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Vetting – Selected Legal Aspects  
of the Vessel Selection Process  
*With special focus on seaworthiness, duty of care  
and charter party vetting clauses*

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# Summary in English

“Vetting” is the general name used to describe the oil and chemical companies’ process of selecting ships for their cargoes. This is a process which is not entirely harmonized and which has not been described or treated to any greater extent in literature, especially not from a legal point of view. This thesis therefore has several purposes, both legal and purely descriptive and informative. The perspective is mainly international law or common law, as the latter is the predominant legal system and principles applied to maritime law. Firstly, the thesis aims to examine and describe the vetting process and how it is conducted by using the Swedish oil company Preem Petroleum AB’s vessel selection process as an example. The process consists, among other things, of a physical inspection of the vessel. The inspection report is entered into an electronic database but does not yield a result of pass or fail. Rather, this report is used as one integral part of the selection process. The other parts of this process may be investigation into vessel history and classification, as well as the experience of the crew and master. Also information concerning the quality of the ship owner’s organization as well as reports from Port State Control and statistics from Equasis are gathered.

Furthermore, the thesis aims to compare the vetting inspection to other types of inspections. The physical inspection differs from the type of inspections carried out by other organizations within the shipping industry, such as Flag State and Port State Control inspections. The latter are mandatory while the vetting inspections are voluntary, at least from a legal perspective, and are conducted upon company initiative.

Among the legal aspects treated in this thesis are the division of liability for pollution damage from an international perspective, how this division of liability can be broken and what in common law constitutes a duty of care for the charterer/cargo owner in relation to the division of liability. Finally, contractual regulations and common vetting clauses with related problems are discussed.

As concerns the focus on liability disbursement for pollution damage and the break through of these rules, the thesis treats ship owner’s duty to supply a seaworthy ship and the owner’s strict liability for pollution damage. This strict liability is regulated in international conventions, such as the 1969 Civil Liability Convention. However, this strict liability channeling through the ship owner can at times be broken and protected parties such as the charterer or cargo owner may be held directly liable. For the strict liability channeling to be broken, the complainant has to show intent, mens rea, or gross negligence. To determine whether these conditions are met, the normal process is to decide whether the party has broken a duty of care. For a long time, vetting has been deemed a completely voluntary process without legal consequences for the neither the charterer nor the cargo owner. During the last decade, however, voices have been raised in support of the opposite view, claiming that the selection process can in fact constitute such a duty of care that could break through channeling provisions if breached, at

least from a common law perspective. In this respect, the thesis provides a brief comparison to Swedish law concerning the duty of care issue. Finally, the contractual regulations most commonly seen concerning vetting are treated. There is generally a lack of harmonization and transparency in the vetting process which is also visible in the clauses used to regulate vetting in charter parties. Many clauses are phrased in such a manner that they are impossible to satisfy. For instance, many charterers require approval by certain companies, but the oil and chemical companies no longer issue such approvals. Other similar Catch 22 regulations are, for example, the requirement of inspection for contract signing, but without a signed contract there may be no business interest in the vessel why the vessel cannot be signed or inspected.

The general purpose of the thesis is, in conclusion, to describe vetting and compare it to other inspection regimes used today as well as to treat three main legal areas of interest: vetting and seaworthiness, the duty of care and contractual regulations. In the analysis, these issues are further discussed as to how vetting and seaworthiness may interact and affect each other, whether vetting can constitute a duty of care, and the many contractual problems arising from the most commonly used vetting clauses.

The breadth is consciously chosen on the expense of depth as vetting is a generally unknown institution and there therefore is relevant to point to and introduce a few different ways in which vetting in fact could have a legal effect.

# Summary in Swedish

“Vetting” är den allmänna benämningen på olje- och kemikaliebolagens process kring val av skepp för sina laster. Det är en inte helt harmoniserad process som hittills inte kartlagts eller behandlats till större utsträckning i litteraturen, särskilt inte från en juridisk synvinkel. Den här uppsatsen har flera syften, dels juridiska och dels rent beskrivande och informerande. Perspektivet är mestadels internationell rätt och/eller *common law* eftersom sjöbranschen till största delen domineras av det sistnämnda rättssystemets principer.

Bland annat syftar uppsatsen till att undersöka och beskriva vad vetting är och hur den utförs genom att använda det svenska oljebolaget Preem Petroleum AB:s urvalsprocess som exempel. Processen består bland annat av en fysisk inspektion av skeppet. Inspektionsrapporten införs i en elektronisk databas men resulterar inte i ett resultat om underkänt eller godkänt. Rapporten används snarare som en del i urvalsprocessen.

Processens andra delar kan bestå i undersökningar angående skeppets historia och klassificering och besättningens erfarenhet. Också information som visar kvaliteten av skeppägarens organisation och säkerhet samlas in, liksom rapporter från hamnstatskontroll och statistik från Equasis.

Vidare syftar uppsatsen till att jämföra vettinginspektionerna med andra typer av inspektioner. Den fysiska inspektionen skiljer sig från den typ av inspektioner som utförs av andra organisationer i sjöbranschen, som flaggstats- och hamnstatsinspektioner. De senare är obligatoriska medan vettinginspektionerna är frivilliga och sker på företagets initiativ.

Bland de juridiska aspekter som behandlas i uppsatsen rör fördelning av ansvar vid förorening i internationellt perspektiv, hur detta kan brytas och vad som i *common law* kan utgöra en s k *duty of care*, eller försiktighetsnorm för befraktaren/lastägaren. Vidare behandlas kontraktsrättsliga aspekter av vettingen.

När det gäller fokus på ansvarsmönster i sjöbranschen samt de sätt som detta mönster kan brytas på fokuserar uppsatsen på skeppägarens plikt att tillhandahålla ett sjövärdigt skepp från ett *common law*-perspektiv och dennes strikta ansvar för föroreningsskador. Det strikta ansvaret regleras i flera internationella konventioner, som 1969-års ansvarighetskonvention. Men detta ansvar kan i vissa fall brytas och skyddade parter som befraktare och lastägare kan hållas direkt ansvariga. För att ansvaret ska brytas måste klaganden visa på uppsåt eller grov vårdslöshet hos den skyddade parten. För att avgöra om detta föreligger måste man som regel visa att parten brutit mot en försiktighetsnorm. Längre har vetting ansetts vara en helt frivillig process som inte har några juridiska konsekvenser för befraktaren eller lastägaren alls. Under det senaste decenniet har dock röster gjort sig hörda som stöder åsikten att urvalsprocessen faktiskt kan utgöra en försiktighetsnorm, särskilt från ett *common law*-perspektiv. Uppsatsen gör en kort jämförelse också till svensk rätt på detta område.

Vidare behandlar uppsatsen de kontraktsrättsliga problemen rörande vetting. Det finns en stor brist på harmonisering och offentlighet i

vettingprocesserna vilket också speglas i utformningen av kontraktsklausuler rörande vetting. Många klausuler ställer krav som är omöjliga att möta. Exempelvis kräver många befraktare att ett skepp är godkänt av vissa bolag men olje- och kemikaliebolagen godkänner inte längre skepp utan ger på sin höjd ett accepterande. Andra problem moment 22-regleringar som att ett skepp måste vara inspekterat för att kontrakt ska skrivas men utan kontrakt och inspektion finns inget affärsintresse i skeppet, varför en del bolag vägrar inspektera skeppet till att börja med. Det övergripande syftet med uppsatsen är att undersöka tre områden där vetting kan ha juridisk konsekvens. I analysen behandlas de kontraktsrättsliga problemen rörande vetting och de möjliga lösningarna till dessa. Analysen behandlar också frågorna hur vetting kan påverka sjövärdighetsbegreppet och huruvida vettingen kan utgöra en försiktighetsnorm för befraktaren/lastägaren.

# Preface

The first lesson learned from writing this master thesis was that you do not write in a vacuum. This may be obvious, but it is also easy to forget as a law student surrounded by academia that theory and practice do not always intersect. When treating a topic that is largely unregulated and mainly based on practice, you have to step outside of the traditional role as a student in several ways. And, quite rewardingly, you must be prepared to present your own research and ideas to industry people and discuss them from several perspectives. Several people have helped me along the way to completing the work behind this thesis. Martin Ratcovich advised me to contact Per A. Sjöberger, secretary of the Swedish Ship Owners Association (Sveriges Redareförening) who offered several suggestions of relevant topics, among them vetting. The help of Mr. Sjöberger has been invaluable in the process of researching this thesis. Through him, I came into contact with Captain Jonas Pettersson, vetting coordinator at Preem Petroleum AB. Capt. Pettersson not only agreed to a telephone interview but also provided practical insight into the vetting process as well as invited me to attend his lecture on Preem's vetting policies at the World Maritime University (WMU) in Malmö. Mr. Sjöberger also recommended I speak to Mr. Lars Mossberg, vice president of Marininvest. Mr. Mossberg's contribution to this thesis is important not only to provide practical insight based on his experience as VP of Marininvest, a private shipping group, but also because he was the chairman of the INTERTANKO Vetting Committee and a member of its Executive Committee. Mr. Mossberg in turn recommended I speak to Capt. Howard Snaith, INTERTANKO's Director of Marine, Ports, Terminals, Chemicals & Environmental Section. In addition to providing me with the permission to reproduce INTERTANKO's sample vetting clauses, he also took the time to answer questions and share his knowledge and experience concerning vetting. Capt. Snaith also contributed with documentary material used in this thesis.

I also had the assistance of Mr. Grant Hunter, head of the documentary department at BIMCO, who took the time to respond to my inquiries regarding BIMCO's view on vetting. Additionally, Capt. Sarabjit, a student at the World Maritime University, also helped me in understanding the complexities of issues involved. I came into contact with him through Lay Yong Mok and her sister, Lynn.

The knowledge and information provided by these people have provided invaluable insight into the industry and the phenomenon of vetting. I wish to thank them for taking the time to share their knowledge and for providing me with a perspective otherwise difficult to gain when working from a legal and mainly theoretical point of view.

Thanks are also due to my supervisor, Lars-Göran Malmberg for guiding me through the process of writing. Finally, but not least, I owe many thanks to my poor friends and family who have had to sit through my explanations and ramblings on a subject they probably never knew they needed to know so much about.



# Abbreviations

1992 Protocol	Protocol of 1992 to amend the the International Convention on Civil Liability for Oil Pollution Damage 1969
ABS	American Bureau of Shipping
BIMCO	The Baltic and International Maritime Conference
BV	Bureau Veritas
Capt.	Captain
CDI	Chemical Distribution Institute
CLC 1969	The International Convention on Civil Liability for Oil Pollution Damage 1969
COLREGs	Convention on the International Regulations for Preventing Collisions at Sea 1972
DNV	Det Norske Veritas
ECFIC	European Chemical Industry Council
EMSA	European Maritime Safety Agency
GREENAWARD	Green Award Foundation
HNSC	International Convention on the transportation of hazardous and noxious substances
IACS	International Association of Classification Societies
ILO	International Labor Organization
IMO	International Maritime Organization
INTERCARGO	International Association of Dry Cargo Ship Owners
INTERTANKO	The International Association of Independent Tanker Owners
IOPCF	International Oil Pollution Compensation Funds
ISM Code	International Safety Management Code
Loadlines	International Convention on Loadlines, 1966
Marisec	The Maritime International Secretariat Services Limited
MARPOL 1973/1978	International Convention for the Prevention of Pollution from Ships 1973/1978
MoU	Memorandum of Understanding
MSC	Maritime Safety Committee
NKK	Nippon Kaiji Kyokai Corp.
OCIMF	Oil Companies International Marine Forum
P&I Club	Protection and Indemnity Club
PESTLE	Political, economic, social, technological, legal and environmental
PSCOs	Port State Control Officers
QB	Queen's Bench
SIRE	Ship Inspection Report Programme (OCIMF)
SIR	Ship Inspection Report (CDI)

SIS	Ship Information System
SMA	Society of Mediators and Arbitrators (USA)
SOLAS	International Convention on Safety of Life at Sea 1974
STCW	Standards for Training Certification and Watch Keeping
TMSA	Tanker Management Self Assessment
UK	United Kingdom
UNCLOS	United Nations' Convention of the Law of the Sea 1982
USA	United States of America
VIQ	Vessel Inspection Questionnaire
VPQ	Vessel Particulars Questionnaire

\* Abbreviations of most oil/chemical company names have been excluded.

# 1 Introduction

## 1.1 Background: The Erika

Oil pollution accidents are not a rare phenomenon and beginning with the *Torrey Canyon* accident in 1967, they have tended to spur international debate in several ways. The *Erika* is no exceptions to this. In 1999, the Maltese tanker the *Erika* went down outside the coast of France, causing immense pollution damage. When discussing vetting, the *Erika* almost inevitably comes up. The case went to criminal trial in France in 2007, in addition to several civil claims over the past decade. Among other things, the prosecution put focus on oil company *Total Petroleum Services* (Total), charterer of the vessel, and its vetting procedure. The aim of the prosecution was to show that the company's approval of the vessel had expired at the time she was chartered. Additionally, the prosecution claimed that the vetting procedure was insufficient in that it lacked a physical inspection of the vessel. In its defense, Total maintained throughout the trial that the vetting procedure used by the company was and is voluntary and therefore of no legally binding consequence for the company. Vetting inspections cannot be confused with the work of classification societies and cannot be used to verify the structural soundness of a vessel, Bertrand Thouilin, the Total Group's head of shipping stated in relation to the trials.<sup>1</sup> The prosecution still claimed that the charterer ought to have caught the latent defects of the aging vessel and chosen another one for the oil cargo. That would require entering the tanks when empty, which is rarely the case and both difficult to schedule and expensive to achieve.<sup>2</sup>

The *Erika* had been inspected by, among others, BP and the company had subsequently withdrawn its approval of her. When questioned if Total would have reconsidered using the vessel if the report had been available to them, the answer was ambivalent.<sup>3</sup> Total was found partly liable in the criminal trial as well as for civil claims in the French courts even though the reason for the accident was deemed to be beyond the control of the company.<sup>4</sup> Part of the reason for this was the company's recklessness in its vessel inspection and vetting procedure. Also after the verdict, Total maintained that the procedures were voluntary and therefore could bring no legal obligation on part of the company.<sup>5</sup> This view had been supported during the course of the trial by French law professor Molfessis. He stated

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<sup>1</sup> Lloyd's List International, *Erika trial focuses on tanker's repair work*, available at 2007 WLNR 3558104.

<sup>2</sup> Lloyd's List International, *Trial draws out responsibilities*, 2007 WLNR 220959

<sup>3</sup> Lloyd's List International, *Gloves come off at Erika trial in rows over inspection reports*, March 5, 2007, available at 2007 WLNR 4054880.

<sup>4</sup> Carvajal, Doreen, *Oil Company Total ruled liable in 1999 spill off French coast*, January 16, 2008 (International Herald Tribune, available at [www.ihf.com](http://www.ihf.com)). Cited as Carvajal, 2008.

<sup>5</sup> Oil Voice, *Total Responds to the Erika Verdict*, January 17, 2008, available at [www.oilvoice.com](http://www.oilvoice.com), accessed January 22, 2008. Cited as Oil Voice, 1/17/2008.

that Total had no obligation to check the status and soundness of the vessel beyond ensuring that she possessed all the required documents.<sup>6</sup>

In 2003, Total called for effective financial liability regulations that would provide incentives for ship owners and insurers to take on a greater burden for pollution damage from the onset. Total claimed the current levels in the civil liability regimes are too low. The company is itself one of those charterers who now claim to take more control of its fleet having lost reliance on the spot market where control is not as readily available. Total also pointed to the common confusion among the public, the politicians and even within the industry itself that vetting procedures constitute an additional certification procedure. Therefore, it has also been assumed that charterers can control and guarantee the quality of the ship. Total maintained this is not so.<sup>7</sup>

The case points to several of the reasons for the development of the vetting procedure. Over the past half century, since the *Torrey Canyon* disaster in 1967, vetting has become a fact of life for the industry. Blindly trusting that others will do what they are legally bound to do is no longer a business possibility. The majority of ship owners and operators are responsible and keep their vessels in good quality, but a significant minority does not.<sup>8</sup>

Extensive risk management and risk evaluation has become necessary. On the flip side of that coin are the minority of charterers who choose vessels based solely on cost, well aware that a few ship owners will cut corners to minimize hire rates in a highly competitive market.<sup>9</sup> As will be discussed below, these charterers oftentimes escape liability for pollution damage. Establishing why vetting has become a necessity in the oil and chemical shipping industries requires a rather broad perspective. It is on the one part an issue of **politics**: when an oil accident occurs the culprits are immediately identified as the large cash rich oil companies who placed their cargo on the ship regardless of what their relationship with the ship owner. Upset voices are raised against these companies causing them bad publicity and ill will among the public. Whether deserved or not can be argued about at length and will not be discussed here. However, these public opinions may lead to rash decision by politicians that in turn may cause more damage than good. Another aspect is **environmental**: substandard shipping accidents, or all accidents for that matter, cause damage to the environment and subsequently high costs both in the millions spent to clean up but also the more immeasurable sufferings of lost businesses and jobs, destroyed beaches and dead wildlife. The **economical, or market related aspect**

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<sup>6</sup> Lloyd's List International, *Total 'is not liable for Erika penalties'*, May 19, 2007, available at 2007 WLNR 9394404. Molfessis also went as far as stating that MARPOL is the legal standard by which the company should be judged. This legal standard creates criminal liability only in cases of deliberate pollution or through reckless action with knowledge that pollution would most likely occur. The professor also stated that MARPOL does not allow states to enact more stringent regulations.

<sup>7</sup> Lloyd's List International, *Total executive calls for effective financial liability*, November 18, 2003, available at 2003 WLNR 4449474.

<sup>8</sup> Pettersson, Jonas, *Shipping & Policy Requirements*, presentation at World Maritime University, May 9, 2008. Cited as Pettersson, WMU 2008.

<sup>9</sup> Direction Paper Prepared by INTERCARGO, p. 4-5, available at <http://www.intercargo.org/>, accessed on July 13, 2008. Cited as INTERCARGO.

centers on the changing character of oil trade and the fleet owning patterns. Commonly, investment or trading companies ship oil which they sell, either at terminals or in route. Oil can change owners several times during a single voyage. The cargo can also be sold in parts and therefore several owners can be involved at a time.<sup>10</sup> Over the past few decades, oil and chemical companies have gone from owning their own fleets to chartering vessels or using other forms of contracts. Prior to the 1980s, many companies had their own fleets of ships and ships were naturally under company control. Subsequently, there has been a shift toward independent tanker ownership. At the same time long term time chartering has decreased and the spot market has seen an increase. Whereas in the past, oil companies used to own their own fleets, they have over the years become charterers and cargo owners instead, using vessels either under charters or trading in the spot market.<sup>11</sup> Long term time charters have decreased as well.<sup>12</sup> Non-traditional shipping interests have also entered the scene in increasing numbers, resulting in smaller fleet or single ship owners.<sup>13</sup> There are several reasons for this. For instance, many oil companies are not traditionally specialized in owning, operating and managing ships and the risks are therefore higher in several ways. The industry also avoids liability in many ways by chartering or using other contracts.<sup>14</sup> Recently, the pendulum has begun to swing back with more oil companies choosing to increase their own fleet numbers in addition to chartering vessels.<sup>15</sup>

**Technically**, the problems seem to be a lack of compliance rather than lack of proper and available technology. The *Erika*, for instance, was one of eight sister ships, all of which had been built in the same yard and at least four of which had severe quality problems. Despite quality problems, these vessels at the cheaper end of the market became popular alternatives to more expensive ships. And to keep costs down, maintenance, among other things, was kept at a minimum.<sup>16</sup>

An important aspect of the *Erika* case for this thesis is the focus on the charterer's vetting procedure and the charterer's legal responsibility which will be the focus of this thesis. The heavier focus on the charterer in

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<sup>10</sup> Telephone interview with Lars Mossberg, April, 2008.

<sup>11</sup> Martowski, David W., Vetting Clauses, 26 Tul. Mar. L.J. p. 123-144 2001-2002, p. 140ff; also see Anderson, Charles B; de la Rue, Colin, *Liability of Charterers and Cargo Owners for Pollution from Ships*, Tul. Mar. L.J. 26 p. 1-60, 2001-2002, p. 52ff. For further background, see Lloyd's List International, *Total executive calls for effective financial liability*, November 18, 2003, available at 2003 WLNR 4449474.

<sup>12</sup> Lloyd's List International, *Total 'is not liable for Erika penalties'*, May 19, 2007, available at 2007 WLNR 9394404; Lloyd's List International, *Total executive calls for effective financial liability*, November 18, 2003, available at 2003 WLNR 4449474; Martowski, 26 Tul. Mar. L.J. 2001-2002, p. 140ff; also see Anderson, Charles B; 26 Tul. Mar. L.J. 2001-2002, p. 52ff.

