FUTURE INSIGHTS WITH NORDISK'S MANAGING DIRECTOR, MATS E SÆTHER

You are a fan of maritime history and something of an expert when it comes to Nordisk's long unique history, why do you think Nordisk has endured over the years and how do you plan to develop the club's strengths further in the future?

I have been a fan of ships and the sea since I was a kid and always enjoyed maritime history. It is therefore no coincidence that I became a shipping lawyer and ultimately a Nordisk lawyer.

When Nordisk celebrated its 125 anniversary, I wrote about the history of Nordisk for our anniversary edition of the Annual Report. When writing the piece, I was struck by both how much has changed over the years, but also how much has stayed the same: Ships become delayed by weather or other reasons, which causes legal issues. Ships deviate or use more fuel than expected; sanctions and other restrictions caused problems 132 years ago and still do today. I was also struck by how Nordisk has been involved in so many of the pivotal cases and issues shipping has faced through the generations.

I believe Nordisk has endured because we are an independent club that has a relentless focus on service and practical advice, grounded in a strong legal tradition. We bridge legal and commercial considerations and strive to be a stress reliever and problem solver for our members.

A key ingredient in the secret sauce is the people. Working at Nordisk is demanding, but very fulfilling and always interesting. It is a great place to work, and many of my colleagues have worked here for 25 years or more, helping develop Nordisk into the modern and agile club we are today. Our aim has always been to employ and develop the very best maritime lawyers, assistants and staff. The young lawyers that have joined Nordisk in recent years are further testament to that goal and I am confident they will ensure our continued success for the next 132 years.

Secondly, when we receive a case, we provide the members with a frank assessment of whether a case is worth pursuing before we set off. Our members

expect us to help ensure they do not spend their time and resources in vain. I remember this well from my ten years in commercial law firms. We knew that if Nordisk had considered the case and found it to be worth pursuing, then we would have a formidable opponent. Our members can be certain that cases that are worth pursuing will be pursued with passion and enthusiasm. This very often results in a successful outcome. I think it is key to Nordisk's enduring success and will be in the future as well.

Both the marine insurance industry and the legal industry are constantly shifting both geographically and topically. What do you see as some of the biggest challenges that Nordisk will face in the coming years and how can Nordisk address future challenges?

The outlook for the marine insurance industry is very positive in many ways. The Scandinavian clubs maintain a large share of the world marine insurance market, and Nordisk has grown in recent years to house almost twice as many ships as in the 90s. Asian shipping has been growing fast and the decision to establish an office in Singapore in 2007 has proven to have been a good one. I have no doubt that Nordisk will continue to grow and will have a bigger footprint in Asia in the years to come.

A key challenge ahead is the industry's carbon footprint. Nordisk has for years worked to reduce its own footprint by taking measures to reduce waste and avoiding unnecessary travel. We had pioneered methods for electronic closing meetings for vessel sales in the years before covid, and the use of technology to conduct business has of course accelerated by leaps since then. I believe the future will likely see a lot of travel replaced by digital meetings on a permanent basis.

Finally, there are a host of topical legal issues that we continue to grapple with including digital bills of lading and other documents, drafting standard clauses to help members adopt a more "green" agenda like our Nordisk Responsible Ship Recycling Clauses 2020, or assisting in the ordering of battery, hybrid, ammonia, hydrogen or LNG powered vessels. Nordisk is proud to be involved in projects on the cutting edge of legal and technological developments.

It is probably fair to say that you are a self-professed tech "geek" and the shipping industry is presently exploring a lot of new technology from green energy to block chain solutions. Do you think that emerging tech relating to the digitalisation and monitoring of ships will affect the claims process in the future?

It might not affect the claims procedure that much, but it has become much easier to get information about facts – what happened, when, and perhaps even why. In salvage cases these days we have pictures, video and the AIS plot right away. Containers are tracked as they transit land and the seas. AIS data provides live vessel updates which assists with arrests and sanctions considerations. It means we know more about where to start.

This also means that litigation has become more time consuming and complex. Cases in the old days had three letters, a telegram and five witnesses. These days cases often have thousands of e-mails and other electronic evidence, which requires different methods of case handling. The method of proceeding is still the same as before: organise the evidence well, always do your utmost to get to the bottom of things, focus on the core issues, and be ready to change your assessment if new facts are uncovered.

On a similar topic, autonomous vessels seem to be the way of the future. What are some of the key areas of risk that you foresee in the ever-continuing shift to automation?

While I am excited about the prospect of autonomous vessels and hope to see them sailing the seas soon, it probably won't be the reality for many years to come for deep sea shipping. However, we are seeing more automation onboard and further specialised training of seafarers for high-tech jobs at sea. However, I am concerned that the developments will impact seafarer jobs, which are important for so many people in countries around the world. The industry has a responsibility to see that this transition happens in a socially responsible way.

Finally, you have spent some time on ships yourself. What ship would you choose for your next sea-going voyage if you could have your pick and why?

Yes, I spent a year on a naval vessel while in law school and have been on board many ships since then. Two of the most exciting have been VLCCs and LNG carriers, a trip on “Edda Fides” to see all the FPSOs and platforms in the Norwegian Sea, and not least the “Boka Vanguard” when it arrived in Norway with the “Aasta Hansteen” SPAR platform a while back. I will make sure the Nordisk team gets to visit more ships in the future, to learn even more about the inner workings of the vessels we work for every day.

My choice for my next sea-going voyage would be to go to an offshore wind farm on one of the many new SOVs being built for the offshore wind industry, or perhaps a battery powered ship to hear the silence of the motors and sounds of the seas passing by.

Mats was interview by Paige Halvorsen.

