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Liability in Connection with the Carriage of Hazardous and Noxious Substances by Sea

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Summary

Borealis AG is a world-leading provider of polypropylene and polyethylene products and has over 50 years of experience in the relevant field. The plastic materials provided by Borealis are mainly used in infrastructure, advanced packaging and in the automotive industry. In addition to the above mentioned Borealis also provides a number of base chemicals, such as melamine, phenol, acetone.

All of these substances are considered to be hazardous and noxious, which has a certain effect on liability when shipping such goods. In general it can be said that liability for an incident involving Hazardous and Noxious Substances lies with the ship owner, which Borealis in general is not, however there are certain instances where a charterer or a cargo owner can be held liable for either pollution damage or damage suffered by a third party.

Such liability most often occurs when the ship owner was either unaware of the nature of the goods shipped or when the charterer has failed to provide a safe port.

The thesis aims at examining relevant case law, national as well as international legislation on carriage of Hazardous and Noxious Substances by sea as well as analyzing Borealis' Contracts of Affreightment in connection with the transportation of the abovementioned substances.

National legislation is mostly silent on the matter, while an International Regime is under adoption at the time of writing. The Hazardous and Noxious Substances Convention, if adopted, will provide a much needed clarification concerning many questions, amongst of which one is who is to be held liable in connection with an incident involving the carriage of Hazardous and Noxious Substances.

The question to be examined is under which circumstances Borealis can be held liable for damage suffered in connection with the carriage of said goods. There are a number of suggestions made for improvements/change in the Contracts of Affreightment in order to limit Borealis' liability to such a great extent as possible.

Preface

I would like to thank Jivar.

Abbreviations

CLC 69	Civil Liability Convention of 1969 and 92
CLH	Charterer's Liability to Hull
CoA AV	Contract of Affreightment Nordic Tankers AS
CoA NT	Contract of Affreightment Anthony Veder B.V.
EEZ	Exclusive Economic Zone
EPA	Environmental Protection Agency
EU	European Union
FMC	Finnish Maritime Code
GRT	Gross Tonnage
HNS	Hazardous and Noxious Substances
HNSC	Hazardous and Noxious Substances Convention
HVR	The Hague/Visby Rules
IMDG	International Maritime Dangerous Goods
IMO	International Maritime Organization
OPA 90	Oil Pollution Act of 1990
P&I	Protection & Indemnity
PE	Polyethylene
PP	Polypropylene
RORO	Roll On/Roll Off
SMC	Swedish Maritime Code

1 Introduction

1.1 Background

Borealis AG is a world-leading provider of polypropylene¹ and polyethylene² products and has over 50 years of experience in the relevant field. The plastic materials provided by Borealis are mainly used in infrastructure, advanced packaging and in the automotive industry. In addition to the above mentioned Borealis also provides a number of base chemicals, such as melamine, phenol, acetone etc.³

In order to provide PP and PE products certain basic feedstock are purchased from the oil and gas industry. These include Naphtha, Butane, Propane and Ethane. These are then shipped to plants in mainly Sweden, Finland and Abu Dhabi as well as to some smaller extent to a facility in Belgium.⁴

All the abovementioned goods fall under the International Maritime Dangerous Goods Code⁵, which is governed by the International Maritime Organization⁶, and are to different extent hazardous to both the human health as well as to the environment. Propane can induce narcosis and central nervous system depression, Butane is highly flammable as are most of the other products as well, and Naphtha is highly carcinogen.⁷

It is of great importance, keeping the abovementioned in mind, to be aware of ones liability when shipping these substances. Borealis is not the ship owner, merely the charterer, and to what extent that affects their liability is the focal point of interest.

At the time of writing there is no international regime in force to deal with compensation for pollution caused by hazardous and noxious substances⁸ being carried by sea transport. There is a Convention adopted, the so-called Hazardous and Noxious Substances Convention⁹, but it has yet to enter into force due to there not being enough ratification to fulfill the criteria set out in the Convention. Due to the lack of international regulation national laws apply to pollution damage caused by HNS. However a ratification process is

¹ Hereinafter referred to as PP.

² Hereinafter referred to as PE.

³ Borealis Annual Report, 2010.

⁴ Ibid.

⁵ International Maritime Dangerous Goods Code, hereinafter referred to as IMDG Code.

⁶ Hereinafter referred to as IMO.

⁷ Borealis Harbor Regulation and Information Guide, p. 19-39.

⁸ Hereinafter referred to as HNS.

⁹ International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996. Hereinafter referred to as HNSC.

under way and due to the work and pressure of the European Union¹⁰ most of its Member States are in the process of ratifying the Convention.¹¹

There are certain channeling provisions in international Conventions dealing with pollution damage, in general, that to different extent exclude charterers from liability, however the HNSC is not yet in force as was mentioned above and oil pollution Conventions are not applicable to pollution caused by HNS. So the question remains as to what extent, or whether at all, Borealis as charterers of ships carrying HNS goods can be held liable for pollution damage. These statutory immunity provisions are however only one piece of the bigger picture. Charterers can be held liable by recourse in as well as in some instances due to the very nature of the goods shipped.¹²

Perhaps the most important obligation for the charterers, in this case Borealis, is to nominate a safe port. The Courts have taken quite a restrictive approach to situations where charterers have failed their obligation under the safe port/safe berth clause and it is thus of outmost importance to examine the case law on the subject. Such clauses, which are standard in most types of charter parties, have been construed as a warranty by the charterer by which he assumes any risk of an unsafe port or berth.¹³

Needless to say the regulatory situation is anything but clear and there are a number of issues that need examining. Not to mentioned that some of the problems can and in all probability will be resolved by a contractual solution.

1.2 Aim

The aim of the thesis is to examine Borealis' liability as charterers in connection with the safe port, alternatively safe berth, clause in the charter party. The thesis also aims at examining to what extent the inherent dangers of the Stenungsund port can leave Borealis open to liability to the ship owner in case of damage to the ship and in instances where pollution damage occurs, other claimants as well.¹⁴

In connection with the above mentioned on liability the thesis will also analyze Borealis two contracts of affreightment in the context of liability for pollution damage. The thesis also aims at making recommendations to Borealis how to best limit such liability in the company's daily practices as well as in contractual situations.

¹⁰ Hereinafter referred to as EU.

¹¹ De la Rue, Colin and Anderson, B. Charles, *Shipping and the Environment* Second edition, 2009 Informa London, p. 269.

¹² Ibid. p. 625-28.

¹³ Ibid.

¹⁴ The thesis is written as a project for Borealis with the abovementioned aim.

1.3 Question

The following question will be answered throughout the thesis:

- Under which specific circumstances is Borealis most likely to incur liability for pollution damage in their capacity as cargo owners/charterers of hazardous and noxious substances?

1.4 Method

The question posed will be answered by applying traditional legal method and by analyzing case law. Analysis of case law will be in the forefront due to the fact that different courts have formulated most rules and principles applicable to the question posed. The major pieces of legislation to be analyzed are firstly the Hazardous and Noxious Substances Convention, although not yet in force it would bring much clarity to the subject matter. Secondly the Civil Liability Convention of 1969 and of 92¹⁵ will also be discussed as parallels can be drawn between the two Conventions and the HNSC. Concerning both Conventions mentioned the relevant Funds adopted will not be analyzed as it falls outside the scope of the thesis. Lastly national legislation will also be analyzed for the same reason as the Civil Liability Convention, to see what parallels can be drawn between national laws and regulations and the Hazardous and Noxious Substances Convention. The national legislations that will be analyzed are the US, Swedish, Finnish and Belgian systems. Each one takes a different legal approach to the problem of HNS damage. Sweden, Finland and Belgium are of interest as Borealis ship its substances to mainly Stenungsund, Porvoo and Antwerp, while the US have perhaps the most comprehensive legal regime on pollution from HNS.

Although not legislation per se the International Maritime Dangerous Goods Code will also be discussed as the relevant goods being shipped all fall under its scope.

Besides legislation and case law, scientific articles and doctrine will also play a major role in the thesis. Governmental reports will be utilized where such are available. One such example is the Swedish governmental report on the adoption of Hazardous and Noxious Substances Convention, SOU 2006:92.¹⁶

Lastly reports and practical information, such as Harbor Regulations, provided by Borealis will also be used. These are of importance as they provide information on the relevant substances as well as on stowage and handling of the above mentioned goods.

¹⁵ International Convention on Civil Liability for Oil Pollution Damage 29 November 1969, hereinafter referred to as CLC 69.

¹⁶ Skadeståndsansvar vid sjötransport av farligt gods, SOU 2006:92, published 7 November 2006.

1.5 Delimitation

Although the thesis deals with charter parties in the sense that Borealis are charterers and not owners of the ships in question, a general account of said charter parties will not be examined.

It was mentioned above that certain analogies will be drawn between certain oil pollution acts and/or Conventions, however these will only be dealt with for that particular purpose and will not be delved into more deeply.

Some of the risks and/or damages suffered can be covered by either Protection & Indemnity Insurance¹⁷ or by Charterer's Liability to Hull Insurance¹⁸. However these different types of insurances are left outside the scope of this thesis.

The thesis will not deal with actual compensation from limitation funds such as the CLC Fund or the HNS Fund. Such compensation falls outside the scope of the question posed and is thus of little interest.

¹⁷ Hereinafter referred to as P&I Insurance.

¹⁸ Hereinafter referred to as CLH Insurance.

2 Hazardous and Noxious Substances

Under this chapter firstly HNS and the HNSC will be scrutinized followed by an account of certain national legislations on the subject. A detailed examination of the charterer's liability under a charter party for pollution damage caused by HNS will also follow including liability in tort. Secondly the chapter will also examine Borealis abovementioned two contracts of affreightment in order to assess Borealis's current liability under contract.

2.1 The Hazardous and Noxious Substances Convention

Under this subheading the background to the Convention will be presented followed by the detailed provisions of the HNSC.

2.1.1 Background

Ever since the *Torrey Canyon* incident there have been voices calling for an International Convention dealing with liability and compensation for pollution damage resulting from hazardous and noxious substances. The problems involved in the concept of HNS, namely that the substances involves range from solids to liquids to gases, they are packed in different manners and the level of toxicity varies from substance to substance, the CLC and Fund Conventions adopted in the wake of the *Torrey Canyon* chose to deal with oil exclusively. Another reason for choosing to deal with oil exclusively is that oil is a visible substance while hazardous and noxious substances most often are not. HNS damage is also generally speaking easier to forget as it is less obvious, while in practice the damage done are more often than not much more severe than damage caused by oil. The *Texas City Disaster* of 1947 is yet another example of the difficulties involved in the concept of HNS. The incident will be dealt with more thoroughly further on in the thesis, for now it is sufficient to note that a Convention on HNS would also need to include provisions on the dangers of carriage of goods by sea including damage, loss of life or injury caused by fire or explosion.¹⁹

The first draft Convention on HNS of 1984, which was never approved for signature, failed mainly due to States not being able to agree upon type of liability (strict or absolute), whether the carrier should be liable or the

¹⁹ *Shipping and the Environment*, p. 269-70.

shipper, how the Convention should relate to other liability Conventions etc.²⁰

There were a few other potential accidents, which fortunately did not result in any major damage that also played a part in convincing the international maritime community of the need for a HNSC. One such incident was the collision between the French Roll On/Roll Off²¹ vessel *Mont Louis* and the German ferry *Olau Britannia*. The RORO vessel was carrying 450 tons of toxic uranium hexafluoride, however due to a successful salvage operation no serious injuries were suffered in the incident.²² In August 1985 the Greek bulk carrier *Ariadne* ran aground outside of Mogadishu while carrying a cargo of over 2000 tons of toxic and explosive chemicals in containers. Over 200 people had to be evacuated with contingency plans made to evacuate up to 300 000 people if the situation drastically should deteriorate. This proved unnecessary due to yet another successful salvage operation.²³

Due to such pollution incidents as mentioned above the international maritime community finally sat down at the drawing table and agreed upon the instrument we now know as the HNSC in 1996 at a diplomatic conference in London.²⁴

At the time of writing the HNSC has still not yet entered into force. For it to do so would require the ratification of the Convention by at least 12 states, including four states with no less than 2 million units of gross tonnage²⁵ and having expressed their consent to be bound by it. The Convention also requires that those persons liable to contribute to the Convention need to have received a total quantity of at least 40 million tones of contributing cargo the previous year.²⁶ The entry into force requirements are quite harsh, however a wide support of the Convention were anticipated, especially in Europe, but the ratification process has been slow.²⁷

Although the ratification process has not been as rapid as expected, measures have been taken to ensure that the required amount of states accedes to the Convention in order for it to enter into force. The EU has adopted a decision, 2002/971/EC requiring the Member States to either ratify or accede to the HNSC “*within a reasonable time*”, and if at all

²⁰ *The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea*, 1996, Rengifo, Antonio, Reciel, Vol. 6 No. 2 1997, p. 191-97.