<sup>13</sup> Hughes, J. W. *Tanker Quality – The Role and Contribution of OCIMF's Ship Inspection Programme (SIRE)*, Intertanko, London, 1999. Mr. Hughes was the then director of OCIMF.

<sup>14</sup> See for instance the Civil Liability Convention 1969 (CLC 1969) Article III which channels liability through the ship owner. A more comprehensive discussion on liability channeling is presented below in chapter 3.

<sup>15</sup> Telephone interview with Capt. Howard Snaith, June 26, 2008.

<sup>16</sup> Mangold, Tom, *The Scandal of the Erika*, BBC News, London, August 16, 2000.

pollution damage cases can also be seen as part of a recent trend to alter the chain of responsibility.<sup>17</sup> The Erika brings up many relevant issues in relation to vetting. First of all, there is widespread confusion among the public and the politicians, and even at times the industry itself as to what vetting actually is. This causes confusion when assigning liability for pollution damage and when regulating vetting contractually.

## **1.2 Purpose**

This thesis serves to introduce the background to vetting through the *Erika* case above and to describe the vetting process as well as to distinguish it from mandatory inspection regimes. Thereafter, it will describe the main liabilities of the ship owner and charterer/cargo owner by looking at the ship owner's duty to provide a seaworthy ship and his or her strict liability for pollution damage in international civil liability regimes. The possible ways of holding a charterer/cargo owner liable for oil pollution damage are examined by looking at liability channeling, recourse actions and the charterer/cargo owner's duty of care. These issues are the basis for answering mainly two questions: Does vetting affect the concept of seaworthiness of tankers and could vetting comprise a standard by which the charterer/cargo owner's duty of care may be determined. The thesis will also treat the contractual regulation of vetting by examining the various vetting clauses in use and discussing some of the major problems relating to these clauses based on the rather thin case law available.

## **1.3 Method and Sources**

Mixed analytical methods have been used in this thesis. The background section above utilizes a PESTLE-analysis, or a review of political, economic, social, technical, legal and environmental aspects, while chapter 2 is mainly descriptive. In chapters 3-6, a legal analytical model has been used looking first to law, then to case law, preparatory works and, finally, to doctrine. The author has chosen to use continuous analysis as well as a finishing analysis and conclusion. Footnotes are used to distinguish the views of others from the views of the author as well as for source references.

Doctrine in the case of vetting is comprised mainly of scattered newspaper articles, legal articles and only two books both published by the International Association of Independent Tanker Owners (INTERTANKO). The web sites of international shipping organizations such as the Baltic and International Maritime Conference (BIMCO), The Oil Companies' International Marine Forum (OCIMF) and INTERTANKO, as well as those of the oil and chemical companies themselves have provided much of the information on the vetting process. The reader is therefore advised that the sources are not necessarily objective. Because the material concerning

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<sup>17</sup> For this view, see Carvajal, 2008. Also see Lloyd's List International, *Two losses that brought the charterer into focus*, available at 2003 WLNR 4553049. Also see INTERCARGO.

vetting is scarce and oftentimes confusing, interviews have been used to compensate the lack of information elsewhere. Four telephone interviews were conducted and one via E-mail communication. In addition to these, the author also attended a lecture on Preem Petroleum AB's ship vetting policies at WMU.

The New York arbitration cases cited below cost \$40.00 per case and copy and the university decided not to purchase them why all those cases have been cited from secondary sources.

## **1.4 Delimitation**

Because vetting is a concept rather unknown and unresearched, there is a need to introduce and describe the vetting process itself in this thesis. This thesis is further limited to treating three main areas in addition to the background and process itself; contractual issues, how vetting may affect seaworthiness and the possibility of vetting setting a standard for duty of care of the charterer/cargo owner. The author has chosen to handle the subject in this manner in order to give the reader, who most likely is unfamiliar with the concept, both an introduction to what it is, how it is done, how vetting inspections differ from other inspections, what the liabilities of the different parties involved are, and how it is contractually handled in addition to analyzing these areas. This does not mean other issues are not of importance. On the contrary, while researching the subject the author has come across many scattered pieces of literature and information on vetting which show a widespread misunderstanding of the private process of inspecting and selecting vessels. In fact, oftentimes the information is confusing and the author cannot ensure that she at all times has understood it correctly, having little technical background. The general misconceptions about vetting, however, show that there is a need for further research on the subject, especially in light of recent court cases such as the *Erika* where politicians, the public and even the legal institutions themselves have turned their eyes to the oil and chemical companies' vetting procedures, claiming liability in a manner similar to that to which classification societies are held as of late.

The main perspective of the thesis is common law and international law, with some references to Swedish and civil law. This is done because common law is the most frequently used legal system in shipping, as evidenced by the case law and cited in doctrine, among other things.<sup>18</sup> Therefore, also the discussion on duty of care centers mainly on common law principles. Again, the need for comprehensive research in this field is demarcated by the absence of literature clarifying the different national and international rules on this issue, whether related to vetting or not.

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<sup>18</sup> See for example Gorton, Lars, *Transporträtt. En översikt.*, 2 ed, Lund 2003 at p. 25-26.

# 2 The Vetting Procedure

## 2.1 Introduction

There is no general definition of maritime vetting. The Society of Mediators and Arbitrators in America (SMA) states that vetting is a verb which relevant meaning in the maritime context is to subject to expert appraisal or correction, to evaluate. Synonyms are words such as to canvass, scrutinize, check up, examine, inspect, survey and study.<sup>19</sup> The European Maritime Safety Agency (EMSA) describes vetting as an “almost copyrighted word”.<sup>20</sup> It is a procedure performed in addition to those compulsory controls carried out by Flag and Port States and/or classification societies. Private experts, either hired by an oil or chemical company or working as the company’s employees, are used to inspect ships before they are chartered.<sup>21</sup> The company One Ocean, a liaison company between the fishing and petroleum industries in New Foundland and Labrador, describes vetting as the “review of a vessel’s trading experiences”<sup>22</sup> with the purpose of seeing if the vessel meets shareholder standards for entry into their terminal.<sup>23</sup> Furthermore, vetting is a risk mitigation tool, especially in preventing environmentally damaging incidents.<sup>24</sup> The oil major Shell Group requires that each ship and each barge have been vetted before any company in the group will agree to use it.<sup>25</sup> The group has a comprehensive standard for ship quality assurance. Each vessel must be positively vetted, or *suitable for intended use*. The positive information has to be confirmed and simply a lack of negative information does not constitute a positive result.<sup>26</sup> Total Petroleum Services describes vetting as “the process by which an oil company determines whether a vessel is suitable to be chartered.”<sup>27</sup> Vetting also extends beyond the age, condition and suitability of the ship itself to include the quality and experience of the crew.<sup>28</sup> Instead of basing a decision to use a vessel solely on the inspection and classification of state agencies or classification societies, or even the assurances of the ship owner, charterers want to ensure that unsafe ships do not enter into their fleet. The *purpose* of the vetting procedure is to determine the suitability of the vessel for its intended purpose, for instance transportation of liquid natural gas. The *inspections* are one basis for the

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<sup>19</sup> The Arbitrator 2, 2000, citing Merriam-Webster’s Collegiate Dictionary and Thesaurus.

<sup>20</sup> EMSA <http://www.emsa.eu.int/end645d002.html>

<sup>21</sup> EMSA <http://www.emsa.eu.int/end645d002.html>

<sup>22</sup> *Selecting Quality Tankers for the Newfoundland Transshipment Limited Whiffen Head Terminal*, [www.oneocean.ca](http://www.oneocean.ca), p. 9

<sup>23</sup> [www.oneocean.ca](http://www.oneocean.ca), at p. 9; Newfoundland Transshipment Limited Whiffen Head Terminal.

<sup>24</sup> [www.oneocean.ca](http://www.oneocean.ca), at p. 15

<sup>25</sup> Shell at [http://www.shell.com/home/content/marine-en/hse/barge\\_vetting\\_service/barge\\_vetting.html](http://www.shell.com/home/content/marine-en/hse/barge_vetting_service/barge_vetting.html) (barge vetting)

<sup>26</sup> [www.shell.com](http://www.shell.com), p. 4 (barge vetting)

<sup>27</sup> [www.total.com](http://www.total.com) Erika: Vessel Vetting 2/9/07

<sup>28</sup> Lloyd’s List International 5/9/07



decision to use the vessel for those purposes, or to reject it. But what else is included in the vetting process? This section serves to introduce and describe the process itself. As indicated, all of the major oil and chemical companies have quality assurance schemes, or vetting procedures of some sort.<sup>29</sup> These procedures of selection, however, are not entirely harmonized. It is therefore impossible to give an accurate account of *all* the differing vetting policies. Therefore, this section will present how the Swedish oil major Preem Petroleum AB conducts its vetting procedure.<sup>30</sup>

How a company vets vessels depends on several factors such as the nature of the contract – whether a time or voyage charter or a contract of affreightment. Some companies have their own vetting inspectors while others use third party vetting services. One common aspect, however, is that nearly all companies now input their vetting inspection reports into the so called SIRE database, which will be discussed below. The first part of the vetting process, then, is the inspection of the vessel.<sup>31</sup>

### **2.1.1 The Inspection: OCIMF and SIRE**

The inspection can be performed either by the in-house vetting inspector, a third party vetting inspector or the company will base a decision on a report previously entered into a database system. In order to understand the system, it is relevant to take a look at the administration behind it. A most important institution for the vetting process is the Oil Companies International Marine Forum (OCIMF), a voluntary association of oil companies that ship and terminal crude oil and other oil products.<sup>32</sup> With tanker ownership patterns changing in the 1970s and 1980s, many OCIMF members began worrying about the quality of available tankers. At first, the companies developed individual inspection regimes but in 1989, common guidelines were created. Due to casualties in the 1980s, this risk management system became even more important to the companies and work to improve it intensified.<sup>33</sup> OCIMF's purpose is to provide expert authority on safe and environmentally responsible operation of both oil tankers and oil terminals. This includes vetting procedures and databases.<sup>34</sup> The organization has created and administers the so-called *Ship Inspection Report Programme* (SIRE), dating from 1993 and has the purpose of addressing sub-standard ship problems. It is a tanker risk assessment program targeting “charterers, ship operators, terminal operators and

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<sup>29</sup> Pettersson, WMU, 2008.

<sup>30</sup> The information is based on an interview and presentation by Preem's own vetting coordinator Jonas Pettersson: Pettersson, WMU, 2008; Telephone interview with Capt. Pettersson, May 2008. Also, see INTERTANKO, *A Guide to the Vetting Process*, 7<sup>th</sup> Ed., London, 2007 for review of several oil major and chemical company vetting policies. Information also comes from a telephone interview with Mr. Mossberg, April 2008, and Capt. Snaith, June 2008.

<sup>31</sup> Pettersson, WMU 2008; Pettersson, May, 2008.

<sup>32</sup> OCIMF's web site at <http://www.ocimf.com/pages.cfm?action=introduction>; accessed June 15, 2008. OCIMF was formed in 1970 by oil companies as a response to increasing public awareness of marine pollution, especially by oil.

<sup>33</sup> Hughes, 1999, p. 2.

<sup>34</sup> OCIMF <http://www.ocimf.com/>

government bodies concerned with ship safety”.<sup>35</sup> At first, mainly oil tankers were entered but since 2004 the program also includes barges and small vessels. The SIRE program is a major source of technical and operational information which is related to management and operational issues concerning vessels. This program helps companies in their vetting decisions and contributes to cleaner seas and safer vessels. The program is available at a cost to companies and operators, while government bodies and others concerned with safety matters can access it for free.<sup>36</sup> OCIMF has close to 70 member oil companies in 2008.<sup>37</sup>

SIRE itself is more specifically a database of ship inspection reports which address issues regarding operational safety and pollution prevention. A vessel does not pass or fail a SIRE inspection. Instead, the inspector may enter observations. The ship owner or operator has 14 days to answer any such observations before the report is published and made available to all with access to the system. These comments become a part of the report. It could either be a comment disagreeing with the findings of the inspector or a simple comment saying the observation has been addressed and the problem solved.<sup>38</sup> These comments issued by technical operators should reflect “the implementation of best industry practice through continuous improvement” and “not only compliance with Flag State or Classification Requirements”.<sup>39</sup> In effect, any comments made by Owners or operators in SIRE reflect the safety culture of the company which may be a selection criteria just as essential to the oil company as the condition of the vessel itself.

The inspection is based on view and questionnaires.<sup>40</sup> The Vessel Inspection Questionnaire (VIQ) for bulk oil and chemical carriers is required in order to submit the data to SIRE. This questionnaire is divided into 12 chapters concerned with certification, crew management, mooring and cargo handling along with other issues such as safety, pollution prevention and the vessels general condition. Questions are answered “yes”, “no”, “not seen” or “not applicable”.<sup>41</sup> For “no” or “not applicable” the inspector may have to make comments if required but may make comments in other cases as well.<sup>42</sup>

Additionally, there is a Vessel Particulars Questionnaire (VPQ). The VPQ enables ship owners and operators to compile vessel particulars data which can be submitted electronically to SIRE. The submission is not mandatory but could help shorten the time an inspector has to spend on board the ship,

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<sup>35</sup> OCIMF [http://www.ocimf.com/pages.cfm?action=sire\\_introduction2](http://www.ocimf.com/pages.cfm?action=sire_introduction2)

<sup>36</sup> OCIMF id. Others here should mean port state authorities, classification societies and probably agencies such as EMSA and the IMO but there is no confirmation on the web site about the latter.

<sup>37</sup> Pettersson, WMU 2008; also see OCIMF’s web site at <http://www.ocimf.com/pages.cfm?action=introduction>, accessed June 15, 2008.

<sup>38</sup> Pettersson, WMU 2008; Pettersson, May 2008.

<sup>39</sup> Pettersson, WMU 2008.

<sup>40</sup> INTERTANKO, 2007, p. 1-11.

<sup>41</sup> INTERTANKO, 2007, p. 10, also Pettersson, WMU 2008, Pettersson, May 2008.

OCIMF, *SIRE Inspection Report Programme. Vessel Inspection Questionnaires for Oil Tankers, Combination Carriers, Shuttle Tankers, Chemical Tankers and Gas Carriers*, 4<sup>th</sup> Ed., London, 2007, p. 6, cited as OCIMF, VIQ 2007.

<sup>42</sup> OCIMF, VIQ 2007, p. 6.

a time range of normally six to eight hours. The VPQ contains around 900 questions.<sup>43</sup>

The inspector him- or herself has to be accredited by OCIMF but OCIMF does not conduct inspections. The inspectors are either hired by the companies themselves or by a third party vetting service, but the name of the inspector is not listed in the SIRE report. The majority of companies charge a fee for the inspection of a vessel, except for Exxon which covers all expenses. Exxon, on the other hand, will only inspect vessels of commercial interest to the company.<sup>44</sup>

Industry practice for the last decade has moved toward using no reports in SIRE that are older than six months but the reports are officially valid for twelve months.<sup>45</sup> The inspection report is based on one inspection opportunity, a snap shot.<sup>46</sup> The report does not reflect subsequent crew changes, or any other changes made after the publication of the report.<sup>47</sup>

Preem also uses a database which the company shares with four other oil companies, called Ship Information System (SIS). The SIS database makes available technical data, inspection data and vessel experience for the five partners to the program.<sup>48</sup> Preem's charter department cannot sign with a vessel unless it is rated in this system. However, the five levels of Preem's vessel ratings from not suitable to voyage or period accepted are not seen in the system, only internally.<sup>49</sup> In other words, whether a vessel has been accepted or not is not visible to another company using the system. Nor can it be discerned from SIRE whether a particular oil company has accepted the vessel.

## 2.1.2 Mandatory Versus Non-mandatory Inspections

It is important to separate the vetting process, and especially the vetting inspection from other types of inspections.<sup>50</sup> The vetting inspection is often misrepresented as yet another of many inspections a ship passes or fails. There are, however, important differences between the vetting inspection and other types of inspections, such as those mandatory inspections performed by Flag States, Classification Societies, and Port States. These latter inspections are mandatory inspections based on law. The International Association of Independent Tanker Owners (INTERTANKO) states that the vetting process includes inspections of not only all the mandatory Flag State and Class requirements but also, among other things, insurance cover requirements, safety management, review of maintenance records,

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<sup>43</sup> INTERTANKO, 2007, p. 10; Regarding inspection time on board, information also obtained from Pettersson, WMU 2008; Pettersson, May 2008; Snaith, June 2008. Inspection time varies and some have stated times up to 15 hours.

<sup>44</sup> Pettersson, WMU 2008; Pettersson, May 2008.

<sup>45</sup> Snaith, June 2008. Also see [www.ocimf.com](http://www.ocimf.com); INTERTANKO, 2007, p. 8.

<sup>46</sup> Expression "snaps hot" used by both Capt. Pettersson, WMU 2008 and Snaith, June 2008.

<sup>47</sup> Pettersson, WMU 2008, Pettersson, May 2008.

<sup>48</sup> Pettersson, WMU 2008, Capt. Pettersson, May 2008.

<sup>49</sup> Pettersson, WMU 2008, Pettersson, May 2008.

<sup>50</sup> See Introduction 1.1, Petterson, WMU 2008; Mossberg, April 2008.

communications, media reports, detention and crew training.<sup>51</sup> The Shell Group also points out that it is important to distinguish between inspection and vetting. Vetting is “the process by which all the information, including inspection reports, is assessed and a decision made regarding the suitability of a ship.”<sup>52</sup> Total explains that vetting is different from classification and certification. The aforementioned activities are public, while vetting is private and a voluntary system originally set up by oil companies to aid in choosing appropriate vessels among the many certified vessels.<sup>53</sup> This section serves to distinguish the vetting inspection from these mandatory inspections through a brief review of Flag State, Classification Society and Port State inspection responsibilities in international law in comparison to the vetting inspection.

### 2.1.2.1 Flag States and Classification Societies

The main international convention assigning duties to the Flag State is the United Nations Convention on the Law of the Sea of 1982 (UNCLOS). Article 94 outlines the responsibilities of the Flag State in international relations.<sup>54</sup> On the high seas, the responsibilities of the Flag State come from the ship flying the State’s flag and bearing its nationality.<sup>55</sup> As such, the State has jurisdiction over the ship on the high seas, a principle also confirmed in the 1927 *Lotus case*.<sup>56</sup> The State has a duty to take all those measures necessary to ensure that ships flying its flag comply with the relevant international conventions and regulations. Article 94 contains a long list of things the State must do with the purpose of exercising jurisdiction and control in administrative, technical and social matters. This responsibility is to be ensured through surveys and inspections, certification and Flag State Control.<sup>57</sup> No similar duty is placed upon oil or chemical companies through legislation but the vetting process partly serves to ensure that a vessel has all the statutory certification in place. Surveying and other measures to ensure safety at sea have traditionally become those of the classification societies.<sup>58</sup> States may, in short, delegate the responsibility of performing surveys and inspections to a “qualified surveyor of ships” but often without placing any legal responsibility on such organizations.<sup>59</sup> These organizations are technical experts that provide

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<sup>51</sup> INTERTANKO, 2007, p. 1-11. Snaith, June 2008.

<sup>52</sup> [www.shell.com](http://www.shell.com), p. 5 (barge vetting)

<sup>53</sup> See above for further discussion on the OCIMF and SIRE.

<sup>54</sup> For the full text of Article 94 and other articles, see Appendix A.

<sup>55</sup> UNCLOS article 90.

<sup>56</sup> Özçayır, Dr. Z. Oya, *Port State Control*, LLP, London, England, 2001, beginning at p. 22. Case as cited by author, [1927] PCIJ, Series A, No. 10 at page 25.

<sup>57</sup> UNCLOS Article 94.

<sup>58</sup> Özçayır, 2001, p. 347ff. Chapter 12 gives a brief yet comprehensive overview of the issues of classification societies, especially as concerns European regulations and liability issues.

