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Ship collision liability within the offshore wind farm area

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1 Chapter 1: Introduction

1.1 Research question and background

The aim of this thesis is to provide an answer to the issues that may arise in term of liability when a ship collision occurs within the offshore wind farm area.

In a context of sustainable development numerous offshore wind farm projects are launched. In fact, offshore renewable energy is the fastest growing sector in Europe¹. Ambitious governmental policies, the prospect of green jobs creation and a potential answer to climate change are among the main drivers behind this booming industry.

As of today, this industry is still somewhat in its infancy. Indeed, if one of the first European offshore wind project took place in Denmark during the 1970s the offshore renewable market remained relatively untapped due to the high costs to run a wind farm, which in turn lead to a low turnover. However, thanks to recent technological breakouts, costs have dropped by 75% over the last 10 years². As a result, numerous market players are looking to develop offshore wind farms.

Unquestionably new markets lead to new legal challenges. For instance, with the development of offshore wind farms shipping lanes are bound to be impacted: sea space will mechanically reduce, and traffic will be denser. Moreover, offshore wind farms relying on fixed structures must be relatively close to coastal zones as the sea is sufficiently shallow in those areas. As a result, risks of collision are becoming a source of concern and should be addressed, not to mention that one of the most severe risk in relation with offshore structures is ship collision³.

Those collisions can happen for many reasons⁴:

- it can be a collision between a vessel working in the area and a wind turbine (offshore supply vessels for installation/maintenance operations),
- it can be a collision a between a vessel passing through the wind farm (navigation error, technical failure from the engine, heavy weather),
- it can be a collision between two vessels working in the wind farm area (offshore supply vessels for installation/maintenance operations).

Lastly, ship collision with offshore structures, such as wind farm assets, is considered to have a rather high probability of occurrence⁵. It is therefore crucial to study the legal regime for collision liability.

The risk of collision is even greater since in Norway it has not been decided yet if smaller ships — whom are not part of the wind farm operations — can navigate through offshore

¹ European Maritime Spatial Planning Platform, *Conflict fiche 7: Maritime transport and offshore wind*.

² Michel Revol, *Batailles pour l'éolien en mer*, Le point, 28 octobre 2021.

³ Jørgen Amdahl, *Ship collision with offshore structures*, p.495

⁴ Report on Risk Mitigation in Multi-Use Offshore Wind Farms.

(https://www.topsectorenergie.nl/sites/default/files/uploads/20210329_RAP_Risk_Mitigation_Multi-Use_Offshore_Wind_Farms_MARIN_F_compl..pdf)

⁵ Amdahl, *Ship collision* p.495

wind farms⁶. As seen in other countries located in the North Sea such as Scotland and the Netherlands smaller vessels, in particular fishing vessels, have a right to navigate through offshore wind farms⁷. It is therefore a possibility that should be considered, and as such a good understanding of the ship collision liability within the wind farm area is even more important to ensure good coexistence between the different activities that may be conducted in the said area.

To better understand the thesis a definition of the offshore wind farm shall be given: Pursuant to the Offshore Energy Act no.21 of 2010, offshore wind farms are installations at sea which act as energy plants to produce and transfer electricity to the grid⁸.

The ship collision liability shall be treated in respect with collisions with other ships (Chapter 2), and with collisions with wind farm assets (Chapter 3). The potential cargo claims arising from a ship collision will be treated separately (Chapter 4). Finally, a special liability regime provided under contract for ship collision within the offshore wind farm will be introduced (Chapter 5).

1.2 Methodology

This thesis aims to provide existing legal solutions to new issues. To do so this study will be based on doctrinal legal research by using cases, statutes, regulations or standard contracts used in the offshore industry. This is because, as this thesis will introduce, numerous legal solutions already exist and provide for collision liability that can be used in the event of a collision between ships in the offshore wind farm area. Moreover, standard contracts have been developed to answer the needs of the offshore industry in relation to the collision liability when it comes to more complex scenarios.

This study will also be based on a comparative legal study when addressing the issue of collision liability when a ship collides with a wind farm asset. Indeed, if collision liability between ships is well established both under tort or contract it is not the case when a collision arises between a ship and a wind farm asset outside a contractual relationship. The comparative study conducted will try to examine the different outcomes possible depending on the jurisdiction in an attempt to provide for relevant recommendations to address more efficiently this issue.

This thesis is meant to be conducted with a Norwegian perspective and as such the legal doctrine will be mostly based on Norwegian sources and practices. However, from time-to-time foreign sources might be used to illustrate a point or when it is necessary to conduct the comparative study.

Regarding the geographical scope, this thesis intends to address offshore installations in the North Sea and Barents Sea.

⁶ The Offshore Energy Act no.21 of 2010 solely provide for general guidelines. Pursuant to §5-2 of the act “the Ministry may issue regulations on safety zones with a ban on activity in a specific area in and around energy facilities that are covered by this Act », no further indications are given (translated from Norwegian by author).

⁷ European Maritime Spatial Planning Platform website (<https://www.msp-platform.eu/sector-information/offshore-wind-and-fisheries>)

⁸ The Offshore Energy Act no.21 of 2010, Kapittel 1 (§1-4) (translated from Norwegian by author).

1.3 Limitations

The current state of the law and offshore contracts results in the offshore wind farm industry resorting to adapt existing legal solutions to new challenges. However, with the development of this industry the regulators and private actors are called to develop industry-specific legal solutions⁹. As such, this thesis is limited to introduce existing issues and solutions that are subject to change. For instance, existing offshore contracts for offshore wind farms are, to a certain extent, based on standard onshore-industry contracts, and as such the risk — in the event of a collision — is not adapted and must be shifted through amendments in the contract to tailor these onshore contracts to the offshore wind farm projects. This can lead to inconsistencies in the liability regime provided contractually. To address this issue the providers behind these standard contracts are looking to launch a special set of provisions for the offshore wind farm industry¹⁰.

Furthermore, Offshore wind farm projects involve some spatial planning. The North Sea being a densely used marine space the inception of a wind farm requires to allocate an exclusive space to ensure safety at sea. Such an urban planning falls outside the scope of this thesis; however, the concept needs to be addressed to better understand where the risks of collision may come from.

A safety zone is a geographical belt around an offshore wind farm that is intended to act as an exclusive spatial allocation for the wind farm. As such, commercial ships do not have the right to navigate within the safety zone, the access to the zone is reserved to ships contracted to work within the wind farm area. Nonetheless, as this thesis will demonstrate, if a safety zone enhances the prevention of collision risks this is not sufficient to prevent them. Moreover, the current state of the law provides little answers when it comes to the issue of smaller ships being able to navigate through the safety zone or not.

⁹ For example, the charterparty WINDTIME has been specifically drafted for the needs of offshore wind farm operations. This standard form will be studied in this thesis.

¹⁰ <https://www.kvale.no/en/articles/using-fidic-yellow-book-for-offshore-wind-projects-en/>

2 Chapter 2: Liability for ship collision in an offshore wind farm area

2.1 Introduction

Let us remind that this chapter addresses solely collision between ships. This study focuses on the different types of collision that may happen in a wind farm area, and to this extent the type of liability that may arise will not be the same depending on the situation at hand. Indeed, a classification of these type of collisions shall be established. A collision may arise between ships — this is the topic of this chapter — but a collision may as well arise between ships and fixed or floating objects¹¹. If both events are corresponding to the general definition of a collision, the applicable law and the outcomes are nevertheless not the same ones.

Moreover, if the parties engaged in a collision shall address the issue of indemnifying damages to the ships, another issue may stand in the way: one or more of the ships engaged in the collision could be transporting goods of value, and these goods could be damaged as well, which will call for action on the tortfeasor end. Therefore, as mentioned above, this chapter will only address collision between ships.

On a more general note, this chapter is important to this thesis because it lays the foundation of key concepts: collisions and ships are defined in accordance with Maritime Law standards, moreover, the need for a fault to trigger liability is underlined.

This chapter central to this thesis and the study of liability for collision because it set forth the scope of application (2.2) and the legal grounds of the collision rules (2.3). This chapter also presents the apportionment of liability between the parties (2.4) and lays out the measure of damages (2.5). Lastly, the principle of limitation of liability is introduced (2.6).

Each of those legal concepts bear their importance when studying the different collision liability scenarios.

2.2 Scope of application of the collision rules: the need for a collision between ships according to the standards of Maritime Law.

If the ordinary definition of a collision or the ordinary definition of a ship is quite straightforward, in maritime law these terms are encompassing precise elements to give a definition of each words. It is therefore important to give a definition of these two terms because they act as the two elements necessary to trigger the liability system for collisions.

When it comes to the term “collision” no definition is to be found in the Norwegian Maritime Code (NMC) Chapter 8 on collisions. According to Thor Falkanger, Bull and Brautaset in *Scandinavian Maritime Law, The Norwegian Perspective*¹² a collision may occur when “there is actual physical contact between two ships”. Furthermore, it is mentioned that there is no need for the ship to be moving or moored¹³ or, there is no need as well for the “physical contact” to happen when the ship is moving by its own power or because of the winds of currents.

¹¹ For the purpose of this thesis fixed or floating objects refers to offshore wind farm assets, they will be defined in Chapter 3 of this thesis.

¹² Falkanger, Bull, Brautaset, *Scandinavian Maritime Law, the Norwegian Perspective 4th ed.*, p.269

¹³ To illustrate, in ND.2000.367 NCA TOP SHELF a pleasure craft was moored outside a cargo vessel while waiting to be lifted on board as cargo but due to strong weather the cargo vessel collided with the pleasure craft resulting in damages. It was held that according to NMC section 161 a collision did occurred.

Further reading of NMC chapter 8 indicates that a collision may also occur “without contact” as per section 163 – collision without contact – the provisions on collision apply when “a ship by its manoeuvres or in similar ways causes damage to another ship or to persons or goods on board although no collision takes place between the ships”.

The term “ship” encompasses the following characteristics: it is a floating construction, moving through the water with minimum dimensions (so the ship can carry passengers or goods)¹⁴. Moreover, NMC section 33 clearly specifies constructions that are not regarded as a ship such as floating cranes, floating docks and dredgers or hovercraft. Nonetheless, upon request of their owner these constructions can be entered in the Ship Register.

Also worth mentioning, pursuant to NMC section 507 drilling platforms and similar constructions which are usually not considered ships are for the purpose of NMC Chapter 8 regarded as ships.

2.3 Grounds for the liability regime

2.3.1 A liability system based on international convention(s).

Maritime law being an international topic by nature, many international conventions were drafted and ratified by numerous countries throughout the world. This was intended in an effort to reach a high degree of harmonization between jurisdictions. Norway is an example of this: many of the legal rules set out in the Norwegian Maritime Code are based on international conventions, this being the case for the NMC Chapter 8 regarding liability for collisions. Indeed, NMC Chapter 8 is based on the Collision Convention of 1910 which was ratified by more than 85 countries (with the notable absence of the US).

