liability to pay does not fall due (and the statute of limitations does not begin to run) until: (i) the principal debtor defaults under the underlying contract, **and** (ii) a demand has been made by the beneficiary.

On-demand bonds, on the other hand, are much more analogous to so-called letters of credit (Norwegian: "*remburs*") and have in practice been treated as substitutes for cash. As a general rule the issuer of an on-demand bond, which will usually be a bank, will not be concerned with the rights or wrongs of any underlying dispute. Once a demand has been made (or documents presented) in accordance with the requirements of the on-demand bond, the issuer must pay in accordance with the terms of the bond, regardless of how unfair that may be to the principal debtor, who in the end will have to indemnify the issuer.

Guarantees and on-demand bonds under Norwegian law – the general principles

Norwegian law has traditionally distinguished between so-called "*simple guarantees*" (author´s translation of the Norwegian: *simpel garanti*) and true guarantees (Norwegian: *selvskyldnerkausjoner*).

A "simpel garanti" will not fall due until the beneficiary has exhausted all means of obtaining payment from the principal debtor, including debt enforcement. A "selvskyldnerkausjon", on the other hand, becomes due and payable on demand if the principal debtor defaults under the underlying contract. The general rule under Norwegian law is that a guarantee is a "simpel garanti" *unless* the wording stipulates otherwise. This is different to the position under English law, where the general rule is that a guarantee imposes a "see to it" obligation whereby the guarantor becomes liable immediately upon the principal debtor´s default.

Both the "simpel garanti" and the "selvskyldnerkausjon" are accessory to the underlying contract and the obligations of the guarantor are co-extensive with those of the principal debtor. Accordingly the obligations of the guarantor can never be either more or less onerous than those of the principal debtor, whether in terms of amount, time for payment or the conditions under which the principal debtor is liable. However, the fact that a "selvskyldnerkausjon" is payable on demand, immediately on default by the principal debtor, means that the burden of raising any objection lies on the guarantor. This means that if the guarantor fails to pay after receiving a demand under the guarantee, and a court finally decides in favour of the beneficiary, the guarantor will be liable to pay default interest from the date the demand was made in addition to the amount originally payable under the guarantee.

A third category of guarantees, "påkravsgarantier", has been borrowed from, and (to a certain extent) treated similarly to, on-demand bonds under English law. The issuer of a "påkravsgaranti" will therefore, as mentioned above, not be concerned with the rights or wrongs of any underlying dispute. The obligation to pay is independent of the obligations under the underlying contract. This means that once a demand has been made in accordance with the requirements of the "påkravsgaranti", the issuer must pay regardless of whether the principal debtor has defaulted.

PHOTO: COURTESY OF HÖEGH LNG

Surety's defences – only available under a true guarantee

Under English law, and to a certain extent under Norwegian law, the guarantor under a true guarantee has

PHOTO: COURTESY OF HÖEGH LNG

certain specific "surety's rights/defences" that may affect its obligation to pay under the guarantee. Such rights should not be confused with the right (that exists under both English and Norwegian law) to invoke the same objections as those available to the principal debtor. This latter right arises from the general principle of co-extensiveness between the obligations under the guarantee and under the underlying contract, i.e., the guarantor´s obligations can never be either more or less onerous than those of the principal. The surety's defences provide the guarantor with special defences due to its position as surety. In certain circumstances these defences may release the guarantor from all obligations under the guarantee.

Examples of circumstances that may allow the guarantor to invoke a surety's defence include

a) a defect that renders the principal debtor's obligation either illegal, void, or unenforceable,

b) a material variation of the terms of the underlying contract that has a negative impact on the guarantor's liabilities under the guarantee,

c) the discharge of a co-surety that is either jointly or jointly and severally liable with the guarantor, and

d) the loss of other securities held by the beneficiary that will adversely affect the position of the guarantor.

In order to prevent the guarantor from being discharged in these types of situations, true guarantees often include: (i) a statement that the guarantor is liable "as a primary obligor and not merely as surety", and (ii) a lengthy list of waivers (often with a heading such as "Survival of the guarantor's liability" or "Waiver of defences").

As such defences are only available to a surety under a true guarantee, if a document excludes or limits the defences available to the guarantor, this tends to suggest that the document is indeed a true guarantee. Conversely, the absence of any such exclusions or limitations will suggest that the document is an on-demand bond, since such clauses would usually serve no commercial purpose in this context.

