Knock in or knock out?

Co-insurance, liability and subrogation in the light of the Ocean Victory case

Trine-Lise Wilhelmsen

Professor, Scandinavian Institute of Maritime Law,
University of Oslo.

Content

1 Introduction

The topic of this article[1] is the concepts of co-insurance, liability and subrogation according to Norwegian law, in the light of a judgment from the UK Supreme Court 10 May 2017 concerning the vessel Ocean Victory (the Ocean Victory case).[2] The concept of co-insurance may refer to insurance contracted with several insurers[3] against the same perils by one person effecting the insurance,[4] or that an insurance contract between the person effecting the insurance and the insurer includes the insured interests of a third party.[5] The concept is here used in the latter meaning, i.e. where the interests of several persons or entities are protected under the same insurance contract. Practical examples are in shipping where insurance of the vessel covers both the interest of the owner and the interests of the managers and of the charterer of the vessel and in building projects where insurance covers both the interest of the builder and the contractors.[6]

Co-insurance is first and foremost effected to protect the economic interests of the co-insured when the insured vessel, project or enterprise is damaged or lost. If a building project is damaged by fire, the insurance will protect both the builder's and the contractor's economic interests in the building. However, co-insurance also includes so called indirect liability insurance. This effect is triggered where a co-insured party B is liable for damage to economic interests belonging to another assured party A. The starting point in this situation is that the insurer, I, will cover damage to A's interest according to the insurance contract, but that I afterwards may raise a subrogated claim against the liable party B. If B is not co-insured, he may have to cover I's payment to A. But if B is co-insured, he is protected against such liability claims to the extent he is not in breach of duties according to the insurance contract. This means that co-insurance bars the subrogation claim from the insurer against the liable party B.

A more complicated question is to what extent co-insurance also bars a claim from the injured party A against the liable party B, i.e. if A may either chose to claim B instead of the insurer, or to claim the insurer first and then claim B for any uncovered losses. In the Ocean Victory case, a majority of three judges concluded (obiter) that co-insurance also barred any claim between A and B. The case concerned co-insurance between the bareboat-charterer B and the owner A of the vessel Ocean Victory, which B in turn time-chartered to S, who sub-chartered the vessel to D. The vessel sunk on departure from a port, and the insurer I paid compensation to A for i.a. total loss. All the three charter parties contained a safe port warranty, and the insurer was assigned A's right to claim B, who then would raise a subrogated or indemnity claim against S, who would claim D as the party directly liable for the breach.

The consequences of the judgment were that as the owner A could not claim B, there was no liability or loss incurred by B to pursue further down the contrac-

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1 The article was written for Festskrift til Lasse Simonsen, being published by Gyldendal during the fall 2023.

2 (2017) UKSC 35

3 Insurance Contract Act (ICA) § 1-2 letter d.

4 ICA § 2-2 letter a. See further Trine-Lise Wilhelmsen and Hans Jacob Bull,*Handbook on Hull Insurance* (2017) (Wilhelmsen/Bull) pp. 40-43, Nordic Marine Insurance Plan 2013 (NP) Cl. 9-1 sub-clause 2.

5 See further ICA ch. 7, Wilhelmsen/Bull ch. 7, Nordic Marine Insurance Plan 2013 ch. 7 and 8.

6 For building projects based on the different Norsk Standard contracts, the mechanism to use the builders insurance may be different from co-insurance, cf. Ivar Alvik, Forsikringsselskapets regressrett ved følgeskader av mangel i entrepriseforhold – særlig om grensen mellom kontrakts- og deliktsansvar,*Tidsskrift for erstatningsrett, forsikringsrett og trygderett* 2020 no. 1 p. 7-38.

tual chain.[7] Thus, D was free from liability, even though neither S nor D were co-insured under the insurance. The effect can be compared to a knock for knock agreement[8] where the parties agree that damage to each party in a contractual arrangement shall stay with that party and each party shall procure a waiver of subrogation from its insurer. This allows losses to be financed though insurance even if caused by another party in the same contractual arrangement.[9] However, this principle is in Norwegian contractual practice normally carefully mapped out in the different contracts between the parties and not established merely by implication from co-insurance – hence the question "knock in or knock out" in the title.

The judgment in the Ocean Victory case came as a surprise to the shipping and marine insurance industry, who has or will change the relevant conditions.[10] However, the underlying questions are not much discussed in Norwegian theory and it is therefore interesting to see if the result in the Ocean Victory case is consistent with Norwegian law and to what extent the issue needs to be dealt with in the relevant contracts. This is directly relevant for charter-parties, but co-insurance schemes are also used in building projects and other projects involving several contractual partners.

In the following, an overview of the relevant Norwegian regulation is provided in section 2. Thereafter, the Ocean Victory case is presented in section 3 and discussed in light of the Norwegian regulation in section 4.

7 However, the judgment para 94 outlines three possible routes for the insurer to claim S and D and then states «For reasons which it is unnecessary to explore the insurers have confined their case to basis (1)». The insurer may therefore have other remedies available against S and D that is not barred by this decision, cf. para 144.

8 See on the knock for knock principle, Hans Jacob Bull,*Tredjemannsdekninger i forsikringsforhold*, Oslo 1988, Del IV, (Bull) Knut Kaasen,*Petroleumskontrakter*, 2018, Del VIII (Kaasen), Monika Zak,*Ansvarsregulering i borekontrakter –Gyldighetssensur i norsk, engelsk og amerikansk rett*, Master Paper 19.05.2012https://www.duo.uio.no/handle/10 852/35 075(Zak), Trine-Lise Wilhelmsen, Liability and insurance clauses in contracts for vessel services in the Norwegian offshore sector - the knock for knock principle,*MarIus* 2013 (419) pp. 81-111 (Wilhelmsen 2013).

9 Cf. for instance Supplytime or HeavyCon charters.

10 For instance Barecon 2017, Gard P&I rule 79 (5) and Nordic Marine Insurance Plan 2013 Cl. 8-2.

2 Overview of the regulation

2.1 The legal sources

Insurance contracts are governed by the Norwegian Insurance Contract Act 1989 (ICA).

Casualty insurance is regulated in ICA part 3. The rules are as a starting point mandatory, i.e. the provisions can not be deviated from to the detriment of the party deriving a claim against the company from the insurance contract.[11] The ICA may, however, be deviated from for insurance concerning substantial risks and for insurance of commercial activity mainly performed abroad.[12] The act does not define the concept of substantial risk, but this is mapped out in regulations.[13] For the purpose of this article the main point is that insurance for vessels[14] and for enterprises of a certain size[15] is outside the mandatory scope of the legislation. This means that for big companies, vessels and commercial activity mainly performed abroad, the ICA may be departed from.