²¹ Hereinafter referred to as RORO

²² Proceedings of the Symposium of Oceanology, Brussels 4-6 March 1985, Thierry G Jacques Scientific Evaluations of an Incident at Sea Involving a Sunken Ship Carrying Dangerous Goods.

²³ Mullai, Arben, *A Risk Analysis Framework for Maritime Transport of Packaged Dangerous Goods- A Validating Demonstration*, Department of Industrial Management and Logistics, University of Lund, 2007.

²⁴ *Shipping and the Environment*, p. 270-71.

²⁵ Hereinafter referred to as GRT

²⁶ HNSC, Article 46.

²⁷ *Shipping and the Environment*, p. 271.

possible before June 2006.²⁸ The Decision also requires the Member States to work towards an amendment of the Convention making it possible for the Community as such to become a contracting party.²⁹

Albeit the abovementioned issues made it more acute to adopt and ratify the HNSC, by the year 2007 only nine states had adopted the Convention. The 1992 Fund Assembly thus called for a working group, known as the “HNS Focus Group”, to work on facilitating the entry into force of the Convention. The Focus Group met in March and June 2008 and submitted a draft Protocol to the IMO Legal Committee in October 2008.³⁰ The final draft was agreed upon in April 2010 at a diplomatic conference in London. The new protocol amends the previous Convention making it more attractive for states to adopt it. One of the measures taken by the protocol is to exclude contribution to the fund of receivers of packaged HNS goods, which was one of the main deterrents for many states to sign, while still keeping packaged HNS goods under the scope of the HNSC. The entry into force provisions were also modified to some extent, requiring the ratification of at least 12 states including 4 states with no less than 2 million units of GRT and having received during the previous calendar year a total quantity of at least 40 million tons of contributing cargo.³¹

There are many positive opinions about the Convention, mainly dealing with the fact that finally the situation is to be regulated by an international Convention thus bringing clarity to a situation much in need of it. However there are also those who would have wished that the Convention would have taken one step further. For example the Convention is lacking a comprehensive classification list of its own in relation to what constitutes HNS, also the Convention is lacking in the sense that it does not provide a procedure by which future HNS can be added.³²

An interesting point of view concerning why the ratification of the Convention has been slow, at best, is that there is a major opposition lobbying against the Convention, mainly made up of the chemical industry. The industry, in contrast with interests related to oil and petroleum products are not used to such a liability scheme as the one proposed by the Convention, which might be the main reason for their opposition. The view has also been put forward that this lobbying has first started on the ratification stage and not the adoption phase, explaining why the later is proving to be more cumbersome.³³

In conclusion the Convention was a much needed instrument and should be seen as a framework in which to further develop the legal regime of liability

²⁸ EC Council Decision 2002/971/EC Article 3, Official Journal L 337 13/12/2002 P. 0055-0056.

²⁹ Ibid. Article 5.

³⁰ *Shipping and the Environment*, p. 272.

³¹ Ibid.

³² Rengifo, p. 193.

³³ *The Development of a Liability Regime for the Carriage of HNS: The Score to Date*, Oude Elferink, Alex G, Marine Pollution Bulletin Vol 22 No 10 p. 484-87 1991.

in connection to damage done by hazardous and noxious substances. However the Convention is far from perfect and it is up the individual Member States to implement its policy and make sure that the prevention of risk in connection with HNS is on the political agenda.³⁴

2.1.2 Scope of Application and General Definitions

Chapter I of the HNSC sets out certain general definitions and determines the scope of application. Article 1 defines the concepts of “*Ships*”, “*Persons*”, “*Owners*”, “*Receivers*”, “*Hazardous and Noxious Substances*”, “*Damage*”, etc. Ship is defined as any sea-going vessel or seaborne craft, of any type whatsoever, and person means any individual or partnership or any public or private entity, corporate or not, including the State.³⁵

Owner is defined as the person or persons registered as the owner of the ship or, in absence of registration, the person or persons owning the ship. If a company is owned by the State and the company is listed as the operator, owner shall mean that company as well.³⁶

Receivers of HNS goods are defined as either the person physically receiving the cargo at the discharging port, alternatively an agent of such person or the person who is deemed by national law to be the receiver of the cargo.³⁷

The two most comprehensive definitions are that of “HNS” and that of “Damage”.

Hazardous and Noxious Substances are defined as:

“a) any substances, materials and articles carried on board a ship as cargo, referred to in (i) to (vii) below:

- i) *oils carried in bulk listed in the appendix I of Annex I to the International Convention for the Prevention of Pollution from Ships, 1973...*
- ii) *noxious liquid substances carried in bulk referred to in Appendix II of Annex II to the International Convention for the Prevention of Pollution from Ships...*
- iii) *dangerous liquid substances carried in bulk listed in chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk...*
- iv) *dangerous, hazardous and harmful substances, materials and articles in packaged form covered by the International Maritime Dangerous Goods Code...*

³⁴ Ibid. p. 197.

³⁵ HNSC, Article 1.

³⁶ Ibid.

³⁷ Ibid.

- v) *liquefied gases as listed in chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk...*
 - vi) *liquid substances carried in bulk with a flashpoint not exceeding 60 °C...*
 - vii) *solid bulk materials possessing chemical hazards covered by appendix B of the Code of Safe Practice for Solid Bulk Cargoes...*
- b) residues from the previous carriage in bulk of substances referred to in a)(i) to (iii) and (v) to (vii) above.*"³⁸

Damage is defined as:

- "(a) loss of life or personal injury on board or outside of the ship carrying hazardous and noxious substances caused by those substances;*
- (b) loss of or damage to property outside the ship carrying the hazardous and noxious substances caused by those substances;*
- (c) loss or damage by contamination of the environment caused by the hazardous and noxious substances, provided that compensation for the impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and*
- (d) the costs of preventive measures and further loss or damage caused by preventive measures.*"³⁹

The geographical scope of the Convention includes the territorial sea of a contracting state whether the damage has arisen from contamination or not. If an incident occurs in the Exclusive Economic Zone⁴⁰ of a contracting state the HNSC will govern claims for damage to the environment no matter where the ship is registered, however other type of claims will be made conditional upon registration of the vessel involved in a contracting state or if it is entitled to fly the flag of such state. Lastly incidents on the High Seas are very similar to that of the EEZ of a contracting state. Namely that damage to the environment is covered by the Convention, however only if the incident occurred in the territory, territorial sea or the EEZ of a contracting state. Other types of damage will again be dependent on the vessels nationality.⁴¹

The last important point to note is that the Convention speaks about incidents and not accidents as many of its predecessors in the liability family.⁴²

³⁸ HNSC Article 1.5.

³⁹ HNSC Article 1.6

⁴⁰ Hereinafter referred to as EEZ

⁴¹ *Shipping and the Environment*, p. 272-73.

⁴² Rengifo, p. 193.

2.1.3 Liability Provisions and Exclusion of Liability

The HNSC imposes strict liability on the ship owner. Strict liability means that the one claiming compensation for loss or damage need not prove fault on the ship owner's side. In cases of more than one ship involved in an incident joint and several liability is imposed.⁴³

Article 7 of the HNSC states that the ship owner shall be held liable for any damage in connection with HNS substances being carried by sea on board a ship unless one of the stated exceptions in the Convention is applicable.⁴⁴

The exceptions read as follows:

"2 No liability shall attach to the owner if the owner proves that:

- (a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or*
- (b) the damage was wholly caused by an act or omission done with the intent to cause damage by a third party, or*
- (c) the damage was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids...*
- (d) the failure of the shipper or any other person to furnish information concerning the hazardous and noxious nature of the substances shipped either
 - (i) has caused the damage, wholly or partially, or*
 - (ii) has led the owner not to obtain insurance in accordance with article 12,*
*provided that neither the owner nor its servants or agents knew or ought reasonably to have known of the hazardous and noxious nature of the substances shipped".*⁴⁵*

The first three sub-paragraphs provide a general exoneration from liability while the last deal with exoneration where the nature of the substances was unknown. The nature of certain substances might be unknown as HNS are shipped in many forms, bulk, packaged, container etc. and lack of relevant information might cause damage due to wrongful handling of the goods.⁴⁶

Another recourse for the owner to escape liability is to show that the damage resulted from an act or omission done with intent to cause damage by the person suffering the damage.⁴⁷

⁴³ Ed. Prof. Debatista, Charles, *Southampton on Shipping Law*, Chapter 8 by Dr. Tsimplis, Michael on *Marine Pollution from Shipping Activities*, Institute of maritime Law, 2008 Informa, London, p. 276-82.

⁴⁴ HNSC, Article 7.2.

⁴⁵ Ibid.

⁴⁶ *Shipping and the Environment*, p. 282.

⁴⁷ HNSC, Article 7.3.

Under the HNSC only insurers and ship owners may limit their liability as it is they who exclusively incur it. Compensation claims may not be brought that are not in accordance with the Convention neither against the owner nor against any other person. The HNSC contains provisions in Article 7.6 excluding liability for the following persons: servants or agents of the owner, pilots, *any charterer how so ever described including bareboat charterer*,⁴⁸ salvors etc. The provision is identical to that in the CLC with the condition that such persons are exempt from liability only if they did not act with intent to cause such damage or with recklessness and with knowledge that such damage would in all probability result.⁴⁹

2.2 National Legislation

Under this subheading mainly Swedish legislation will be examined followed by an account on Belgian, American and Finnish law as well.

2.2.1 Swedish Legislation

Sweden has not yet ratified the HNSC and the Swedish Maritime Code⁵⁰ thus takes a different approach to HNS and liability in connection to sea transport thereof. The approach taken by the SMC is in reality a non-approach as it is silent on anything even remotely dealing with HNS. However a proposal has been put forward in 2006 suggesting the implementation of the HNSC into national law. However it is important to note that the proposition for implementing the HNSC into national law has not been accepted and the current situation remains as it was.⁵¹

The proposal aims at incorporating the HNSC into mainly chapter 11 of the SMC, which today only contains a single provision on transport of radioactive materials. The proposed provisions are almost word for word identical to those in the Convention, mentioned above. Some provisions would be incorporated into other parts of the SMC as well, mainly on limitation of liability, jurisdictional issues etc.⁵²

There are at the time of writing two provisions dealing with HNS in the SMC. Paragraph 7 states in broad terms that a charterer, or shipper of any kind, must notify the carrier of the nature of the goods. Should he fail to do so the carrier can, according to Paragraph 41, discharge, defuse and/or destroy the substances at his own discretion without any liability to pay damage to the shipper. The shipper however is liable to pay compensation

⁴⁸ Author's own italics.

⁴⁹ *Shipping and the Environment*, p. 282-83.

⁵⁰ Hereinafter referred to as SMC.

⁵¹ Skadeståndsansvar vid sjötransport av farligt gods, betänkande av HNS-utredningen, SOU 2006:92.

