

# SHIP MANAGEMENT AGREEMENTS AND THIRD PARTY CLAIMS

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## TABLE OF CONTENT

1	INTRODUCTION TO SHIP MANAGEMENT .....	1
1.1	PRESENTATION OF PROBLEM.....	3
1.2	DEMARICATION OF THESIS .....	4
1.3	TERMINOLOGY.....	5
1.4	SOURCES OF LAW AND METHOD .....	6
2	THE CONTRACTUAL RELATIONSHIP BETWEEN THE SHIPOWNER AND THE SHIPMANAGER.....	8
2.1	GENERAL DESCRIPTION OF THE CONTRACTS AND THEIR PURPOSE .....	8
2.2	EXAMPLE OF CONTRACTS, BIMCO – SHIPMAN 98.....	10
2.2.1	THE OBLIGATIONS OF THE PARTIES .....	11
2.2.2	NON-PERFORMANCE AND REMEDIES FOR BREACH IN THE AGREEMENT .....	13
2.3	LEGAL BACKGROUND.....	14
2.3.1	THE LAW OF OBLIGATIONS, THE OBLIGATIONS OF THE PARTIES .....	16
2.3.2	THE LAW OF OBLIGATIONS, NON-PERFORMANCE AND REMEDIES OF CONTRACT.....	19
3	THE LEGAL RELATIONSHIP BETWEEN THIRD PARTY CLAIMANTS AND SHIPMANAGER AND/OR SHIPOWNER .....	23
3.1	INTRODUCTION .....	23
3.2	NATIONAL RULES ON REPRESENTATION - AGENCY AND OBLIGATION AS CONTRACTUAL PARTY .....	24
3.2.1	DIRECT REPRESENTATION – AGENCY WITH DISCLOSED PRINCIPAL .....	26
3.2.1.1	Danish and Norwegian Law .....	26
3.2.1.2	English Law .....	30
3.2.2	INDIRECT REPRESENTATION – AGENCY WITH UNDISCLOSED PRINCIPAL.....	32
3.2.2.1	Danish and Norwegian Law .....	32
3.2.2.2	English Law .....	33
4	JURISDICTION AND CHOICE OF LAW .....	35
4.1	INTRODUCTION .....	35
4.2	RELATIONSHIP BETWEEN SHIPOWNER AND SHIPMANAGER .....	36

4.2.1	JURISDICTION.....	37
4.2.1.1	Denmark and Norway.....	37
4.2.1.2	England.....	38
4.2.2	CHOICE OF LAW.....	39
4.2.2.1	Denmark and Norway.....	39
4.2.2.2	England.....	41
4.3	RELATIONSHIP BETWEEN SHIPMANAGER / SHIPOWNER AND THIRD PARTY .....	42
4.3.1	CHOICE OF LAW IN RELATION TO DETERMINATION OF THE PERSON WHO IS BOUND AS CONTRACTUAL PARTY UNDER THE CONTRACT WITH THIRD PARTY. ....	42
4.3.2	JURISDICTION AND CHOICE OF LAW IN RELATION TO DETERMINATION OF THIRD PARTY’S CLAIM AGAINST THE SHIPMANAGER .....	44
4.3.3	JURISDICTION IN RELATION TO DETERMINATION OF THIRD PARTY’S CLAIM AGAINST SHIPOWNER.....	45
4.3.4	CHOICE OF LAW IN RELATION TO DETERMINATION OF THIRD PARTY’S CLAIM AGAINST SHIPOWNER.....	48
5	CONCLUSION .....	54
5.1	CONCLUSION ON 2ND SECTION.....	54
5.2	CONCLUSION ON 3RD SECTION.....	55
5.3	CONCLUSION ON 4TH SECTION.....	56
6	ANNEXES .....	58
6.1	BOOKS.....	58
6.2	COMMISSION REGULATIONS.....	59
6.3	MISCELLANEOUS DOCUMENTS.....	59
6.4	ARTICLES .....	59
6.5	TABLE OF INTERNATIONAL INSTRUMENTS.....	59
6.6	TABLE OF NATIONAL LEGISLATION .....	60
6.7	TABLE OF JUDICIAL DECISIONS .....	60

## **1 INTRODUCTION TO SHIP MANAGEMENT**

Traditionally the shipowner's role has embraced several functions like financing of the vessel, employment of personnel, technical supervision, commercial utilisation, operation etc. In today's shipping a considerable number of players have entered shipping without any first-hand knowledge of the sector, but the functions are still there but often split on different hands. Even shipowner's who have the know-how to operate their own vessels have found it expedient to delegate certain aspects of their business to others. Many participants in limited partnerships fall into this category.

The reason of the change of the traditionally structure of the shipping companies being for example that vessels today cost as much as a factory, and it is then natural that the owner will try to utilise the vessel in the best economic way. The consequence of this is that the owner will have to determine the decisive factors for the choice of country of registration of the vessel. One factor will then be the competitiveness of labour, another one the vessel's eligibility for cargoes, a third one the availability of know-how, a fourth one of the taxes applicable, partly as a result of the opportunity given to foreigners to register vessels in the NIS and DIS, increased internationalisation etc. These are some factors, which have contributed to a growing market for shipping services.

The group of shipowners has therefore delegated many of the mentioned functions traditionally performed by a shipowner to experts in various areas like ship management companies, chartering companies, and so on. The nature of the functions transferred and the number of others parties involved vary considerably.

It is ship management; the agreements and the problems about the relationship to third party's the thesis will deal with. It will therefore be natural to start giving the definition of ship management.<sup>1</sup> Malcolm Willingale in "Ship Management" third edition, in addition to John Spruyt in the previous edition of the book, describes it very simple. "Ship management is: 'The professional supply of a single or range of services by a management company separate from the vessel's ownership in support of the primary objectives of the shipowner.'" This means that the professional supplier (shipmanager) provides service (s) to the shipowner according to the contracted terms and in return for a management fee. The shipmanager must often ensure that the vessel complies with international rules and regulations, is run in a safe and cost efficient manner, and take care of the environment. The shipowner selects one or more services offered by the shipmanager, most often technical management, crew management and commercial management. The services of the ship management are independent from the shipowner working with its own staff and from a separate office. There should be no common shareholding interests between the shipowner and the manager, but in practice such shareholding interests exist in many instances, although the manager in every case will function as a separate cost centre and will provide equitable services to all clients according to a well defined contract and detailed budget agreed between the two main contracting parties. The last part of the definition makes it clear that the shipmanager's and the shipowner's main objectives are different.

The independent shipmanager may therefore cover few or several of the shipowner's functions and thus the shipmanager may appear as an agent performing in the name of and for the account of the principal or as an independent body performing in its own name and for its own account.

In reality this simple presentation of ship management does not reflect the complexity of the relationship, which often exists between the shipowner and the shipmanager. Various legal problems may occur in this connection related to the duties and functions of the

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<sup>1</sup> Willingale, Malcolm, Ship Management, third edition. Great Britain, 1998, p. 26

shipmanager and his authority and liability in different relations to third parties, e.g. cargo owners, passengers, crew, suppliers, etc.

Distinctions can be made between two groups of legal rules<sup>2</sup>:

- 1) Rules that apply to the relationship between the owner and the manager.
- 2) Rules that apply to the manager's relationship to third parties.

It is specially the second set of rules and questions in that relation I will go through in my thesis, because it is an every day problem in the business. The differences within the Danish, Norwegian and English law about the relation to third party, is also very important in determining questions about jurisdiction and governing law, and especially because there is no national or international background law covering third party issues in ship management.

## 1.1 Presentation of Problem

My approach to this thesis is the following:

**I.** A presentation of ship management contracts, hereunder BIMCO – SHIPMAN 98 and the legal background. This will be dealt with in section 2.

**II.** When the shipmanager enters into agreements with third parties about purchase of goods/services or about transport, who is then obligated as a contracting party towards the third party. Is it the shipmanager or the shipowner and how do they become obligated and legitimated? The above problem will be dealt with from a legal perspective in section 3 below.

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<sup>2</sup> Falkanger, Thor. et.al. Scandinavian Maritime Law. Second edition, Oslo, 2004, p. 146

NOTE: When it has been clarified which party is obligated as the contracting party, the legal matters between the said party and the third party will be determined according to the general rules of provisions in contracts which apply to the agreement in question regarding purchase of goods/services or transportation of goods. I will not treat this further in this thesis.

**III.** When you have to decide which party to be obligated as the contracting party towards the third party, which country's rules shall then apply? The question gives rise to two different situations.

1) If the shipmanager is the obligated contracting party the general rules and rules of provision concerning governing law and jurisdiction shall apply. It does not cause any notable problems and will therefore not be treated much in this thesis.

2) If the contracting party is the shipowner certain problems regarding governing law and jurisdiction may arise. The reason for such problems is that three parties and two contracts would be relevant when determining the governing law and jurisdiction.

This problem will be dealt with in section 4.3.1 below.

**IV.** Where is the jurisdiction of the third party's claim against the shipowner?

**V.** Which country's law shall apply when determining the third party, e.g. the transport customer's, claim against the shipowner?

The above problems in III-V will be treated in section 4 below.

**VI.** Finally a conclusion of all the problems raised in the thesis.

## 1.2 Demarcation of Thesis



This thesis will only consider the theme ship management and the problems in regard to agency and third party claims. Questions of conflict rules in that perspective is very relevant and will therefore be analysed. This will be discussed on the basis of relevant contracts, practice and law, however very little has been published about the subject.

Furthermore the thesis will be limited to focus on Danish law, and to a considerable and unavoidable extent, Norwegian and English law.

### 1.3 Terminology

- *Ship management*, is typical a manager, a partnership or limited company which take over for example the technical management of a ship. Duties would include manning the vessel and obtaining necessary supplies. In addition, a manager may be obliged to supervise the ship's technical standard and decide when and where for example repairs should be performed etc<sup>3</sup>.

- *Shipowner*: refers to the Danish and Norwegian "Reder", but there is a difference in terminology and there is a lack of a corresponding term in English. With a few exceptions, "Reder" can be appropriately translated as shipowner, but it should be kept in mind however that shipowner is not always the same entity as the "Reder". Legally the shipowner is a person or part owner who operates a ship for his own account<sup>4</sup>.

- *Contract Act* is not the same as the *law of contracts*. "The contract act" is the act of contracts, and "the law of contracts" is the term used for statutory and non-statutory rules about obligations and remedies within contractual relationships.

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<sup>3</sup> Falkanger, Thor. et.al. Scandinavian Maritime Law. Second edition, Oslo, 2004, p. 154

<sup>4</sup> Falkanger, Thor. et.al. Scandinavian Maritime Law. Second edition, Oslo, 2004, p. 143

- *Agency*: In law the concept “agency” may have different meanings. Whereas in common law agency is a wide concept covering the law related to “authority” and “power to bind”, the agent in Scandinavian law is a particular kind of intermediary. In English law the concept of “agent” may appear in different contexts, for example can an agent primarily mean a person employed for the purpose of placing the principal in contractual or other relations with a third party – like the shipmanager<sup>5</sup>. The ship’s agent on the other hand, is a particular kind of shipping intermediary, for example the agent of a shipowner at a particular port.

- *Third party* in this thesis will be persons contracting with the shipmanager and may be crewmembers, transport customers, suppliers of oil etc.

#### 1.4 Sources of Law and Method

Sources relevant to the subject of the thesis for section 2 is found in ship management agreements, and here the SHIPMAN 98 by BIMCO<sup>6</sup> and the comments of BIMCO is chosen because it is an international well known and acknowledged contract. Furthermore the relevant background law will supplement the Ship management agreement.