Even if the ICA is not mandatory for these types of insurance, it will, however, function as background legislation for issues not regulated in the insurance contract between the parties. Commercial enterprises on land in Norway are normally insured based on ICA even in cases where the act may be deviated from. Rules on co-insurance is provided in ICA part 3 chapter 7.

Marine insurance on the other hand, are based on an agreed document, the Nordic Marine Insurance Plan 2013 (NP), that functions more like private legislation than a contractual document.[16] The NP is revised every third or fourth year and the current version is Version 2023.[17] However, this article is mainly based on Version 2019[18] being the version in use when the article was written. Version 2023 was amended to avoid the result in the Ocean Victory case, cf. section 5 below.

The relevant provisions NP includes most types of marine insurance, hereunder hull insurance which was the relevant insurance in the Ocean Victory case. NP includes provisions on co-insurance in chapters 7 (for mortgagees) and 8 (for other third parties).

2.2 Insurance company, policy-holder, and assured

The insurance contract is a three part relationship based on a distinction between the person effecting the insurance and the person that is entitled to compensation when the insured event occurs. The parties to the insurance contract is the policy-holder, which is the party who enters into the contract with the company,[19] and the company, which is the party who in the contract undertakes to provide insurance.[20] The party who according to the insurance contract will be entitled to indemnity or an insured amount is called the insured party or the assured.[21]

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11 ICA § 2-3 sub paragraph 1.

12 ICA § 2-3 sub paragraph 2 cf. § 1-3.

13 FOR-2022-03-04-323 § 1.

14 Regulation § 1 sub paragraph 1 letter a with reference to insurance class 6.

15 Regulation § 1 sub paragraph 1 letter c with reference to insurance class 3, 8, 9, 10, 13 and 16, but qualified to a certain size with regard to assets according to the latest balance sheet, sales according to the latest annual report and accounts and number of employees.

16 See on the NP, Wilhelmsen/Bull p. 26 ff.

17 Printed atThe Plan (nordicplan.org)

18 Printed atNordicPlan

19 ICA § 2-2 letter a, NP Cl. 1-1 letter b, Bull,*Forsikringsrett,* 2008 (Bull 2008), p. 91, Wilhelmsen/Bull p. 44. The Norwegian terminology is «the person effecting the insurance», but here «policy holder» is used because this is the UK terminology.

20 NP Cl. 1-1 letter a, Bull 2008 p. 91, Wilhelmsen/Bull p. 36.

21 ICA § 2-2 letter b, NP Cl. 1-1 letter c, Bull p. 91, Wilhelmsen/Bull p. 45.

In many cases, the policy-holder and the assured is the same person: the owner of a house or a car insures the object and will be entitled to compensation when the house or car is damaged. The distinction between the policy holder and the assured makes it, however, possible to let one insurance contract be issued to the benefit of more parties than the policy-holder. Typically, this will be the situation where the economic interest in the insured object is divided between several people, for instance several owners (spouses owning a house together or co-owners of a vessel) or an owner and mortgagee of a house or entity.[22] In such cases, both the policy holder, and the co-owner, mortgagee or a person in possession of another economic interest in the insured object, will be entitled to compensation according to their economic interest. The term "assured" thus comprises both the "assured" as the "principal" assured and the co-insured.[23]

2.3 Co-insurance for economic interest in insured goods

2.3.1 The regulation in ICA

Co-insurance is governed by ICA chapter 7 Rights of third parties according to the insurance contract. The rules are generally mandatory for small risks, but even so some of the rules may be deviated from.

According to ICA § 7-1, insurance of real property benefits the policyholder and the holder of the judicially registered right of ownership, charge or other judicially registered security. The same holds for the holder of security rights in movable property which can be separately registered in a systematic register.[24] These provisions may be deviated from, but if they are not, ICA § 7-3 provides for mandatory protection of the co-insured by stating that the co-insured is not identified with the policy-holder or the assured; i.e. if the policy-holder breaches the duty of disclosure or the assured breaches the duty of due care during the insurance period, this does not affect the position of the co-insured.[25] The relevant duties of due care is defined in ICA § 4-6/§ 4-7 on change of risk, § 4-8 on breach of safety regulations and § 4-9 on causing the insured event.

Further, according to ICA § 7-5, the parties may agree on co-insurance for other parties than the ones mentioned in ICA § 7-1 – for instance contractors with economic interests in a building project. In such cases, the protection in ICA § 7-3 will apply, i.e. there is no identification between the policy-holder/assured and the co-insured unless the contract states otherwise.[26]

On the other hand, if the co-insured himself breaches the provisions on change of risk, violation of safety regulations or deliberately or through gross negligence causes the insured event, he will be subject to the sanctions for such breaches. In regard to violation of safety regulation or causing the insured event, the sanction is that the compensation will be reduced depending on i.a. the degree of fault and causation.[27] This reduction will then apply to the cover for the co-insureds economic interest in the insured object.

22 Bull 2008 p. 92.

23 See Bull 2008 s. 92, Commentary NP 2019 to Chapter 8 Co-insurance of third Parties, General,Chapter 8 - NordicPlan, stating that "The term 'the assured' is defined in Cl. 1-1 litra (c) to make room for others than the 'principal assured' to be included as assureds under the insurance contract. This is done by making use of the concept of co-insurance", Wilhelmsen/Bull p. 45-46.

24 ICA § 7-1 sub paragraph 2 and 3, see further Bull 2008 pp. 507 ff.

25 See further Bull pp. 530 ff.

26 See further Bull p. 517.

27 ICA § 4-8 third sentence and § 4-9 second sub paragraph.

2.3.2 The Nordic Marine Insurance Plan

The Nordic Marine Insurance Plan 2013 version 2023 regulates co-insurance of mortgagees in chapter 7 and co-insurance of other parties in chapter 8. For the mortgagee the co-insurance is automatic, i.e. the mortgagee is co-insured even if the insurer has not been notified.[28] However, contrary to the regulation in the ICA, the starting point in the NP chapter 7 is that the co-insured is identified with the assured, which means that if the assured breaches the duty of care according to NP chapter 3 and thereby causes damage to the insured property, the co-insured will normally lose his cover.[29] Chapter 7 contains no provisions on the co-insured's own duties of due care, but it follows from his status as co-insured that the duties addressed to the assured applies similarly to him.[30] Thus, in the less likely situation that the co-insured mortgagee breaches his duties of due care and thereby causes damage to the insured property, he will lose cover for his own interest according to the regulation in NP chapter 3. Whether the main assured will be identified with the co-insured in this situation, will depend of the position of the co-insured in relation to the operation of the vessel.[31]