The decisive factors for the English Court of Appeal

In *Wuhan v Emporiki* the claimant, a Chinese shipyard, had entered into a shipbuilding contract for the construction of two bulk carriers. The contract required the buyer to secure its second instalment through a payment guarantee. The buyer did not pay the second instalment, alleging that the requirements for payment had not been fulfilled under the contract. The seller therefore turned to the buyer´s bank and demanded payment under the payment guarantee. The buyer´s bank contended that the payment guarantee was a true guarantee, meaning that the bank would not be liable to pay under the guarantee if the second instalment had not in fact fallen due.

The Court of Appeal in *Wuhan v Emporiki* drew up two categories of arguments: (i) those favouring the conclusion that the document

was a true guarantee, and (ii) those favouring the conclusion that it was an on-demand bond. Arguments in the first category included the following: the instrument was called a "payment guarantee" not an "on-demand bond", the bank had guaranteed "*the due and punctual payment by the Buyer of the 2nd instalment*", the bank had to pay "*in the event that the Buyer fails punctually to pay the second instalment*", and the guarantor's obligation was not to be affected or prejudiced by any variations or extensions of the terms of the shipbuilding contract or by the grant of any time or indulgence.

Arguments in favour of the instrument being an "on-demand bond" were inter alia that: payment was to be made on the seller's first written demand stating that the buyer had been in default of the payment obligation for 20 days, payment was to be made "immediately" without any request being made to the seller to take any action against the buyer, and the bank's obligations were not to be affected or prejudiced by "*any dispute between the Seller and the Buyer under the shipbuilding contract or by any delay by the Seller in the construction or delivery of the vessel*".

The court´s conclusion after weighing up these various points was that the instrument in question was an on-demand bond.

One of the decisive factors in the court's conclusion seems to have been a passage in *Paget's Law of Banking*: "Where an instrument (i) relates to an underlying transaction between the parties in different jurisdictions, (ii) is issued by a bank, (iii) contains an undertaking to pay "on demand" (with or without the words "first" and/or "written") and (iv) does not contain clauses excluding or limiting the defences available to a guarantor, it will almost always be construed as a demand guarantee".

Reasons for the Norwegian Supreme Court's conclusion in the Silvercoin case

In the Norwegian *Silvercoin* case, the claimant, Norsk Tillitsmann (on behalf of the Bond Note Holders (Norwegian: *obligasjonseiere*)), had entered into three loan agreements in 2006 and 2007 with Thule Drilling ASA, for the financing of the construction and upgrading of certain drilling rigs. Thule Drilling ASA defaulted on payment in 2008, as a result of which Thule Drilling ASA and Norsk Tillitsmann entered into negotiations. The parties agreed that Thule Drilling ASA must repay the loans before 15 November 2008, either by selling the drilling rig *Thule Power* or by issuing new shares in the company in order to generate new capital. In addition, the repayment was secured by new guarantees from the shareholders of Thule Drilling ASA. By 15 November 2008, neither *Thule Power* had been sold nor the share issue completed and Norsk Tillitsmann demanded payment under the guarantees. One of the guarantors, Silvercoin, claimed that Norsk Tillitsmann had conducted itself in a disloyal and illegal manner towards Thule Drilling ASA in the negotiations following the default on the lLoan agreements and had thus prevented the implementation of a fair repayment solution for the principal debtor. On this basis, Silvercoin denied that it was obliged to pay under the guarantee. Norsk Tillitsmann argued that the instrument was a pure on-demand bond, independent of the underlying contract, meaning that no defences to liability were available.

The Supreme Court concluded that the guarantee issued by Silvercoin was a "selvskyldnerkausjon", i.e., accessory to the loan agreement. The

guarantor therefore had the same rights and defences as the principal debtor, meaning that the dispute under the underlying contract, i.e., whether the loan was due or not, had to be decided first.

The court emphasised that even though the wording of a contract between two commercial parties should be interpreted objectively, and even though the guarantee in question contained many words and expressions that were commonly used in on-demand bonds (such as, for example, "*as their own debt"/"irrevocably and unconditionally guarantee"/"immediately due on first demand*"), it was nevertheless important to evaluate how commonly on-demand bonds were used in this type of situation/business sector, as well as how familiar the parties would have been with these types of words and expressions . The court also emphasised that the use of individual words and expressions could not be viewed in isolation. The guarantee wording had to be read in the context of the entire instrument in order to determine whether the instrument was an on-demand bond or a true guarantee.