⁵² *Ibid*, p. 1-58.

for any damage incurred by the ship owner due to the carrier's non-knowledge of the nature of the substances shipped.⁵³

The relatively cool interest from a Swedish point of view to ratify the Convention, and why there are so few provisions dealing with HNS damage, can be explained by the fact that there have been only a few incidents in Swedish waters involving substances of the nature discussed. In the last 10-20 years only three accidents have occurred where the Swedish Coast Guard had to call upon the emergency response team charged with clean-up operations involving accidents at sea. The first such accident was *Tom Lis*, a ship carrying orthoxylen which is a highly flammable substance, which spilled into the river Göta Älv prompting the closing of it for a short period of time. The second accident involved the *Martine* where due to the collision with a German ship five persons died. The ship was transporting Hydrochloric Acid which was successively let out into the sea. The last accident involved the *Stena Line Carrier* where only a small amount of ethylenediamin escaped from a container due to faulty ventilation of a container. However it is important to note, and probably the main reason why so little interest is paid to HNS issues, that there is yet to occur an incident where persons suffering damage in connection with transport of HNS in Sweden are rewarded any substantial compensation.⁵⁴

2.2.2 Belgian Legislation

The main piece of legislation in Belgium dealing with marine pollution is the statute of January 20th of 1999.⁵⁵ The statute is known for incorporating the main features of international law and EC legislation, but also for going further than both on many issues. The statute is applicable in both the territorial sea as well as in the EEZ and on the Continental Shelf of Belgium. There are six main principles enshrined in the legislation; the *prevention-*, *precautionary-*, *sustainable management-*, *polluter pays-*, *restoration-*, and the most important, *strict liability* principle. The first three principles deal with situations before an accident while the remaining three deal with situations where an accident has already taken place.⁵⁶

Not only is damage to the environment covered by the statute but the concept of *disruption of the environment* is introduced as well. Damage to the environment is defined as “*every form of damage, loss or prejudice, suffered by an identifiable natural or legal person, caused by an impairment of the marine environment, irrespective of its cause*”.⁵⁷ In contrast with most

⁵³ SMC, Paragraphs 7 and 41.

⁵⁴ Skadeståndsansvar vid sjötransport av farligt gods, p. 62.

⁵⁵ B.S. of 12 March 1999 (Belgian OJ)

⁵⁶ Ed. Faure, Michael G and Hu, James, *Prevention and Compensation for Marine Pollution Damage – Recent Developments in Europe, China and the US*, Chapter on *Protection of the Marine Environment under Belgian Law*, by Huybrechts, Marc A. and Van Damme, Katrien N. Kluwer Law International, 2006, The Netherlands, p.123.

⁵⁷ *Ibid.* p. 124.

international regimes the definition in the statute includes, but are not limited to economic loss as well. Basically all claims are accepted as long as two conditions are met, firstly the damage must be caused by the impairment to the marine environment and secondly damage must be suffered personally by the one claiming compensation.⁵⁸

The concept of disruption of the marine environment is defined as “a negative impact on the marine environment in as far as it is not covered by the traditional concept damages”.⁵⁹ The concept deals with non-economic losses to resources belonging to none, and all, namely the environment.⁶⁰

Compensation is to be paid under a strict liability regime, as was mentioned above. The principle applies equally whether the damage falls under the definition of damage to the marine environment or disruption of the marine environment. However there are a number of exceptions to the principle of strict liability which the defendant can avail himself of. The first such exception being the general *fore majeure* exception, including act of war, terrorism, extreme weather etc. The second being that the damage was caused by the willful or negligent act of the third party suffering the damage, or by an agent or representative of said person. The third and last exception deals with damage caused by the negligence or fault of public authorities.⁶¹

2.2.3 American Legislation

The US legislation is unique in the sense that quite the number of different statutes regulates HNS damage to the environment. The most important ones for the purpose of this thesis are the Clean Water Act⁶² and the Comprehensive Environmental Response, Compensation and Liability Act.⁶³ As will be discussed more in detail below both statutes only authorize recovery for clean-up costs and not for damage to or loss of property or injury to persons. The result of this limited statutory right to compensation is that traditional tort law has played a much greater role in the US than in most European countries.⁶⁴

The CWA imposes strict, but limited, liability on the ship-owner and/or operator of a vessel for clean-up costs incurred due to an incident involving HNS. The Act dates back to 1972 when HNS damage became subject to the same liability regime as oil pollution. Today the Oil Pollution Act⁶⁵ of 1990 regulates pollution by oil and the provisions on oil pollution in the CWA are

⁵⁸ Ibid.

⁵⁹ Ibid. p. 125.

⁶⁰ Ibid.

⁶¹ Ibid. p. 125-26.

⁶² 33 U.S.C. §§ 1251-1387 (2008), hereinafter referred to as CWA.

⁶³ 42 U.S.C. §§ 9601-9675 (2008), hereinafter referred to as CERCLA.

⁶⁴ *Shipping and the Environment*, p. 295.

⁶⁵ 101 H.R. 1465, P.L. 101-380, hereinafter referred to as OPA 90.

supplemented by the newer act. However concerning pollution by HNS the CWA is still an important piece of legislation.⁶⁶

The main features of the Act include a discharge prohibition of such amounts of substances that may be harmful into the navigable waters of the United States. The Policy stated by the statute is that there should be no discharges of said substances at all. A permit can be applied for in order to discharge certain substances and there are a number of limited exceptions to the main rule of no discharge. The CWA also requires the Environmental Protection Agency⁶⁷ to draw up guidelines on HNS, which may constitute a substantial threat to health of citizens as well as to wildlife and fauna. Such guidelines should also include the amount that is harmful. Costs that are recoverable under the CWA are government clean-up costs and liability for damage to the environment. Criminal sanctions and a reporting system are also imposed to ensure conformity with the Act.⁶⁸

The CERCLA also imposes strict liability, however the concept of potential responsible parties is much wider than in the CWA. The Act identifies four potential responsible parties, namely the owner/operator of the polluting vessel/facility, the owner/operator of a facility at the time of disposal, waste generators and transporters of hazardous substances who selected the disposal site.⁶⁹ It is important to note that the CERCLA does not only apply to accidental pollution damage by HNS but also to deliberate dumping and disposal of HNS waste, which makes it substantially different than the HNSC for example.⁷⁰

There are three defenses supplied by the CERCLA, an act of God, an act of war and the action or omission of a third party who is not an agent or employee of the defendant. These defenses are to be interpreted extremely narrowly. An act of God for example does in general not include heavy weather or storms as these are most often not to be considered unforeseeable by the defendant. The act of war is probably the least likely defense to be claimed. The defense, which is most often invoked, is the action or omission of a third party. As was mentioned above the defenses are to be interpreted extremely narrowly and thus some legislative hurdles have been raised in order to limit the scope of said defense:⁷¹

“an act or omission of a third party other than an employee or agent of the defendant or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual agreement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substances concerned, taking into

⁶⁶ *Shipping and the Environment*, p. 302-03.

⁶⁷ Hereinafter referred to as EPA.

⁶⁸ *Shipping and the Environment*, p. 302-03.

⁶⁹ 42 U.S.C. §9607(a).

⁷⁰ *Shipping and the Environment*, p. 309-10.

⁷¹ *Ibid.*

consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.”⁷²

Recoverable costs under CERCLA include response costs incurred by the Government. Response is defined as remove, removal, remedy and remedial action. The terms are deliberately wide so to include not only clean up costs but costs for investigation and for enforcement actions as well, including attorney fees, costs for designing and implementing removal actions, site security etc.⁷³ Private cost recovery actions are also authorized by the CERCLA. Those claiming such compensation must show that the costs incurred were necessary in order to accomplish the clean-up of the hazardous and noxious substances.⁷⁴

Both the CWA and CERCLA allows for damages to be claim by the federal Government for the loss of, or injury to, natural resources. Natural resources include fish, land, wildlife, biota, water etc. As was mentioned above third parties may claim for clean-up costs but both statutes bar third parties from claiming damages for economic loss, lost income or profits, even personal injury or disease caused by the release of HNS are not recoverable under CERCLA.⁷⁵

The liability of shippers under the CERCLA regime is somewhat special. Prima facie shippers can be held liable for the release of HNS as operators or owners of a facility. However it is enough for the federal Government in an action under CERCLA to find one responsible party, which is most often easier to do with owners or operators of a vessel rather than the shipper as owner of a facility. It is then up to the defendant to sue for contribution from the other wrongdoers. This accomplishes prompt clean-up costs as the federal Government does not need to waste time finding all the culprits. The relevant section in CERCLA states:⁷⁶

“in the case of a hazardous substance which has been accepted for transportation by a common or contract carrier... (i) the term “owner or operator” shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substances shall not be considered to have caused or contributed to any release during transportation which resulted solely from circumstances or conditions beyond his control”⁷⁷

The Courts have generally avoided the imposition of strict liability for the shipper as operator.⁷⁸ In *U.S v Santa Clara I* the court refused to impose

⁷² 42 U.S.C §9607(b)(3).

⁷³ *Shipping and the Environment*, p. 314-15.

⁷⁴ *Ibid.* p. 316-17.

⁷⁵ *Ibid.* 319.

⁷⁶ *Ibid.*

⁷⁷ 42 U.S.C. §9601 (20)(B).

⁷⁸ *Shipping and the Environment*, p. 321.

strict liability on the shipper even though he had not noted on the bill of lading that magnesium phosphide was being carried onboard. The Court argued that although noting that a hazardous substance is being carried onboard is something within the control of the shipper it is not enough for a summary judgment. The Court also dealt with the fact that the owner argued that the shipper had stowed barrels of arsenic trioxide improperly which resulted in the release of HNS. Although stowing is something that is most certainly within the control of the shipper the Court yet again argued that such culpability is difficult to establish and can only be done at trial and thus refused to grant a summary judgment against the shipper.⁷⁹

However it is important to note that even though judgment is not rendered summarily against a shipper the owner or operator may always claim reimbursement from the shipper as a joint tortfeasor at a later stage.⁸⁰

2.2.4 Finnish Legislation

Finnish legislation is similar, in most cases even identical, to the Swedish legislation discussed above. Both countries choose to regulate maritime law within one major piece of legislation, where provisions on HNS are side by side with provisions on collisions, registration etc. There are mainly three provisions dealing with HNS in the Finnish Maritime Code and these will be detailed below.

Firstly chapter 13 § 7 states that hazardous goods should be properly labeled. The owner of such goods ought to inform the ship owner of the particular characteristics of said goods and necessary safety measure to be taken.⁸¹

§ 41 of the same chapter stipulates under which circumstances the owner of hazardous substances can be held liable. The provision states that if notification of the hazardous nature of the goods has not been made according to the above mentioned paragraph the owner of the goods can be held liable for any damage suffered by the ship owner. However, this does not include any third party damage, which is regulated by general tort law. The provision also allows for the ship owner to dispose of any HNS if said notification has not taken place.⁸²

⁷⁹ *U.S. v Santa Clara I*, DC SC (2:92-0389-18, May 8 1995), reported in Bureau of National Affairs Environmental Reporter, June 23, 1995, p. 452.

⁸⁰ *Shipping and the Environment*, p. 321.

⁸¹ Merilaki, Annettu Naantalissa 15 päivänä heinäkuuta 1994, herinafter referred to as FMC (Finnish Maritime Code), 13 § 7.

⁸² *Ibid.* 13 § 41.

2.3 The Charterer's Contractual Liability and Liability in Tort

The ship owner's, and to some extent the charterer's, liability imposed by statute have been discussed above. This chapter is limited in scope to the charterer's liability under contract, namely a charter party, and his liability in tort.