For other third parties with economic interests in the vessel, for instance co-owners or charterers, there is no automatic co-insurance. However, such co-insurance may be effected by expressly stating in the policy that it is effected for the benefit of a third party.[32] For such co-insureds, the duty of disclosure and due care and identification is expressly regulated.[33] The main rule is that the co-insured has the same duties as the person effecting the insurance and the assured, and that he will be identified with the assured. However, a co-insured according to chapter 8 may also effect so called independent co-insurance and thereby avoid identification with the person effecting the insurance and the assured.[34]

2.4 The co-insured's indirect liability insurance

The presentation in 2.3 shows that if the co-insured breaches his duties of due care and thereby causes damage to the insured object, he will lose cover for his own economic interest in the object. If the assured is identified with the co-insured and he also loses cover for his economic interest, the insurer is free from liability and any further claims must be settled between the assured and the co-insured. However, if the assured is not identified with the co-insured, the insurer will have to compensate the assured for his loss. The question then arise if the insurer may raise a subrogated claim against the co-insured being liable for the damage. This is the question of the co-insured's indirect liability insurance, i.e. if the co-insured is protected against this subrogated claim.

A similar question may arise for a third party with no economic interest in the insured object or enterprise, but who is in a position to cause damage to this enterprise. This is sometimes called "protective co-insurance", which refers to a situation where a third party is exposed to liability for loss of or damage to the

28 NP Cl. 7-1 sub-clause 1, Wilhelmsen/Bull p. 222.

29 NP Cl. 7-1 cf. Cl. 3-36 to Cl. 3-38. See further Wilhelmsen/Bull p. 224-225. The regulation is complicated, but the details are outside the scope of the topic here.

30 Wilhelmsen/Bull p. 223-224.

31 NP Cl. 3-37: "The insurer may not invoke against the assured faults or negligence committed by another assured or a co-owner of the insured vessel, or anyone with whom they may be identified under Cl. 3-36, sub-clause 2, unless the relevant assured or co-owner has overall decision-making authority for the operation of the vessel".

32 NP Cl. 8-1, see further Wilhelmsen/Bull p. 231.

33 NP Cl. 8-3, see further Wilhelmsen/Bull p. 233-235.

34 NP cl. 8-7, see further Wilhelmsen/Bull p. 236-237. A mortgagee may also effect such insurance to avoid being identified with the main assured.

insured object itself.[35] Such co-insurance may be effected according to ICA § 7-5 or NP Cl. 8-2.

The starting point is that the insurer has a right of subrogation against a third party causing damage to the insured object. The development of this rule is complicated, but today it appears to be an established rule on "legal cesjon" based on court practise.[36] The tort law contains a limitation to this rule for consumer-insurance where the loss is channelled to the injured party's casualty insurance and thus subrogation is barred,[37] but for insurance of commercial activity the right of subrogation is intact.[38] In a situation where for instance a contractor is liable for fire to the building project and the insurer pays compensation to the owner, the insurer may raise a subrogated claim against the contractor.

The same rule follows from NP § 5-13 for marine insurance:

> If the assured has a claim against a third party for compensation of a loss, the insurer is, upon payment of compensation to the assured for the loss, subrogated to the rights of the assured against the third party concerned.

This regulation may be seen as part of a general principle that a party who has covered another party's obligation normally and as a starting point has a valid recourse action. It is the limitation of any such recourse action that requires specific legal basis.[39]

If the liable party is co-insured, it is however stated in the preparatory documents to the ICA that co-insurance also contains a so-called indirect liability insurance, and that the co-insured is protected against a claim for recourse brought against him by the insurer to the same extent he is protected as an assured. This means that the ICA chapter 4 applies to the subrogated claim and that the insurer may only make a claim against him if he is in breach of rules of change of risk, violation of safety regulation or has damaged the insured object through gross negligence or deliberately.[40]

In the NP, this situation is expressly regulated:

> **Clause 8-2. Protection of third parties against subrogation claims from the insurer**
> The insurer does not have any right of subrogation against the co-insured third party unless and to the extent that such right is specified in the insurance contract or the co-insured third party has undertaken an express contractual obligation to an assured to remain liable for losses of the kind otherwise covered by the insurance.

The main rule here is similar to the "indirect liability insurance" which is described as an inherent element in co-insurance according to the ICA, but both the insurance contract and the contract that provides for co-insurance may depart from this starting point. Interestingly, the Commentary has the following example upon how the contractual obligation may reinstate the right of subrogation:[41]

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35 Commentary NP 2019 to chapter 8, General, Wilhelmsen/Bull p. 229, see also Bull p. 539.

36 Trine-Lise Wilhelmsen, Regress i skadeforsikring,*Tidsskrift for erstatningsrett, forsikringsrett og trygderett*, no. 1, 2019 pp. 7-32 (Wilhelmsen 2019) at p. 13, with reference to Rt. 1986 p. 381 and Rt. 1968 p. 48, Viggo Hagstrøm and Are Stenvik, Erstatningsrett, 2015 (Hagstrøm og Stenvik 2015), s. 539–540. See also Ot.prp. no. 60 (1980–1981) Om lov om endringer i erstatningslovgivningen for så vidt gjelder lemping av erstatningsansvar, forsikringsgivers regressrett m m, p. 43.

37 Tort act § 4-3 cf. § 4-2.

38 Tort act § 4-2 cf. § 4-2 no. 1 letter b.

39 Rt. 1997 p. 1029 at p. 1036.

40 NOU 1987:24, p. 145, with further reference to Selmer,*Forsikringsrett* (1982) (Selmer), p. 129-130, Bull 2008 p. 539.

41 Commentary NP 2019 to Cl. 8-2, printed atChapter 8 - NordicPlan

The second exception refers to a situation where the third party expressly has undertaken to remain liable for the relevant losses, even if he has been included as a co-insured party. … An example may illustrate how this can be done. If the standard charterparty between the assured owner of the ship and the charterer contains a "safe port" provision, the charterer will as a co-insured party be protected under the main rule of Cl. 8-2 against a subrogation claim from the insurer in case of damage caused by a breach of the provision. If the assured owner and/or the insurer requests a subrogation right for the insurer, he/they would have to secure that the charterer undertakes a specific contractual obligation to the assured owner. This can be done through a separate clause or rider in the contract with the owner, setting out that the charterer will remain liable for losses of the kind prescribed in the "safe port" provision despite the protection given to him by the co-insurance arrangement.