One of the provisions that the claimant, Norsk Tillitsmann, asserted was important for the interpretation of the guarantee, and that suggested the existence of an on-demand bond, was Section 5. According to this provision, "*the obligations of the Guarantors hereunder shall be valid and enforceable irrespective of the genuineness, validity, regularity or enforceability of the Loan Agreement, provided that any lack of genuineness, validity, regularity or enforceability is due to (i) acts omissions or misrepresentations of the Borrower or (ii) any event that the Borrower otherwise is responsible for in relation to the Loan Agreements.*"

The Supreme Court, however, concluded that a prerequisite for the operation of the provision was that the circumstances described therein were caused solely by the borrower´s actions, omissions or misrepresentations. In the court's view, if the intention had been for the guarantor to have no defences whatsoever deriving from the underlying loan agreement, this would have been expressed more explicitly (for example, by deleting the qualifying wording). The provision as it stood suggested that the intention had not been to waive all defences deriving from the underlying contractual relationship, but to ensure that the instrument was a true guarantee/"selvskyldnerkausjon", under which the guarantors waived their right to invoke some, but not all, of their defences.

As the guarantee had been drafted by representatives for Norsk Tillitsmann, the court found that any ambiguity should be interpreted against the interests of Norsk Tillitsmann, who was by far the most experienced of the parties involved.

Finally the Supreme Court emphasised that the subsequent conduct of the parties was relevant to the interpretation of the guarantee. As the guarantee was consistently described as a "selvskyldnergaranti" in the summons, obviously Norsk Tillitsmann's legal advisors must originally have considered the guarantee to be a "selvskyldnergaranti".

Conclusions

As the above cases illustrate, there is no clear dividing line between on-demand bonds/"påkravsgarantier" and true guarantees ("selvskyldnerkausjoner"). The distinction is important, however, as under the latter the guarantor may be able to invoke certain defences (surety defences and the defences under the underlying contract).

Under English law, for reasons including the findings in W*uhan v Emporiki*, an instrument will most likely be construed as an on-demand bond if it, among other factors: (i) is issued by a bank, (ii) contains an undertaking to pay "on demand", and (iii) does not contain clauses excluding or limiting the defences available to the guarantor. If the document is clearly inconsistent with these characteristics, however, the outcome may be different. For example, if the court rules that an instrument that includes no waiver of surety's defences at all is a true guarantee, the beneficiary may have the unpleasant experience of finding that what he thought was an on-demand bond is in fact a true guarantee, subject to all the surety's defences potentially available to the guarantor.

Under Norwegian law, the wording and expressions used in a guarantee between two commercial parties will be decisive for the construction of its terms. If the wording is ambiguous, however, expressions and words will be read in the context of the rest of the wording of the guarantee. This means that the court will not look at individual words and expressions in isolation in order to decide the nature of the guarantor's obligation.

Our conclusion and advice must be that the parties, whether under English or Norwegian law, must decide in advance what type of instrument they want/need. Having made this decision, it is vital to draft the instrument carefully and make sure that the wording is consistent and avoids any ambiguity.

CHARTERING OF SUBSEA VESSELS

PHOTO: COURTESY OF BOURBON OFFSHORE NORWAY AS

Charterparties for subsea operations – certain matters that are not adequately dealt with in Supplytime 2005 where additional wording is recommended

By Norman Hansen Meyer and Knut Erling Øyehaug

Many of our offshore members either own or charter in vessels that are employed in subsea operations. Such operations may involve a wide variety of activities such as pipelaying, construction, ROV/diving operations and well interventions. During the last couple of years we have seen an increased focus on maximising output and extending the lifespan of existing fields in the North Sea. This, in combination with the exploration of new offshore fields in areas such as Brazil and the west coast of Africa, have spurred demand for vessels capable of performing subsea support services. Looking at such subsea operations from a contractual perspective, we can identify two sets of contracts, each with different types of contractual parties and different scopes.

On the one hand we have contracts entered into between customers (e.g., oil companies developing a new field or national governments requesting a new subsea cable) and subsea contractors. In such contracts, the services provided by the "spread" (i.e., the vessel and associated equipment) may only form a limited part of the entire scope of work performed by the contractor. For instance, the main obligation of the contractor under such a contract might involve the engineer-

ing, procurement and construction of advanced cables, with the cable laying, and the provision of the spread, only forming a minor part of the entire scope of the work. Such contracts will often use terminology, and be based on a contractual structure, normally found within the offshore construction industry.