2.3.1 The Charterer's Obligations Under a Charter Party

Under this subheading those obligations of the Charterer that are of interest from a HNS perspective will be presented. Obligations that fall outside the scope of HNS, such as the obligation to pay freight, payment of demurrage, delivery of the cargo, engagement in lawful trade etc. will not be dealt with.⁸³

2.3.1.1 Duty not to Ship Dangerous Goods

The duty not to ship dangerous goods is a duty not to do so without first notifying the carrier of the nature of the goods shipped. This notification is however not necessary if the carrier or its crew knew, or ought to have known, of the dangerous nature of the goods. The obligation is often implied, which means that it need not be stated in the charter party for it to be applicable.⁸⁴

The concept of dangerous goods has been given a wide meaning to include not only goods of a flammable, corrosive, explosive and/or noxious character but also goods that are a danger to crew or ship if not handled properly.⁸⁵ The argument of Mustill J. in the case of *Athanasia* shows how widely the concept should be interpreted as he argues that it is of importance to remember:

*"that we are here concerned, not with the labeling in the abstract of goods as "dangerous" or "safe" but with the distribution of risk for the consequences of a dangerous situation arising during the voyage"*⁸⁶.

In other words how the goods should be handled during the voyage is of equal importance as the knowledge of their dangerous nature. The generous approach taken in *Athanasia* has been reaffirmed in many cases since, one example being the *Effort Shipping Co* where the court stated that the

⁸³ Chuah C.T. Jason, *Law of International Trade: Cross-Border Commercial Transactions*, Fourth Edition, Thomson Reuters, 2009 London, p. 247 ff.

⁸⁴ Wilson, F John, *Carriage of Goods by Sea*, Sixth Edition, Pearson Education, 2008 Harlow, p. 32.

⁸⁵ *Law of International Trade*, p. 247.

⁸⁶ *The Athanasia Comminos and Georges Chr Lemos*, [1990] 1 Lloyd's Rep. 277, QBD.

concept of dangerous goods should not be limited to goods that constitutes a danger to ship or crew but also goods that are a danger to other cargo. The danger need not even be of a direct physical nature for goods to be construed as dangerous.⁸⁷

Liability is strict and can be incurred towards the ship owner, and if it is a Bill of Lading Contract instead of a Charter Party towards other cargo owners if the dangerous goods have caused damage to their cargo as well. The liability for shipping dangerous goods under a charter party without the consent or knowledge of the carrier is quite similar to the liability discussed above in Swedish and Finnish legislation. The Hague/Visby Rules⁸⁸ for example contains the same provision on the right to claim damages and to neutralize dangerous goods as the abovementioned legislations:

“Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier... has not consented, with the knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment”.⁸⁹

The interpretation of Article IV rule 6 in the HVR is very similar, although not identical, to the interpretation above on the implied obligation of the charterer not to ship dangerous goods.⁹⁰

2.3.1.2 The Duty to Nominate a Safe Port

It was discussed above that the channeling provisions in the HNSC excluded claims being brought against a charterer of a ship. Claims were instead to be made against the owner of a vessel. However this does not mean that said owner cannot bring a recourse action against the charterer if the charterer is likely to be held liable in tort. The most common liability incurred by charterers is under the obligation to provide the ship owner with a safe port, respectively a safe berth.⁹¹

The charterer’s liability for safety of port was first established in *Compania Naviera Maropan S/A v Bowaters Lloyd Pulp and Paper Mills Ltd.*⁹². Before the Court of Appeal delivered judgment in the case, confusion existed on who was actually liable for providing an unsafe port or berth. In the case at hand *Bowaters* had chartered a ship, *Stork*, to carry a cargo of logs from Newfoundland to England. The logs were taken aboard in Tommy’s Arm, a narrow strait where the ships bows were usually held in

⁸⁷ *The Effort Shipping Co. Ltd. v Linden Management Sa -8The Giannis NK* [1998] A.C. 605; [1998] 2 W.L.R. 206.

⁸⁸ The International Convention for the Unification of Certain Rules relating to Bills of Lading 1924, as amended by the Brussels Protocol of 1968, hereinafter referred to as HVR.

⁸⁹ *Ibid.* Article IV rule 6.

⁹⁰ *Carriage of Goods by Sea*, p. 35.

⁹¹ *Shipping and the Environment*, p. 630.

⁹² *Compania Naviera Maropan S/A v Bowaters Lloyd Pulp and Paper Mills* [1955] 2 Q.B. 68.

place by anchors and their sterns were moored to a nearby island. However before the arrival of *Stork* only one ship of comparable size had entered into Tommy's Arm. The master of the *Stork* first refused to enter the strait but subsequently changed his mind after reassurance from the local pilot. During the first few days of loading everything went as planned, however after a heavy gale on the third day the ship dragged its anchors and was driven onto the nearby rocks damaging the ship in the process. The ship owner brought claims against the charterer of the ship claiming a violation of the requirement to provide a safe port, while the charterer refuted the claims on the basis that no such obligation did exist. The Court found in the favor of the claimants acknowledging the fact that an obligation did indeed exist of providing a safe port. This was not affected by the master's yielding to the pilot in continuing the process of entering into the straight.⁹³

The obligation to nominate a safe port is most often an implied warranty, however many standard forms of charter parties include clauses such as⁹⁴:
“*The vessel shall be employed in lawful trades for the carriage of lawful merchandise only between safe ports or places where the vessel can safely lie afloat*”.⁹⁵

The test which determines whether a port is safe or not was first expressed by *Sellers* in *The Eastern City*:
“*a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by goods navigation and seamanship*”.⁹⁶

Firstly one needs to examine the wording of the definition above. A port is to be considered unsafe if a ship cannot reach it, use it and return from it in the relevant period of time. This means that the obligation to nominate a safe port is not over when the ship has entered the port or berth, but it needs to be able to leave it safely as well.⁹⁷ An example of such continuing duty is the case of *Limerick v Stott* where a ship after discharge at Manchester port were unable to leave the canal system and enter the sea due to its high masts not fitting under the bridges over the canal. The port was subsequently found to be unsafe.⁹⁸

The above mentioned shows that not only must a port be safe in general but also for the particular ship. Meaning that if the particular ship cannot enter or leave the port than it is to be considered unsafe.⁹⁹

⁹³ *Charterer's Liability for Safety of Port*, Giles, O.C. The Modern Law Review, Vol 18 No. 6 November 1955, p. 615-17.

⁹⁴ *Carriage of Goods by Sea*, p. 25.

⁹⁵ *Baltimere 1993, Uniform Time-Charter* (as revised in 2001)

⁹⁶ *The Eastern City* [1958] 2 Lloyd's Rep 127 p. 131.

⁹⁷ *Carriage of Goods by Sea*, p. 26.

⁹⁸ *The Limerick v Stott* [1921] 2 KB 613.

⁹⁹ *Shipping and the Environment*, p. 630.

Secondly one must consider that the question of the port being safe is one of fact and not of law and varies between individual ships. What is safe for one ship might be unsafe for another. An example is if the draught of a 250 000 ton vessel is too deep for a port it is unsafe for it, however for normal sized vessels the port is to be considered perfectly safe from that perspective.¹⁰⁰

The most important test however within the definition mentioned above is whether an occurrence is abnormal and unexpected and if it can be avoided by good seamanship and navigation. Heavy weather and storms for example is an often invoked defense by the charterer, but the Courts have been restrictive in granting exceptions from the safe port warranty on grounds of heavy weather.¹⁰¹ A port is to be deemed unsafe in case of bad weather if one of the following is lacking: an adequate forecasting system, availability of pilots and tugs, adequate room for maneuvering and systems ensuring that such room is available. The abovementioned requirements were iterated by Lord Denning in the case of *The Khian Sea*.¹⁰²

There have however been examples of cases where, even though the abovementioned systems were in place, the charterer escaped liability due to the unprecedented nature of the storm.¹⁰³

Bad weather conditions can also include ice in ports during the winter months. However a port will not be considered unsafe on the mere fact that it is affected by ice, but the situation will be judge on a case-by-case basis.¹⁰⁴ In the case of *Livanita* the port was not judged unsafe even though the port of St Petersburg was affected by ice. However due to icebreaking, ice blocks were floating around posing as a hazard to ships and the port was subsequently found to be unsafe.¹⁰⁵

Another example of a case involving good seamanship is the *Polyglory* case. The case involved an oil tanker mooring at a buoy in La Nouvelle, France. In heavy weather her starboard anchor dragged and damaged an underwater pipeline as she was preparing to leave. The Court found that even though the incident could have been avoided using greater skill on the part of the pilot or the master, the charterer was still found to be liable as it would have required something more than ordinary skill to avoid the danger.¹⁰⁶

The example of the *Polyglory* shows that it is demanded of the crew or pilot of a ship to exercise normal prudence in navigation and anything beyond that requirement will fall on the charterers. For example even though a pilot

¹⁰⁰ *Carriage of Goods by Sea*, p. 27.

¹⁰¹ *Ibid*.

¹⁰² *The Khian Sea* [1979] 1 Lloyd's Rep 545.

¹⁰³ *Shipping and the Environment*, p. 631.

¹⁰⁴ *Law of International Trade*, p. 261.

¹⁰⁵ *The Livanita* [2007] EWHC 1317.

¹⁰⁶ *Kristiansands Tankrederi A/S v Standard Tankers (Bahamas) Ltd (The Polyglory)* [1977] 2 Lloyd's Rep 353.

was aware of an underwater obstruction the Court still refused to hold him liable as inadequate turning room was available to the vessel.¹⁰⁷

Many obstructions caused by heavy weather or storms are of a temporary nature and will thus not render a port unsafe. In cases of high winds, neap tides or silting for example the master is expected to wait a reasonable period of time in order to avoid the danger. There have been examples of a ship being delayed in port for 21 days due to fog and still the port was deemed safe. The focal point in determining whether a port is safe or not is if the delay caused by the danger frustrates the very purpose of the contract and if it could have been foreseen by the charterer.¹⁰⁸

Concerning underwater obstructions the case of *Maintop Shipping Co Ltd v Bulkindo Lines Pte Ltd (The Marinicki)* shows how these can be considered to be unforeseeable. In the relevant case an underwater obstruction did exist in the channel leading in and out of the port of Jakarta, Indonesia. However, the ship owners were unable to show when and how the obstruction came to rest in the dredged channel and the Court thus held that the obstruction was of an unforeseeable and fortuitous nature and the port was to be deemed safe, even though such an obstruction would normally be enough to render a port unsafe.¹⁰⁹

Another situation that might render a port unsafe is political unrest, war or other similar activities.¹¹⁰ The case of the *Evia* is one such example, however the case also deals with when a port should be deemed safe. Is it at the time of nomination and in theory until departure from the port of discharge or is it until actual departure from port of discharge. The facts of the case were that the ship had been chartered on Baltime form for trade between safe ports. The ship loaded in Cuba in March 1980 and was scheduled to discharge in the port of Basrah, Iraq. Due to congestion at Shatt al Arab the ship entered into port not before the 20th of August and discharged its goods on 22nd of September, the day of the outbreak of the Iran-Iraq war. The Court first agreed that war in it self makes a port unsafe, however the warranty of a safe port is not continuous in the sense that the ship actually needs to be able to leave. Instead the warranty of a safe port should be interpreted so that the port should be safe at the time of nomination and prospectively at the time of actual discharge. However if by unseen circumstances the port is unsafe at discharge and the ship is unable to leave, the charterers should not be held liable for breach of the safety warranty in the charter party.¹¹¹

The case of the *Lucille*, in which the facts were almost identical to the *Evia*, the Court came to a somewhat different conclusion. It is important to note that the ship entered Basrah on the 20th, only two days before the outbreak

¹⁰⁷ *Shipping and the Environment*, p. 631.

¹⁰⁸ *Carriage of Goods by Sea*, p. 27.

¹⁰⁹ *Maintop Shipping Co Ltd v Bulkindo Lines Pte Ltd (The Marinicki)* [2003] EWHC 1894.

¹¹⁰ *Law of International Trade*, p. 260.

