Wreck Law

– A Systematisation of Legal Interests and Conflicts

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The river is within us, the sea is all about us;
The sea is the land's edge also, the granite
Into which it reaches, the beaches where it tosses
Its hints of earlier and other creation:
The starfish, the horseshoe crab, the whale's backbone;
The pools where it offers to our curiosity
The more delicate algae and the sea anemone.
It tosses up our losses, the torn seine,
The shattered lobsterpot, the broken oar
And the gear of foreign dead men. The sea has many voices,
Many gods and many voices.

The Dry Salvages, *Four Quartets*
– T.S. Eliot

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Contents

List of Figures

Introduction

Chapter 1

Presentation of the Subject

1.1 Introductory Remarks

An important role and function of legal research is to contribute with new insights by systematising legal norms and regulatory systems. This has been hailed as one of the most important tasks for legal research.[1] This task of systematisation can be executed in various ways. In an area of law where internationalisation and harmonisation between legal systems are important components of the regulatory framework, this task entails specific challenges and problems in regards to both theoretical and methodological considerations. Similar challenges arise in relation to an area of law where not much legal research has been conducted. The topic of this study falls into both of these described categories and this has had various implications on the way that the task of systematisation has been undertaken in this case.[2]

The contribution of this work should be viewed as providing a framework and a perspective of this area of law. This has meant that the presented systematisation is not a traditional exhaustive legal analysis of the legal or normative material on a given subject on the surface level of law. Instead, the work pursues the deeper structures of this legal

[1] Cf. Hans Petter Graver. "Rettsforskningens oppgaver og rettsvitenskapens autonomi". In: *Tidsskrift for Rettsvitenskap* 124.2 (2011), p. 235.

[2] See further in section 1.3 and chapter 2.

area with the aim of constructing a conceptualization of legal interests and conflicts that intersect in this particular field. The result is thus an example of how the task of systematisation can be carried out in an evolving area where law is needed in order to handle different interests and conflicts.

1.2 Problem Introduction

Few things are as peaceful and calming as the sound or sight of distant crashing waves. Yet, at the same time, embedded in those serene waves lie the violence and force that have challenged sailors and seafarers since the point in time when they first ventured out to sea. The dichotomy between the tranquillity and uproar of the water, between its peace and calamity, has characterised, shaped and driven mankind's attitude and relation to the sea. This is evidenced in both history and culture. An example of the former is the extraordinary gains that could be reaped from oversea trade versus the huge risks involved especially in the early days of trade between merchants by sea. All journeys did not end well and far from all seafarers returned home from sea as in Stevenson's poem.[3] As for the latter, the calmness and serenity in some of Turner's seascapes can be contrasted with the later impressionistic interpretations and depictions of the sea, where the violence and force of the waves are not seldom highlighted as in some of Monet's different renditions portraying the white cliffs of Étretat.[4]

[3] Cf. the latter part of Robert Louis Stevenson's *Requiem* as engraved on his tomb:

This be the verse you 'grave for me,
Here he lies where he long'd to be,
Home is the sailor, home from [the] sea,
And the hunter home from the hill.

[4] Other examples of where this dichotomy is captured are Debussy's famous *La mer, trois esquisses symphoniques pour orchestre*, composed by Debussy between 1903 and 1905, Lesure Number 109, and, perhaps even more so, in the contrast between the peaceful prelude to *Das Rheingold* and the final bars, as riveting as tempestuous, in the ending crescendo of Isolde's *Liebestod*; from *Das Rheingold* and *Tristan und Isolde*; operas by Richard Wagner.

The focus of this study has been one of the above-mentioned dichotomy's potential outcomes in the form of shipwrecks and their eventual subsequent removal. As discussed further below, there are several different variations or kinds of wrecks that affect us in various ways.[5] Wrecks may be problematic in the sense that they pose hazards to the navigation of other vessels or because they threaten the environment. Wrecks may also be dangerous in themselves for other reasons, e.g. if they carry munitions, explosives or nuclear cargo.

The hazards and dangers that wrecks can pose may require actions as to mitigate, reduce or remove the involved danger or hazard. Legal instruments are needed in order to enable such actions to be taken and to allocate risk and responsibility in these situations. There are several international conventions, such as the Nairobi International Convention on the Removal of Wrecks (WRC) and the different conventions related to oil pollution, that can be relevant in relation to these hazards and dangers. There are also domestic regulations, on a national level, in different legal systems. Domestic legislation can implement regulations from international conventions in dualistic states, but there are also separate national regulations dealing with wrecks in various ways that are thus limited to specific legal systems. This means that there can be several co-existing regulations that can be of relevance in relation to a situation involving a wreck. These regulations can, in some cases, be aligned. In other scenarios, they may not affect each other at all in the sense that they concern and deal with different aspects of a situation. There may, however, also be cases where the regulations are in conflict and do overlap. These different layers of regulations along with potential conflicts can pose legal problems when dealing with shipwrecks.

Wrecks may also be in need of protection. Protection can be necessary in relation to the cargo or some other property that is on board or located in the vicinity of a wreck. Another reason for protection can be that a wreck is seen as a final resting place for the ones on board

[5] An in-depth discussion and an analysis of the problem area, as well as a classification of different wrecks, are found below in section 1.5 and 1.6.

that went down with the ship. The wreck can be viewed as a gravesite in such circumstances. There may also be archaeological, historical or cultural reasons behind the rationale of offering protection to a wreck. These different grounds for protection, and the cluster of relations between different involved subjects, can result in complicated situations and balances of interests where the approach or stance on the resulting legal issues is not evident.

A situation can be further complicated by the different maritime zones in which a wreck may be located and jurisdictional matters as to which legal system that is to govern the wreck. Careful scrutiny may be required in order to determine which legal framework or frameworks that are relevant in relation to a wreck in light of this complexity. Furthermore, questions concerning proprietary interests and contractual issues in relation to wrecks can, among other things, impact on the situation and especially so when assessing rights in respect of a wreck and liability issues.

There can, furthermore, be different interests and rights in respect of a wreck that may come into conflict with each other in various situations. One such example is when the owner of a wrecked ship claims rights to it, while the state in whose territory the wreck is located, and where it poses a hazard, also claims rights e.g. in respect of its removal. This creates a conflict between the ship-owner and the state. Many other potential conflicts of this kind can be identified.

The study aims at investigating the above-mentioned problem area. In other words, its subject is interests and conflicts in relation to wrecks and wreck removal. These concern issues of private law. As is often the case with issues relating to maritime and transport law, however, it is often hard or even illusory to try to make a clear distinction between private and public law.[6] This characteristic is also shared by other

[6]Cf. the description of the law of wreck in Nicholas Gaskell and Craig Forrest. *The Law of Wreck*. CRC Press, 2019, p. 3 f. As a further example, see Kurt Grönfors. *Fraktavtalet under etthundra år*. Skrifter, Sjörättsföreningen i Göteborg, 66, 1986, p. 19 on this issue in relation to contracts of carriage and also ibid., p. 27 ff for a discussion on the political and contextual impact on the inclusions of private and public law elements in regulations of different modes of transport. In relation to the law of salvage, as

evolving new fields of law that are not confined to the traditional division and view of separate legal disciplines within law as conceived during the 19th century.[7]

1.3 Purpose and Method

The purpose of this study is to systematise interests and conflicts in relation to wrecks and wreck removal. In this way, the ambition of this work is to provide a framework and a perspective of this area of law and the context in which these interests and conflicts reside. The systematisation can, hopefully, be used in various ways, e.g. in order to analyse problems involving wrecks and wreck removal as well as discussing possible regulatory mechanisms and solutions that can deal with the identified interests and conflicts.

The systematisation concerns interests and conflicts as they are perceived in a legal sense. This means that legal norms are included in the systematisation. The discussion is, however, not limited to legal norms and the ambition of the study should not be seen as a mere systematisation of normative material. The ambition is deeper than the surface level of law. Instead, the study pursues the deeper structures involved in this area. This is partly due to the context in which this area of law resides, as well as its particular characteristics. The norms involved are, to various extents, international and aimed at harmonization. They are also, in many instances, characterised by their piecemeal nature, causing the area to appear fragmented in many parts. This has turned the discussion towards the deep structures involved in contrast to an exhaustive legal analysis of a given theme or legal question on the surface level of law.[8]

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another example, the intricate intertwining of private and public law elements was discussed, in a Nordic context, as early as the beginning of the 20th century; see Helge Klæstad. *Om bergning av skib*. Kristiania, J. W. Cappelens Forlag, 1917, p. 10 f.

[7] Kaarlo Tuori. "The Law and its Traditions". In: *Scandinavian Studies in Law* 48 (2005), p. 502 f.

[8] Cf. ibid., p. 490 and, in more depth, Kaarlo Tuori. *Critical Legal Positivism*. Routledge, 2016.

Different interests and conflicts have been identified in relation to wrecks and wreck removal from norms used in several different jurisdictions and international conventions. In several cases, the interests and conflicts have also been identified based on actual events involving wrecks. Both normative and empirical content have thus formed the material for the study.

In order to systematise this material, several ways of viewing and construing the material have been used. One way has been to classify wrecks based on several different divisions and parameters. Another way has been to relate the material to different identified risks involved in these situations. Furthermore, another way has been to reflect upon and involve ethical aspects in the discussion. Also the proprietary perspective in relation to wrecks and wreck removal has been taken into account as well as the dimension of time. In relation to all these aspects, several jurisdictions and the variety of norms and perspectives that they bring to the area have been studied. Another consequence of the purpose is that the analysis behind the systematisation, reveals advantages and disadvantages with these different legal solutions to the identified interests and conflicts. These advantages and disadvantages can be understood in relation to different identified functions.[9]

By systematising the interests and conflicts, a structure is created which, hopefully, makes it easier to approach and understand this area of law and the legal norms that are involved. The contribution of this work amounts to new knowledge because of the understanding that the structure brings as a whole but also in its different parts along with the legal issues represented there.

1.4 Defining the Problem Area

In order to reach the purpose of the study, this beginning section identifies different interests and conflicts in relation to wrecks and wreck removal. The process is in two stages. First, different interests and conflicts are discussed in order to clearly delineate relevant problems

[9]For details on the theoretical and methodological considerations, see chapter 2.

and conflicts and to provide a solid background for the ensuing parts. The interests and conflicts are identified based on the empirical, historical and legal sources referred to in the following discussion. This part, subsequently, forms a foundation for the second stage, resulting in a functional classification of different wrecks. The classification is functional in the sense that it identifies different wrecks in relation to certain functions. The purpose of the classification is to provide a model or a structure while, at the same time, also demarcating and delimiting the problem area.

This first section thus forms a foundation for the rest of the study and results in a classification of different wrecks. In this sense, the two stages taken together form and define the problem area of the study. The classification, furthermore, distills and condenses the problem area into separate fields. These results are subsequently used in order to formulate research questions in section 1.8.

There are thus two introductory research questions in this process. These questions are:

- Which interests and conflicts are involved in relation to wrecks and wreck removal?

- How can wrecks functionally be classified?

These two introductory research questions are discussed and answered below in section 1.5 and 1.6.

1.5 Involved Interests and Conflicts

1.5.1 Introductory Research Question I

This study concerns legal interests and conflicts that arise as a consequence of wrecks and wreck removal. The research question for this section is formulated as identifying these interests and conflicts. The results form the basis for the classification in the next section that, in turn, shapes and delineates the analysis for the ensuing parts.

1.5.2 Different Kinds of Wrecks

There are many wrecks located in various parts of the world. Some lie close to shore, while others are far out to sea; some are long sought after, still lost in the depths. These wrecks can affect us and our environment in different ways. The effects can vary depending on, among other things, the position, content or condition of the wreck as well as its age and status. The variations are many. The oceans and shipwrecks have also fascinated mankind throughout history. This interest is very much alive today and in the recent past elements of wrecks and wreck removal have come to the top of the agenda in the shipping world as well as on the political stage.[10]

There are several reasons behind the increased interest in wrecks and wreck removal. One driving force is probably the increased amount of money that is spent on salvaging ships and removing wrecks.[11] The advances within the salvage and wreck removal industry, and the cutting-edge technology now being used in these endeavours, have enabled more complicated removal processes to take place and, as a consequence, wrecks that previously could not be reached, removed or salved can now be handled.[12] In correlation with this ability to salve and remove wrecks in more and more complicated situations, the costs involved have also skyrocketed.[13] Another reason behind increased

[10] One notable example of this is the creation and the coming into force of the Nairobi International Convention on the Removal of Wrecks, highlighting that wrecks can pose hazards of different kinds. Another example is the attention put on already existing wrecks that pose environmental hazards, resulting in political actions in order to deal with or mitigate their hazardous effects. The governmental spending in order to clean up existing wrecks that pose environmental hazards in Swedish waters is one concrete example of this; see Regeringskansliet (2019). *Rent hav – Fakta-pm*. Miljö- och energidepartemenetet. 2017. URL: https://www.regeringen.se/4a5335/globalassets/regeringen/dokument/miljo--och-energidepartementet/pdf/bp18-rent-hav-faktapm.pdf (visited on 02/2019), p. 1.

[11] Cf. International Salvage Union (2019). *International Salvage Union Annual Review 2017*. 2017. URL: http://www.marine-salvage.com/pdfs/ISUAnnualReview2017.pdf (visited on 01/2019), p. 10.

[12] Gaskell and Forrest, *The Law of Wreck*, p. 5. Gaskell and Forrest describe the current position in the following way "with modern recovery and salvage technology virtually any wreck can be found and recovered"; ibid., p. 223.

[13] To name a few examples, the container ship MSC Napoli, of around 53 000 GT (gross tonnage), that was stranded and wrecked off the coast of England in 2007

costs can be interventions by states or other authorities in different salvage and wreck removal operations resulting in additional or other actions than the originally involved parties had envisaged.[14]

The probably most well-known case of a wreck removal operation in recent times, is the removal of the passenger cruise ship Costa Concordia that ran aground outside the island of Giglio off the coast of western Italy in 2012. The ship carried 4 200 passengers and crew of which 32 people died. The wreck removal is estimated to have cost one and a half billion euros.[15] The wreckage is an example of how different key factors can have an impact on how a wreck removal operation is carried out and the costs involved. Various aspects played a part in making the Costa Concordia the most expensive wreck removal operation ever conducted. The ship was massive,[16] it was wrecked at a difficult location on rocks in the immediate vicinity of much deeper water and environmental concerns, expressed by the authorities involved, meant that a complicated removal process had to be conducted.[17]

In the removal process, more than 2 000 tonnes of bunker oil were removed under an initial salvage contract. A tendering process was also initiated, where parties could bid on the subsequent wreck removal contract. While this was ongoing, measures were taken in order to prevent pollution from the wreck under a caretaking contract concluded with

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carrying 2 400 containers, of which 103 fell into the sea, and bunkers of 3 500 tonnes, cost around 135 million dollars to remove. Furthermore, the removal of the bulk carrier the New Flame, of around 26 000 GT, that also sunk in 2007 off the coast of Gibraltar, following a collision, cost 177 million dollars; see Nicholas Gaskell and Craig Forrest. "The Wreck Removal Convention 2007". In: *Lloyd's Maritime and Commercial Law Quarterly* (2016), p. 98 f.

[14] Cf. Gaskell and Forrest, *The Law of Wreck*, p. 32 ff.

[15] David Osler (July 7, 2014). *Costa Concordia costs likely to hit $2bn*. Lloyd's List. URL: https://lloydslist.maritimeintelligence.informa.com/LL046531/Costa-Concordia-costs-likely-to-hit-%5C$2bn (visited on 02/2018). In Gaskell and Forrest, *The Law of Wreck*, p. 29, the estimate 1.5 billion US dollars is given.

[16] With a volume of 114 147 GT the ship was 291 m in length and had a maximum breadth of 62 m; see MarineTraffic (2018). *Costa Concordia*. 2017. URL: http://www.marinetraffic.com/ais/details/ships/imo:9320544 (visited on 02/2018).

[17] James Herbert (2018). *The Challenges and Implications of Removing Shipwrecks in the 21st Century*. Lloyd's of London, 2013. URL: https://www.lloyds.com/news-and-risk-insight/risk-reports/library/technology/wreck-report (visited on 02/2018), p. 24 and Gaskell and Forrest, *The Law of Wreck*, p. 27.

the same contractor that had removed the bunkers. When the tendering process was complete, a wreck removal contract was agreed with another contractor.[18] The removal process was intricate and focused on removing the wreck in one piece. In order to remove it, the ship had to be parbuckled, re-floated and then towed away in whole. To achieve this, an underwater platform was constructed at the site and the side of the wreck was affixed with watertight boxes, called caissons. The ship was then tilted upright by the use of cranes and by filling the caissons with water. When the ship was once again upright, resting on the underwater platform, a further set of caissons were affixed to the other side of the wreck. The water-filled caissons were then emptied and filled with air in order to provide buoyancy and to stabilize the ship for the ensuing towage.[19]

Another notable example of a complicated and an expensive wreck removal operation is the container ship Rena that went aground on the Astrolabe Reef off the coast of New Zealand in 2011 and subsequently split in half. The cost of that operation has exceeded 600 million New Zealand dollars.[20] One estimate from 2017 put the total cost of the work with the wreck to 650 million US dollars.[21]

1.5.3 Why Remove Wrecks?

The high costs involved in removing wrecks merit the question as to why it is necessary to do so. The answer is multifaceted, since wrecks may need to be removed for various reasons. These can be divided into

[18] Gaskell and Forrest, *The Law of Wreck*, p. 27 f.

[19] The perhaps more practical and cost-effective option of cutting the ship up where she laid, was turned down by a certain committee, dealing with the removal process, as well as by Italian authorities expressing environmental concern; see Herbert, *The Challenges and Implications of Removing Shipwrecks in the 21st Century*, p. 24 and cf. Gaskell and Forrest, *The Law of Wreck*, p. 28.

[20] David Schiel, Philip Ross and Chris Battershill. "Environmental effects of the MV Rena shipwreck: cross-disciplinary investigations of oil and debris impacts on a coastal ecosystem". In: *New Zealand Journal of Marine and Freshwater Research* 50 (Issue 1: The wreck of the MV Rena: cross-disciplinary investigations into the effects of oil, contaminants and debris 2016), p. 2.

[21] Approximately 900 million New Zealand dollars; Gaskell and Forrest, *The Law of Wreck*, p. 21.

two main categories.

Firstly, a wreck may be an obstacle and thereby pose a hazard to the navigation of other vessels. This is especially likely to be the case if the wreck is located in a busy shipping area or if it is hard to discover. An example of this is the Norwegian flagged vehicle carrier Tricolor, which sank after a collision in the English Channel in 2002. The sinking took place in a densely trafficked area of the channel, which caused the wreck to become a navigational hazard. Depending on the tide, the ship was either submerged close to the surface or positioned just above the water line, which added to the danger. Following the sinking, two ships collided with the wreck despite of the fact that it had been marked and was monitored.[22] Another car carrier, that posed a similar navigational hazard, was the Baltic Ace. She sank in shallow waters after a collision with a container ship in the vicinity of the North Hinder Junction, the shipping lane that leads to the port of Rotterdam. She was submerged at a depth of 10–12 m and, as a consequence, posed a threat to passing ships.[23]

Other vessels than ships, like barges and floating platforms, can also cause navigational hazards. One such example is the Norwegian offshore platform West Gamma that capsized while being towed in 1990. The accident turned the platform into an obstacle for navigation because of its shallow position. In order to remove the hazard, an operation to provide sufficient space above the platform had to be conducted.[24]

The second category relates to wrecks that create environmental hazards. There may be various reasons as to why this is so. The potential problems are well illustrated by the sinkings of the oil tankers Erika and Prestige around the turn of the millennium. Both of these led to massive

[22] Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 51. For details on the sinking and the complicated wreck removal operation that followed, see Ivar Brynildsen (May 1, 2005). *TRICOLOR – The collision, sinking and wreck removal*. URL: http://www.gard.no/web/updates/content/51625/tricolor-the-collision-sinking-and-wreck-removal (visited on 02/2018).

[23] For more information on the wreck removal operation, see Boskalis (2018). *Baltic Ace Wreck Removal – Car carrier safely removed months before deadline*. Nov. 2015. URL: https://magazine.boskalis.com/issue03/baltic-ace-wreck-removal (visited on 02/2018).

[24] See further Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 70.

oil spills.[25] The Erika was a Maltese oil tanker, carrying heavy fuel oil, and was wrecked off the coast of Brittany in 1999. The reported amount of oil that was leaked varies, but the leakage is estimated to have been in the region of 20 000–30 000 tonnes.[26] The pollution affected the French coast and had negative effects on fishing and tourism.[27]

The larger Prestige was operated by a Greek shipping company, under Bahamian flag, and carried 77 000 tones of heavy fuel oil when she ran into bad weather in 2002. Outside Galicia, in north-western Spain, the ship suffered a structural failure and began to leak oil. Instead of offering the ship a place of refuge, the fear of further pollution led the authorities to tow her out to sea. A couple of days later the ship broke in two and sank to a depth of more than 3 500 m.[28] Of its cargo, about 60 000 tonnes of oil are thought to have leaked out into the ocean. A recovery operation subsequently managed to seal the remaining oil, more or less, inside the wreck and the oil was later successfully removed.[29] The spill affected large coastal areas and caused broad public attention. It also had effects on fishing and sensitive protected areas in the region.[30] The accident led to a long legal aftermath with various liability clams.[31]

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[25]For further examples of this kind, see Gaskell and Forrest, *The Law of Wreck*, p. 5 ff and Christopher Hill. *Maritime Law*. Informa Professional Publishing Ltd, LLP, 2003, p. 424 ff.