On the other hand we have contracts between subsea contractors and shipowners. These contracts deal with the chartering of the "spread". Generally they are structured as time charters and include terms and conditions typically found in charters for offshore support vessels, such as *Supplytime 2005*. In the following we focus on these latter contracts, i.e., charterparties between shipowners and subsea contractors.

The provisions contained in charters for subsea support vessels may of course vary depending on the requirements of the parties, the area of operation, the type of vessel and the kind of services to be provided. As a starting point, a standard contract such as BIMCO's *Supplytime 2005*, which is perhaps more suitable for other kinds of offshore vessels, such as PSVs and AHTS vessels, will cover several of the more basic terms and conditions that should be included in a charter for subsea services. However, *Supplytime 2005* does not deal adequately with some characteristics of subsea services. This means that the parties will have to agree on additional wording.

Worldwide operations – cost and risks

Vessels used for subsea operations are often chartered on a long-term basis and employed in various jurisdictions. Lengthy operations in a single jurisdiction will often cause both charterers and owners to incur additional costs and expenses that were not contemplated when they entered into the charterparty. For instance, the parties may initially have contemplated that the vessel would perform subsea services in the North Sea. After a couple of years, however, the charterers may have tendered for other projects worldwide and ended up with a subsea construction contract in, for example, Australia. The vessel will then have to comply with local content rules (e.g., employment of a certain number of Australian nationals) and strict environmental regulations. Significant costs may be incurred in connection with the import and export of the vessel, and the vessel may also need to undergo extensive modifications and approvals in order to be allowed to carry out operations in the jurisdiction in question. In addition, both charterers and owners may face significant tax exposure. Clearly it is best to avoid uncertainty about the allocation of such costs and risks, and we strongly advise our members to ensure that their charters deal specifically with these matters. A common solution is for the charter to specify that the owners shall provide and pay for all permits, licences, export/import duties and cover all crew costs in respect of operations within one particular area (e.g., "the North Sea"), but that owners shall be entitled to an increase in the rate of hire to compensate for increased costs and expenses resulting from operations outside this area. In addition, the parties sometimes agree that charterers shall bear the risk of compliance with any local rules and requirements, such as providing work permits for crew and the employment of local crew, while owners shall use due diligence to assist charterers. We often see similar provisions concerning tax, i.e., that owners will be responsible for any fees and taxes levied upon

them, their vessel or their crew in respect of operations in (e.g.) the North Sea, while charterers shall compensate owners for any increased tax exposure caused by operations outside this area.

Crew

The charterers of vessels used for subsea operations often need to have a significant number of their own personnel on board the vessel as well as the personnel of their customers and subcontractors. It is not uncommon for owners' crew to constitute only a small proportion of the total personnel on board the vessel. Under the Maritime Labour Convention 2006 (the "MLC"), which comes into force in August 2013, it is the "shipowner's" (as defined in the MLC) responsibility to ensure that all seafarers on board the vessel comply with the rules of the convention. Since most of the charterers' personnel may be considered "seafarers" under the MLC, the charterparty should include a dedicated MLC clause. This should make charterers responsible for compliance and ensures that charterers will indemnify the owners from the consequences of any non-compliance with MLC requirements relating to charterers' personnel (and the personnel of charterers' customers and subcontractors).

Most charterparties for subsea services will provide undertakings by owners to provide a minimum level of manning on board the vessel that will exceed the flag state's minimum manning requirements. For instance, owners often warrant that the vessel shall be provided with at least four dynamic positioning operators ("DPOs") and two certified crane drivers. This is to ensure that the vessel has round-the-clock capability to perform subsea operations. It is common for owners' personnel to be requested to attend meetings with charterers and their customers, and further for owner's crew to be requested to undertake specific training arranged by charterers' customers. The charterparty should state clearly whether charterers are to meet the costs of additional personnel as well as costs such as those incurred in relation to travel, accommodation and additional salaries/overtime for owners' personnel attending such meetings or training.

Since the vessel may remain continuously offshore for significant periods while performing subsea operations, crew changes will often become more complicated and operations far from the vessel's home port will generally incur additional costs and expenses. Charterparties for subsea services should thus include a provision dealing with crew changes. Often the parties will agree that owners shall arrange and pay for crew changes taking place within a specified area (e.g., "the North Sea") while charterers shall compensate owners for additional costs incurred as a consequence of crew changes outside this area. Alternatively, the parties may agree that charterers shall arrange for crew changes (by using their own or their customers' transportation) between the vessel and shore, while owners shall pay for the costs of transporting the crew from their home countries to the port nearest the vessel's operations. It is important for such clauses also to deal with the consequences of delays. Typically the charter will provide that charterers shall indemnify owners for any consequences of delays caused by charterers' deviations from owners' notified crew-change schedules or any delays in respect of transport provided

by charterers or their customers.