The principle of "indirect liability insurance" may also protect a third party A with no economic interest in the insured object or enterprise, but who is in a position to cause damage to this enterprise. This is sometimes called "protective co-insurance", which refers to a situation where a third party is exposed to liability for loss of or damage to the insured object itself.[42] Such co-insurance may be effected according to ICA § 7-5 or NP Cl. 8-2.

2.5 Indirect liability insurance and the relationship between the assured and the co-insured

The question here is what effect the indirect liability insurance has on the underlying liability claim between the assured and the co-insured. Liability insurance is a means to finance liability against a third party, but the concept of liability insurance does not enforce the liable party to use this insurance. Neither does the concept of co-insurance regulate the relationship between the co-insured and the assured. Except for cases regulated by the provision in the tort act on channelling of claims to the casualty insurer,[43] the injured party is free to raise the claim against the liable party instead of claiming his insurer. The starting point for liability in commercial activity is therefore that the injured party may claim the liable party and is not obliged to use his insurance.

The Commentary to the NP chapter 8 has the following remark on this issue under "General":[44]

> If the insurer has covered the loss to the assured, the status as co-insured would protect the third party against a possible subrogation claim from the insurer. Similarly, if the assured should elect to bring action against the third party instead of claiming under the insurance, the co-insured third party would be able to avail himself of the insurance cover. The central idea behind both situations is that the loss, damage or claim should rest with the insurer according to the insurance conditions, without him being able to seek recovery from or deny cover to the co-insured third party. In other words; the "protection" that is relevant differs from a co-insured's liability interest because it is protection as between co-insureds based on some form of underlying contractual relationship, which in turn is recognised and accepted by the insurer.

From this it can be deduced that i) the assured may elect to raise the claim against the co-insured third party and ii) if so, the co-insured "would be able to" avail

42 Commentary NP 2019 to chapter 8, General, Wilhelmsen/Bull p. 229, see also Bull p. 539.

43 Tort act § 4-2 does not apply to damage caused by professional tort feasors, cf. no 1 letter b.

44 Chapter 8 - NordicPlanto Cl. 8-2. See also Wilhelmsen/Bull p. 229, Bull 2008 p. 539, Bull p. 484, 487.

himself of the insurance cover. This means that neither of the parties must use the insurance cover. Normally, they will of course claim the damage from the insurer, but they are free to raise a claim against a party that is not co-insured, cf. below.

2.6 The position of a not co-insured liable third party in the project

It may be that the third party liable for the damage to the assured's economic interest is not part of the co-insurance arrangement. An example is the Ocean Victory case where the owner and bare-boat charterer were jointly assured, but where the directly liable party was a sub-charterer that was not co-insured. The bare-boat charterer was liable for the breach of the safe port warranty against the owner, the time charterer was liable against the bare-boat charterer and the sub-charterer was liable against the time-charterer. Similarly, in a building project the builder and main-contractor may be assured/co-insured, but fire is caused by a not co-insured sub-contractor. The sub-contractor is liable for breach of contract against the contractor, who is similarly liable against the owner. The question then is whether the fact that the insurers are prevented from claiming recourse against the assured(s) and the co-assured(s) will prevent them from pursuing a subrogated claim against this third party.

The starting point according to the tort act § 4-3 cf. § 4-2 for a professional tort feasor and NP § 5-13 is as mentioned that an insurer having paid compensation under a casualty insurance contract may claim subrogation from the liable third party. A complicating factor is however that the right of subrogation is tied to the relationship between the liable party and the injured party (tort act § 4-3 cf. § 4-2) or a claim from the "assured" against a third party (NP Cl. 5-13). In a case where the insurer has covered loss of the owner's economic interest, but the subrogation claim against the co-insured who is liable against the owner is barred, the subrogated claim must be raised against a not co-insured party further down the contractual chain who is liable for the damage against his contractual partner, but not against the owner.

However, the wording in NP Cl. 5-13 may be reconciled to this situation; It may be argued that the insurer in this case first has covered the assured's loss of his economic interest in the vessel, and thereafter compensated the co-insured bare-boat charter for his liability for this loss through waiver of subrogation. The insurer then is "subrogated to the rights of the assured against the third party concerned", i.e. subrogated to the co-insured's right against the third party concerned. It is clear that the co-insured qualifies as "assured" under the policy, and this assured "has a claim against a third party" – namely the charterer, who in turn may claim from the sub-charterer.[45]

It is less natural to say that a co-insured contractor who is protected against this liability against the builder gets the status as injured party according to tort act § 4-3 cf. § 4-2 and thereby opens the door for a subrogated claim against the not co-insured liable contractor. This requires a shift from being a liable party to an injured party due to the waiver of subrogation and is conceptually difficult.

On the other hand, the general principle according to the Norwegian Supreme Court is as mentioned that a party that has covered another's party's obligation, normally and as a starting point, has a valid recourse action, and that a limitation of such recourse action requires specific legal basis.[46] The Supreme Court here refers to court cases permitting recourse from insurer B against another insurer A being liable for loss paid by B,[47] and the recourse claim in the case where the statement is given concerned a payment from the insurer that the insurer denied

45 For UK marine insurance, this issue is governed by MIA sec. 79.

46 Rt. 1997 p. 1029 (at p. 1036).

47 Rt. 1986 p. 381and Rt. 1993 p. 1018.

liability for. These situations are therefore not directly comparable to the issue at hand, although it could be argued that the casualty insurer as indirect liability insurer for the co-insured liable party is covering the liability of the not co-insured sub-contractor. It could also be argued that it is a case of joint and several liability between the casualty insurer and the sub-contractor for the co-insured's liability, which should be solved through an analogy from the tort act § 5-3 regulating the situation when more than one party are liable for the same damage.[48] The rule here is that the liability between the jointly liable parties should be divided according to the degree of fault and other relevant circumstances, where i.a. causation is a relevant issue.[49] It appears to be an open question which of these legal routes one should apply as a legal basis for subrogation in such cases.

48 Wilhelmsen 2019 p. 19.

49 Wilhelmsen 2019 p. 19, Hagstrøm/Stenvik 2014, p. 537; Trine-Lise Wilhelmsen and Birgitte Hagland,*Om erstatningsrett*, 2017, p. 374.