[26]See e.g. Fariba Davoodi and Guy Claireaux. "Effects of exposure to petroleum hydrocarbons upon the metabolism of the common sole Solea solea". In: *Marine Pollution Bulletin* 54.7 (2007), p. 928 and cf. Gaskell and Forrest, *The Law of Wreck*, p. 12 f and Hill, *Maritime Law*, p. 425.

[27]ibid., p. 425.

[28]To be precise, the stern is located at a depth of 3 565 m and the bow at 3 830 m. See for further information Joan Albaigés, Beatriz Morales-Nin and Frederico Vilas. "The *Prestige* Oil Spill: A Scientific Response". In: *Marine Pollution Bulletin* 53.5–7 (2006), p. 205.

[29]A smaller amount of oil, around 100 tonnes, however, seems to have been left after the operation, being disproportionately expensive to remove; see Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 82 and Gaskell and Forrest, *The Law of Wreck*, p. 13.

[30]Albaigés, Morales-Nin and Vilas, "The *Prestige* Oil Spill: A Scientific Response", p. 205 ff but cf. Johan Schelin. "Convention on Wreck Removal – The Rules that No One Wanted". In: *Shipwrecks in International and National Law – Focus on Wreck Removal and Pollution Prevention*. Ed. by Henrik Rak and Peter Wetterstein. Åbo Akademi University, 2008, p. 37.

[31]See Gaskell and Forrest, *The Law of Wreck*, p. 13.

Another example, but of a different kind, is the above-mentioned container ship Rena. The ship was loaded with 1 368 containers and broke in half a couple of days after stranding on the Astrolabe Reef. As a result of this, several containers fell into the sea.[32] Some of the containers loaded on the vessel also contained dangerous cargo, threatening to pollute the reef and the surrounding water. The ship, furthermore, continuously leaked diesel as well as hydraulic oil and heavy fuel oil from her bunkers through the damaged hull.[33]

The Rena is also an example of another difficulty or reason for removal that can arise as a consequence of a wreck. Indigenous interests in New Zeeland argued that the wreck had to be removed in total, with no trace remaining on the Astrolabe Reef, based on cultural reasons. These, thus, had no connection to either an environmental or a navigational hazard.[34] This also created new challenges in assessing and handling these kinds of interests and conflicts that may be difficult to relate to the traditional approach to maritime law and the existing liability regimes.[35] This example also illustrates the underlying conflict between a position that could be phrased as a full wreck removal, i.e. removing all traces of a wreck, and a partial removal, focusing the removal process on the hazard that the wreck poses, e.g. from a navigational or environmental point of view. The latter will thus not necessarily entail a full removal of the wreck and could, in some circumstances, result in only minor parts of the wreck being removed.[36]

As in the case with wrecks that pose navigational hazards, the

[32] Containers can be problematic in various ways. They can constitute hazards to the environment because of their cargo, but can also pose navigational hazards when floating free at sea. Every year thousands of containers are lost at sea either by being washed overboard or as a consequence of shipwrecks and accidents. See further ibid., p. 30 ff.

[33] See Schiel, Ross and Battershill, "Environmental effects of the MV Rena shipwreck: cross-disciplinary investigations of oil and debris impacts on a coastal ecosystem", p. 1 ff.

[34] See Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 85.

[35] See the discussion in Gaskell and Forrest, *The Law of Wreck*, p. 20 ff.

[36] To make this distinction is essential in order to understand the construction of the Nairobi International Convention on the Removal of Wrecks, which is discussed below in section 5.5.

situations discussed here can result in high monetary claims. This is true also for smaller spills of both cargo and bunkers. As an example, the bulk carrier the Pacific Adventurer spilled around 270 tonnes of bunker oil outside of Australia in 2009, which, when compared to the other examples above, was a relatively small spill. Despite the small quantity, the leakage, however, led to aggregated claims of more than 30 million Australian dollars.[37]

Apart from modern wrecks like the Erika, Prestige and Rena, also already existing older wrecks can pose problems of this kind. To mention one group of wrecks that is relevant in this respect, more than 9 000 marine vessels were sunk during the Second World War including both tankers and ships carrying munitions. Such wrecks may, of course, also contain bunker oil that, sooner or later, will leak. Many of these wrecks are likely to be hazardous and pose a threat to the environment especially considering their ongoing corrosion and deterioration.[38] An illustrative example of a wreck from the Second World War that has posed an environmental hazard is the German warship Blücher that was sunk in 1940.[39] Following the sinking it continuously leaked oil, with an observed increase in the early nineties. As a consequence of this, the Norwegian government decided to conduct a removal process in order to remove as much of the oil as possible. In the end, around 1 000 tonnes of oil were removed from the wreck.[40]

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[37] See Nick Gaskell. "Compensation for Offshore Pollution: Ships and Platforms". In: *Maritime Law Evolving*. Ed. by Malcolm Clarke. Hart Publishing, 2013, p. 72 ff.

[38] A survey encompassing a total of 8 569 wrecks, that may pose a threat of oil pollution, showed that 75 % dated back to the Second World War; Sarah Dromgoole and Craig Forrest. "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks". In: *Lloyd's Maritime and Commercial Law Quarterly* (2011), p. 107 ff.

[39] Blücher was leading the attack meant to seize Oslo, when she was targeted by fire from the Oscarsborg Fortress. The firing caused severe damage to the ship. A fire broke out and, following an explosion, the ship sank in the middle of the Oslofjord. The wreck still lies at the bottom of the fjord. Other notable examples of wrecks posing similar hazards are the USS Arizona and HMS Royal Oak, both of which are also considered to be war graves; see further ibid., p. 109.

[40] The removal process proved to be complicated since the oil was distributed in different tanks, some of which were hard to reach. The total cost for the removal has been estimated to 7.1 million dollars. The wreck is now protected as a gravesite and cultural heritage in Norway; see Riksantikvaren. *Forslag om fredning av restene etter krysseren Blücher ved Askholmene i Drøbaksundet, Frogn kommune, Akershus*. 2015, p. 1 ff,

1.5.4 Wreck Removal Convention

The high costs involved in wreck removal operations and the fact that wrecks can pose hazards to both navigation and the environment, are some of the underlying reasons behind the creation of the Nairobi International Convention on the Removal of Wrecks. The convention, which entered into force in 2015, includes articles that aim at making the registered owner of a ship responsible in a situation where the ship, upon a maritime casualty, has turned into a wreck that poses a navigational or environmental hazard. The registered owner is also financially liable for the costs involved in locating, marking, and, subsequently, removing the wreck. The state, in which convention area the wreck is located, shall, furthermore, be able to demand that the owner removes the wreck and should the owner not do so, the state shall also have the possibility to remove it at the owner's expense.[41] In order to secure compliance with the convention, there is also an article concerning compulsory insurance for possible costs.[42] To further augment the possibility of compensation, the convention also enables an affected state to claim the insurer directly. The convention thus includes elements of both public and private law in relation to the different rights and duties that are assigned to the different parties.[43]

Aslak Runde. "Vrakfjerning". In: *MarIus* 213 (1995), p. 6 f and Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", p. 109. See also Miljødirektoratet, Klima- og forurensningsdirektoratet (Klif) (2018). *'Blücher' har sprukket midtskips*. Nov. 2002. URL: http://www.miljodirektoratet.no/no/Nyheter/Nyheter/Old-klif/2002/November/Blucher_har_sprukket_midtskips/ (visited on 02/2018).

[41] The convention area is a novel concept defined in the convention and is equal to the convention's scope of application; see art. 1(1) and art. 3 in the convention.

[42] For an in depth discussion of compulsory insurance and its implications, see Ling Zhu and Xiuhua Pan. "Compulsory insurance and its implications". In: *Lloyd's Maritime and Commercial Law Quarterly* (2016), p. 563 ff.

[43] Of course, in order for the convention to be applied in practice, its articles must in some way be implemented, transformed or incorporated into the domestic legal systems of the member states provided that they are dualist nations. The convention is discussed in depth in section 5.5. See further Richard Shaw (2018). "The Nairobi International Removal Convention". In: *CMI Yearbook 2009*. Comité Maritime International, 2009. URL: http://www.comitemaritime.org/Yearbooks/0,2714,11432,00.html (visited on 02/2018), p. 402 ff, Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 49 ff and p. 82 and Proshanto K Mukherjee and Mark Brownrigg. *Farthing*

1.5.5 Ethical Questions

So far, wrecks that pose a hazard to navigation and to the environment have been discussed, as well as questions of arising costs and potential liability for these. Wrecks and wreck removal operations may, however, also result in other difficulties.

The sinking of the Estonian passenger ship MS Estonia in the Baltic Sea in 1994, shows that wrecks also can pose problems of a different kind. The disaster claimed 852 lives and in the wake of the sinking there were discussions as to how the wreck was to be handled. While some wanted the wreck to be left as it was and designate it as a protected gravesite, others wanted to raise the vessel and recover the bodies.[44] The latter, however, was subsequently ruled out as a viable alternative in practice, considering the conditions on the scene and especially the expected effects on the decaying bodies in a situation where the ship was to be raised.[45] As a consequence, the wreck was left as it was and a special regulation was enacted, based on an international agreement between Estonia, Finland and Sweden, prohibiting diving and similar

on International Shipping. Springer, 2013, p. 327 f. See also Gotthard Gauci. "The International Convention on the Removal of Wrecks 2007 – a flawed instrument?" In: *Journal of Business Law* (2009), p. 203 ff, Klaus Ramming (2018). "The Wreck Removal Convention – Current Status and Issues". In: *CMI Yearbook 2014*. Comité Maritime International, 2014. URL: http://www.comitemaritime.org/Yearbooks/0,2714,11432,00.html (visited on 02/2018), p. 372 ff, Jhonnie Kern. "Wreck Removal and the Nairobi Convention – a Movement Toward a Unified Framework?" In: *Frontiers in Marine Science* 3 (2016), p. 1 ff and, from a Swedish perspective, Jhonnie Kern. "Den internationella vrakkonventionen – en bakgrund och analys inför ett svenskt tillträde". In: *Juridisk Publikation* 2 (2016), p. 325 ff.

[44] This was based on the will to recover the human remains and not on financial interests in the ship. Quite to the contrary, both the newly elected prime minister of Sweden at the time, Ingvar Carlsson, and the then departing prime minister, Carl Bildt, claimed, in the immediate aftermath of the accident, that either the wreck as a whole or the bodies had to be recovered at whatever cost necessary. As time passed and the complexity of the situation unfolded, however, they assessed the situation differently; cf. Johan Juhlin (2019). *Ingvar Carlsson: Det var rätt att låta Estonia bli en gravplats*. Sept. 2014. URL: https://www.svt.se/nyheter/inrikes/ingvar-carlsson-jag-hade (visited on 02/2019).

[45] Concern was also raised about the psychological impact on the personnel that was to carry out such an operation as well as on those bereaved that did not approve of raising the wreck. Cf. SOU 1998:132. *En granskning av Estoniakatastrofen och dess följder: Delrapport av Analysgruppen för granskning av Estoniakatastrofen och dess följder*, p. 107 f.

activities on and in the vicinity of the wreck.[46] Denmark subsequently acceded to the agreement as well. Since the wreck is located in international waters, there is however no possibility to prevent or prohibit other states from e.g. commissioning diving on the wreck or diving conducted by individuals from other states. Such diving has also taken place.[47]

Another example of a ship that has raised questions like these, is the wreck site of RMS Titanic.[48] 1 523 passengers and crew perished with the ship. This has, however, not stopped salvage or recovering operations from taking place on the wreck.[49] A third and final example, is the German military transport ship MV Wilhelm Gustloff, which was sunk by a Soviet submarine as the ship was evacuating German civilians and military personnel from Gdynia in January 1945.[50] Although it has been hard to assess how many passengers that were on board, it is estimated that 9 000 people lost their lives, making the sinking the deadliest in history.[51] The wreck is located close to the Polish coast and is protected as a gravesite prohibiting any diving in or around the

[46] In Swedish law, as an example, this is regulated in the Act (1995:732) on the Protection of Grave Sanctity at the Wreck of the Passenger Vessel Estonia (Sw. *lag (1995:732) om skydd för gravfriden vid vraket efter passagerarfartyget Estonia*).

[47] Other states can, however, accede to or, arguably, choose to adhere to the agreement and enforce it. For a more detailed but concise overview, see Hugo Tiberg. "Why Cover the Wreck of a Sunken Ship?" In: *Scandinavian Studies in Law* 39 (2000), p. 483 ff, which also deals with the fact that the Swedish government proposed to cover the entire wreck with concrete. These plans were later abandoned.

[48] RMS Titanic sank on her maiden voyage in April 1912 and was discovered in 1985 by a French-American expedition around 600 km off the coast of Newfoundland. She was found split in two parts at a depth of around 3 800 m. The discovery was remarkable for its time and the deep-water technological development that made the expedition possible has opened up a new field of salvage and wreck removal at these depths; see Sarah Dromgoole. "The International Agreement for the Protection of the *Titanic*: Problems and Prospects". In: *Ocean Development & International Law* 37.1 (2006), p. 1 f.

[49] ibid., p. 2.

[50] The ship was named after Wilhelm Gustloff, a leading representative of NSDAP in Switzerland who was assassinated in 1936; see Ian Kershaw. *Hitler 1889–1936 Hubris*. Penguin Books, 2001, p. 573 and Nicki Peter Petrikowski. "Wilhelm Gustloff". In: *Britannica Academic*. 2017.

[51] ibid. For further examples of accidents resulting in the loss of lives, see e.g. Gaskell and Forrest, *The Law of Wreck*, p. 14 f.

wreck.[52]

The three examples above show that wrecks may also pose ethical questions that may affect how wrecks and human remains are to be handled, as well as how salvage and wreck removal operations are to be conducted in light of this.

1.5.6 Wrecks of Historical Importance and Value

Another aspect of the interest concerning wrecks and wreck removal is the fascination concerning historical wrecks, still lost or being discovered in the depths. Once again, an example of this interest is the sinking and subsequent discovery of the Titanic.[53] More or less immediately after the discovery, a bill was enacted by the US Congress, titled *the RMS Titanic Maritime Memorial Act of 1986*, with the aim of protecting the wreck. The expedition found that the wreck was relatively well preserved, but also assessed it to be vulnerable to further interference and salvage attempts. It was also suggested that the hull of the ship should not be entered, probably in light of the fact that many of the passengers were trapped inside during the sinking.[54]

The US bill states that the site of the wreck is to be considered as an international maritime memorial to those who lost their lives in the disaster. It also calls upon other states to enter into international agreements with the US, in order to preserve and protect the wreck. The wreck is, however, not located on US territory and the bill was only a unilateral attempt to protect the wreck, the success of which depended on other states' willingness to enter into agreements on the issue. The bill and its content did not, however, attract any great interest, but an agreement aimed at protecting the wreck was subsequently formulated and the United Kingdom signed it in 2003.[55] In late 2019, the agree-

[52] The Wrecksite (2020). *M/S Wilhelm Gustloff*. Jan. 2020. URL: https://www.wrecksite.eu/wreck.aspx?13271 (visited on 07/2020).

[53] Sara Dromgoole and Nicholas Gaskell. "Interests in Wreck". In: *Interests in Goods*. Ed. by Norman Palmer and Evan McKendrick. Lloyd's of London Press, 1993, p. 345.

[54] Cf. Dromgoole, "The International Agreement for the Protection of the *Titanic*: Problems and Prospects", p. 3.

[55] See further the Protection of Wrecks (RMS Titanic) Order 2003, SI 2003/2496 and

ment was also ratified by the US and, as a consequence, it came into force in November 2019.[56] As stated earlier, in spite of the measures taken to protect the wreck, multiple expeditions and salvage attempts, in order to recover various items, have been conducted, although still somewhat limited by the level of difficulty in reaching the wreck.[57] It remains to be seen what impact the international agreement will have on the discussed situation involving RMS Titanic.

It is hard to estimate the number of potential historical wrecks that may be of interest and the advancing technology has, at the same time, made more and more wrecks accessible.[58] These wrecks can be

John Reeder. *Brice on Maritime Law of Salvage*. Sweet & Maxwell, 2003, s. 4–100, p. 293.

[56] See "Agreement concerning the Shipwrecked Vessel RMS Titanic", Treaty Series No. 8 (2019) and GOV.UK (2020). *RMS Titanic wreck to be protected under historic treaty with US*. Jan. 2020. URL: https://www.gov.uk/government/news/rms-titanic-wreck-to-be-protected-under-historic-treaty-with-us (visited on 01/2020).

[57] For further information and a description of the somewhat peculiar stance, arguably in direct opposition to the mentioned bill and agreement, taken by US federal courts in relation to the wreck, founding jurisdiction and granting exclusive salvage rights as a salvor in possession to a single company even though the wreck is not situated within US territorial waters, see Dromgoole, "The International Agreement for the Protection of the *Titanic*: Problems and Prospects", p. 2 ff and the extensive discussion of the quasi in rem-approach and the specific case involving RMS Titanic in Gaskell and Forrest, *The Law of Wreck*, p. 243 ff. One possible upside of such a position, however, is that a court possibly can impact and control such salvage activities. In this sense, the approach could actually lead to protection rather than exploitation when compared to other scenarios. A thorough examination, and defence, of the extensive US take on jurisdiction in relation to historical wrecks, is found in Jonathan Joseph Beren Segarra. "Above Us the Waves: Defending the Expansive Jurisdictional Reach of American Admiralty Courts in Determining the Recovery Rights in Ancient or Historic Wrecks". In: *Journal of Maritime Law & Commerce* 43.3 (2012), p. 349 ff.

[58] It has e.g. been estimated that there are 50 000 shipwrecks located in navigable waters in the US alone, of which 5–10 % are of historical significance, i.e. up to around 5 000 wrecks; see Timothy T Stevens. "The Abandoned Shipwreck Act of 1987: Finding the Proper Ballast for the States". In: *Villanova Law Review* 37 (1992), p. 575. Another estimation concerning the Baltic Sea amounts to 40 000 – 50 000 wrecks. Most of these, however, it is presumed, will never be found; Sjöfartsverket (2018a). *Miljörisker från fartygsvrak*. Regeringsuppdrag 2009/4683/TR. 2011. URL: http://www.sjofartsverket.se/upload/vrakutredning/Vrakrapport.pdf (visited on 02/2018), p. 16. An even higher figure of 80 000 vessels in the Baltic Sea has been estimated elsewhere; see Jan Aminoff. "Salvage of Wrecks in the Baltic Sea – A Finnish Perspective". In: *Regulatory Gaps in Baltic Sea Governance*. Ed. by Henrik Ringbom. Springer International Publishing AG, 2018, p. 90. Around 1 500 wrecks have been found in the territorial waters of Finland and approximately 660 of these are thought to have sunk more than a century ago; see ibid., p. 89 f and Jan Aminoff. "Historic Wrecks and Salvage under Finnish Law – Recent Developments". In: *Shipwrecks in*

of interest in relation to the cargo, still contained in or located in the vicinity of the wreck, or to the wreck itself. The wreck in itself can be of historical interest e.g. because of its age, the fact that the wreck is rare or due to the fact that it has links to important and historical events or persons.[59]

Historical wrecks and their cargo can be of significant value from both a cultural and an economic perspective.[60] An example of valuable cargo in relation to a historical wreck, is the steamship Central America that sank in 1857, to a depth of 2 500 m, carrying around 14 000 kg of gold. Following the wreck's discovery in 1988, some of the gold has been recovered at an estimated value of 100–400 million dollars.[61] The wreck also illustrates that historical wrecks can cause proprietary conflicts. Insurers that had paid on the original insurance policies provided in relation to the gold onboard the vessel at its time of sinking made proprietary claims in relation to the recovered gold with the argument that proprietary rights had passed to them following their payments to the insureds at the time of the sinking. The insurers were successful in their claims and were awarded 10 % of the gold's value, while the

International and National Law – Focus on Wreck Removal and Pollution Prevention. Ed. by Henrik Rak and Peter Wetterstein. Åbo Akademi University, 2008, p. 116, where slightly different figures are given. In relation to Swedish waters, a search in the National Heritage Board's database for archaeological sites and monuments for remains from ships renders 4 603 registered remains. The database is accessible through http://www.fmis.raa.se/cocoon/fornsok/search.html; cf. Aminoff, "Salvage of Wrecks in the Baltic Sea – A Finnish Perspective", p. 90.