Charterers' and owners' equipment
Charterers often require their own equipment such as ROVs/LARS (Launch and Recovery Systems), lay towers or carousels to be installed on board the vessel. In addition, particular projects may necessitate modifications to the vessel. Although *Supplytime 2005* includes provisions dealing with these matters, we would always advise the parties to agree on additional wording. For instance, prudent charterers should ensure that where necessary they will have a right of access to the vessel during pre-project mobilisation. Preferably the charterparty should also contain a detailed description of "Charterers' Equipment", as well as clear wording specifying which party shall be responsible for maintaining, insuring and operating such equipment. It is also worthwhile including a specific statement to the effect that the breakdown of such equipment shall not put the vessel off hire, even if this is apparently covered by the actual off-hire clause. Upon expiry of the charter period, the charterers will usually have an obligation to reinstate the vessel at their own time and cost. In some cases, however, it may be practical to agree in advance that certain items of equipment and certain installations (e.g., IT and telecommunications cabling) shall remain on board and be taken over by owners upon redelivery.

Pursuant to *Supplytime 2005*, owners undertake to maintain the vessel and its equipment inter alia in accordance with class. However the requirements of charterers' customers regarding dynamic positioning and cranes will often be more stringent than those of class. Accordingly charterers will often require certain aspects of the vessel's equipment and systems to fulfil requirements laid down by organisations such as the International Marine Contractors' Association (IMCA), as well as for owners regularly to perform specific tests, such as FMEAs (failure modes and effects analyses).

Supplytime 2005 includes provisions concerning maintenance allowances and owners' right to have the vessel dry-docked at regular intervals. As mentioned above, vessels used for subsea services will often have various items of charterers' equipment installed on board. Clearly such equipment can most practically be repaired and maintained during dry-docking. Some subsea charterparties thus state expressly that owners must allow charterers to carry out repair and maintenance during dry-docking, always provided that such work does not interfere with the dry-docking schedule and/or that the vessel shall be on-hire for any excess time, and that charterers shall compensate owners for any additional expenses. Conversely, some charters state specifically that owners may carry out maintenance activities (without eating into their accrued maintenance allowance) while the vessel is lying idle or while charterers are mobilising for their next project.

Indemnities
Subsea operations often involve high-value assets, and the consequences of any errors, such as damage to offshore installations or subsea umbilicals, may be far reaching. In addition, parties performing subsea operations will always have significant exposure given the potential for oil pollution. In most projects, charterers and their customers will be better placed to obtain adequate insurance for such risks. This is reflected in *Supplytime 2005*, which allocates risk on a knock-for-knock basis, whereby charterers as a starting

PHOTO: SIMON MØKSTER SHIPPING AS

point must indemnify owners for any claims caused by loss or damage to inter alia equipment owned by charterers or their customers. To avoid any uncertainty, we advise widening the definition of "Offshore Units" in the "Definitions" clause to include, for example, "subsea installations or objects such as wellheads, umbilicals, cables and pipelines". In addition, due to the inherent risk that the vessel may damage subsea installations owned by third parties (not only members of "Charterers' Group") while performing subsea operations, the charterparty should include a provision dealing with any such third-party loss or damage. This provision should oblige charterers to indemnify owners from the consequences of any loss or damage to any subsea installations or objects.

Charterers often have the benefit of significant indemnities from their customers, including, for example, indemnities in respect of liability for actual or potential pollution damage and damage to offshore installations. To ensure that owners will enjoy the same indemnities, the indemnities clause should specifically oblige charterers to extend to owners the protection of any indemnities provided by their customers. Finally, if charterers have entered into an EPCI (Engineering, Procurement Construction and Installation) or similar contract with a customer, charterers will usually need to take out a CAR (construction all risks) insurance policy. Generally this will cover damage to the work or deliverables, as well as liability for any loss or damage caused by, or during the installation of, the contract object. Owners should ensure that charterers have an obligation (at least a "best endeavours" obligation) to ensure that owners are listed as co-assured on any such policy.

At Nordisk we advise many of our offshore members on the drafting and amendment of charterparties for subsea operations. Due to the recent increase in the worldwide demand for support vessels for subsea operations, we are anticipating a steady increase in related enquiries from our members.