<sup>59</sup> UNCLOS, Article 94 §4 (a). European incentives such as Directive 2001/105/EC of the European Parliament and of the Council of 19 December 2001 amending Council Directive 94/57/EC on common rules and standards for ship inspection and surveying organizations and for the relevant activities of maritime administrations will not be discussed here for lack of space. They do, however, intend to create liability by establishing the right of the State to recourse action against these organizations by making it mandatory for the State to

ships with a classification depending on its construction and design and which also perform surveys to make sure that ships meet their classification.<sup>60</sup> Vetting, on the other hand, does not include certification but rather a review to ensure that certifications are in place and if there are conditions of class before the vessel is used.<sup>61</sup>

Mostly, classification societies are concerned with the seaworthiness of vessels.<sup>62</sup> This type of activity can be referred to as statutory certification of ships and mostly originates in international conventions and standards provided by the International Maritime Organization (IMO). These statutory requirements can be divided into three categories; 1) design and structural integrity, load line and stability, essential propulsion, etc; 2) accident prevention such as fire prevention; and 3) post-accident activity such as fire containment and evacuation.<sup>63</sup> These regulations are found in conventions such as the International Convention on Safety of Life at Sea (SOLAS). Classification does not cover the manning, crew experience and the subsequent operation of ships, while this on the other hand is one aspect reviewed in the vetting process.<sup>64</sup>

Traditionally, classification societies fall without reach of liability regarding statutory duties. Some states even provide legal immunity for government appointed persons or organizations, such as was the case in the Bahamas concerning the *Sundancer*, surveyed by the American Bureau of Shipping (ABS). The government appointee was immune in cases of statutory certification in good faith.<sup>65</sup> Additionally, most classification societies include extensive exemption clauses in their contract, as well as indemnity clauses to protect them from third party claims. Also liability limitation clauses are common in classification society contracts. This of course hampers contractual liability which otherwise would pose a duty of care and requirement of a workmanlike performance of the societies' duties.<sup>66</sup>

For claims arising in tort for negligence causing harm to third parties, liability differs from jurisdiction to jurisdiction but general principles are similar, such as duty of care and causality. Generally, and as seen in the *Sundancer*, courts have tended to favor classification societies leaving them outside the reach of liability.<sup>67</sup> In recent years, however, there has been a

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include such clauses in their contracts. More information can be found at

<http://emsa.europa.eu/end185d007d001d001.html> .

<sup>60</sup> Gard, 2002, p. 131f

<sup>61</sup> Snaith, June 2008 regarding condition of class.

<sup>62</sup> Falkanger, 2004, p. 79

<sup>63</sup> International Association of Classification Societies (IACS), *What are classification societies*, 2004, p. 6

<sup>64</sup> Özçayir, 2001, p. 350. Snaith, June 2008 regarding vetting of crew certification and experience.

<sup>65</sup> Özçayir, 2001, p. 364. Case as cited by author: *Sundance Cruise Corp. v. American Bureau of Shipping* 799 F.Supp. 363, 1992 A.M.C. 2946, (S.D.N.Y. 1992), *affirmed*, 7 F.3d 1077, 1994 A.M.C. 1, (2d Cir. 1993), *certiorari denied*, 114 S. Ct. 1399 (1994) (*Sundancer*).

<sup>66</sup> Özçayir, 2001, p. 534-357, p. 365-366. Reader is advised that cited works are mainly concerned with common law.

<sup>67</sup> Özçayir, 2001, p. 357-364. Also on p. 369f. Swedish term which best translate tortious liability is "utomobligatoriskt skadeståndsansvar". Refer to International Private Law regulations of each state for further details regarding tort liability regimes.

trend to hold even classification societies liable for negligent misrepresentation to third party claimants if they breach their duty of care in surveying and classification.<sup>68</sup> Though not discussed here, this could be relevant in comparing the possible responsibilities of vetting inspectors with those of surveyors from classification societies.<sup>69</sup>

### 2.1.2.2 Port State Control

The concept of Port State jurisdiction over the enforcement of international standards for the protection and preservation of marine environment is rather new. Port State Control jurisdiction was gradually increased and expanded during the 20<sup>th</sup> century. However, it was not until the 1970s that Port State jurisdiction was introduced at the IMO Conference on Marine Pollution (1973). Though not accepted at the time, the discussion had begun in earnest and the result was later incorporated into UNCLOS article 218 granting Port States certain enforcement authority.<sup>70</sup> Port State Control is in some scholars' view one part of a safety net designed to help keep substandard ships from trading on the high seas by working within six key elements: 1) IMO conventions; 2) International Labor Organization (ILO) conventions; 3) Flag State Control; 4) classification societies; 5) marine insurance; and 6) Port State Control. If any one of these instances fails to ensure adherence to international rules and standards regarding safety and pollution prevention, the holes of the net become too large and substandard ships, such as the *Erika*, pass through them unnoticed.<sup>71</sup> Vetting has become a seventh safety net of sorts in the oil and chemical shipping industry, one which checks even Port State Control through a fact compilation and risk assessment procedure. Data gathered from Port State Control is also one important aspect included in the vetting process.<sup>72</sup>

There are extensive guidelines from IMO for the exercise of Port State Control, based primarily on resolution A.787(19) and amending procedures in resolution A.882(21). In short, Port State Control is the inspection of foreign ships to ensure compliance with the applicable international rules on safety, pollution prevention, manning and operation.<sup>73</sup> Port states can perform inspections of ships on the initiative of a party to a convention

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<sup>68</sup> O'Halloran, Rory B., *Otto Candies, L. L. C. v. Nippon Kaiji Kyokai Corp.: In a Novel Decision, the Fifth Circuit Recognizes the Tort of Negligent Misrepresentation in Connection with Maritime Classification Societies and Third-Party Plaintiffs*, 78 Tul. L. Rev. 1389 (2003-2004), at p 1395ff. Please also see discussion on duty of care for charterers/cargo owners in chapter 3 below.

<sup>69</sup> In the *Erika* case, opinions were raised claiming the vetting inspector should have discovered the latent defects of the vessel. If this argument were successful, a vetting inspector could be held accountable for defects not discovered during inspection that should have been discovered. However, such a discussion is a complex issue which has been left out here. See source references under chapter 1.1.

<sup>70</sup> Özçayir, 2001, p. 74ff.

<sup>71</sup> Özçayir, 2001, p. 93ff.

<sup>72</sup> For further discussion regarding use of Port State Control data, see chapter 2.1.5 below.

<sup>73</sup> Özçayir, 2001, p. 100. For further information, see [www.imo.org](http://www.imo.org/Safety/index.asp?topic_id=159). Also see [http://www.imo.org/Safety/index.asp?topic\\_id=159](http://www.imo.org/Safety/index.asp?topic_id=159)

containing the Port State Control provision.<sup>74</sup> A request for inspection can also be made by the ship, on the basis of information provided regarding the ship by another party, or by other parties with an interest in the safety of the ship or the protection of the marine environment. If the ship is lacking appropriate certificates and other documents or if there are clear grounds for suspecting that the ship does not meet safety requirements, a more detailed inspection can be performed. The goal is to identify substandard ships, which are ships that lack important equipment, the hull is substantially deteriorated, and the operational proficiency is inadequate etc.<sup>75</sup> Port State Control tends to be organized regionally. Examples of these regional agreements are the Paris Memorandum of Understanding (MoU), the Tokyo MoU, and the Abuja MoU (West and Central Africa).<sup>76</sup> These MoUs can to a great degree control the admission of substandard ships into their respective areas. Upon inspection, substandard ships can, among other things, be requested to have deficiencies repaired either immediately or within a certain time. Ships can also be detained by the Port State Authorities if deemed appropriate. Additionally, according to for instance the Paris MoU section 3.9.1. ships may be banned from the area if they evade detention or if they fail to call at an indicated repair yard. As such, these ships will be refused access to any port in the region. In 1999, for example, a total of nine ships were banned. Out of the ships listed as banned between 1996 and 2001, several were flagged in so-called open registry states, or flags of convenience.<sup>77</sup>

Though vetting serves to identify many of the same issues as does Port State Control, a vetting inspector has no right to inspect a ship on his or her own initiative on any of the bases a Port State Control Officer (PSCO) does. A request for inspection has to come from the ship owner or operator. A vetting inspector cannot detain a ship that does not meet international standards, or those higher standards set by the charterer or cargo owner and are deemed necessary by the inspecting company. The inspector can make an observation in the SIRE report, but that observation does not constitute a pass or fail of the inspection and leads to no sanctions in law but may lead to a decision by the vetting department not to recommend the vessel for use.

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<sup>74</sup> These can be found in SOLAS 1974 (ch. I, reg. 19; ch. IX reg. 6.2; ch. XI reg. 4), Load Lines 1966 article 21, MARPOL 1973/78 (arts. 5-6 of reg. 8A, Annex I; reg. 15, Annex II; reg. 8, Annex III; reg. 8 of Annex V), and in article 12 of the Tonnage Convention of 1969.

<sup>75</sup> Özçayır, 2001, p. 101ff.

<sup>76</sup> [http://www.imo.org/Safety/index.asp?topic\\_id=159](http://www.imo.org/Safety/index.asp?topic_id=159)

<sup>77</sup> Özçayır, 2001, p. 134-136. Regarding detention, see specific requirements on p. 135. Banning ships, p.138-140.

### 2.1.3 Tanker Management and Self Assessment, Class and History<sup>78</sup>

The Tanker Management and Self Assessment (TMSA) program is a framework for self assessment of ship operator management systems. It is a voluntary program from OCIMF which is also recommended by INTERTANKO for use by its members.<sup>79</sup> The program is a tool to help ship owners and operators both measure and advance their management systems in accordance with 12 key elements in four stages which indicate what OCIMF considers to be best industry practice. The TMSA can be said to work as a complement to the International Safety Management (ISM) Code. It is also submitted and updated electronically.<sup>80</sup> Taking into consideration that the vetting process consists of much more than the actual vetting inspection, the TMSA is a valuable initiative for the tanker owners to know how to best prepare themselves for the vetting procedure. It provides a strong indicator of what oil and chemical companies will expect from a good management system. INTERTANKO's TMSA working group has produced a TMSA liability clause which the organization recommends to its members to ensure that the TMSA submissions are not regarded as absolute guarantees, but rather a good faith effort that the information is to the best of the owner or operator's knowledge.<sup>81</sup> It is especially important as the vetting process will check the TMSA against the SIRE report and other information to verify the information provided.<sup>82</sup>

Preem also uses management review as a part of the selection process, especially for longer term time charters. This is also an important tool when considering using vessels with companies not previously in cooperation with the oil major. These reviews serve to evaluate not only the vessel itself but the company owning or operating the vessel in order to assess risk. All information collected is confidential and not shared with any other company. It serves only as an internal selection criteria. The TMSA, however, is one element in this review and information submitted in the TMSA may be confirmed in the review.<sup>83</sup>

In the Preem selection process also the vessel history of accidents and other experiences are important. Various sources are used for the collection of this

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<sup>78</sup> While finishing this thesis, a TMSA2 was released by OCIMF on June 23, 2008 and will be in effect on July 1, 2008. (See Tanker Operator Newsletter June 23 2008 available at [www.tankeroperator.com](http://www.tankeroperator.com).) Because of the timing, there has been no opportunity to include the TMSA2 in this discussion. Also see OCIMF's web site. One significant difference in the program is that now all tanker operators are included, also those with small vessels and coastal operations.

<sup>79</sup> INTERTANKO, 2007, p. 221-223.

<sup>80</sup> Pettersson, 2008, presentation at WMU; Telephone interview with Capt. Pettersson, May 2008.

<sup>81</sup> INTERTANKO, 2007, p. 222-223: "The information contained herein is provided to the best of the owner's/manager's knowledge and in good faith. However, the accuracy of the information is not guaranteed, either expressly or by implication, and owners/managers exclude liability for any errors or omissions whether caused negligently or otherwise."

<sup>82</sup> Snaith, June 2008.

<sup>83</sup> Pettersson, 2008, presentation at WMU; Telephone interview with Capt. Pettersson, May 2008.



information, for instance terminal reports.<sup>84</sup> Additional elements considered when selecting a vessel are class history and the structural condition of the vessel, which is, as mentioned, also a part of the VIQ. Here, the older the vessel the more to evaluate. Preem, as well as other companies, also has to take into account local regulations in the areas where the company's terminals are located. The Brofjorden Terminal, for instance, is under a local ordinance not allowed to admit tankers older than 25 years, but the company policy is in general not as restrictive as that. For tankers less than 3000 dwt and for gas carriers the policy is 30 years or less, while for tankers over 3000 dwt the age limit is 25 years.<sup>85</sup> Many companies have a strict age limit of 25 years for ships unless exceptional circumstances apply.<sup>86</sup> The strict 25-year age limit could be seen a plaster fix for a much more complex issue which cannot be solved by a simple age restriction. Age is one indicator of a vessel's condition, but well maintained ships may be in a structurally sound condition sometimes better than younger ships poorly maintained and operated.<sup>87</sup>

## 2.1.4 Port State Controls and Equasis

Another selection criterion for Preem is to look at Port State Control reports<sup>88</sup> on the vessels and to use information entered into the Equasis database. Equasis is a European Union database which provides information on the world merchant fleet for purposes of improving information exchange regarding safety related aspects. It is the result of the Quality Shipping Campaign launched in 1997 at the initiative of the European Commission and the UK. Among other things, one problem in the shipping industry is the lack of transparency.<sup>89</sup> The Commission and the French Maritime Administration decided to co-operate in creating the database to counter transparency problems. Among the database's objectives is to reduce substandard shipping and the information entered should cover the entire world fleet. In order for the information to be up to date and relevant, the cooperation of all interested parties, including ship owners, management companies, brokers, insurers, and others is needed. The use of the database is voluntary. Equasis is not a vetting system as such but can be used as a tool for better decision making in the process of selecting vessels and

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<sup>84</sup> Pettersson, WMU 2008, Pettersson, May 2008; Snaith, June 2008.

<sup>85</sup> Pettersson, WMU 2008, Pettersson, May 2008.

<sup>86</sup> Pettersson, WMU 2008, Pettersson, May 2008; also see INTERTANKO, 2007, p. 41. Adnoc ship vetting policy is to accept no ships older than 25 years except LNG and bulk carriers or if exceptional circumstances apply. P. 50, the BP Group policy ranges from an age limit of 20 years for ships over 5000 dwt, 25 years for vessels less than 5000 dwt. LPG tankers have to be 25 years or less while for double hull tankers the age limit is 40 years. P. 56; The CESP Group accepts no vessels above 25 years of age while Enel accepts no tankers older than 20 years (p. 84).

<sup>87</sup> Mossberg, April 2008. Also, compare chapter 1.1, the *Erika* accident.

<sup>88</sup> See above for discussion on Port State Control inspection regimes. The reader is referred to Özçayır, Dr. Z. Oya, *Port State Control*, LLP, London, England, 2001 for more information on Port State Control regimes world wide.

<sup>89</sup> Snaith, June 2008.

eliminating substandard ships.<sup>90</sup> The data collected is from public authorities and industry organizations and among the providers the Paris and Tokyo MoUs and the US Coast Guard can be found. Other providers are the Chemical Distribution Institute (CDI), OCIMF and classification societies. From the international group of Protection and Indemnity Clubs (P&I Clubs) such participants as the Swedish Club, the UK P&I Club, and Norwegian Assuranceforeningen Skuld are listed as well as industry organizations such as INTERTANKO and ILO. The data is focused on ship characteristics and ship management.<sup>91</sup>

Equasis issued an official report on the state of the world merchant fleet in 2005. For instance, oil and chemical tankers make out 62 per cent of the large tonnage vessels, or almost 45 per cent of the entire fleet. About two thirds of the world fleet is registered with a black listed flag.<sup>92</sup> Among classification society records, Equasis has found that those ships classed with an International Association of Classification Societies (IACS) member were less likely to be detained by Port State Control than those not classed with a member society.<sup>93</sup> Finally, Equasis statistics indicate that ships under a trade association or industry vetting scheme are less likely to be detained.<sup>94</sup>

## **2.2 INTERTANKO and BIMCO**

The International Association of Independent Tanker Owners (INTERTANKO) was founded in 1970 and aims at ensuring that oil is shipped safely, responsibly and competitively. The association is open to oil and chemical tanker owners not affiliated with oil companies or under State control.<sup>95</sup> Among the committees in INTERTANKO's organization is a Vetting Committee divided into nine Working Groups, together covering relevant areas from terminal vetting and SIRE, to charter party clauses and vetting publications.<sup>96</sup> The initial idea of the Vetting Committee was to encourage the oil companies to work on harmonizing their vetting processes to have as much as possible of the information needed drawn from a central source, such as SIRE.<sup>97</sup> Now the work has expanded beyond this purpose and INTERTANKO works to promote transparency and harmonization in the vetting process. In fact, INTERTANKO has created two of the very few publications available on vetting, *A Guide to the Vetting Process* and *Vetting Clauses*, in order to help tanker owners understand and be prepared

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<sup>90</sup> [www.equasis.org](http://www.equasis.org); for information on Equasis, also see INTERTANKO, 2007, p. 197. For specific details on Port State Control regimes in for instance the US, Australia and other States, INTERTANKO, 2007, provides guidance for ship owners and operators for better preparedness. Also see Özgayir, 2001, for a comprehensive treatment of different port state regimes.

<sup>91</sup> [www.equasis.org](http://www.equasis.org), accessed June 15, 2008.

<sup>92</sup> Equasis, 2005, at p. 7

<sup>93</sup> Equasis, 2005, at p. 20

<sup>94</sup> Lloyd's List International, *Equasis sets down state of world fleet*, 1/8/2007. See also Equasis, 2005, at p 109ff.

<sup>95</sup> [www.intertanko.com](http://www.intertanko.com) accessed June 15, 2008.

<sup>96</sup> <http://www.intertanko.com/templates/Page.aspx?id=18973>, accessed June 15, 2008.

<sup>97</sup> Lars Mossberg, April 2008; Snaith, June 2008.

for the vetting process.<sup>98</sup> INTERTANKO is not involved in the process concerning acceptance or rejection of a vessel. However, the organization can be turned to in cases where the format is problematic, such as if the VIQ questions are incorrect.<sup>99</sup>

Another organization relevant to vetting is the Baltic and International Maritime Council (BIMCO), a private shipping organization that on the surface may not have all that much to do with vetting in particular. However, with members in over 120 countries, including over 900 owners, the organization has very much become concerned with vetting. Among BIMCO's specialized committees is the Documentary Committee which, among other things, provides assistance with contractual matters to its members.<sup>100</sup> The Committee oversees the development of new contracts and clauses in the industry and suggests revisions of existing ones. BIMCO issues, for instance, charter parties aimed specifically at the oil and chemical shipping industries.<sup>101</sup>

## **2.3 CDI and GreenAward**

OCIMF does not supply the only inspection regime used in the oil/chemical shipping industry today. As OCIMF concerns mainly oil tankers, the Chemical Distribution Institute (CDI), an independent institute, administers an inspection scheme for chemical and liquid petroleum gas vessels. Same as OCIMF, CDI aims at a uniform inspection scheme. While the institute does not perform inspections, it does train and accredit ship inspectors, operate a database for inspection reports, and maintain and update inspection protocols. However, the CDI does not determine the suitability of vessels. This responsibility falls on the user.<sup>102</sup> CDI publishes a Ship Inspection Report (SIR) questionnaire for chemical tankers to be read in conjunction with the VPQ. As with the SIRE report, the SIR does not provide a pass or fail result, but serves as an assessment of conformance measured against internationally accepted standards. Also with SIR it is emphasized that it is to be regarded as an assessment at the time of inspection, or a snap shot of the ship at a particular point in time.<sup>103</sup> The questions are formulated as statements and divided into several categories, such as statutory which reference to international regulations, recommended in reference to industry code of practice, and desirable which are those criteria required by CDI participants. The inspection report is uploaded into CDI's electronic database.<sup>104</sup> Questions concern, for example, areas of

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<sup>98</sup> Mossberg, April 2008. Both works are cited herein. Please see bibliography for details.

<sup>99</sup> Snaith, June 2008.

<sup>100</sup> Information available at (accessed June 15, 2008):

[http://www.bimco.org/Corporate%20Area/About/BIMCO\\_a\\_century\\_of\\_service.aspx](http://www.bimco.org/Corporate%20Area/About/BIMCO_a_century_of_service.aspx).

<sup>101</sup> <http://www.bimco.org/Corporate%20Area/Documents/About.aspx>, accessed June 15 2008.

<sup>102</sup> INTERTANKO, 2007, p. 12-14. Also see [www.cdi.org.uk](http://www.cdi.org.uk).

<sup>103</sup> CDI, *Ship Inspection Report. Chemical Tanker*. 6th Ed. Edinburgh, 2007, p. 5.

Developed under guidance of European Chemical Industry Council (ECFIC).

<sup>104</sup> CDI, 2006, p. 6.

certification, manning, management and personnel, cargo operations and operational safety, fire fighting, life saving and environmental protection.<sup>105</sup> Another inspection regime is called GreenAward. Greenaward inspections are paid by the Ship Owner and are performed on oil tankers. If a tanker is successfully inspected, it is awarded a certificate, a Greenaward. Among other things, the certificate means that the owner can get discounts on port dues from participating ports. In addition, the shore based management system of the vessel is inspected. Inspections are redone annually in order for the ship to maintain the certification. The award is granted by the non-profit Greenaward Foundation. Though widely used, the certificate is not yet recognized by port state control regimes.<sup>106</sup> It is, however, a manner in which ship owners can show compliance and effort to reach and maintain a high standard of quality in the vessel and its operation. The award is now regarded as a mark of quality within the industry.<sup>107</sup>

## **2.4 Conclusions**

Vetting is not a simple one-step process. It seems as though a common misconception is that vessels pass a vetting inspection and subsequently are approved by an oil or chemical company for use. The process is, in reality, much more complex than that and contains many more elements than the inspection itself. It is not enough that a vessel is appropriately classed or meets Flag State requirements but the vessel, as well as the company owning and/or operating it, should reflect best industry practice.<sup>108</sup>

The vetting schemes in existence vary depending on several factors, such as type of cargo and vessel, but there are common denominators, such as the performance of a physical inspection with a subsequent inspection report entered into a database, mainly SIRE and CDI's electronic database. This inspection and selection regime differs from mandatory inspection and classification regimes. A vetting inspector cannot issue certifications or documents legally providing for the suitability of a vessel as classification societies can. Nor can an inspector detain a ship not in compliance with relevant standards. Additionally, vetting is not mandatory by law. The industry maintains it is not mandatory at all and should therefore create no legal liability.<sup>109</sup>

In terms of numbers, this table with statistics from the 2005 Equasis report will serve to illustrate the frequency of vetting inspections.