¹¹¹ *The Evia* [1982] 2 Lloyd's Rep 307.

of the war. The court found that the charterer could have warned the ship and ordered it to leave while there till was an opportunity to do so. Failing to do so was a breach of the safe port warranty and the charterer was thus held liable.¹¹²

The obligation to nominate a safe port is considered to be an implied obligation. If the charter party is silent on which port is to be considered to be a safe, the port nominated by the charterer for discharge is construed to be safe and an implied obligation exists. This implied obligation to nominate a safe port does not extend to a safe berth. The obligation to provide as safe berth exists only in cases where the charter party expressly nominates a safe port/berth.¹¹³

If a port of loading/discharge is mentioned in the charter party but the contract is silent on safety, a warranty of safe port/berth is not likely to be implied. If such a contract exists the ship owner is deemed to have had the opportunity to examine and to gather sufficient information to judge the port safe or not. It has been argued even when a port is named as safe in the charter party such an express warranty should be ignored as the owner have had the opportunity to judge the port safe or not, however the Courts have so far rejected such argumentation.¹¹⁴

An example of the abovementioned is that the wording: load one safe port X/discharge safe port X is to be regarded as a warranty of a safe port.¹¹⁵ This was reaffirmed by the case of the *Archimidis* where “*Load one safe port Ventpils. Discharge ½ safe ports United Kingdom Continent Bordeaux/Hamburg range*” was considered to be a warranty of safety.¹¹⁶

2.3.1.3 The Nature of the Goods Shipped

The statutory situation on shipping dangerous goods has been discussed above. This section takes aim on situations where the goods themselves, or rather the manner in which they have been packed, stowed or handled, cause an incident leading to environmental damage. Most often such damage result from collisions, groundings etc. but there have been quite the number of incidents related to the cargo itself.¹¹⁷

If for example goods are being transported at the wrong temperature with the result of gases accumulating which could pose as a hazard, the charterer could be held liable for any damage that occurs if the ship owner could not have reasonably known of the hazardous properties of the goods, nor ought

¹¹² *The Lucille* [1983] 1 Lloyd’s Rep 387.

¹¹³ *Law of International Trade*, p. 260.

¹¹⁴ *Shipping and the Environment*, p. 632.

¹¹⁵ *Law of International Trade*, p. 259.

¹¹⁶ *AIC Ltd v Marine Pilot Ltd (The Archimidis)* [2008] EWCA Civ 175.

¹¹⁷ *Shipping and the Environment*, p. 633.

to have known. Often such liability is regulated within the charter party, and more specifically in the indemnity clauses.¹¹⁸

The *Texas City Disaster* is one example of a case where the incident has been attributed to the goods themselves. The background to the case was that on the 16th of April 1947 the French Liberty ship *Grandcamp* was loading a general cargo at Texas City, USA. Subsequently a plume of smoke was seen rising from the stow of a consignment of 2 500 tons of bagged ammonium nitrate fertilizer. Any and all attempts to put out the fire failed. No one on the site had any particular knowledge of the substance, especially the fact that in confined spaces and at high temperature it explodes with half the force of TNT. The subsequent explosion that followed was devastating and claimed the lives of over 500 people and caused injury to over six times that number who had gathered to watch only a few hundred feet away due to the unnatural color of the flames. The fire that followed caused massive property damage, mainly due to the fact several other ships also caught fire, amongst other the *High Flyer* another vessel carrying ammonium nitrate fertilizer which caused an even greater explosion than the first. The shipper in the case was the US and the claims made against the state as owner of the goods failed on the basis that it had not been shown that they had been negligent in not warning the ship owner of any potential hazards. Further it was stated that since the goods at the time of the incident were handled according to general industry standards, although lacking, no liability did exist with the shipper.¹¹⁹

If the nature, and the particular hazardous characteristics, of the goods are well known there is no obligation on the charterer to provide any further information to the ship owner than what is already stated in the shipping documents. Also provided that the goods are adequately labeled the hazardous properties can always be found in the IMDG code.¹²⁰

However simply arguing that the characteristics of certain goods are stated in the IMDG code might not always be sufficient. The case of *CMA Djakarta*, bleaching powder was being carried onboard even though the charter party stated that the vessel should not carry any goods of a flammable, dangerous or otherwise corrosive nature. Due the goods self-heating substantial fire broke out leading to the crew abandoning the ship and a month long salvage operation being undertaken. The charterer was found to be liable due to breach of contract, which stated that no dangerous goods were to be shipped onboard.¹²¹

¹¹⁸ Ibid.

¹¹⁹ *In re Texas City Disaster Litigation*, 197 F.2d 771, *aff'd sub. Nom. Dalehite v U.S.* 346 U.S. 15 (1953); *Republic of France v U.S.* 290 F.2d 395 (5th Cir. 1961) *cert. denied* 369 U.S. 804 (1962).

¹²⁰ *Shipping and the Environment*, p. 634.

¹²¹ *The CMA Djakarta* [2004] 1 Lloyd's Rep 460.

2.3.2 Liability in Tort for HNS Damage

Under this subheading three different types of tort, namely negligence, strict liability and liability to third parties, will be examined.

2.3.2.1 Negligence

Under general maritime law, and under Common Law as well, there is an obligation to disclose the hazardous nature of the cargo shipped. The legal situation on the matter has been discussed above and this chapter deals with the Courts applying said obligation. One of the major cases on neglecting to inform the ship owner of the hazardous nature of the cargo is the case of *Hooker Chemical*.¹²²

In the case *Hooker Chemical* was shipping drums of sulfur dioxide in containers to Rotterdam. On route to Rotterdam the ship experienced heavy weather and smoke and fume were subsequently noticed emanating from the container. Some of the more damaged drums were thrown overboard and the rest were re-stowed by the crew. Upon entering the port of Rotterdam even more smoke were noticed, which resulted in an explosion within the container. The container was thus thrown into the North Sea and the ship owner claimed damages from the cargo owner for damage to property and the crew claimed for damage to health because of the injuries sustained in the explosion. The Court found the cargo owner to be negligent and dismissed their counter-claim, which were based upon that the bill of lading provided were lacking proper notification possibilities as to the nature of the cargo shipped. The argument put forward by the cargo owner that rough weather was the main cause of the casualties were also dismissed by the Court, which stated that the act of not providing the ship owner with the relevant information constitutes a negligent act which the cargo owner is liable for.¹²³

There has been quite the number of instances where the Courts have reaffirmed the fact that heavy weather is not a defense against not furnishing the ship owner with proper documentation on the hazardous nature of the goods shipped.¹²⁴

2.3.2.2 Strict Liability

In some instances of neglecting to inform the ship owner of the inherent hazardous nature of the goods shipped, the shipper has been found to be strictly liable for any damage incurred by either the ship owner or third parties in general. Strict liability can be incurred when both the shipper and the ship owner is unaware of the hazardous nature of the cargo, other wise the negligence is more of likely to be the tort.¹²⁵

¹²² *Shipping and the Environment*, p. 296.

¹²³ *Polskie Linie Oceaniczne v Hooker Chemical Corp.* 499 F. Supp. 94 (S.D.N.Y. 1980).

¹²⁴ *Shipping and the Environment*, p. 297.

¹²⁵ *Ibid.*

The line of case law on strict liability due to damage resulting from hazardous goods when neither the shipper nor the ship owner was aware of the nature of the goods stem from the *Senator Linie GmbH & Co. KG v Sunway Line Inc.* The case involved an outbreak of fire on the ship due to heat release within a container carrying 300 drums of thioride dioxide, a substance stable under normal circumstances but flammable under the wrong ones. The Court found that although the main rule is that the shipper is liable for any negligent act on his part, however there is a “*specific rule of strict liability for a shipper of inherently dangerous goods when neither the shipper nor carrier had actual or constructive knowledge of the cargo’s dangerous nature*”. The focal point is that both parties were unaware or ought to have been unaware for the strict liability to apply.¹²⁶

The line of reasoning in the *Senator Line Inc.* was reaffirmed in the case of *Contship Containerlines Ltd. v PPG Industries* where faulty stowing on the ship owner’s side resulted in the heating of certain cargo with the end result of an outbreak of fire in the ship’s hold. The cargo in question was calcium hypochlorite, a chemical that is known to be highly flammable at wrong temperatures. The carrier argued that due to the hazardous nature of the cargo the shipper was strictly liable for any damages incurred by the carrier. The Court found that although strict liability does exist under certain circumstances, the current situation did not warrant such a liability. The Court further argued that despite the ship owner’s knowledge of the flammable nature of the cargo the stowing of it resulted in the fire and strict liability can only be invoked when both parties are unaware or ought to have been unaware of the dangerous nature of the cargo in question. In the circumstances of the case where the carrier knew of the flammable nature of the goods and still chose to stow it improperly to allow for strict liability on the shipper’s side would be most peculiar. The Court thus dismissed the ship owner’s claim for damages.¹²⁷

It is of interest to note here that simply providing information in certain hazardous cargo regulations or safety procedure is something that does not automatically absolve the shipper/charterer from strict liability, but the shipper/charterer need also to fulfill his obligation under general maritime law and to warn of any foreseeable dangers.¹²⁸

Liability was for example incurred by the shipper in *Ionmar Compania Naviera S.A. v Central Georgia R.R. Co.* even though certain labeling and warning had been delivered of the dangerous nature of the cargo. The background to the case was an outbreak of fire on the ship *M/V Nicolaos* which were loading cargo in Savannah, Georgia. The fire was caused by a spill of calcium hypochlorite from drums, which were actually labeled

¹²⁶ *Senator Linie GmbH & Co. KG v Sunway Line Inc.* 291 F.3d 145, 2002 A.M.C. 1217 (2d Cir 2002).

¹²⁷ *Contship Containerlines Ltd. v PPG Industries* 442 F.#d 74, 2006 A.M.C. 686 (2d Cir. 2006).

¹²⁸ *Shipping and the Environment*, p. 300.

according to the Coast Guard regulations. The warning labels were however insufficient since they lacked a description of the products characteristics, how it reacts with certain other substances etc.¹²⁹

2.3.2.3 Liability Towards Third Parties

The main authority on liability for hazardous spills towards third parties is the *Texas City Disaster* discussed above. For further details on the case see the relevant section above. The case law tends to lean towards being somewhat restrictive on applying strict liability for charterers or shippers in cases involving spills of hazardous and noxious substances, when the damage have been suffered by a third party.¹³⁰

In *China Union Lines Ltd. v A.O. Andersen & Co.* two vessels, the *M/V Union Reliance* and the *M/V Berean*, collided causing an outbreak of fire on both ships causing extensive damage and loss of life. The owners of the *Union Reliance* claimed that the cause of fire was the un-seaworthiness on the side of *Berean* as acrylonitrile was stowed in a forward wing tank. The cargo in question was a dangerous cargo and the claim was that the cargo was wrongfully stowed which caused it to be more flammable in case of a collision. The classification of the substance was a C Grade Flammable substance, according to the Coast Guard Regulations. The said regulations also stated that flammable substances of a lethal character cannot be carried in the forward wing tanks, however acrylonitrile was not considered to be such a substance. The Court found that the carrier were able to rely on the Coast Guard Regulations in order to determine how the substances were to be stowed on the ship.¹³¹

The owners of the *Union Reliance* also sued the owner of the cargo claiming that they should have notified the carrier of the dangerous nature of the cargo and the fact that the Coast Guard Regulations were faulty, in the sense of how and where acrylonitrile could be stowed. The Court found that the death of the crewmembers and additional property damage was caused by the fire and not by the hazardous nature of the substance. It was also decided that the claimant had been unable to show that the owner of the goods should have been aware of the fact that the Coast Guard Regulations were inadequate in the way it classified acrylonitrile and thus should have notified the carrier. In the end the Court found that the main cause of the fire was the collision that resulted from the wrongful navigation on the part of the *Union Reliance*.¹³²

¹²⁹ *Ionmar Compania Naviera S.S. v Central Georgia R.R. Co.* 471 F. Supp. 942, 1979 A.M.C. 1747 (S.D. Ga. 1979).