Another international convention has been enacted into the NMC and provides for the principle of limitation of liability of the shipowner; it is based on the 1976 Convention for Limitation of Liability for Maritime Claims (LLMC convention). Pursuant to this principle the limitation of liability excludes full compensation for damages and result by the establishment of a limitation fund set up by the shipowner. This principle is one of the most important principle in maritime law¹⁵.

Although international conventions are signed and ratified it is required by Norwegian law that they be enacted into statute before it can become legally binding¹⁶. For instance, the aforementioned conventions have been enacted by statute before being transposed into the NMC.

2.3.2 Liability system based on fault.

Set out in NMC section 161, and transposed from the Collision Convention of 1910, the liability system is based on the concept of fault. This excludes the application of strict liability which deviates from the principles of Norwegian tort law¹⁷. Therefore, establishing negligence in a collision is the cornerstone of the liability system, if no negligence is to be found then no liability can be held against the ship part in the collision.

¹⁴ Falkanger, Bull, Brautaset, *Scandinavian Maritime Law, the Norwegian Perspective 4th ed.*, p.50

¹⁵ Rémond, Martine. *L’exploration pétrolière en mer et le droit* (Editions Technip, 1970), p.111

¹⁶ Falkanger. *Scandinavian Maritime Law*, p.28

¹⁷ Falkanger. *Scandinavian Maritime Law*, p. 269

According to the *Gard Guidance on Maritime Claims and Insurance* the negligence may be established if a certain standard of care is not followed. This standard of care is based on “three broad principles:

- General concepts of prudent seamanship and reasonable care;
- Statutory and regulatory rules on the movement and management of ships;
- Traditionally accepted customs and usages.”¹⁸

It then belongs to the judge to establish a breach to this standard of care. In his assessment the judge will have an objective approach and all subjective elements should be disregarded, elements such as crew’s tiredness or inexperience¹⁹. Not unexpectedly, as objective the judge can be it can be rather difficult to establish if one act or failure to act can be considered a fault, once again international conventions prove to be helpful and courts are now relying on a widely accepted convention: The International Regulations for Preventing Collisions at Sea also referred as COLREGs. If the latter convention was not designed to establish liability or fault the clarity of the convention led courts to rely on it²⁰.

2.3.3 COLREGs

To better understand which acts can lead to a fault it may be insightful to have a look at the COLREGs. Seamen are expected to have very good knowledge of the convention and its rule. Breaking the rules will in turn provide *prima facie* evidence of negligence²¹. This convention is deemed to be essential because it is the foundation of the Norwegian “Rules of the Road” when navigating at sea, it is therefore easy to understand that a breach of the rules will result in a fault.

The COLREGs have five parts and four attached annexes. To illustrate the convention this study has retained three rules that are accounting for many collisions:

1. Rule 5 – Look-out: Absence or lack of a proper look-out, especially with larger vessels, can easily result in a collision with another vessel.
2. Rule 6 – Safe speed: vessels should always operate at safe speed.
3. Rule 7 – Risk of collision: vessels should be always assessing risk of collision.

Coherently, the vessel that break the rules and creates a dangerous situation will have a higher proportion of fault than a vessel that failed to escape danger²².

Moreover, and this should be underlined, the apportionment of the fault is based on a qualitative approach and not a quantitative approach meaning that it is not about adding up faults, but it is more about the seriousness of the negligent behavior²³.

¹⁸ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset. *Scandinavian Maritime Law, The Norwegian Perspective 4th ed.* (Oslo : Universitetsforlaget, 2017). p. 269.

¹⁹ Williams, Richard. *Gard Guidance on Maritime Claims and Insurance.* (Gard, 2013). p. 170.

²⁰ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset. *Scandinavian Maritime Law, The Norwegian Perspective 4th Ed.* (Oslo : Universitetsforlaget, 2017). p. 277.

²¹ Williams, Richard. *Gard on Maritime Claims and Insurance.* (Gard, 2013). p. 171

²² For instance, in The “MOUNT APO” and the “HANJIN RAS LAFFAN” (high court of Singapore, 8 march 2019 – SGHC 57) it was held that the MOUNT APO should be accountable for 60% of the blame because it was held that the vessel was “*highly culpable*” by breaching the rule 10(c) of the COLREGs (traffic separation scheme) and crossed a lane improperly. On the other hand, the HANJIN RAS LAFFAN was held accountable for 40% of the blame as she made a fault by trying to escape danger: a misuse of the VHF to arrange green-to-green passing in reaction to the difficult situation created by the MOUNT APO.

²³ Williams. *Gard Guidance*, p. 173.

2.4 Assessment according to the type of fault

2.4.1 One ship at fault.

Provided in NMC section 161, scenarios where only one ship is at fault are arguably the easiest to address: coherently and pursuant to the aforementioned section, the ship at fault shall cover the damage of the innocent ship.

Pursuant to NMC section 161: “When damage is caused to ships, goods, or persons as a result of a collision between ships and the fault is all on one side, that side shall cover the damage”.

2.4.2 Both ships to blame.

As mentioned above, the provisions on collisions in the NMC are an incorporated version of the Collision Convention of 1910. One of the most notable features of this convention is that the losses are divided in proportion to the fault committed, for instance in the United Kingdom in a both-to-blame collision the apportionment of the liability was always divided equally prior to the Collision Convention²⁴, this is fortunate as it is fairer especially on the vessel that as the smallest blame.

NMC section 161 provides as well for the liability for collision when both ships are at fault, the “both-to-blame-collision”.

In this scenario there shall be an apportionment of the liability between both ships “in proportion to the faults committed on each side”, this is pursuant to NMC section 161.

Traditionally, fault is not apportioned in percentage but in fractions. The usual apportionment is the following: 1/2-1/2, 1/3-2/3, 1/4-3/4²⁵.

If allocation cannot be affirmed, then the damage shall be apportioned equally pursuant to NMC section 161 §2: “if the circumstances give no grounds for an apportionment in any definite proportion, the damage is apportioned equally”.

Here is a fictitious example to demonstrate how a both-to-blame collision claim shall be set-off:

Ship A collides with ship B. Ship A is found to be 1/3 to blame and ship B is found to be 2/3 to blame.

Ship A suffers a damage of	NOK 15.000.000
Ship B suffers a damage of	NOK 9.000.000
Total loss for both ships	NOK 24.000.000
Ship A pays to Ship B 1/3 of 9 million	NOK 3.000.000
Ship B pays to Ship B 2/3 of 15 million	NOK 5.000.000
On balance Ship B pays to Ship A (set-off)	NOK 2.000.000

²⁴ Andrew Tettenborn, John Kimbell QC. *Marsden and Gault on Collisions at Sea, 15th Edition*. England : Thomson Reuters, 2021. p. 404

²⁵ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset. *Scandinavian Maritime Law, The Norwegian Perspective, 4th ed*. Oslo : Universtitetsforlaget, 2017. p. 270.

2.4.3 Collision with three or more ships

Pursuant to NMC section 161 no rules are given for the scenario where more than two ships collide. However, by analogy same reasoning as in the both-to-blame collision can be applied²⁶. In other words, each ship is liable for the proportion of their blame.

It should be underlined that in scenarios where two or more ships are to blame in relation to an innocent ship the doctrine appears to be still unclear on the type of liability that may arise. Indeed, many authors believe that joint and several liability shall exist so that the innocent ship can recover more easily its damages by turning itself toward the most solvent party.

In ND 1945.225 NCC PAN the two ships liable for the collision were jointly and severally liable in relation to the innocent ship.

Inversely, in decisions such as UfR 1958.1212 DCC URANUS or even in 1965.142 NCC SOLTIND the courts applied pro rata distribution of the blame.

Scandinavian doctrine has assumed that joint and several liability should occur, but other authors believe that the opposite solution should prevail²⁷.

2.4.4 Accidental collisions

Pursuant to NMC section 162: “If a collision was accidental or it cannot be established that it was caused by fault on either of the sides, each ship bears its own loss”.

Interestingly this section of the NMC also address the scenario where it cannot be held if there was an actual blame on the part of a ship. It should be held in that case that the injured party has no claim for damages²⁸. This solution is supported by the jurisprudence, in particular in the landmark case ND 1971.36 NSC MARNA HEPSØ. In this case an accident happened following the failure of the ship’s reverse engine, it was held that no negligence was committed by the crew when the reverse engine failed, therefore each of the ships had to bear their own losses.

2.5 The measure of damages

After studying what proportion of the claim is recoverable in relation to the other ship, one should consider what elements, or losses, can be part of the claim and be recoverable?

One common point between common law systems and civil law systems is that when it comes to the measure of damages the principle of *restitutio in integrum* applies – this mean that “the object of the award of damages arising out of a collision is to place the owner of the lost or injured ship as nearly as may be in the same pecuniary position as he would have been in but for the collision”²⁹ –. This principle thus takes into account damages such as the cost of repair, or if lost, the value of the ship, but it also takes into account consequential losses such as loss of future income, crew repatriation costs, costs of raising or neutralizing the wreck, cost of the liability for pollution. This principle is subject to limitation such as remoteness of damage, this will be further developed in this point.

As seen above, the liability for collision can only be established if a fault can be proven. Principles such as strict liability, which derivates from the ordinary Norwegian tort law, are

²⁶ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset. *Scandinavian Maritime Law, The Norwegian Perspective*, 4th ed. Oslo : Universtitetsforlaget, 2017. p. 270.

²⁷ Ibid. p. 271

²⁸ Ibid. p. 272

²⁹ **Andrew tettenborn, John Kimbell QC.** *Marsden and Gault*. United Kingdom : Sweet & Maxwell, 2021. p. 453

ineffective. Nonetheless, if the injurious act relies on a special fault-based regime the measure of damages relies on ordinary tort law principles. According to the Tort Act chapter 3 and 4 an injured party has a claim for damages as long as the damage is sufficiently proximate to the injurious act and that the injured party did try to mitigate its loss^{30 31}. Following this statement two points should be developed: remoteness of damage and the duty to mitigate loss.

Remoteness of damage.- According to the *Gard Guidance on Maritime Claims and Insurance* “it is only those losses that arise as a “*direct and immediate result of the collision*” that may be claimed”³². In other words, it means that the damage must not be too remote. Thus, there is a need for foreseeability in the damage, to this end two points must be clarified: firstly, the foreseeability of the claimant, and secondly, the foreseeability of the type of damage.

When it comes to the claimant, the burden of proof should be on his shoulders. The claimant needs to bring evidence that he has suffered a loss against the defendant, this can be quite extensive and rather problematic this is why the loss should be a “direct and immediate result of the collision”, for instance if one ship collides into another because the former had a faulty engine due to a previous collision a year ago it shall not be remote enough for the innocent ship to ask damages against the ship from the collision a year ago³³.

When it comes to the type of damage, it needs to be proved by the claimant that the loss he suffered resulted from a “direct and immediate result of the collision”. It will be up to the courts to decide whether the damage is remote enough. As seen above, consequential losses are part of the recoverable damages. It is understandable that cost of crew repatriation or dry-docking expenses should be recoverable, although some difficulties can arise when it comes to losses such as the lost opportunity to conclude a favorable charter party³⁴.