The sources used in section 3 is primary the acts of agency and contracts. Furthermore articles and illustrating cases plays here an important role to discuss the issues, and may here decide how a statute or a contractual provision is to be understood, or what rule shall apply where the statute or contract is silent. Finally legal literature is of interest, though it is vague.

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<sup>5</sup> Gorton, Lars. Ship Management Agreements, Journal of Business Law. 1991, p. 2

<sup>6</sup> BIMCO – SHIPMAN 98: The Baltic and International Maritime Council Standard Ship Management Agreement

In section 4 of the thesis, the primary source is International Conventions such as the Brussels Convention of 1968, which is now transformed into a Council Regulation (44/2001), the Lugano Convention of 1988, the Rome Convention and the Hague-agency Convention. National legislation is also relevant. Legal literature and the discussions there is also of interest here because of the vague determination on this field within third party claims in ship management.

It is mainly Danish law compared to Norwegian law, which is described, and therefore other Nordic material has also been used. This thesis also includes a comparison with English law and therefore English material is also used. In this thesis ordinary legal method has been used.

## **2 THE CONTRACTUAL RELATIONSHIP BETWEEN THE SHIPOWNER AND THE SHIPMANAGER**

### **2.1 General Description of The Contracts and Their Purpose**

In this field there is freedom of contract and thus it is important to describe the contract and not the law. If the contract gives rise to any doubts concerning content or scope it may be supplemented with law.

The management agreements govern the relationship between the shipmanager and the shipowner. The shipowner may agree with a particular ship management company that the manager will take on the duty of manning the vessel, the technical supervision of the vessel already from the start of a new-building project, etc. The terminology is, however, not very precise, and it will be up to the parties to set the frame of their relations. The various terms and conditions it contains determine the roles and responsibilities of the respective parties. What is headed a management agreement may therefore embrace a large number of functions as well as a limited number of them<sup>7</sup>.

A management agreement is normally a part of a big and complex documentation, for example together with charter parties, pool agreements and financing documents. It is best if the same parts draft all the documents and by that make sure of the context. If one must only make the management agreement, it is important to be aware of the other documents. Often it will be suitable to make a framework agreement, which in overall describes the content of the contract, its purpose, and its agreements of choice of law and governing law.

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<sup>7</sup> Gorton, Lars. Ship Management Agreements, Journal of Business Law. 1991, p. 4

The agreements are either prepared by the ship management company itself, based on its own experience over time and the consultation with legal advisors, or a standard format is utilized. The latter can be provided by in the form of the acknowledged BIMCO's SHIPMAN 98<sup>8</sup>, which is an agreed document, negotiated by the parties. This will be discussed in greater detail below.

The actual Management agreements and the content of the agreements vary considerably. Normally the typical manager would be a partnership or limited company, which would take on the technical management of a ship. Duties would include manning the vessel and obtaining necessary supplies. In addition, a manager may be obliged to supervise the ship's technical standard and decide when and where repairs should be performed. A manager may also be required to arrange satisfactory insurance cover. Sometimes a manager may even have to obtain employment for the ship. In this case the manager's position would be very similar to that of the managing owner in a shipowning partnership.

The management agreements may also vary in the terms of remunerations for the work of the manager. A widely utilized method is the costs plus agreement, whereby the shipowner pays or undertakes to reimburse the shipmanager for all costs incurred in the provision of services to the vessel plus a separate management fee. There is also the lump sum agreement, which is based on the payment of a single, all encompassing sum out of which the shipmanager pays all the costs of service provision and takes a management fee without further recourse to the shipowner unless exceptional circumstances prevail<sup>9</sup>.

Regardless of the type of agreement it is invariably subject to detailed and often lengthy negotiations over specific terms and conditions including fees payable.

The agreements will often contain wide-ranging exemptions from liability, to the effect that the owner will indemnify and hold harmless the manager if he is exposed to any claim

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<sup>8</sup> The Baltic and International Maritime Council Standard Ship Management Agreement

<sup>9</sup> Willingale, Malcolm. Ship Management. Third edition. Great Britain, 1998, p. 125

from third parties. In addition there may be clauses exempting the manager from liability or limiting his liability in relation to the Owner.

The general contractual position of a shipmanager is based on the law of agency. The shipmanager does not conduct business in its own right but acts as an agent on behalf of a principal – the shipowner. More about general law of agency below.

## 2.2 Example of Contracts, BIMCO – SHIPMAN 98

The SHIPMAN 98 form prepared by BIMCO is a good example of a ship management agreement and a good contribution to the uniformity in a rapidly evolving ship management industry. The agreement is a carefully prepared and balanced document, which is setting the industry standard and reflecting the current shipping practice. It is easy to use and it takes many practical problems into account. The document can often be used without any changes. It is an “agreed document” negotiated by both parties, and is known and used by many in this field, and which – besides few exemptions dealt with in this thesis – has not give rise to many disputes. The contract can seem a little overwhelming, but the reason is that there are hardly any laws in the world which specific concerns ship management<sup>10</sup>.

The importance of SHIPMAN 98 as a standard agreement for third-party ship management cannot be underestimated. The absence of national or international background law covering third party ship management makes the contract clauses increasingly important, not only in providing contractual clarity, but also in the setting of standards in an industry where an increasing proportion of the world fleet is being placed under management agreements. SHIPMAN 98 is now a document that provides clear contractual provisions

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<sup>10</sup> Palmgren, Nils-Gufstaf. SHIPMAN 98. Scandinavian Shipping Conference, 1999, p. 10.

striking a fair balance between rights and obligations of the owners and the managers, thus reducing the risk of disputes on interpretation to the extent possible<sup>11</sup>.

SHIPMAN 98 comes into two parts. Part I is in BIMCO's preferred box layout in which can be inserted the name and place of business of the owners and managers, the time and date of the commencement of the agreement as well as its intended termination, the annual lump sum management fee and the sum agreed in respect of redundancy costs. The other boxes are used to indicate the management services contracted for including crewing, technical management, insurance, freight management, accounting, chartering, sale or purchase, provisioning, bunkering and operations. Part II contains the standard terms, conditions and other clauses of the agreement with the intention that these are left unaltered by the parties – unless they specifically wish to alter the careful balance of provisions.

### 2.2.1 The Obligations of The Parties

According to the contract clause 3 about the basis of agreement the clause provides very important provisions regarding the capacity in which the managers are acting in carrying out the various management functions contracted for. The clause makes it clear that in carrying out the functions specified in the agreement, the managers act as the agents for and on behalf of the owners. This provision affords the managers some protection from claims made by third parties, and can normally be defended on the basis that they were only acting as agent to the owners.

The obligations of the managers in carrying out their services are set in clause 4 of the agreement. The clause specifies that the managers shall use their best endeavours to provide the agreed management services as agents for and on behalf of the owners in

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<sup>11</sup> Gorton, Lars. Ship Management Agreements, Journal of Business Law. 1991

accordance with sound ship management practice and to protect and promote the interests of the owners in all matters relating to the provision of the services hereunder.

In recognition of the fact that the managers may simultaneously act as managers for other vessels on behalf of other owners, the provision in the second paragraph of sub-clause 4.1 define the overall responsibility of the managers in relation to all vessels entrusted to their management. These important provisions allow managers acting for a number of different owners to allocate manpower and services in a fair and reasonable manner. In the absence of such provisions the managers would be faced with the impracticability of trying to give priority to all owners.

Where the manager are providing technical management he shall procure that the requirements of the law of the flag of the vessel are satisfied and he shall in particular be deemed to be the company as defined by the ISM code, assuming the responsibility for the operation of the vessel and taking over the duties and responsibilities imposed by the ISM code when applicable.

Clause 5 in the agreement specifies the owner's obligations. The owners shall pay all sums due to the managers punctually in accordance with the terms of this agreement. Where the manager are providing technical management in accordance with sub-clause 3.2 of the SHIPMAN agreement and where the managers are not employers of the crew, the owners shall procure that all officers and ratings supplied by them or on their behalf comply with the requirements of STCW 95, and the owners must instruct such officers and ratings to obey all reasonable orders of the managers in connection with the operation of the managers safety management system.

Where the managers are not providing technical management in accordance with sub-clause 3.2 of the agreement, the owners shall procure that the requirements of the law of the flag of the vessel are satisfied and that they, or such other entity as may be appointed by them and identified to the managers, shall be deemed to be the company as defined by the ISM code assuming the responsibility for the operation of the vessel and taking over the duties and responsibilities imposed by the ISM code when applicable.



The responsibilities is found in clause 11 and provide equitable solutions which strike a fair balance between the owners and the managers. The liability is apportioned on the basis that the owners should not be in a better position than they would have been in if they managed the vessel for themselves. Equally, it has been found that the managers ought to be liable to a certain extent for negligence. A fair guideline as to what would be a reasonably apportionment between the parties, is found in compliance with the English Unfair Contract Terms Act 1977 and similar legislation existing in other jurisdictions which state that such clauses must be reasonable<sup>12</sup>.

Clause 11 operates with several situations about the responsibility between the parties, for example force majeure, liability to owners, indemnity, Himalaya clause etc, but these I will not go into details about.

## 2.2.2 Non-Performance and Remedies for Breach in The Agreement

The agreement says very little about non-performance and remedies, but clause 18 gives clear rules as to the termination of the agreement, which is a remedy, and indirectly regulates non-performance. It distinguishes between termination by default on the part of the owners, a default on the part of the managers, and extraordinary termination.

A default by the owners can be in payment relating to the vessel or the vessels under the agreement and associated vessels. Without obligation, the managers are entitled to terminate the agreement if the owner fails to pay moneys due to the managers within 10 running days of receipt of the manager's request for funds. Clause 18 further provides a remedy for the managers should the owners fail to meet their obligations under sub-clause 5.2 and 5.3 or permit the vessel to undertake a voyage which the managers consider to be improper, unlawful or unduly hazardous. The managers are hereafter entitled to terminate

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<sup>12</sup> BIMCO's homepage about comments to SHIPMAN 98

the agreement unless the owners' default is rectified in a reasonable time and to the satisfaction of the agreement.

Managers default is found in clause 18.2 and corresponds to the provisions of clause 18.1 (ii) and gives the owners an express entitlement to terminate the agreement if the managers fail to adhere to their obligations to provide the services agreed in clause 3.

Finally sub-clause 18.3 deals with extraordinary termination and lists a number of events, which, if they materialise, will automatically entitle either party to terminate the agreement without further consequences, except as mentioned in sub-clause 18.6. The list of events is for example, termination in case of the sale of the vessel, total loss of the vessel, bankruptcy etc.

Certain warranties relating to the managers performance may be written into the agreement. For example, if the manager fails to provide properly qualified and suitable experienced officers and ratings then the manager will be forced to replace the crew or implement other corrective action at its expense. An owner may in similarly circumstances try to secure a performance guarantee from a shipmanager which is forfeited if the manager breaches its contractual obligations and fails to remedy the breach within an agreed period.

These contractual regulations will in case they are incomplete be supplemented by the general rules of contract law and other non-statutory rules.

### 2.3 Legal Background

The main relationship between the parties is still based on the agreement, but many of the obligations arising out of it are imposed or regulated by law. A contract may be defined as an agreement between two or more parties that is binding in law. This means that the agreement generates rights and obligations that may be enforced in the courts. The normal

method of enforcement is an action for damages for breach of contract, though in some cases the court may compel performance by the party in default.

But if the contract between the parties does not give a clear answer of the obligations or the remedies, it must be determined by interpretation. If interpretation is not enough, the contract must be supplemented with rules of practice. These rules are more or less the same for Danish, Norwegian and English law<sup>13</sup>. Principles of European Contract Law (PECL) is rules within the general law of contracts, and is about entering into contract, validity, substance, performance, non-performance, etc. The rules are still “soft law” and not binding, therefore I will not analyse them further, but they will be remembered as supplement.