[59] Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", p. 106.

[60] For an economic analysis concerning the salvage of historic shipwrecks, see Paul Hallwood and Thomas J Miceli. "Murky Waters: The Law and Economics of Salvaging Historic Shipwrecks". In: *The Journal of Legal Studies* 35.2 (2006), p. 285 ff. It has been suggested that a wreck, or its content, in order to be of interest commercially, has to be worth in the region of 10 million dollars; see Sarah Dromgoole. "Murky waters for government policy: the case of a 17th century British warship and 10 tonnes of gold coins". In: *Marine Policy* 28 (2004), p. 189.

[61] See Paul Fletcher-Tomenius and Craig Forrest. "Historic wreck in international waters: conflict or consensus?" In: *Marine Policy* 24.1 (2000), p. 1 and Andrew Marszal and Tom Shiel (2018). *What was the SS Central America – or 'Ship of Gold' – and why did it sink?* Jan. 2015. URL: http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11376701/What-was-the-SS-Central-America-or-Ship-of-Gold-and-why-did-it-sink.html (visited on 02/2018).

salvors were awarded the remaining value as a salvage reward.[62]

There may, furthermore, be other valuable items, such as jewellery or treasures on board sunken wrecks.[63] More modern wrecks may also have contents of value. In these cases, the cargo is likely to be of interest. There are sunken wrecks that still contain valuable cargoes of nickel, copper, aluminium and platinum as well as bullion.[64] Cargoes made up of coal, jute and teak, may also be of interest in this respect. There are hundreds of merchant ships that were sunk during the First and the Second World War, that may contain these valuable cargoes.[65] These more modern wrecks, primarily from the world wars in the form of warships but to a certain extent also merchant ships, are, furthermore, increasingly being treated and recognised as important historical objects that need to be protected.[66] This can lead to conflicts between parties claiming proprietary rights, commercial salvors and historical or archaeological interests.

The legal framework surrounding these historical wrecks, as well as the more or less modern wrecks discussed above, can be unclear and especially so in relation to wrecks lying outside of territorial waters. There can also be confusion as to how the possible protection that may exist in relation to these wrecks, relates to salvage and commercial interests. One notable example, that illustrates this conflict, is the HMS Sussex, a British warship that sank in 1694 off Gibraltar. The wreck is thought to contain a large amount of gold and silver coins, with an estimated aggregated value in the region of several millions to a billion dollars. Upon finding remains of what is thought to be

[62] Gaskell and Forrest, *The Law of Wreck*, p. 237.

[63] Titanic, to return once again to this example, was not loaded with a considerable amount of valuable non-perishable cargo. The passengers, however, carried valuable jewellery. It is however thought that many of these items were brought to the lifeboats. A safe, that included valuable items, has been raised from the wreck; Dromgoole, "The International Agreement for the Protection of the *Titanic*: Problems and Prospects", p. 2 and p. 21.

[64] Bullion refers mainly to gold, silver or platinum in their capacity and value as metals, typically in the form of bars; Encyclopædia Britannic. *Bullion*. 2019.

[65] Dromgoole and Gaskell, "Interests in Wreck", p. 345.

[66] See Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", p. 106 f for several examples of this.

the wreck, the company that found it entered into a contract with the UK government concerning the recovery of the valuable cargo. The value of the recovered cargo was to be divided depending on certain criteria. This drew a lot of criticism from the archaeological world, with claims that the contract in fact aimed at treasure hunting in breach of archaeological principles and interests.[67]

There is thus a potential conflict between private interests and states in these matters and, of course, there may also be conflicts between individual parties, like archaeologists and salvors.[68] These conflicts are augmented by the fact that advancing technology has enabled more and more wrecks to be located and accessed.[69] Another area of uncertainty, is how, if possible, rights to these wrecks can be established and especially so outside of territorial waters.[70]

1.5.7 Protecting Wrecks

Sunken wrecks located close to the water surface are often popular diving sites. This may put the wrecks and their contents at risk. There have e.g. been instances of cannons being plundered from historical wrecks.[71] Also diving in general may be problematic, even if nothing is taken from the wreck site, since widespread diving activity in itself

[67] The issue has, to my knowledge, not been settled. See for more information, Dromgoole, "Murky waters for government policy: the case of a 17th century British warship and 10 tonnes of gold coins", p. 189 ff.

[68] Dromgoole, "The International Agreement for the Protection of the *Titanic*: Problems and Prospects", p. 2 and Hallwood and Miceli, "Murky Waters: The Law and Economics of Salvaging Historic Shipwrecks", p. 285.

[69] Cf. Tullio Scovazzi. "Convention on the Protection of Underwater Cultural Heritage". In: *Environmental Policy and Law* 32.3–4 (2002), p. 156.

[70] Cf. David Curfman. "Thar Be Treasure Here: Rights to Ancient Shipwrecks in International Waters – A New Policy Regime". In: *Washington University Law Review* 86.1 (2008), p. 181 ff.

[71] In the UK, two divers were ordered to pay heavy fines following the plundering of, among other things, a cannon from the early 19th-century, as well as propellers from a German submarine that sank during the First World War. Together, the pair is thought to have plundered items to a value of more than £250 000; see Steven Morris (2018). *Divers ordered to pay £60,000 for plundering artefacts from wrecks*. July 2014. URL: https://www.theguardian.com/uk-news/2014/jul/02/divers-pay-60000-plunder-artefacts-wrecks-fail-declare-haul (visited on 02/2018).

can be a problem for the preservation of a wreck.[72] Such wrecks may also, in themselves, pose a threat to divers. The wrecks may be dangerous because of their frail structure or because they are loaded with dangerous cargo, like munitions, explosives or nuclear cargo. Another variation is sunken nuclear submarines that can cause radiation hazards as a consequence of their nuclear reactors or nuclear warheads.[73]

One notable example of a dangerous wreck is SS Richard Montgomery, lying close to shore in the Thames Estuary. The wreck was a US Liberty Ship, carrying material for the war effort during the Second World War. While waiting to join a convoy to cross the channel, the ship grounded on a sandbank and, subsequently, sank in shallow waters. Her masts are still clearly visible above the waterline during all stages of the tide, making the wreck a familiar site. Even though some of the cargo was recovered in the immediate aftermath of the grounding, the wreck is still heavily loaded with 1 400 tonnes of explosives. The wreck is deteriorating gradually and the explosives on board may become unstable and even explode. Such an explosion might be triggered by

[72] Hugo Tiberg. "Wrecks and Wreckage in Swedish Waters". In: *Scandinavian Studies in Law* 46 (2004), p. 1. There have e.g. been reports that submersibles landing on sections of the hull of the Titanic have caused significant damage; Dromgoole, "The International Agreement for the Protection of the *Titanic*: Problems and Prospects", p. 7 and p. 24.

[73] One example of a wreck of a nuclear submarine is the Komsomolets, a Russian submarine that sank in the Norwegian Sea in 1989. Some radioactive pollution has been recorded from samples taken at the site of the wreck, but due to the low rate of corrosion in general the submarine as a whole is not regarded as a significant threat at the present time; see Steinar Høibråten, Per E Thoresen and Are Haugan. "The sunken nuclear submarine Komsomolets and its effects on the environment". In: *Science of the Total Environment* 202.1-3 (1997), pp. 67–78 but cf. Justin P Gwynn et al. "Norwegian monitoring (1990–2015) of the marine environment around the sunken nuclear submarine Komsomolets". In: *Journal of Environmental Radioactivity* 182 (2018), pp. 52–62, calling for continuous monitoring of the wreck for potential radioactive contamination. See also I Amundsen et al. "The accidental sinking of the nuclear submarine, the Kursk: monitoring of radioactivity and the preliminary assessment of the potential impact of radioactive releases". In: *Marine Pollution Bulletin* 44.6 (2002), pp. 459–468, on how radioactivity was monitored following the sinking of another Russian nuclear submarine, the Kursk, in 2000 along with a calculated model for potential nuclear release in a worst case scenario. The article was written before the main parts of the submarine were raised in a wreck removal operation in 2001. This variation of wrecks can, of course, also be viewed as a hazard to the environment depending on the circumstances in the case.

interference with the wreck or a collision. Because of these reasons, the wreck is constantly monitored and also protected under the Protection of Wrecks Act 1973 in English law.[74] As another example, on a similar theme, there have been repeated claims, that the ocean liner Lusitania carried munitions when a German U-boat sunk her in 1915 during the First World War. Such cargo could make the wreck potentially dangerous to divers and salvors.[75]

The above-mentioned aspects motivate the need for enabling protection in relation to these kinds of wrecks. Such a regulation can, however, be constructed in different ways and there can be numerous problems associated with such protection. Examples of these are which law that is to be applied in relation to the wreck, the role of originally state-owned or military crafts and the question of when a wreck is deemed to be worthy of protection.[76] The possibility to protect a certain wreck must

[74]See Maritime & Coastguard Agency (2018b). *The SS Richard Montgomery: background information*. 2014. URL: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/303404/SS_Richard_Montgomery.pdf (visited on 02/2018), Maritime & Coastguard Agency (2018a). *SS RICHARD MONTGOMERY Survey & Sub-Bottom Profiling Report 2014*. 2014. URL: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/488871/MCA_Summary_Report_2014.pdf (visited on 02/2018) and Maritime & Coastguard Agency (2018c). *SS RICHARD MONTGOMERY SURVEY REPORT 2015*. 2015. URL: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/638868/SSRM_2015_Summary_Report_final.pdf (visited on 02/2018).

[75]The sinking, that took just 18 minutes, claimed 1 195 lives and created public outcry. It supposedly played a part in persuading the US to later enter the war. The question of whether the vessel contained munitions, or similar cargo, has been controversial, given the fact that Germany tried to legitimise the sinking, which was carried out without warning, by claiming *inter alia* that she carried war material. That she carried cargo of this nature has always been denied. The salvage team, that raised parts of the wreck in 1982, was, however, allegedly warned by the British Foreign Office, about what they might encounter in the wreck and that the ship in fact did carry large amounts of ammunition that may be highly dangerous; see Alan Travis (2018). *Lusitania divers warned of danger from war munitions in 1982, papers reveal*. May 2014. URL: https://www.theguardian.com/world/2014/may/01/lusitania-salvage-warning-munitions-1982 (visited on 02/2018). The issue has, to my knowledge, not been settled. For a detailed review of the sinking and its possible causes, see MG Wood, DI Smith and MR Hayns. "The sinking of the *Lusitania*: reviewing the evidence." In: *Science & justice* 42.3 (2002), p. 173 ff.

[76]For an overview of the Swedish regulation, briefly compared to the specific statutes that exist in English law, see Jhonnie Kern. "En svensk vrakrätt". In: *Svensk Juristtidning* 8 (2016), p. 597 and for an overview of Finish law, that has value for the Nordic countries in general, see Peter Wetterstein. "Vrak och gamla skatter". In: *Tidskrift*

also be related to where the wreck is located. The possibilities might vary depending on if the wreck lies in territorial waters, a contiguous zone, an exclusive economic zone, the continental shelf or on the high seas.[77]

1.5.8 Complicated Area of Law

The different aspects and problems concerning wrecks mentioned above, show that this can be a complicated area of law. It is consequently reasonable to presume that it is hard to fully deal with the various issues involved when legislating. There are also several competing interests to keep in mind. The different dimensions of this complexity will be further elaborated in the classification in section 1.6.

Notwithstanding the above-mentioned difficulties, there are regulations and international conventions that deal with some of these issues. The already mentioned Nairobi International Convention on the Removal of Wrecks is one example, but the convention far from covers all of the discussed problems above. It is applicable in relation to certain wrecks deemed to pose a hazard to navigation or the environment.

There are, furthermore, international conventions that concern other situations but that can be relevant in relation to ships that are in the process of becoming wrecks. Thus, should there be oil pollution, the provisions that emanate from the International Convention on Civil Liability for Oil Pollution Damage (CLC) may be applicable. That convention, and the provisions that stem from it, can be relevant in order to cover pollution damage caused by an oil spill from a tanker carrying oil in bulk. Furthermore, the International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER) and the provisions that derive from it, may be relevant in situations where there is a threat of pollution from bunker oil.[78] Other conventions, like the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (INTERVENTION) and the United

utgiven av Juridiska föreningen i Finland 2000/5 (2000), p. 451 ff.

[77] Cf. Tiberg, "Wrecks and Wreckage in Swedish Waters", p. 2.

[78] Cf. Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 89.

Nations Convention on the Law of the Sea (UNCLOS), may also be relevant in this context. These different conventions, along with others, and the provisions in the legal systems that derive from them, might, also, come into conflict with each other. This is thus another type of conflict that may need to be solved when dealing with wrecks and wreck removal.

1.5.9 Results for the Classification

This section has identified that there are several different potential interests and conflicts that can become relevant as a consequence of wrecks and wreck removal. Wrecks can pose a hazard to the navigation of other vessels or to the environment. Wrecks may also be in need of protection for various reasons. Protection can be motivated on archaeological, historical or cultural grounds. Another reason for protection can be that the wreck is considered to be a grave-site. Wrecks can also in themselves be dangerous, which can mean that protection is needed in order to protect the public from being exposed to the wreck.

All of the above cases can cause problems and conflicts that may need to be handled from a legal point of view. The section has also identified various interests that can be relevant in respect of a wreck. This can be the interest of the cargo or ship owner and also of the state in whose territory the wreck is located as well as other legal subjects affected by the wreck. There may, furthermore, be situations where the owner of a wreck is unknown. A further variation arises when a wreck has no owner. An additional division that can be identified is the distinction between state and non-state wrecks.

Another result from this section is the recognition that there are various wrecks from different periods in time. There are old historical wrecks as well as modern wrecks. There are also wrecks in the middle of this scale that are not treated as historical wrecks but still are not modern. Such wrecks can be denoted as non-protected wrecks since they are not considered as historical wrecks and thus not offered any potential protection as such, while at the same time not being modern.

The above results form the basis for the classification below.

1.6 Classification of Wrecks

1.6.1 Introductory Research Question II

Before pursuing with the ensuing parts of inquiry, the described complexity in the previous section is elucidated and broken down by the use of a classification of different kinds of wrecks. The introductory research question for this section is how wrecks functionally can be classified. The classification is meant to illustrate the different dimensions involved and the potential complexity of these situations. It would, in my view, be beneficial for a legal system if the provisions, which deal with wrecks and wreck removal, are able to relate to these various forms of wrecks in one way or another. It may, however, prove difficult to provide a legal framework that adequately addresses all of these situations.

As stated above, wrecks can pose various problems. There are also different kinds of wrecks. In the classification made here, 72 different subcategories of wrecks are identified as explained in the following. The classification has been made based on the fact that a wreck can function either as a state wreck, i.e. a wreck originally belonging to a state e.g. in the form of a warship, or a non-state wreck, i.e. a vessel, or part of a vessel, originally privately owned that has foundered and become a wreck. There are, of course, many ways in which the problem area can be divided and demarcated, but for the purposes here this classification is used.

1.6.2 Introductory Distinctions

As shown above, problems relating to wrecks and wreck removal can become intricate. In order to demarcate the area of research, it is thus necessary to make some introductory distinctions as to what the classification concerns and what it does not concern. As already discussed, a situation involving a wreck can have impact on several different parties

that are affected by the vessel that has been wrecked in different ways. It can be the owner of the vessel, the owners of cargo onboard the vessel, a state that is affected by the wreck and so on. One key distinction to make between these involved parties, is the one between the parties that have pre-contractual relations relating to the ship itself and the parties that are external to the ship.[79] This study will primarily relate to the relations that occur as a consequence of a wreck in relation to the latter. In other words, the interests and conflicts that arise as a consequence of the relation between the wreck and external parties is the main focus of the classification and study.

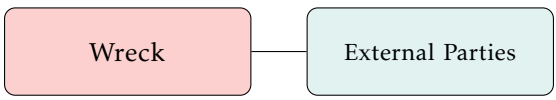

Figure 1.1: The relation between the wreck and external parties.

These two different dimensions, involved in wreck scenarios, reflect an underlying difference in how the various relations are regulated. The relations that exist prior to a wreckage and that is related to the activity of the vessel are e.g. the relations between the ship owner and potential charterers and sub-charterers involved, between the P&I-club, hull insurer and the ship owner, between the owners of cargo and their relevant counterparty, insurers and so on. All these relations relate to the operation of the vessel or, phrased differently, to the marine adventure and are contractual in nature. In this sense, they deal with the law of obligations in legal systems where that concept is relevant. A shipwreck can, of course, have severe impact on potential charterers and cargo owners that own cargo transported on the vessel. In many cases, this will lead to legal claims based on the occurred incident and how the individual contracts regulate these matters.[80] The classification made here, however, is not primarily concerned with this dimension of the problem.

[79] Cf. Gaskell and Forrest, *The Law of Wreck*, p. 35 ff.
[80] For further discussions on this, see ibid., p. 35 ff.

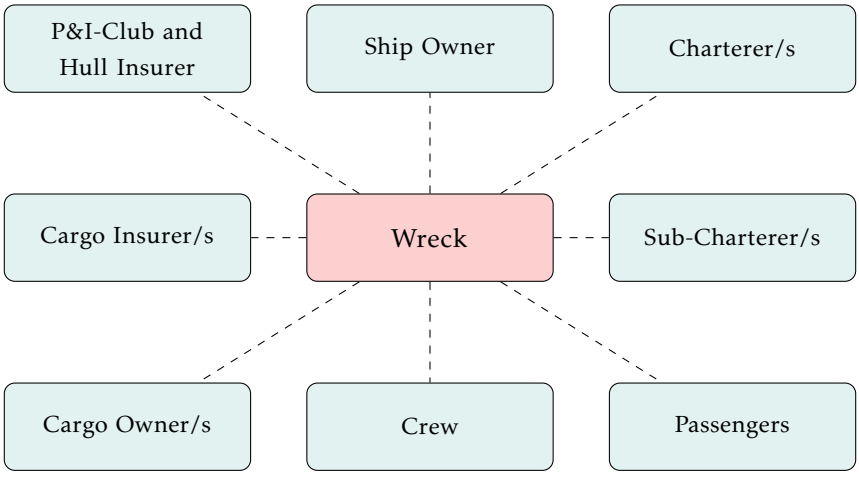

Figure 1.2: Parties involved in the operation of the vessel or the marine adventure.

The parties involved in the operation of the vessel or the marine adventure are interwoven in contractual relationships that can be complicated. As a means of illustration, figure 1.3 shows an example of potential contractual relationships in relation to a particular vessel where there is a charterer as well as two sub-charterers involved along with other parties.[81] If a vessel is destroyed, as a consequence of a wreckage, this incident will have effects on all of these contractual relationships in different ways. Some of these parties may, however, also be subject to relations with external parties in the way illustrated above in

[81] In this example, there is a contractual relationship between the ship owner and a P&I-club and hull insurer for insurance cover in relation to the vessel. The ship owner will often hire the crew and there is thus contractual relationships between these parties as well. The different charterers involved in the example are further illustrations of how different parties can be contractually bound together. There will be contractual relations between the shipowner and each charterer or between charterers depending on whether it is a charter or a sub-charter. If there is a bareboat charter involved, this charterer will hire the whole ship and also employ its own crew, hence the dashed line between the crew and the charterer in the illustration. Furthermore, cargo owners will have contractual relations with their counterparts in their individual contracts of carriage. Insurers of the cargo will, at the same time, be contractually bound to the owners of cargo as a result of insurance policies. Passengers are omitted from the example, but there can also be contractual relationships between them and the relevant carrier as a further variation.

figure 1.1.

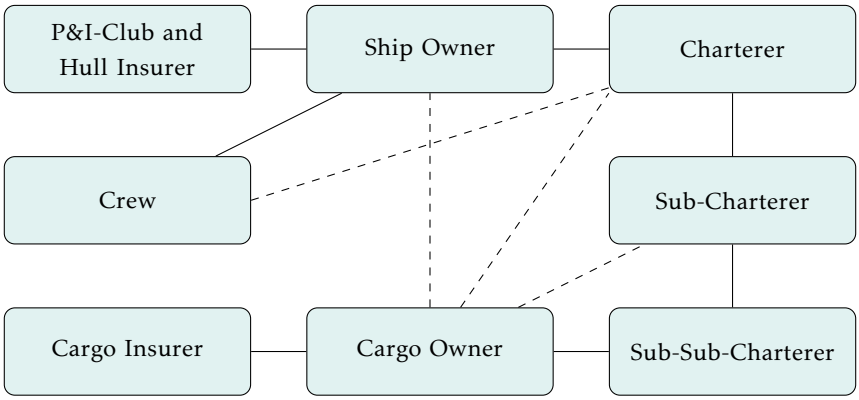

Figure 1.3: Example of contractual relationships involved in the operation of a vessel or a marine adventure.