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<sup>105</sup> CDI, 2006, see Index and corresponding chapters.

<sup>106</sup> Knapp, 2006, p. 26

<sup>107</sup> Snaith, June 2008.

<sup>108</sup> For instance CDI recommended and desired criteria.

<sup>109</sup> See chapter 1.1.

Association	Vessels covered by vetting scheme	Vessels not covered	Total number of vessels	% vetted
INTERTANKO	1945	8349	10 294	18,89
INTERCARGO	709	21 487	22 196	3,20
Green Award	186	8944	9130	2,00
CDI	1216	9001	10 217	11,90
OCIMF	4540	5783	10 323	43,98
All	8596	53 564	62 160	13,83

Only 13 per cent of the total fleet was actually inspected by a vetting inspector in the 2005 Equasis report. However, those numbers must be read against the background that most oil and chemical tankers are found among Intertanko and OCIMF's large (between 25,000 and 60,000 gross tonnes) and very large vessels (60,000 gross tonnes or more). Out of 2531 large and very large tankers 1170, or 46,2, per cent were covered among INTERTANKO's members. These numbers for OCIMF were even higher with a total of 2502 large and very large vessels of which 88,45 per cent were covered by a vetting inspection scheme. In terms of tonnage the large and very large category of ships represent 71% of the entire world fleet, with the oil and chemical carriers representing almost 62 per cent of those.<sup>110</sup>

For the relevant section of the industry, the numbers of ships undergoing vetting inspections are substantial.<sup>111</sup> This along with inspection regimes and extensive guidelines developed by the industry on vessel selection shows that vetting is now a common industry practice.

<sup>110</sup> Equasis, *The world merchant fleet of 2005. Equasis statistics*, 2005, [www.equasis.org](http://www.equasis.org)

<sup>111</sup> Author's table. The table is a summary of numbers provided by Equasis in table 186 in the report from 2005 on p. 110. Additional information is found on p. 109.

# 3 Grounds for Civil Liability for Pollution Damage<sup>112</sup>

## 3.1 Introduction

In interviews and research for this thesis, several sources have indicated that vetting is a voluntary process which therefore should create no legal obligations. Total maintained this view throughout the *Erika* trial and it is supported by many in the business, companies and tanker owners alike. As of late, however, voices have been raised claiming that vetting indeed does create a liability for the companies performing it.<sup>113</sup> This chapter will serve as an overview of the duties and civil liabilities of the major players involved in vetting, the ship owner, the charterer and the cargo owner, with main focus on the first two. The discussion will center on the duties of the ship owner as seaworthiness, and on his or her strict civil liability in international pollution prevention conventions concerning chemical and oil industries, mainly the International Convention on the transportation of hazardous and noxious substances (HNSC) and the International Convention on Civil Liability for Oil Pollution Damage (CLC) and its 1992 protocol (1992 Protocol).<sup>114</sup> Introduced and examined will be the channeling of liability concept and the possibility of recourse action on part of the ship owner. This chapter will also focus on the ship owner and charterer/cargo owner's liability according to the aforementioned conventions. Finally, the charterer/cargo owner's duty of care will be discussed. The purpose of these topics is to discern in the analysis whether vetting affects any of these liabilities, or vice versa. The perspective is international and common law with some comparisons to civil law.

## 3.2 Ship Owner's Duty as to Seaworthiness

The Flag State has to ensure safety at sea by, inter alia, surveying and inspecting vessels to determine seaworthiness.<sup>115</sup> The subject liable for the seaworthiness of the vessel is the ship owner. He or she is ultimately responsible for ensuring that the vessel meets those requirements set forth by international conventions, Flag States and the shipping industry. Among these requirements is the duty to provide a seaworthy ship. This duty is an implied obligation, and often expressed, in any contract of affreightment.<sup>116</sup>

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<sup>112</sup> For an illustration of liability patterns, please see Supplement B.

<sup>113</sup> See for instance Anderson, de la Rue, 2001-2002, p. 40f. Also see above discussion under chapter 2 regarding the *Erika* verdict.

<sup>114</sup> See Supplement B for a simplified schedule depicting the relationships between the relevant parties and other parties in the shipping industry, both public and private.

<sup>115</sup> UNCLOS, Article 94 §4 (a)

<sup>116</sup> Wilson, 2008, p. 9

The obligation is twofold. First, the crew and equipment must be suitable and able to meet ordinary perils of the sea adventure. However, the vessel must also be cargo worthy, fit and suitable for the intended cargo.<sup>117</sup> Seaworthiness in common law is generally considered an innominate term, though voices have been raised arguing it is a condition.<sup>118</sup> When a condition is breached, the injured party generally has a right to claim damages and to terminate the contract. However, when an innominate term is breached, the consequences depend on the factual circumstances. There is a right to terminate the contract and sue for damages only if the breach deprives the injured party of substantially all the benefit the party was intended to derive from the contract term.<sup>119</sup> For example, if the ship is unseaworthy from the onset but this never leads to a problem or the breach is such that the injured party still has the substantial benefit intended in the contract, there is no ground to sue or terminate.

The Courts have provided a test for the determination of classification of terms. The test states that one has to look at the contract in the light of the surrounding circumstances and from that make up one's mind whether the parties' intentions as evidenced in the contract are best carried out by treating the promise as "a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability".<sup>120</sup> To that, there is a third possibility in naming the term an innominate term. As previously mentioned, a term is more likely to be regarded a condition if it is important to the contract. However, the importance is to be assessed in relation to possible breaches, not actual ones. The intentions to look at are the ones at the time of contracting, not at the time the breach occurred. In the maritime case *Hong Kong Fir Shipping Co. Ltd. Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 the charterer treated seaworthiness as a condition of contract which gave rise to damages and termination. In the case, the point was made that the right to termination due to breach of seaworthiness did not depend on whether the term was a condition or a warranty, but rather the factual circumstances of the case. Only if the factual consequences were sufficiently serious was termination warranted, not otherwise.<sup>121</sup>

In the common law context, seaworthiness is absolute and breach is the ship owner's liability regardless of fault, and can lead to damages and/or termination. This may sound as a strict condition but the ship owner is not required to provide a perfect ship but one that is reasonably fit for the intended purposes. However, the requirement can be displaced by a contract clause, which, in order to be binding, must be clear and unambiguous. Where the Hague Visby Rules apply the strict liability is replaced by the

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<sup>117</sup> Wilson, 2008, p. 12. See also, for instance, *Reed v. Page* [1876] 1 Q.B.D. 377. Case law regarding the nature of seaworthiness is voluminous. Also, Liang, Chen, *Seaworthiness in Charter Parties*, Journal of Business Law, J.B.L. 2000, JAN 1-35 at pp.1-3.

<sup>118</sup> Liang, 2000 at pp. 5-8.

<sup>119</sup> Koffman, Laurence; Macdonald, Elizabeth, *The Law of Contract*, 6th Ed., Oxford University Press, Oxford, 2007 at p. 139ff. Compare to breach of warranty which entitles injured party to sue only for damages.

<sup>120</sup> Koffman, 2007, at p. 140-141, citing *Bentsen v. Taylor, Sons, & Co. (No. 2)* [1893] 2 QB 274.

<sup>121</sup> Koffman, 2007, p. 142. Case referred to as cited in Koffman.

duty of due diligence to provide a seaworthy ship. In voyage charters, the obligation arises at the time of sailing on the charter voyage unless otherwise provided in the contract. Any obligation to maintain a vessel in a certain condition throughout the charter is different from the obligation to provide a seaworthy ship.<sup>122</sup>

As for cargo worthiness, the requirement is that the ship is cargo worthy from the commencement of loading the cargo onto the vessel. She is to be fit to receive the goods under the charter party but there is no continued warranty that the ship remains cargo worthy throughout the charter.<sup>123</sup> For time charters under common law, however, there is no implied absolute warranty to supply a seaworthy ship but all those terms must be expressed contractually.<sup>124</sup>

Though the matter of seaworthiness largely pertains to commercial maritime law and as such concerns contracts under which a party can claim damages or an insurance company can withhold an insurance payout if a ship is unseaworthy, there is also the concept of statutory seaworthiness.<sup>125</sup> The detailed standards that pertain to ship, cargo and navigational safety can be found in more technical regulations of conventions such as International Convention for the Prevention of Pollution from Ships (MARPOL 1973/1978), the International Convention on Safety of Life at Sea (SOLAS, 1974), Convention on the International Regulations for Preventing Collisions at Sea (COLREGs 1972), and the International Convention on Load Lines, (Loadlines 1966).<sup>126</sup> For instance, as part of SOLAS, the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code) regulates maritime safety from a managerial and operational approach.<sup>127</sup> As such it provides in part some specifications that can be referenced back to seaworthiness as concerns the safe manning and operation of ships.

The seaworthiness obligation is non-delegable and as such courts have in the past been unwilling to hold, for instance, classification societies liable instead of ship owners for breaches. Just as the classification society is a third party outside the contract which is delegated the duty of to some extent determine seaworthiness of the vessel and even though class is a legal requirement on the ship owner, the act of classifying is not considered part of the concept of seaworthiness only the classification itself.<sup>128</sup>

The contractual concept and duty of seaworthiness can be affected by surrounding circumstances. In the *Fjord Wind* case<sup>129</sup> two clauses pertaining to seaworthiness were included in the charter party. Clause 1 specified the condition of the ship as fit for the voyage while clause 35 concerned the owner's duty of due diligence to make the ship seaworthy before and at the

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<sup>122</sup> Wilson, 2008, p. 9f

<sup>123</sup> Wilson, 2008, p. 9f

<sup>124</sup> Liang, 2000, p. 10f.

<sup>125</sup> Mukherjee, P. K., *An Introduction to Maritime Law and Admiralty Jurisdiction*, World Maritime University, Malmö, no year provided, p. 13.

<sup>126</sup> Mukherjee, P. K., *An Introduction to Maritime Law and Admiralty Jurisdiction*, p. 11ff.

<sup>127</sup> International Maritime Organization (IMO) [www.imo.org](http://www.imo.org)

<sup>128</sup> Liang, 2000, pp. 7-10.

<sup>129</sup> *Eridania S.P.A. and others v. Rudolf A. Oetker and others* [2000] 2 Lloyd's Law Rep. 191 (*The Fjord Wind*)



beginning of the voyage as well as to have the ship properly manned and equipped. The terms of the voyage charter were also incorporated into the bill of lading contract. The issue of the case was the nature of the owner's obligation as to seaworthiness and how the two clauses were intended to cooperate in practice.<sup>130</sup> Without clause 35, the court was inclined to regard clause 1 as an absolute warranty of seaworthiness. Clause 35 directly affected the construction of clause 1. The court found that the clauses together meant that the owner was under a continuous duty to exercise due diligence to make the ship seaworthy at all stages of the charter.<sup>131</sup> The obligation of seaworthiness had thereby been extended beyond the commencement of the voyage.

### **3.3 Strict Liability and Liability Channeling**

A common denominator for most pollution compensation schemes is that the ship owner is strictly liable for any pollution damage.<sup>132</sup> Most of these regimes also channel liability directly through the ship owner, meaning that other parties involved are protected.<sup>133</sup> However, in certain cases, the strict liability is not absolute and the channeling of liability through the Ship owner can be broken.

Normally, in the first tier of the compensation scheme, or compensation through the CLC 1969 and the 1992 Protocol, the ship owner will be liable unless he or she can prove that someone else caused the damage, for instance that the injured party caused the damage intentionally or through contributory negligence.<sup>134</sup> In the second tier compensation scheme, that of the International Oil Pollution Fund (IOPCF), the cargo owners, or the receivers of oil, contribute to the Fund which then compensates claimants.<sup>135</sup> In the past, there have also been voluntary industry compensation schemes, such as the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP) and the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL), which are now inactive.<sup>136</sup>

Despite the channeling of liability through the ship owner, cargo owners and charterers can become liable for oil pollution damage in mainly two ways.

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<sup>130</sup> *The Fjord Wind* at pp. 194-195.

<sup>131</sup> *The Fjord Wind*, at pp. 196-198.

<sup>132</sup> See for instance CLC 1969 Article III.1 and 1992 Protocol Article 4.1. Also see SOU 2006:92 Skadeståndsansvar vid sjötransporter av farligt gods, p. 86, and International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1969, (HNSC) Article 7.1. Also, Anderson, 2001-2002, p. 3f.

<sup>133</sup> For instance, CLC 1969 II.2 and 3, 1992 Protocol, Article 4.2 and 3, and HNSC Article 7.5.

<sup>134</sup> SMC 10:3 (2); CLC 1969 Article III.2(b), not changed by 1992 Protocol.

<sup>135</sup> Jacobsson, Måns, *The International Oil Pollution Compensation Funds and the International Regime of Compensation for Oil Pollution Damage*, Malmö, 2006, p. 4-6, p. 13-17. Also see Anderson, 2001-2002, p. 6.

<sup>136</sup> Falkanger, 2008, p. 197

First, if the requirements for breaking through the channeling of liability to the ship owner are fulfilled, the claimant can, sue the cargo owner or charterer directly. Secondly, the ship owner may seek to recover from cargo owners and charterers in recourse action.

The idea behind channeling liability through the ship owner is to protect parties sometimes far removed through the ship owner's strict liability and to make the process of damage recovery more effective.<sup>137</sup> It is especially due to predictability. If anyone can be sued at any time for the same oil pollution damage, all the parties that could possibly be involved will have to insure themselves against the possibility of incurring liability. The number of situations that would have to be regulated would cover a vast expanse and create insecurity in the business regarding the disbursement of liability.<sup>138</sup> In Sweden, for instance, the Coast Guard, or in other words the State, is responsible for responding to and cleaning up oil in the water. But as soon as the oil reaches the beach, the owner of that area, oftentimes a county will be responsible for prevention and sanitation.<sup>139</sup> On both sides there can be numerous parties involved: Crew, salvage companies, pilots, charterers, cargo owners, operators and managers. Regulating the liability of each of those groups is complicated and unpredictable. Also, if general tort rules were used, who would sue whom and when and where would be almost impossible to overview. Instead, a channeling provision was chosen which directs liability through one of the parties.

In the 1969 CLC and the 1992 Protocol, this provision of channeling is found in Article III.4 and Article 4 2§.<sup>140</sup> A similar channeling provision is found in HNSC Article 7.5. This channeling can be broken in cases where the person or persons subject to the claim have caused the accident intentionally or due to gross negligence with the realization that the pollution damage was likely to occur as a result of their behavior.<sup>141</sup> The channeling of responsibility means that these persons are protected from direct legal action in cases where the required state of mind cannot be shown. In the 1969 CLC, the protected persons are not specified above and beyond the servants or agents of the owner.<sup>142</sup> In the 1992 Protocol, the list of protected persons was expanded to include, among others, any charterer, including bareboat charterers, managers and operators of the ship.<sup>143</sup> The

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<sup>137</sup> For a discussion on the background on channeling, see Falkanger, 2008, p.200ff.

<sup>138</sup> See article 4 of the 1992 Protocol to the 1969 Civil Liability Convention for the Convention list of parties protected by channeling provisions. Note that the Swedish and Nordic laws go further in also channeling liability for charterers and cargo owners from the 1969 Convention. The 1992 Protocol includes charterers under article 4.2(c). However, the cargo owner is not protected according to the 1992 Protocol but in some jurisdictions, for instance in Sweden, the Cargo owner has been given separate protection as well (see Swedish Maritime Code 10:4).

<sup>139</sup> Proposition 1973:140 Kungl. Maj:ts proposition med förslag till lag om ansvarighet för oljeskada till sjöss m.m. p. 71.

<sup>140</sup> 1992 Protocol Article 4.2; Prop. 1994/95:169 p. 58-62.

<sup>141</sup> CLC 1969 Article III.3, 1992 Protocol Article 4.2 and HNSC Article 7.5.

<sup>142</sup> CLC 1969 Article III.4. Also see Gauci, Gotthard, *Oil Pollution at Sea. Civil Liability y and Compensation for Damage*, West Sussex, 1997, p. 92ff demise/bareboat charterers are not likely to be equaled with owners also in the 1969 CLC. However, ship operators may not be protected, see discussion on p. 94 regarding the *Amoco Cadiz*.

<sup>143</sup> 1992 Protocol Article 4 2§ 8(c).

cargo owner was not included, but many States were of the opinion that more stringent measures were allowed and therefore included also these persons among the protected.<sup>144</sup> In the HNSC, the enumeration is almost identical to that of the 1992 Protocol with the exception that also the servants or agents of certain parties, among them the charterer, are also protected.<sup>145</sup> Cargo interests are not generally faced with liability for oil pollution damage but do contribute through other compensation schemes, such as the aforementioned IOPCF.<sup>146</sup>

Outside of the conventions, national law determines the basis for liability and the basis differs widely between different jurisdictions. The United States, for instance, is not a party to the conventions and regulates the liability issues within the Oil Pollution Act of 1990.<sup>147</sup> In the UK, the substance of the liability regimes has been incorporated into the 1971 Merchant Shipping Act and an action there will be based either on the legislative regulations or on common law principles. The common law grounds for pollution damage claims are generally trespass, public or private nuisance or negligence.<sup>148</sup> In the civil law jurisdiction of Sweden, liability for oil pollution damage is regulated in chapter 10 of the Swedish Maritime Code (SMC). The code covers all incidents of pollution in Sweden, also outside of the conventions.<sup>149</sup> This essentially means that the convention covers all cases except for those pertaining to non-convention state flagged ships involved in incidents on the high seas.

### **3.4 The Right to Recourse**

Neither the CLC 1969, the 1992 Protocol or HNSC limit the ship owner's right to recourse action against third persons according to general tort law.<sup>150</sup> The ship owner can therefore direct recourse action to recover fully the amounts he or she has been found liable for under the Conventions according

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<sup>144</sup> Swedish and Nordic laws go further in channeling liability for charterers and cargo owners from the 1969 Convention even before the 1992 Protocol. The 1992 Protocol includes charterers under article 4.2(c). See the Swedish Maritime Code chapter 10 section 4. Also see Falkanger, 2008, p.203 and Prop. 1994/95:169 p. 59, p. 62. Abecassis, 1985, discusses the regimes up until 1985 on p. 173-251, the Funds on p. 252-302. For an overview of UK law, see Abecassis, 1985, p. 329ff. A discussion on civil liability and common law is found in the same works, p. 355-405.

<sup>145</sup> HNSC Article 7.5.

<sup>146</sup> Gauci, 1997, p. 97.

<sup>147</sup> Lindgren. Rickard, *Ansvar för oljeskador i USA. Ansvarig part enligt OPA 1990.*, Juristförlaget, Stockholm, 1993. The thesis treats the definition of "responsible party" under the OPA.

<sup>148</sup> Abecassis, 1985, p. 355. Also see Gauci, 1997, p. 10-12 for a review of the common law torts. These are not treated in any detail other than in relation to duty of care below.

<sup>149</sup> 10:19 SMC, see 10:1 for definitions and 10:2 for scope. Applicability to non-convention incidents limits liability according to chapter 9 of the SMC and not within the convention. Only accidents occurring on the High Seas involving a vessel flagged in a non-convention State are not covered by the SMC. 10:19 SMC, 10:2 SMC e contrario.