3 The Ocean Victory case

3.1 The factual circumstances, the claim and the issue before the court

The Ocean Victory case concerned the grounding of the vessel Ocean Victory in the port of Kashima in Japan in October 2006. The vessel was owned by Ocean Victory Maritime Inc ("OVM", "the owners" or "A"), who chartered the vessel to Ocean Line Holdings Ltd ("OLH", "the bare-boat charterer" or "B"), which was a related company, on Barecon 89 as amended.[50] The significant feature of bareboat chartering, or chartering by demise, is that during the period of the charter "the vessel comes in the full possession, at the absolute disposal, and under the complete control of the bareboat charterers." Bareboat chartering is therefore entirely different from ordinary time chartering when it comes to the allocation of costs, liabilities and responsibilities.[51]

B time chartered the vessel to China National Chartering Co Ltd ("Sinochart" or "S"), who in turn sub-chartered the vessel to Daiichi Chuo Kisen Kaisha ("Daiichi", "D" or "the charterers") for a time charter trip.[52]

The demise charterparty and both time charterparties contained an undertaking (on materially identical terms) to trade the vessel between safe ports. On 12/13 September 2006, Daiichi (and thus Sinochart) gave the vessel instructions to load a cargo in South Africa and to discharge at Kashima. The vessel discharged the cargo at Kashima 20 October.[53]

Upon departure from the port of Kashima during a storm the vessel allided with the side of a specially constructed channel that connected Kashima to the sea and grounded. The vessel eventually broke in two and was lost.[54]

According to the bare-boat charter party cl. 12, the bare-boat charterer should effect i.a. hull insurance at their expense and for the benefit of both owners, charterers and mortgagees. The hull insurers compensated the owner for the loss of the vessel. One of the hull insurers, Gard Marine & Energy Ltd ("Gard"), thereafter took assignments of the rights of the owners A and the bare-boat charterer B in respect of the grounding and total loss of the vessel. In its capacity as assignee of those rights, Gard subsequently brought a claim against S (which S passed on to D) for damages for breach of the charterers' undertaking to trade only between safe ports.[55] Gard claimed that i) Kashima was not a safe port, ii) D breached the safe port undertaking in the time sub-charter between D and S, iii) S was in breach of the equivalent undertaking in the time charter between S and B, iv) B was in breach of clause 29 of the demise charter between B and the owners A.[56] Gard's case was that the breach of clause 29 caused the loss of the vessel; therefore B was liable to A for the vessel's value, and the fact that A was paid that amount by the insurers was "res inter alios acta" as between B and S.[57]

The issues for the Supreme Court was i.a.[58]

I whether there was a breach of the safe port undertaking and
II if there was a breach of the safe port undertaking, did the provisions for joint insurance in clause 12 of the Barecon 89 form preclude rights of subrogation

50 The judgment para 1.

51 Judgment para 133 referring BIMCO's explanatory notes to Barecon 89.

52 The judgment para 1.

53 The judgment para 2.

54 The judgment para 4.

55 The judgment para 5.

56 Para 137.

57 Para 138. "Res inter alios acta" means "none of their business".

58 Para 8.

of hull insurers and the right of owners to recover in respect of losses covered by hull insurers against the demise charterer for breach of an express safe port undertaking.

The second issue was limited to whether B had a liability to A, which in turn enabled B to claim damages down the line.[59] Other potential bases on which B might be in a position to claim damages from S or D was not an issue for the Supreme Court.[60]

The five Supreme Court judges agreed that there was no breach of the safe port undertaking. Even so, they discussed the question concerning the insurer's right of subrogation against the sub-charter D. A majority of three judges held that the insurer had no such right of subrogation, whereas two judges held that the insurer had such a right.

3.2 The clauses

The demise charter was on the Barecon 89 form, which is a commonly used form of bareboat charter world-wide. Under clause 9 of the form, the demise charterers have the obligation to maintain the vessel in good repair and efficient operating condition and to take immediate steps to have any necessary repairs carried out. The insurances are governed by either clause 12 or clause 13, one of which must be selected. Clause 12, which was selected in this case, provides (so far as relevant):[61]

> 12. lnsurance and Repairs
>
> (a) During the Charter period the Vessel shall be kept insured by the Charterers at their expense against marine, war and Protection and indemnity risks in such form as the Owners shall in writing approve, which approval shall not be unreasonably withheld. Such marine, war and P & I insurances shall be arranged by the Charterers to protect the interests of both the Owners and the Charterers and mortgagees (if any), and the Charterers shall be at liberty to protect under such insurances the interests of any managers they may appoint. All insurance policies shall be in the joint names of the Owners and the Charterers as their interests may appear.
>
> If the Charterers fail to arrange and keep any of the insurances provided for under the provisions of sub-clause (a) above in the manner described therein, the Owners shall notify the Charterers whereupon the Charterers shall rectify the position within seven running days, failing which Owners shall have the right to withdraw the Vessel from the service of the Charterers without prejudice to any claim the Owners may otherwise have against the Charterers.
>
> The Charterers shall, subject to the approval of the Owners and the Underwriters, effect all insured repairs and shall undertake settlement of all costs in connection with such repairs as well as insured charges, expenses and liabilities (reimbursement to be secured by the Charterers from the Underwriters) to the extent of coverage under the insurances herein provided for.
>
> The Charterers also to remain responsible for and to effect repairs and settlement of costs and expenses incurred thereby in respect of all other repairs not covered by the insurances and/or not exceeding any possible franchise(s) or deductibles provided for in the insurances.

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59 Para 124.

60 Para 94 cf. para 145: "It does not follow that the demise charterers (or their insurers in their shoes) necessarily had no available remedy against the time charterers".

61 Para 95.

> ...
> (b) If the conditions of the above insurances permit additional insurance to be placed by the parties, such cover shall be limited to the amount for each party set out in Box 28 Page 39 and Box 29, respectively. The Owners or the Charterers as the case may be shall immediately furnish the other party with particulars of any additional insurance effected, including copies of any cover notes or policies and the written consent of the insurers of any such required insurance in any case where the consent of such insurers is necessary.
> (c) Should the Vessel become an actual, constructive, compromised or agreed total loss under the insurances required under sub-clause (a) of clause 12, all insurance payments for such loss shall be paid to the Mortgagee, if any, in the manner described in the Deed(s) of Covenant, who shall distribute the moneys between themselves, the Owners and the Charterers according to their respective interests. The Charterers undertake to notify the Owners and the Mortgagee, if any, of any occurrences in consequence of which the Vessel is likely to become a Total Loss as defined in this clause.
> (d) If the Vessel becomes an actual, constructive, compromised or agreed total loss under the insurances arranged by the Charterers in accordance with subclause (a) of this Clause, this Charter shall terminate as of the date of such loss. (e) ... (f) For the purpose of insurance coverage against marine and war risks under the provisions of sub-clause (a) of this clause, the value of the vessel is the sum indicated in Box 27.