LEGAL STAFF

Georg Scheel
Managing Director
Born 1950, graduated from the University of Oslo in 1974, where he was assistant professor from 1973 until 1975, when he joined the Office of the Attorney General. In 1975 Mr. Scheel received the King's gold medal for his book on legal questions concerning drilling rigs. In 1977 he was admitted to the Bar of the Supreme Court of Norway. He has extensive experience as a litigator and arbitrator. Mr. Scheel joined Nordisk in 1980, becoming Deputy Managing Director in 1986 and Managing Director in 2000.

Frode Grotmol
Deputy General Manager
Born 1949, graduated from the University of Oslo in 1976. Mr. Grotmol was a deputy judge before joining the Office of the Attorney General in 1977. He was admitted to the Bar of the Supreme Court of Norway in 1981. Mr. Grotmol is a member of Intertanko's Documentary Committee and was formerly Vice Chairman of the IBA's Maritime and Transport Law Committee. Mr. Grotmol has extensive experience as a litigator and arbitrator. He joined Nordisk in 1981 and was appointed Deputy General Manager in 2000.

Knut Erling Øyehaug
Born 1959, graduated from the University of Oslo in 1985. He holds a Licentiatus Juris degree for his thesis on legal issues pertaining to drilling rigs. Mr. Øyehaug is an experienced litigator who has handled large-scale offshore and shipping disputes, and provides legal advice related to offshore projects, shipbuilding, sale and purchase, charterparties, pool- and joint venture agreements etc. He joined Nordisk in 1986, serving as a deputy judge from 1988 to 1989. He has also been a partner at a major Oslo law firm.

Lasse Brautaset
Born 1957, graduated from Princeton University in 1980 and the University of Oregon School of Law in 1985. After completing the Washington State bar examination he moved back to Norway and took up an assistant professorship at the Scandinavian Institute of Maritime Law, later becoming an in-house lawyer at Den norske Creditbank. Mr. Brautaset joined Nordisk in 1989. In 2002 he obtained a Norwegian law degree. He is co-author of the standard textbook "Scandinavian Maritime Law 3rd edition (2011)".

Susan Clark
Born 1957, graduated from the George Washington University in 1984. She also holds a BA in Political Science from Pennsylvania State University. Ms Clark is admitted to the bar in Washington, D.C. and New York and worked as a litigation attorney before accepting a research fellowship at the Max Planck Institute in Germany. In 1992 Ms Clark moved to Norway, joining Nordisk the same year. Ms Clark is an experienced litigator, has lectured at the University of Oslo in contracts law and has served on a BIMCO documentary committee concerning U.S. security measures.

Egil André Berglund
Born 1970, graduated from the University of Oslo in 1996, where he has since served as an external examiner and lectured in tort/contract law. Mr. Berglund joined Nordisk in 1997. Mr. Berglund has extensive litigation experience and his field of expertise includes the negotiation and litigation of repair and conversion contracts, marine insurance, ship brokerage and CoAs. In January 2007 he became head of Nordisk's new Singapore office. After two successful years in Singapore, he moved back to the Oslo office in January 2009.












Michael Brooks
Born 1956, graduated from the University of Bristol in 1978. In 1981 he joined Sinclair Roche & Temperley in London and in 1989 moved to their Hong Kong office, where he became Head of Litigation. Mr. Brooks is a Fellow of the Chartered Institute of Arbitrators, is on its panel of approved arbitrators in London and on that of the Hong Kong International Arbitration Centre. He is visiting professor at Dalian Maritime University and an external examiner for the University of Oslo. He joined Nordisk in 1999.

Henrik Aadnesen
Born 1975, graduated from the University of Oslo in 2000. Before joining Nordisk in 2001, he was a research assistant at the Scandinavian Institute of Maritime Law. Mr. Aadnesen has extensive experience of contentious and non-contentious offshore work, as well as other non-contentious areas and is head of our transactions and finance group. Mr. Aadnesen is the author of commentaries (in the volume *Norsk Lovkommentar*) on the chapters on shipowners' liability in the Maritime Code. He is also co-editor of *Nordiske Domme* (the Scandinavian transport law report journal).