The other dimension concerns the relations between the wreck and external parties that arise as a consequence of the wreckage. It is primarily these relations that the classification and the study concern. One relation that becomes relevant in this dimension is the one between the wreck and the state in whose territorial waters or exclusive economic zone the wreck is located. Another potential relation is between salvors or wreck removal operators involved in taking actions in relation to a wreck. These relations are regulated by the law of torts and other such mechanisms as well as mandatory liability provisions. They are, in other words, not contractually linked to the operation of the vessel or the marine adventure as discussed above. They may, however, result in contracts, e.g. in the form of wreck removal contracts or salvage contracts in the immediate aftermath of a wreckage.

The classification primarily concerns the relations that occur as a consequence of a wreckage. This does not, however, mean that the parties identified in the first dimension are always irrelevant in the discussions. These different parties may become relevant if they are subject to the occurred relations to external parties. Thus, a P&I-insurer that an external party can claim as a result of mandatory liability provi-

sions is relevant to discuss since this, in fact, concerns the dimension between the wreck and external parties. The same is true for other parties related to the operation of the vessel or the marine adventure if there is such a connection. As will be discussed further on, the structure of the studied regulations, however, often relate the external parties to the owner of the ship. This also means that the focus of the classification is on the wreck as such and not primarily on the individual parties that are tied to it in various ways.

1.6.3 Division Based on Proprietary Interests

Wrecks are here divided into two main spheres of interests. The first sphere concerns proprietary interests in relation to a wreck. This may refer to, depending on legal system and other circumstances, the question of who has title to or ownership of the wreck or, in certain situations, its cargo or other items. The concept of title or ownership also refers to someone who has derived such a right from someone else, e.g. because of a sale, subrogation or other action.

It should be observed that the terminology used, in the form of a right, title or ownership, is not to be construed in a rigid way. It may very well be the case that several subjects have different or even conflicting interests in the wreck, which can make it rather simplistic to refer to the wreck in terms of these concepts.[82] The concepts in the classification are used, however, in order to denote the subject that has the major interest in a wreck or a legal responsibility in relation to it, e.g. in the form of liability. This crude definition will suffice for the purposes here. These constellations can also be used in order to identify conflicts between different subjects in respect of a wreck.

When it comes to non-state wrecks and proprietary interests, these wrecks may have an owner that is known. As noted above, this may also be relevant in relation to cargo or other items in or around the wreck. An example of this could be a container ship that has sunk

[82] It may also be the case that possession alone is a relevant factor to consider without any need for proprietary interests.

following a collision with another ship. In this case there will often be a known owner of the ship, although the rights involved may have been transferred to an insurer if the ship owner has claimed under an insurance policy. In the same way, there will also likely be a known owner or often several owners of the cargo that was loaded on the vessel.

The already discussed cases involving Costa Concordia, Rena and Tricolor are all examples of the above category of wrecks in relation to proprietary interests since they all have known ship owners. But the category is not limited to more or less modern wrecks. Older wrecks can also have known owners or subjects that claim rights in relation to them. As an example, in the legal proceedings concerning the wreck of the Lusitania, it was recognized that insurers, having paid on insurance policies present at the time of wreckage in 1915, had valid claims in relation to items from the wreck following a raising operation in 1982.[83]

In other situations, the owner of a wreck can be unknown. An example could be a wreck that has been abandoned for a long time and that is subsequently found with no remaining trace of the owner. This is arguably more likely in the case of smaller or older wrecks because of the characteristics that they have. As an example of the former, attention has been paid to smaller wrecks with unknown owners as a form of littering in the Swedish legal system.[84] It should, however, be noted that the fact that the owner is unknown, at the same time, entails and presumes that there is an owner. This is what separates this category from the next and final one when it comes to non-state wrecks.

The final category is a situation where the wreck has no owner due to the fact that the owner has ceased to exist. This is not an uncommon situation in the shipping world. It is common to form shipping firms in a system of one-ship-companies, i.e. each ship is owned by a separate and often limited company.[85] In this way, should the ship sink and

[83] S. D. Lillington. "Wreck or Wreccum Maris?" In: *Lloyd's Maritime and Commercial Law Quarterly* (1987), p. 267.

[84] Cf. M2012/1824/R. *Sjöfartsverkets yttrande över Miljödepartementets promemoria om flyttning av båtar eller skrotbåtar (Eng. The Swedish Maritime Authority's Statement on the Ministry of the Environment's Memorandum on the Removal of Boats or Scrap Boats)*.

[85] The structures can often be complex; cf. Aleka Mandaraka-Sheppard. *Modern*

become a total loss, the company will become insolvent since the main asset in the company was the now wrecked ship of usually negligible value. Since the company usually will cease to exist through bankruptcy or liquidation, it is also no longer possible to make claims in relation to it, e.g. claims concerning wreck removal costs. In these cases, the result is that the wreck has no owner. The same situation can arguably occur, should the wreck have been abandoned and as a consequence has turned into *res derelicta*.[86]

These different variations of non-state wrecks in relation to proprietary interests, result in the scheme in figure 1.4.

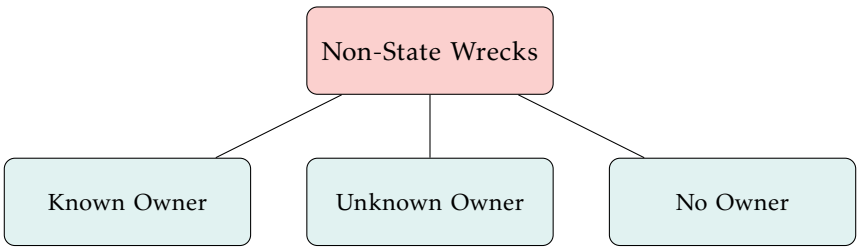

Figure 1.4: Non-State wrecks and proprietary interests.

When it comes to state wrecks, on the other hand, it is reasonable to make other distinctions. In these cases, the wreck earlier functioned as

Admiralty Law. Cavendish Publishing Limited, 2001, p. 303.

[86]There will be cases where it is unclear whether a wreck has an unknown owner or if the owner has ceased to exist, e.g. in relation to historical wrecks. It is, however, functionally possible to divide between the categories in the described way. The category of wrecks with unknown owners require that there is an existing owner somewhere although unknown, whereas the last category requires that the owner has ceased to exist. In relation to a historical wreck, the classification will depend on whether there still is an owner, e.g. a case where ownership, title or right has been passed on to other subjects, or if the owner has ceased to exist and no other valid claims can be derived from the original subject to someone else. Another way to express this way of distinguishing between the categories is to ask whether there is someone who can make a proprietary claim other than occupation, provided that such a claim is to be treated as a proprietary claim, in relation to the wreck. If a proprietary claim other than occupation can be made, the wreck cannot belong to the last category, i.e. a wreck where the owner has ceased to exist. Arguably, in most cases there will be no such proprietary claims in relation to historical wrecks given the amount of time that has to have passed in order for the wreck to be deemed historical. Most historical wrecks should thus belong to the last category.

a state vessel of some sort. An example is a warship that sunk during one of the world wars.[87] The fact that the wreck is a state object can result in various situations, depending on the known facts and how the state chooses to relate to the wreck. Three main categories can be identified as described below.

Firstly, it may be evident to which state the wreck belongs. Most often this will probably be the case when it comes to state wrecks due to their nature. Thus, a British warship that sunk during the Second World War is a British state wreck and belongs to this category. There may, however, be variations on this theme and also other more complicated situations. Consider a case where the state, to which the wreck originally belonged to, does not claim the wreck. In this case the state has, in some sense, renounced interest in the wreck. The wreck can, however, still be viewed as a state wreck.[88] This might have consequences as to how the wreck is and can be handled. Another variation is a case where the state does not at all acknowledge that the wreck is a state wreck. This scenario can have other implications than the previous one.

On the other side of the spectrum, should the state claim the wreck and identify it as a sovereign object, the state may be reluctant in accepting other states interfering with the wreck. This may, to take one example, lead to conflicts if a wreck is located in the territorial waters of another state. Especially in a case where the wreck poses a hazard of some sort and the state, in whose territorial waters the

[87] A warship is defined, according to art. 29 in the UNCLOS, as a "a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline".

[88] Although one could make the opposite claim, i.e. that the wreck is deprived of its status as a state wreck should the state renounce interest in it. Should one choose this path, the wreck could instead, arguably, be treated as a non-state wreck where the owner has ceased to exist. Such a stance, however, fails to take into account more complicated situations where it is not evident that the state is the sole party involved in relation to the wreck and its status. Other subjects and dimensions might also have to be taken into account in these situations. For the purposes here, this stance will thus not be taken.

wreck is located, claims the right to take action in order to mitigate the danger that the wreck poses, while the other state, to which the state wreck belongs, forbids any such action. Should the state not claim the wreck, the matter is totally different, in this respect, since there would be no conflict of this kind. Furthermore, there may also be situations where the state, from which the wreck originates, no longer exists or has dissolved or coalesced into a new state. This creates yet another subcategory of state wrecks.

One notable example of a state wreck is the, already mentioned, German cruiser Blücher that was sunk when it took part in the invasion of Norway in 1940. In this case, the wreck could seem to be a state wreck in the form of a warship belonging to the state of Germany. The issue is, however, more complicated. German property in Norway, including wrecks along the Norwegian coast, was confiscated at the end of the war.[89] Thus, the rights to Blücher, according to Norwegian law, passed to Norway at this stage or, expressed differently, Norway acquired better right to the wreck after this point in time. But if this fact, for the sake of the argument, is disregarded for the moment, yet another distinction can be made in relation to state wrecks. One could argue that Blücher was a state vessel in the form of a warship, but that the state, to which the ship belonged, no longer exists. Blücher was built during the rule of the NSDAP in a situation where Germany had departed from the terms in the peace treaty of Versailles after the First World War.[90] One could thus make the claim that Germany, at this stage, developed into a new separate state or regime in the form of Nazi Germany. Consequently, it could be argued that the vessel belonged to Nazi Germany, a state that no longer exists and that Germany, as a present nation, can make no claims in relation to it. The, arguably more convincing, counterargument to that position, however, would be that the present state of Germany has succeeded in its place and therefore has acquired rights by means of succession or, indeed, that it was the

[89] See Sjur Brækhus. "Salvage of Wrecks and Wreckage: Legal Issues Arising from the Runde Find". In: *Scandinavian Studies in Law* 20 (1976), p. 53 ff.

[90] This is, of course, a simplification, but it suffices here in order to make this point.

one state of Germany all along.[91] This example nevertheless shows that there are various lines of reasoning and ways to argue in relation to these wrecks.

The above-mentioned variations of state wrecks, result in the scheme in figure 1.5. This is, however, a simplification as the examples above show.[92]

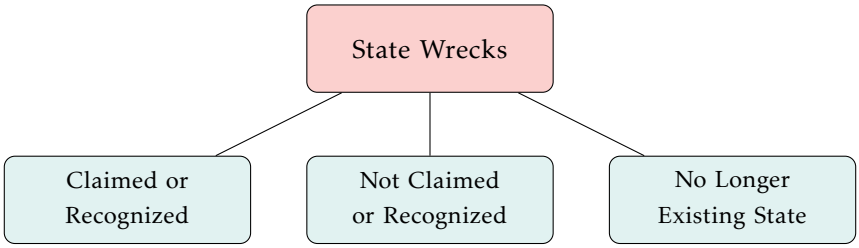

Figure 1.5: State wrecks and proprietary interests.

1.6.4 Division Based on Problem Areas

The second sphere of interests relates to different kinds of problems that wrecks can pose. In this classification, four different problems or hazards are identified based on the results from the first introductory research question. Firstly, a wreck may pose a danger to navigation. This was the case with, the already mentioned, Tricolor that sank in the English Channel, as well as the Baltic Ace that sank close to the entry of the shipping lane that leads to the port of Rotterdam. Secondly, a wreck may pose a danger to the environment. Examples of this are the oil tankers Erika and Prestige, as well as the container ship Rena. Thirdly, a wreck may in itself be dangerous to its surroundings. In these cases, the wreck does not threaten the environment as such, but rather constitutes a danger to anyone approaching it. An example of

[91] Cf. Dromgoole and Gaskell, "Interests in Wreck", p. 354.

[92] One further such instance is a case where more than one state claims and recognizes the wreck as belonging to the state. This results in a proprietary conflict in relation to a state wreck.

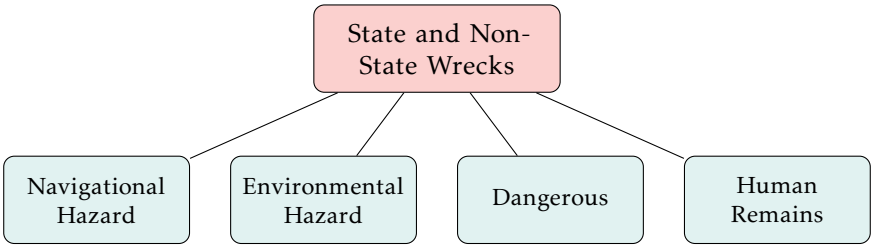

Figure 1.6: Wrecks in relation to problem areas.

this is the discussed warship SS Richard Montgomery.[93] Fourthly, and finally, a wreck may pose problems or need protection as a consequence of human remains being present in connection with the wreck. These remains may impact on how the wreck can be handled and the wreck may need protection for this reason. The mentioned legal discussion concerning the protection of MS Estonia is one example of this.

Of course, there may also be other problems in relation to wrecks and wreck removal. In order to reach a reasonable demarcation of the subject matter, the analysed problems will, however, be limited to the ones mentioned here. These four problems may be present, although to various extents, for both state and non-state wrecks, resulting in the scheme in figure 1.6.[94]

1.6.5 Combined Spheres

The two spheres of interests can be combined. This is relevant since the proprietary interests will have an impact on how the problems or hazards can and will be handled. Thus, a wreck that poses a navigational hazard and that has a known owner can be handled in ways that might

[93] Another example may be the Polish ferry MS Jan Heweliusz that sank 1993 in bad weather *en route* to Ystad claiming 55 lives. The wreck is located in shallow waters of 27 m, making it attractive to divers. Because of its construction the wreck may, however, be in bad condition and diving inside the hull can thus be dangerous.

[94] This is, once again, a simplification. Further aspects and problems can be identified, e.g. wrecks that may be of interest to preserve. Such situations do not, however, entail a hazard, problem or danger as such and are thus left out of this scheme. This aspect is, however, taken into account below in section 1.6.6 on wrecks from different periods in time.

not be possible should the wreck pose the same problem but be without an owner. In the same way, in a case where the owner of a wreck is unknown, it may still be possible to find out who the owner is, allowing certain measures and possibilities that would be ruled out should the wreck have no owner or should the owner no longer exist. In relation to non-state wrecks, the combination results in the scheme in figure 1.7.

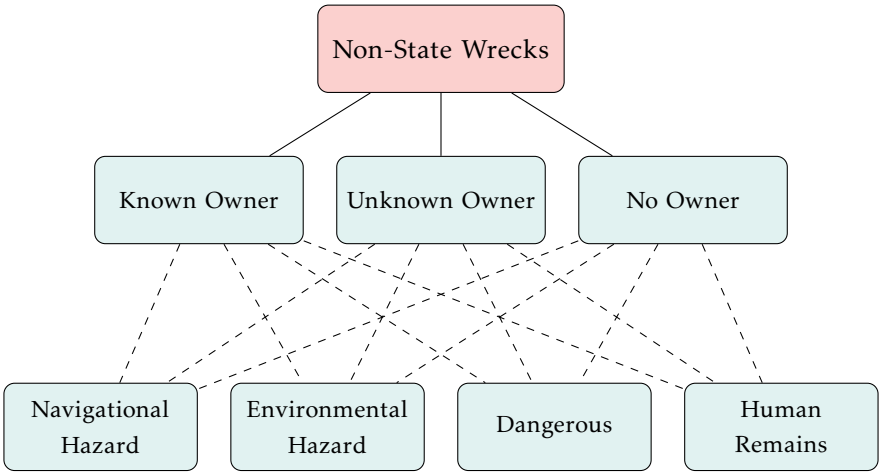

Figure 1.7: Combined spheres of proprietary interests and problem areas in relation to non-state wrecks.

The same kind of combination can be made in relation to state wrecks. In this case, the possibility to handle a wreck that creates a specific hazard can vary and depend on whether the wreck is claimed or recognized by a state or if the state no longer exists. This can impact on how the state, in whose territory the wreck is located, can act. It may, as an example, be the case that the state to which the wreck belongs, identifies it as a sovereign object that no other state has the right to approach. In a situation where the wreck poses e.g. an environmental hazard, this may be a difficult conflict to solve. This is especially likely to be the case if the state, to which the wreck belongs, has no intention of taking any unilateral action in order to deal with the hazard or should the state not recognize it as a problem. In relation to state-wrecks, the

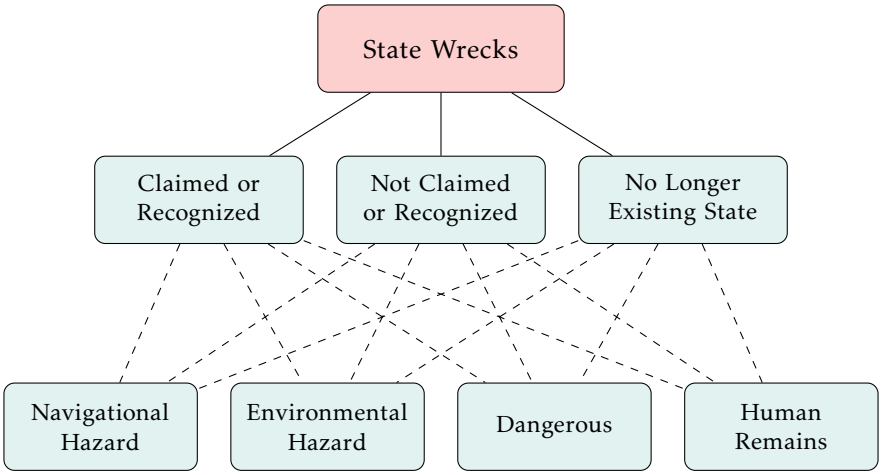

Figure 1.8: Combined spheres of proprietary interests and problem areas in relation to state wrecks.

combination results in the scheme in figure 1.8.

1.6.6 Period of Time

One further distinction that can be made between different wrecks relates to time. Wrecks can be divided based on when the incident or wreckage occurred.[95] Historical wrecks have already been discussed and may need to be protected because of their historical or cultural value. At the same time, they can also pose the problems and hazards mentioned above. At the other end of the scale are, what can be denoted as, modern wrecks. These wrecks are modern in the sense that they are recent and involve the ships crossing the oceans today. This group includes the Costa Concordia, Tricolor and Rena as discussed above.

Between the two mentioned endpoints of the scale there is, finally, a

[95] Another variation is to relate the wreck to the age of the ship or property itself. In that sense, a ship of considerable age that sinks because of an accident could, depending on the circumstances, also be recognized as a historical wreck, e.g. in need of protection, even though the wreckage has occurred recently. An opposite view would be to treat such a wreck as a modern wreck, making the time of wreckage the deciding factor. Arguably, the chosen construction can vary depending on the functional perspective. If such a ship is in need of protection because of its historical nature, it is difficult to see why it should not be possible to treat it as a historical wreck.

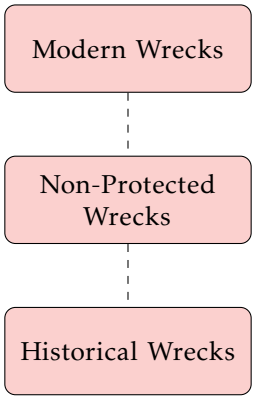

Figure 1.9: Different wrecks in relation to time.

third group of wrecks that can be identified. These wrecks belong to a category that can be denoted as non-protected wrecks, in the sense that they are not protected or recognized as historical wrecks while still not being modern.[96] Thus, wrecks in this group may cause the hazards and problems mentioned above but are, at the same time, not classified as historical wrecks within the legal system that governs them. Likewise, wrecks in this category may also be in need of protection even if they do not fit the description or fulfil the demands in order to be classified as historical wrecks.[97]

The wrecks in these three main categories can also be subject to proprietary rights, even if this may not always be relevant e.g. in relation to historical wrecks, and they may also cause hazards and pose dangers in line with what has been stated above. Thus, the combined schemes

[96] It is often unproblematic to determine whether a wreck is protected as a historical wreck or not. The precise limit between non-protected wrecks and modern wrecks, however, can be hard to determine and might vary depending on perspective. This is, arguably, not that much of a problem since it is the function of the different categories that is of interest. The crucial thing to ask is thus if a certain wreck, in a functional sense, is to be seen as a non-protected or a modern wreck in light of the classification.