Denmark and Norway have specific law and general rules that regulates the relationship between to parties to a contract, it is called law of obligations, and under the specific law, we have special rules of agency. In the United Kingdom general rules of obligation does not exists. Instead the Contract Act and, in this specific situation in the thesis, the Agency Act applies.

The general contractual position of a shipmanager is based on the law of agency. The shipmanager is the agent of his principal, the shipowner. The rights and the duties of the principal and the agent depends upon the terms of the contract, whether express or implied,, which exists between them. But in addition to these specific provisions, the mere existence of the relationship raises certain duties on both sides. In particular, an agent owes fiduciary duties to its principal. The distinguishing obligation of a fiduciary is the obligation of loyalty. Although it has been said that the essence of a fiduciary obligation is that it creates obligations of a different character from those deriving from the contract

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<sup>13</sup> Bryde Anderson, Mads and Lookofsky, Joseph. *Lærebog i Obligationsret I*. Second edition, Copenhagen, 2005, p. 26.

itself, where the agency is based on a contract between the principal and the agent, the fiduciary duties may in certain cases be varied by the terms of the contract<sup>14</sup>.

### 2.3.1 The Law of Obligations, The Obligations of The Parties

In Danish and Norwegian law the law of obligations is regulating the obligations of a debtor to a creditor, and what remedies the creditor can claim in case of debtors non-performance. The law of obligations is divided into general rules and specific rules<sup>15</sup>. The general rules deals with all indebtedness, like the Contracts Acts, and the method to solve a dispute is to; 1) determine the cause of action – is there a value agreement, 2) determine the obligation – what are the promises, and 3) the question of non-performance. The specific rules are rules for specific types of deals, like the Sale of Goods Act etc. The thesis will deal with the general rules to discuss these problems.

In Danish and Norwegian law the obligation for a debtor can exist in paying money or in something else but money, for example services etc. Both obligations must be performed in the right place, at the right time and in the right condition. These conditions are normally regulated in the ship management contract, but sometimes the standard form of contract are not filled out clearly, and must therefore be supplemented by the legal background.

The law of agency also regulates the internal relationship between the manager and the owner in ship management. This is the case because the manager acts as intermediary for the owner, by having the daily operation of the ship.

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<sup>14</sup> Beatson, J. Anson's, Law of Contract. 28<sup>th</sup> edition, New York, 2002, p. 675.

<sup>15</sup> Bryde Anderson, Mads and Lookofsky, Joseph. Lærebog i Obligationsret I. Second edition, Copenhagen, 2005, p. 26.

The Nordic Contract Acts does not regulate this relationship, but in commission the Commission Act regulates the relationship. This act regulates several rules that determine the relationship between the commission agent and the principal. The silence of the Contract Act does not mean that agency is lawless. Most of the questions is regulated by employment law and to a certain extent by the Commission Act, for example the agents withhold/lien in costs<sup>16</sup>. The salary of the agent depends of the agreement or custom, and the agent is obligated to protect the interest of the principal. Neglect and remedies of these obligations is regulated by the normal principle of fault.

An example of a situation where it becomes necessary to supplement the contract with law, because the SHIPMAN 98 is silent, is for example when a dispute has arisen about who of either the shipowner or the shipmanager there is bound as the contractual party against third party. This problem will be dealt with in section 3 below.

The general rule in English law is that performance of a contract must be precise and exact. That is, a party performing an obligation under a contract must perform that obligation exactly within the time frame set by the contract and exactly to the standard required by the contract. Sometimes that standard will be strict. This is so in the case of many common law obligations such as a seller's obligation to load cargo, not to ship dangerous cargo, and to obtain an export licence. It is also the case of the statutory implied terms of quality in contracts for sale and supply of goods. Sometimes, as in the case of contracts for services, like in our example of ship management, it will only require the exercise of reasonable care or due diligence<sup>17</sup>. Whether the alleged performance satisfies this criterion is a question to be answered by construing the ship management agreement, so as to see what the parties meant by performance, and then by applying the ascertained facts to that construction, to see whether that which has been done correspond to what which was promised.

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<sup>16</sup> Lyng Andersen, Lennart. Madsen, Palle Bo. *Aftaler og Mellemmænd*. forth edition, København, 2001, p. 284.

<sup>17</sup> Beatson, J. Anson's, *Law of Contract*. 28<sup>th</sup> edition, New York, 2002, p. 499.

Like Danish law the performance under English law must be at the right time, at the right place and in the right condition.

Out of the ship management agreement we can see that in entering into an agency agreement, the agent normally undertakes distinct sets of obligations to the principal. The first is the performance of the duties imposed on him by the express or implied terms of the agency agreement. The agent must perform with reasonable care and skill the duties allotted to him by the agreement, must observe any lawful and reasonable instructions given by the principal so far as they are consistent with the terms of the agreement and must be strictly within the limits of his actual authority. The law usually treats the agent as a fiduciary and thus requires him to fulfil a further range of duties which equity imposes in fiduciaries. The extent to which these apply and the strength of their application vary according to the nature and circumstances of the agency agreement. The ship management agreements does not specify this clearly, but it will generally include a duty to act towards the principal loyally and in good faith, to keep money and other assets received from or for the principal separate from his own, to keep and be prepared to render accounts of his dealings on behalf of the principal, to subordinate his own interests to those of the principal, to avoid conflicts of interest between the principal and other principals and to refrain from using his position as agent to acquire for himself property, contracts or other benefits which he ought to do so for the principal. On this field English law and Norwegian and Danish law are very similar.

Hitherto the duties owed by the principal to the agent have been left to determination by the express or implied terms of the agreement. English law has been reluctant to imply terms other than in relation to the agent's remuneration and security for payment of it, and the case law has for the most part been concerned with such questions as whether the agent has done what is necessary to entitle him to his commission and whether the principal owes the agent a duty to avoid steps which would prevent the agent from earning his commission<sup>18</sup>. The agent has also a right to be reimbursed his agreed or reasonable

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<sup>18</sup> Good, Roy. Commercial Law. Second Edition, England, 1995, p. 580.

expenses, and to be indemnified against all liabilities, incurred in the performance of his duties.

### 2.3.2 The Law of Obligations, Non-Performance and Remedies of Contract

The SHIPMAN 98 does not regulate much in concerning to non-performance and remedies of breach of contract, which is why the contract must be supplemented by legal background.

It is now determined that an indebtedness has arisen and that the obligations between the parties are clear. The question now is what the consequences are if either the shipowner or the shipmanager do not meet the conditions of the ship management agreement. If debtor has not met his obligation, this will be a non-performance that entails one or more remedies. The ship management agreement is not very specific concerning the remedies and it only deals with the question of termination of the agreement. In this case the legal background may supplement the agreement with other alternatives.

In Danish and Norwegian law a non-performance as in the ship management agreement can consist of; the obligation does not take place, the obligation will be delayed, maybe there is a lack of conformity or a defective title. A non-performance can also consist if one of the claimant's refusal to take delivery<sup>19</sup>.

The main rule in Danish and Norwegian contract law is that the injured party can claim the obligations *in natura*. This right comes from the principle of commitment in an agreement. In a bilateral privity the remedies between the parties therefore in general are specific

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<sup>19</sup> Bryde Anderson, Mads and Lookofsky, Joseph. Lærebog i Obligationsret I. second edition, Copenhagen, 2005, p. 109

performance, so the obligations can be enforced<sup>20</sup>. If the injured party did not have this right the promise would not be worth much. This rule is subject to some modifications, which make the rule close to the common law model, which will be analysed further below. First procedural law does not allow specific performance to be enforced if the creditor does not have the remedy at his disposal. Second there are many practical difficulties for certain types of contracts and personal service, like in this case with ship management agreements and the circumstances in that perspective. It is therefore not realistic to enforce a specific performance in this case. The performance will not be satisfactory and acceptable for the other party and in employment the right does simply not exist<sup>21</sup>. Third the consideration of waste of value, so the specific performance converses to a money claim. More about specific performance and a comparison between the Danish and Norwegian rules and the English rules below.

In the SHIPMAN 98 it is stated that the creditor may terminate the contract under certain conditions. This right to terminate the contract instead of specific performance also follows from the legal background. Because it is the most serious consequence of a non-performance, there are some conditions of termination: First it must be specific and clear agreed that a certain non-performance is basis of termination, second there must be a material breach, like serious consequence for the injured party, which must be evaluated in the concrete situation and out of the knowledge of the debtor<sup>22</sup>.

A claim of damage may also be a remedy of breach. The solution is that the parties should be in the same financial situation like they were before they entered into the ship management agreement. A condition of that is a basis of liability, for example trough the contract, *lex specialis*, principles of fault.

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<sup>20</sup> Bryde Anderson, Mads and Lookofsky, Joseph. Lærebog i Obligationsret I. second edition, Copenhagen, 2005, p. 115

<sup>21</sup> Bryde Anderson, Mads and Lookofsky, Joseph. Lærebog i Obligationsret I. Second edition, Copenhagen, 2005, p. 242

<sup>22</sup> Bryde Anderson, Mads and Lookofsky, Joseph. Lærebog i Obligationsret I. Second edition, Copenhagen, 2005, p. 243.



In English law where the party to a contract does not perform after the standard required by the ship management agreement or within the timeframe set, that party will breach the contract. The remedies for the other party fall under the following heads:

Damages for breach of contract are the main remedy and is designed to compensate for the damage, loss or injury the claimant has suffered through that breach<sup>23</sup>.

In certain circumstances the injured party may obtain the enforcement of the promise by an order of specific performance of the contract. An order for specific performance is one by which the Courts direct the defendant to perform the contract, and in accordance with the terms. Though the general rule is that specific performance will not be available where damages would be an adequate remedy<sup>24</sup>. If it was the question in sale and purchase of unique goods, it could be the alternative, but in a situation with services like this within Ship management the solution with specific performance is difficult. By contrast to Danish and Norwegian law which as mentioned generally regard the innocent party's primary recourse as, in principle, to have the contract performed, the jurisdiction to order specific performance is supplementary to the English remedy of damages. Notwithstanding this difference of principle in practice, even within Danish and Norwegian law as mentioned above, specific performance is only granted if the innocent party has a specific interest in performance which is not satisfied by damages.

In other circumstances the parties to a contract that has been broken may be entitled to return of money paid, recompense for services rendered or goods transferred, or a money award reflecting the gain to the defendant. These are restitutionary remedies. Although some of them are based on a distinct branch of the law of obligations, restitution, and are not based on breach of contract, others are based on contract<sup>25</sup>.

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<sup>23</sup> Beatson, J. Anson's Law of Contract. 28<sup>th</sup> edition, New York, 2002, p. 589

<sup>24</sup> Treitel. Remedies of Breach of Contract. England. 1988

<sup>25</sup> Beatson, J. Anson's Law of Contract. 28<sup>th</sup> edition, New York, 2002, p. 590

SHIPMAN 98 says very little concerning the remedies in agency. The remedies available to the Shipowner for breach of the Shipmanager's fiduciary duties vary according to the circumstances. They include personal remedies, such as an account and payment of monies received for the principal, compensation by way of equitable debt for loss caused to the principal, and confiscation of a bribe or secret commission received by the agent, and remedies for the enforcement of proprietary rights, such as a constructive trust of money or other assets received by the agent for himself which he should have received for the principal and the proceeds of the principals property which the agent has misappropriated.