Joanna Evje
Born 1978, graduated from the University of Cambridge in 2001 and was called to the Bar of England and Wales in 2004. After completing a year's experience at 20 Essex Street chambers she joined Nordisk in 2006. Ms Evje offers assistance in all areas of the maritime and offshore industry, specialising in queries and disputes arising out of charterparties and bills of lading as well as drilling contracts and contracts for the conversion and operation of FPSOs. As a barrister, she has extensive expertise in English law litigation work as well as providing English law advice on non-contentious matters.

Karl Even Rygh
Born 1975, graduated from the University of Oslo in 2000. Mr. Rygh also holds an LLM in maritime law from the University of London. After seven years in the shipping group of the Bergen office of leading Norwegian law firm Thommessen, he joined Nordisk in 2007. Mr. Rygh has considerable experience in newbuilding contracts, ship financing, sale-and-purchase and bareboat transactions.

Joanne Conway-Petersen
Born 1978, graduated in 2001 from the University of Bristol, winning the Sinclair, Roche & Temperley Prize for Best Performance in Shipping Law in her final year. After completing her legal studies at Cardiff Law School, Ms Conway joined Stephenson Harwood as a trainee solicitor, qualifying into the Shipping Litigation department in 2006. She has significant experience of both High Court litigation and London arbitration and specialises in dry shipping and offshore contracts, including charterparty, bill of lading, saleform and shipbuilding contract disputes. Ms Conway joined Nordisk in 2009.

Norman Hansen Meyer
Born 1980, he graduated from the University of Oslo in 2006. Mr. Meyer held a research assistant post at the Scandinavian Institute of Maritime Law during the final year of his studies. Mr. Meyer also holds an LLM (MJur) degree from the University of Oxford. Before joining Nordisk in 2011, Mr. Meyer held positions at Wallenius Wilhelmsen Logistics and Wilh. Wilhelmsen Investments in Australia, and worked as an associate in the leading Norwegian law firm Thommessen. Mr. Meyer has also served as a deputy judge. He specialises in offshore contracts and dispute resolution.

Paige Young
Born 1982, Ms Young received her BA from SOAS in 2004, her JD from Northeastern in 2010 and her LLM in Admiralty from Tulane in 2011, where she was the Harry F. Stiles Scholar. Her thesis won the 2011 Bell, Ryniker & Letourneau Admiralty Writing Competition. Prior to joining Nordisk, Ms Young gained work experience in the maritime practices of Frilot LLC in New Orleans, and Ehlermann Rindfleisch Gadow in Hamburg. Ms Young is admitted to the New York Bar and is a member the Maritime Law Society of the United States.

Ylva MacDowall Hayler
Born 1973, graduated from the University of Uppsala with a LLM in 1997, including studies in maritime law at the University of Oslo in 1996. Ms Hayler supplemented her legal education by studying micro- and macro-economics and financial reporting and analysis at the Norwegian Business School BI. Before joining Nordisk in 2012, Ms Hayler worked for five years at the Norwegian law firm Schjødt and thereafter for six years as an in-house lawyer at Nordea Bank Norge ASA, where her responsibilities included the provision of legal services to the shipping department.

Anders Evje
Born 1980, graduated from the University of Oslo in 2007. During the last year of his studies he held a research assistant's post at the Scandinavian Institute of Maritime Law. After working as a trainee at the Norwegian law firm Thommessen and at the Office of the Attorney General, Mr. Evje joined Nordisk in 2007. In 2010 he left Nordisk to join the law firm BA-HR, but returned to Nordisk in 2012. His areas of expertise include the negotiation of shipping and offshore contracts, dispute resolution and sale and purchase.

Scarlett Henwood
Graduated from the University of Sheffield with a Law and German degree in 2005. Ms Henwood qualified as a solicitor at Ince & Co in London in 2009. Her practice at the firm focused on shipping and energy/offshore where she acted in High Court disputes, as well as arbitration. In August 2011 she was seconded to Nordisk where she continued to be involved in shipping and energy/offshore disputes, but also started working for the non-contentious shipping and offshore department. On 1 September 2012 she joined Nordisk as a permanent employee.

Mats E. Sæther
Mr. Sæther joined Nordisk in 2013, after working for 10 years as a shipping lawyer at leading Norwegian law firms Wikborg Rein and BA-HR. Mr. Sæther's experience covers both maritime and commercial law, and he has extensive experience in arbitration and litigation, including charter party and marine insurance disputes. Mr. Sæther was recommended in the legal guide Legal 500 (2013) within the fields of maritime law, offshore construction and shipbuilding, including for his "strong reputation in salvage disputes".