Duty to mitigate.- A person injured “must ordinarily mitigate damages if he can reasonably do so”³⁵. Therefore, courts will verify if a claimant has mitigated his losses. For example, a claimant has to take the proper measures so that the damaged vessel does not become a total loss. If the claimant fails to do so, he will only be awarded with the cost of repair and not with the cost of the value of the vessel.

2.6 Limitation of liability

A general principle of law when it comes to the recoverability of damages is that those damages should be recoverable in full as long as they are remote enough and that the claimant has mitigated his damages. Nonetheless, as often in Maritime Law, a rule of limitation of liability will be applicable. Ships and their cargo are very expansive properties and a claim for damage can result in very high sums of money, sums that could lead to the bankruptcy of the owner. Fortunately, insurances can provide a solution to this issue, but they wouldn't be so willing to cover maritime expeditions if it was not for the principle of limitation of liability.

³⁰ See ND 2006.224 NCC SVEAFJELL on the duty to mitigate loss.

³¹ *Scandinavian Maritime Law, The Norwegian Perspective, 4th ed.* Oslo : Universitetsforlaget, 2017. p. 271

³² Williams, Richard. *Gard on Maritime Claims and Insurance*. s.l. : Gard, 2013. p. 181

³³ Andrew Tettendorn, John Kimbell QC. *Marsden and Gault on Collision at Sea*. United Kingdom : Sweet & Maxwell, 2021. p. 460

³⁴ In English Law a ruling addressed this issue in relation to remoteness of damages, in *Transfield Shipping Inc v Mercator Shipping Inc (2008) UKHL 48* or *The Achilleas* it was held that the loss of profits in the next charter party was not within the rules of the landmark case *Hadley v. Baxendale (1854) EWHC J70*, the latter held that “a breaching party is liable for all losses that the contracting parties should have foreseen, but is not liable for any losses that the breaching party could have not foreseen on the information available to him”.

³⁵ Tettenborn. *Marsden and Gault on Collision at Sea*. p. 463

Simply put, limitation of liability entitles the tortfeasor to pay less than the total amount he should normally pay to cover the damage.

Rules on limitation of liability are set forth in the NMC Chapter 9 pertaining to limitation of liability and obligation to Insure. Chapter 9 provides which person are entitled to limitation – the reder, shipowner, charterer or manager – pursuant to section 171. The following section, section 172, provides for the scope of limitation (in other words the types of claim for which liability can be limited), collision being a property damage is provided by section 172 1). Finally, section 175 provides the limits of liability for the “claims comprised by section 172”. Indeed, special limits of liability are found in chapter 9 section 172a in relation to claims in connection with clean-up efforts relating to marine accident. Should also be acknowledged section 181 §2 providing for a special limit of liability with regard to “ships built or equipped to drill for subsea natural resources”, the limits of liability regardless of the size of the vessel shall be 36 million SDR. If section 172a is applicable the limit shall be increased to 60 million SDR³⁶.

With the general principles on limitation laid out, this study can focus on demonstrating how the limitation works in practice when it comes to the limitation of liability in the event of a collision. Pursuant to section 175 3) limitation is based on the size of the vessel, its tonnage to be more specific.

For ships with a tonnage under 2,000 tons the limit of liability is 1,000,000 SDR. For ships that exceed that tonnage the limit is increased as follow:

For every ton from 2,001 – 30,000	by 400 SDR
For every ton from 30,001 – 70,000	by 300 SDR
For very ton exceeding 70,000 tons	by 200 SDR

It is important to underline that pursuant to section 175 4) the limit provided is applicable for “all claims arising from one and the same event”. This means that if more one than one accident occurred, each accident shall be limited individually³⁷, therefore several limitation funds can be set up.

2.7 Conclusion

This chapter set forth the general liability for collision. This means that the right of action in negligence introduced here relies on tort and that other outcomes as to liability in case of a collision exist, for instance special provisions on liability may be provided in a contract.

It is important to address the general liability system because even if operators will usually use a special liability regime through the use of special contracts (frequently used in the offshore industry, which shall be addressed in chapter 4), the possibility of ships passing through the Offshore Wind Farm (OWF) still stands, due to the uncertainty of the state regulations

³⁶ SDR is defined in §505 NMC: « For the purposes of the present Code, SDR means the special drawing rights established by the International Monetary Fund. It shall be translated into Norwegian currency according to the value of the krone expressed in SDR on the day when payment is made or a limitation fund is established according to Chapter 9 or 10. ». The exchange rate for 1 right amount to USD 1.407 at the time of writing.

³⁷ In ND 1971.199 DCC ESBERN SNARE two ships enter in collision twice in the course of a few minutes, it was held to each collision was a separate accident calling for the establishment of two limitation funds.

pertaining to the right of navigation through safety zones. These ships are stranger to the activities of the OWF and therefore are not bound by the aforementioned offshore contracts. Not to mention that it is not excluded that even if safety zones forbid navigation through the OWF, a vessel could still end up colliding in the OWF for numerous reasons such as adverse weather or faulty navigational equipment.

3 Chapter 3: Ship collision with a wind farm asset: liability regime for fixed or floating objects (FFO liability)

3.1 Introduction

During the course of its operation a ship may not only enter in a collision with another ship, but it can as well enter in collision with a “structure”, such a structure is referred as a fixed or floating object (FFO), such as wind farm assets. As seen in Chapter 2, when it comes to collision between vessels much of the liability system have been harmonized. This has the advantage of providing a high-level foreseeability in case of a collision with another vessel. This is perhaps one of the main differences with the collision liability regime for FFO: there are no international conventions regulating the matter.

Therefore, claims for liability for damage to FFO are mainly covered under local statutes or other regulations. To have a good understanding of the possible outcomes of such a claim, the present section will compare different statutes and regulations in force in different jurisdictions, and the solution they provide to this issue. Nonetheless, if liability for damage to FFO may be covered by national laws it may as well be covered under a contract or in tort.

Liability for collision with FFO calls for the study of similar issues to those Chapter 1, thus this chapter shall address the measure of damages and the limitation of liability. Finally, insurance coverage in this situation will be studied.

Before conducting a comparative study between the different regime of liability globally, a definition of FFO should be given.

According to the *Gard Guidance on Maritime Claims and Insurance* a fixed object is defined as “a man-made structure that does not float and, therefore, is not designed to move or to be moved on water”³⁸. As an example, fixed offshore platforms and subsea pipelines but also offshore wind turbines (OWT) and offshore substations³⁹ fall under this definition.

According to the same source a floating object is defined as a “man-made structure other than a ship that is designed to have buoyancy”⁴⁰. Interestingly, the same type of offshore wind assets can be given as an example of floating object, they might have the same functions, but their conception differs so that they are not fixed but floating. Thus, we can name offshore wind turbines (OWT) and offshore substations as an example of floating objects.

Following these definitions, it appears that when it comes to offshore wind assets little room is left to doubt when asking if such an asset is a fixed object or a floating object. This is fortunate as it can be a difficult question. Indeed, some floating objects have a ship-like design which consequently poses difficulties in defining whether the liability for collision between ships is applicable or not.

³⁸ Williams, Richard. *Gard on Maritime Claims and Insurance*. s.l. : Gard, 2013. p. 219

³⁹ « An Offshore Substation facilitates the systems to collect and export the power generated by an offshore wind farm through specialized submarine cables and are an essential component of offshore wind farms, especially at large, multi-megawatt sites. They are critical to stabilizing and optimizing the voltage generated offshore, reduce potential electrical losses and transmit the electricity to shore in an economical manner to maximize the return on investment for the project ». (1)

⁴⁰ Williams. *Gard Guidance*. p. 219

Following from these definition, offshore wind farm assets can be defined as FFO. The liability regime for ship collisions with wind farm assets should be introduced (3.2) before presenting a comparative study between jurisdictions (3.3). Lastly, the insurance coverage will be explained (3.4).

3.2 liability for damage to fixed or floating objects (FFO)

3.2.1 Liability in tort

As mentioned in the introduction (see 3.1) in the absence of international conventions claims for collision liability with FFO are covered by national law or other regulations. In most cases, domestic legislations are holding the shipowner or his servants and agents liable for the collision with the FFO⁴¹. In some cases, this presumption of fault is rebuttable. The rationale is that a FFO is not capable of moving to avoid contact, therefore there is no reasons for the ship not to be able to avoid collision.

To rebut that presumption, the shipowner may bring proof that he did not act in a negligent manner and that the collision happened due to some extraordinary and irresistible reasons which constitute grounds of *force majeure*.

Another way to rebut the presumption of liability is to show evidence that the collision in fact took place because of a negligence on behalf of the owner. The mere fact that an object is either fixed or floating does not mean that there is no obligation of care on the owner's end. For instance, an offshore wind turbine should be correctly signaled by sound or light systems, moreover the OWT position should be properly recorded on charts. If such evidence of a negligent behavior on behalf of the OWT owner is brought, then this will call for an apportionment of the amount of the shipowner's liability or it may even lead the shipowner to avoid liability for the collision.

3.2.2 Liability under contract

Liability for collision with an offshore wind asset can also arise in contract. The owner of offshore wind assets should provide for a liability clause in case of collision in order to ensure that its assets are protected. Indeed, the most frequent scenario providing for such a liability is found in "harbor contracts" or in offshore contracts. Harbors are places of passage, often congested. Logically, with a high number of vessels in transit, it is not uncommon for collisions to occur. In addition to collisions between ships, a lot of equipment is present in harbors, such as cranes, bridge, jetty or floating storage units.

As a remedy to this potential collision risk, ports will often have standard terms and "conditions of use"⁴². Most of the time port areas will not authorize ships to access the area if the contractual conditions of use are not entered into⁴³. The terms will often result in strict liability against the shipowner in case of a collision within the port area, even if the port authority is solely to blame⁴⁴. Moreover, even if no formal contract is signed between the port

⁴¹ Gold, Edgard. *Gard Handbook on P&I Insurance*, 5th ed. s.l. : Gard, 2002. p. 172

⁴² Ibid. p. 180

⁴³ Williams, Richard. *Gard on Maritime Claims and Insurance*. s.l. : Gard, 2013. p. 221

⁴⁴ This is made possible as the shipowner enter a contract with the port authority deviating from the tort liability which relies on an apportionment of the liability based on the degree of responsibility of each party in the collision. The terms might be onerous, but they are accepted by the shipowner.

area and the shipowner, the latter will nonetheless be bound to the terms and conditions of use as long as the shipowner has been made aware of them. The shipowner may then access the port and use its facilities, if repeated use is made of the port and its equipment, it will be implied that the prior agreement to the terms and conditions is binding for subsequent access to the port.

A situation closer to that studied in this thesis is that of offshore contracts. The peculiarities of the offshore industry and its players called for the use of a special liability regime. This regime is often referred as “knock-for-knock”⁴⁵. Under those terms each party bear its own losses in the event of a collision⁴⁶. In other words, one party to the dispute will not be able to seek the liability of another party in the event of a collision. This study will later address the special features of this regime (see chapter 4), the remaining part of this chapter will focus on liability in the event of a collision with an offshore wind asset in an extra-contractual context.