The remedies for breach of duty by the Shipowner may be personal or proprietary. The Shipmanager has a personal right of action for unpaid remuneration and expenses, and has a lien over any property of the principal in his possession to secure payment of what is owed to him<sup>26</sup>. Further, where the agent has at the principal's request incurred on behalf of the principal a commitment to make a payment to third party, the agent's authority to make the payment becomes irrevocable, and he is entitled to recoup himself from funds of the principal available to him and for that purpose to debit the principal's account, even if the Principal in the meanwhile has become bankrupt or gone into liquidation. This irrevocable right of recoupment by debit to the principal's account is quite distinct from any lien or right of set-off the agent may have.

By this it can be concluded that the SHIPMAN 98 agreement in many perspectives will be supplemented by the legal background, either the governing law is Danish, Norwegian or English. The legal background and the rules of practice can vary all depending on which country there will be the governing law, and this is important to remember by contracting the ship management agreements. Further about jurisdiction and choice of law in section 4 below.

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<sup>26</sup> Good, Roy. Commercial Law. Second Edition, England, 1995, p. 440.

### **3 THE LEGAL RELATIONSHIP BETWEEN THIRD PARTY CLAIMANTS AND SHIPMANAGER AND/OR SHIPOWNER**

#### **3.1 Introduction**

The general situation is discussed previous in this thesis and now it is the problems in relation to third party there will be discussed.

Today many different parties with different functions assist in shipping and transport of goods - e.g. in contracting, payment of deliveries to the vessel, crew matters etc. The different parties' activities and obligations are usually organised and determined by several mutual agreements between the parties. The organisational patterns and contract patterns are often very complex and complicated and usually not known to outside customers, e.g. in the situation of a ship management agreement.

When for an example goods disappear, are damaged or delayed a transport customer or its insurance company sometimes raise a claim for damages against a party which the transport customer erroneously thinks is the proper person to raise the claim against and liable for the customer's loss. The reason for the transport customer's erroneous perception is often the existing extensive organisational and contractual patterns which are impossible to get an overall view of and that for an example a carrier or a sub-carrier has not given sufficient information and true and fair information about the relations in the transport agreements and transport documents.

When the shipmanager therefore enters into agreements with third parties about the acquisition of goods/services or about transport, who is then obligated as a contracting party towards the third party. Is it the shipmanager or the shipowner who is the contractual party and how do they become obligated and legitimated? To what extent can the shipowner be bound by the shipmanager?

Again it must be mentioned that when it has been clarified which party is obligated as the contracting party, the legal matters between the said party and the third party will be determined according to the general rules of provisions in contracts which apply to the agreement in question regarding purchase of goods/services or transportation of goods. I will not discuss this further in this thesis.

### 3.2 National Rules on Representation - Agency and Obligation as Contractual Party

Legally a ship management agreement can be described as a delegation of certain (in the agreement described) functions from the shipowner to the shipmanager. The letter of attorney is a necessary condition if a shipowner wants the operational management to be transferred to an external undertaking without losing any financial interest<sup>27</sup>.

The agency relationship thus implies that a manager acts on the ship owner's account and thus the owner is in principle also the one to bear the financial risk of the contracts entered into by the manager. But what kind of legal figure is ship management then? From a review of the contract itself between the shipowner and the shipmanager and their mutual obligations and rights, the shipmanager will be qualified as an intermediary. An academic stand has thus been taken and from that the following law may be analysed.

In the following, the national rules on representation, agency and obligation as a contracting party and their loyalty is analysed on the basis of the rules of an intermediary being able to act in these possible capacities; intermediary, commission agent, agent, contracting party or other things falling in between.

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<sup>27</sup> Willingale, Malcolm. Ship Management. Third edition. Great Britain, 1998, p. 126

It is especially the power of attorney, which is relevant in connection with ship management. Firstly because as a principal rule the manager acts in the name of the owner and thus as an agent, secondly because per se a situation involving a power of attorney causes more problems on the outside than a situation involving commission.

The manager receives a letter of attorney, like a general authority, to operate the whole ship or certain functions, for the expense of the shipowner. At the same time the manager receives certain instructions and limitations about how he must operate the ship. The manager therefore has to operate within the frames of the authority given to him<sup>28</sup>.

The service the shipmanager performs is an agreed product. Both the internal relationship and the relationship towards third party is regulated of what the management agreement says, and after how the parties de facto performs in relation to the given authority and instructions.

It is the area of law of agents and commission and the manager's possibility of being the contracting party, which will be discussed further.

The discussion will be based on the question of which conditions that have to be fulfilled in order for among other things the effects of the power of attorneys to be attained, and it will also be based on the question of what are the consequences of these conditions not being fulfilled.

It must be noted that the legal matter may be clarified in accordance with the functions which the manager can have according to different types of requirements made by the third party, for instance; payment of deliveries, oil, goods etc., crew requirements, claims for damages regarding cargo, and possibly non-contractual damages. In the question of liability in tort towards third parties, the general liability of the shipowner is not imposed on his manager, but depending on the circumstances, a manager may be liable under the

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<sup>28</sup> Willingale, Malcolm. Ship Management. Third edition. Great Britain, 1998

general rules of negligence. This could be the case if the manager has been negligent in his choice of repair yard or his supervision of the work performed. This question is a big issue per se and will not be discussed further in this thesis.

### 3.2.1 Direct Representation – Agency with Disclosed Principal

#### 3.2.1.1 Danish and Norwegian Law

Agency exists when the intermediary acts in a different name. The intermediary will set up rights and obligations for the principal contributor by his transactions and he himself stands outside the contract.

In most cases the ship management agreement will include provisions about the manager's right to enter into certain agreements in the owner's name. In this respect the management agreement works as a power of attorney and the Danish and Norwegian Contracts Act hereof govern the more detailed provisions.

An absolute requirement in order for the agent not to be bound is that he actually acts in the principal's name. If the third party has not been informed that there is a principal behind the manager who is supposed to be the third party's other contracting party even the principal cannot require to be made a party to the contract<sup>29</sup>. The reason for this rule is that it is said that the third party needs to know with whom he is doing business. The agency agreement per se between the owner and the manager is not enough to inform the third party that the owner is the contracting party, as there are various circumstances concerning the general authority in section 10 of the Danish Contracts Act and section 18 of Danish Contracts Act about authority without special statement. As a general rule the authority

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<sup>29</sup> Bryde Andersen, Mads. Enkelte Transaktioner, Aftaleretten III. Copenhagen, 2004, p. 150

does not include any obligation but a right for the manager to act in the owner's name. The authority is thus a document of competence and it is therefore necessary that the manager at the conclusion of the contract clearly state that he merely acts as the owner's representative and does not want to enter into a legal relationship with the third party.

What are the requirements in order for it to be considered disclosed that the manager acts in another person's name? It has to be decided from an assessment of evidence<sup>30</sup>. If the manager has made it clear to the third party that he acts as an agent and who the principal is, he will not be bound by the transactions and the manager may thus not be considered the contracting party. This legal effect or sanction may also follow the rules and principles of the determination - "interpretation" - of the legal effects of contracts towards third parties that acquire or infer rights from the contract on the basis of objective conditions and without any special consideration for the contracting parties' subjective conditions and intentions. It may also be concluded from the rules of simulating (*pro forma*) legal transactions and so-called sham contracts<sup>31</sup>.

The abovementioned rules protect the other contracting parties' and third parties' legitimated expectations and good faith by laying down a duty to act loyally, fair conduct and reasonable preparation of the relationship between the contracting parties and the obligations. The duty of loyalty reflects basic and ordinary contractual relations. This is clearly established in legal practice and theory<sup>32</sup>. The usual rule of loyalty imposes a duty on the contracting parties and other creditors and debtors of reasonable preparation of their relationship between the contracting parties and obligations towards third parties in good faith who have incurred or may be imposed rights or duties as a consequence of the parties' contractual relationship or obligations.

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<sup>30</sup> Lyngé Andersen, Lennart. Madsen, Palle Bo. *Aftaler og Mellemmænd*. Forth edition, Copenhagen, 2001, p. 245

<sup>31</sup> Lyngé Andersen, Lennart. Madsen, Palle Bo. *Aftaler og Mellemmænd*. Forth edition, Copenhagen, 2001, p. 246

<sup>32</sup> Gomard. *Obligationsret, First part*. Third edition. Copenhagen, 1998 , p. 45 and Selvig, *Kontraksret til studiebruk*, Hefte 1, 1997

The problem concerning whether it is the owner or the manager that will become obligated as the contracting party towards the third party has been handled by the courts several times.

The most important and the first judgment of principle concerning the application of the general rules to management companies and assistant managers signing of contracts with third parties is ND 1980.181 NH the *Fekete* judgment. Some vessels were owned by limited partnerships and they entered into assistant manager agreements with Fekete & Co. upon which they received a power of attorney corresponding to the power of attorney, which the Norwegian Maritime Act gives the owner. The financial separation between the assistant management company Fekete & Co. and the limited partnerships was implemented strictly. The organizational form with a assistant management company was common in Norwegian shipping business in that period. The assistant management company ordered bunker oil for the vessels of the limited partnerships. The suppliers demanded payment for the bunker oil from the assistant management company but the company denied being bound by the supply agreements as well as being liable for the payments. The assistant management company stated that the organizational form in question with an assistant management company and separate owner companies for the vessels was traditional in Norwegian shipping business and well known by everybody affiliated with Norwegian shipping business. The organization form implied that the owner company and not the operating company were bound and liable towards the other contracting parties. The Norwegian Supreme Court clearly dismissed this. With the other judges' approval the leading judge concluded that also within shipping the main rule is that the person who enter into contracts – here the assistant management company – he him self will be bound when other things is not stated clearly between the parties. Further the judge stated that not even in proportion to the other contracting party who should know the organization form and the intern relationship, could one conclude that the Ship owning company and not the assistant manager should be liable. The Supreme Court did not found it proven that within shipping and Ship owning companies there should be a custom for such companies to have assistant managers.

Also in the case ND 1993.353 Hålogaland lagmannsrett *Aurita* about a management company's order of deliveries to a vessel, the court concluded that the assistant



management company was liable for payment of the delivery because it was not emphasized quite adequately to a German supplier that it was the owner company and not the assistant management company that was to be liable. It did appear from the assistant manager's writing paper that the company was "managers", however, that was not enough. The court also stated that it would be much easier for the assistant management company to make the indicated agency absolutely clear than it would be for the German supplier to resolve this subsequently.

By the ruling ND 1993.444 NH *Scan Power*, also within the field of crew requirements, the Norwegian supreme court has determined that the management company "not in a sufficiently clear way" has expressed that it was not obligated as employer according to the employment contract and that it merely acted as agent for another party which was obligated instead.

The principles laid down by the courts still apply today. This follows from the ruling of the Finnish Högsta Domstolen, see ND 2003.83 FH *Linda* where the management company, Engship, was obligated as carrier and contracting party as a consequence of a contract signing as managers but in own name for m/s *Linda*, and did not clearly state that it was on the behalf of *Langh Ship*.

After a review of the rulings, it seems that a party may be bound as a contracting party or obligated in accordance with the contractual rules even if the said party according to a traditional perception has not made any promises or entered into any agreement. The basis for the party's obligation as a contracting party or in accordance with the contractual rules may be actual conditions combined with the law, which in a broad sense means the rules of law. An example of rules and principles is the interpretation of the legal effect of contracts on third parties; - third parties that acquire or infer rights of the agreement on the basis of objective and subjective conditions and intentions. Another example is the rule according to which the person who enters into an agreement becomes obligated as a contracting party if the party in question not in a sufficiently clear way makes it apparent that the said party only enters into the agreement as an agent for another party. If certain, possibly the above mentioned, actual conditions are present and the party from an overall assessment of the legal rules etc., the legal effect which consequently sets in may impose an obligation on the party as a contracting party according to the principles of contract law.