Clause 13 applies in place of clause 12 if the parties so choose in part I of the contract. The clause 13(a) puts the responsibility for maintaining marine and war risks clause on the owner:[62]

> During the Charter period the Vessel shall be kept insured by the Owners at their expense against marine and war risks under the form of policy or policies attached hereto. The Owners and/or insurers shall not have any right of recovery or subrogation against the Charterers on account of loss of or any damage to the Vessel or her machinery or appurtenances covered by such insurance, or on account of payments made to discharge claims against or liabilities of the Vessel or the Owners covered by such insurance. All insurance policies shall be in the joint names of the Owners and the Charterers as their interests may appear.

Further, the Barecon 89 form was amended by deleting the trading limits clause (clause 5) and adding at clause 29 a safe port warranty in the following terms:

> **29. Trading Exclusions**
> Vessel to be employed in lawful trades for the carriage of lawful merchandises only between good and safe berths, ports or are as where vessel can safely lie always afloat ...[63]

3.3 The majority's reasoning

The majority of three judges held that the co-insurance clause in Clause 12 barred a subrogated claim against the bare-boat charterer in case of total loss under the hull insurance. According to Lord Toulson, the critical question was

62 The judgment para 132.

63 Para 96.

> ... whether the contractual scheme between the owners and the demise charterer precluded any claim by the former against the latter for the insured loss of the vessel. This is a matter of construction. It has become a common practice in various industries for the parties to provide for specified loss or damage to be covered by insurance for their mutual benefit, whether caused by one party's fault or not, thus avoiding potential litigation between them. The question in each case is whether the parties are to be taken to have intended to create an insurance fund which would be the sole avenue for making good the relevant loss or damage, or whether the existence of the fund co-exists with an independent right of action for breach of a term of the contract which has caused that loss.[64]

The judge referred to previous cases concerning building contracts where the owner, contractors and sub-contractors were jointly assured, and when the electrical sub-contractor were liable for fire due to breach of a warranty in the contract with the owner, the co-insurance barred the owner from claiming the damage from the sub-contractor.[65] The main argument was that "it cannot have been the parties' intention that parties who were jointly insured under a contractors' all risks policy could make claims against one another in respect of damage covered by the insurance, or that the insurers could make a subrogated claim in the name of the owners against" the sub-contractor. This was an "implied term", presupposing that the party relying on it has not by his own conduct prevented recovery of the loss under the policy".[66]

In the present case, the Court of Appeal had followed the same reasoning in holding that the proper construction of clause 12 was that there was to be "an insurance funded result in the event of loss or damage to the vessel by marine risks" and that, if the demise charterers had been in breach of the safe port clause, they would have been under no liability to the owners for the amount of the insured loss because they had made provision for looking to the insurance proceeds for compensation. The court did not consider that the introduction of clause 29 on safe ports was intended to alter the way in which clause 12 was to operate.[67] Lord Toulson agreed with this and added:[68]

> The demise charter allowed for a subdemise with the owners' consent, which was not to be unreasonably withheld. The risk existed that the vessel might be directed to an unsafe port, not necessarily by negligence on anyone's part, so causing peril to the vessel, but the risk of consequential damage to the vessel was catered for by the insurance required to be maintained by the demise charterer in the joint names of itself and the owners. The commercial purpose of maintaining joint insurance in such circumstances is not only to provide a fund to make good the loss but to avoid litigation between them, or the bringing of a subrogation claim in

64 Para 139.

65 Para 139-140, with reference to Co-operative Retail Services Ltd v Taylor Young Partnership Ltd [2002] 1 WLR 1419 and Mr Recorder Jackson QC, as he then was, in Hopewell Project Management Ltd v Ewbank Preece Ltd [1998] 1 Lloyd's Rep 448, 458.

66 Para 140 with reference to Board of Trustees of the Tate Gallery v Duffy Construction Ltd [2007] BLR 216. See for a different result Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd and others [2018] EWHC 558 (TCC), where thejudge in the Technology and Construction Court (TCC) held that a requirement for a sub-contractor to maintain its own GBP 5 million insurance in its sub-contract prevented it from claiming protective cover under a project insurance policy in which it became co assured.

67 Para 141.

68 Para 142.

> the name of one against the other. I do not accept that by substituting clause 29 for clause 5 the parties intended to subvert that purpose.

Lord Toulson also stated that "insurance arrangements under clause 12 provided not only a fund but the avoidance of commercially unnecessary and undesirable disputes between the co-insured".[69]

Both lord Mance and lord Toulson commented for the majority upon the relationship between clauses 12 and 13. BIMCO had explained that the reason for the optional alternative of clause 13 was that when a vessel is bare-boat chartered for only a short period it may make sense for the owners to carry on with their own insurances. Clause 13 therefore provides that the vessel is to be kept insured by the owners against marine and war risks, and that the owners and their insurers are to have no right of recovery or subrogation against the charterers on account of loss or damage covered by such insurance. Lord Mance stated that:

> It would be unnecessary to include equivalent words in clause 12. It cannot have been the parties' intention that the charterer's exposure to liability should be greater under clause 13, where cover against marine and war risks was to be maintained at the owner's expense than under clause 12, where it was to be maintained at the charterer's expense. Longmore LJ put the point pithily when he described the exclusion of rights of recovery or subrogation in clause 13 as "a confirmation rather than a negation of such exclusion in the more usually adopted clause 12 for the longer term charters when it is the charterers who pay the premium" (para 88).[70]

Lord Toulson agreed and concluded

> ... that the express exclusion of a right of recovery or subrogation in clause 13 was simply belt and braces in the context of insurances taken out by owners, and that the reason why no such express term appears in clause 12 was that it never occurred that there could be such claims in the context of insurances arranged by charterers to cover their own as well as owners' interests. It is inconceivable that the parties intended fundamentally to alter the incidence of risk by permitting or excluding breach-based claims as between themselves in respect of a hull loss, depending upon whether it happened to be convenient to continue to use hull insurances taken out by owners or to rely on fresh insurances taken out by charterers.[71]

69 Para 144.

70 Para 135.

71 Para 117.

4 The Ocean Victory case and Norwegian law

4.1 Introduction and overview

It appears that the common starting point in Norwegian and UK law is that co-insurance protect the co-insured against a subrogated claim from the insurer if the co-insured is liable for damage to another assured's property, unless the co-insured has caused the damage through breach of provisions in the insurance contract.