NORDISK 101 - INNOMINATE TERMS AND TERMINATION

In the last edition of the Nordisk Circular, we explained what is meant by classifying a contractual obligation as a "*condition*" of a contract, which if breached entitles the innocent party to terminate the contract and claim damages. This article focusses on another contractual obligation, the "innominate" or "intermediate" term, breach of which may (but not always) give rise to a right of termination, together with a claim in damages.

Classifying terms as "innominate"

Innominate terms represent the middle ground between conditions and warranties. A condition is so important to the contract that a breach of the same no matter how minor, will always give rise to a right of termination. By contrast, the question of whether a breach of an innominate term will permit a lawful termination, is generally met with the answer "maybe". Such an equivocal answer arises because in determining whether a right of termination arises, a number of factors, generally specific to the facts of the particular case have to be considered, as further shown below.

Identifying an innominate term is perhaps best achieved by a process of elimination. As we know, a condition is recognised by its utmost importance to the contract, or in many cases, because it has already been helpfully classified by the Courts or the parties themselves as such.

If not a condition, then consider the nature of the obligation imposed and ask whether a breach of the same would only ever lead to limited adverse consequences for the innocent party. If the answer to that is "yes", you are probably looking at a warranty, breach of which will only ever entitle the innocent party to claim damages.

If the term in question does not fit easily into either of these categories, then we have reached our middle ground (or "no man's land") of innominate terms. These terms cover a range of contractual obligations, breach of which in some circumstances could lead to serious consequences, whereas in others, the consequences are insignificant.

BY JOANNE CONWAY-PETERSEN

Take, for example, a well-

known innominate term: the obligation to provide a seaworthy vessel and consider a breach of the same resulting in a vessel breakdown. In some circumstances, the breach may only give rise to very limited consequences, if for example the breakdown lasts only a few days before repairs are made. In other circumstances however, where a protracted delay results and the repairs are having no effect; a breach of this obligation could be very serious indeed and may well justify a termination.

Termination for breach of an innominate term

So, having identified a term is an innominate one, we are then back to the question of when a breach of such term permits the innocent party to terminate the contract? The answer to that question is far from straightforward and as mentioned above, depends on the nature of the breach itself, and the consequences in the relevant circumstances. In legal terms the key question is whether the breach is such as to deprive the innocent party of substantially the entire benefit of the contract? If the answer to that is yes, then the innocent party may terminate the contract and claim damages. If not, the innocent party may claim damages but otherwise remains bound to perform the contract.

So, in what circumstances is the innocent party deprived of substantially the entire benefit of the contract? To answer this question, we can contrast the approach of the Court in two well known cases which considered the question of termination in relation to a breach of the seaworthiness obligation.

In the case of *Hongkong Fir Shipping Company Ltd., v Kawasaki Kisen Kaisha, Ltd* [1], the "*Hongkong Fir*" was chartered out for 24 months. Whilst she was delivered with engines in a reasonable condition, because of their age, they required careful attention. Unfortunately, the engineers on board were too few in number and incompetent.

Unsurprisingly, this led to a number of engine breakdowns shortly after delivery with a delay of about 20 weeks in total whilst repairs were being made. Before the ship was made seaworthy again, charterers purported to terminate the charter. The owners said this was an unlawful termination and sued the charterers for damages.

The Court held that the owners were right, and that whilst the owners were no doubt in breach of their seaworthiness obligation, since that obligation was not a condition of the charter, the charterers had to show that the owners' breach of the seaworthiness obligation went to the root of the contract in order to terminate. In other words, the charterers had to show that the consequences which resulted (the delay) was such as could be regarded as depriving them of substantially the whole benefit of the contract.

The Court found that when compared to the length of the charterparty (24 months) and the fact that under this particular charter, off hire periods (which effectively covered the delay which had arisen) could be added back to the charter period, the 20-week delay was not so serious so as to deprive charterers of the whole benefit of the contract and thus, their termination was unlawful.

By way of comparison, in *Snia v Sukuzi* [2], the Court held that the defects in the vessel's propeller on delivery, in respect of which the owners had spent over two months trying to repair but without success, were enough to permit a lawful termination for breach of the seaworthiness obligation.

The Court in that case paid particular attention to the fact that there was good reason (namely the owners continued lack of success in repairing the defective propeller) to believe that the vessel would never in fact be seaworthy. In those circumstances, the charterers would be deprived of the entire benefit of the charter and were thus entitled to terminate.

Health warning!

Given the difficulty of classifying terms in the first place, together with the not so straightforward question of whether a breach of an innominate term can permit a lawful termination of the contract, it goes without saying that caution must always be exercised when deciding whether to terminate a contract or not.

If you terminate a contract when there is no legal right to do so, you will be the party facing what could be a significant claim in damages from the party who was initially the one in breach!

1 [1961] 1 Lloyd's Rep. 159

2 (1924) 18 Li.L Rep. 333

NORDISK NEWS - NEW NORDISK ASSOCIATE LAWYERS

In June Nordisk happily welcomes two new associates, Mats Aas Larsen and Anders Rønningen, to the Oslo team.

Mats joins us from Wiersholm law firm, where he has been an associate for two years working on transactions. Mats graduated from the University of Bergen in 2019 and he also holds a Postgraduate Certificate in international finance law from Queen Mary University.

Mats will principally work within Nordisk's transactions team but will also support the FD&D team.

Anders graduates from the University of Oslo in June and will join Nordisk thereafter. Anders is also a research assistant at the Scandinavian Institute of Maritime Law, where he is writing his master's thesis on collision liability for unmanned ships.

We look forward to welcoming them into our expanding legal team!

Photos:

Page 3 - Courtesy of Viking Line

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Photo of Mats Aas Larsen - Courtesy of Wiersholm law firm