The rules of contract law lay down obligations to the manager about loyal behaviour, fair conduct and reasonable preparation of the relationship between the contracting parties and the obligations. The rules thus protect other contracting parties' and third parties' justified expectations and good faith. Disregard of these obligations is therefore among other things sanctioned by imposing obligations and liability on contracting parties.

### 3.2.1.2 English Law

Where the agent contracts expressly as agent for the principal as a named or identifiable principal, the third parties contract with the principal, not the agent, and only the principal can sue and be sued on the contract. This is so even where in making the contract the agent exceeds his authority, though in such a case he becomes liable to third party for damages for breach of the implied warranty of authority<sup>33</sup>. But the agent can expressly undertake liability, either in substitution for that of the principal or in addition to the principal's liability. Where the agent contracts as such but without disclosing the principal's identity, it is a question of construction of the contract whether the third party entered into the contract on the basis that he was willing to treat as the other party any person by whom the agent was authorized to make the contract or whether he looks to the credit of the agent, not of the principal. In the former case, the third parties contract is with the principal, in the latter, with the agent. Here it is interesting that the English law is similar to the principle expressed in Art 12 of the Unidroit Convention on Agency in the International Sale of Goods:

Where an agent acts on the behalf of a principal within the scope of his authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly bind the principal and the third party to each other, unless it follows

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<sup>33</sup> Gorton, Lars. Ship Management Agreements, Journal of Business Law. 1991, p. 10.

from the circumstances of the case, for example by the reference to a contract of commission, that the agent undertakes to bind himself only.

However, in the case of signed contracts in writing there is an established rule that where the agent signs in his own name he is personally liable unless it is clear from the document that he is signing in his capacity as agent. The mere addition of words of description after the signature, such as “agent”, “manager” etc., will not normally suffice to displace the agent’s liability, it is necessary for him to indicate that he is acting in a representative capacity, e.g. “for and on behalf of the principal”<sup>34</sup>.

Where the agent contracts as agent but without identifying the principal, who actually exists, the agent will not normally be liable, but liability will be imposed where the agent is in fact the principal, and has sometimes been imposed where the principal was fictitious or non-existent or where the agent refused to disclose the principals identity, thus preventing the third party from enforcing the contract against the principal, or his evidence as to his principal is disbelieved.

The fact that a shipmanager is “known” to be a manager is insufficient to create a proper agency relationship with third parties. In the well-known case of *Maritime Stores Limited v. H.P. Marshall & Co. Ltd.* (1963) 1 Lloyd’s Rep. 602, the fact that Maritime Stores knew that Marshall were ship agents was “in no way determinative of the issue”. The court found on the facts that Marshall, the agent, had not contracted as agent and was personally liable. A shipmanager must therefore act like any other agent and make it clear when contracting with a third party on the behalf of his principal that he is acting “as agent only”. This is usually done by confirming all contracts in writing and signing off “for the manager as agent for and on behalf of the owner.

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<sup>34</sup> Good, Roy. Commercial Law. Second Edition, England, 1995, p. 645

### 3.2.2 Indirect Representation – Agency with Undisclosed Principal

#### 3.2.2.1 Danish and Norwegian Law

The most ordinary intermediary relation in ship management is the manager as an agent. However, ship management agreements that offer alternative provisions of making contracts in the manager's or the owner's name also exist. A prior condition is probably usually that the manager acts "on behalf of the owner" even he does it in his own name. Usually this means that he can choose between acting as an agent or as a commission agent.

As regards commission conditions it is usually of no importance to the third party if the manager act as commissioner. The agreement is entered in the name of the manager and thus he becomes the third party's other contracting party. There will be no legal relations between the principal (the shipowner) and the third party. In Nordic law it is provided in the general rules of direct or indirect representation that a party who makes legal transactions and acts in his own name towards a third party is responsible and liable for such transactions, even if the party internally acts on behalf of somebody else and at that person's account and risk. This is provided in the general rules of undisclosed representation, see Danish and Norwegian Act on Commission, section 56. A party (the commissioner) who makes legal transactions towards a third party in his own name but on another person's account (the principal), he himself becomes bound and obligated towards the third party.

It is not until the commissioner becomes insolvent that the representation relation has a certain practical significance for the third party. In such case the owner will be able to have a direct claim against the third party based on the third party's obligations towards the manager, see the section 57 of the Danish Commission Act, without the third party itself be proven right upon any of the manager's claims against the owner. This is based on the point

of view that fundamentally the principal is regarded as the owner of the claim against the commissioner's other contracting party<sup>35</sup>. The third party also risks to meet the claim twice if he knew or ought to have known about the commissioner relation, see section 62 of the Danish Commission Act. Apart from situations of insolvency, the commissioner structure may also have a certain significance if the third party on certain conditions becomes entitled to setting off against the manager with his outstanding claims against the owner, see section 64 of the Danish Commission Act.

### 3.2.2.2 English Law

The problems raised under Danish and Norwegian law, are treated differently under English law.

In English law the theory of undisclosed principals applies<sup>36</sup>. In short it states that the principal may obtain rights and obligations upon the agent's transactions without his identity being known to the third party, and even in situations where the third party did not know that there was in fact a principal behind it all. The principal and the agent will then both become liable. The theory does not apply if the third party was aware of who the principal is. There has to be a situation where it according to the underlying condition is the parties' intention to have the agent as a representative. Whether these conditions have been fulfilled will be based on a specific interpretation of the management agreement. Here it is important to note that English interpretation theory is much more occupied with the wording of the contracts than Danish and Norwegian interpretation.

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<sup>35</sup> Grönfors, Kurt. *Avtalslagen*. 1984, p. 81

<sup>36</sup> Beatson, J. Anson's, *Law of Contract*. 28<sup>th</sup> edition, New York, 2002, p. 499

Mimi Berdal points out in "Funksjonsfordeling og Rederibedrift"<sup>37</sup> page 56 that it appears that a manager's signature "as owner" excludes the rules of undisclosed principals, as this would be a strong indication of the agreement being entered into in one's own name as owner. On the other hand, if "owner" is added with e.g. "disponent owner" or "managing owner" you are probably within the theory of undisclosed principals if the basis of the transaction is a power of attorney.

The effect of the rules of undisclosed principals is as already mentioned that the principal obtains the rights and obligations in accordance with the agreement and may be sued by the other contracting party (or the principal himself may sue). Such situation may also be possible under Danish or Norwegian law if it is assumed that the third party has accepted to make a contract without knowing whom the other contracting party is (anonymous power of attorney). The rules of undisclosed principals are unusual compared to Danish and Norwegian law as the agent in these situations will become joint and several liable with the principal. The third party may thus sue both in accordance with the agreement. This difference between the two legal systems about who will become obligated as the contracting party and thus liable, is very important to remember in determining the questions about jurisdiction and the governing law. This question will be dealt with below under section 4.

However it must be mentioned that the doctrine of the undisclosed principal does not apply where (a) the terms of the contract expressly or impliedly exclude the principal's right to sue and liability to be sued, (b) the agent does not intend to contract on the principals behalf, (c) the third party makes it clear that he does not wish to contract with anyone other than the agent or (d) the principal stipulates that the agent is not to commit the principal to a contract with third parties but is to undertake all transactions on his own behalf<sup>38</sup>.

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<sup>37</sup> Berdal, Mimi K, Berg, Marianne. Funksjonsfordeling og Rederidrift. Oslo, 1987, p. 56

<sup>38</sup> Good, Roy. Commercial Law. Second Edition, England, 1995, p. 180

## 4 JURISDICTION AND CHOICE OF LAW

### 4.1 Introduction

Within shipping and the situations described above there are two factors which give choice of law and jurisdiction questions central importance in maritime law and in particular within ship management and third party claims. The first factor is that there are more than two parties and a large number of international contracts entered into by parties from different countries. The second factor is the central position of the ship in all maritime legal relations in conjunction with the frequent voyages of the ship from one state to another. As we have seen in the former sections, we cannot get by with only a study of national law, and a study of foreign maritime law becomes a practical necessity, and in its wake choice of law becomes a necessity. The differences between for example Danish, Norwegian and English law in determining the obligations etc. against third party, is therefore important to decide which countries conflict rules there must apply.

Therefore it is a big and important question, which states law, regulates an international transaction in a situation with three parties involved? There are rules that have the function of identifying the laws governing international relationships, so-called conflict rules, or choice of law rules. The area of law that regulates the choice of the governing law is called private international law.

The state where the court has its venue (*lex fori*) will identify the governing law through the conflict rules. Some of the national choices of law rules are part of the state law because they are contained in international conventions that were ratified by that state, such as for example The Rome Convention. Some choice of law rules are contained in national legislation for example the Norwegian Act on the Law Applicable to Insurance Agreements of 1992, which is an act regulating choice of law in a specific sector. Other choices of law rules are customary or based on judicial precedents. It is highly desirable

that the various national conflict rules are harmonised and interpreted in a uniform way, for the purpose of predictability<sup>39</sup>.

The most important conflict rule for contracts is the rule of party autonomy, which gives the parties the power to choose in their contract the law that will govern their relationship. The above-mentioned Rome Convention, which constitutes the private international law of all states in the European Union, recognises in article 3 the rule of party autonomy.

International contracts very often contain a clause on choice of law, but sometimes the parties do not exercise their party autonomy. The reasons for the parties failure to choose the governing law may vary between; either the parties have not managed to reach an agreement on what law should be applicable to their contract, or because the parties have forgotten or have not deemed it necessary to make a choice of law, or because the contract is very simple.

However, an international contract is always governed by a state law, but how can the governing law be determined in this situation with a contract between a shipowner and a ship manager, and between a ship manager and a third party?

As already mentioned, the governing law is determined by conflict rules. The first step is therefore to find out what conflict rules are applicable, which are the rules of the *lex fori*. Therefore it will be necessary to determine what forum is or what the forum would be, in case of dispute<sup>40</sup>.

## 4.2 Relationship Between Shipowner and Shipmanager

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<sup>39</sup> Nielsen, Peter Arnt. International privat- og procesret. Copenhagen, 1997, p. 485

<sup>40</sup> Lookofsky, Joseph. International Privatret. Second edition. Copenhagen, 1997, p. 17



This *inter partes* relationship between the Principal (the shipowner) and the agent (the shipmanager) does not give rise to any special comments, because there is only one contract and two parties. However for the further analyse for the other complicated relations, I will briefly go through the general conflict rules within Danish, Norwegian and English law.

#### 4.2.1 Jurisdiction

##### 4.2.1.1 Denmark and Norway

Identification of the state having jurisdiction is important to find out what rules govern the dispute and the contract, but also if there is no dispute, to find out what court would have jurisdiction in the case of dispute, for so to apply the private international law of that court's state to identify the law governing the contract.

The forum is the court of the state that accepts jurisdiction on the case. The jurisdiction is regulated by the civil procedure law (In the example of Denmark -Retsplejeloven and Norway -Tvistemålsloven) and conventions of each state. As a general rule, a court will have jurisdiction if the defendant is resident in that state, but there might be alternative fora, and therefore more than one potential forum, and more potential conflict rules<sup>41</sup>.

In order to prevent this detrimental result, Denmark and Norway have ratified the Lugano Convention of 1998. The Lugano Convention is based on the Brussels Convention of 1968, which is now transformed into a Council Regulation and is now directly applicable in most of the states of the European Community. Norway has ratified the Council Regulation, but

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<sup>41</sup> Lookofsky, Joseph. *International Privatret*. Second edition. Copenhagen, 1997, p. 23

in Denmark the Regulation is not applicable, as a consequence of Denmark's reservations in connection with the Amsterdam Treaty of 1997.