¹³⁰ *Shipping and the Environment*, p. 301.

¹³¹ *China Lines Ltd. v A.O. Andersen & Co.* 364 F.2d 769, 1966 A.M.C. 1653 (5th Cir. 1966).

¹³² *Ibid.*

2.4 Borealis Contracts of Affreightment

Under this heading Borealis two contracts of affreightment will be discussed. Special attention will be paid to those provisions in the contracts relating to safe port/safe berth as well as general provisions which can effect liability issues in case of an incident resulting in the release of HNS. As has been mentioned before there are two Contracts of Affreightment involved in Borealis carriage of HNS by sea, namely one with Nordic Tankers AS¹³³ and one with Anthony Veder Chartering B.V.¹³⁴

2.4.1 Safe Port/Safe Berth

It has above been discussed to what extent a charterer can be held liable for an accident due to not having nominated a safe port. It will be remember that the concept of safe port is implied in a contract of affreightment while the concept of safe berth is not. In other words for there to exist an obligation on the part of the charterer to nominate a safe berth there must be an explicit provision in the charter party to that end.

In the CoA NT there is one safe *berth* specified, namely the Port of Stenungsund for loading and for discharge one safe *berth* each Ports of Rotterdam (including Moerdijk), Terneuzen, Antwerp, Tees or Grangemouth. The charter party attached to the CoA NT follows up with one safe port/place and is in no material way different to the CoA NT. It does however clarify what is actually meant by safe, at least to some extent. Clause 16 in the charter party reads as follows:

“SAFE LOCATION(S). Charterer shall exercise due diligence to order Vessel to port(s) or place(s) which are safe for Vessel and where it can lie always safely afloat. Notwithstanding anything contained in this or any other Clause in this Charter to the contrary, Charterer shall not be deemed to warrant the safety of any such port(s) or place(s) and shall not be liable for any loss, damage, injury or delay resulting from any unsafe condition at such port(s) or place(s) which could have been avoided by the exercise of reasonable care on the part of the Master or Owner. The term “safe”, as used in part 1(C) and (D), shall be consistent with the Charterer’s obligation as set forth in this Paragraph.”¹³⁵

The CoA AV is in most instances quite similar, if not even identical to the CoA NT. For example the CoA AV also applies the concept of safe *berth*. Load ports being Stenungsund, Porvoo or Brofjorden and discharge ports being Ara, Stenungsund, Porvoo, Port Jerome, Stade or Rafnes.¹³⁶

¹³³ Hereinafter referred to as CoA NT

¹³⁴ Hereinafter referred to as CoA AV

¹³⁵ Exxon Mobile VOY2005, 16 (b).

¹³⁶ CoA AV

However the CoA AV has a nominating procedure in place that stipulates that no later than 10 calendar days prior to the first day of each calendar month the Charterer should give a full tentative lifting schedule, including loading and discharge ports. The provision which is enshrined in Article 7 also provides for the charterer to change discharge ports and for the Owner to as far as possible try to accommodate such a request.¹³⁷

The CoA AV also states in its Article 1 that the vessel is not to be order nor bound to enter ports or places where epidemics are present or in case of icebound ports or places unless the vessel has an ice class 1A. Nor should a vessel enter into a place where any of the above mentioned has not occurred but can reasonably be expected to occur.¹³⁸

Concerning ice conditions, there is an Article 8.10 exclusively dealing with ice conditions and ice classed vessels. The Article states that if at any time during the voyage the load or discharge ports are ice filled the vessel shall follow ice breakers if its ice class is insufficient for entering into port on its own. The master can if he considers it to be unsafe to refuse to enter a port if the ice conditions are severe. According to the CoA AV the charterer is responsible for providing ice breakers and if unable to do so the Owners need not proceed with the voyage. The clause even goes so far as to empower the Owner at his sole discretion to cease loading/discharging if he deems the vessel to be in danger due to ice and leave said port.¹³⁹

The CoA AV is complimented by the ASBATANKVOY, which contains certain complimentary provisions on safe port/safe berth loading and discharging. In Article 4 for example the charter party specifies that the charterer shall nominate the loading port at least 24 hours prior to the Vessels readiness to sail from the last port of discharge. The charter party is, in addition to what has already been mentioned on safe port/berth, in the contract of affreightment quite silent. There are some minor clauses mentioning safe port, or wharf, however only in connection with shifting and stating that when shifting a vessel that the obligation to provide a safe port/berth still remains.¹⁴⁰

There is in the charter party also a provision on icing conditions. The Article states that ice filled ports shall be avoided in quite general terms and that in case of such conditions the Master has the right to contact the Charterer asking him to provide a new port, which still needs to fulfill the obligation of safety as discussed above.¹⁴¹

Concerning safe port/safe berth, both contracts of affreightment are quite similar especially in only dealing with the issue on a very general level. This is however not uncommon as what is to be considered to be a safe port/safe

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ ASBATANKVOY, Article 9.

¹⁴¹ Ibid. Article 14 (a) – (b).

berth follows both by law as well as by previous judgments. However since it is the most important aspect concerning the charterer's liability in connection with HNS damage it is important to be well aware of the implications of certain contractual terms.

2.4.2 Other Provisions Affecting Liability

Although it has been discussed above that a breach of the safe port/safe berth warranty is one of the main lanes for the charterer to incur liability there are other provisions in a contract of affreightment affecting the liability of the charterer as well. As was the case above firstly the CoA NT will be discussed followed by the CoA AV.

Firstly it need to be noted that there are detailed provisions on last cargo and the need for tank cleaning before loading in case of certain cargoes. Secondly the crew of the chartered ship must be trained and aware of the hazardous nature of the goods shipped and the handling of the relevant materials. The crew must also be instructed in the handling of safety equipment as well as emergency procedures.¹⁴²

The CoA NT also includes an obligation for the owner of the vessel to maintain a P&I insurance which also covers pollution accidents. Such insurance should be at no cost for the charterer and it is explicitly stated that it is a warranty that such insurance exists.¹⁴³

There is a provision, namely Clause 14 of the rider clauses in the CoA NT which allows for the ship to load cargoes belonging to different parties. The question stands whether this can at some point constitute a certain risk, namely the fact that cargoes of different nature and cargoes that might in some instance react violently to one another, be transported on the same ship. The question of increased risk is especially acute in cases where leakage, groundings etc are already a fact.¹⁴⁴

The CoA NT also includes a dangerous incident report scheme, stipulating certain procedures to be followed in case of an accident or a near accident. Such reporting obligations are of importance for documentation reasons, however the question remains as to what extent they have an impact on liability in general.¹⁴⁵

Clause 34 of the rider clauses in the CoA NT is of great importance as it states that the attached safety data sheet forms an integral part of the charter party. The safety data sheets contain detailed information on the goods to be shipped. Such information includes, but are not limited to, boiling point,

¹⁴² CoA NT

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

handling information, hazardous effects on the environment as well as on humans, safety measures to be taken in case of exposure etc.¹⁴⁶

The CoA AV on the other hand as quite early in the contract specified what types of products are to be carried under the contract of affreightment, however technical specifications are lacking at this point. Further on in clause 4 of the contract of affreightment certain technical specifications are given, namely load temperature as well as discharge temperature for Propylane, Ethylene, C4 Raffinate/Crude C4 as well as for Ethane. There is a question mark here on whether the supplied technical information is sufficient in case of an incident.¹⁴⁷

Considering the abovementioned the CoA AV does however in the actual contract, in contrast with the CoA NT which has its safety data sheets, specify certain highly relevant information. Firstly under clause 9.1 the contract specifies in general terms what types of last cargo is approved as well as if certain cargo has been carried on the last voyage, which vessels are not approved. Secondly in 9.2 the contract has technical specifications for Polymer grade Propylene, including last cargo specifications as well as loading temperature. In 9.3 the technical specs. are given for Chemical grade Propylene ex Stenungsund, including load temperature, pressure levels, dew point etc. The list goes on for Ethylene, Ethane, CC4 and C4 Raffinate. Vessel specifications go only so far as to mention the condition of cargo re-heater as well as pumping rate.¹⁴⁸

The CoA AV further specifies in the safety rules and regulations clause that:
“The master, officers and crew of each vessel will:

1. Be aware of the properties and hazards of the cargo to be carried and of the requirements for safe handling of such cargoes.”¹⁴⁹

The inclusion of such a clause in the contract does by itself not affect the liability of the cargo owner by much. It has above been discussed what impact such a general clause has on liability.¹⁵⁰

The CoA AV applies a similar incident reporting system that was discussed in connection with the CoA NT and will thus not be dealt with in detail. Concerning insurance however the two contracts differ substantially. Although the coverage is similar in relation to the amount the CoA AV only includes oil pollution cover and not pollution cover in general as specified in the CoA NT. Meaning that also HNS pollution is covered by the later one.¹⁵¹

¹⁴⁶ Ibid.

¹⁴⁷ CoA AV

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

3 Analysis

Under this heading firstly the Hazardous and Noxious Substances Convention will be analyzed in order to determine to what extent it affects the charterer's liability in connection to pollution caused by such substances. The abovementioned will be followed by a general analysis of the charterer's pollution liability for incidents/accidents involving HNS. Lastly the two abovementioned contracts of affreightment will be analyzed keeping in mind both the HNSC, national legislation as well as general principles concerning a charterer's liability, all in order to answer the abovementioned question, namely *under which specific circumstances is Borealis most likely to incur liability for pollution damage in their capacity as cargo owners of hazardous and noxious substances?*

3.1 The Hazardous and Noxious Substances Convention

First it is important to keep in mind that the Hazardous and Noxious Substances Convention is not yet in force. This means that the discussion in this chapter is purely hypothetical and will only be relevant when, or if, the Convention enters into force. However certain countries have already based their national legislations upon the Convention so the discussion here still serves some purpose.

Secondly we must look at whether or not the definitions in the Convention are applicable concerning Borealis situation. The definition reads as follows: "*a) any substances, materials and articles carried on board a ship as cargo, referred to in (i) to (vii) below:*

- viii) *oils carried in bulk listed in the appendix I of Annex I to the International Convention for the Prevention of Pollution from Ships, 1973...*
- ix) *noxious liquid substances carried in bulk referred to in Appendix II of Annex II to the International Convention for the Prevention of Pollution from Ships...*
- x) *dangerous liquid substances carried in bulk listed in chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk...*
- xi) *dangerous, hazardous and harmful substances, materials and articles in packaged form covered by the International Maritime Dangerous Goods Code...*
- xii) *liquefied gases as listed in chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk...*
- xiii) *liquid substances carried in bulk with a flashpoint not exceeding 60°C...*

- xiv) *solid bulk materials possessing chemical hazards covered by appendix B of the Code of Safe Practice for Solid Bulk Cargoes...*
- b) *residues from the previous carriage in bulk of substances referred to in a)(i) to (iii) and (v) to (vii) above.*¹⁵²

The definition of Hazardous and Noxious Substances is pretty clear that it matches that which Borealis is both shipping to its facilities as well as shipping out from them.

Thirdly the definition of what constitutes damage according to the HNSC must be examined. The definition of damage reads as follows:

- “(a) loss of life or personal injury on board or outside of the ship carrying hazardous and noxious substances caused by those substances;*
- (b) loss of or damage to property outside the ship carrying the hazardous and noxious substances caused by those substances;*
- (c) loss or damage by contamination of the environment caused by the hazardous and noxious substances, provided that compensation for the impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and*
- (d) the costs of preventive measures and further loss or damage caused by preventive measures.*¹⁵³

Whether this is applicable or not will depend on each individual situation involving a ship carrying HNS. However it is important to note that it is quite a generous definition including personal damage, damage to both ship, goods, environment as well as other property damage by the HNS, corresponding to the CLC, and it also entails not only actual damage but also preventive measures as well.