<sup>150</sup> Prop. 1994/95:169 p. 59; CLC 1969 Article III.5; HNSC Article 7.6. In the Swedish preparatory works cited in this footnote it was presumed that the right to recourse was to be governing entirely nationally (at p. 59). Also see Prop. 1973:140 p. 43. In the same manner, the 1992 Protocol was not found to change this possibility of recourse action nor the regulation of it.

to national general recourse principles.<sup>151</sup> For instance, according to Swedish general principles, the one who answers strictly has a general right to recourse action against another party who has caused the accident.<sup>152</sup> The right to recourse is not regulated per se in the CLC 1969 or the 1992 protocol but they state that nothing in the conventions shall affect the right of the ship owner to recovery from third persons.<sup>153</sup> In some national legislation, such as in Sweden, the law states that any compensation due to oil damage may not be reclaimed from a protected person, unless the person against whom the claim is made has caused the damage intentionally or by gross negligence and with knowledge that such damage would occur.<sup>154</sup> In UK common law, recovery for relational economic loss arising from damage to a third party's property is not generally recoverable unless the claimant can somehow show loss to his or her own property.<sup>155</sup> The ship owner would in that case have to have another basis for recovery. Common recourse actions are related to breach of safety warranties. For instance, if the ship grounds while under way to a nominated port, the charterer can be liable contractually for failure to nominate a safe port. Other liabilities may concern loading, discharge and stowage of the cargo. Particularly the charterer is targeted for recourse action.<sup>156</sup>

### **3.5 Charterer/Cargo Owner's Duty of Care and Common Trade Practice**

Arguments have been raised that the very existence of vetting procedures creates a liability for the charterer/cargo owner.<sup>157</sup> The liability would be derived from looking at the common practice of the industry when selecting vessels, for instance the detailed guidelines from OCIMF. These guidelines create an industry vessel selection standard, a duty of care.<sup>158</sup> A breach of duty of care could possibly break through the channeling of liability in pollution damage cases or give rise to an action in tort. Duty of care in the common law sense is a legal obligation that requires individuals or companies to adhere to a reasonable standard of care when

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<sup>151</sup> Prop. 1994/95:169 p. 60

<sup>152</sup> Prop. 1994/95:169 p. 60; CLC 1969 Article III.5, this has not been amended in the 1992 Protocol. For discussion, see Anderson, 2001-2002, p. 23-26.

<sup>153</sup> CLC 1969 Article III.5, this has not been amended in the 1992 Protocol. For discussion, see Anderson, 2001-2002, p. 23-26.

<sup>154</sup> SMC 10:4 2§ and 3§. See 2§ for enumeration of protected persons. In effect, this requirement in Swedish law means a practical limitation of the right to recover to cases where the required state of mind can be proven. Ordinarily, recourse is fully available. For cargo owners and charterers to become liable in recourse, negligence suffices to satisfy the procedural requirement as opposed to gross negligence for channeling break through. See Prop. 1994/95:169 p. 60 and Prop. 1973:140 p. 42.

<sup>155</sup> Deakin, Simon etc, *Markesinis and Deakin's Tort Law*, 6th Ed., Oxford, 2008, at p. 185f. (Cited as Deakin, 2008.)

<sup>156</sup> Anderson, 2001-2002, p. 23-26

<sup>157</sup> Anderson, 2001-2002, p. 40-42.

<sup>158</sup> Anderson, 2001-2002, p. 41. Anderson refers to OCIMF guidelines from 2002. Please note that the system is more harmonized and undergoes continuous development and the standards today may differ from those published in 2002.

performing an act that can foreseeably cause harm.<sup>159</sup> There is no general duty in tort to prevent harm. Every act or omission does not constitute a breach of a duty.<sup>160</sup> A conduct constitutes a breach when that conduct is unreasonable in failing to reach the appropriate standard of care applicable in that particular case.<sup>161</sup> In order to establish whether there is a tortious liability one has to determine if the damage is such that it is recoverable in principle, or constitutes a duty, and whether the damage could have been prevented by taking reasonable precautions considered by the law as an acceptable burden under the circumstances.<sup>162</sup> These reasonable precautions are those standards “of normally careful behavior in the profession, occupation or activity in question”.<sup>163</sup>

In the civil law sense, the determination of culpa is not very different from the discussion of duty of care.<sup>164</sup> Gauci states that the “law of torts in a common law system generally performs the function accomplished by that part of the law of obligations dealing with *dolus* and *culpa* in the law of obligations in Roman-law based systems.”<sup>165</sup> However, according to Hellner the common law concept of duty of care has a much wider comprehension than the duty of care concept in continental civil law, especially Swedish civil law.<sup>166</sup> There, the duty of care is more limited to concern the actual duty not to harm others, while duty of care in the common law sense also includes what is referred to in civil law as the determination of causality and third party liability.<sup>167</sup> Still, the concept of *culpa negligentia* includes the general definition that the defendant has not taken the necessary precautions demanded by the circumstances at hand. One such manner in which to determine culpa is to look at the level of care a person of normal precaution would take. Could that person have prevented the incident through another behavior?<sup>168</sup> Another norm is comprised of the precautions generally expected to be taken in the situation at hand according to general standards of care, for instance standard instructions issued.<sup>169</sup> A freer determination is also used in applying what Dahlman calls the economic criteria, where the level of risk is measured against the cost of

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<sup>159</sup> *Donoghue (or McAlister) v Stevenson*, [1932] All ER Rep 1; [1932] AC 562; House of Lords, p. 580ff. Lord Atkin therein establishes the neighbor principle, or foreseeability, as a test of duty. Deakin, 2008 at p. 119f stresses, however, that this is but one element of duty.

<sup>160</sup> Deakin, 2008, p. 199-200.

<sup>161</sup> Deakin, 2008, p. 120.

<sup>162</sup> Deakin, 2008, p. 120.

<sup>163</sup> Deakin, 2008, p. 120.

<sup>164</sup> The perspective is Swedish civil law but is in general terms representative of civil law, though the practical application may differ in the various jurisdictions. Deakin, 2008, at p. 116f states that the duty of care concept has no exact equivalent in civil law in Europe. However, the criteria for determining culpa or duty are similar. The duty of care discussion should therefore have some relevance also in civil law, especially in maritime law.

<sup>165</sup> Gauci, 1997, p. 11 (sic).

<sup>166</sup> Hellner, Jan; Radetzki, Marcus; *Skadeståndsrätt*, 7e Ed., Stockholm, 2006, p. 110. Cited as Hellner, 2006.

<sup>167</sup> Hellner, 2006, p. 110.

<sup>168</sup> Dahlman, Christian, *Konkurrerande Culpakriterier*, Lund, 2000, s. 10-16, 36ff, Hellner, 2006, p. 133.

<sup>169</sup> Dahlman, 2000, s. 34f, also see NJA 1965 s. 474 where the defendant breached generally accepted norms for competition. Also see Hellner, 2006, p. 116, p. 128-129, p. 133, p. 143 and p. 149.

avoiding the risk.<sup>170</sup> Though there is a difference in terms between civil and common law in this respect, the determinations serve to establish the same thing, namely the extent of a duty of care of a party. The following will focus on the common law duty of care.<sup>171</sup>

The common law duty of care may exist between individuals that at current have no direct connection, but may have so in the future.<sup>172</sup> In the case of *Otto Candies LLC v. Nippon Kaiji Kyokai Corp. (NKK)*<sup>173</sup> the NKK classification society was found to have a duty of care in assuming the responsibility to properly class a vessel, also against third parties.<sup>174</sup> In this case, the courts found that when classification societies take on the duty of surveying and classifying a vessel they accept a duty to do so in accordance with their own rules and standards.<sup>175</sup> Generally, however, a classification society cannot be seen as insurers of a vessel's seaworthiness but they do have a duty to ensure that their work is carried out with reasonable care. Therefore, depending on the facts of the individual case, a classification society can be found to have a duty of care against a third party.<sup>176</sup> This situation could be applied analogously to the charterer in relation to a third party affected by pollution damage caused by the cargo shipped on the vessel hired by the charterer as "it may include the person to whom the innocent machine is "lent or given""<sup>177</sup>.

Some may argue that the cases against classification societies cannot be applied to vetting as the vetting process is voluntary and not based in legislation. Even though these guidelines are voluntary, they have become a common standard for tanker owners to follow or they do not do business with oil or chemical companies.<sup>178</sup> Though this higher standard of due diligence in vessel selection may create a liability for the company which fails to adhere to it, it does not remove anything from the standards which ship owners have to meet. However, the vetting policies of many companies set criteria higher than the legal standards and in order for the ship owner or operator to meet these standards, cooperation between the different sections of the industry is necessary. Here, international organizations such as INTERTANKO and OCIMF have become important in publishing and clarifying the standards. Even though there are still numerous vetting procedures and policies, common denominators can be seen such as a SIRE report from a physical inspection, the setting of age and hull construction

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<sup>170</sup> Dahlman, 2000, p. 43ff; Hellner, 2006, p. 139, the *Learned Hand* formula.

<sup>171</sup> See chapter 1.4 regarding delimitation of subject.

<sup>172</sup> <sup>172</sup> *Donoghue (or McAlister) v Stevenson*, [1932] All ER Rep 1; [1932] AC 562; House of Lords, p. 591.

<sup>173</sup> *Otto Candies, L. L. C. v. Nippon Kaiji Kyokai Corp.*, 346 F.3d 530, 2003 AMC 2409, 2410 (5<sup>th</sup> Cir. 2003).

<sup>174</sup> O'Halloran, Rory B., *Otto Candies, L. L. C. v. Nippon Kaiji Kyokai Corp.: In a Novel Decision, the Fifth Circuit Recognizes the Tort of Negligent Misrepresentation in Connection with Maritime Classification Societies and Third-Party Plaintiffs*, 78 Tul. L. Rev. 1389 (2003-2004).

<sup>175</sup> O'Halloran, 2003-2004, p. 1397.

<sup>176</sup> O'Halloran, 2003-2004, p. 1397.

<sup>177</sup> *Donoghue (or McAlister) v Stevenson*, [1932] All ER Rep 1; [1932] AC 562; House of Lords, p. 591.

<sup>178</sup> Mossberg, April 2008; Snaith, June 2008; also see case law below, especially the New York Arbitration Cases.

requirements, and the review of vessel history. Regardless of the lack of harmonization, it is not illogical to state that a company has a duty of using reasonable care also beyond common criteria when selecting a vessel for the dangerous activity of shipping oil and chemicals no matter if the standards are voluntary or imposed by law.

In United States common law, the possibility that a voluntary standard can create a duty of care has been supported in case law. In *Keller v. United States*<sup>179</sup> a longshoreman was injured when falling from a ladder. The ship owner claimed that the ladder met relevant safety standards, which at the time were not promulgated yet. The Court held that these voluntary standards were an indication of industry safety practices already when the accident occurred.<sup>180</sup> The district court argued that compliance and practice of an industry do not necessarily constitute due care but may be evidence of such due care. In other words, if those standards are followed, the manner of conduct can be considered to have been performed with due care. When relied on by a fact finder there must be a particular strong showing as to the unreasonableness of the customary practice if the findings are to be disregarded.<sup>181</sup> In *Coastal (Bermuda) Ltd. V. E.W. Saybolt & Co.*<sup>182</sup> the American Fifth Circuit Court stated that an independent oil surveyor testing oil must reasonably expect that subsequent buyers of that oil would rely on those test results, not just the current buyer.<sup>183</sup> However, there must be actual knowledge that the information will be relied upon by someone other than the client for whom it is primarily intended.<sup>184</sup>

When a charterer/cargo owner selects a vessel for a cargo dangerous to the environment and to the life in it, potential third parties may expect a certain level of care in the selection. That duty of care can be evidenced by industry practice. To the extent that practice is conformed, the standards derived from it or expressed have probative value for the determination of the extent of the duty of care.<sup>185</sup> A common practice setting high standards of care in vessel selection can create a stronger duty of care.

### **3.6 Conclusions**

Generally, liability for the condition of a vessel rests with the ship owner and is enforced by Flag States, Classification Societies and to some extent by Port State Control. However, major oil pollution accidents such as the *Erika* have brought the attention to the charterer and his or her duty to ensure that the ships used for oil transportation are not only appropriately

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<sup>179</sup> *Keller v. United States*, 38 F.3d 16, 1995 AMC 397 (1st Cir. 1994). Also see Anderson, 2001-2002 at p. 41.

<sup>180</sup> *Keller v. United States*, 38 F.3d 16, at page 26, 1995 AMC 397 (1st Cir. 1994). Also see Anderson, 2001-2002 at p. 41.

<sup>181</sup> *Keller v. United States*, 38 F.3d 16, at page 27, 1995 AMC 397 (1st Cir. 1994).

<sup>182</sup> *Coastal (Bermuda) Ltd. V. E.W. Saybolt & Co.* 826 F.2d 424, 1988 AMC 207, (5<sup>th</sup> Cir. 1987)

<sup>183</sup> *Coastal (Bermuda) Ltd. V. E.W. Saybolt & Co.* at p. 425 and at p. 208. The plaintiff could, however, not provide enough evidence for a prima facie case of negligent misrepresentation. Also see O'Halloran, 2003-2004 at p. 1394.

<sup>184</sup> O'Halloran, 2003-2004, p. 1395.

<sup>185</sup> Anderson, 2001-2002, at p. 41.

classed but also suitable for their purpose.<sup>186</sup> As ownership patterns have changed from oil and chemical companies owning their own fleets, to small fleet and non-traditional owners today, this focus may be a result of the lack of control by the oil and chemical companies over the ships they are using. As mentioned, in terms of tonnage the large and very large ships represent 71% of the entire world fleet, with the oil and chemical carriers representing almost 62 per cent of those.<sup>187</sup> That is a sizeable amount of ships to keep track of and the safety net of inspection has expanded to the oil and chemical shipping industries in the form of vetting policies, or risk assessment and management procedures. Some argue that this development places rightful responsibility on the charterer/cargo Owner, while others maintain that the responsibility falls on the ship owner alone under the auspices of Flag State Control and classification. Others yet argue that vetting should not even have to exist, that ships are over inspected and that Flag State Control should be enough.<sup>188</sup> The industry also maintains that vetting is a voluntary scheme, as opposed to surveying and classification, and therefore should create no liabilities. Regardless of opinion, it is clear that vetting has become an industry practice with many common standards or vessel selection criteria. This selection process, especially through common criteria, although voluntary, may create a duty of care of charterers/cargo owners in relation to third parties.

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<sup>186</sup> Peter D. Clark, *Vetting is becoming crucial to awarding charters for tankers*, Clark, Atcheson & Reisert, 1995 ([www.havlaw.com](http://www.havlaw.com)); Lloyd's List International *Two losses that brought the charterer into focus* 10/28/2003.

<sup>187</sup> Equasis, *The world merchant fleet of 2005*. Equasis statistics, 2005, [www.equasis.org](http://www.equasis.org)

<sup>188</sup> Lloyd's List International 10/28/2003. Also, see in general on over-inspection of ships the works of Dr. Sabine Knapp.



# 4 The Charter Party Vetting Clause

## 4.1 Introduction

The assignment of the risks and costs of vetting is regulated contractually, mainly in a charter party. The most common contracts used are time charter parties, but also voyage charters and other contracts of affreightment exist. Herein, the focus will be on the charter party regulations.

Vetting clauses are as varied in wording as the vetting procedures are multifarious. BIMCO states that the great majority of charter party vetting clauses developed over the years have been so by the oil majors and with their explicit interests in mind. There are many various and oftentimes unreasonable and arbitrary Vetting Clauses which also are contrary to industry practice. Among organizations working with vetting clauses, BIMCO aims to produce information on existing clauses as well as to develop clauses that are more reasonable and practical. Another aim is to ensure that the interests of all parties are taken into account.<sup>189</sup> When the author approached BIMCO with the question of what the main problems with contractual regulation of vetting are, the response was that the problem lies in the attempt to provide a reasonable solution to an unreasonable problem. BIMCO, in fact, describes vetting as one of the more vexing aspects of the shipping industry.<sup>190</sup> Part of the reason for this vexation is the character of the industry. Ship owners do not always use their own ships but charter them out as well as charter ships in. Sometimes the company requiring that a ship owner undergoes a vetting procedure may be a ship owner in turn. Therefore, when the ship owner acts as ship owner, he or she will want a vetting clause formulated to his or her advantage, or a more lenient clause. But when the ship owner acts as the charterer, chartering in a ship from elsewhere, he or she will want a strong vetting clause. It does not help in this situation that brokers and others involved may lack the understanding of the vetting process. However, the ship owners and charterers can oftentimes not be accused of lacking understanding, but rather of purposefully using the wording of the clause depending on which hat, owner's or charterer's, they are wearing.<sup>191</sup>

What, then, is a vetting clause? Attorney Honan states that a vetting clause is “a charter provision under which the owner warrants as of the date of the vessel's delivery and throughout the charter term that third party oil and/or chemical companies have accepted, and will accept, the vessel.”<sup>192</sup> Against the background of the complexity of the vetting procedures, this ought to mean that the vessel has undergone the individual vetting procedures of each of the oil major or chemical companies enumerated in the contract. A more comprehensive description would

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<sup>189</sup> INTERTANKO, 2006, p. 4; Mossberg, April 2008.

<sup>190</sup> Hunter, Grant, E-mail communication, May 13, 2008

<sup>191</sup> Snaith, June 2008. Also discussed by Mossberg, April 2008, as to the owner in the different roles, chartering vessels in as well as out.

<sup>192</sup> Honan, William J., *Vetting Clauses: A Review*, Holland & Knight, LLP, New York March 29, 2007, p 2. Mr. Honan is also a co-author of INTERTANKO, 2006.

also include that the ship has been inspected by a trade certified vetting inspector (such as OCIMF or CDI), and that there is a report of that inspection in SIRE or a report lodged with CDI depending on vessel and type of cargo.<sup>193</sup> The discussion in this chapter will center on the charter party clauses and their wording and aim. The terminological problems concerning acceptance and approval will also be treated. Thereafter, a range of contractual issues will be dealt with. The discussion is mainly based on the limited case law available but also on the opinions and work of trade organizations attempting to resolve issues surrounding the contractual regulation of vetting.

## **4.2 Charter Party Vetting Clauses**

To state that there is a typical vetting clause would be an oxymoron. A review of vetting clauses commonly used in the industry shows that they are as different in wording as in title. To start with, they are not always called vetting clauses. The vetting clause used by Alpine Oil Services Corporation has the heading “Eligibility Clause”<sup>194</sup>. Oil company BP calls its clause a Vetting and Auditing Clause, while Lyondell simply lists its vetting clause as number 32.<sup>195</sup> A rather common heading, however, is to call the clause an Oil Majors’ Approval Clause.<sup>196</sup> There are similarities in aim that can be pointed to. First, a clause will generally aim to ensure that a vessel inspection report has been entered into SIRE or that the vessel has been inspected in another manner. Secondly, the clause will aim to ensure the charterer that the vessel has been approved or accepted by an oil or chemical company, or by a range of such major companies. A vetting clause will oftentimes also serve to allocate the risks for rejection of the vessel and the costs of inspections; to set time bars for reinstatement in cases of non-compliance.; to provide for decrease in hire during periods when the ship remains uninspected and for the option to place the vessel off hire; and to provide for the charterer’s right to terminate the contract in case of breach or other sanctions. Finally, a vetting clause will also constitute a warranty or guarantee of the owner that the vessel meets the standards of enumerated oil or chemical companies.<sup>197</sup>

## **4.3 Approval or Acceptance**

As a part of the contractual vetting regulation, the charterer will seek to hold the ship owner liable for the vessel being *approved* by arrange of oil or chemical companies. A common wording of this part of the clause is as follows:

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<sup>193</sup> Kelly, Marie, *Norton Rose, The Owner’s Obligation to Obtain and Maintain Oil Major Approvals*, October 21, 2003. INTERTANKO, 2006, see the wording of the various vetting clauses in this publication and in the discussion below.

<sup>194</sup> INTERTANKO, 2006, p. 13.

<sup>195</sup> INTERTANKO, 2006, p. 15 and p. 19.

<sup>196</sup> INTERTANKO, 2006, see for instance on p. 18, Glencore Shipping, on p. 22, Vitol, or simply approval on p. 21, Remmy.

<sup>197</sup> Please see Supplement A for sample vetting clauses.

*“Owners warrant at the time of delivery, the vessel and her management are approved by the major oil companies[...].”*<sup>198</sup> or *“Owner will endeavour to maintain all necessary oil company approvals during the course of this charter.”*<sup>199</sup>

As seen in the *Erika* case, the question of the oil company’s approval was of issue to the court. The vessel had been rejected by another oil company and Total chose to use her, possibly without knowledge of such rejection. The phrasing *approval* has since become problematic in that oil companies do not want to give the view that a stamp of approval means that they have agreed to use the vessel.<sup>200</sup> Nor do they want to be held liable for their approval in case another company chooses to use the vessel referring to approval already in place.<sup>201</sup> Therefore, approvals are no longer issued. INTERTANKO also finds this wording problematic. The organization recommends that the reference to approvals is removed and replaced by a phrasing indicating that the vessel is not unacceptable to a certain company or that a rating of acceptable is used.<sup>202</sup> Even so, many charter parties still contain clauses requiring the approval of oil major. These clauses are now difficult, if not impossible to comply with.<sup>203</sup> For purposes of the continued discussion, *approved* will be used where it is used in the charter party. The wording *accepted* will be used in all other cases as it is the more correct phrasing.