To summarise very briefly the rules of the Lugano Convention in respect of the forum for disputes relating to international contracts, we will have to look at art. 2, which is the general rule there will provide for jurisdiction of the courts in the state where the defendant is resident. Art. 5.1 provides for an alternative forum, the courts of the state where the disputed obligation has been or should have been performed. Art. 17 permit the parties to choose the forum (and choice of forum in the contract is certainly the most preferable alternative to avoid uncertainties).

#### 4.2.1.2 England

The Brussels Convention has acquired legal force in the United Kingdom, which now concerns the questions of jurisdiction. The United Kingdom normally do not participate in the acts because of reservations of the Amsterdam Treaty, but they have the possibility to do so, if they so elect. In the case of the Brussels Regulation the United Kingdom opted in, and the Council Regulation is therefore applicable to them<sup>42</sup>.

In the case of proceedings in England against a defendant domiciled in another European Community state on a matter falling within the scope of the Brussels Convention, those of the 1968 Brussels Convention on Jurisdiction etc. displace English domestic rules of jurisdiction as amended. Where the defendant is domiciled in a state within the EFTA bloc, an English court is required to apply the provisions of the Lugano Convention, which, as mentioned above, is similar, though not identical to the Brussels Convention.

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<sup>42</sup> Cordero Moss, Guiditta. Lectures in International Commercial Law. Oslo, 2003, p. 82

Article 5 of the Brussels Convention confers jurisdiction in matters relating to a contract, on the courts of the place for performance of the obligation in question. Here is one of the most important differences between the Lugano Convention and the Brussels Regulation. While the Lugano Convention does not specify how to determine the place of performance, the Brussels Regulation defines in art 5.1(b) the place of performance as the place of delivery of goods, or where the services are to be rendered.

The convention says that if a defendant is domiciled in a contracting state he must be sued in the courts of that state except where the convention itself permits him to be sued in the courts of another contracting state. If the defendant is not domiciled in a contracting state the jurisdiction of the courts of each contracting state is governed by the law of that state, subject to the provisions of article 16.<sup>43</sup>

In matters relating to a contract a defendant domiciled in one contracting state may be sued in the courts of another contracting state of the place for performance of the obligation in question.

## 4.2.2 Choice of Law

### 4.2.2.1 Denmark and Norway

Once identified the *lex fori*, it will be necessary to look at its private international law. The conflict rules therein will determine what state's law governs the contract and the dispute. As mentioned above the main conflict rule generally is party autonomy. Failing a choice by the parties, the judge will apply the conflict rule set forth in his or her private international law.

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<sup>43</sup> Good, Roy. Commercial Law. Second Edition, England, 1995, p. 1098

In many private international law legislations the most common conflict rule is that of the closest connection. Failing a choice of law by the parties, the contract is to be governed by the law with which it has the closest connection<sup>44</sup>.

Norway has not codified the Rome Convention and the rule about the “closest connection”, Norway has also the main conflict rule of party autonomy, but in failing of a choice made by the parties the legal doctrine and practice are unanimous in the application of the so-called individualising model, according to which a contract has to be regulated by the law of the state with which it has the closest connection. The Supreme Court has laid down this criterion in 1923 in a case regarding maritime law, the so-called “Irma-Mignon Rule”<sup>45</sup> or the “individualising method”. Here the court is supposed to analyse the dispute in its individuality, examine all the circumstances, the dispute more closely belongs. This gives a wide discretion to the judge, and is therefore positively considered by the courts, which may reach a solution that they consider just in the specific case. As a comment this high degree of discretion is strongly criticised for example by Sjur Brækhus in “Choice of Law Problems in International Shipping”<sup>46</sup>, namely because of the lack of predictability, which is an important goal for the International harmonisation.

In Denmark the question about choice of law problem, will be regulated by the Rome Convention, which they have ratified, cf. article 1.2. (f), because Denmark has not ratified the Hague Convention concerning agency. The Rome Convention has a main rule of party autonomy, which gives the parties the possibility to choose the governing law in the contract article 3. Failing a choice of law, the Rome Convention has the criterion of the closest connection article 4.1 but find it necessary to give it specific form and objectivity by laying down a series of presumptions, article 4.2: a contract is presumed to have the

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<sup>44</sup> Cordero Moss, Guiditta. Lectures on International Commercial Law, Oslo 2003, p. 82

<sup>45</sup> ND 1923.289 NSC *Irma-Mignon*

<sup>46</sup> Brækhus, Sjur. Sjørett, Voldgift og Lovvalg. Oslo, 1998, p. 21

closest connection with the state in which the party who is to effect the most characteristic performance (the agent) has his habitual residence or its central administration at the time of conclusion of the contract. To this the Rome Convention provides for exceptions to the presumptions; if the characteristic performance of the contract cannot be determined and if all the circumstances of the case show that the contract has a closer connection with another state.

The Danish court has been criticised of choosing a loose interpretation as a weak presumption, because they seem to have applied the principle of the closest connection rather than the presumption of the habitual residence of the characteristic performer<sup>47</sup>.

Like other contractual relationships, the relationship *inter partes* between the principal and the intermediary in choice of law concerning commission and agency covered by the Law Applicable to Contractual Obligations.

#### 4.2.2.2 England

The Rome Convention was given effect in the United Kingdom by the Contracts Act 1990, and since it is universal in application it displaces the common law conflict rules relating to contracts except as regards matters excluded from the scope of the Convention. Therefore the applicable law will be the same as described above under the Danish rules according to the principle of party autonomy and in failing of choice of law in the contract, by the law of the country with which it is most closely connected<sup>48</sup>.

When it is determined which countries choice of law rules there will apply, the dispute will be determined after the general rule for that type of contract, for example the transportation

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<sup>47</sup> Lookofsky, Joseph. *International Privatret*. Second edition. Copenhagen, 1997, p. 74

<sup>48</sup> Good, Roy. *Commercial Law*. Second Edition, England, 1995, p. 1121

rules, like the Maritime Code, in a transport agreement in Scandinavia, and the Sales of Goods Acts in agreements of sale and purchase.

### 4.3 Relationship Between Shipmanager / Shipowner and Third Party

#### 4.3.1 Choice of Law in Relation to Determination of The Person WHO is Bound as Contractual Party Under The Contract with Third Party.

Special cases occur if the agreement with a third party concerning for example reserving bunkers or employing new employees has been entered into by agent, i.e. a shipmanager. Which country's rules shall apply to the decision of whether the shipowner or the shipmanager is obligated as a contracting party towards the third party?

When deciding whether the shipowner is bound by legal transactions made by someone else, e.g. abroad and on behalf of the shipowner, either the consideration to the principal or to the third party may be emphasised. Finally, the question may be considered to be decided upon according to the rules generally applicable to the contractual relationship, i.e. the rules and considerations regarding the laws of obligations and contracts described in the above section 2.

If the agent resides, for instance, in another country or if he acts in his own name as a commission agent, the rules of the country in which the agent applies his authority should be decisive for determining the mere existence of such authority and, in the affirmative, the extent of it. If the agent acts in his own name, the third party has no possibility at all to investigate the rules of the principal's country. And if the agent resides in another country, consideration and safety, as I will describe further below, call for the applying of the rules of this country while no consideration is taken to the principal who, when employing an agent or manager in the country in question, had the possibility to take precautions in relation to the country's rules.

If the agent only occasionally enters into contracts abroad, the question becomes more complicated. Authors like Borum and Philip<sup>49</sup> state that in such cases it may be relevant to apply the rules of the principal's domicile in addition to the contract's articles. By doing this, the principal will avoid the risk in connection with sending an agent to a country the rules of which he is not familiar with. A special need to protect the principal applies to those cases in which the agent acts in a country in which the principal never considered the agent to be acting at all. However, the consideration to any third party who cannot be considered to be familiar with the principal's rules calls for applying the rules of the country in which the agent acts, i.e. where their mutual agreement is made. These rules are not necessarily identical to the contract's articles. However, there is some confusion in the statements of Borum and Philip as they mention a 1952 convention draft prepared by the International Law Associations which points to the rules of the country in which the agent acts. Alan Philip states that this solution may very well be the correct one when reciprocity is ensured through convention. If this is not the case, the consideration to the principal still seems more important and the law of his domicile – which is where a lawsuit concerning those questions is most likely to take place – should therefore apply to the decision concerning the existence and extent of the authority.

Lando<sup>50</sup> rejects the application of the principal's domicile referring to the fact that whoever acts through an intermediary when doing business abroad is more expected than any third party to be familiar with foreign rules concerning the authorities and powers of an intermediary. Therefore, he advocates the rules of the place of action but points out that this notion is not unequivocal since a distinction is necessary between the place of negotiation, the intermediary's business premises and the place of effect, like the area in which the intermediary operates business. The place of effect will be identical with the country or area of law in which the third party's business premises are situated or, if there

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<sup>49</sup> Borum, O.A. *Lovkonflikter*. Forth edition. Copenhagen, 1957, p. 164ff and Philip, Allan. *Dansk international privat- og procesret*. Third edition. Copenhagen, 1976, p. 304.

<sup>50</sup> Lando, Ole. *Kontraktstatuttet, Danske og fremmede lovvalgsregler om kontrakter*. Third edition. Copenhagen, 1981, p. 229

are no such premises, the third party's residence, provided that this country and area of law falls within the territory of the intermediary. Those three places may be identical, or they may be situated in three different countries.

If the shipowner or the shipmanager is bound towards the third party will be decided in accordance with the special conflicts of law rules regarding agency and other forms of legal representation. The outcome will be one of the following: (1) The shipmanager is obligated towards the third party. (2) The shipowner is obligated towards the third party. (3) Both the shipmanager and the shipowner are obligated towards the third party.

#### 4.3.2 Jurisdiction and Choice of Law in Relation to Determination of Third Party's Claim Against The Shipmanager

The legal relationship between the third party and the shipmanager is – in a case like this where the relationship may be considered contractual – comprised by, for example the Rome Convention as regards Denmark and England. This will be repeating the above and since no questions of special interest appear from this, it will not be commented any further in the present text.

However, the Hague Convention concerning agency, which as mentioned above has not yet been ratified by neither Norway, nor Denmark, nor England, contains some reasonable and useful considerations which will be described below.

The relationship between the shipmanager as a possible contracting party and a third party must according to Article 15 of the Hague Convention concerning agency, the rules applicable under Article 11-14 in the relationship between the principal and a third party also apply to the relationship between the agent and a third party. The background for this rule is that it was considered desirable to apply a single country's rules to both external legal relations resulting from the agency. When the agent exceeds his authority or acts without any authority, the third party has no contractual claim against the principal and, likewise, the third party cannot be considered having obtained any contractual claim against the agent. These matters imply that in most cases the third party's claim against the



agent should be considered a claim in damages which is why the relationship is not comprised by, e.g., the Rome Convention, cf. Article 1(1). However, if the relationship can be considered contractual, it must be assumed that Article 15 of the Hague Convention concerning agency comprises the relationship.

Hence, the choice of law is made according to the rules of Article 11-14 of the Hague Convention concerning agency. In practice the choice of law will probably turn out in favour of the rules of the place of action which is in accordance with Danish theory up till now<sup>51</sup>. The probably very few cases in which the legal relationship between the agent and the third party is considered contractual, e.g. the Rome Convention must be applied until the Hague Convention concerning agency is ratified in Denmark. However, the aim of applying the Rome Convention should be that the choice of law will be the same as applied according to Article 15 of the Hague Convention concerning agency, cf. Article 11-14. Such assessment will probably be possible in most cases in accordance with Article 4.1, 4.2. and 4.5. of the Rome Convention.

#### 4.3.3 Jurisdiction in Relation to Determination of Third Party's Claim Against Shipowner

As mentioned in section 4.1.1 of this thesis, Denmark and Norway have ratified the Lugano Convention of 1988, and the United Kingdom has ratified the Brussels Convention and now the Council Regulation of identification of which state having jurisdiction.