Lastly and most importantly the liability provisions in the Convention stipulates that the owner of a vessel shall have strict liability in connection with an incident involving pollution or other damage caused by a vessel carrying HNS. However most importantly for Borealis the Convention contains a provision exempting any charterer from liability. Such an exemption is only applicable if they did not act with intent to cause such damage or with recklessness and with knowledge that such damage would in all probability result. This provision has as a result that Borealis is exempt from liability under the HNSC regime, unless it has acted with recklessness or intent to cause damage. Not considering the contribution scheme, which falls outside the scope of this paper, the HNSC liability regime is to say the least quite favorable to charterers in general and Borealis in particular.

¹⁵² HNSC Article 1.5.

¹⁵³ HNSC Article 1.6

3.2 National Legislation

Under this heading the different national legislation discussed above will be examined and compared, both to each other as well as to the international scheme of the Hazardous and Noxious Substances Convention.

The Swedish legislation takes the silent approach to the concept of regulating pollution damage by hazardous and noxious substances. The only mention of HNS at all in the Swedish Maritime Code is the duty discussed above of the shipper to disclose the dangerous nature of the goods shipped. The obvious problem when such an approach is taken is that the legal situation is quite unclear. In case of pollution damage in connection with Borealis shipping HNS for example the question would remain whether those who have suffered damage can sue Borealis directly or if they can only sue the owner as per the HNSC. The answer is not forthcoming at all in the relevant legislation. In other words general tort law would be applicable actually leaving Borealis more vulnerable in liability issues than they would otherwise have been. If a claimant can show damage, which has been caused by a causal link attributed to the carriage of HNS by a Borealis chartered vessel than in theory a claimant can choose whether to sue the owner or the charterer. In practice however it is easier for someone who has suffered pollution damage to claim compensation from the owner of a vessel, which is obviously the preferable option for Borealis.

Another theory is that since the SMC is silent on hazardous and noxious substances that the provisions on oil pollution and damage in connection to carriage of oil by sea are applicable analogously. If that is the case than the SMC takes the approach of the CLC, in other words the one suffering damage can only sue the owner of the vessel and the charterer is exempt from liability under the Convention regime. This would in practice mean that the same approach is taken as under the HNSC. However this does not prevent the owner of a vessel to sue by way of recourse in case of fault, negligence etc. on the part of the charterer. This approach is more unlikely to be taken than the one discussed above on general tort law being applicable.

Belgium is a country that goes further than most. In contrast with most international regimes the definition of damage in the statute includes, but are not limited to economic loss as well. Basically all claims are accepted as long as two conditions are met, firstly the damage must be caused by the impairment to the marine environment and secondly damage must be suffered personally by the one claiming compensation. In addition to this strict liability principle is also applied meaning that everything is quite in line with the HNSC and in some instances additional protection to the environment is awarded. For example *disruption of the environment* is a concept introduced which is wider than simply damage to the environment. It is important to remember that under the Belgian legislation those suffering damage can only sue the owner of the vessel causing the pollution as their legislation in this instance is implementing the HNSC. For Borealis

this means that although a person suffering damage cannot sue them directly the scope of what the claimant can sue under is widened, in other words under a recourse action brought by the owner of a vessel the liability can be greater than under most national regimes.

The USA might be the country with the most comprehensive legislation concerning pollution by hazardous and noxious substances, however the pieces of legislation dealing with HNS pollution take aim at clean-up measures and allocation of costs relating to said measures while liability is mostly dealt with by tort law. The analysis of said tort law will be dealt with in a coming chapter, but it is worth mentioning that the US case law on maritime pollution in general and pollution in connection with the carriage of HNS in particular is quite extensive.

Concerning both pieces of legislation, namely the CWA and the CERCLA, they both apply strict liability for clean up costs. Another point worth considering is that the US authorities are much better than the HNSC regime on drawing up guidelines on what substances are to be considered hazardous and noxious as well as an authorization system enabling parties to apply for a license to discharge certain amounts of substances. However the major drawback with the American system is that no damage to persons or health are recoverable under the system imposed by the CWA/CERCLA, which if compared to the HNSC is quite peculiar. For the purpose of CWA/CERCLA another substantial difference compared to the HNSC is that the shipper can prima facie be held liable, however in practice the owner is the one who most often gets sued. But the fact remains that the shipper can be held liable by statute for pollution damage in connection with the carriage of HNS. In comparison to the European schemes discussed above and for Borealis this means that they run a higher risk of being found liable in the United States than in Europe and the same goes concerning liability in tort, which will be discussed deeper below.

Concerning the last country Finland and its legislation there is not much left to say. In general the legislation is quite similar to Sweden where the maritime code is mostly silent on the subject which is dealt with instead by general tort law. For the consequences for Borealis see the discussion above on Sweden.

3.3 The Charterer's Contractual Liability and Liability in Tort

Under this heading firstly the impact of the charterer's contractual liability towards the owner in case of an accident, whether it involves pollution or not, will be discussed followed by a detailed analysis on case law involving liability for pollution damage and the carriage of hazardous and noxious substance by sea. Every aspect analyzed will be focused upon what impacts

it might have upon Borealis as charterers of ships carrying hazardous and noxious substances.

3.3.1 The Charterer's Contractual Liability

Firstly the duty not to ship dangerous goods, without the knowledge or consent of the ship owner, will be discussed. Notification that shipment of dangerous goods will be made must be communicated to the ship owner, such a duty is however not mandatory if the owner or the crew knew or ought to have known of the dangerous qualities of the above mentioned goods. If said notification has not been made the charterer/shipper run the risk of being liable in case of an accident involving the goods shipped.

How does this then affect Borealis? It must first be determined whether the goods shipped by Borealis can be considered to be "dangerous" goods. The quote mentioned above on what is, or is not dangerous goods state "*that we are here concerned, not with the labeling in the abstract of goods as "dangerous" or "safe" but with the distribution of risk for the consequences of a dangerous situation arising during the voyage*"¹⁵⁴. If there should be an accident involving the ship carrying the substances that Borealis are shipping there would in all certainty be an additional risk arising from that particular situation. Further the HVR talks of dangerous goods as "*Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier... has not consented, with the knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment*".¹⁵⁵

The answer to the question posed if the goods shipped by Borealis are to be considered dangerous would be in the affirmative. It is however important to note that it is highly unlikely that the ship owner, or the crew, would be unaware of the nature of the goods shipped. As such there is no additional risk of incurring liability as charterer's from Borealis.

It has been mentioned above that the most common way of incurring liability as a charterer for accidents involving the chartered ship is to breach the obligation to nominate a safe port. Subsequently it is concerning this obligation that Borealis must exercise most caution in order to avoid liability as charterers. The obligation to provide a safe port is an implied warranty, however both contracts of affreightment mention the notion of safe port being provided by Borealis.

The definition as to what is considered a safe port or not is quite wide, Sellers definition in the *Eastern City* on what is a safe port is as follows:

¹⁵⁴ *The Athanasia Comminos and Georges Chr Lemos*, [1990] 1 Lloyd's Rep. 277, QBD.

¹⁵⁵ *Ibid.* Article IV rule 6.

“a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by goods navigation and seamanship”.¹⁵⁶

The obligation is also continuous, so that it is not sufficient that a ship can enter a port but must also be able to leave it safely, this follows from the *Limerick v Stott*. This is of relevance to Borealis in connection with the *Tjörn* bridge being located just outside of the port where there is often not much margin to go on for ships coming in and out of the harbor. Said ships must be able to pass under the bridge both whether coming or going, loading or discharging. It is up to Borealis to make sure that the ship in question can pass under the bridge and any incident involving groundings there will in all probability be considered as a breach of the warranty of safe port. The obligation to provide a safe port is a question of fact and not of law. Which means that each individual situation will be judged on its merits and what is a safe port for one ship might not be a safe port for another. One cannot stress this point too much, even if Ship A can pass under the bridge in a given case the port might still be considered unsafe if Ship B cannot pass under it in another situation.

The breach of the obligation to provide a safe port due to bad weather is something of an exception. In today's technically advanced world there is always, or most often at least, weather forecasting systems in place. However if there is sufficiently bad weather a charterer must make sure that there are available tugs or pilots in place should there be need of those. If there are not available in Stenugnsund in case of bad weather there are instances where the port could be considered unsafe and Borealis could incur liability for breach of said warranty.

Something akin to bad weather is icing conditions in port. This is most acute in certain parts of Sweden as well as the entire Baltic. For Borealis which ships to Porvoo there are certain parts of the year where the ports are sure to be filled with ice. The case of *Livanita* shows that even though it is rarely the case that icing conditions make a port unsafe there is still the risk that a court might find floating ice blocks etc to be a sufficient hazard in order to render a port unsafe.

The case of political unrest or war/civil war etc are highly unlikely to affect Borealis in these parts of the world, however in the Middle East for example, where Borealis most certainly has interests, there are such risks. In case of outbreaks of such incidents it is obviously going to render a port of discharge or loading unsafe.

The last point concerning the obligation to provide a safe port is that although it is an implied warranty to do so, there is no equivalent to providing a safe berth. Such warranty only exists if it is expressly stated in

¹⁵⁶ *The Eastern City* [1958] 2 Lloyd's Rep 127 p. 131.

the contract of affreightment, which it is in both of Borealis CoA:s. In order to limit ones liability it might be wise to consider removing such warranties if one does not want to increase the scope of obligations towards the ship owner.

The last avenue of increasing the risk of liability for a charterer is by the very nature of the goods shipped. To avoid increased risk of liability it is important for the charterer to always disclose what goods are being shipped. As a charterer, although not always sufficient by its own, the referral to the IMDG Code is mandatory for limiting the risk of liability in cases where accidents have occurred and the owner leans on the fact that he was not aware of the nature of the goods shipped. Other important points to mention, which in fact Borealis have done in the contracts of affreightment, is to specify loading and discharging temperature, storing temperature etc.

Lastly the *Texas City Disaster* is an example of how it is important to always treat the goods shipped according to industry standards, as known at the time. Even though in the relevant case the ship owner and the crew handled the substances in the wrong manner it was considered to be industry standard to treat such substances in a certain way. The charterers avoided liability since they could not have notified the crew of any different way of handling the goods as they knew of no other way.

3.3.2 Liability in Tort for HNS Damage

The first tort to be discussed is negligence. A charterer can be negligent when failing to notify the carrier of the hazardous and noxious nature of the goods shipped. It is highly doubtful that such negligence could exist in cases where Borealis are chartering ships as the ship owners are aware, or ought to be aware, of the nature of the goods shipped. In any case such knowledge should exist based upon the mention of goods, the handling of such etc. in the contracts of affreightment.

The second type of liability for damage resulting from hazardous and noxious substances is based upon strict liability. There have been some instances where the charterer of a ship has been found to be strictly liable when failing to notify the ship owner of the dangerous nature of the goods shipped, see case law on the subject above. Strict liability of the sort discussed here can only be invoked when the ship owner was totally unaware of the nature of the goods shipped. Such knowledge is both based upon fact, what he did or did not know, and speculative knowledge, what ought the ship owner be aware of.

Strict liability is escaped in instances where it can be proved that any information concerning the dangerous nature of the goods has been provided the ship owner. Looking at Borealis contracts of affreightment it is clear that sufficient information have been provided to the ship owner, as well as the crew, in order to escape strict liability for any eventual damage

resulting from HNS. However it is still of importance that Borealis provide sufficient information on stowage, handling, loading as well as discharging of the goods in order to escape any eventual liability based upon negligence.