The question is if this indirect liability protection also effects the underlying liability between the parties to the charterparty (or other contracts as the case may be) and thus bars a subrogated claim against a liable party that is not part of the co-insurance scheme. According to the Ocean Victory case para 139, "This is a matter of construction", but the core reasoning for the majority decision appears to be based upon general English law principles of co-insurance developed over several years.[72] This approach seems to be similar to the Norwegian approach. In the following, the majority's interpretation of cl. 12 is addressed in 4.2 and the relationship between cl. 12 and 13 in 4.3.

4.2 Clause 12

The charterparty cl. 12 contains a comprehensive regulation of "Insurance and repairs", and maps out i) that the charterer shall effect the insurance for their own expense, ii) that the insurance shall protect the interests of both the owners and charterers and be in the names of both according to their interest, iii) the situation if the charterer fails to effect the insurance and iv) the charters liability to effect insured repairs and how the insurance payment shall be distributed in case of a total loss. Both the heading and the text indicate that the clause regulates the bare-boat charterer's duty to effect insurance, the duty to repair the vessel and how the settlement shall be in case of total loss. This must be seen in the context of the characteristic feature of bare-boat chartering that the bare-boat charterer takes possession of the vessel with the corresponding duties connected to maintenance and insurance.

The wording on co-insurance is very limited:

> Such marine, war and P & I insurances shall be arranged by the Charterers to protect the interests of both the Owners and the Charterers and mortgagees (if any), and the Charterers shall be at liberty to protect under such insurances the interests of any managers they may appoint. All insurance policies shall be in the joint names of the Owners and the Charterers as their interests may appear.

The charterer has a duty "to protect the interests of both the Owners and the Charterers and mortgagees". According to Norwegian law, the concept of "interest" in relation to insurance is developed i.a. to explain that the object of insurance is not the physical object that is insured, but the economic interest in this object.[73] In this sense, the concept of interest is also used to explain that different persons can possess different economic interests in the same property, for instance the distinction between the mortgagees interest in the value of the loan and the owners interest in the rest of the value of the same property.[74] In relation to the charterer, the economic interest that is directly insured is his duty to effect

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72 See for instance para 55-57, 98-99, 114-115.

73 Trine-Lise Wilhelmsen, Forsikring og regress ved salg av bolig,*Tidsskrift for erstatningsrett, forsikringsrett og trygderett*, no. 2-3, 2018, pp. 108-137 at p. 122, Selmer, p. 74 f.; Bull, p. 433; NOU 1987: 24 Lov om avtaler om skadeforsikring, ch. 6.2.1.

74 Selmer, p. 75; Bull, p. 433.

repairs of the vessel as part of the bare-boat charter. The clause letter c also states that in case of total loss the insurance shall be distributed between "the Owners and the Charters according to their respective interests". Such distribution of the insurance proceeds according to each co-insureds direct economic interest is according to Norwegian law principles for co-insurance.[75]

In addition to this, insurance/co-insurance means that the insurer may not raise a claim against an assured/co-insured for damage to the insured interest. In the Ocean Victory case, the bare-boat charterer B was the assured, and any wrongdoing on his part will be regulated by NP ch. 3. This means that his claim may be reduced if he caused the loss by gross negligence,[76] but there is no basis for subrogation against him as the "main" assured. This is similar to the principle on "indirect liability insurance" for the co-insured, but as the owner A in this case has the position of co-insured, he has no need for such cover. It is also clear as stated by the majority that the inclusion of a safe port warranty in itself would not provide the insurer with a wider right of subrogation. This is as mentioned above in 2.5 clearly stated in the Commentary for co-insurance and must be even clearer in the case of the bare-boat charterer being the main assured.

On the other hand, the clauses say nothing about the relationship between the charterer and the owner, and does not say that the loss is channeled to the insurance company in a way that precludes the owner from claiming the charterer instead of the insurance company.

Nor does it follow that the charterers, instead of availing himself of the insurance, are precluded from pursuing a claim against a third party. According to Norwegian law, in cases where the loss is not channelled to the insurer according to tort act § 4-2 cf. § 4-3, the insurer is as mentioned above in section 2.5 free to make a subrogated claim against the person causing the loss. If the bare-boat charterer in the position of policy-holder in the Ocean Victory case is seen as the "main assured", the insurer's right of subrogation will follow directly from the wording of NP cl. 5-13. If the owner is seen as the main assured because he is entitled to the insurance compensation for total loss, the situation is more complicated. Here, the insurer first covers the owner. This would as a starting point give him a subrogated claim against the bare-boat charterer, but this claim is barred when the bare-boat charterer is co-insured. This means that the insurer by covering the assured's loss, also covers the bare-boat charterer's liability as indirect liability insurer. He may then take over the bare-boat charterers claim against the charterer, the charterer will sue the sub-charterer D and the loss will rest with him as the liable party.

The majority's interpretation that co-insurance is meant to establish "an insurance funding" which prevents any claim between the parties appears to implicate a knock for knock agreement where all parties in the contractual chain are protected against a claim from any other contractual party. The bare-boat charter cl. 12 is interpreted to mean that the bare-boat charterer waive their liability against the owner. Since the owner has no claim against the bare-boat charterer, the bare-boat charterer will not have a claim against the time-charterer S, who in turn has no claim against the sub-charterer D who is directly liable for the loss. This means that both the bare-boat charterer's liability against the owner and the bare-boat-charterer's right to subrogation against the charterer is waived. The result is that cl. 12 also means a waiver of liability for the time-charterer S and the sub-charterer D, even if these parties are not parties to the bare-boat charterparty and not co-insured under the insurance scheme.

Such waiver of liability and right to subrogation is typical for a knock for knock agreement much used in the off-shore sector, but these agreements are carefully

75 Bull p. 520 ff, and for example NP Cl. 7-4 for co-insurance of mortgagees.

76 NP Cl. 3-33.

drafted to obtain the effect.[77] In particular, there is extensive regulation of liability between the parties to the contract, and to include other parties in the contractual structure, there is a complicated system of attribution of liability not only between the parties to the contract, but including parties to other contracts in the same projects. The court's interpretation of cl. 12 implies that this carefully drafted system of liability and insurance is unnecessary and that the same effect could be obtained using a co-insurance scheme.

It is interesting to note the court's reasoning that the co-insurance scheme "provide the fund for the cost of restoring and repairing the fire damage rather than … indulge in litigation with each other" (para 143). This is also a main reason for establishing a knock for knock system.[78] However, such argument has not been used to explain co-insurance of third parties. The rationale here is mainly that it is convenient that one insurance capture the different economic interests in the same asset or entity instead of each party having to insure their own economic interest. This is efficient from a transaction cost perspective, but is has never been implied that such an instrument will create a full liability regulation between the contractual parties.