As regards the question of where the shipowner as the defendant can be sued, it can be summarised very briefly that the general rules of the Lugano Convention and the Brussels Convention, including the Council Regulation, in respect of the forum for disputes relating to international con-tracts, will point to Article 2 of the conventions. Article 2 is the

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<sup>51</sup> Philip, Allan. Dansk international privat- og procesret. Third edition. Copenhagen, 1976, p. 305.

general rule, which will provide for jurisdiction of the courts in the state where the defendant is resident. But where the defendant's residence is actually situated is subject to discussion because of different definitions in Danish, Norwegian and English law.

As mentioned in section 4.1.1, Article 5.1. provides for an alternative forum, which can be the courts of the state where the disputed obligation has been or should have been performed. Article 17 permits the parties to choose the forum (and choice of forum in the contract is certainly the most preferable alternative to avoid uncertainties).

In this special relationship of a ship management agreement with a shipowner hiring a manager to enter into contracts with a third party in terms of e.g. transportation, employment of employees or purchase of bunkers, Article 5, no. 1 of the judgments convention concerning jurisdiction of a company's branch office may be applied and thereby supplement Article 2 concerning the jurisdiction of the parent company. As described in the introduction in section 1, many ship management companies have a certain connection, maybe shareholding interest, with the shipowning company. According to Article 5, no. 5 proceedings concerning the operation of a branch office, an agency or a similar business can be commenced in the country of this branch office etc. if the parent company, i.e. the shipowner, resides in a different member state from the one of the branch office etc. This provision is equivalent to section 237 of the Danish Civil Procedure Act. The jurisdiction of the company's branch office is probably not mutual and hence, the company cannot claim this jurisdiction in proceedings comprised by the provision. It is assumed that the jurisdiction of the company's branch office cannot be applied to cases between the parent company and the branch office.

As mentioned already, it is a basic condition for applying Article 5, no. 5 that the parent company resides in a member state different from the one of the branch office etc. If the parent company resides in a third state, the national rules concerning international jurisdiction must be applied instead according to Article 4.1. In Denmark's case the relevant rules are found in section 238.2. of the Procedure Act, cf. section 246.1.

It is considered necessary to note that the jurisdiction of a company's branch office contains a number of notions, which are not defined in the judgments convention. The court has established that the notions shall be subject to an independent EU law

interpretation in order to obtain a uniform application of the jurisdiction of a company's branch office. The background for this is that due process protection and equal rights between the parties' rights and obligations in relation to the possibility of derogating from the parent company jurisdiction of Article 2 is increased. Thus, the court has defined a notion, which demands firm business operation and requires a reasonable independent management competence. Thus, a jurisdiction of a company's branch office is taken to mean that a centre for business operations exists, and that this centre externally appears to be a permanent representation of the parent company with a management and materially equipped to be able to negotiate with a third party in such a way that this third party, even though aware that a legal connection with the parent company residing abroad may appear, does not need to approach this parent company but may enter into contracts on the centre for business operations of the representation.

It is no condition for applying Article 5, no. 5 of the judgments convention that the obligations which the branch office etc. has undertaken in the name of the principal is performed in the member state in which the branch office etc. resides. However, it is a condition for applying the jurisdiction of the company's branch office etc. that the case concerns the operation of the branch office etc. This notion of operation is also subject to an independent EU law interpretation. According to the court the notion "operation" – besides the actual management of the branch office etc. – comprises any disputes concerning the obligations, which the branch office etc. has undertaken for the parent company, and any disputes regarding non-contractual damages resulting from the business of the branch office etc.

The above examination of the jurisdiction basis concerning e.g. commencing proceedings at the defendant's home court or the jurisdiction of the company's branch office etc. in the situation shipowner versus a third party is, under the conventions and the regulations,

applicable to Danish, Norwegian and English law<sup>52</sup>. Furthermore, interpretation of the rules should be uniform due to the objective of EU harmonisation.

#### 4.3.4 Choice of Law in Relation to Determination of Third Party's Claim Against Shipowner

The relationship between the principal and a third party comprises first and foremost the question of the extent to which the principal is bound toward the third party as a result of the agent contract or actions in general. Subsequently, the area of the rules applied regulates existence and extent of the agent's authority.

In this relation with the shipowner as a possible contracting party a special problem arises in terms of choice of law. The reason for this is that three parties and two contractual relationships may be relevant for the determination of choice of law and jurisdiction.

When listing the rules for the choice of law regarding the relationship of principal and agent, focus may be put on the rules of the principal's domicile, the rules of the place in which the agent acts, often the rules of third party's country of residence, the rules applying to the contract between the principal and the agent and, finally, the rules under which the contract between the principal and the third party is made.

Case law regarding this question is sparse and Danish case law only contains one example, namely the judgment of SHT 1923.209. This judgment did not take a clear position on the relationship but presumably, the court found that the question regarding the extent of the authority should be decided according to the rules of the agent's home court<sup>53</sup>. Since it is

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<sup>52</sup> Nielsen, Peter Arnt. *International privat- og procesret*. Copenhagen, 1997, p. 168 and Hertz, Ketilbjørn. *Jurisdiction in Contract and Tort under the Brussels Convention*, Copenhagen, 1998, p. 307.

<sup>53</sup> Svønné Schmidt, Torben. *International formueret*. Second edition. Copenhagen, 2000, p. 261

not possible on the basis of this single judgment to list a satisfactory set of rules of the choice of law regarding the extent of the authority, the elaboration of such rules has been a theoretical task supported by the theory and practice of other countries.

There is general agreement<sup>54</sup> that when listing the rules of choice of law regarding agencies, it is decisive to make a balancing between the interests of the principal and the third party based on the consideration, which is the background for the material rules. An essential consideration for the parties is the need for predictability. For the principal it is essential to be able to control the extent to which he will be bound by the actions of the agent. Hence, the principal will achieve the most desirable legal position if the legal relationship between himself and the third party is subject to the rules of the principal's domicile or, if this does not apply, the principal's address. Application of the contractual rules, i.e. the rules under which the contract between the agent and the third party is made, will not imply predictability for the principal as the principal is normally not able to make provision against the agent agreeing with the third party on the rules under which to make the contract. Application of the contractual rules will result in the agent obtaining the possibility of determining the extent of the authority in connection with the choice of law. Application of the rules under which the contract between the principal and the agent is made will often result in the third party having no influence on the choice of law. If the third party does not know the principal's domicile or address, applying the rules of the principal's domicile or address will leave the third party forming a contract with no knowledge at all of the contract's actual legal limitations. The third party is, essentially, interested in predicting which rules will apply to the contract between himself and the principal. The best way of achieving this is to apply a fixed rule stating that the rules of the third party's domicile or address shall be applied. In this way the principal's interest in determining the extent of the authority in advance is rendered impossible.

The complicated question of finding a solution in relation to the choice of law in connection with agencies is not answered anywhere in case law or legislation but some

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<sup>54</sup> Nielsen, Peter Arnt. *International privat- og procesret*. Copenhagen, 1997, p. 169

suggestions for a future solution are presented in literature. Lando's answer<sup>55</sup> is that fixed rules for the choice of law should be avoided; instead, only presumption rules should be defined. As a basic rule, Lando advocates the application of the rules of the place of action. The rules of the place of effect can also be applied to those cases in which the intermediary permanently is to cover a territory of one or more areas of law and, hence, the rules of the country of the third party's address should be applied, provided that this is part of the territory and notwithstanding if the intermediary has acted from his own place of business or any other country. According to Lando, though, the rules of the intermediary's place of business should only be applied to those special cases in which the intermediary's territory is not geographically limited and negotiations have been conducted in a place different from both the intermediary's and the third party's place of business. Finally, Lando states that the principal should have the possibility of clearly expressing to the third party that the intermediary's powers are subject to specific rules or where the third party's claim for this must be considered approved by the principal.

However, there are several objections against this perception. Obviously, the judge has the possibility of derogating from the suggested presumption rules thus disregarding the need for predictability wanted by the principal and the third party. In addition, it seems rather drastic to reject the application of the rules of the principal's place of business even though it may be true that the principal, being the party who makes use of an intermediary in international relations, would be more exposed than the third party to the risk of the authority being more extensive than expected. Also, the place of negotiation will often be chosen by mere incident, which is why this place should be applied only as a factor of attachment when supported by other attachments.

Another answer to the question could be the application of fixed rules for the choice of law as suggested by Philip<sup>56</sup>. The Hague Convention concerning agency was elaborated in

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<sup>55</sup> Lando, Ole. *Kontraktstatuttet, Danske og fremmede lovvalgsregler om kontrakter*. Third edition. Copenhagen, 1981, p. 232

<sup>56</sup> Philip, Allan. *Dansk international privat- og procesret*. Third edition. Copenhagen, 1976, p. 304

1978 but it has not yet been carried into effect in Danish legislation. It is presupposed that the Hague Convention concerning agency is in good accordance with Danish legislation and Svenné Schmidt<sup>57</sup> onwards states that the convention to a certain degree could be viewed as an expression of current legislation, at least in terms of the convention's rules regarding the choice of law for the relationship between the principal and the third party. Svenné Schmidt further states that this solution is very plausible, especially in relation to the need for predictability in international agencies.

One last answer, which I believe in, is the very obvious one of trying such a case concerning agency and choice of law before the court, partly like the case SHT 1923.209 but with the addition that in this new case, a useful judgment should be available in order to define some satisfactory rules of choice of law.

Since a reasonable solution could be predictability in the form of fixed rules for the choice of law, I find it interesting and necessary to describe the legal relationship between the principal and the third party if the Hague Convention concerning agency is ratified in Danish, Norwegian and English law. Article 11-14 of the convention regulate this relationship and no conflict will occur with the rules of the Rome Convention because the latter does not apply to the relationship between the principal and the third party, cf. Article 1.2. (f).

The theoretical starting point of The Hague Convention concerning agency is that the principal and the third party are in a relationship of party autonomy. However, Article 14 mentions some conditions for agreeing on the choice of law. According to Article 14, a choice of law is approved if the principal or the third party has stated in writing that the rules of a particular country shall apply and the other party has approved this. Three requirements for the agreement of choice of law are stated. First, either party must state in writing that the question of authority is to be decided under the rules of a particular country. Second, the agreement of choice of law must probably be specified to apply for

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<sup>57</sup> Svenné Schmidt, Torben. *International formueret*. Second edition. Copenhagen, 2000, p. 265ff

the actual agency and thus, it is not sufficient to state that the contract in its entirety is subject to the rules of a specific country. And third, the choice of law must be clearly accepted by the other party, however this acceptance does not have to be in writing.

The choice of law clause will normally be stated by the principal in a written authority for the third party to see or it will appear from the contract with the third party. If the choice of law clause is present in a standard contract, the general rules for disregarding standard terms in *lex causae* for the authority, i.e. the rules chosen for the agency, may cause disregard of the choice of law. That the validity of the agreement of choice of law is to be decided according to the rules applicable if the agreement of choice of law was valid, follows from Article 11 of the Hague Convention concerning agency according to which the rules chosen comprise, e.g., questions on the existence and extent of the authority compared to Article 3.3. of the Rome convention (cf. also Article 8, 9 and 11).

If the agent without authority has accepted a clause of choice of law, which complies, with the requirements of Article 14, the said Article provides that such clause is not binding since the choice of law is only to be made by the principal and the third party. This choice of law made by the principal and the third party may be disregarded if international mandatory rules are to be applied.