[97] In Swedish law, as an example, wrecks from the First and Second World War will fall under the category of non-protected wrecks, since the legislation governing the protection of wrecks as a form of cultural heritage does not, in general, recognize wrecks from 1850 and onwards; see 2:1 a *Kulturmiljölagen* (1988:959) (Eng. *Act on the Cultural Environment).* There may, however, be exceptions to this as discussed further below in chapter 10.

concerning both state and non-state wrecks are valid, although practically relevant to various degrees, for these three different categories of wrecks. This leads to a further combined final scheme of the conjoined combinations of state and non-state wrecks with these three categories in relation to time. In the scheme in figure 1.10, the three categories, i.e. modern, non-protected and historical wrecks are entered into one box. Thus, the final scheme, in fact, consists of three combined schemes like this; one for historical wrecks, one for non-protected wrecks and one for modern wrecks. In total, the full scheme, consequently, results in 72 different kinds of combinations and as many variations of wrecks. For spatial reasons the full scheme is not included here.

1.6.7 Combination of Variations

There may, of course, also be situations where a wreck is a combination of two of the identified kinds of wrecks or more, e.g. when a wreck, like the Baltic Ace, is a hazard both to navigation and to the environment. Consequently, the Baltic Ace was a modern non-state wreck with a known owner that constituted both a hazard to navigation and to the environment. This results in an array of combinations. Another example is, yet again, MS Estonia, whose bunkers were removed subsequent to the sinking for environmental reasons.[98] The wreck was, therefore, a combination of a modern, or arguably now non-protected depending on perspective, non-state wreck with a known owner that posed a hazard to the environment, while at the same time containing human remains.[99] Costa Concordia, to illustrate these combinations with a final example, was a modern non-state wreck with a known owner that posed a hazard to the environment as well as, arguably, to the navigation of other vessels and that also contained human remains as illustrated in figure 1.11 and 1.12.

[98] Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 80.

[99] The term non-protected refers to the category as introduced above and should not be confused with the various acts in the Nordic legal systems that protect the grave sanctity of MS Estonia. These are discussed in more detail below in chapter 9.

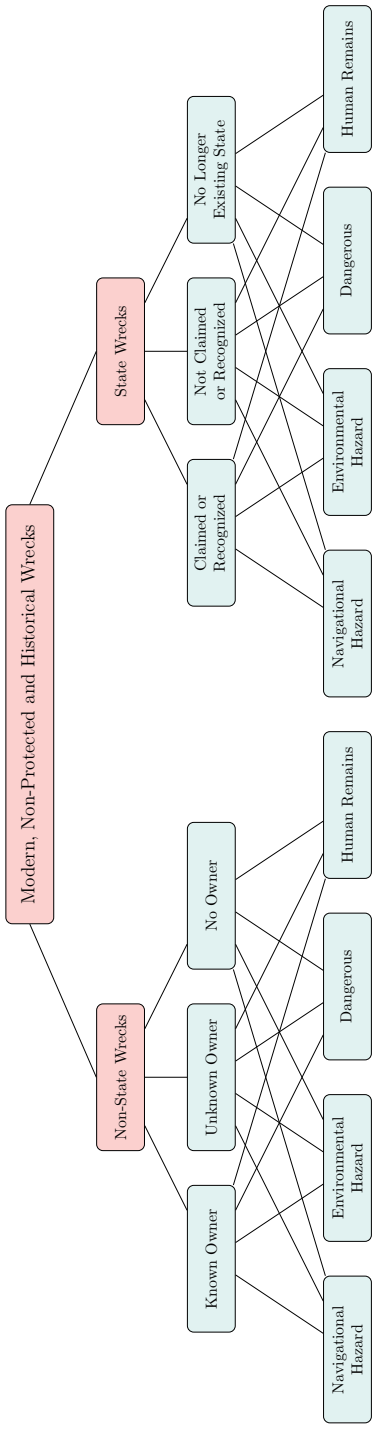

Figure 1.10: Combined scheme of the classified wrecks.

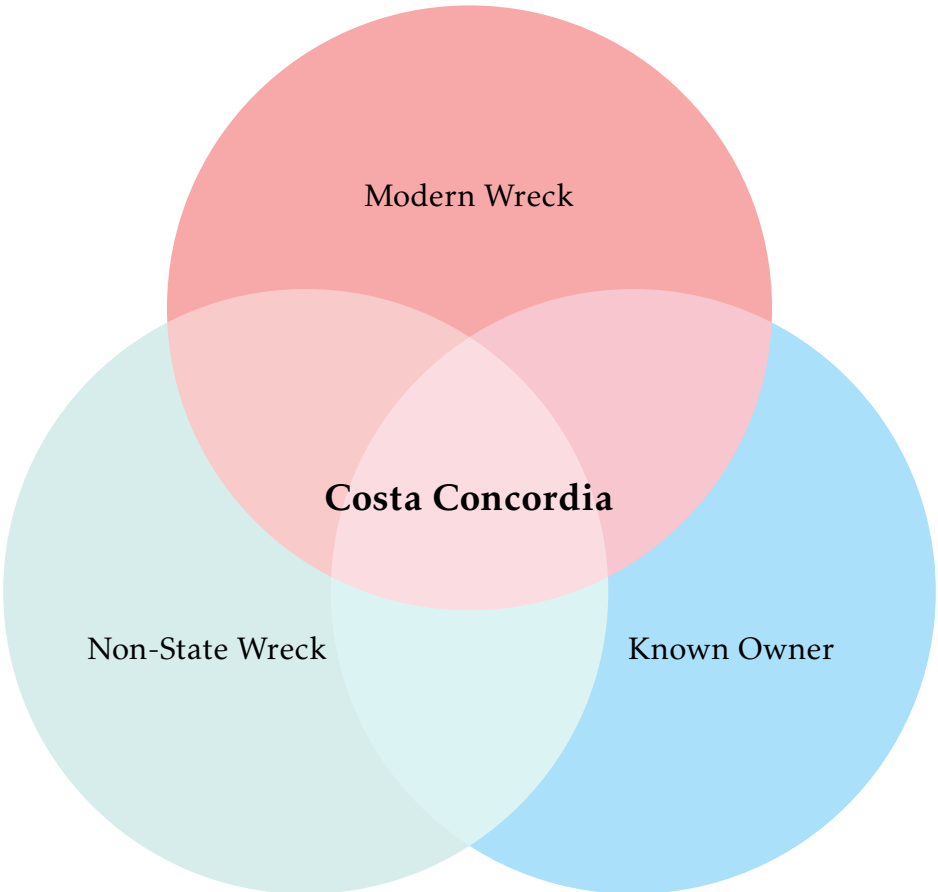

Figure 1.11: Costa Concordia in relation to proprietary interests.

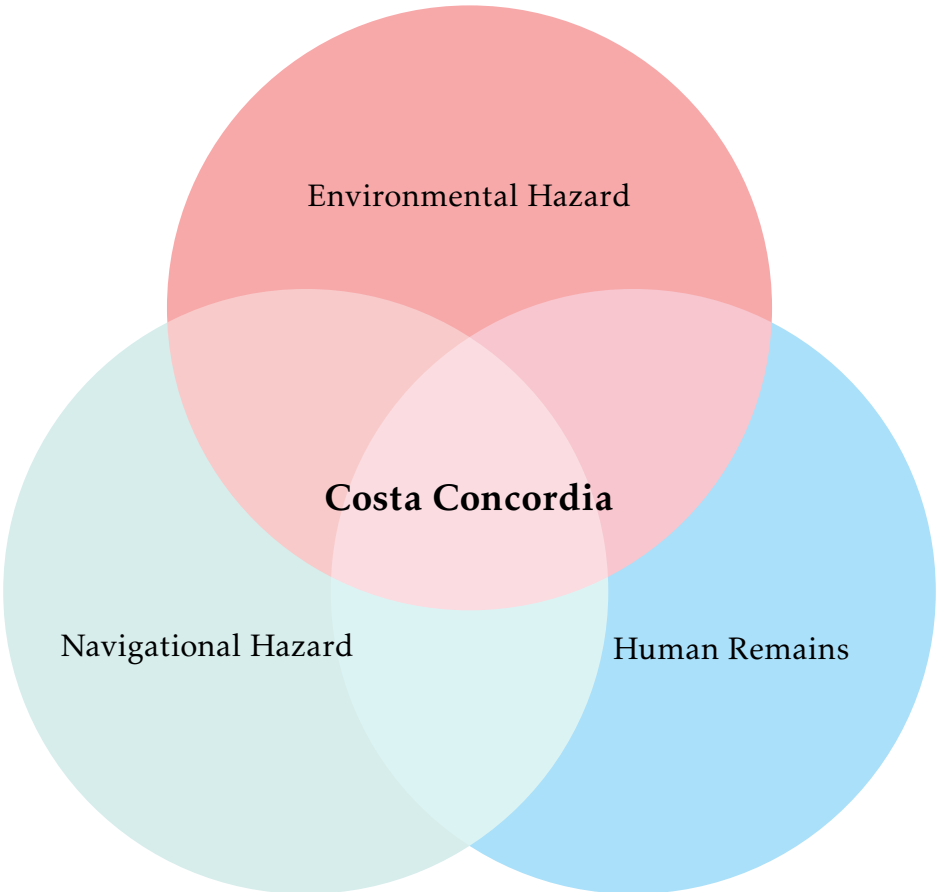

Figure 1.12: Costa Concordia in relation to problem areas.

1.6.8 Geographical Element

The different variations can also be related to where wrecks are located. Various rules and regulations will apply, based on the geographical circumstances. Thus, the flag state will be important in relation to a wreck that is located on the high seas. The situation is different should the wreck, as an example, be located in a harbour in the internal waters of a state. Another, more uncertain, situation is a case where the wreck is located outside of the territorial waters of a state, but within its exclusive economic zone. In these two latter examples, the law of the state in question will have to be taken into account in various ways depending on the situation.

Moreover, there may be situations where the wreck is positioned in territory that is disputed.[100] If a wreckage should occur there, or if a wreck is found in the region, it may prove difficult to determine which legal system that is to be applied should there be several contending ones. This uncertainty, or indeed an uncertainty caused by the environment being volatile or dangerous, may result in that a salvor or an organization specialising in wreck removal determines it to be too risky to initiate a salvage operation or contract concerning a wreck removal operation.

As can be seen from this short passage, the geographical element, and the other aspects mentioned above, may even further complicate the different scenarios in which problems and conflicts relating to wrecks and wreck removal can occur.

1.6.9 Private and Public Interests and Conflicts

Shipwrecks may also lead to conflicts and competing interest between private individuals and states or public interests. There are various examples of this. One such conflict can arise when a wreck is found. The finder may then wish to acquire ownership of the wreck. At the

[100] An example is the South China Sea, where several states are involved in territorial disputes; see e.g. BBC (2018). *Why is the South China Sea contentious?* July 2016. URL: http://www.bbc.com/news/world-asia-pacific-13748349 (visited on 02/2018).

same time, there may be other individuals that claim rights in respect of the wreck, e.g. a previous owner of the vessel, and the state may need to provide mechanisms for solving such disputes. There can, however, also be conflicts between private interests and the state. The state may claim better right to all wrecks that are found or claim such a right in relation to wrecks of a particular age that the state deems in need of protection for historical reasons. Another variation is when a wreck is abandoned by a previous owner, which can lead to a conflict between that person and public interests should the wreck, as an example, pose a hazard to the environment. Another example is the question of when a wreck is to be deemed as abandoned by such an individual according to the state in whose territory the wreck is located. This can also lead to conflicts.

Another area where there may be conflicting interests between states and private individuals concern the right to limit liability for arising liabilities as a consequence of a wreck. The possibility to limit liability is an important principle in maritime law that individual and private parties may wish to uphold. States, on the other hand, may in some cases wish to restrict the possibility to limit liability, in relation to e.g. wreck removal costs, for various reasons. This is thus another example of a potential conflict between private and public interests.

A final area where there can also be conflicting interests between private individuals and the state is salvage and how that area of law relates to wrecks and wreck removal. As an example, private interests may wish to salvage wrecks that contain valuable cargo. The state, on the other hand, may regard the wreck as a protected object, e.g. because of its age, and thus object to such a salvage operation. This thus also results in a conflict between private and public interests. There can also be uncertainty as to when the state is to take a more active role, e.g. in the sense of arranging or imposing conditions upon a wreck removal operation. The individual parties involved in such a case, e.g. the shipowner and a salvor, may wish to handle the situation themselves in the form of a salvage operation. The boundary between salvage and wreck removal is thus another area where conflicts can arise between

private and public interests.

1.6.10 Other Variations and Aspects

There may, furthermore, be other variations and aspects to take into account than the ones previously mentioned. In the classification above, wrecks are classified in relation to proprietary interests concerning non-state wrecks in light of ownership. In a situation where the ship as such has no value and the remaining cargo is commercially attractive for salvors, it is, however, more relevant to investigate the relation between the cargo owner and the salvor, provided that the cargo owner is not the same as the owner of the ship. In many cases these will differ.

The example can be further complicated. Consider a non-state commercial ship, owned by an Australian company, that is found somewhere in a disputed area of the South China Sea. It turns out that the ship sank during the Second World War and was carrying non-perishable cargo for an English company. The wreck now lies in a place where several states in the area claim territorial rights. A potential salvor, provided that the wreck can be a subject of salvage, or some other party that wants to take action in relation to the wreck, will in this case be in a potentially difficult situation with several interests and conflicts to take into account. The relation to the English cargo owner, if the owner still exists, may have to be investigated along with the relation to the Australian ship owner, if still existing, as well as any potential insurers or reinsurers of the cargo. Furthermore, potential claims from the surrounding states that make territorial claims in the region may have to be taken into account. Some of these may, as an example, favour salvage or wreck removal, while others refute it.[101]

Another aspect and potential cause for confusion, is which law that is to be applied in relation to the wreck. From the flag state doctrine, it follows that a ship and consequently, at least arguably, also the wreck is to be governed by the law of the flag.[102] The wreck may, however, as

[101] The example is inspired by the one found in Dromgoole and Gaskell, "Interests in Wreck", p. 347.

[102] See in general Richard A Barnes. "Flag States". In: *The Oxford Handbook of the Law*

already discussed, be located in territorial waters, which will entail a concurrent jurisdiction in the form of the coastal state. The coastal state may claim that its law is to govern the wreck, resulting in a conflict. Another complexity is if the ship was dual-registered in a bareboat registry. Should the law of the bareboat charterer then be applied or the law of the initial registration for the ship itself or the law in the state where the ship owner is based?

Furthermore, the flag state principle may, arguably, also be applicable in relation to ships that have been abandoned. The case is, however, less clear if the wreck has been abandoned for a long time. If a wreck is located within the territorial waters of another state, the state may claim ownership of, or better right to, the wreck according to the statutory provisions of that state in certain situations. For older historical wrecks, it may also be possible for a state to claim that the wreck, over the years, has become an integral part of the state. It has e.g. been argued that a wreck can been embedded in the subsoil and thereby be transformed into a property of the state.[103] It can also be claimed that a historical wreck has been located in a specific place for so long, that it has created historical and cultural links to the state in question.

Other questions, in relation to the choice of law, arise when items from the crew or passengers are still left in the wreck. The crew and passengers may be of different nationalities and come from various different states. Arguably, it may in these cases be reasonable, when in doubt, to coalesce into the law of the flag state or some other convenient law. Should the owner be unknown, it will be a question of either applying the law of the site or the forum or, maybe, alternatively that of the salvor or finder.[104]

As illustrated by these short reflections, various interests and conflicts, involving intricate balances of interests, may have to be addressed

of the Sea. Ed. by Donald R. Rothwell et al. Oxford University Press, 2015.

[103]Cf. Sarah Dromgoole and Nicholas Gaskell. "Who has a Right to Historic Wrecks and Wreckage?" In: *International Journal of Cultural Property* 2.2 (1993), p. 219.

[104]If the flag of the salvor or finder should be applied, a further problem may arise when there are various nationalities involved, e.g. a joint venture of salvage companies from different states. See further on these issues Dromgoole and Gaskell, "Interests in Wreck", p. 348 f.

in situations like these. The complexity is, however, not necessarily a bad thing. Instead, the various different dimensions and interests can also inspire creative legal solutions and approaches to these issues.

1.6.11 Results for the Ensuing Parts

This section has resulted in the classification that the second introductory research question sought. Thus, the different interests and conflicts in relation to wrecks and wreck removal, as identified in the previous section, have been condensed into a classification of different wrecks. The classification builds on two spheres consisting of proprietary interests in relation to wrecks on the one hand and the problems that wrecks can pose on the other.

In relation to proprietary interests, the classification is based on the fact that a wreck can be either a state or a non-state wreck. This will impact on to the potential proprietary interests in the wreck. If it is a non-state wreck, its owner might either be known, unknown or no longer existing. If the wreck is a state wreck, the state may claim or recognize the wreck, not claim or recognize the wreck or the state may no longer exist.

In relation to problems that wrecks can pose, these have been divided into four different groups: wrecks that pose navigational hazards, environmental hazards, wrecks that are dangerous and, finally, those that contain human remains. All of the identified categories of wrecks relating to proprietary interests can pose these problems. Consequently, both spheres can be combined.

In addition to the above, a further division has been made in relation to time. A wreck may be a historic or a modern wreck. There is also a category in-between these ends on the scale in the form of wrecks that are not recognized as historical while also not being modern. These wrecks have been labelled as non-protected wrecks. In total there are thus three identified wrecks in relation to time: historical wrecks, non-protected wrecks and modern wrecks.

The classification above is used, when appropriate, throughout the

remaining parts of the study in order to shape and delineate the analysis. The model can be used and construed in different ways. One way is to functionally relate it to the four identified problem areas. These, in turn, can be further divided into two main fields based on whether the wreck poses a hazard to navigation and the environment or if it needs to be protected because it is dangerous or contains human remains.[105] This means that the identified problems that state and non-state wrecks may pose, can be divided into two main fields, i.e. hazards and protection, as illustrated in figure 1.13.

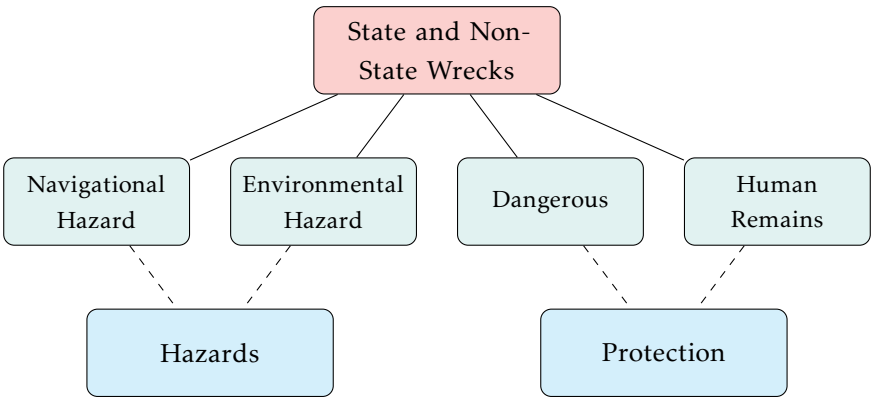

Figure 1.13: Problem area in relation to functions.

The classification model can also be functionally related to time. It is clear that all of the identified wrecks in relation to time, i.e. historical wrecks, non-protected wrecks and modern wrecks, can constitute hazards in light of the above division. As discussed in this section, the classified wrecks are, however, more or less likely to fall into the identified categories. It is, consequently, more likely that modern wrecks and, to a certain extent, non-protected wrecks will pose hazards to the envi-

[105] This division is, of course, a simplification. It could be argued that protection is a common denominator for all the identified problem areas, since the aim is to protect someone, something or the wreck itself in most situations. It is, furthermore, clear that a wreck here denoted as dangerous, of course, also constitutes a hazard of some sort. The division here, however, is, yet again, functional and works as a model for the ensuing analysis.

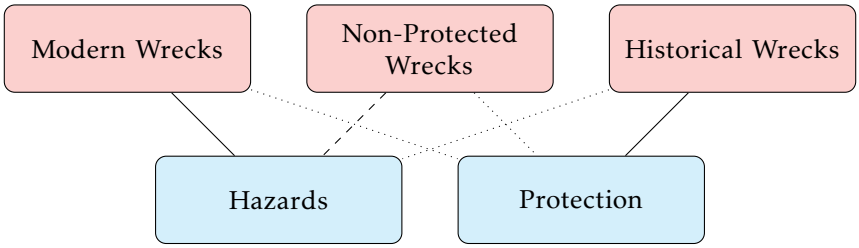

Figure 1.14: Problem area in relation to time.

ronment. Because of their age, it is less likely that historical wrecks will pose such hazards. When it comes to navigational hazards, moreover, it is, most likely, modern wrecks that will pose a problem in practice. There can, however, also be instances where also non-protected wrecks or even historical wrecks can pose such problems.[106]

In relation to the field of protection, the definition used when classifying wrecks in relation to time entails that protection because of age is directed towards historical wrecks. It should, however, be noted that the other categories in relation to time may also fall into the field of protection should they be either dangerous or contain human remains as discussed above in relation to the identified problem area. The connections between the classification of wrecks in relation to time and the two identified fields are illustrated in figure 1.14.[107]

The functional division of the problem area, both in relation to problems and time, also has to be viewed against the backdrop of the proprietary interests. Thus for each non-state wreck, it is crucial to identify if there is a known owner, if the owner is unknown or if the wreck has no owner. Likewise, in relation to state wrecks, the situation will vary depending on whether the wreck is claimed or recognized by

[106] These are generalisations based on the discussion above. No empirical investigation has been carried out in order to reach any conclusions to this end. It should, however, be possible to conduct such an investigation in order to test the veracity of these predictions.