## **4.4 Contractual Issues**

### **4.4.1 Allocation of Risk and Termination of Contract**

As vetting clauses are not harmonized in wording, possible problems in relation to these clauses can only be generalized to a certain degree. The following contractual issues are therefore based on the limited case law available and on the work of trade organizations such as BIMCO and INTERTANKO, as well as on the author’s own opinions.

Normally, the charterer will carry the risk that a third party under contract with the charterer will reject the vessel. In the oil and chemical shipping industries, however it has become common practice to allocate that risk to the ship owner through the approval or acceptance clause.<sup>204</sup> The wording can be as follows:

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<sup>198</sup> INTERTANKO, 2006, p. 12. Emphasis added.

<sup>199</sup> INTERTANKO, 2006, p. 18. Emphasis added.

<sup>200</sup> The Arbitrator 2, 2000; Also Hunter, Grant, E-mail communication, May 13, 2008 (BIMCO).

<sup>201</sup> Pettersson, May 2008; Also Pettersson, WMU 2008.

<sup>202</sup> INTERTANKO, 2006, p. 18.

<sup>203</sup> See INTERTANKO, 2006, for sample clauses. Also, Snaith, June 2008.

<sup>204</sup> INTERTANKO, 2006, p. 8.

*Owner warrants that for the duration of this charter the vessel will be kept in standard acceptable to all major oil producers and all major chemical companies.*<sup>205</sup>

The clause cited was disputed in a New York arbitration case. In *American Energy* (S.M.A. No. 3141)<sup>206</sup> a Ship Owner fought the vetting clause claiming it did not require him to obtain approval by any oil or chemical major prior to or during the charter. Rather, the vessel was to be kept in such a condition that it would be approved or accepted at any time if called upon to undergo a vetting procedure.<sup>207</sup>

As the owner did not have the required acceptance<sup>208</sup> at the time of delivery, the charterer terminated the contract referring to the vetting and approval clause. The arbitrators agreed with the charterer and found the owner under an obligation to maintain specific approval by certain oil majors. The clause was considered a warranty that the approvals were actually in place. It was not enough that the ship met unspecified standards. Additionally, the clause specified that all approvals were to be in place and not just a few. The owner had no approvals at all at the time of delivery. Even though the owner managed to obtain some approvals before the date of cancellation provided in the contract, the breach was still substantial and warranted termination of the contract.<sup>209</sup> The panel further stated that terms and conditions of contracts “usually deal with the allocation of risks and costs to a particular partner in the contract. If the terms demanded (prior to entering into the contract) become too onerous, then a commercial decision has to be made whether one wishes to accept them or terminate the negotiations.”<sup>210</sup> In other words, either as a vessel owner one complies or one does not do business.

This allocation of the risk of rejection poses a multitude of problems. If the owner charters the vessel to the oil or chemical shipping company directly, the acceptance of that company is more easily guaranteed. However, if the charterer wants to sub-charter the vessel the range of companies instantly increases to involve more or less all the major companies in the industry. As a first problem, the clause expands the duties of the ship owner toward the charterer to satisfy duties that the charterer has toward the third party, the oil or chemical company. Secondly, the companies may have their own vetting criteria in addition to the SIRE/SIR inspection report. If these criteria differ widely, the burden of meeting them can be heavy. Even though recent developments have led to some harmonization of criteria,

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<sup>205</sup> INTERTANKO, 2006, p. 9.

<sup>206</sup> Martowski, 2001-2002, p. 127-128. Also see *in re Arbitration Between Sunrise Shipping Ltd. & Stainless Navigation Co. (American Energy Arbitration)* SMA Award No. 3141, at p. 843-847 (1995) (Bulow, Laing, & Arnold, Arbs.). Please note that the citations are from a secondary source. Please see chapter 1 under Method and Sources for an explanation to this.

<sup>207</sup> Martowski, 2001-2002, p. 127-128. Also see *American Energy Arbitration* at p. 843-847.

<sup>208</sup> Despite the wording in the clause, the arbitrators refer to *Approvals*, see Martowski, 2001-2002, p. 127-128.

<sup>209</sup> Clark, 1995

<sup>210</sup> As cited by Martowski, 2001-2002, at p. 128.

companies still set their own standards of acceptance. Thirdly, the specification of companies in the clauses may not always be exact.<sup>211</sup> A clause as the one cited above is more or less impossible to fulfill as the range of companies is imprecise and could be infinite. First, which are the companies considered major oil or chemical companies? How set is this list of companies? Secondly, how widely do the criteria they set differ? Is it even possible for an oil tanker to satisfy the criteria set by a chemical company and vice versa? Are the criteria trade specific or do they intersect?

#### 4.4.2 Acceptance Catch 22

Another problem with the vetting clause is that many major oil and chemical companies will not inspect or accept a vessel in which the company has no economic interest.<sup>212</sup> If the company does not cooperate, the owner cannot meet the condition of the charter party to obtain the required approval. However, the owner cannot put the vessel at the service of the company without the acceptance. Otherwise, the owner is under an obligation posed by a third party contracting with the charterer.<sup>213</sup> The owner is bound by a contract he or she cannot fulfill. The charterer on the other hand cannot present the vessel for use until the owner has obtained an acceptance rating.

This problem can be illustrated by the *Opal Sun*<sup>214</sup> where a chemical carrier was chartered under the standard Charter Party Shelltime 4 (see Supplement A) while under construction. The charter's vetting clause required that the vessel held approvals of enumerated companies, among them Exxon, at all times during the charter. Failure to reinstate would activate the charterer's off hire option.<sup>215</sup> However, when the owners requested that Exxon inspect the vessel, the company refused stating that she did not meet the selection criteria. The charterers threatened to take her off hire as they were about to load Exxon cargo on to the vessel. The owners notified Exxon's inspection service that the *Opal Sun* was nominated to carry Exxon cargo, but the company still refused to inspect because the vessel did not meet the criteria establishing a business need for inspection. Subsequently, the vessel was placed off hire and the owner's were found to be in breach of the contract.<sup>216</sup>

To create such economic interest either a special clause in the contract creating interest or the possibility of a pre-contractual inspection are needed, especially when the vessel is a new build.

As previously discussed, the OCIMF inspections originate from the cargo owner, not the ship owner. The result is bizarre considering that oil and chemical majors are the most frequent users of the vetting procedure. In

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<sup>211</sup> INTERTANKO, 2006, p. 8-10.

<sup>212</sup> The Arbitrator 2, 2000; Also Hunter, Grant, E-mail communication, May 13, 2008 (BIMCO).

<sup>213</sup> The Arbitrator 2, 2000

<sup>214</sup> *In re Arbitration Between Orange Mar. Pte. Ltd. & O.N.E. Shipping, Inc. (Opal Sun Arbitration)*, SMA Award No. 3664; Martowski, 2001-2002, p. 136-138.

<sup>215</sup> Martowski, 2001-2002, p. 136.

<sup>216</sup> Martowski, 2001-2002, p. 137.

other words, a charterer can cause the ship owner to have to obtain an inspection prior to entering into a charter contract but make no allowance for the oil or chemical major's refusal to perform such an inspection because of lacking business interest. In the *Diamond Park/Emerald Park*<sup>217</sup> the panel stated that if "a charterer is unwilling or unable to inspect a vessel at a given time, this vessel will remain unvetted until it suits a charterer's program, even with the best intentions of its owner."<sup>218</sup> There, the panel suggested that more specific clauses may be the answer regulating this, or a more standardized and harmonized inspection program which allows owners to have the vessels inspected at their cost and according to their schedule, and not when it suits a charterer or cargo owner.<sup>219</sup> At the same time, the *Opal Sun* shows that the arbitrators consider it a business reality that owners will carry the risk for unless otherwise regulated in the contract. This points to a need for owners to ensure they do not agree to anything they cannot perform, or at the very least to the need for charterers to make allowances for the refusal of a cargo owner to initiate inspection in such a manner that one such refusal does not thwart the entire contract. Another Catch 22 situation is the validity of the SIRE report in the database. Officially, the report is valid for twelve months.<sup>220</sup> However, several charterers, after the *Erika*, will no longer accept reports older than six months.<sup>221</sup> For owners who obtain reports with observations or simply bad reports, the oil company will want to re-inspect the vessel before making a decision rather than rely on an existing report. For these owners, satisfying the six-month requirement is usually not a problem. However, for those vessels with good reports, the oil company may not consider there to be a business need for inspection as the report is valid and good.<sup>222</sup> For these owners, it will be more difficult to satisfy the six-month requirement and subsequently the charter party.

### 4.4.3 Pass or Fail

The vetting inspection itself is, as stated, only one part of the vessel selection process. The inspection itself does not present a result of pass or fail for the vessel. Instead, it is one basis upon which the vessel is selected. The *Stellar Hope*<sup>223</sup> concerned a vetting clause phrased:

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<sup>217</sup> *In re Arbitration Between O.N.E. Shipping, Inc. & Lamport Mar. S.A. (Diamond Park/Emerald Park Arbitration)*, SMA Award No. 3576 (1999); Martowski, 2001-2002, p. 133.

<sup>218</sup> As cited in Martowski, 2001-2002, p. 133.

<sup>219</sup> Martowski, 2001-2002, p. 134.

<sup>220</sup> See discussion under chapter 2.1 above.

<sup>221</sup> INTERTANKO, 2006, p. 19, see Owner's Clause A under B(b) formulated to accommodate currently industry practice. Also, Snaith, June 2008.

<sup>222</sup> Snaith, June 2008.

<sup>223</sup> Martowski, 2001-2002, p. 130; *In re Arbitration Between Iino Kaiun Kaisha Ltd. & Chembulk Trading Inc. (Stellar Hope Arbitration)*, SMA Award No. 3248, at 1275-80 (1996) (Ferrara, Besman & van Gelder, arbitrators). Please be advised that the case is cited from a secondary source. Please see chapter one under Method and Sources for details. The case does not specifically discuss the issue of terminology.

*“Owners warrant that the vessel will be in all respects able to pass safety vetting inspections conducted by Charterers and cargo interests, such as – not limited to – Shell, Mobil, Exxon, BP, Texaco, etc.”*<sup>224</sup>

As one approval had expired, charterers withheld partial hire for their trading loss. However, the clause could be distinguished from the clauses in the *American Energy* and *American Chemist* in the wording “able to pass”. The warranty that the ship was up to a certain standard could not be breached until the vessel had actually failed an inspection.

In several clauses used today, vessels are required to pass the oil or chemical major’s inspection or vetting inspection, just as in the *Stellar Hope*.<sup>225</sup>

However, the SIRE inspection does not generate a pass or fail result but a report with or without observations and comments. How is this viewed? The case law does not address it.<sup>226</sup> It could perhaps be that the courts and arbitrators assume that the inspection in the contract means that the vessel has been accepted as up to standard by enumerated oil and chemical companies. BP’s Vetting and Auditing Clause is formulated as follows:

*“The Owner and performing vessel are to pass the BP Ship Inspection, Owner Audit, if necessary, prior to entering this Charter Party.”*<sup>227</sup>

The clause lists both inspection and audit to be passed. Here, a certain distinction is made between the inspection and other aspects of the process. There is a problem inherently within the clause. It is impossible to fulfill as an inspection is not passed but simply reported. Drafters of vetting clauses should be aware that a vetting inspection comprises only a part of the actual vetting process. More steps are required to pass a vetting process and become accepted. Clauses should specify more in detail what exactly is meant by passing vetting inspections. Is it enough that a SIRE report exists? In that case, does it have to be a SIRE report without observations? Or will a SIRE report with observations be accepted as passing if the comments reveal that the observations have been resolved? Does it suffice to have a SIRE report with observations and comments, or a report without comments?

Considering the various ship vetting policies of the oil and chemical companies, there is an obvious need for harmonization of this expression, especially when several approvals/acceptances are required as different companies may pose different requirements. That the issue is not entirely clear also to arbitrators may be discerned in the panel’s statement in the *Diamond Park/Emerald Park*<sup>228</sup>; in regards to a clause requiring that the

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<sup>224</sup> Martowski, 2001-2002, p. 130. Emphasis added.

<sup>225</sup> For further examples, see INTERTANKO, 2006, p. 15 (BP), p. 16-17 (CSSA).

<sup>226</sup> Petterson, May 2008 and Pettersson, WMU 2008; inspections are not pass or fail.

Snaith, June 2008: when discussing this with Capt. Snaith the author understood this as a real problem that could be an issue of dispute if a charterer chooses to enforce the provisions.

<sup>227</sup> INTERTANKO, 2006, p. 15. Emphasis added.

<sup>228</sup> *In re Arbitration Between O.N.E. Shipping, Inc. & Lamport Mar. S.A. (Diamond Park/Emerald Park Arbitration)*, SMA Award No. 3576 (1999); Martowski, 2001-2002, p. 133.

vessel will pass inspection. The panel stated obiter that this meant that the vessel did not need to have all inspections or approvals in place but rather that when called upon she would be able to pass “inspections and/or vetting applications.”<sup>229</sup> The panel did not state whether this distinction should be expressly specified in the contract.

Another issue is the enumeration of companies in the contract. At times, wordings such as simply requiring oil major approvals, cause problems in that the range of companies is undefined and can vary from time to time. Adam Maritime, for instance, requires that the vessel is “approved by the major oil companies, such as, but not limited to” a number of enumerated companies.<sup>230</sup> This list could be expanded to include unidentified major oil companies, and as to which these major oil companies could be there is no indication. ChevronTexaco’s wording provides another sample of an imprecise requirement of approval by oil companies “including” a range of enumerated companies.<sup>231</sup> The list does not preclude the requirement that acceptance ratings are acquired from companies not on the list.

#### 4.4.4 Time Bars for Reinstatement

Another issue oftentimes addressed in vetting clauses is the amount of time an owner has to have the vessel re-inspected or acceptance reinstated. It is especially a problem if time bars are too low or when vessels are new-builds.<sup>232</sup> BP for instance uses a clause which requires that owners rectify defects or correct non-compliance within 30 days or the charterer may put the vessel off hire or cancel the contract. An additional ten days from non-compliance are given for the oil company to declare the option of enforcing the off-hire or cancellation clause or the charter party will remain in force.<sup>233</sup> CSSA provides new-builds with a 45 day window after delivery to obtain approvals, subject to schedule and availability of inspectors.<sup>234</sup> It is unclear in the clause whether a difficult schedule or the unavailability of inspectors extends the period. Clear is, however, that if the vessel fails to be reinstated within two months, the charterer may cancel the contract.<sup>235</sup> ChevronTexaco includes a less stringent time bar in its Oil Majors Approval clause. It requires that the Owner reinstate the vessel “at its earliest opportunity”.<sup>236</sup> A very strict time bar was set in the case of the *Opal Sun* where the Owners were given a full five days to reinstate any lost approvals, while the contract made no allowances for the newly built ship to obtain approvals after delivery.<sup>237</sup> In the *Diamond Park/Emerald Park*<sup>238</sup> the

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<sup>229</sup> Martowski, 2001-2002, p. 133.

<sup>230</sup> INTERTANKO, 2006, p. 12.

<sup>231</sup> INTERTANKO, 2006, p. 17-18. Also see commentary by the authors in connection to the clause.

<sup>232</sup> INTERTANKO, 2006, p. 11.

<sup>233</sup> INTERTANKO, 2006, p. 16.

<sup>234</sup> INTERTANKO, 2006, p. 16-17.

<sup>235</sup> INTERTANKO, 2006, p. 17.

<sup>236</sup> INTERTANKO, 2006, p. 18.

<sup>237</sup> Martowski, 2001-2002, p. 136. Also compare the CSSA clause.



vessels lost their vetting approvals because of a change of ownership. The arbitrators considered it a reality that vessels will lose their approvals because of change of ownership and that it therefore would be inequitable to penalize the owners for an event beyond their control. At the same time, the new owners should be expected to take all measures to ensure that approvals are regained. In the opinion, the panel stated that it is common in the industry that it takes around two months for before major oil companies to schedule inspections.<sup>239</sup> The acceptance could also take additional time depending on the rest of the vetting procedure. If it is a matter of a vessel being placed on technical hold because of a matter easily resolved, time frames could be shorter. Other times, accessibility of inspectors could require even longer time, especially if the vessel has to meet the inspector in a port out of its way.<sup>240</sup>

#### 4.4.5 Reduction of Hire and Off Hire

As seen with the BP clause referred to in the previous section, some companies reserve the right to place a non-complying vessel off hire and at times hire may also be reduced. Though the BP clause is rather straight forward in this respect, some contract wordings have led to disputes whether the charterer has the right to place the vessel off hire or to reduce hire if she fails to obtain or maintain approval or acceptance by enumerated oil or chemical majors.

CSSA uses a vetting clause which gives the option to the charterer to place the vessel off hire if she fails an inspection by any of the majors and to keep her off hire until she passes said inspection.<sup>241</sup> Against the background of the above discussion, this clause could be impossible to enforce as a SIRE inspection is not a pass or fail inspection, unless the word “inspection” means the entire vetting process leading to a positive result.

ChevronTexaco requires a replacement vessel in case of a vessel losing its required acceptance or the vessel will be placed off hire. The company requires that vessels have the acceptance in place of several listed companies and the replacement vessel seems to be a provision valid only for loss of approval for those companies as any loss of approval/acceptance from ChevronTexaco leads to immediate activation of the off hire option.<sup>242</sup>

In the *American Chemist* (S.M.A. No. 3189),<sup>243</sup> a clause identical to the one in the *American Energy* was used. The case, however, dealt with the

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<sup>238</sup> *In re Arbitration Between O.N.E. Shipping, Inc. & Lamport Mar. S.A. (Diamond Park/Emerald Park Arbitration)*, SMA Award No. 3576 (1999); Martowski, 2001-2002, p. 130-134.

<sup>239</sup> Martowski, 2001-2002, p. 132. Also see *The Arbitrator 2*, 2000. Snaith, June 2008.

<sup>240</sup> Snaith, June 2008.

<sup>241</sup> INTERTANKO, 2006, p. 17.

<sup>242</sup> INTERTANKO, 2006, p. 18. The deduction is the author's own based on the wording of the contract and is not the expressed opinion of INTERTANKO. The term approval is used in the opinion.

<sup>243</sup> *In re Arbitration Between Sunrise Shipping Ltd. & Oceanic Mars Mar. Co. (American Chemist Arbitration)* SMA Award No. 3189, at 1067 (1995) (Forti, Zubrod, & Besman, Arbs.), Martowski, 2001-2002, p. 129-130.

charterer's right to place the vessel off hire and to reduce hire for a vessel that was not in compliance with the vetting provisions of the contract. The owner argued in the same manner as in the *American Energy* that there was no requirement for an actual approval, simply that the vessel be kept in a certain standard. The charterer, on the other hand, claimed that the lack of compliance was a case of unjust enrichment of the owner. The owner further argued that the charterer wrongfully placed the vessel off-hire and reduced hire payments and therefore could claim no restitution. The arbitrators found that the vessel had been wrongfully placed off hire. However, the owner had done little to nothing during the charter to comply with the vetting clause. Therefore, the arbitrators did agree that the charterer had the right to reduce hire, but not due to unjust enrichment as had been claimed. Rather, the panel held that a vessel without its approvals in place simply is worth less on the market. The panel finally set a so called deficiency value of the unvetted vessel at \$2000 per day for the period she was in breach.<sup>244</sup>

In the *Harold K. Hudner*<sup>245</sup> charterers placed the vessel off hire as she did not have an approval by Mobil in place. The owners claimed the option was enforced wrongfully and that the clause regulating it was ambiguous and therefore should be interpreted to the disadvantage of the charterer having introduced the clause.<sup>246</sup> The clause stated in relevant parts that "*Owners warrant that they will arrange for inspection and have vessel approved and maintain such approvals during the Time Charter.[...] Should Owners fail to obtain or maintain such approvals during the terms of this Charter then the Charterers have the option to take the vessel off-hire...*"<sup>247</sup> The court took the charterer's view and stated that this clause was clear and unambiguous. The clause was also unaffected by another clause in the contract stating that off-hire provision were activated only if time was actually lost.<sup>248</sup>

Also in the *Diamond Park/Emerald Park*<sup>249</sup> the court held that an unvetted vessel normally has a lower market value than a vessel with all its approvals or acceptance in place.<sup>250</sup> Against this background it is clear that, the arbitrators find that an unvetted vessel is worth less in hire and may be placed off-hire until vetted and that any such contract regulations are considered reasonable. It is up to the owner to maintain approvals and prevent the vessel from ending up off hire. INTERTANKO recommends ship owners to avoid wordings that give the charterer the right to place the vessel off hire and to make sure the vessel is to remain under hire while

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<sup>244</sup> Martowski, 2001-2002, p. 129-130.

<sup>245</sup> *In re Arbitration Between Product Transport Corp. Ltd. & Blystad Shipping & Trading, Inc. (Harold K. Hudner Arbitration)* SMA Award No. 3619 (2000); Martowski, 2001-2002, p. 134-136.