3.2.3 Recoverable damages

Damages are normally recoverable by the owner or operator of the wind farm asset. In the eventuality of a collision the wind farm asset owner or operator can ask to recover⁴⁷:

- The cost of both temporary and permanent repair to the FFO.
- Compensation for the loss of income due to the loss of use of the FFO.
- Third party liabilities whether arising under contract, tort or statute⁴⁸.
- Consequential losses⁴⁹.

3.2.4 Limitation of liability

Similarly to collisions with other ships, a collision with an offshore wind asset can result in very high sums of money, perhaps even higher in this instance than in a collision with another ship. A collision with an offshore substation resulting in a temporary shutdown of the asset can cause very significant damages in relation to loss of incomes. Moreover, as seen above, it is most likely that the shipowner will have a strict liability in the event of a collision with a FFO, therefore it is crucial for the shipowner to be able to limit its liability.

The possible limitation of liability will depend on the domestic law, which in turn depend on the international conventions it has ratified. In the scenario of a collision with another vessel rights for limitation of liability are derived from the rules of the 1976 London Convention on Limitation of Liability on Maritime Claims (LLMC convention), which have been ratified by 54 states⁵⁰ including Norway. With many states throughout the world party to the convention it is likely that the shipowner will be able to limit its liability. As mentioned, when it comes to

⁴⁵ Williams, Richard, *Gard on Maritime Claims and Insurance*. s.l. : Gard, 2013. p. 221

⁴⁶ Gideon Parchomovsky, Endre Stavang. *CREE working papers - Contracting around tort defaults: the knock-for-knock principle and accident costs*. s.l. : CREE center, 2013. p. 2

⁴⁷ Gold, Edgar. *Gard Handbook on P&I Insurance, 5th ed.* s.l. : Gard, 2002. p. 182

⁴⁸ An FFO owner or operator may be liable to other third parties as a result of the impossibility or restricted use of the FFO. The owner or operator will look for compensation from the shipowner to indemnify the third parties (although it might happen in a different other, such as the owner/operator indemnifying the third parties and then asking compensation to the shipowner).

⁴⁹ Compensation of loss income has been mentioned but other consequences from the collision are possible such as expenses in surveying and inspecting the wind farm asset (checking for the structure integrity for instance) or expenses in wreck removal.

⁵⁰ Convention on limitation of liability for maritime claims, 1976. *United Nation*.

Norway the shipowner will have the right to limit its liability pursuant to NMC section 172, this section provides limitation of liability for “property damage”. Identically to the liability regime for collisions with another ship, NMC section 175 provide for the setting of one limitation fund per incident. In other words, each accident must be limited individually. It can sometimes be difficult to determine if there were one or more accident, for instance one could ask what is the outcome when a ship because of bad weather or bad anchorage collide several times within minutes in a wind farm asset⁵¹?

Looking at the Norwegian case law it appears that the test to know if the collision is one and same accident is that “the incidents can all be traced back to one particular action”, as held by the first judge in ND 1984.129 NSC TØNSNES.

If it is likely that the shipowner will be held liable for the collision, nonetheless the eventuality of the owner or operator of the wind farm asset being held liable should be addressed as well.

NMC section 172 provides for the rules on limitation of liability “pursuant to the rules of the 1976 London Convention on Limitation of Liability on Maritime Claims, as amended by the 1996 protocol”, thus a look at the 1976 LLMC convention should be given. Pursuant to Article 1 of the LLMC convention a list of persons entitled to limit their liability is given. Article 1(1) provides that “Shipowners and salvors, as hereinafter defined, may limit their liability (...)”, following this statement Article 1(2) provides that “The term “shipowner” shall mean the owner, charterer, manager and operator of a seagoing ship ». Therefore, only ships have the right to limit their liability and as seen in the definition of a FFO, they are not categorized as ships and thus cannot limit their liability, which does not seem very problematic for the FFO’s owner insofar as the shipowner is most likely strictly liable for the collision. With that said, it could be possible for the owner or operator of the FFO to limit its liability according to domestic law, this shall be addressed in the next point (see 3.3).

3.3 Comparative study: overview of the liability for collision with an FFO

With no international conventions providing for a framework on liability for collision with an offshore wind farm asset, this study proposes to compare how the liability for collision will work in different jurisdictions pursuant to domestic law and regulations, namely Norway, UK, USA and France.

Following this comparison, the study will try to see if a general pattern in relation to liability arise.

3.3.1 Norway

Liability for collision with an FFO.- The short answer here is that under Norwegian law the shipowner is strictly liable for damages to FFO. Unlike collisions with other ships there are no rules regulating collisions between ships and FFO⁵². However, some rulings of the Norwegian Supreme Court gave room for non-statutory strict liability. Following the study of these rulings it appears that a distinction is made between collisions caused by a technical failure of the ship’s reverse engines.

⁵¹ In ND 1971.199 DCC ESBERN SNARE it was held that a vessel colliding twice into another vessel within a few minutes was deemed to be two separate accidents. This resulted in setting two separate funds, as a consequence this increase the total liability of the defendant.

⁵² Thor Falkanger, Hans Jacob Bull, Lasse brautaset. *Scandinavian Maritime Law, The Norwegian Perspective*, 4th ed. Oslo : Universitetsforlaget, 2017. p. 283

In ND 1921.401 NEPTUN and ND 1952.320 NSC SOKRATES the courts have imposed liability on the shipowner when colliding with an FFO (respectively a bridge and a dock) after that the ship encountered technical problems with the reverse engines.

Conversely, in ND 1958.587 LEDA the court did not impose liability on the shipowner as there were no technical issue nor negligent behavior on the part of the shipowner.

Limitation of liability.- As mentioned above, NMC section 172 provides for a right for the shipowner to limit its liability in the eventuality of a collision with an FFO. On the other hand, NMC section 172 being only applicable to ships an owner of an FFO will not be able to limit its liability if found responsible for the collision.

3.3.2 United Kingdom (UK)

Liability for collision with an FFO.- Under English law, no statutory laws provide for collision liability with *all type* of FFO. However, under the *Harbors, Docks and Piers Clauses Act of 1847* it is provided that a shipowner will be liable for damages to the FFO of a harbor, dock or piers. Moreover, pursuant to this act, the shipowner is held strictly liable even if there is a contributory negligence by the harbor authority⁵³. Unfortunately, this statute is not very helpful to this study in relation to the liability for damage to offshore wind assets. This is because, such assets are not found in a port area (although if it was the case, then the 1847 act would be applicable, and the shipowner would be held strictly liable).

Although it is unfortunate at this point that no regulation addresses the matter, this has the merits to evidence the lack of regulation that can be faced domestically when collision liability issues arise with a wind farm asset.

Limitation of liability.- The UK are party to the 1976 LLMC convention, therefore limitation of liability is possible on the shipowner's end following the rules described in point 3.2.4 above. Again, as seen above in the study case of Norway, the owner of the wind farm asset is not eligible to the LLMC convention.

3.3.3 United States of America (USA)

Liability for collision with an FFO.- When addressing the issue of a collision with an FFO the situation remains somewhat uncertain but previous rulings provide some guidelines. The most important precedent is the US Supreme Court ruling "The Steamship Pennsylvania" from 1873, which lead to the "Pennsylvania Rule". According to this rule if a ship is in violation with a statutory rule then the ship is presumably at fault. Once again pursuant to judicially created rules the burden of proof is reversed, and it belongs to the defendant to bring proof of the absence of fault. Originally, the Pennsylvania Rule was intended to apply to ships only but following the *Dover Barge*⁵⁴ ruling it was made clear that the rule was meant to apply to "any maritime accident". This in turns makes the rule applicable to FFO such as OWT. Moreover, the rule also applies to owner of FFO, thus the owner will have to prove that all statutes and regulations have been complied with before the presumption of the vessel's fault can be applied, as demonstrated in *Rogers v Saeger*, 1958 (10th circuit).

Interestingly, and unlike English law under the *Harbors, Docks Piers Clauses Act of 1847* the presumption of liability is rebuttable. Three ways of rebutting the presumption can be found⁵⁵:

⁵³ Gold, Edgar. *Gard Handbook on P&I Insurance*, 5th ed. s.l. : Gard, 2002. p. 173

⁵⁴ *Dover Barge Company v. Tug "Crow"*, 642 F.Supp. 2d 266 (United States District Court, New York, 2009)

⁵⁵ Will Bland III. *Presumptions in General Maritime Law*. Website: Mouledoux, Bland, Legrand & Brackett. <https://mblb.com/admiralty-maritime/presumptions-in-general-maritime-law/>

firstly, the shipowner can prove that the owner of the FFO was solely to blame. Secondly, the shipowner can prove that the situation would lead to a collision anyway and that the fault was made in an attempt to avoid the collision. Finally, the shipowner can demonstrate that the fault did not lead to the collision⁵⁶.

Limitation of liability.- The US have the particularity that they are out of many international conventions when it comes to Maritime law, for instance the US are not part to the Collision Convention of 1910 nor they are part of the LLMC convention of 1976. Nonetheless, a shipowner should be entitled to limit its liability pursuant to the Limitation of Liability Act, 46 U.S.C. 30501, et seq.. However, it appears that in practice numerous factual grounds will prevent the limitation to apply as it is not in the US legal tradition to limit liability^{57, 58}.

3.3.4 France

Liability for collision with an FFO.- In France the Collision Convention of 1910 has been signed and ratified. It was then transposed into French law, the Collision Convention rules can be found now in *loi n°67-545 du 7 juillet 1967, relative aux évènements de la mer* also known as *Loi du 7 juillet 1967*⁵⁹.

For the Loi du 7 juillet 1967 to be applicable it is sufficient that a ship enters in collision with another ship, as seen in Chapter 1 no definition of a ship was given in the Collision Convention of 1910, similarly when transposing the convention into French law, the legislator did not give a definition of a ship. Pursuant to the 1967 statute in its article 1 first paragraph the collision rules are applicable to “*every floating device, with the exception of those moored at a fixed position, are assimilated, as the case may be, either to seagoing vessels or to inland navigation vessels (...)*”⁶⁰. This means that for the collision rules to be applicable to offshore wind farm devices – which mean applicable to an FFO – the offshore devices must not be moored at a fixed position. Thus, it appears that offshore wind assets are not susceptible to be regulated by the 1967 statute. Indeed, offshore substations are fixed to the seabed, and when it comes to OWT they are either fixed (hence the statute is not applicable) or they are floating. Nonetheless, if the latter are floating and are stabilized by a ballast it is not sufficient for the floating asset to remain in place which calls for mooring lines to anchor the asset to the seabed, which consequently makes it impossible for the 1967 statute to be applicable. Since the rules are not applicable when colliding with a fixed structure (either fixed directly to the seabed or moored to it) French jurisdictions will apply the rules of tort liability to repair the entire damage⁶¹.