Lastly the question on liability towards third parties who have suffered damage from hazardous and noxious substances remains. The Courts have been quite restrictive in applying the strict liability principle for third parties claiming for damages in cases involving hazardous and noxious substance, which is favorable to say the least for Borealis. The main authority on the subject is the *China Union Lines Ltd. V A.O Andersen & Co* where the charterers escaped liability even though they had provided wrongful information on the stowage of the goods in question. Since the information provided on stowage was according to regulations in place at the time the Court refused to find any liability on the side of the charterers. Even had the charterers known of the faulty information provided it is questionable if they would have been found strictly liable for damages resulting there from, however in all probability the negligent act of not furnishing proper information when in possession of the knowledge that faulty regulations are in place would still possibly be found to be such negligence as to warrant liability.

3.3.3 Borealis Contracts of Affreightment

It has been mentioned a number of times above that the main route to incur liability for the charterer in a charter party is to breach the warranty of a safe port. It was also mentioned that the obligation to provide a safe port is an implied warranty, while on the other hand the obligation to provide a safe berth exists only if expressly stated in the contract of affreightment.

The CoA NT expressly states that a safe berth is guaranteed, which in practice increases the scope of liability for Borealis in case of an accident in port. The CoA AV on the other hand talks about “*a safe location*”. The question concerning “*a safe location*” is whether it is similar, or more importantly identical, to the concept of a safe berth. The wording “location” is more specific than port in general and following this line of thought it is in all probability more in line with the concept of berth, which is also more specific, than the concept of port in general. Thus it is difficult to argue that there is any material difference between the two contracts of affreightment on the fact that they both provide not only an implied warranty of safe port but also an expressly stated guarantee of a safe berth. This is important to keep in mind as there is no general obligation to provide such an extended warranty from the charterer’s point of view.

The CoA AV is different in one important way than the CoA NT, namely that it contains provisions on nominating procedures that are quite detailed. These are useful mainly due to such provisions providing flexibility in a situation where if no such clause existed there would only be the choice, or

rather no choice at all, to comply with the previously stated port of destination.

The CoA AV also contains detailed provisions in case of icing conditions in the port of loading/discharging. These provisions are basically a transformation of the relevant case law into contractual provisions. They are applying what has been decided in case law on icing conditions, mainly that it may under certain conditions be considered such a situation as to render a port unsafe. For it to be considered unsafe due to ice it must be of extraordinary character, however to be on the safe side the contract of affreightment requires ships not to enter into ice filled ports without ice breakers, thus ensuring that the ship owner cannot sue for violation of the safe port warranty in case of breach of said article. Such a clause is definitely of importance in order to limit once liability, especially since Borealis ship goods in areas where icing conditions are not uncommon or rather quite common in the winter months.

Other provisions of interest in both contracts of affreightment are the ones on training of the crew on handling certain dangerous substances. In case the crew is unaware and untrained in how to handle certain substances and an incident takes place due to such unawareness the charterer is highly likely to be held liable for any damage suffered by both the ship owner, crew as well as third parties involved. Of importance in the context is also what is known of the actual substance and how it is handled according to industry standards. In general one can say that as long as the goods are handled according to such standards it is highly unlikely that the charterer can be held liable. However in order for the crew to handle hazardous and noxious substances according to industry standards they must firstly be trained on how to handle such goods in general. It is of that particular reason it is of importance to include a clause on training of the crew on handling of dangerous goods.

Provisions which are of little importance from a liability perspective, which is not the same as saying that they hold no practical use in other situations, are the provisions in both contracts of affreightment on the Dangerous Incident Reporting Scheme. Such a scheme only discusses what should be done in the way of reporting an actual or potential incident and not what to actually do in case of accidents involving spills. As was mentioned above it is of course not the same as stating that the scheme is superfluous, as it provides the parties with information on who to contact and when. Such information might in the long run act to limit potential damage as well.

Lastly the information provided on the goods shipped will be discussed. Firstly it is of importance to mention that the CoA NT contains detailed "Data Safety Sheets" which are of great importance in the context of providing the ship owner with the proper information on the goods shipped. It has above been discussed and mentioned several times the impact it can have on the liability of the charterer not to disclose the dangerous nature of the goods shipped or not to provide the proper information on how to handle

dangerous goods which are to be shipped. By attaching “Safety Data Sheets” of the type enclosed in the contract of affreightment Borealis effectively avoids incurring liability due to not providing such information.

Secondly it is worth mentioning that the CoA AV has no such “Safety Data Sheets” attached to it. Instead it has provisions scattered throughout the contract on technical specifications of the goods to be shipped. The question is whether this is a satisfactory way of providing information on the handling of the goods to be shipped and whether the information provided is sufficient. When doing a thorough read-through of each article containing technical specification and comparing it to the information provided in the “Safety Data Sheets” it is plain that the information provided is of equal value and should be enough in order to limit ones liability due to not having provided sufficient information on the goods shipped. However it must be pointed out that the “Safety Data Sheets” is a much more uncomplicated and straightforward way of providing the same information.

To sum up although taking different approaches to certain issues both contracts of affreightments are similar in most aspects when it comes to the result that they achieve. The following chapter will conclude to what extent the contracts of affreightment increase or limit the liability of Borealis in the event of an accident involving HNS.

4 Conclusion

The aim of the thesis was to examine Borealis liability as charterers in connection with the safe port, alternatively safe berth, clause in the charter party. The thesis also aimed at examining to what extent the inherent dangers of Stenungsund port could leave Borealis open to liability to the ship owner in cases of damage to the ship and in instances where pollution damage occurs, other claimants as well.

In connection with the above mentioned on liability the thesis also aimed at analyzing Borealis two contracts of affreightment in the context of liability for pollution damage. Another point of the thesis was to make recommendations to Borealis how to best limit such liability in the company's daily practices as well as in contractual situations.

The question to be answered was under which specific circumstances Borealis was most likely to incur liability for pollution damage in their capacity as cargo owners/charterers of hazardous and noxious substances?

National legislation is one of the major factors affecting liability for charterers in general and Borealis in particular. Most of the abovementioned national legislations either are silent all together on the matter or choose to deal with liability in connection with damage resulting from hazardous and noxious substances in an insufficient manner. Swedish and Finnish legislation in particular are totally silent on allocation of liability. This affects any charterer in the sense that legal certainty is less than had the situation been regulated by law, rather than by tort as it is at the moment. Looking at Belgian law, which is more substantial than its Nordic counterparts, it is similar to the Hazardous and Noxious Substances Convention channeling the liability away from the charterer and towards the ship owner. The American legislation, although substantial in certain ways, chooses not to deal with the issue of liability in case of an accidents involving HNS other than concerning clean-up costs as well as costs related thereto incurred by the federal government.

In general it must be said that none of the national legislations examined above, except for the Belgian legislation, is satisfactory from the point of legal certainty. This is however not the same as to say that those legislations are unfavorable towards Borealis. The deciding factor will instead be what general tort law has to say on the issue.

In case of an adoption of the HNSC however the situation would be quite different. The channeling provisions contained therein would "save" Borealis from any direct liability and the ship owner would be the one taking on such an onus. However it has been mentioned above a number of times that such a situation would not hinder the ship owner from suing the charterer by way of recourse if there is any fault or negligence on the part of

the charterer. Still the fact remains that by adopting the Convention legal certainty would increase both for charterers, ship owners as well as claimants in proceedings concerning damage suffered by hazardous and noxious substances.

Following the above stated on liability by way of recourse, by far the most common way to incur liability by the charterer is to break the warranty of Safe Port, or Safe Berth. There are a number of ways the warranty can be breached, each has been discussed above and will not be reiterated here in detail. It is however always important to keep in mind that there must be adequate weather forecasting systems, maneuvering space, sufficient depth etc.

Concerning the depth as well as the maneuvering space the situation at Stenungsund port is very interesting. The entrance to the port is through a sound with a bridge that under certain circumstances has no more than one meter between ships passing under it and its highest point. If Borealis have failed to notify the ship owner of this particular circumstance or if in bad weather the maneuvering space is limited and the ships highest point is no longer able to stay within the “safe” limits under the bridge and grounding occurs Borealis has in all probability breached the warranty of a safe port. Notification, as per above, on the relevant information on the height of the bridge might not even be enough. Case law above has shown that lack of space in channels, ports or similar might result in an unsafe port for a certain ship.

The safe port warranty is a continuous duty to provide a safe port which has the effect that ships must be able to pass both at loading as well as discharging. To conclude the Stenungsund port situation the bridge is by far the most obvious danger concerning a possible breach of the warranty of safe port by Borealis, which can be avoided by providing relevant information as well as making sure that the ships chartered has the capabilities necessary of making the voyage safe and sound in and out of the port of Stenungsund.

Lastly concerning the safe port warranty in the Nordic and Baltic countries there is a great risk of bad weather and or a risk of icing conditions during the winter months. The risk of icing conditions is especially great in the Baltic regions, however also in the western parts of Sweden ice-filled ports are quite common during the relevant season. Although such conditions do not by themselves make a port unsafe they can help if there are no ice-breakers, tugs and pilots available where such are needed. If such utilities are lacking in a port and a ship is ordered there, Borealis would in all probability be in breach of the safe port warranty in case of an incident involving the chartered ship.

It has above also been discussed that a charterer can incur liability due to the specific nature of the goods shipped. This is the case where the ship owner is not aware of the fact that a charterer or a shipper is shipping dangerous

goods. Concerning situations involving Borealis it is highly unlikely that the ship owner could claim to be unaware of the nature of the goods shipped, as it is the purpose of the very voyage to ship inherently dangerous goods.

Following the fact that the ship owner is aware or ought to be aware of the dangerous nature of the cargo, strict liability is not really an issue for Borealis.

However negligence can still be an issue in certain circumstances, namely when or if the contracts of affreightment should be considered lacking in providing the relevant information on handling of the goods during voyage, during the loading and/or discharging etc. It must however be said that the contracts of affreightment applied by Borealis cannot be considered lacking in these circumstances and thus negligence of the kind discussed above is not really a risk for Borealis.

If moving on to the actual contracts of affreightment it is worth mentioning that the requirement of an ice classed ship A is only required in one of the two contracts. In the CoA which is lacking such requirement ships are still trafficking in the northern regions of Europe, a fact that could be highly relevant in case of an incident involving ice. The obvious suggestion would be to consider having a clause in both the contracts of affreightment requiring the ship owner to only provide ice classed ships, at least when the voyage takes the ship(s) into regions where icing conditions are a reality more often than not in the winter period.

The next suggestion concerning the contracts of affreightment is a quite obvious one and has been hinted at a number of times throughout the thesis. There is no need to specify a safe berth. A safe port is an implied warranty in a charter party, while a berth is not. By specifying a safe berth as well Borealis is widening the scope of their liability in case of an incident relating to the safety of the ship while berthing. It not being said that the safety of the ship need to be provided for if the safe berth clause is removed, however it is undeniable that providing such a warranty is something beyond what is required by law.

To sum up the situation for a charterer of a ship carrying hazardous and noxious substances are quite favorable. In case of an accident most legal systems provide the one suffered damage to claim from the ship owner instead of the charterer, the same being said for the Hazardous and Noxious Substances Convention should it enter into force. There are however a certain number of instances where charterers have been found liable for pollution damage, most often in connection with shipping dangerous goods without the knowledge of the ship owner (not something that is a risk for Borealis) as well as in connection with a breach of the safe port warranty. The safe port warranty, or at the moment safe berth warranty as well, in the contracts of affreightment applied by Borealis is where the most risk lies in case of an incident involving the carriage of HNS by sea for the benefit of Borealis. One needs to make sure that the right type of ship is employed, be

it that it possesses a sufficient ice class or that it is of the right dimensions to fit under the bridge at Stenugnsund. It needs also to be remembered that an obligation to provide a safe port is a continuous duty and the ship needs to be able not only to enter the port but to depart from it as well. Although some minor changes have been recommended in general it must be said that the risk for Borealis in connection with the carriage of hazardous and noxious substances by sea are minor, as the two contracts of affreightment being applied are quite substantive and adequate concerning protecting Borealis in avoiding to incur liability for damage resulting from HNS.

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