[107] In the figure, the strength of connection between the category of wreck and function is illustrated in the following way: *line* = strong connection, *dashed* = less strong connection and *dotted* = least strong connection.

a state or if the state no longer exists.

In relation to wrecks that pose navigational hazards, to illustrate the above discussion with an example, it is therefore first of interest to differ between state and non-state wrecks. Thereafter, a further division can be made in relation to non-state wrecks between wrecks that have known owners, wrecks where the owners are unknown and, finally, wrecks that have no owners. In relation to state wrecks, it is, in the same way, relevant to distinguish between wrecks that are claimed or recognized by a state, those that are not claimed or recognized by a state and, finally, those cases where the state no longer exists. The six different categories of wrecks that this example results in are illustrated in figure 1.15. The same division can be made for all the categories that fall under either hazards or protection.

The two main fields, of hazards and protection, form two areas of study. Additionally, a third area consists of the private and public interests and conflicts discussed above relating to the law of finds, the possibility to limit liability for wreck removal costs as well as the relation between salvage and wreck removal. As an introductory part, finally, the legal background to the problem area is discussed. How this is carried out in more detail, is outlined in the next section.

1.7 Structure and Legal Analysis

In order to reach the purpose of the study, interests and conflicts in relation to wrecks and wreck removal have been identified and formed a basis for a classification of different wrecks. This model has resulted in demarcated areas of research for the ensuing parts. The purpose of the study is reached by the study of these key areas:

i) The legal background to the field and the term wreck as a legal concept.

ii) Wrecks that pose hazards to navigation and the environment.

iii) The possibility to protect wrecks.

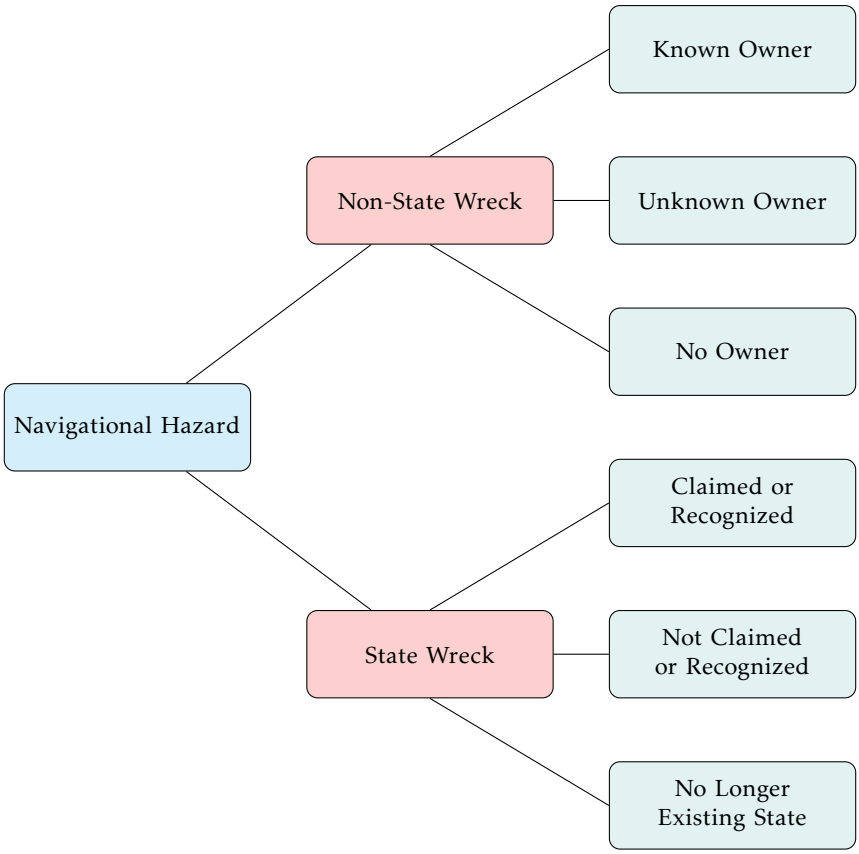

Figure 1.15: Wrecks that pose navigational hazards.

iv) Private and public interests and conflicts.

Hopefully, the analysis and discussions in relation to these issues can provide new insights and some illumination to this field of law, not least from a comparative point of view. In this sense, an additional ambition has also been to enable access to how problems of this sort are and have been handled in different legal systems and in particular to make the Nordic approaches available in English. The study may, however, be of interest to anyone who is interested in the questions that wrecks and wreck removal raise and their complexity.

It should, at the same time, be made quite clear what the study is not. Its purpose is to deal with interpretations of law in line with the theoretical considerations and the method as discussed in chapter 2. The purpose is not to provide a final construction of how this field of law is to be handled or how the questions are to be solved once and for all. Such an endeavour is irreconcilable with the chosen theoretical stance. Instead, the view presented here represents one construction of this field of law and can, hopefully, be a step forward towards further investigation in this field. The study is, furthermore, not an exhaustive legal analysis on a given theme or legal question. Instead, the purpose, as already discussed, is to pursue the deeper structures involved in this area of law. In this sense, the studied legal solutions and regulatory mechanisms in the legal systems are seen as manifestations of these deeper structures.[108]

1.7.1 Four Parts of Inquiry

The study is based on four central parts that represent the key areas mentioned above:

i) History and Concept

ii) Hazards

iii) Protection

[108] Cf. Tuori, "The Law and its Traditions", p. 490 and, in more depth, Tuori, *Critical Legal Positivism*.

iv) Private and Public Interests and Conflicts

These different parts are divided into different chapters each addressing research questions. The research questions for each chapter are outlined in greater detail in section 1.8. The different parts are, more or less, independent and separate, although there are connections and common denominators between them. The first part of the study, where history and concept are discussed, however, functions as a background and foundation for the subsequent parts and it may thus be relevant to read this part before reading the others. Apart from that, it is possible to read the chapters that are of interest independently without having to read the preceding ones. To get an overview of the subject, before or without going into details, it may also be suitable to read the concluding chapter 14, on conclusions and concluding remarks, before turning to the individual chapters. This chapter includes a final discussion of the different chapters and research questions in order to draw conclusions.

1.7.2 Legal Comparisons

In order to reach its purpose and to answer the research questions in the different parts, the study consists of legal analysis that includes comparisons of relevant regulations and provisions, as well as case law and other legal documents, from different legal systems. This analysis and the comparisons, which have been carried out as discussed further in chapter 2, have been executed with the intention of reaching results in relation to the identified problems and issues concerning wrecks and wreck removal. These are reflected in the research questions for each part and chapter. The legal systems that have been compared are the Nordic ones, including Danish, Finnish, Norwegian and Swedish law, as well as English law. At times, it has also been relevant to discuss a certain issue with reference to other legal systems as well, but no comprehensive comparison has been made in relation to those legal systems.

In brief, the different legal systems have been studied and analysed by identifying different functions that are relevant when dealing with

wrecks and wreck removal. These functions, which correlate with the classification, form a foundation, upon which the analysis of the different legal systems has been based. This has involved investigating how the legal systems relate to the identified functions, as well as how well, if possible to determine, the functions are fulfilled. Furthermore, how the different legal systems relate to one another in relation to the identified functions has been of interest. Thus, the purpose of the comparative element in the study is twofold:

- Firstly, the aim of the comparisons has been to enable an overview of how different legal systems have dealt with the issues at hand in order to create an understanding of how they have tackled the problems in order to compare the systems with each other.
- Secondly, the analysis has aimed at scrutinizing, if possible, how successful the different legal systems have been in relation to the identified functions. The successfulness has been determined by how fully a function is covered in a legal system.[109]

The comparisons and their results have not been conducted and reached with any claim of completeness or exhaustiveness. They are instead interpretations in line with the theoretical considerations that are discussed in further detail in section 2.1. With this kept in mind, however, it may be possible for the comparisons to be useful in future reforms in this area of law should others share the offered interpretations. The description, demarcation and analysis of the problem area can hopefully also inspire future inquiry in this exciting field of law.

1.8 Research Questions

In this section, the different central parts and key areas, i.e. the four parts of inquiry, are explained in further detail along with the specific research questions for each part and chapter. The enumeration of the research questions in parenthesis refers to the specific chapters and sections in the study where they are discussed.

[109] See the further discussion in section 2.2.

1.8.1 History and Concept

In this part, the historical development and the legal background to this area of law are discussed. The main purpose has been to put the research topic, as well as the subsequent parts of the study, in a historical and cultural context. The background focuses on how wrecks and wreck removal have been regulated in this perspective. This has been done with the assumption that it is valuable to know the relevant history and context in order to more fully understand and grasp the problem area, which, in turn, is motivated by the belief that it is valuable to know the historical background of a regulation.

The research questions in relation to this historical part are:

- How have wrecks and wreck removal been regulated historically? (3)
- Based on the findings from the first question, is it possible, and if so in what way, to trace the development of concepts or identified problems in different regulations throughout history? (3)
- Can certain common grounds be distinguished as to how wrecks and wreck removal have been regulated historically? (3)

Secondly, this part has also addressed the notion of wreck as a legal concept or a legal construction. The main purpose has been to analyse the definitions of what a wreck is and how these differ and are construed in different legal systems. This is important since the definition and construction will influence the provisions that deal with wrecks and wreck removal. It is also crucial to understand how the different systems approach the concept in order to relate and compare them with each other in a relevant way. In order to elucidate the question further, it has also been relevant to investigate how the definitions and constructions of what a wreck is relate to the concept of ship or vessel.

The research questions in relation to this part are:

- How has the notion of wreck as a legal concept been defined and construed in different legal systems and is it possible to distinguish common denominators in these constructions? (4)

- How do the above definitions and constructions of what a wreck is relate to the concept of ship or vessel? (4)

1.8.2 Hazards

This part concerns wrecks that pose hazards of different kinds. Wrecks can pose hazards of various sorts. In order to demarcate and delimit the field of study, the investigation has focused on the problems that emanate from the discussion and classification found in section 1.5 and 1.6. This means that wrecks that pose navigational and environmental hazards have been studied.[110]

The research questions in relation to the hazards that a wreck can pose are:

- How can wrecks that pose navigational hazards be handled from a legal point of view? (6)
- How can wrecks that pose environmental hazards be handled from a legal point of view? (7)

These research questions are elaborated and broken down into different dimensions or functions in the respective chapters. Since there are international conventions that make up a common ground between the legal systems to various degrees, this is discussed in a separate chapter that precedes the ones containing the research questions. In this chapter, the Nairobi International Convention on the Removal of Wrecks is also discussed in detail. The common ground is found in chapter 5.

1.8.3 Protection

When it comes to the protection of wrecks, this may be relevant in order to protect wrecks that are of archaeological, cultural or historical interest as well as to protect wrecks that are dangerous or are seen as gravesites. The subject of study here has thus been the possibility to

[110] For an in-depth discussion of these and how they differ, see section 1.5 and 1.6.

protect wrecks in these cases, as well as how different interests can be balanced in this respect.

The research questions in relation to protection are therefore:

- How can dangerous wrecks be handled from a legal point of view? (8)
- How can wrecks that contain human remains be handled from a legal point of view? (9)
- How is it possible to legally protect wrecks that are of historical, archaeological or cultural interest? (10)

These research questions are elaborated and broken down into different dimensions or functions in the respective chapters.

1.8.4 Private and Public Interests and Conflicts

This final part focuses on certain interests in relation to wrecks and wreck removal as well as various conflicts that can arise between different subjects claiming different rights in respect of a wreck. In order to demarcate the area of study, three central themes are in focus. The first relates to the finding of wrecks and how proprietary interests and conflicts can be handled. In this context, state claims in relation to historical wrecks and issues of dereliction and abandonment of wrecks are also discussed. The second theme relates to limitation of liability and how this concept relates to wreck removal costs. Finally, the third theme concerns the boundary between salvage and wreck removal. How salvage law relates to wreck law is, consequently, the focus of the final chapter in this part.

The research questions in relation to private and public interests and conflicts are thus:

- How can the finding of wrecks and resulting proprietary interests and conflicts be regulated? (11)
- In what way can state claims in relation to historical wrecks affect proprietary interests and conflicts in relation to such wrecks? (11)

- How does dereliction or abandonment affect proprietary interests and conflicts in relation wrecks? (11)
- Which interests and conflicts are of importance when deciding if it should be possible to limit liability for wreck removal claims and how do the legal systems approach the issue of limitation? (12)
- How does salvage relate to wrecks and wreck removal? (13)

Chapter 2

Execution of the Study

2.1 Theoretical Considerations

Some theoretical considerations are discussed here in relation to the study. This section does not, however, thoroughly examine all the potential theoretical problems and standpoints that may be of interest to law in this context. Instead, points that are relevant for the ensuing work are highlighted, since they affect how the discussions and the investigations have been carried out.

One important thing to keep in mind and reflect upon, when conducting legal research, is what could be described as the always-present subjective element in law. This element makes it difficult to compare legal research with research conducted within certain other disciplines like the natural sciences.[111] The subjective element may exist, to take two examples, in the form of a judgement held by a judge or a political stance behind a specific regulation.[112] The subjective element may

[111] Cf. Graver, "Rettsforskningens oppgaver og rettsvitenskapens autonomi", p. 231. Cf. also the Popperian stance on science, which can be condensed as knowledge that is objectively testable, predictable and falsifiable. For a concise, yet lucid, account of Popper's views on science, see Karl Popper. *Conjectures and Refutations*. Routledge and Keagan Paul, 1963, p. 33 ff and cf. Nils Jareborg. "Rättsdogmatik som vetenskap". In: *Svensk juristtidning* (2004), p. 3 ff. See also Eva-Maria Svensson. "De lege interpretata – om behovet av metodologisk reflektion". In: *Juridisk publikation* (2014), p. 211, for a nuanced discussion from a legal perspective, where a distinction is made between practised law and legal research.

[112] Cf. on the former Ronald Dworkin. *Law's Empire*. Harvard University Press, 1986,

relate to normative questions, as to what is deemed as morally good or ethical, or which provisions that are most effective and predictable. This must be taken into account and reflected upon when conducting research in the field of law.

It has been argued that it is unclear how legal research should handle these kinds of questions and that this uncertainty makes legal research problematic.[113] It is, however, my view that this fact, even if true, does not render legal research unnecessary or useless. With the problems and idiosyncrasies taken into account, legal research can still be of value and yield results.[114] What matters in the end is to reach results that contribute to the scientific and scholarly endeavour as well as to the legal tradition and thereby, ideally, to add something to the knowledge of mankind.[115] Further details on how legal research can make such contributions will not be elaborated here. Instead, the focus for the rest of this chapter is on what has been done in order to enable the study to meet this ambition.

In the study, *law* is treated in a sense that may differ from, what could be described as, a doctrinal view of law.[116] Instead of the view

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p. 1 and, also, the statement by Konrad Zweigert and Hein Kötz. *An Introduction to Comparative Law*. Oxford: Clarendon Press, 1998, p. 33: "[m]ost probably there will always remain in comparative law, as in legal science generally, let alone in the practical application of law, an area where only sound judgment, common sense, or even intuition can be of any help". See also Kurt Grönfors. "Ändamål och funktion". In: *JT* 1999/00.3 (1999), p. 535 on a purpose focused approach to legal interpretation, where it is stated that "[i]n the end, the legal interpreter's own experience and conceptions have to govern the sampling and the evaluation of the facts at hand" *(my translation)*.

[113]See Claes Sandgren. "Är rättsdogmatiken dogmatisk?" In: *Tidsskrift for Rettsvitenskap*, *TfR* 118.4-5 (2005), p. 653.

[114]It is, of course, possible to question the validity of legal research just as well as it is possible to doubt in the existence of the world and everyday experiences. The history and practice of philosophy, arguably, show that this is a perfectly tenable position to hold and one that may very well be impossible to refute. Not much use or value is, however, gained from resorting to Pyrrhonism in wait of an approaching wagon. The philosophical stance here is rather one of pragmatic fallibilism.

[115]Cf. Claes Martinson. *Femton förmögenhetsrättsliga forskningsresultat*. Iustus förlag, 2018, p. 53 ff.

[116]It is, however, hard to pinpoint what exactly is meant with a doctrinal view, a black letter law approach or the concept of *Rechtsdogmatik*. Many legal researchers tend to use these terms and methods without explaining them; see Sandgren, "Är rättsdogmatiken dogmatisk?", p. 648.

that it is possible to use the legal method, if such a method is possible to denote in singular, and the tools available to the lawyer in order to derive what the law is or what the law says on a certain issue, legal method is here treated as a means of interpretation. The law, as such, is not treated as something that exists independently of an interpreter. It has no objective existence or meaning in itself.[117] Instead, it is viewed as a construction that becomes meaningful only when interpreted and applied.[118]

Different subjects will make their own interpretations of the law.[119] This thus differs from a conservative doctrinal view, in the sense that there is no hidden truth in wait of discovery by the legal scholar or a pure final construction of the law.[120] By using legal methodology, lawyers have, rather, developed an ability to interpret law according to certain sources, principles and guidelines.[121] This has caused the effect

[117]Cf. Dworkin, *Law's Empire*, p. 4. It is submitted that law is a social construction in the sense that mankind has created the rules and regulations that make up the law in each legal system. The view that legal research is meant to, as it were, "uncover . . . the immutable laws of nature", seems less relevant these days; cf. Nancy Cook. "Law as Science: Revisiting Langdell's Paradigm in the 21st Century". In: *North Dakota Law Review* 88 (2012), p. 22; although, the emergence of human rights and their sometimes argued foundation in natural law, may balance this notion. Also the argued occurrence of peremptory norms or rules of *jus cogens*, may reflect a mind-set where there exist fundamental immutable laws inherent in nature; cf. art. 53 of the Vienna Convention on the Law of Treaties where it is stated that:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

It is, however, hard to escape the fact that even if such rules or norms are acknowledged, they are so acknowledged within the sphere of application and within what is accepted, recognized and interpreted and, therefore, within the construction as such.

[118]For a, perhaps, contrarian view, see Jareborg, "Rättsdogmatik som vetenskap", p. 8 f.

[119]Cf. Svensson, "De lege interpretata – om behovet av metodologisk reflektion", p. 211 ff. and p. 214. Some, however, might claim that this notion is not incompatible with a doctrinal view, a black letter law approach or the concept of *Rechtsdogmatik*; see Sandgren, "Är rättsdogmatiken dogmatisk?", p. 650 f.

[120]Cf. ibid., p. 648 f.

[121]Cf. Grönfors, "Ändamål och funktion", p. 537, where legal interpretation is

that the individual interpretations bear resemblance thus enabling a more or less, but far from always, uniform view or construction of the law on a certain issue.[122] In this way, a legal system, constructed by the individual similar interpretations of the law, may be acceptably coherent in a self-producing system.[123]

It follows from the fact that the legal system is built on individual interpretations, that there will not always be coherence or consensus as to what the law is or how it should be interpreted.[124] This is manifested in practice in the sense that individuals may construe the law differently and have different opinions as to what the law implies on a certain issue. The view of law as a construction in this way, also enables a view of law as a developing entity that can shift in line with the interpreters and the societal context. The view taken here can be described as a pragmatic take on law and legal research.[125]

Given these theoretical considerations, the focus in the next section turns to the methodological aspects of the study.

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described as a ”difficult balancing act” and a ”skill that only with time can be acquired through exercise and not by theoretical studies alone” *(my translation)*.

[122] Cf. Sandgren, “Är rättsdogmatiken dogmatisk?”, p. 653 f. and Claes Martinson. *Kreditsäkerhet i fakturafordringar – en förmögenhetsrättslig studie*. Iustus förlag, 2002, p. 81 f.

[123] Although, not a closed system, since it consists of individual interpretations. Cf. the view in Nils Jansen. “Comparative Law and Comparative Knowledge”. In: *The Oxford Handbook of Comparative Law*. Ed. by Mathias Reimann and Reinhard Zimmermann. Oxford University Press, 2006, p. 307, where law is treated as ”a partly autonomous reality created by the norms, doctrine, and concepts of a legal system”.

[124] It is, consequently, reasonable to question the use of a terminology built around the concept of *the law*. Given the theoretical standpoint, this use of language is inescapably some kind of illusion; cf. Mats Glavå and Ulf Petrusson. “Illusionen om rätten. Juristprofessionen och ansvaret för rättskonstruktionen”. In: *Erkjennelse och Engasjement. Minneseminar for David Doublet (1954–2000)*. Ed. by Bjarte Askeland and Jan Fridthof. Fagbogforlaget, 2002, p. 109 ff and Martinson, *Femton förmögenhetsrättsliga forskningsresultat*, p. 41 ff. It is, however, a convenient way of discussing law and is, therefore, used in this way here.