LEGAL STAFF AT OUR SINGAPORE OFFICE:




Magne Andersen
Born 1973, graduated from the University of Oslo in 2000. He held a research assistant post at the Scandinavian Institute of Maritime Law during the final year of his studies. In 2001 he joined the law firm BA-HR as an assistant attorney, before joining Nordisk in 2002. Mr. Andersen has considerable experience drafting and negotiating contracts, as well as in litigation in several jurisdictions. He is also co-editor of *Nordiske Domme* (the Scandinavian transport law report journal). In early 2009 Mr. Andersen moved to Nordisk's Singapore office where he is now Managing Director.

Jude McWilliams
Graduated in 2004 from the University of Manchester with a BA (Hons) degree in law. She completed the Legal Practice Course at BPP School of Law, Manchester in 2006. Ms McWilliams has particular expertise in LMAA, SIAC and ICC arbitration/litigation having been involved in several major international trade disputes in various jurisdictions. Specialising in commercial dispute resolution with a focus on charterparties, bills of lading and contracts of affreightment, before joining Nordisk she was employed as an associate solicitor at Holman Fenwick Willan Singapore.

Tom Pullin
Born 1982, graduated 2001 from the University of Westminster. Mr. Pullin was called to the Bar as a non-practising barrister in 2006. He went on to spend six years at London law firm Stephenson Harwood. Mr. Pullin qualified as a solicitor in 2009. He has experience of both contentious and non-contentious work in the shipping, shipbuilding and offshore industries with particular expertise in charterparty and shipbuilding disputes both in arbitration and in the High Court. Mr. Pullin spent six months at Nordisk in 2011 and joined the Singapore office in 2012.

Ian Fisher
Born 1973, graduated from the University of Southampton in 1995. After completing his legal studies at the College of Law, he joined Ince & Co as a trainee solicitor and qualified in 2001. He has worked in London and Tokyo as well as Singapore where he is currently based. He has considerable experience in conducting international arbitrations, in numerous countries under various rules, with a particular emphasis on shipping, shipbuilding and offshore disputes. Before joining Nordisk in April 2013, Mr. Fisher was a partner at a leading global law firm.

FINANCIAL STATEMENT 2012

Summary of Audited Accounts

All amounts in 1000 NOK	2012	2011
PROFIT AND LOSS ACCOUNT		
OPERATING REVENUES AND EXPENSES		
Total operating revenues	103 588	109 375
OPERATING EXPENSES		
Legal fees	-1 109	9 246
Personnel expenses	77 730	70 079
Depreciation of fixed asssets	2 439	2 379
Other operating expenses	19 552	16 524
Total operating expenses	98 612	98 227
OPERATING PROFIT	4 976	11 148
Net financial income	1 273	390
PROFIT BEFORE TAX	6 249	11 538
Tax expense	1 756	3 680
Profit for the year	4 493	7 858
ASSETS		
Intangible assets	1 238	436
Fixed assets	19 300	21 397
Financial assets	5 503	7 748
Total non-current assets	26 041	29 581
CURRENT ASSETS		
Debtors	9 256	13 594
Shares in money market and mutual funds	37 094	28 469
Deposits	42 556	24 692
Total current assets	**88 906**	**66 755**
Total assets	114 947	96 336
EQUITY AND LIABILITIES		
Total equity	47 593	43 100
LIABILITIES		
Total long-term provisions	9 918	8 326
Current liabilities		
Outstanding legal fees	4 710	-360
Northern Shipowners' Defence Club Ltd.	22 583	9 797
Other current liabilities	30 143	35 473
Total current liabilities	**57 435**	**44 909**
Total equity and liabilities	114 947	96 336

CASH FLOW STATEMENT

All amounts in 1000 NOK	2012	2011
Cash flow from operating activities		
Operating profit before tax	6 249	11 538
Tax paid	-4 306	-2 957
Depreciation	2 439	2 379
Profit/loss from sale of assets	-120	0
Difference between pensions expense and premiums and pensions paid	3 239	2 179
Changes in debtors	4 935	-4 303
Changes in liabilities	14 274	4 127
Net cash from operating activities	26 710	12 963
Cash flow from investment activities		
Investments in fixed assets	-694	-4 593
Proceeds from sales of fixed assets	473	0
Changes in other investments	-8 626	-7 201
Total cash flow from investment activities	-8 846	-11 794
Cash flow from financing activities		
Net change in cash	17 863	1 169
Cash and bank deposits 01.01	24 692	23 523
Cash and bank deposits 31.12	42 556	24 692

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