One may also look for liability for collision under contractual terms. Usually supply vessels working in an offshore area are working under contracts that provide for special liability regime. As seen above (see point 3.2.2) this is the knock-for-knock regime, this regime will be studied in Chapter 4.

⁵⁶ Following the principle of remoteness of damage, if the fault is too remote then it cannot be held against the shipowner that it was that event that led to the collision.

⁵⁷ US legal tradition has a history for punitive damages, which may result in very high sums of money in damages and it is not traditional for the courts to refer to limitation of liability regulations.

⁵⁸ Williams, Richard. *Gard on Maritime Claims and Insurance*, 5th ed. s.l. : Gard, 2013. p. 224.

⁵⁹ Bourbonnais-Jacquard, Ingrid. *L'abordage maritime*. Aix-en-provence : Presses Universitaires d'Aix-Marseille, 2013. p. 34

⁶⁰ Translated from French by the author of this study.

⁶¹ Bourbonnais-Jaquard. *L'abordage maritime*. p. 92

Limitation of liability.- Similarly to the UK and Norway, France is part to the 1976 LLMC convention. Thus, the shipowner will be able to limit its liability if a claim arises in the eventuality of a collision with an FFO, as seen in point 3.2.4 an FFO is not eligible to the LLMC convention.

3.4 Insurance coverage

In the shipping industry, offshore platforms are often referred as the “most expansive real estate on the planet”⁶². In this respect, insurance claims for collisions with an FFO tend to result in the most expensive insurance claims against P&I clubs⁶³. Therefore, with such high stakes it is important to understand how the insurance mechanism works.

Firstly, let us remind that the Norwegian law, namely the Insurance Contract Act (ICA) of 1989, provide that the injured party as a right to have direct action against the insurer of the ship involved in the collision (it is not relevant if the damage is caused to a ship or an FFO)⁶⁴. This mechanism is called subrogation. Rights in subrogation give the right to the injured party to have a direct action against the insurer of the ship. Moreover, the insurer will be subrogated as well in the shipowner’s rights, meaning that he will be entitled to raise the same defenses in tort as the assured⁶⁵.

Secondly, to a certain extent there is a mandatory obligation for a shipowner to be insured, and it is the duty of the shipowner to subscribe to this compulsory liability insurance⁶⁶. Pursuant to NMC section 182a the shipowner “of a Norwegian ship of 300 gross tonnage or more is obliged to have in place insurance or other security to cover such liability as may be limited pursuant to the limitation of maritime claims, as amended by the protocol of 2 May 1996.”. This means that all other liability claims, including claims in property damage, covered by NMC 172 must be mandatorily insured⁶⁷.

After these introductory remarks it is now important to recall the existing insurance categories. Each of the insurance categories has a specific function, it is important to study which category is called upon to cover the risks of collision with an offshore wind farm asset. As expected, a collision may be caused to an offshore asset by a ship or may be caused to a ship by an offshore asset.

The main type of insurance cover that can be found are Hull and Machinery (H&M), Hull Interest/Increased value insurance (IV) and Protection and Indemnity insurance (P&I).

Under the H&M insurance damage or loss of property is covered: if the ship is damaged the repair costs will be covered and if the ship become a total loss the shipowner will be covered for the insured value of the ship. To some extent the H&I cover some liability claims. When it comes to a collision with an FFO, the shipowner and the damage to his ship will be covered up to the value insured of the ship. When it comes to the liability for damages to an FFO the standard Nordic terms provide cover, however, the cover is limited to the sum insured in the insurance policy⁶⁸. Worth mentioning, FFO collision liabilities are covered under Norwegian

⁶² Dowdy, Mike. VP of sales. Interview: *TechnipFMC on Oil and Gas Pitch*. 2 July 2020.

⁶³ Booth, Liz, *Maritime Risk International*. ISSN 1742-9404.

⁶⁴ Thor Falkanger, Hans Jacob Bull, Lasse brautaset. *Scandinavian Maritime Law, The Norwegian Perspective 4th ed.* Oslo : Universtetitsforlaget, 2017. p. 687

⁶⁵ Williams, Richard. *Gard Guidance on Maritime Claims and Insurance*. s.l. : Gard, 2013. p. 225

⁶⁶ Falkanger. *Scandinavian Maritime Law*. p. 681

⁶⁷ Ibid p. 682

⁶⁸ Williams, Richard. *Gard Guidance on Maritime Claims and Insurance*. s.l. : Gard, 2013. p. 226

terms but it may not be the case in other countries, for instance standard English UK and US to not cover these collision liabilities⁶⁹.

Claims regarding collisions with an FFO being very high, often the H&M insurance will not be sufficient to cover the damage, in this respect the P&I insurance should take over. P&I insurance aims to cover liability claims and in certain circumstances damage suffered by the insured⁷⁰.

Thus, the P&I insurance should cover for the damage that are outside the scope of the H&I policy⁷¹. However, some restrictions to the applications of the P&I insurance exist:

- Damages that should be covered under the H&M policy⁷².
- Damages must have been caused by a physical contact between the ship and the FFO⁷³ (therefore ruling out collisions without contact, provided in NMC section 163).

3.5 Conclusion

To this day, there is no harmonized regime between jurisdiction throughout the world when it comes to collision between ships and offshore wind farm assets. Nonetheless, each state has its own approach to this matter. As seen in the short comparative study conducted (see point 3.3) it is hard to establish a pattern, although it seems that there is a consensus on strict liability of the shipowner in the event of a collision with an OWF asset, the comparative study shows no evidence that strict liability is always the solution.

However, it seems that one common ground can be found: the burden of proof is always reversed, and it will belong to the shipowner to prove that no fault was committed on his end. When it comes to limitation of liability, predictability on the outcomes of a claim in collision with a FFO are enhanced as many countries have ratified the LLMC convention, then again, some countries like the US are not part of the aforementioned convention.

This leads to conclude that in the absence of a harmonized regime on an international scale the law turns out to be unpredictable since it depends on a national system which is unfortunate as the claims are especially high when a wind farm asset is involved in a collision.

So far, the best solution is to provide for liability under contract, which is the solution adopted by the offshore maritime players. However, this is not resolving the issue of ships that are not under an offshore contract and involved in a collision with a wind farm asset: ships navigating close to the safety zone of the OWF are a risk of collision due to possible navigational error, technical issues or adverse weather.

The legal framework regarding OWF still being in its infancy it would be interesting to see how the law will evolve regarding this matter.

⁶⁹ Gold, Edgar. *Gard Handbook on P&I insurance, 5th ed.* s.l. : Gard, 2002. p. 182

⁷⁰ Falkanger. *Scandinavian Maritime Law.* p. 683

⁷¹ Williams, Richard. *Gard Guidance on Maritime Claims and Insurance.* s.l. : Gard, 2013. p. 226

⁷² Gold. *Gard Handbook.* p. 179

⁷³ Williams. *Gard Guidance.* p. 227

4 Chapter 4: Cargo claims in a wind farm area: losses of goods by collision.

4.1 Introduction

Previous chapters this study reviewed the liability incurred by ship owners in a collision. This liability was considered in the context of damage to ships. However, not only can ships be damaged, but goods can also be damaged. Indeed, it is not uncommon that if a collision damages a ship, the latter can also damage the cargo of the ships involved in the collision.

One important difference is that unlike in liability for collision between ships, liability for damage to goods highlights a leading protagonist: the cargo owner⁷⁴.

If the shipowner may be the cargo owner (who in turn will be entitled to his own claims for cargo damages), it is nonetheless an unlikely scenario in the offshore industry. Often an operator or owner of an OWF will rely on the services of a carrier to transport the necessary materials to install or service the OWF. For instance, a carrier can transport to the OWF a set of propellers intended to be installed on the wind turbines. Just one unit of propeller can cost up to USD 170,000. If a ship carries a dozen of propellers and the latter get damaged or worst, lost, this can raise a claim superior to USD 2 million. It is therefore understandable that one must have a good understanding of the possible recourses, this will be explained through the study of the liability for cargo claims.

To understand how cargo claims may be conducted this chapter will study general principles such as the measure of damages and the condition of the goods (4.2). Then, it will be studied who may sue (4.3) as different players may have a claim for cargo damages, this should be presented in two parties: who can raise a claim against the carrying ship (4.4) and who can raise a claim against a non-carrying ship (4.5).

4.2 General principles

When it comes to damages either resulting from a collision between ships or resulting from a loss or damage to goods the principle for the measure of damages remain the same: the claimant is entitled to a full indemnity as per the principle of *restitutio in integrum*, however let us remind that this principle should be limited to the proportion of fault the incriminated ship has in the collision⁷⁵.

Moreover, the principle of remoteness of damage must be kept in mind when seeking for damages (as discussed in point 2.5).

When strictly addressing cargo claims, the measure of damage is “the difference between the position of a plaintiff if the goods had been safely delivered, and his position if the goods are lost”⁷⁶.

When it comes to the measure of damages, the outcome of a cargo claim will depend on the condition of the goods after a collision has happened.

⁷⁴ This does not mean that the cargo owner has no rightful claim in the event of a collision between ship – as seen in chapter 1 and 2 - when there is no loss or damage to the cargo, indeed this chapter will evidence the possible rights a cargo owner may have when ships are colliding.

⁷⁵ If the cargo claim is 100 but the incriminated ship as a blame of 20% then the claimant is entitled to recover 20 out of the 100.

⁷⁶ Andrew Tettenborn, John Kimbell QC. *Marsden and Gault on Collisions at Sea, 15th ed*, Sweet & Maxwell, 2021. p. 496

This can be introduced in three categories: the goods may be either lost, damaged or delayed as a result of the collision.

When the goods are lost the rule is that the claimant is entitled to recover the market value of the goods at arrival⁷⁷. In the event where the goods are not lost but damaged, the claimant is entitled to recover “the difference between the sound arrived value and the damaged value”⁷⁸. Lastly, it is also possible that the goods are neither lost or damaged but as a result of the collision they might be delayed, this can have consequences for the goods owner, and he might want to seek compensation. As provided in NMC section 278, the carrier is liable “for losses resulting from delay”. Indeed, the delay can result in a deterioration of the goods (for instance the goods might have a shelf life such as chemicals like sealant, gasket paste and so on), if it can be proved that damage to the goods is a direct result of the delay due to the collision, then the goods owner is entitled to recover for damages⁷⁹ either for the market value of the goods if the goods are lost, or either for “the difference between the sound arrived value and the damaged value” if the goods are damaged.

4.3 Who may sue

Multiple actors can be involved in a cargo claim resulting from a collision. This is because, as seen in chapter 2, there can be scenarios where only one ship is at fault and there can be scenarios where both are to blame, and there can be even three ships or more involved in a collision. Because the collision may result in damage for the cargo owner, the latter shall be able to recover damages against the parties that are responsible, the issue is that the parties do not have the same relationship with the cargo owner, as this chapter will show.

The persons interested in cargo lost or damaged have a right to sue⁸⁰. As a general outline, the persons interested in a cargo claim can raise a claim either against the ship carrying the cargo or against the non-carrying ship.