<sup>246</sup> The *contra proferentem* rule, see Martowski, 2001-2002, p. 135. Also see Chen-Wishart, Mindy, *Contract Law*, 2d ed., Oxford, 2008 on p. 431f and 513f.

<sup>247</sup> As cited in Martowski, 2001-2002, p. 135.

<sup>248</sup> Martowski, 2001-2002, p. 135.

<sup>249</sup> *In re Arbitration Between O.N.E. Shipping, Inc. & Lamport Mar. S.A. (Diamond Park/Emerald Park Arbitration)*, SMA Award No. 3576 (1999); Martowski, 2001-2002, p. 130-134.

<sup>250</sup> Martowski, 2001-2002, p. 132.

being inspected or awaiting inspection.<sup>251</sup> In the *Opal Sun*, the arbitrators pointed to the reality of lesser market worth for an unvetted vessel and to the need to decide beforehand the lesser value in order to avoid dispute later on. In this case, vetting value was defined as the additional trading value of a vetted vessel as opposed to the trading value of a non-vetted vessel.<sup>252</sup> Whichever is better, preventing reduction of hire and avoiding off-hire clauses, or the recommended approach in the *Opal Sun* will of course depend on whether one takes the Owner's view or the Charterer's.

#### 4.4.6 Condition or Warranty

In chapter 3.2, the differences in contractual terms were discussed in relation to seaworthiness. The classification of terms has relevance also as concerns the vetting clause. To recap, courts have provided a test for the determination of classification of terms, which states that one has to look at the contract in the light of the surrounding circumstances and not simply the wording used. Then, one determines whether the parties' intentions are best carried out by treating the promise as "a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability".<sup>253</sup> Alternatively, the term can be an innominate term. A term is more likely to be regarded a condition if it is important to the contract. However, the importance is to be assessed in relation to possible breaches, not actual ones. One looks at the intentions at the time of contracting, not at the time the breach occurred. One of the first things to look to is to what extent the contents of the promise could affect the substance and foundation of the adventure of the contract.<sup>254</sup> To date, there is but one English decision, the *Seaflower*,<sup>255</sup> concerning vetting and it, among other things, dealt with the determination of the clause as a condition or a warranty. It also shows that lacking or failing approval, the term used in the case, can give rise to substantial damages and termination of contract. Also anticipated breach can warrant sanctions. The *Seaflower* was time chartered under a charter party dated October 20 1997. The charter party contained an approval clause similar to the one above guaranteeing approval by several oil companies:

*"Vessel is presently MOBIL (expiring 27/1/98) CONOCO (expiring 3/2/98) BP (expiring 28/1/98) and SHELL (expiring 14/1/98) acceptable. Owners*

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<sup>251</sup> INTERTANKO, 2006, p. 11.

<sup>252</sup> Martowski, 2001-2002, p. 138.

<sup>253</sup> Koffman, 2007, at p. 140-141, citing *Bentsen v. Taylor, Sons, & Co. (No. 2)* [1893] 2 QB 274.

<sup>254</sup> Koffman, 2007, at p. 140-141, citing *Bentsen v. Taylor, Sons, & Co. (No. 2)* [1893] 2 QB 274, on p. 141. "It may well be that such a test can only be applied after getting the jury to say what the effect of a breach of such a condition would be on the substance and foundation of the adventure; not the effect of the breach which has in fact taken place, but the effect likely to be produced on the foundation of the adventure by any such breach of that portion of the contract."

<sup>255</sup> *BS&N Ltd (BVI) v Micado Shipping Ltd (Malta) (The Seaflower)* (No.1) [2001] 1 All E.R. (Comm) 240 [2001] 1 Lloyd's Rep. 341 [2001] C.L.C. 421 2000 WL 1720339 2000 WL 1720339

*guarantee to obtain within 60 days (sixty) EXXON approval in addition to present approvals. On delivery date hire rate will be discounted USD 250 ... for each approval missing ... If for any reason, Owners would lose even one of such acceptances they must advise charterers at once and they must reinstate same within 30 (thirty) days from such occurrence failing which Charterers will be at liberty to cancel charter party... ”<sup>256</sup>*

The ship was delivered on November 5, 1997. The owner had also committed to obtaining Exxon approval within 60 days and the continued maintenance of previously obtained approvals. At the time of delivery, such approval was not obtained but the vessel was kept in service. When the ship later was to be used for Exxon products, the owners were told to obtain approval no later than January 5, 1998 but they in turn claimed the vessel could not be inspected until at the end of January at the earliest. However, because the owners failed to have the ship inspected in time, the charterers terminated the contract for breach of condition. The lower court reached the conclusion that the clause was simply a warranty, which would give rise to damages only and not the right to terminate the contract. The court treated the expiring approval and the future approvals differently in that way. Violating an expiring approval would give rise to termination while the failure to obtain Exxon approval would give rise to damages, especially as the hire rate for each day without approval was discounted.

In the appeal, the charterer added that the contract would have been terminated regardless of Exxon approval as another approval would expire shortly and would not be renewed in time.<sup>257</sup> The Court of Appeal focused on the use of the word “guarantee” as indicating the intention of the parties. The word, the court found, indicated that the approval requirement for both existing and future approvals was absolute. “I see no commercial (or indeed logical) reason why the failure to obtain an outstanding approval should not receive substantially the same contractual treatment as the failure to reinstate an existing approval” Lord Justice Parker stated.<sup>258</sup>

Accordingly, the court held that each approval was a condition of contract, regardless of whether it was a future approval or an existing one. If approval was not obtained, the owner was in breach giving rise to repudiation and the charterer had the right to terminate the contract.<sup>259</sup>

The aspects of the case most relevant here are that the failure to obtain acceptance ratings can lead to both damages and termination of the contract at the owner’s expense. Additionally, a failure to obtain future approval or meet the renewal requirements of an existing approval, so-called anticipated breach, can lead to termination and damages as well. Most importantly, it is the wording of the clause and, to the court, especially the use of “guarantee” versus “warranty” which determines the cause of action available to the parties in case of breach.<sup>260</sup> INTERTANKO recommends that owners avoid

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<sup>256</sup> *The Seaflower*, [2001] 1 Lloyd’s Rep. 341 at p. 341

<sup>257</sup> *The Seaflower*, [2001] 1 Lloyd’s Rep. 341

<sup>258</sup> *The Seaflower*, [2001] 1 Lloyd’s Rep. 341 at p. 355, paragraph 102, subsection 4.

<sup>259</sup> *The Seaflower*, [2001] 1 Lloyd’s Rep. 341, at 350, 353, and 356

<sup>260</sup> Please also see discussion under chapter 6 regarding the concept of seaworthiness and vetting.

accepting a wording that makes vetting a condition of contract or amounts to a guarantee.<sup>261</sup>

In the *American Chemist* (S.M.A. No. 3189),<sup>262</sup> a clause identical to one in the aforementioned *American Energy* was used. There, the arbitrators found that the vetting clause amounted to a warranty for the duration of the charter and breach of the warranty could give rise to restitution damages.<sup>263</sup> The distinction of the latter case as compared to *the Seaflower*, where the discussion centered on the use of the word “guarantee”, is that the clause in the *American Chemist* used the word “warrant”. On the surface, that should qualify the clause as a warranty giving rise only to damages as discussed above under chapter 4. However, as also discussed therein, it is the wording of the clause in its entirety and all other circumstances which determine the character of the clause, not the individual words used out of context. Therefore the clause was found to be a warranty in the contract.

## 4.5 Conclusions

Vetting clauses vary in wording and title but certain common denominators can be discerned, among them the requirement to have a vessel inspected and up to date in the SIRE or the CDI database system and to require the approval or acceptance of a number of oil or chemical companies. These either can be enumerated or not in the contract, but oftentimes the range of possible companies expands beyond those enumerated. Among the contractual issues are problems of terminology in using the words approved or accepted as oil and chemical companies as of late do not wish to issue approvals or acceptance. At most, BIMCO’s Grant Hunter writes, one can expect at best a statement that the vessel has been inspected and that nothing unacceptable has been found.<sup>264</sup> Additional problems relating to approvals and acceptance concern the unwillingness by cargo owners and/or charterers to inspect vessels for lack of a business interest. In cases of such refusals, a ship owner will find it impossible to live up the contract.

Problems also exist with unrealistic time bars for reinstatement of lost approvals. It is industry reality that it takes up to three months to have a vessel inspected and time limits of 45 days down to as low as 5 days to have an acceptance reinstated may prove to be impossible to satisfy.

Meanwhile, a vessel without acceptance ratings in place, if not facing contract termination, may be considered worth less in hire during this unvetted period or even be placed off hire until approvals/acceptance have been reinstated. Finally, vetting clauses are often formulated as conditions of contract, the breach of which gives rise to the option of the charterer not only to damages but also to terminate the contract.

The wording of the different vetting clauses is bizarre considering the relationships within the industry. At one point, the ship owner can be the

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<sup>261</sup> INTERTANKO, 2006, p. 11.

<sup>262</sup> *In re Arbitration Between Sunrise Shipping Ltd. & Oceanic Mars Mar. Co.* (American Chemist Arbitration) SMA Award No. 3189, at 1067 (1995) (Forti, Zubrod, & Besman, Arbs.)

<sup>263</sup> Clark, 1995

<sup>264</sup> Hunter, Grant, E-mail communication, May 13, 2008.

charterer, chartering a vessel in from another owner. Then he or she will want a more stringent vetting clause. However, in the situation where the same person or company is actually the ship owner, he or she will want the clause to be more lenient. The problem within the industry is not that the major players lack the understanding of the clauses but that they want vetting clauses that suit their needs at the time regardless of whether they are possible to fulfill or not. In times when the market is good, a charterer may not enforce impossible regulations such as that the ship owner shall maintain approvals, when no approvals are provided any longer. However, if the market turns, the clause will enable the charterer to get out of a losing contract. The entire contractual regulation of vetting can therefore be said to be in a Catch 22 mode at present.<sup>265</sup>

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<sup>265</sup> Hunter, Grant, E-mail communication, May 13, 2008. Mr. Hunter described the entire vetting process as being in a catch 22 mode. The author has used the expression to refer to contractual regulations only.

# 5 Analysis and Conclusions

## 5.1 Introduction

Though ship vetting and selection policies vary widely from company to company common denominators can be discerned. One thing that stands clearer than the rest is that this is no longer a voluntary aspect of the oil and chemical shipping industries. On the contrary, the shipping industry itself as well as the arbitration cases herein support the view that vetting is a fact of life which a ship owner either accepts or the ship owner must accept not doing business. What ever you choose to call the vessel selection policy of a company, vetting has become the universal term used to describe the process.

Another common denominator is the inspection requirement for oil and chemical cargo tankers. Most, if not all companies dealing in these types of cargos will require that a vessel be inspected before the company will agree to place its cargo on it. But the vessel selection process commonly extends beyond the inspection itself. The inspection report will be evaluated, along with the ship owners themselves, through the TMSA and/or management reviews, or audits. The vessel selection process has earned its place in the industry as a safety net which collects, comprises and reviews all the information gathered from the other safety nets; Flag State Control, classification, Port State Control and others. As such, it has become a valuable addition to the regimes of accident prevention as well as a most effective manner in which to raise the quality level of tankers.

This section serves to review, analyze and conclude some of the major issues treated previously in this thesis by looking at two sub-areas; contractual and liability issues.

## 5.2 Contractual Issues

### *Catch 22 Issues and Establishing a Business Interest*

As concerns the use of the terminology *approved*, there is an obvious need for revision of several clauses in use today. First of all, they are impossible to satisfy if companies do not issue approvals. Phrasings such as *not unacceptable* or *not rejected* have been suggested by both INTERTANKO and BIMCO and are perfectly acceptable as long as they are actually used. Preem uses a set of internal ratings which include using the wording *acceptable* rather than *approved*. There is an obvious need for the industry to harmonize the terminology used in this aspect, but it seems as though the industry itself is rather unwilling to accomplish this. Though it is almost impossible for a ship owner to maintain an approval or even obtain one in the first place as they are rarely issued anymore, the frustration of the phrasing in this situation can prove useful if the owner in fact charters in a vessel from someone else. The culprits of the difficulties are not easily identified as owners or charterers, but are rather a combination of the two.

How does one circumvent this problem? Theoretically, it is the easiest thing – one simply replaces the word *approval* with the word *acceptable* or any other phrasings depending on what one wants to achieve with the contract. Using a wording of *not unacceptable* or *not rejected* could provide for a wider range of possibilities meaning that even a ship on technical hold could be in compliance with the vetting clause as it has not been rejected. However, realistically the switch will be difficult as long as the industry does not promote a change in practice. Here, brokers and others could be of assistance if they were made aware of the terminological problems and could properly inform the parties at signing. Still, the parties themselves do not seem entirely unaware of the issue but rather accepting of difficulties when they are on one side as the difficulties will be advantages when they are on the other side of the negotiations.

The Approval Catch 22 also remains a problem in that an unsigned vessel does not constitute a business interest for some companies, and they will not inspect the vessel until she is signed. On the other hand, they will not approve her until she is vetted. As the *Opal Sun* demonstrates, this can lead to significant losses in trading. Even though most companies charge for their inspections and do not face losing that cost if the vessel is later rejected, it is still up to the third party company whether it will make its vetting inspectors available. Capt. Howard Snaith of INTERTANKO suggested the problem be solved by the creation of a pool of independent inspectors, maybe hired by OCIMF itself instead of the oil and chemical companies. This certainly would alleviate the problem. A problem that still remains then is ensuring that all companies will accept these inspections as they would accept them and in fact use the reports. As the name of inspectors are not seen in the SIRE system, this may not be a practical issue. Another problem relates to how these contractors will work.

Another Catch 22 situation is the validity of the report itself. Officially, SIRE reports are valid for twelve months but it is not uncommon that companies will require that reports are no older than six months. Owners in good standing may find themselves outside the business interest again if they maintain good reports. Owners with bad reports will be more likely to be able to meet the time requirement as companies are often unwilling to use a pre-existing report which is considered bad. However, owners with good reports may find that there will be no business need for re-inspection after only six months. They cannot meet the requirement until the report expires after 12 months. Even if the owner maintains a good report record, a company is unlikely to use an expired report. Then, there is also a business need for re-inspection of the vessel. Also here a pool of independent inspectors could solve the issue as the owner could arrange for inspections him- or herself and not be refused inspection because of a lack of commercial interest in the vessel.

### ***Pass or Fail***

There seems to be a need to harmonize also other terms involved in vetting, as well as a more detailed explanation of how the procedure works. Vetting coordinator Capt. Pettersson says that a vetting inspection is not a pass or fail inspection. Still, several contract clauses require that ships pass



inspections. These clauses are impossible in practice to fulfill unless the terms are specified to include the entire vetting process and, in that case, that the process has a positive outcome such as not rejected or that the vessel is contracted in. Considering that a vetting inspection does not result in a pass or fail verdict, the clauses should mean that the entire vetting process must be passed in order to be in compliance. But when is that processed indeed passed? When a contract is signed concerning the vessel in question or when the vessel has been termed not rejected? Judging from the arbitration cases, the arbitrators seem to support the latter view. Still some companies use clauses specifying that both the inspection and other parts of the process must be passed for the vessel to be accepted by the company. The clauses need to be phrased so that they require that there be an inspection report rather than a pass or fail result. Also, brokers, owners, charterers, lawyers and others dealing with vetting need to be educated in the vetting process so that they can more easily understand how it works. The workings of the vetting process are not familiar enough within the industry and this alone causes problems. It is quite common to assume that a vessel passes or fails an inspection as this is the result of other types of inspections conducted in the shipping industry. Therefore, not only does the process need to be more clearly publicized, it also needs to be distinguished from other inspection regimes in place. Further need for harmonization lies in the definition of oil or chemical major companies. Many clauses will require the approvals/acceptance of an enumerate range of companies but under the expansion of “including but not limited to” meaning that an unidentified range of companies can be included. The lack of an industry definition of this range makes this list too fluent and unpredictable. One possibility is to create clauses with only enumerated companies. As this may be an disadvantageous trade restriction in a fluent market place, a more effective manner of regulation may be to simply give the word a set definition, for instance that oil major shall mean any of OCIMF’s member companies. Though still a fluent list, it is a list more predictable than an undefined group of companies. However, this list is long, currently comprised of almost 70 companies. This may not be a realistic approach as long as vetting criteria and procedures lack harmonization.

### ***Time Bars and Reduction of Hire***

These time bars for reinstatement of vessels seem to be almost universally unrealistically short, some even as short as five days. Not even if only the inspection is needed to reinstate the vessel is this a reasonable time frame to use. If the entire vetting process is required, the time frame may have to be even longer to be reasonable. As the case law and practice show, the average time for a vetting inspection to take place after scheduling is two to three months. In order for these clauses not to pose a problem, the time frames need to be more flexible. A vessel on technical hold because of an issue that can be easily resolved may only need a five day window to comply with the contract, while a newbuild may need months to have all the acceptance ratings in place.

Against the background of these long time frames it may require to have a vessel reinstated, the vessel's trading disadvantage may cause it to have a lesser market worth. This substantial time frame may also lead to vessels being placed off hire. The case law points to the need of contract parties to discuss and settle these issues in contract before hand in order to avoid dispute. At the same time the same case law also seems to indicate that reduction of hire has become common trade practice why it would not be a waste of time for the industry to agree on a range of recommended presets for this reduction in hire. This may be especially valuable in a case where the Charter Party does not include a regulation of reduction of hire but the option is chosen over placing the vessel off-hire, a choice which would be a considerable advantage to both parties. In case law, the range has depended on the vessel and the trading pattern. This author is not familiar enough with these trading realities to make the statement that a recommended range of presets is absolutely conceivable. However, considering the possible losses involved, investigating the possibility would certainly be worth the effort.

#### ***Condition or Warranty and More...***

Though arbitrators, courts and industry parties alike seem to accept that one either complies with a vetting clause or one does not do business, there is at times undue hardship in clauses that require a party to a contract to fulfill a contract with a charterer while this fulfillment depends on the business interest of a third party with which the charterer has a contract. Ship owners should of course not sign charter parties they cannot live up to. However, and especially when it comes to reinstatement of vessels, the arbitrary refusal of a company to inspect a vessel, such as in the *Opal Sun*, makes it impossible to fulfill the contract. If the vetting clause is phrased as a condition of contract, this refusal is grounds for termination of the contract and the charterer does not have to take on any responsibility for the failed inspection by a company with which he or she has a contract. Arbitrators have taken this into account in some of the cases, while still placing the bulk of the burden on the ship owner. Contractually, it should be regulated according to INTERTANKO recommendations and the clause should not be termed a condition but rather a warranty. Alternatively, arbitrators and courts should take care to allow the charterer to terminate the contract on such grounds where the charterer, if not in law, so at least in equity, has a duty to alleviate the contractual relationship. If the refusal to inspect is based on the lack of a business interest, the charterer can be the link creating such an interest. Otherwise, there is a need for a clause that exculpates the owner if a company refuses to inspect on these grounds. Even though owners traditionally bear the bulk of the legal and commercial responsibility, there are situations where such responsibility is unrealistic, or one might even call it unfair.

Another way to circumvent this problem is to require only the acceptance of a few of a list of companies as suggested by INTERTANKO (see sample clause in Supplement A). This approach, however, would probably require greater harmonization between the varying vetting policies so as to bring them close enough to each other that a vessel deemed suitable for one company can be assumed suitable for a larger range of companies. The

question is if it will be in the interest of the oil and chemical companies to share their vetting policies with one another in a climate of tough competition.

## **5.3 Liability Issues**

### ***Seaworthiness***

Wilson states that any requirement to provide for the ship in a certain state throughout the charter or after the onset is different from the duty to provide a seaworthy ship. Also, the act of classification has been deemed not to be a part of the seaworthiness concept, only class itself. There seems to be no cause, then, to think that the vetting process, if viewed analogously against this background, could affect the duty of providing a seaworthy ship. Still, seaworthiness means that a ship is ready, fit and able to take on her cargo and fulfill her intended purpose in the contract. Are there no parts of the two processes that intersect or somehow affect each other? The *Fjord Wind* case indicates that contractually this is quite possible.

Vetting serves to determine the suitability of the vessel for a certain cargo, voyage and/or time period. The process sets certain criteria. These criteria are determined in several ways. One important aspect of them is that the vessel has to have all the statutory documents in place. Furthermore, the process reviews safety in operation, crew experience, pollution prevention, class and structural condition of the ship. The criteria oftentimes stretch far beyond what is required of a seaworthy ship. Seaworthiness means the ship is structurally sound, cargo holds are intact and ready to take on cargo, and the ship is staunch and ready for her task. The concept is enveloped as one aspect of the vetting process. An unseaworthy ship could mean that the process results in a negative decision on using the vessel. However, a seaworthy ship is not the only criteria that would satisfy the selection process. Beyond seaworthiness, other issues must still be reviewed to fulfill the selection criteria. Therefore, a seaworthy ship cannot be considered a fully vetted ship but it can be assumed that a positively vetted ship also is a seaworthy ship.