If no choice of law has been made, Article 11 of the Convention shall apply as it contains a varied set of rules for choice of law made in order to consider the need for the above-mentioned predict-ability for the principal and the third party. The general rule is that rules of the country of the agent's place of business shall apply, cf. Article 11.1. This general rule is, however, not applicable to four specific cases as it is replaced by the rules of the country of the agent's acting, cf. Article 11.2. Primarily, the rules of the place of action are applied to the two cases in which the principal or the third party's place of business or, if not applicable, address in the country of action if the agent acted in the name of the principal, cf. Article 11.2.(a) and (b). In addition, the rules of the place of action are also applied if the agent acted in an exchange or an auction or if the agent has no place of business, cf. Article 11.2.(c) and (d). Those four exceptions from the rules of the country of the agent's place of business imply that the convention, in theory, could have been based on a general rule on applying the rules of the place of action when the place of action is in a country in which one of the three parties has its place of business. The reason for



applying the rules of the place of action in the four cases of Article 11.2. is that the circumstances mentioned in Article 11.2.(a-d) provides sufficient attachment to the place of action which is often chosen by incident and thus generally not relevant as place of attachment.

Finally, it must be mentioned that when determining the country's applicable choice of law rules, the dispute will be determined according to the general rule for the relevant type of contract. Examples of these types of contracts are the rules of transportation, the Maritime Code in a transportation agreement in Scandinavia, or the Sales of Goods Act in agreements of sale and purchase.

## 5 CONCLUSION

In today's shipping a considerable number of players have entered without any first-hand knowledge of the sector, and therefore it is found expedient to delegate certain aspects of their business to other competent players – i.e. shipmanagers.

In ship management there is no single set of rules, but the individual functions of the shipmanager may have their respective legal regulation. Thus there are rules governing the relation between the shipmanager and the shipowner, and rules governing the relation to third parties, whether in tort or in contract.

### 5.1 Conclusion on 2nd Section

The ship management agreements govern the relationship between the shipmanager and the shipowner, and may vary in several ways aside from the individual terms and conditions. The SHIPMAN 98 form prepared by BIMCO is a good example of ship management agreements. It is a carefully prepared and balanced document, used by many in the business, and it is an "agreed document" negotiated by both the shipowner and the shipmanager. The importance of SHIPMAN 98 as a standard agreement for third-party ship management cannot be underestimated. The absence of national or international background law covering third-party ship management makes the contract clauses increasingly important, not only in providing contractual clarity, but also in the setting of standards in an industry.

However these contractual regulations will in case they are incomplete be supplemented by the governing laws general rules of contract and agency, and other non-statutory rules. Depending on the governing law might be Danish, Norwegian or English, there are a difference in the consequences. For example within Danish and Norwegian law the main remedy of breach of contract is specific performance while in English law it is claim of damages. Danish and Norwegian law however states that in some situations it is not

suitable with claim of specific performance. This is the case with ship management agreements, where it would not be logical to claim specific performance.

## 5.2 Conclusion on 3rd Section

Within Danish and Norwegian law, an absolute requirement in order for the shipmanager not to be bound is that he actually acts in the name of the shipowner. It is important that the shipmanager at the conclusion of the contract with a third party, clearly states that he merely acts as the shipowner's representative and does not want to enter into a legal relationship with the third party. If the shipmanager has made it clear to the third party that he acts as an agent and who the principal is, he will not be bound by the transactions and therefore he will not be considered as the contracting party. After a review of the rulings, it seems that a party may be bound as a contracting party or obligated in accordance with the contractual rules even if the shipmanager according to a traditional perception has not made any promises and just acting as an agent. The rulings states that a shipmanager will become liable if he not in a sufficiently clear way emphasize the role of the parties and that he merely acts as an agent for another party which is obligated instead. The rules of contract law lays down obligations to the manager that he must act with loyal behaviour, fair conduct and reasonable preparation of the relationship between the parties.

In English law when the shipmanager contracts expressly as agent for a named or identifiable shipowner, third parties contract with the shipowner, not the shipmanager. If a shipmanager signs a contract in his own name, he will become liable unless it is clear from the document that he is signing in his capacity as agent. Like it is stated in the rulings, it is not suffice to ad "agent" or "manager" to the contract, but it must be clear that he is acting in a representative capacity.

Where the shipmanager clearly states that he is acting on behalf of the principal but without identifying the principal, he will normally still not be liable.

The fact that a shipmanager is "known" to be a manager is insufficient to create a proper agency relationship with third parties.

The difference between Danish and Norwegian law and English law is not big. Both law systems states that a shipmanager must make it clear that he is acting as an agent, but in English the name or identity of the principal does not have to be written in the contract with third party, compared with Danish and Norwegian law where the shipmanager has to tell who the principal is.

Within commission under Danish and Norwegian law the shipmanager still acts on behalf of the shipowner, but in his own name and becomes the third party's other contracting party. There will be no legal relationship between the shipowner and the third party. This makes the shipmanager responsible and liable for the transactions. It is not until the shipmanager for example becomes insolvent that the representation relation has a certain practical significance for the third party because the shipowner here will be able to have a direct claim against him, and that he might risks to be met with the claim twice.

The shipowner may in English law obtain rights and obligations upon the agent's transactions without third party knows his identity. Both shipowner and shipmanager becomes liable and third party may thus be sued or sue both in accordance with the agreement. In this respect it differs sharply from the Danish and Norwegian law, which treats the principal's authority to the agent in such cases as a purely internal mandate, which neither confers rights nor imposes liabilities on the third party.

### 5.3 Conclusion on 4th Section

It is difficult to provide a precise overview of current legislation applying to international agency law in terms of jurisdiction and choice of law, and this is exactly what has been the question during recent decades. The reason for this derives from several different problems.

First: No satisfactory case law exists. There is only one single judgment, SHT 1923.209, in which the court applied the rules of the agent's place of business to the relationship

between the principal and the third party, and no specific rules for the choice of law are derived from this. Second: Opinions differ significantly on the theory of which legal position is the most appropriate. Lando<sup>58</sup> suggests that some presumption rules should be defined while Philip<sup>59</sup> recommends fixed rules for the choice of law. Svénné Schmidt<sup>60</sup> believes that the Hague Convention concerning agency to a wide extent corresponds to current legislation, especially in the case of the legal relationship between the principal and the third party. And third: It is unclear if Denmark, Norway and England will ever ratify the Hague Convention concerning agency. A Danish, Norwegian and English ratification of the Hague Convention concerning agency will, thus, significantly clarify the legal position in relation to the sparse case law and the different opinions which have been described in theory. Also, the need for uniform rules of choice of law and predictability in this area, which is practically important in terms of international agencies, call for a ratification of the convention.

Hence, it is not possible to provide a clear answer to the problem of this thesis but it could be possible to find a solution through a leading case of general public importance concerning the problem of choice of law between a principal and a third party. In such case the judge could look at the theories from literature, which might help him in making a judgment useful to define some clear and satisfactory rules for the choice of law.

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<sup>58</sup> Lando, Ole. *Kontraktstatuttet, Danske og fremmede lovvalgsregler om kontrakter*. Third edition. Copenhagen, 1981, p. 232

<sup>59</sup> Philip, Allan. *Dansk international privat- og procesret*. Third edition. Copenhagen, 1976, p. 304

<sup>60</sup> Svénné Schmidt, Torben. *International formueret*. Second edition. Copenhagen, 2000, p. 196

## 6 ANNEXES

### 6.1 Books

- Beatson, J. Anson's, Law of Contract. 28th edition, New York, 2002
- Berdal, Mimi K, Berg, Marianne. Funksjonsfordeling og Rederidrift. Oslo, 1987
- Borum, O.A. Lovkonflikter. Forth edition. Copenhagen, 1957
- Bryde Andersen, Mads. Enkelte Transaksjoner, Aftaleretten III. Copenhagen, 2004.
- Bryde Anderson, Mads and Lookofsky, Joseph. Lærebog i Obligationsret I. second edition, Copenhagen, 2005
- Brækhus, Sjur. Sjørett, Voldgift og Lovvalg. Oslo, 1998
- Cordero Moss, Guiditta. Lectures on International Commercial Law, Oslo 2003
- Falkanger, Thor. et.al. Scandinavian Maritime Law. Second edition, Oslo, 2004
- Gomard. Obligationsret, first part. Third edition. Copenhagen, 1998
- Good, Roy. Commercial Law. Second Edition, England, 1995
- Grönfors, Kurt. Avtalslagen. 1984
- Hertz, Ketilbjørn. Jurisdiction in Contract and Tort under the Brussels Convention, Copenhagen, 1998
- Lando, Ole. Kontraktstatuttet, Danske og fremmede lovvalgsregler om kontrakter. Third edition. Copenhagen, 1981
- Lookofsky, Joseph. International Privatret. Second edition. Copenhagen, 1997
- Lynge Andersen, Lennart. Madsen, Palle Bo. Aftaler og Mellemmænd. Forth edition, Copenhagen, 2001
- Nielsen, Peter Arnt. International privat- og procesret. Copenhagen, 1997
- Nielsen, Peter Arnt. International Handelsret, Tekster. Copenhagen, 2005
- Philip, Allan. EU-IP. Second edition. Copenhagen, 1994
- Philip, Allan. Dansk international privat- og procesret. Third edition. Copenhagen, 1976
- Svenné Schmidt, Torben. International formueret. Second edition. Copenhagen, 2000
- Treitel. Remedies of Breach of Contract. England. 1988
- Willingale, Malcolm. Ship Management. Third edition. Great Britain, 1998

## 6.2 Commission Regulations

Lugano Convention of 16 September 1988

Brussels Convention of 1968

Council Regulation (44/2001)

Rome convention of 19 June 1980 on the Law Applicable to Contractual Obligations

Hague- convention of 14 March 1978 on the Law Applicable to Agency.

## 6.3 Miscellaneous Documents

Marius nr. 155. Pool samarbejde, Management, åbne register. 1988

BIMCO – SHIPMAN 98: The Baltic and International Maritime Council Standard Ship Management Agreement

BIMCO´s homepage about comments to SHIPMAN 98

Palmgren, Nils-Gufstaf. SHIPMAN 98. Scandinavian Shipping Conference, 1999

## 6.4 Articles

Bogdan, Michael. Intermediaries in Shipping: Choice of Forum and Choice of Law. Lund University.

Gorton, Lars. Ship Management Agreements, Journal of Business Law. 1991

Lando, Ole. Obligationsretlige loves sprog og struktur. U.2006B.239

Selvigs comments to case ND 1980.181 NH *Fekete* in ND 1980. VI ff.

Selvig, Kontraktsret til studiebruk, Hefte 1, 1997

## 6.5 Table of International Instruments

Principles of European Contract Law (PECL)

Unidroit Convention on Agency in the International Sale of Goods

## 6.6 Table of National Legislation

Danish Act. nr. 243 af 8. maj 1917 om Kommission handelsagentur og handelsrejsende.

Norwegian Act av 30. juni 1916 nr. 1 om Kommisjon

Norwegian Act on the Law Applicable to Insurance Agreements of 1992

Danish Contract Act, nr. 781 of 26 august 1996

Danish Civil Procedure Act. (*Retsplejeloven*)

Norwegian Civil Procedure Act. (*Tvistemålsloven*)

Maritime Code (the Norwegian), 20 of june

English Unfair Contract Terms Act 1977

English Contracts Act, 1990

English Jurisdiction and Judgment Act, 1982

## 6.7 Table of Judicial Decisions

ND 2003.83 FH *Linda*

ND 1993. 444 NH *Scanpower*

ND 1993.353 Hålogoland lagmannsret *Aurita*

ND 1980.181 NH *Fekete*

ND 1923.289 NSC *Irma-Mignon*

SHT 1923.209 (About conflict rules)

Lloyd's Rep. 602. *Maritime Stores Limited v. H.P. Marshall & Co. Ltd.* (1963)