In the former scenario, the liability of the carrying vessel will depend on the contract of affreightment⁸¹ under which the cargo owner and the carrier are bound, the NMC provide for mandatory rules applicable to such a contract. In addition, when referring to contract of affreightment the NMC encompasses bills of lading and waybills, voyage charters, quantity contracts and time charters as contracts of affreightment⁸². Moreover, the carrier’s liability for damage under a contract of carriage is set forth in NMC section 274 et seq.⁸³.

In the latter scenario, the liability of the non-carrying vessel is not based on a contractual relationship. As seen in chapter 2, when there is a collision between ships, if a fault can be held against the vessel, the responsibility of the latter can be retained therefore the claimant will be able to seek damages. However, as seen in the general principles (4.2) above, the non-carrying ship can only be held responsible for its portion of fault. Therefore, if one ship is solely to blame

⁷⁷ Andrew Tettenborn, John Kimbell QC, *Marsden and Gault on Collision at Sea*, Sweet & Maxwell, 2021. p. 498

⁷⁸ Ibid. p. 499.

⁷⁹ Ibid. p. 499

⁸⁰ Carver, Thomas Gilbert. *Carver’s carriage by sea, 13th ed*, Stevens & Sons, 1982. p. 1448. Vol. 2

⁸¹ A contract of affreightment is defined as « a contract to perform transportation services by ship or to make a ship’s transportation capacity available” Falkanger, Bull, Brautaset, *Scandinavian maritime law*, 4th ed., 2017, p.317

⁸² Falkanger, Bull, Brautaset, *Scandinavian maritime law*, 4th ed., 2017, p.317

⁸³ Falkanger. *Scandinavian Maritime Law*. p. 274

in a collision involving multiple ships then the ship at fault is solely liable for the damages, but when there is a both-to-blame collisions the tortfeasors are liable *pro rata* pursuant to NMC section 161 third paragraph⁸⁴.

4.4 Claims against the carrier

The cargo owner as a choice when raising a claim for cargo loss or damaged, he may either raise a claim against the carrying ship, whose outcome will depend on the contract he and the carrier are bound by (4.4.1) or the cargo owner can raise a claim against the other ship in respect of his liability in the collision (4.5). It may seem logical that the goods owner will seek compensation under the contract, but this can be actually quite treacherous as the owner may face a limitative or exemption clause of liability pursuant to NMC section 276 (4.4.2).

4.4.1 Claim under a contract

In its relationship with the carrier, the owner of the cargo may invoke that there was a loss or damage under a contractual relationship, thus the owner is entitled to bring a contractual action against the carrier⁸⁵. Although, this is not to be taken lightly. There is a risk that the carrier will invoke as a ground for exemption of liability a loss due to nautical fault, which pursuant to NMC 276 exonerate the carrier from its liability toward the cargo owner.

If the carrying ship, under a contract of affreightment with the cargo owner, is found to be liable it should be able to exercise a recourse action against the non-carrying ship to recover the amount proportional to the fault committed by the non-carrying ship. However, pursuant to the published legal doctrine this solution might not be always effective⁸⁶.

4.4.2 The carrier's liability for damages and exemption of liability

Usually, the carrier will transport the goods under a contract of carriage. This contract falls under the rules of NMC Chapter 13 on "carriage of general cargo"⁸⁷. It is important to study how the rules are functioning as they provide for the carrier a way to be exempted from liability for cargo damages.

Pursuant to NMC section 275 the main rule is that the carrier is liable for loss or damages (or delay) unless he can prove that the loss was not due to his or her personal fault or neglect or that anyone for whom he or she is responsible (see NMC section 276).

Thus, in order to establish the liability of the carrier pursuant to chapter 13, title V, there must a breach of contract which is materialized by damages to the goods (may they be lost, damaged or delayed). Then, the cargo must have been in the carrier's custody. Indeed, pursuant to NMC section 274: « *The carrier is responsible for the goods while they are in his or her custody at the port of loading, during the carriage, and at the port of discharge.* », any provisions in a

⁸⁴ Falkanger, Bull, Brautaset, *Scandinavian Maritime Law, The Norwegian Perspective 4th ed.*, Universtitetsforlaget, 2017. p. 274

⁸⁵ Ingrid Bourbonnais-Jaquard, *L'abordage maritime*, 2013, p.152

⁸⁶ In the *Marsden and Gault on Collisions at Sea* (A. Tettenborn, J.Kimbel QC, 2021, p.498) the authors believe that the recourse action will be irrelevant as the non-carrying ship may insist that the true owner of cargo joins the action so that damages will be paid immediately to the goods owner. On the other hand, in the *L'abordage maritime* (Ingrid Bourbonnais-Jaquard, 2013, P.152) the author believes that the carrying ship may sue the other ship for loss or damage to cargo, after the former paid damages to the cargo owner.

⁸⁷ As mentioned in point 3.3 when the NMC refers to contract of affreightment or to carriage of general cargo this encompasses bills of lading and waybills, voyage charters, quantity contracts and time charters.

contract of carriage willing to limit the period of responsibility are void as the provisions of 274 are mandatory (see section 254 of the NMC). On the other hand, it may be possible to contractually extend the period of responsibility.

If then it is shown that the carrier had the cargo under its responsibility then the carrier must prove that there was no negligence on his end, this follows NMC section 275: “the carrier is liable for losses (...) unless the carrier shows that the loss was not due to his or her personal fault or neglect or that anyone for whom he or she is responsible”.

Hence, one might ask, what is the level of a prudent behaviour and how to avoid being branded as negligent?

Section 262, pertaining to the duty of the carrier to protect the interests of the cargo owner, states the obligation of the carrier of « due care and despatch ». There should be a loyal performance of the voyage as the carrier « shall perform the carriage with due care and despatch, take care of the goods and in other respects protect the interest of the owner from the reception and to the delivery of the goods ». Then paragraph two of section 262 provides for the necessary seaworthiness of the vessel.

Section 131, regarding the seaworthiness of the ship, has the same duty of care toward seaworthiness: « *The master shall before a voyage begins ensure that the ship is worthy, including that it is sufficiently equipped, manned and supplied with provisions and in a proper condition for reception, carriage and preservation of the cargo. The master shall see that the cargo is properly stowed, that the ship is not overloaded, that its stability is satisfactory and that the hatches are properly closed and battened down.*

During the voyage the master shall do everything in his or her power to keep the ship in a seaworthy condition. »

If the carrier can prove he has not been negligent, then pursuant to NMC section 275 he will not be held liable. If not, the carrier shall be held liable.

However, the carrier still has a way to avoid liability through the NMC section 276. Pursuant to this article “the carrier is not liable if the carrier can show” that the loss resulted either from a navigational error, an error in the management of the ship or from a fire.

NMC section 276 acts as an exception to the carrier’s liability when the requirements are met, although it turns out that section 276 encompasses an exception to the exemption rule.

Indeed, in section 276 second paragraph it is stated that “the carrier is nevertheless liable for losses in consequence of unseaworthiness which is caused by the carrier personally or a person for whom the carrier is responsible (...)”. In other words, if it is proven that the ship was unseaworthy at the commencement of the voyage, then the exemption of liability of the carrier set in section 276 will not be applicable.

4.5 Claims against the non-carrying ship

If the cargo owner can bring a claim against the carrier, the owner may as well raise a claim against the non-carrying ship. In respect of the Collision Convention of 1910, transposed in the NMC in Chapter 8 (section 161), each ship is liable for the amount which represents the portion of its liability in the collision, this is possible under the extra-contractual event that is the collision.

For instance, if the cargo owner were to raise a claim against the carrying ship, this would be settled under the contract of affreightment, this means that the owner would raise a claim in damages for the whole amount against the carrying ship. In the present scenario, the owner

decides not to sue under the contract but in tort. This means that he will sue each ship for cargo damages accordingly to each ship portion of liability⁸⁸.

This can be an interesting choice for the goods owner, indeed as seen in point 4.4, a claim against the carrier will prevent the goods owner to raise a claim against the non-carrying ship since he should be able to recover the whole amount of the damage. Depending, on the situation this might not be the best solution for the cargo owner. It has been shown that pursuant to NMC section 276 the carrier can oppose to the owner an exemption of liability if he was not negligent which should be fairly easy to demonstrate as long as the ship was not unseaworthy at the commencement of the voyage.

It therefore strategically important for the cargo owner to assess which is the best solution to improve his chances to recover damages⁸⁹.

4.6 Conclusion

In respect of cargo claims it is essential to distinguish the claims that can be brought against the carrying ship and the non-carrying ship⁹⁰. Depending on which party the cargo decides to raise its claim, this may have serious consequences. If the owner raises a claim against the carrying ship pursuant to the contractual relationship they have, the carrier might be able to be exempted from its liability thanks to the exemption rule of NMC section 276 following “a fault or neglect in the navigation or management of the ship, on the part of the master, crew, pilot or tug or others performing work in the service of the ship”.

This study being based on a Norwegian perspective, it should be underlined that section 276 provides in its last paragraph that the exemption mechanism is not available for contracts of affreightment by sea “in domestic trade in Norway”, this means that the owner has a better position because he is able to sue, as efficiently, either the carrying ship or the non-carrying ship. Indeed, the error in navigation defense is not available to the carrier. However, the cargo owner needs to keep in mind that limitation of liability by the defendant is possible.

⁸⁸ For example, in a collision where Ship A is the carrier and the liability of Ship A is ½ and Ship B is ½ for a damage amounting to NOK 1.000.000, the cargo owner will be entitled to recover NOK 500.000 from Ship A and NOK 500.000 from Ship B.

⁸⁹ R. Williams, *Gard Guidance on Maritime Claims and Insurance*, Gard, 2013, p.175

⁹⁰ Ibid.

5 Chapter 5: The peculiarities of the offshore regime: the knock-for-knock regime

5.1 Introduction

The offshore industry has the particularity of resorting to many actors, moreover all of these actors are called upon to work in the same area. Not only in the offshore industry are used ships to transport goods but there are also construction activities, and passenger transport activities in order to service constructions at sea, there are also activities for the oil and gas industry. With regard to the OWF industry, we find the same set of players, and we also find the same contractual chain. Indeed, in the offshore legal scheme we find two protagonists as well as actors who are related to them. These two protagonists are the operator of the OWF and the contractor, both of them may use the services of sub-contractors.

Furthermore, the offshore industry is subject to specific constraints. First of all, time is very valuable in offshore operations, the latter aim to produce an energy, when we first referred to offshore industry it was referring to the activity of extracting oil and gas at sea. Now with the development of renewable energies, the aim remains the same but the means to achieve this goal are new. Operator are not drilling for oil, but they are operating wind turbines that produces energy. It involves a lot of personnel and to make a profit these offshore installations need to be functioning, if it were not to be the case, in the event of a collision damaging an OWT for instance, the loss can rapidly become cost threatening to the operation. Not to mention the time and sums of money spent on potential further litigation.