Can vetting change the concept of seaworthiness for tankers? As seen, the concept is fluent depending on the contract, the cargo and many other factors. Therefore, the concept of seaworthiness is difficult to generalize. One must look at the individual ships and the contractual situation they are in. A seaworthy passenger ship cannot be equaled to a seaworthy tanker. The tanker has to meet another set of requirements.

Can vetting affect these requirements? It is not impossible. Seaworthiness is not only determined statutorily but also contractually, whether expressed or implied. For tankers with an oil or gas cargo, special criteria for seaworthiness must necessarily be found in the nature of the business. Cargo holds must be suitable for, for instance, oil freight which means that they must be structurally able to take on oil cargo in a manner which will fulfill the purpose of the charter party. If all or nearly all the oil companies began placing a certain requirement on the cargo handling ability of oil tankers outside statutory requirements, this requirement could well become part of the seaworthiness concept of oil tankers over time. As the oil and chemical

companies set certain criteria, and have done so for a few decades now, a closer inspection of the criteria and a comparison of them to the concept of seaworthiness for tankers may well reveal that the concept has been affected by these criteria. These criteria in turn are part of the vetting process. Therefore, it is not entirely unlikely that the industry standards developed through the criteria set by these companies changes the fluent concept of seaworthiness.

Vetting clauses often require ships to maintain inspection records not older than six months and the reports themselves are valid no longer than twelve months. Additionally, the clauses often require that the ship obtain and maintain acceptance ratings from major oil and/or chemical companies. As argued before, the determination of seaworthiness is but one part of this acceptance process. However, if the acceptance rating has to be maintained at all times, that in fact means that the ship has to be seaworthy at all times or the acceptance could be withdrawn. At the very least, the ship must be seaworthy at the time of re-inspection unless the contract calls for the ship to be able to maintain acceptance ratings at any time regardless of the length of the contract. As in the *Fjord Wind*, this can affect the contractual requirements concerning seaworthiness in so far as that the ship must remain seaworthy also after the onset of the voyage or throughout the time charter. An unseaworthy ship is unlikely to maintain its acceptance rating. For the time charter, this means in fact that even if a seaworthiness requirement is not included in the charter party, it will be implied through the vetting requirements.

Additionally, breach of seaworthiness as an innominate term normally only leads to damages and/or termination of the contract if it is sufficiently severe or if the purpose of the contract has been defeated. However, as an unseaworthy ship is unlikely to maintain acceptance ratings, she will be in breach of the vetting clause if she is unseaworthy. Regardless of whether the vetting clause has been phrased as a condition or a warranty, unseaworthiness will equal a breach that can lead to damages and/or termination despite the conditions for an innominate term. At the very least, a breach of seaworthiness may lead to reduction of hire due to loss of acceptance ratings. As in the *Fjord Wind*, whether an express clause or implied obligation, the innominate term of seaworthiness can be changed into a condition or warranty when read together with the vetting clause essentially changing the character of the obligation.

### ***Charterer/Cargo Owner Liability and Duty of Care***

The determination of a possible duty of care for the charterer/cargo owner is important especially as a lacking vessel selection procedure could lead to a break through of the channeling of liability through the ship owner in international and national pollution liability regimes. Though vetting has been claimed to be a voluntary risk assessment program it has also been argued to have a legally binding effect, especially through this duty of care set by industry standards. When interpreting the contents and meaning of a contract, the practice of the trade is important in discerning the meaning of the clauses. A contract naturally does not exist in a vacuum but takes many things for granted that are common practice within the relevant industry. As

the statistics from Equasis show, vetting is such a common trade practice. This is confirmed also by the case law, especially the *America Energy* award.

It can hardly be maintained any more that vetting is a voluntary process even though there is no law demanding it be carried out. The process, first of all, is beyond the control of the ship owner, as well as the charterer if he or she is not the same as the cargo owner. It is a matter of oil and chemical company policy to perform vetting. You may not pass a vetting inspection itself, but the overall determination of the suitability of a vessel for the specific purpose – or the vessel selection process – is ever present. It is ever present even if a company claims not to have a vetting procedure. Vetting is a manner in which to determine the risk of using a specific vessel.

Regardless of the name of the procedure, the selection of a vessel can be said to be vetting procedure. Even a company that does not use SIRE, the CDI database or inspects vessels, uses some sort of selection criteria when chartering a vessel. The selection is a necessary part of business, whatever the reasons for it – the greater good such as saving the environment, protecting natural resources and lives – or simply economics. Vetting is, as stated in *American Energy*, a fact of life. You either comply or you don't do business unless you can find the rare oil or chemical company that does not use a more stringent vetting procedure when selecting vessels. Still, even this company will have some sort of process in place when selecting and signing vessels. Therefore, vetting cannot be regarded as a voluntary process. To have a report in SIRE is strictly voluntary, that is true. The manner in which to vet is not regulated and is strictly voluntary as well but has over the past 30 or so years become more and more standardized. Whether a company wants to look at the general safety culture of the charterer and/or ship owner is entirely up to the company. However, a vessel has to be selected and the selection process means setting some sort of criteria. Considering the frequency with which companies use criteria to select vessels, the stringent contract clauses along with statements by courts and arbitrators, vetting cannot be considered a voluntary and scattered process. It is common trade practice.

What does it mean that vetting is common trade practice? Vessel selection criteria differ from company to company as well as the manner in which to set and determine the compliance with these criteria. It is difficult to argue that there is a manner in which to vet. However, considering the frequency with which SIRE and internal databases are used, it could be argued that the contents of related questionnaires are the norm for the common vetting criteria. Though little data is available here at all, the common denominators of the selections made by oil companies based on the SIRE or CDI reports could be considered common trade practice if reviewed and reported. However, insight into the actual selection process is virtually none and would require transparency in the selection process. This is not a right and perhaps not to a competitive advantage for the companies and therefore likely not to be possible although desirable from a legal viewpoint. However, common criteria can be discerned. Theoretically, the common trade practice criteria of the industry can be set at the minimum standards by which oil and chemical companies select vessels for their cargo, such as the

twelve key elements of the TMSA or the industry code of practice referred to by CDI in SIR. The standards in turn will indicate where the duty of care of the charterer/cargo owner will fall. If several companies have rejected a vessel on certain grounds, and this knowledge is available, a company considering using the vessel can rightfully be argued to have a greater duty to motivate the selection and to take precautions in relation to the reasons for rejection. If the common trade practice is to use only double hull tankers, the company using single hull tankers will have to provide a strong motivation for the selection (though this choice is and will soon also be illegal in many parts of the world).

Is this duty of selecting carefully and wisely equitable with the ship owner's duty to provide a seaworthy vessel? Only if the unseaworthiness causes a problem or defeats the purpose of the contract is there a breach. This should also be true in cases where the vessel selection criteria fall below trade practice or statutory regulations. The question is whether the minimum standard should be, as argued by Professor Molfassis in the *Erika* case, the statutory regulation or the vessel selection criteria? This is a complex question without a given answer. On the one hand, it seems illogical to demand that oil and chemical companies should be held to a higher standard than those standards demanded by the ship owner in the law, which indirectly sets a higher standard also for the ship owner. On the other hand, case law indicates that such standards set by the industry, even if voluntary, as in *Kellerman V. United States*, can determine the range of responsibility which may exceed statutory regulations. They may also work as a complement to statutory standards by making them more precise. As an example, if a ship must be fit and suitable, or cargo worthy, this suitability is in turn determined by the nature of the cargo and the risks associated with it. The risks associated with it are determined by the party placing the cargo on the vessel. The standards of the latter party in selecting a suitable vessel become the standard against which risk is measured. A party using vessel selection standards lower than those generally used by the industry is breaching those common standards even if they are actually at the legal standard. This is in tort the definition of a duty of care. Thus, to claim that vetting procedures comprise such a common standard and practice that determines the duty of care of the charterer/cargo owner is simply to place vetting in its rightful place in general tort law. Though not tried in many cases, the inclination of the *Erika* case is to support this view that vetting comprises a duty of care, or the common standard of the industry that in fact can create liability.

## **5.4 Conclusions**

A need for harmonization seems to be the phrase that appears most frequently when reviewing the impact of vetting policies on various legal aspects of the shipping industry. As a business reality for all parties involved, vetting permeates all aspects of the industry, quite a few of which have not been explored here. There are several safety nets in the shipping industry to ensure the quality of vessels, some more effective than others are. In the oil and chemical shipping industry, the safety net expands beyond

Flag States, Classification Societies and Port State Control to private non-mandatory inspection procedures and vessel selection processes called vetting. This initially voluntary scheme of setting vessel selection criteria has over the past three or four decades become common trade practice. Though these schemes are as varied as there are oil and chemical companies, common denominators are discernable. Most notably, there is a great need for harmonizing the policies and procedures of the major oil and chemical companies. This must especially be seen against a background where terminals are owned by one company and the cargo by another or several other companies. The trading patterns of the industry make it virtually impossible for a ship owner to have the vessel vetted by only one company.

In researching this thesis, also the contractual aspects and case law have indicated the need for harmonization. Findings included that the creation of a balanced and fair vetting clause and approval/acceptance clause is almost impossible. Those chartering vessels in for use to transport oil and chemical cargo demand strict clauses while those chartering out to oil and chemical companies wish to have milder formulated clauses. Industry organizations such as INTERTANKO and BIMCO have worked diligently on creating fair and balanced clauses, and continue to do so, in order to make life easier for owners, charterers and cargo owners. Though they have succeeded in theory, these clauses have sometimes been undermined in practice due to the strength of the oil and chemical industries, as well as the minority of sub-standard ships still in circulation today. Courts and arbitrators have chosen to take a hard line, maintaining that vetting is a fact of life for owners and charterers/cargo owners alike today and especially the ship owners must adhere to the contracts and accept business reality, or simply not do business. Still, the work of the trade organizations is invaluable in continuing to create and encourage a balance in the industry.

This balance is also discernable elsewhere, in the civil liability disbursement between the different industry parties. Vetting has become common industry practice and as such, an unvetted, or an uninspected ship is worth less in hire than a vetted ship. The existence of a vetting inspection report in SIRE has become such common practice that it can even be argued that the absence of a report may affect the seaworthiness of the vessel. As the vetting procedure serves to determine the suitability of a vessel for use with the particular cargo for the particular voyage, the determination must necessarily affect the general seaworthiness of tankers, though this has not as of yet been supported in case law.

This common trade practice has also been argued to comprise such a standard that creates a duty of care for the charterer/cargo owner. A breach of such a duty may lead to civil liability in tort in the case of an oil pollution accident. As such, an inadequate vetting procedure was argued in the *Erika* case to create a responsibility for oil pollution damage for the company chartering the vessel. The industry maintains that the vessel selection processes are strictly voluntary and therefore do not create any liability at all. However, case law and general legal principles show that even such common standards create liabilities. Case law as well as the industry itself also maintains that vetting is a fact of life which a party has to accept or

simply not do business in that industry. This does not signify a voluntary scheme.

Still, vetting is an important and invaluable addition to the safety net to ensure that the industry uses good quality ships. It does not take away any liability from other parties, such as the ship owner. Rather, it places a higher standard also on those parties, which contributes to an overall higher standard in the industry than has been accomplished through legislation. The fact that vetting affects the definition of seaworthiness for tankers, that the contractual regulation of it is difficult to balance, and that there is an increased duty of care placed upon charterers/cargo owners is not negative. It has accomplished accident and pollution prevention in a manner almost more effective than legislation by ensuring that sub-standard ships do not enter the fleets of the oil and chemical shipping companies. On the contrary, it is a manner of vessel selection that should be encourage and continued efforts of harmonization should be made. The benefits of a well functioning vetting policy, or vessel selection system are by far greater than the possible liabilities it may bring with it.



# Supplement A Sample Vetting Clauses

The following is a sample vetting clause from INTERTANKO.<sup>266</sup>

## Owners Clause A

- A. To the best of owners' knowledge vessel is currently not unacceptable to (a list of companies and screening dates).
- B. Owners warrant that at the commencement of this Charter:
  - (a) A Vessel Particular Questionnaire (VPQ) under the SIRE system has been lodged and is up to date.
  - (b) There is a SIRE report on the vessel which has been registered in the SIRE Register, not older than six months.
  - (c) The vessel has not been rejected or refused by any Charterer since the inspection leading to the said present SIRE report and the date of this Charter Party.
- C. Subject to the Vessel's trading pattern permitting inspection by oil major companies and provided that the Charterers give Owners a minimum of seven days notice of Final Discharge Port(s), and Inspectors available, the Owners will make their best endeavors to arrange inspections as necessary to maintain acceptability by minimum two out of Statoil, Shell, BP, Exxon/Mobil, Chevron/Texaco and Total.
- D. If the Vessel due to its physical condition is rejected or refused permission to carry out cargo operations by any Sub-Charterer or Terminal Operator consequent upon any vetting inspection carried out under the SIRE system, Owners will inform the Charterers and take all reasonable steps to rectify or clarify all deficiencies/observations based on existing rules and regulations and invite re-inspection to be carried out under the SIRE system as soon as is reasonably practicable.
- E. Should the Vessel be declared unacceptable to one of the above oil companies for other reasons than the physical condition at an inspection, Owners will inform the Charterers and Endeavour to clarify the reasons for such non-acceptability and to take necessary and reasonable steps to rectify the stated cause.
- F. Should the Charterers require any other vetting inspections of the vessel than what is necessary to maintain acceptability of two of the oil companies under sub-clause C above and/or re-inspection under sub-clause D above, and if these inspections are carried out during the currency of this Charter, then any loss of time, deviation costs and inspection fees in connection with the inspection shall be for the Charterer's account.

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<sup>266</sup> INTERTANKO, 2006, p. 19-21. The author has made some typographical changes without affecting the contents of the clauses.

A failed vetting inspection shall not of itself constitute a reason for the Charterers to put the vessel off-hire or enable the Charterers to assert a claim under this Charter.

Should the vessel, always subject to the conditions in this clause, after inspection and screening by the above oil companies not be acceptable to at least two, and this lack of acceptability affects the Vessel's trading, the Charterers may put the vessel off hire, provided that the situation is not rectified within 60 days after such unacceptability is made known to the Owners.

The Vessel's VPQ will be maintained fully up to date by owners whenever necessary during the Charter.

**SHELLTIME 4 Clause 55) Oil Major Approval's Clause<sup>267</sup>**

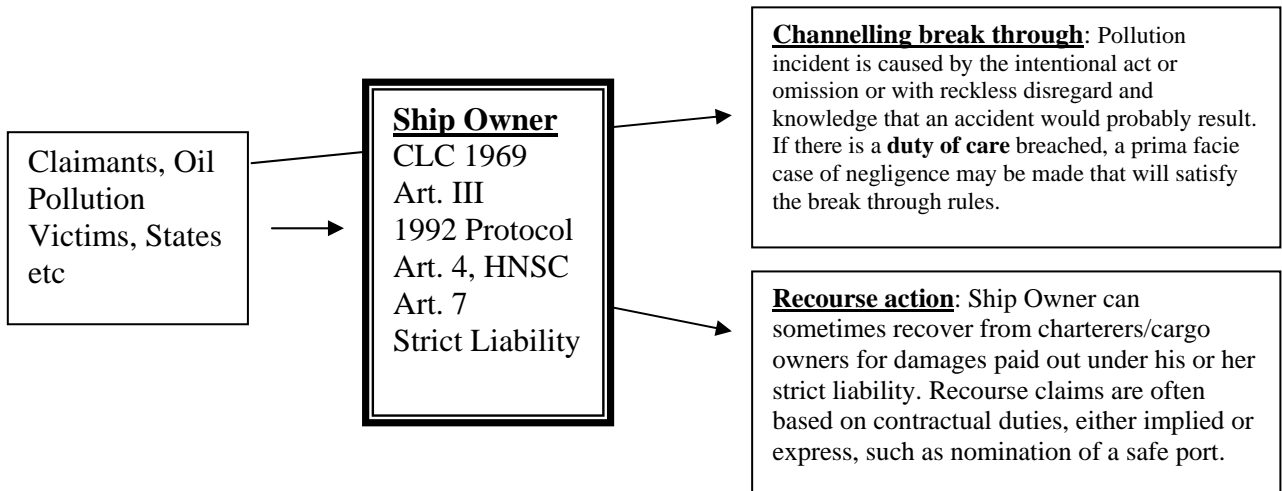
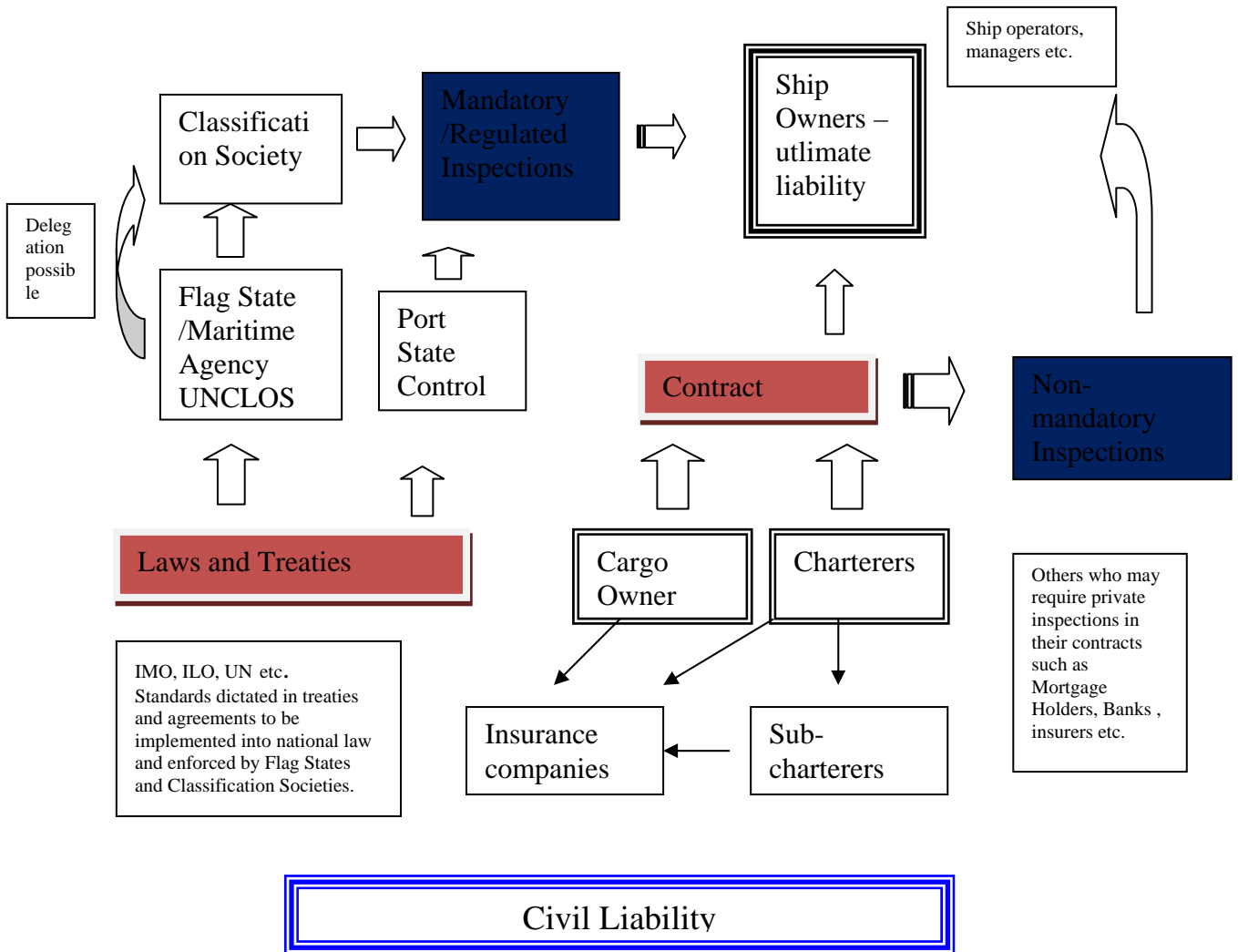
Owners will arrange for regular vetting by major oil companies to ensure as many as possible vetting approvals are maintained or obtained, however Owners warrant that the following oil majors will be obtain and maintained within 3 months of delivery of the Vessel (provided vessels trading areas make it possible for inspection and availability of such inspectors): Exxon-Mobil, BP, Shell, Chevron-Texaco and Total-Fina-Elf.

Should the vessel become blacklisted and/or boycotted and/or unpreferred by oil companies hindering vessel's ability to trade freely under this Charter Party, Owner's (sic) shall immediately take steps to rectify the deficiencies. Time and expense for vetting shall be borne by the Owner.

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<sup>267</sup> Courtesy of Capt. Sarabjit.

# Supplement B Schedule of Statutory and Contractual Relationships



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