[125] Cf. Jørgen Dalberg-Larsen. *Pragmatisk retsteori*. Jurist- og Økonomforbundets Forlag, 2001, p. 103 ff.

2.2 Methodological Aspects

2.2.1 A Comparative Law Approach

In order to approach the four parts of inquiry and to answer the research questions, different legal systems have been analysed. The analysis aims at identifying and discussing central functions that regulations on wrecks and wreck removal have or need to consider in light of the chosen key areas of research.[126] The different legal systems have been analysed in relation to these functions in order to investigate how they have handled the issues at hand. The analysis also includes comparisons of how the legal systems vary from each other or converge in these respects. Based on the comparisons, conclusions have been drawn as to how the legal systems relate to and handle the different functions of wrecks and wreck removal.[127]

The comparisons, furthermore, aim at discovering advantages and disadvantages in the different legal systems, in relation to the identified functions, which may serve as a foundation for reform in areas where functions have not been met or fulfilled in a satisfying way.[128] The purpose of the investigation can thus also be phrased as to analyse how the identified functions can be fulfilled, taken all the studied legal systems into account. In this way it may also be possible to discuss and evaluate, what could be denoted as, best practices in this field.[129] This also means that the study is not centered on one specific legal system. The study has, consequently, not focused on e.g. the Swedish legal system and studied how it can be reformed in light of comparisons with other legal systems, although it may be possible to draw such conclusions from the material. The study is meant to go deeper and has

[126] See section 1.7.

[127] This way of using a method of comparative law in order to identify functions, bears similarities to the method put forth in Zweigert and Kötz, *An Introduction to Comparative Law*, p. 6. The use of functions in comparative law is elaborated further below.

[128] Cf. ibid., p. 46.

[129] Cf. Wolfgang Faber. "Functional method of comparative law and argumentation analysis in the field of transfers of movables: Can they contribute to each other?" In: *European Property Law Journal* 2.1 (2013), p. 22.

a more holistic approach.[130]

2.2.2 Comparative Method

It is possible to discuss at length the use of comparative law as a method for legal research and the literature on the subject is vast.[131] According to Watson, comparative law "as an academic discipline [...] is the best approach to understanding the nature of law and its relationship with society".[132] In its core, the method deals with comparing different legal systems.[133] It can, furthermore, be argued that it is misleading to treat comparative law as one singular method, since there are different ways to deal with an analysis based on comparative law.[134] Thus, it is more reasonable to discuss different methods of comparative law.[135]

[130] Cf. in these parts Zweigert and Kötz, *An Introduction to Comparative Law*, p. 46 f.

[131] For a historical perspective on comparative law and discussions on the question of whether it is to be deemed as a method of study or a branch of legal science, see e.g. Clive Maximilian Schmitthoff. "The Science of Comparative Law". In: *The Cambridge Law Journal* 7.1 (1939), p. 95 ff with further references and note the passage in Alan Watson. "Comparative Law and Legal Change". In: *The Cambridge Law Journal* 37.2 (1978), p. 317. The view in this study has been that comparative law is a method within legal research. It is thus not a separate field of law, containing normative rules, as other branches of law. It has been stated, purposely incongruous, that the specific attribute of comparative law is that it does not exist; see Walter Joseph Kamba. "Comparative Law: A Theoretical Framework". In: *International and Comparative Law Quarterly* 23.3 (1974), p. 486 f.

[132] Watson, "Comparative Law and Legal Change", p. 318.

[133] Zweigert and Kötz, *An Introduction to Comparative Law*, p. 2. Using this definition, the method can probably be traced back to Aristotle. Most of this ancient work has, however, been lost and the comparative method was rather rediscovered much later, than founded on the writings of Aristotle; see Charles Donahue. "Comparative Law before the Code Napoléon". In: *The Oxford Handbook of Comparative Law*. Ed. by Mathias Reimann and Reinhard Zimmermann. Oxford University Press, 2006, p. 4 ff and Zweigert and Kötz, *An Introduction to Comparative Law*, p. 49.

[134] Another take on the matter is that comparative law in itself perhaps is more of a goal or a purpose than a method. Viewed in this way, the investigations shall lead up to and finally reach the status of being comparative law. Of course, the different views presented here can also converge.

[135] See Michele Graziadei. "The functionalist heritage". In: *Comparative Legal Studies: Traditions and Transitions*. Ed. by Pierre Legrand and Roderick Munday. Cambridge University Press, 2003, p. 100, where focus is also put on the role of the historical contexts of regulations in comparative law analysis. This can be seen as an alternative method of comparative law. Various works in the field have also used this method; see John Philip Dawson. *The Oracles of the Law*. William S. Hein & Company, 1968 and John Henry Merryman and Rogelio Pérez-Perdomo. *The Civil Law Tradition: An*

Regardless of the chosen definition of comparative law as one or several methods, it is the comparison that is the defining inclusion in the analysis. Therefore, it is crucial that an investigation, using comparative law, not only deals with how a specific area of law has been handled in different jurisdictions. The investigation should also include an actual comparison, between the different legal systems, in order to reach an analytic value. If there is no comparison, it has been argued that no comparative law method as such has been applied.[136] A more descriptive study of the relevant legal systems can, however, be a first step in the process leading up to a comparison and thus form a basis for analysis.[137] Another aspect of this process can also be that a legal system is enabled or made accessible to a foreign audience, which can have a value of its own.[138] Analytic value can, of course, also be the result of legal analysis within a specific legal system, but this, arguably, lies outside the scope of a comparative method as such. Comparative law and legal analysis of one or more legal systems can, however, be combined in order to yield results in this way.

A comparison of different legal systems, or how certain functions, problems or conflicts have been solved in them, may yield various results. In such an analysis, it may be possible to ask which system that is superior in handling a certain function or solving a certain conflict or problem.[139] It has been claimed that comparative law enables

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Introduction to the Legal Systems of Europe and Latin America. Stanford University Press, 2007; Graziadei, "The functionalist heritage", p. 100.

[136]Michael Bogdan. *Comparative Law*. Norstedts Juridik, 1994, p. 20 and 57. See also Zweigert and Kötz, *An Introduction to Comparative Law*, p. 6, where it is claimed that a mere listing of the contents of different legal systems, without any real comparison, at most can be called *descriptive comparative law*. Without a comparison, it falls short of being comparative law as such.

[137]ibid., p. 43 and see Schmitthoff, "The Science of Comparative Law", p. 95 f. where comparative law is described as having two phases. The first involves a more or less descriptive examination of how different legal systems handle a certain problem, while the second is denoted as a stage of utilization, where the results from the first phase are used in order to reach various results.

[138]Cf. the discussion of what is referred to as *pro-active comparative law* in Ewoud Hondius. "Pro-active Comparative Law: The Case of Nordic Law". In: *Stockholm Institute for Scandinavian Law* 50 (2010), p. 144 ff. In this way, an ambition of this study has been to make the Nordic approaches available in English.

[139]Bogdan, *Comparative Law*, p. 22.

far-reaching possibilities in this way, since the comparative lawyer studies how a certain issue has been dealt with in a multitude of legal systems. Consequently, the comparative lawyer will come into contact with different solutions that may be completely new for the person in question and that, otherwise, could have been hard to envisage given the context from which the comparative lawyer stems. In this way, comparative law can be used to shine light on various solutions to a problem in order to find the preferred or superior one for a given situation.[140] Given this array of different solutions, it may furthermore be possible to find if there exists a common core or if there are common denominators in the compared systems.[141]

It has, however, been contested if comparative law really can be used in the sense of determining whether one solution is better than another. If this is possible or not will, arguably, depend on how an actual comparison is carried out and how the results of such an investigation are analysed. If the investigation is narrowed down to a specific context and a specific time period, it may be easier to reach a beneficial result. It is hard to imagine a successful comparison, using comparative law, which aims at finding the best solution for a specific function or problem, regardless of context and time. Such a view would verge on a Platonic theory of forms, in the sense that every function or problem would have an ideal solution to which all other solutions are imperfect copies.

This study will not view legal norms in the above way. Instead, the taken view is that the most relevant solution will depend on the specific context and time. It is, however, probable that the contexts, in the cases discussed here, will be similar. The comparisons deal with wrecks and wreck removal in certain legal systems that are fairly similar. Thus, it may be possible to compare the different solutions in a way that results in finding the preferred or superior one. Of course, it may also be true that the legal systems have different strengths and weaknesses in this

[140] Zweigert and Kötz, *An Introduction to Comparative Law*, p. 15. The investigation may, of course, also result in the studied solutions being equally good. It may also be hard or impossible to make a clear assessment; cf. ibid., p. 46 f.

[141] Bogdan, *Comparative Law*, p. 22.

sense, making the picture less clear. At the end of the day, the best solution for a given context and time will also depend on how practical it is and whether it is deemed appropriate or not in the legal system.[142]

Furthermore, a comparative study may enhance the understanding of the domestic law.[143] In studying other legal systems, it is possible to place the domestic system in a broader context and also to reflect upon how the regulation could have been constructed differently.[144] Hopefully, this study can also serve this purpose. A comparative law approach may, in this way, also be beneficial in reform processes.[145] Knowledge of how other legal systems have dealt with a certain issue may facilitate reform processes and also be helpful in legal argumentation. The use of comparative law has also been instrumental in the legal research behind common frameworks like PECL and DCFR.[146]

Knowledge of other legal systems may also be helpful when filling gaps in the law.[147] Thus, if there is a lacuna in the law, or if the wording or meaning of a certain norm is uncertain, a judge may construe it in light of how the matter has been dealt with in other legal systems.[148]

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[142] Zweigert and Kötz, *An Introduction to Comparative Law*, p. 33.

[143] Bogdan, *Comparative Law*, p. 24.

[144] For a practical example of this, see Ulf Göranson. *Traditionsprincipen*. Iustus förlag, 1985, p. 20, where the author states that he most likely would not have questioned the meaning of the legal concept of possession had he not studied the approaches to the concept in other legal systems.

[145] Kamba, "Comparative Law: A Theoretical Framework", p. 487. Investigations using comparative law, to find how a certain problem has been handled in different legal systems, are often included in preparatory works in the Nordic countries; cf. Bogdan, *Comparative Law*, p. 28 ff. Similar approaches have also been used in legislative processes in Germany, as well as in the United Kingdom; see Zweigert and Kötz, *An Introduction to Comparative Law*, p. 16 f. and Schmitthoff, "The Science of Comparative Law", p. 103 f.

[146] See Faber, "Functional method of comparative law and argumentation analysis in the field of transfers of movables: Can they contribute to each other?", p. 22 f.

[147] Bogdan, *Comparative Law*, p. 32.

[148] This is also, to various extents, done in practice. The process of construing, using a comparative law method, can be found in both German and English case law. As another example, cases from Switzerland, in particular, seem to include passages and arguments based on comparative law. This may be the result of the clear mandate given to the ruling judge in the Swiss Civil Code, where the judge, should there be a lacuna in the law, shall decide a case according to a rule that the judge, were he or she legislator, would adopt; see Zweigert and Kötz, *An Introduction to Comparative Law*, p. 18 ff. and Schmitthoff, "The Science of Comparative Law", p. 104 ff. especially dealing with the

If, furthermore, a judge is to rule on a norm emanating from an international convention or similar agreement, it is also of importance that the rule is construed in this context with the purpose of promoting uniformity.[149] This can also be described as a process of comparative law and the study could thus, potentially, prove useful should such instances occur in relation to wrecks and wreck removal.[150]

Even though an analysis, using a comparative law method, may yield beneficial results, there are also pitfalls and difficulties in using such a method. Legal systems are constructed in different ways and may be based on different principles. In order to grasp a legal system in a, more or less, satisfying way, it helps to know the language or at least to be familiar with it. One could go even further and claim that a broader understanding of the culture of the state, along with its institutions, is also needed. It may, of course, prove difficult or even impossible to fully reach such an understanding. As a researcher, it is, however, necessary to strive towards this ideal. There may also exist legal concepts in one legal system, that are unknown or that have different meanings in other systems. An often-mentioned example of this is the concept of *trust* in English law that has no direct resemblance in, among others, the Nordic legal systems.[151] Another example is the notion of title or ownership that varies, especially in relation to transfer of title or rights, between legal systems. These issues have been taken into account when the analysis has been conducted.[152]

There is also a need, when conducting research using comparative law, to disentangle oneself, as it were, from the notions of the domestic legal system, i.e. from the system where the comparative lawyer has been educated. It is important not to impose upon the foreign system, concepts or ways of interpretation that exist only in the domestic one.

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early use of Roman and Civil law in English case law.

[149] See e.g., in relation to carriage of goods by road under CMR, Malcolm A. Clarke. *International Carriage of Goods by Road*. Informa Law from Routledge, 2014, s. 3–7, p. 4 ff and cf. Kurt Grönfors. *Tolkning av fraktavtal*. Skrifter, Sjörättsföreningen i Göteborg, 67, 1989, p. 47 f.

[150] Zweigert and Kötz, *An Introduction to Comparative Law*, p. 21.

[151] Bogdan, *Comparative Law*, p. 40 ff.

[152] See e.g. section 6.6.3.

The foreign legal system should, ideally, be viewed without such distractions.[153] This may also pose problems when it comes to investigating different legal systems. A lawyer educated in a specific domestic system, may very well set out to investigate a foreign legal system believing that the corresponding regulation will exist in approximately the same place as in the domestic one. He or she may, furthermore, believe that more or less the same legal concepts will be involved in handling the specific issue. This may, however, not be the case. The solution or regulation may exist in a completely different part of the law or may involve concepts that are not familiar. It may, furthermore, also be the case that the specific issue is not regulated by statute, but instead handled in case law or by custom. This shows the danger of being too narrow-minded in relation to the domestic legal system of the comparatist. Instead, the comparative lawyer must endeavour to be free from such internal interference, which, of course, may be easier said than done.[154]

It is, furthermore, important to observe if the hierarchy of the legal sources differs between the legal systems. This may be the case and an analysis obviously needs to address such instances. It may also be the case that the method used when applying or construing law, differs between the systems. This is also something that needs to be considered when making a comparison.[155] Moreover, the differences must also be used in practice when comparing. The comparatist must thus treat the legal sources, and other factors that have an impact on how the law is actually applied in the legal system, in the same way as a domestic lawyer in that system would. Also other aspects in the specific legal system such as history, legal heritage and so on, may be relevant to take into account. There is, however, of course also a limit as to what can be comprehended about another legal system. In practice, it may thus not be possible to take all of the above factors into account.[156]

This study is a multilateral comparison, since it, primarily, encom-

[153] Bogdan, *Comparative Law*, p. 41 f.
[154] Zweigert and Kötz, *An Introduction to Comparative Law*, p. 35.
[155] Bogdan, *Comparative Law*, p. 45 f. and Schmitthoff, "The Science of Comparative Law", p. 98.
[156] Zweigert and Kötz, *An Introduction to Comparative Law*, p. 35 f.

passes the Nordic legal systems, including Swedish, Norwegian, Finnish and Danish law, as well as English law and with occasional references to other legal systems as well.[157] It is, furthermore, a comparison of substantial law, rather than a formal comparison of the legal systems as such. In a sense, it is also what can be called a micro-comparison, i.e. a comparison of rules that are used in order to solve specific problems or a specific area of law, since it is the specific regulations concerning wrecks and wreck removal that have been investigated.[158]

The case is, however, not as clear-cut as described above, since it is also necessary to investigate how rules are applied in practice in different legal systems. Thus, the procedures, by which the rules become applicable, may have to be analysed. This, in fact, entails that a comparison also includes aspects of a macro-comparison. It is hard to draw an exact line between these two kinds of comparisons.[159] Also sociological aspects may be of interest in a comparison, since it may be relevant to investigate how the rules actually function in the specific society.[160]

When conducting comparative legal analysis, the comparison is made in relation to the chosen legal systems. These are to be compared. The challenges in doing so, as discussed above, should not be underestimated. When comparing, similarities and differences will be observed between systems. This is, however, only the first stage in the comparative process. A further dimension in the analysis can be reached if the studied solutions are evaluated in the light of the functions they are meant to fulfil.[161]

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[157] Zweigert and Kötz suggest that a comparative study of a certain topic or issue in private law should include English and American law, French and Italian law as well as German and Swiss law. Furthermore, it is suggested to include Swedish and Danish law "[…] because of their refreshing lack of dogma". Even if not all the suggested systems are included in this study, it will include aspects of at least some of them; cf. Zweigert and Kötz, *An Introduction to Comparative Law*, p. 41 f.

[158] Cf. Bogdan, *Comparative Law*, p. 57.

[159] Zweigert and Kötz, *An Introduction to Comparative Law*, p. 5.

[160] Indeed, it has been claimed that comparative law and sociology are closely related; see ibid., p. 10 ff.

[161] ibid., p. 43 f.

2.2.3 The Use of Functions in Legal Comparative Analysis

The comparisons and analysis have been conducted in relation to identified functions. This approach is methodologically similar to the part of comparative law that is sometimes referred to as functionalism.[162] This field of functionalism is to be separated from a similar concept, also often denoted as functionalism, in the Nordic legal systems and particularly in property law.[163] The latter is something different, even though there may be similarities between the two.[164] Another way of phrasing the approach, is to say that the analysis is based on how certain conflicts are solved or approached in different legal systems.[165] The choice of methodology in this part, is motivated by the assumption that a piece of legislation ultimately aims at solving a certain problem or to fulfil a specific function.[166] If the traditional terminology of comparative law

[162]See Ralf Michaels. "The Functional Method of Comparative Law". In: *The Oxford Handbook of Comparative Law*. Ed. by Mathias Reimann and Reinhard Zimmermann. Oxford University Press, 2006, p. 330 ff, Bogdan, *Comparative Law*, p. 58 ff and Michael Bogdan. *Concise introduction to Comparative Law*. Europa Law Publishing, 2013, p. 48 f. with further references. According to Zweigert and Kötz, "[t]he basic methodological principle of all comparative law is that of *functionality*"; see Zweigert and Kötz, *An Introduction to Comparative Law*, p. 34. Faber states that functionalism appears to be the mainstream methodological approach in comparative legal research; see Faber, "Functional method of comparative law and argumentation analysis in the field of transfers of movables: Can they contribute to each other?", p. 23. It can be noted, that the functional approach to comparative law also has been subjected to criticism. For examples of this see Michaels, "The Functional Method of Comparative Law", p. 388 ff with further references, Graziadei, "The functionalist heritage", p. 108 ff and Johan Sandstedt. *Sakrätten, Norden och europeiseringen – Nordisk funktionalism möter kontinental substanitalism*. Jure, 2013, p. 51 f.

[163]Cf. Claes Martinson. "How Swedish Lawyers Think about 'Ownership' and 'Transfer of Ownership' – Are We Just Peculiar or Actually Ahead?" In: *Rules for the Transfer of Movables: A Candidate for European Harmonisation Or National Reforms?* Ed. by Wolfgang Faber and Brigitta Lurger. Sellier European law publishers, 2008. Schriften Zur Europaischen Rechstswissenschaft/European Legal Studies/Etudes Juridques Europeennes (Book 6), p. 69 ff and Göranson, *Traditionsprincipen*, p. 21. Property law has also been described as being especially apt for functional analysis; see Grönfors, "Ändamål och funktion", p. 532.

[164]See Sandstedt, *Sakrätten, Norden och europeiseringen – Nordisk funktionalism möter kontinental substanitalism*, p. 48.

[165]See in relation to this Zweigert and Kötz, *An Introduction to Comparative Law*, p. 4 and p. 15.

[166]Rabel, by some considered the originator of functionalism within comparative law, described his theory as:

is to be used, the shared functions in the chosen legal systems are the *tertium comparationis* of the comparison.[167]

In using this method, within comparative legal analysis, it is necessary for the research questions to relate to the identified functions. The questions should not be confined to domestic concepts within a specific legal system. In the study, common denominators, such as shared problems, based on the interests and conflicts, as discussed in section 1.5, have been used. Questions like ”how can the removal of a wreck that poses a hazard to navigation be regulated?” and ”who is liable for the costs of removing a wreck?” are examples of such questions. When analysing the different legal systems, the aim has been to, with an open mind, reason in terms of ”what concrete problem is at hand here?” or ”what issue is this piece of legislation meant to address?”.[168] At the end of the day, the focus of the analysis has been on which functions certain regulations represent and not the provision or regulation in itself. Phrased differently, what has been sought are the legal mechanisms that have been put in force as a consequence of existing or identified problems.[169] Nevertheless, the legislation as such, of course, has to be analysed in order to reach and recognize these effects.

An underlying assumption, arguably necessary to validate this way of thinking, is that there exist legal problems and conflicts that are shared between different legal systems.[170] This work concerns wrecks

> ”[r]ather than comparing fixed data and isolated paragraphs, we compare the solutions produced by one state for a specific factual situation with those produced by another state for the same factual situation, and then we ask why they were produced and what success they had.”