This specific lay out of the operations taking place offshore raised concern for offshore operators and contractors in terms of liability if anything were to go wrong. Indeed, many areas appears to be problematic, especially in relation with collision liability: firstly, offshore structures are not covered by the collision liability regime, as seen in chapter 3 offshore structures are defined as fixed or floating objects (FFO), thus in the event of a collision the tortfeasor, following the principles of tort law, will be liable to repair the damage without consideration for fault and the principles on limitation of liability may not be applicable either. This can in turn make offshore activities impossible to conduct as a liability for a collision can result in the bankruptcy of the defendant, the latter being liable to repair the full damage, which include consequential losses. Not only offshore structures are very expensive but compensation for the stoppage of the operations can be even more expensive as the loss for the operator of the production of the energy is very high, not to mention that sub-contractors may raise claims for compensation, their activities being interrupted as well.

Therefore, with such potential litigation risks, operators and contractors resorted to arrange their respective liabilities under contract, as a result many operators and contractors were using in-house contracts or adapted existing standard charter party forms, which proved not to be ideally suited for the offshore industry⁹¹. This led to the rise of a charter party specifically drafted for offshore activities by BIMCO⁹²: SUPPLYTIME. This charter party has been specifically drafted to match the needs of the oil and gas offshore industry, and as such, has been among the top-ten BIMCO form sold to the industry⁹³. With the development of offshore wind farms BIMCO started to work with OWF companies in order to draft a specific form for this industry: WINDTIME which was released in 2013.

⁹¹ Baris Soyer, Andrew Tettenborn, *Offshore Contracts and Liabilities*, Informa Law, 2015, p.5

⁹² BIMCO is the world's largest direct-membership organisation for shipowners, charterers, shipbrokers and agents, according to BIMCO's website (www.bimco.org).

⁹³ Tettenborn, *Offshore Contracts and Liabilities*, Informa Law, 2015, p.5

In order to better understand how a collision liability may be addressed, this chapter will set forth the legal sources on which the offshore industry – and especially the OWF industry – relies on (5.2). This calls for the introduction of offshore contracts, their contractual structure and the parties involved (5.3). Finally, the relevant offshore contract for the OWF industry will be studied (5.4).

5.2 Legal sources

In many areas, statute is the primary source of law⁹⁴, as such the NMC is the most important source. In other areas, statute as a lesser importance, such is the case in relation with chartering of ships. Pursuant to NMC section 322 freedom of contract prevails, in other words the parties to the contract are free to regulate their relationships as they wish, and statutory provisions should only be relevant when the contract is silent⁹⁵. Indeed, pursuant to section 322 the NMC should only be relevant “insofar as anything to the contrary follows from the contract, practice established between the parties, or customs of the trade or other usage which must be considered binding upon the parties”.

In the shipping industry, in order to be cost effective but also because they have proven to be efficient, contract of affreightments are predominantly standard form contracts⁹⁶. When it comes to offshore contracts this is no exception. As seen in the introduction above (5.1) many players are interlinked in the offshore area and an operator may enter numerous high value agreements with different contractors⁹⁷, the former and the latter often using sub-contractors it is therefore important for the liability system to leave no loophole, hence the success of the BIMCO’s standard form.

As a result, the main legal source in the offshore industry is the contract.

5.3 Structure and content of offshore contracts

Offshore contracts are evidencing two points: Firstly, there is a contractual chain between the operator, the contractor and their sub-contractors. Secondly, there is a special liability mechanism that waives any possible tort suits⁹⁸: the knock-for-knock principle.

Contractual chain inside offshore contracts.- The function of the knock-for-knock principle is to regulate the allocation of risks; however, third parties do not have to comply with the aforementioned principle⁹⁹. As a result, this defeats the purpose of such a principle, indeed the parties involved in the contracts will frequently use the service of sub-contractors but if these sub-contractors are not under the umbrella of the contractual relationship between the operator and the contractor, they will be able to raise a claim in tort if a damage were to happen.

For that reason, contracts using knock-for-knock principle are creating a contractual chain between the highest parties, the operator and the contractor, with the third parties that are involved with one of the contracting parties: this corresponds to the so-called *Himalaya clause*. This is to ensure that sub-contractors are under the same liability regime as the highest parties.

⁹⁴ Falkanger, Bull, Brautaset, *Scandinavian Maritime Law*, 4th ed., 2017, p.32

⁹⁵ Ibid.

⁹⁶ Ibid, p.326

⁹⁷ Meade, Neuberger, *Knock-for-knock indemnities: risk allocation in offshore oil and gas contracts*, www.bracewell.com

⁹⁸ Parchomovsky, Stavang, *CONTRACTING AROUND TORT DEFAULTS: THE KNOCK-FOR-KNOCK PRINCIPLE AND ACCIDENT COSTS*, CREE, working papers 2013, p.2

⁹⁹ Ibid. p.10

As a result, offshore contracts will often refer to a *party's group*. The operator and the contractor will each constitute a group and all the sub-contractors of each parties will be part of a group so that they can fall under the umbrella of the liability regime of the contract.

The knock-for-knock principle.- It can be defined as a mechanism “under which each party bears its own cost in the event of an accident and must insure against its own losses”¹⁰⁰. In other words, damage and loss to property or personnel suffered by one party will be considered their own loss and the option of bringing a tort suit is non-existent. Moreover, for this mechanism to be efficient, the regime must be extended to include third parties that are providing services to the contracting parties. This is made possible through a contractual chain where one can find at the top of the chain the operator and the contractor and where one can find linked to these aforementioned parties some other third parties acting as sub-contractors; this leads to the notion of “party's group”. The contract will usually state in which party's group the third parties, acting as sub-contractors, are included¹⁰¹.

This principle is often referred as a mutual hold agreement¹⁰². The use of this agreement is to mitigate “the complexities of post-event liability allocation between contracting parties”¹⁰³. In other words, the knock-for-knock principle helps the contracting parties to clearly establish each other's liability prior to any potential damage claims. This is very helpful to the parties as offshore structures are not covered by the collision liability nor the rules on limitation of liabilities (when the fault is on the wind farm owner) which is source of difficulties and would make the process of liability allocation lengthy and unpredictable.

5.4 WINDTIME

This section will introduce the WINDTIME form, and then study how the collision liability is addressed following the use of the knock-for-knock principle in the WINDTIME charter.

The WINDTIME charter is a derivative of the SUPPLYTIME charter, the latter is in use in the offshore oil and gas industry. It provides for a knock-for-knock regime between the main parties to the contract and their sub-contractors, as seen the sub-contractors who are normally third parties to the contract will be bound by the same provision expressed in the contract between the main parties, therefore the knock-for-knock principle is applicable to them.

The first OWF projects, for the lack of a better charter, were using the SUPPLYTIME charter as it was designed for the offshore oil and gas industry and was the closest form usable in the OWF industry. However, the OWF industry being very differently constructed to the offshore oil and gas industry, the drafting of a new form specifically designed for the OWF was needed¹⁰⁴. This led to the BIMCO's WINDTIME charter party.

5.4.1 Use of WINDTIME

¹⁰⁰ Parchomovsky, Stavang, CONTRACTING AROUND TORT DEFAULTS: THE KNOCK-FOR-KNOCK PRINCIPLE AND ACCIDENT COSTS, CREE, working papers 2013, p.2

¹⁰¹ For example, in WINDTIME charter the owner's group is defined as “the Owners, and their contractors and sub-contractors, and Employees of any of the foregoing. », part II, p.3

¹⁰² Baris Soyer, Andrew Tettenborn, *Offshore Contracts and Liabilities*, Informa Law, 2015, p.68

¹⁰³ Meade, Neuberger, *Knock-for-knock indemnities: risk allocation in offshore oil and gas contracts*,

www.bracewell.com

¹⁰⁴ Ibid, p.9

Amidst the plethora of business sectors working together (engineering companies, construction companies, supply vessels companies, etc) to carry out the offshore operations, one sector is key: transportation to and from offshore sites. Equipment and personnel being necessary to the installation and maintenance of the OWF, supply vessels will be used to make the junction between land and the working area. That is for this purpose that the WINDTIME form has been drafted: it is meant as « a standard charter party for personnel transfer and support vessels servicing offshore wind farms»¹⁰⁵.

Therefore, when it comes to construction work other contracts must be used. To this extent, it must be acknowledged that WINDTIME alone is not designed to cover every liability scenario possible, but only cover for liability arising out of the use of supply vessels.

5.4.2 Knock-for-knock clause

Like other offshore contracts, the WINDTIME form has a knock-for-knock clause provided in its clause 16 pertaining to liabilities and indemnities¹⁰⁶. Like the SUPPLYTIME form on which WINDTIME is based, the main idea regarding liability, such as liability in the event of a collision, is that each party shall bear the cost of their own loss “so as to leave losses where they fall”¹⁰⁷. However, in comparison to SUPPLYTIME the wording of clause 16 is not exactly the same and have been adjusted, as this section will evidence.

As studied above (see point 5.3) WINDTIME introduce the concept of party’s group¹⁰⁸, thus two groups can be found in the contract: the owner’s group and the charterer’s group (which correspond to the contractor and its sub-contractors). As such, the knock-for-knock clause will be applicable to all the parties included in these two groups. This is actually clearly stated in WINDTIME, the latter providing for a Himalaya clause¹⁰⁹. This clause is ensuring that there is no pass through of liability between a sub-contractor and one of the main parties to the contract, it wraps up the knock-for knock provisions¹¹⁰.

Clause 16 is divided in several letters. Starting with letter a, clause 16(a) set forth the general provisions on the knock-for-knock regime: both the owner’s and charterer’s group “shall not be responsible for loss of or damage to the property of any member” or “for personal injury or death of any member”. Moreover, the clause is also providing that even in the event where the loss, damage or injury happened “by the act, neglect, gross neglect or default” of one of the parties the knock-for-knock provision shall be applicable nevertheless. This point must be underlined as it is very important to the parties: if one them is trying to find a way to escape their liability by allocating the blame on the other party¹¹¹, it is here not possible due to this provision.

Clause 16(b) is providing for the exclusion of consequential damages. Just as any loss or damage of injury, any consequential loss is excluded from the liability of either the owner or the charterer.

¹⁰⁵ Wikiborg Rein website (<https://www.wr.no/en/news/publications/global-offshore-project---marine-renewables/bimco-windtime/>)

¹⁰⁶ BIMCO’s WINDTIME p.12

¹⁰⁷ **Baris Soyer, Andrew Tettenborn**, *Offshore Contracts and Liabilities*, Informa Law, 2015, p.20

¹⁰⁸ See WINDTIME part II on definitions p.3

¹⁰⁹ BIMCO’s WINDTIME p.12

¹¹⁰ **Baris**, *Offshore Contracts*, p.23

¹¹¹ **Baris**, *Offshore Contracts*, p.21

5.4.3 Force majeure

As provided by clause 16, in the event of a collision each party shall be liable for their own loss or damage according to the knock-for-knock principle. However, WINDTIME is also providing for a force majeure clause¹¹². The clause provides that no party should be liable if the events listed in the force majeure clause occur.