A strong argument against the court's interpretation is also that it results in an unwarranted gain for the sub-charterer that is not co-insured. This sub-charterer has presumably not paid any part of the insurance premium for the co-insurance scheme and thus can have no legitimate expectation to be protected by the insurance. At the same time, the insurer will have to calculate the premium for such bare-boat arrangements to include protection of not co-insured sub-charterers. This means that the economic risk for the sub-charterer's contractual breach is attributed to the owner and bareboat charterer, which again can reduce the deterrence effect of the liability system. A main argument against the knock for knock principle is that it undermines the deterrence effect of liability. But with a full knock for knock regulation all parties are familiar with the regulation and it must be presumed that the contractual attribution of risk for damage is fairly attributed between the parties.[79] This was presumably not the situation in the Ocean Victory case.

4.3 The difference between cl. 12 and cl. 13

The court also refers to the difference between cl. 12 and cl. 13. Clause 13 is aimed at short term bare-boat charters where it may be natural for the owner to continue their insurance. In this case, the clause states that the "Owners and/or insurers shall not have any right of recovery or subrogation against the Charterers on account of loss of or any damage to the Vessel or her machinery or appurtenances covered by such insurance". The fact that this clause bars the owner's/insurer's right of subrogation whereas the same provision is not found in cl. 12 is disregarded by the majority in the case, who finds it inconceivable that the parties have meant that the clauses should provide for a different attribution of risk. For the court this appears to mean that cl. 12 implies the same rule on no right to recovery/subrogation.

Under cl. 13, the owner is the policy-holder and the charterer is co-insured. This means that the charterer as co-insured has indirect liability insurance for any damage he causes to the vessel. From a Norwegian law perspective it should

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77 See Wilhelmsen 2013 pp. 87-95 and as examples of knock for knock regulation, Supplytime 2017 Time Charter for Offshore Service Vessels (Supplytime), art. 14 and 15, OLF Proposal "New conditions of contract for drilling and well services" no. 8, "https://www.norskoljeoggass.no/contentassets/5cd867 185b5c47fc85 720d3d96a6f399/drilling-and-well-services.pdf, Norwegian Fabrication Contract 2015 (NF), art. 29-31, cf.https://www.norskindustri.no/dokumenter/leveringsbetingelser/nfntk-standardkontrakter/

78 Bull p. 353, Kaasen p. 766, Wilhelmsen 2013 pp. 95-96.

79 See on the deterrence effect and the knock for knock principle, Wilhelmsen 2013 pp. 98-101.

therefore be unnecessary to state that the insurer have no right to subrogation against the charterer as this is inherent in the co-insurance scheme. To this effect, cl. 12 and 13 appears to be similar, but according to Norwegian law, the insurer's waiver of subrogation does not mean that claims between the parties are barred.

The owner's waiver of recovery from the charterer is more difficult to explain in the context of co-insurance, but may be seen in the context of the charter-party clauses 9 and 12. According to cl. 9, the charterers have the obligation to maintain the vessel in good repair and efficient operating condition and to take immediate steps to have any necessary repairs carried out. Clause 12 states that the charterer "shall, subject to the approval of the Owners and the Underwriters, effect all insured repairs and shall undertake settlement of all costs in connection with such repairs as well as insured charges, expenses and liabilities (reimbursement to be secured by the Charterers from the Underwriters) to the extent of coverage under the insurances herein provided for." Clause 13 has no similar regulation of repairs, presumably because in this case the owner as policy-holder will organize repairs in cooperation with the insurer. The situation may then arise that the owner pays for repairs with compensation from the insurance, and thereafter claim recovery from the charterer based on cl. 9. This may put the charterer in a difficult position: the insurer has already paid the claim and thus the charterer may not claim the insurer even if he is co-insured. Even if the starting point naturally is that the owner may not claim the repair costs twice, the waiver of recovery can be explained to avoid this situation. A similar situation will not arise under cl. 12.

5 Some conclusions

The result and the reasoning in the Ocean Victory case is not convincing according to Norwegian law. This is true whether the judgment is based on interpretation of the charter-party or on general English law principles of co-insurance. The result appears contrary to considerations of deterrence, gives the wrongdoer a totally unwarranted gain and results in an unfair distribution of costs for the risk connected to unsafe ports (or other breaches as the case may be). However, the article has demonstrated that the concept of co-insurance may raise difficult problems in enterprises or projects involving several contractual parties where some parties but not all are covered under a co-insurance scheme. Neither the co-insured's direct liability insurance nor the relationship between the co-insured parties is regulated in the ICA, and the comments in the preparatory documents are limited. It is an open question if the rules on subrogation in the tort act or Norwegian contract law open for the insurer's subrogation against a liable party in a contractual chain who is not directly liable to the assured. In building projects and other projects based on ICA's co-insurance system the parties should be aware of these problems to avoid unwanted results.

Both indirect liability insurance and subrogation is better regulated in the NP with regard to these issues, but the questions discussed here were not directly addressed in Version 2019. However, to avoid the result in the Ocean Victory case, a new sub-clause was added to Cl. 8-2:

> The liability of the assured and co-insured third parties to each other shall not be excluded nor discharged by reason of co-insurance. Any payment to the assured or co-insured third party in respect of any liabilities, losses, costs and expenses shall operate only as satisfaction of the assured's claim against the insurer but not exclusion or discharge of the liability of such person to the assured or co-insured third party.

Further, the Commentary states that[80]

> As a starting point, this solution would follow from Norwegian background law, where co-insurance is meant to provide financial cover for any liability the co-insured might get against the assured, but not to effect the liability between the assured and the co-insured. This means that in cases with contractual chains, e.g. owner A charters a vessel to B, who sub-charters the vessel to C, where A and B are co-insured, the insurer has a right of subrogation against C, who is not co-insured. A waiver of liability between the parties therefore presumes explicit contractual regulation, for instance through a knock for knock agreement.
>
> However, the UK Supreme Court case (2017) UKSC 35 "Ocean Victory" may give grounds for an argument that creates uncertainty to this principle.... Even if this is contrary to the legal position in the Nordic countries, the Committee finds it necessary to state this expressly to avoid any uncertainty. Thus, the insurers payment of compensation to an assured will operate only as satisfaction of the insurance claim from the assured against the insurer but not as an exclusion or discharge of the underlying liability between the assureds. Sub-clause 2 therefore preserves the insurer's right to recover damages from any party external to the assured's insurance arrangements such as a time charterer, or shipper of dangerous goods.

80 Chapter 8 (nordicplan.org)