For instance, if a collision were to happen as a result of an earthquake or other extraordinary reasons (as provided in clause 32) then the provisions of the clause will be triggered, as a result “neither party shall be liable for any loss, damage, liquidated damages or delay”.

5.4.4 Limit to the use of WINDTIME

As mentioned in point 5.4.1, WINDTIME is not meant to regulate the whole offshore wind farm operation. It is a charter party for personnel transfer and support vessels servicing offshore wind farms and as such it is not meant to cover the construction work that takes place offshore, in this case other contracts are more suitable. So far, it has been common practice to use FIDIC contracts for offshore windfarm construction¹¹³. This can be source of unpredictability when it comes to liability for collision, indeed unlike in a WINDTIME contract, standard FIDIC contracts do not use the knock-for-knock principle, this in turn change the risk balance between the parties¹¹⁴, hence the contractor must be careful when entering in such a contract as he will be liable towards the operator if a collision were to happen notwithstanding his fault or its sub-contractor fault. However, alterations to the standard contract can be made in order to provide for a mutual hold harmless regime (knock-for-knock), in that case it is important for the parties to make sure that this provision is implemented at each level of the contractual chain¹¹⁵.

5.5 Conclusion

The key aspect of the offshore industry is that its actors need to protect themselves against any potential source of liability, and that in the event of a damage parties involved must have an understanding, through their contractual relationship, to avoid time — and cost — consuming litigation.

To address the specific needs of the offshore wind farm industry the WINDTIME was drafted and has become the contract of choice for the chartering of vessel. However, WINDTIME is far from a complete solution when it comes to combining vessels with construction work. Indeed, FIDIC contracts are often used in offshore wind farm EPC¹¹⁶ contracts¹¹⁷. As seen above (5.4.4) this can be problematic when it comes to liability as the liability regime is not aligned with the traditional knock-for-knock regime. This issue needs to be addressed as it may result in a loophole to the liability system.

Applied to a collision within the OWF it means that under a WINDTIME charter both main parties know exactly where their liability lies in case of a collision: each party shall be liable for their own damage. But when it comes to the construction work other type of vessel will be used, and during construction for instance a collision might happen, for the contractor his

¹¹² BIMCO's WINDTIME clause 32 p.19

¹¹³ <https://www.kvale.no/en/articles/using-fidic-yellow-book-for-offshore-wind-projects-en/>

¹¹⁴ Norsk Industri website (https://www.norskindustri.no/siteassets/dokumenter/rappporter-og-brosjyrer/leveransemodeller-havvind/leveransemodeller-havvind_juni_contracting.pdf) p.29

¹¹⁵ Ibid) p.30

¹¹⁶ EPC stands for Engineering, procurement and construction

¹¹⁷ <https://a2seanews.editionmanager.com/2015/09/15/plug-n-play-contracts-on-the-horizon/>

liability will depend on another type of contract such as a FIDIC contract, and if the contractor has not been careful or was not aware of the potential difference in terms of liability in the event of a collision then the regime might switch from knock-for-knock to a more traditional fault based regime where the contractor will be liable to repair the damage caused by the collision which can be very costly. This is why it is crucial for the parties to make sure that the knock-for-knock principle has been implemented in all the contractual chain, between parties and between contracts.

6 Chapter 6: General conclusion

This thesis aimed to identify how liability for ship collision is treated within offshore wind farms.

Not only the risk of collision is the most prominent risk, but it is also the most frequent, this is for this reason that this thesis is addressing the collision liability in particular among all the possible scenario triggering liability. As of today, the literature available on collision liability is very comprehensive, nonetheless some grey areas remain: this is especially the case when it comes to collision events within the offshore wind farm area. Indeed, the legal framework around the offshore wind farm industry is somewhat still in its infancy, and as such there is a lack of doctrinal research, international conventions, standard contracts or statute law regarding this matter.

As a result, this thesis strives to apply existing solutions to new legal issues. It aims to introduce how the research findings may follow or challenge the existing legal framework on liability for ship collision when applied to the offshore wind farms.

6.1 Assessment according to the type of claim

First and foremost, it is necessary to distinguish between claims that may be brought under a contract and claims that may be brought in tort.

6.1.1 Tort claims

Addressing tort claims first, these claims can be divided into three groups: the first group is pertaining to claims arising out of a collision with another ship within an offshore wind farm, the second group is pertaining to claims arising out of a collision with a FFO, namely an OWF assets (such as an OWT or a substation) within an offshore wind farm, and the third group is pertaining to claims arising out of a collision and results in a loss or damage of goods within an offshore wind farm.

The first group regarding collision with other ships is based on international conventions, the central convention to the collision liability regime, the 1910 Collision Convention, has been widely ratified and Norway is no exception. This provides for a great harmonization and foreseeability between jurisdictions. Concretely, if a collision between ships, and only ships, were to happen outside the scope of a contractual relationship within an offshore wind farm, the two key takeaways is that to trigger the liability of a ship the collision must have been caused by the fault of one or both ships. If no fault can be found, then no liability can be withheld. Secondly, another international convention, the LLMC convention, has been enacted by statute in Norway and introduce the principle of limitation of liability. This principle of limiting the liability of shipowners is one of the most important in maritime law: the limitation of liability excludes full compensation for damage and implies their coverage by a limitation fund set up by the shipowner or the responsible operator. Since the liability for collision arise outside of a contractual relationship no provisions are regulating the framework of liability, and as such the liable party should be responsible to compensate the full damage which have proved to be unworkable in the maritime field, the limitation of liability is a remedy to this issue.

The second group regarding collision with an offshore wind farm asset, which fall under the umbrella of FFO, did not benefit from a harmonization of its regime as no international conventions address the matter. In this scenario the damaged object is not a ship, hence the Collision Convention, and its transposed provisions in the NMC, is not applicable. Thus,

ordinary tort rules will be applicable, and the parties will have to rely on the domestic law applicable. This thesis has evidenced that it is most likely that a shipowner owner will be held strictly liable in the event of a collision with an offshore wind farm asset. The rationale behind this is that the offshore wind farm asset is stationary and as such cannot avoid contact, unlike a moving ship, as a result there is a rebuttable presumption that the ship is at fault. This is a difficult position for the shipowner as damage to offshore assets can result in very substantial claims particularly when the asset is part of a production process and therefore add to the initial damage costs some other consequential damage costs.

However, if the claim arises in country where the limitation principles of the LLMC convention are applicable such as Norway then it is possible for the shipowner to limit its liability. Nonetheless, the limitation of liability is only applicable to ships and in some cases, it is possible that the owner of the offshore wind farm assets is found to be liable for the collision, and as such the owner will not be able to limit its liability.

Based on these conclusions regulators and practitioners could consider drafting an international regime so that collision liability with offshore wind assets can benefit from a harmonized and predictable legal framework around the world.

The third group is addressing cargo claims. The common claims pertaining to cargo claims are in relation with loss, damage or delay of the cargo. Indeed, it is not uncommon that a collision may result in damages to cargo which raise some legal issues. This group pertaining to cargo claims is somewhat falling between contractual and non-contractual claims. Indeed, the cargo owner may have a claim against the carrying ship which most likely will be under a contractual relationship with the owner, but it is also possible for the cargo owner to have a claim against a non-carrying ship¹¹⁸, the latter not being part of the contractual relationship between the cargo owner and the carrier if the owner were to raise a claim then it would be a claim an extra-contractual claim. It is key to determine if a claim can be brought under contractual provision or not because it is possible that contractual or mandatory statutory provisions exist to limit or reduce the liability of one party. In Norway such mandatory provisions are to be found in the NMC.

However, when a claim in cargo damage following a collision arise in tort, the party on which lies the fault will not be able to rely on exemption of liability defences since these exemptions are only applicable in a contract of carriage.

6.1.2 Contractual claims

Right of action following a collision in the perimeter of an offshore wind farm may arise either, as seen above, in tort or, as introduced now, in contract.

Collisions being fortuitous event they tend to be addressed in tort. However, applying traditional liability scheme in an offshore operation such as an offshore wind farm would result in putting substantial risks on the head of one party: the contractor. Indeed, the contractor and its subcontractors are led to use ships around the offshore wind farm, whereas the operator solely needs to hire a contractor, moreover, as seen in the event of a collision with an offshore wind asset the collision liability regime is not applicable and often the ship part to the collision is held strictly liable, meaning the contractor using a ship to service the offshore wind farm. The risk-reward balance being unworkable, offshore maritime players worked together to develop standard offshore contracts where the liability of each party is provided. This led to the advent of the knock-for-knock regime, a contractual liability regime where each party is liable for its own losses and hold the other party harmless. This solution has been used in the offshore

¹¹⁸ If it is acknowledged that the non-carrying ship, due to its negligence, caused the damage to the cargo.

oil and gas industry and is now adapted to the offshore wind farm industry. Indeed, with the complexity of the projects, the values of property at stake, and the number of workers in the area of operation, it is necessary to have a liability system that is balanced between the parties and that allows foreseeability regarding the liability of each co-contracting party.

Maritime transportation being essential to the offshore activities — as it is the only vehicle between land and the wind farm — BIMCO released in 2013 a standard contract form: WINDTIME. This form is a charter party which allows the contractor to charter ships to work and service the wind farm. This form is key to the offshore wind farm industry as it is specially developed for its market, the form provide for the aforementioned knock-for-knock liability regime. As a result, if a collision were to happen in the OWF each party, and their subcontractor, will solely be liable for their own loss regarding property or personnel.

However, WINDTIME is far from a complete solution when it comes to combine the use of ships and construction work. Indeed, as studied in Chapter 4, offshore wind farm activities relies on a contractual chain and if WINDTIME is addressing the chartering a service and supply vessel other contract are needed to conduct the operations fully, these contract are onshore based and have to be amended to introduce the knock-for-knock liability regime throughout the whole contractual chain, this can be source of difficulties as the owner or contractor might receive claims from third parties who somehow are not under the umbrella of the knock-for-knock regime in the event of a collision.

6.2 Relevance of the study of contractual and extra-contractual ship collision liability regimes

To conclude, the vicinity of the offshore wind farm is the object of a safety zone, and as such the only ships that should be a risk of collision with an offshore wind farm asset or with another ship within the wind farm should be ships that are contracted to work in the wind farm, as they are the only ships that should be allowed to navigate in the safety zone. As a result, it is most likely that the collision liability regime will be provided under contractual clauses. Thus, it is central for players involved in offshore operations to have a good understanding of the collision liability under the knock-for-knock principle.

Nonetheless, offshore wind farm being located in coastal areas and with safety zones forbidding commercial ships to navigate through the wind farm this leads to an increased risk of ship-to-ship collision due to reduced shipping lanes between the wind farm and the coast.

Moreover, a risk of collision between a ship and a wind farm asset (FFO) is not to exclude, indeed even if a re-routing of the shipping lanes is put into place some lanes might still be passing close enough to a wind farm to create a risk of collision. This risk can arise from many reasons, such as adverse weather, technical issues with the navigation equipment or even a failure with the ship's engines.

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