See David J Gerber. “Sculpting the Agenda of Comparative Law: Ernst Rabel and the Facade of language”. In: *Rethinking the Masters of Comparative Law*. Ed. by Annelise Riles. Hart Publishing, 2001, p. 199, Sandstedt, *Sakrätten, Norden och europeiseringen – Nordisk funktionalism möter kontinental substanitalism*, p. 48 and cf. Jaakko Husa. “Functional Method in Comparative Law – Much Ado About Nothing?” In: *European Property Law Journal* 2.1 (2013), p. 10 f.

[167] Bogdan, *Comparative Law*, p. 58 ff.

[168] Cf. Zweigert and Kötz, *An Introduction to Comparative Law*, p. 34 f.

[169] Cf. once again Michaels, “The Functional Method of Comparative Law”, p. 342 and Zweigert and Kötz, *An Introduction to Comparative Law*, p. 34 f.

[170] Michaels, “The Functional Method of Comparative Law”, p. 345, Husa, “Functional Method in Comparative Law – Much Ado About Nothing?”, p. 10 and see Zweigert and

and wreck removal. The involved problems and issues, as introduced above, are shared by all states that have coasts and also by landlocked states that own, or have citizens that own, ships or are affected by them in other ways. Consequently, there are good prospects for comparisons between different legal systems in this field. Since the problems are shared and the identified functions are meant to apply in general, there are, furthermore, reasons to believe that such comparisons also can yield successful results, despite the fact that the compared legal systems stem from, what is sometimes referred to as, different legal families.[171]

2.2.4 Legal History and Comparative Law

One way of using comparative law methodology is to focus on legal history. Some sections of the study have variations of this focus. In using this method, within the realm of legal history, regulations and legal systems are studied in order to trace their development backwards or to explain similarities or differences between legal systems from a historical perspective.[172] This understanding is beneficial, since it is valuable to know where regulations emanate from, why they were created and how they have developed over the years.[173] Likewise, it

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Kötz, where it is assumed, without discussion, that legal systems, in different societies, mainly deal with the same issues and problems but solve them in different ways, although often with similar results; Zweigert and Kötz, *An Introduction to Comparative Law*, p. 34. According to Bogdan, expanding on the issue of different legal systems, "[t]he problems in the society that require legal regulation are often identical, or at the least very similar"; Bogdan, *Comparative Law*, p. 19. For a critique of this view in relation to functionalism, see Gunter Frankenberg. "Critical Comparisons: Re-thinking Comparative Law". In: *Harvard International Law Journal* 26.2 (1985), p. 436 ff.

[171] Cf. Zweigert and Kötz, *An Introduction to Comparative Law*, p. 17 and Husa, "Functional Method in Comparative Law – Much Ado About Nothing?", p. 19 f.

[172] Bogdan, *Comparative Law*, p. 38 and Schmitthoff, "The Science of Comparative Law", p. 95 f. and p. 101 f.

[173] Watson, "Comparative Law and Legal Change", p. 316, H Edwin Anderson III. "Risk, Shipping, and Roman Law". In: *Tulane Maritime Law Journal* 34 (2009), p. 209 f and see, for an illustrative example of this, Grönfors, *Fraktavtalet under etthundra år*, p. 86 ff on the historical development of the possibility to bind parties to contracts of carriage in Swedish transport law, explained through historical analysis with comparative inclusions. See also the excellent discussion on the carrier's liability in ibid., p. 128 ff and, especially, p. 143 ff on the nautical fault exception for carriage of goods by sea.

is relevant to study how different functions have emerged through history and how they have been handled.[174] This can also strengthen the functional analysis.[175]

This described comparative aspect can be said to be a part of legal history.[176] Others claim that legal history and comparative law are two different but intertwined disciplines. In this way, Zweigert and Kötz make a distinction between the disciplines of comparative law and legal history, but still hold that the legal historian normally will use comparative law when investigating a specific historical regulation by relating or comparing it to the modern law in which the legal historian is educated. Furthermore, the comparative lawyer benefits from studying the history of the regulation that is analysed or the legal system, in order to gain a deeper understanding of the subject of study.[177] It may also be hard to understand a legal system, if one does not understand its historical background in relation to e.g. culture, economics and politics.[178]

2.2.5 Sources and Material

In conducting research using comparative law, it is paramount to have access to relevant sources and material.[179] In this study, this has not posed a problem when it comes to the particular regulations and related case law, since sources and material from the legal systems are available in these respects. It has been claimed that it is preferable to mainly focus on legislation and case law, when studying sources and material for comparative law research, since these are in general ranked high in the legal hierarchy of the legal systems. Also legal writing may

[174] Cf. Kurt Grönfors. *Towards Sea Waybills and Electronic Documents*. Skrifter, Sjörättsföreningen i Göteborg, 70, 1991, p. 5 f, where Grönfors applies what he describes as a "[...] method that combines a historic perspective with a functional approach".

[175] Grönfors, "Ändamål och funktion", p. 533.

[176] Watson, "Comparative Law and Legal Change", p. 318. Another take on the issue is to denote comparative analysis in legal history as *comparative legal history*; see Donahue, "Comparative Law before the Code Napoléon", p. 4.

[177] Zweigert and Kötz, *An Introduction to Comparative Law*, p. 6 and p. 8 f.

[178] Jansen, "Comparative Law and Comparative Knowledge", p. 306.

[179] Bogdan, *Comparative Law*, p. 42 f.

be helpful, not least in identifying which statutes and cases that are relevant on a certain issue.[180]

Legislation and case law have been studied in this analysis, but the material has not been limited to these sources. Also other sources that have been useful, e.g. in order to shine light on how certain functions have been handled, have been considered relevant. When it comes to legal writing and commentaries, the value of these, as always, depends on the quality of the arguments found in them.[181] Since the area has received limited attention from a legal point of view, it is also important to point out that the available legal writing on the subject is limited.

Legal norms, furthermore, need to be viewed and analysed in their respective contexts. Thus, it is also relevant to study the contexts in which the rules reside.[182] It may also be the case that some legal norms are obsolete. These have to be identified and singled out from the norms that are actually in use.[183] In order to establish a view on this, it has to be known how the norms are applied in practice, which leads to the inclusion of a sociological element in the investigation. In the study, this has been partly approached by the use of empirical data from real examples of wrecks and wreck removal. Furthermore, the underlying economic and social contexts may be relevant when carrying out an analysis.[184]

When conducting the comparative analysis, it is, as mentioned, important to take into account how different legal systems treat the question of hierarchy of norms and legal sources. This differs between the chosen legal systems in this study. In the Swedish legal system, to

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[180] ibid., p. 43.

[181] Cf. the English case Fothergill v Monarch Airlines Ltd [1981] AC 251, p. 283 f., where Lord Diplock argued that: "[t]he persuasive effect of learned commentaries, like the arguments of counsel in an English court, will depend on the cogency of their reasoning". See also Sandgren, "Är rättsdogmatiken dogmatisk?", p. 654.

[182] Cf. Dalberg-Larsen, *Pragmatisk retsteori*, p. 11. This is, of course, relevant also in relation to other sources and materials. For a practical example within contract law of the context being decisive for the construction of a contract in the form of a specific charterparty, see Grönfors, *Tolkning av fraktavtal*, p. 64.

[183] Bogdan, *Comparative Law*, p. 51 ff.

[184] ibid., p. 54 ff and cf. Husa, "Functional Method in Comparative Law – Much Ado About Nothing?", p. 14 f.

illustrate the Nordic approach, preparatory works are treated as legal sources in themselves and are referred to and relied on in a sense that differs a lot from how some other legal systems approach preparatory works. Other legal systems tend to be much more restrictive in this respect.[185] The main division here is between the Nordic systems and English law. These differences must be taken into account in the comparisons.

In the end, the sources and material that have been studied are the ones that impact the law in the legal systems. It is reasonable not to approach this too rigidly or in a narrow way. What matters, at the end of the day, is what the legal systems regulate and how they function in practice.

2.2.6 Reform Processes

In some parts of the study, there may arise questions of reforming a system in situations where a certain function has been handled in an unsatisfying way or not at all. In a situation like this, it may be tempting to suggest the implementation of a solution that fulfils the function in a satisfying way in another legal system. Such an implementation may,

[185] See, for comparison, in English law, Francis Rose. *Kennedy and Rose on the Law of Salvage*. Sweet & Maxwell, 2017, s. 1-099—1-101, p. 46 f, where Lord Wilberforce is quoted from the case Forthergill v Monarch Airlines Ltd [1981] A.C. 251 calling for caution in using preparatory works when construing international conventions. Such cases "should be rare, and only where two conditions are fulfilled, first, that the material involved is public and accessible, and secondly, that the *travaux préparatoires* clearly and indisputably point to a definite legislative intention". Cf. also Effort Shipping Co Ltd v Linden Management SA (The Giannis NK) [1998] A.C. 605, where it was noted by HL Lord Steyn that:

> "I would be quite prepared, in an appropriate case involving truly feasible alternative interpretations of a convention, to allow the evidence contained in the travaux préparatoires to be determinative of the question of construction. But that is only possible where the court is satisfied that the travaux préparatoires clearly and indisputably point to a definite legal intention [...] Only a bull's eye counts. Nothing less will do".

As another example, Honnold has stated that "[l]egislative history (like vintage wine) calls for discretion"; John Honnold. *Uniform Law for International Sales*. Deventer, 1991, para. 91 quoted in Clarke, *International Carriage of Goods by Road*, p. 9.

however, not be possible or successful for various reasons.[186] It has been held that there are two primary things to consider when it comes to the prospect of implementing a solution from one legal system into another. Firstly, the foreign solution has to have been beneficial in the legal system from which it stems and, secondly, the prospects of it also working in the other legal system must be good.[187]

It can be argued that maritime law is an area of law especially apt for comparative law analysis, since the area, to a large extent, is formed by international conventions and a strive towards the same or similar solutions to legal problems.[188] Maritime law is, furthermore, an area of law that has evolved and progressed gradually over thousands of years. Emerging legal systems have borrowed and been influenced by preceding legal frameworks. It has also been claimed that the origin of maritime law distinguishes it from most other areas of law in the sense that common interests between parties involved in maritime trade required regulations and institutions that were not too distant from each other.[189] These facts have led to similarities and consensus on

[186] A lot has been written on the topic of legal transplants, which perhaps could be a suitable description for implementations like these; see primarily Alan Watson. *Legal Transplants – An Approach to Comparative Law*. University of Georgia Press, 1993 and the severe critique from e.g. Legrand in Pierre Legrand. "European Legal Systems are not Converging". In: *International & Comparative Law Quarterly* 45 (1996), p. 52 ff, Pierre Legrand. "The Impossibility of 'Legal Transplants'". In: *Maastricht journal of European and comparative law* 4 (1997), p. 111 ff and Pierre Legrand. "The same and the different". In: *Comparative Legal Studies: Traditions and Transitions*. Ed. by Pierre Legrand and Roderick Munday. Cambridge University Press, 2003, p. 240 ff. Gunter Teubner has claimed that the term *legal irritants* is a more fitting label for these attempted transplants from one legal system to another and that legal transplants, as a term, is misleading; see Gunther Teubner. "Legal Irritants: Good Faith in British law or How Unifying Law Ends Up in New Divergencies". In: *The Modern Law Review* 61.1 (1998), p. 11 ff, on the introduction of the concept of *good faith* in English law.

[187] Zweigert and Kötz, *An Introduction to Comparative Law*, p. 17 and cf. Bogdan, *Comparative Law*, p. 29 f. It may also be the case that a certain solution to a problem that is viewed as beneficial in one legal system, is not possible to implement in another system because it would be against *ordre public*. This may also cause problems when comparing legal systems; see Zweigert and Kötz, *An Introduction to Comparative Law*, p. 39 f. Since this study has focused on wrecks and wreck removal, and not more, arguably, contentious and morally charged areas like e.g. family law, it is hard to imagine such conflicts in this case.

[188] Cf. Grönfors, *Tolkning av fraktavtal*, p. 47.

[189] Thus, the point has been made that while the laws regulating e.g. the transfer of

different issues in maritime law.[190]

When it comes to the analysed legal systems, it can also be noted that the Nordic systems share a lot of similarities. The most obvious example is the almost identical maritime codes in the systems, which is the result of a joint effort to legislate on maritime issues.[191] There are, however, still differences in the systems in some respects.[192] The Nordic systems are also closely related on a systemic level, which, arguably, also entails good prospects for successful comparisons.[193]

English law, on the other hand, differs a lot from the Nordic systems. Its important role in maritime matters has, however, caused it to be highly influential on maritime law in general. This has caused it to influence other systems and, among them, the Nordic systems.[194] One example of this is the implementation of the Salvage Convention 1989 in the Nordic systems. The convention and its predecessor, the Brussels

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rights to land in different legal systems vary to a large extent, indicating that each legal system has developed in more or less unique fashions, maritime law in different legal systems has remained fairly similar; see William Senior. "The History of Maritime Law". In: *The Mariner's Mirror* 38.4 (1952), p. 260.

[190] Thor Falkanger, Hans Jacob Bull and Lasse Brautaset. *Scandinavian Maritime Law – The Norwegian Perspective*. Oslo: Universitetsforlaget, 2017, p. 23 f. Mukherjee and Brownrigg, *Farthing on International Shipping*, p. 1 ff, cf. Bogdan, *Comparative Law*, p. 31 and see Schmitthoff, "The Science of Comparative Law", p. 108 ff, where the field of maritime law is mentioned as an example of a successful unification or harmonization using comparative law.

[191] This collaboration was firmly established already by 1891 when the maritime codes in Sweden, Denmark and Norway were more or less the same. Subsequently, also Finland became a part of this collaboration; Kaj Pineus. "Sources of Maritime Law Seen From a Swedish Point of View". In: *Tulane Law Review* 30 (1955), p. 89.

[192] Falkanger, Bull and Brautaset, *Scandinavian Maritime Law – The Norwegian Perspective*, p. 24 and p. 26 f.

[193] Cf. Svante O. Johansson. *Stoppningsrätt under godstransport*. Norstedts Juridik, 2001, p. 39 and Thomas Wilhelmsson. *Social civilrätt*. Juristförbundets förlag, 1987, p. 49, where it is argued that the Finnish and Swedish societies are so closely related on legal and social issues as to allow identical suggestions for reform on general rules of contract law unless there is an expressed difference in the legal sources. It is also noted that there is a common Nordic view on these issues. There is no reason to view the field of maritime law in a different way. See also Wetterstein, "Vrak och gamla skatter", p. 456, where it is argued, in relation to an unregulated issue on salvage in Finnish law, that there is no reason for Finnish law to deviate from how the issue has been regulated in the other Nordic legal systems.

[194] It can, however, be debated how influential English law has been in this context from a historical perspective and especially prior to the 20th century; cf. Pineus, "Sources of Maritime Law Seen From a Swedish Point of View", p. 90.

Salvage Convention 1910, to a large extent encompass the developments within the English law of salvage over the centuries.[195] It has also been argued that it, in general, is possible to investigate solutions in English law when dealing with relevant maritime issues in other legal systems.[196] These factors also suggest that successful comparisons can be conducted between the systems.

2.2.7 Empirical Data

To further illustrate and contextualize the studied issues, empirical data has been included.[197] The way empirical facts and data have been used in section 1.5 of the study is an example of this. No empirical study *per se*, however, has been conducted. Instead, the inclusion of empirical data is meant to provide context, as discussed above, to the different parts of the study, as well as to show the practical use of the rules and regulations. Furthermore, empirical information concerning actual wreck removals have been used when appropriate. Once again, the purposes of this has been to provide context and to show how wreck removal operations and other aspects of wrecks are handled and carried out in practice.

2.3 Theory and Method Combined

The theoretical considerations and the methodological aspects introduced above form the foundation on which the study has been built. In order to be transparent, the limitations of this combination should be addressed. It is not claimed that the different problems and issues that

[195] Cf. Richard Shaw. "The 1989 Salvage Convention and English Law". In: *Lloyd's Maritime and Commercial Law Quarterly* (1996), p. 203 ff.

[196] This is based on England's historical key role when it comes to maritime affairs; cf. John J Kenny and Ronald R Hrusoff. "The Ownership of the Treasures of the Sea". In: *William and Mary Law Review* 9.2 (1967), p. 385. See also Pineus, "Sources of Maritime Law Seen From a Swedish Point of View", p. 96 and, concerning issues of marine insurance from a practical perspective, Jonas Rosengren. "Tolkning av sjöförsäkringsavtal". In: *Svensk juristtidning* (2018), p. 195 ff.

[197] Cf. Claes Sandgren. "Om empiri och rättsvetenskap (del 1)". In: *JT* 1995–1996.3 (1995), p. 735 ff.

are presented, discussed and analysed in the study have been dealt with in an exhaustive or final objective way. It follows from the theoretical considerations that there is no such thing as absolute objectivity in legal research. Another consequence of this, as discussed, is that there is no *law per se*. Instead, there are different interpretations of law. Thus, the discussions and arguments put forth are based on legal interpretations of the subject matter.

Furthermore, the different functions used in the comparisons and the analysis, being the method of research, have been identified largely by the material and facts presented in section 1.5 on the involved interests and conflicts. It is, of course, the case that also these identified interests and conflicts are interpretations of the material that is presented there. This means that there may, very well, be other conflicts and problems that are not raised in the study or, indeed, that some elements and interests may have been left out of the analysis. A comprehensive all-encompassing study of wrecks and wreck removal has not been pursued. The study must be read with this in mind.[198] In this way, the interpretations also function as a demarcation and delimitation of the study.

The purpose is, finally, not to provide ultimate answers to the identified conflicts, problems and issues. Rather, different tentative approaches and various lines of reasoning, have been elaborated and presented, when there has been uncertainty as to how a question is to be approached, construed or answered. Once again, the arguments and conclusions made are interpretations of the chosen sources and material; nothing more, and hopefully, nothing less.

[198] In light of the theoretical considerations and the use of functions discussed here, cf. the pragmatic approach to functionalism in Husa, "Functional Method in Comparative Law – Much Ado About Nothing?", p. 16 ff. Husa supports what he calls a *moderate version of functionalism*; see Jaakko Husa. "Farewell to functionalism or methodological tolerance?" In: *Rabels Zeitschrift für ausländisches und internationales Privatrecht/The Rabel Journal of Comparative and International Private Law* Bd. 67, H. 3 (2003), p. 421.

Part I

History and Concept

Chapter 3

Historical Development

This chapter discusses the historical background to this area of law and serves, along with the next chapter on wreck as a legal concept, as a backdrop to the following parts of the study. In this way, the purpose is to put the current rules and regulations, found in the studied legal systems, into a historical context. This is motivated by the assumption that it is valuable to know the historical background of a provision or a regulation in order to understand it better.[199] To achieve this, a form of comparative legal history is used with the purpose of illustrating how rules and regulations have evolved and developed in different systems.

The chapter focuses on three main dimensions that correlate with the research questions in section 1.8. The first is a discussion in search of how historical rules and regulations have dealt with different kinds of wrecks and the problems relating to them. The second builds on the first and focuses on how the development of certain rules can be traced through different sets of rules. The third and final dimension focuses on common grounds that can be distinguished in the studied rules and regulations. As already stated, there is, however, no claim of

[199]Cf. the statement by Gadamer: "[s]omeone who is seeking to understand the correct meaning of a law must first know the original one". A distinction should, however, be made between construing the law as it was when enacted, along with the decisions and revisions that preceded it, and a construction made today, taking all this and following events into account. Such a later construction may, very well, entail a new normative interpretation of the historical law in the setting of today; see further Hans-Georg Gadamer. *Truth and Method*. Bloomsbury Publishing, 2004, p. 322.

completeness or exhaustiveness in these discussions. There is neither time nor space available at this stage to delve into a more thorough examination of these topics.[200] The intention is instead to paint the broad strokes of history as captured by some key legal frameworks and to illustrate how shipwrecks have played an important role in various areas of law throughout history.

3.1 Origins

The interest in the ocean, shipping and maritime matters is deeply rooted in both our history and culture.[201] The Presocratic Thales of Miletus, often referred to and regarded as the first philosopher in western philosophy and who, with the help of others, paved the way for the scientific progress during antiquity, concluded that water was the core substance[202] and origin of the world.[203] From water all other

[200] It would, however, be interesting to return to these issues, in a more thorough way, at a future stage and especially so in relation to the historical regulations in force around the Baltic Sea with a focus on the Nordic countries.

[201] To give one illustration of this, society itself is compared to a ship in a famous passage of Plato's Republic. The *Ship-of-State* metaphor, as it is sometimes referred to, is found in Book VI, 488a–489d. To use a ship as a metaphor for society in this way, was a recurring theme in Greek literature; see Plato. *Staten. Skrifter. Bok 3 (Plato's Republic)*. Trans. by Jan Stolpe. Atlantis, 2016, p. 257 f. and p. 475. This metaphor has since then lived on, as e.g. expressed in Henry Wadsworth Longfellows's poem *O Ship of State* or, more recently, in the Leonard Cohen song *Democracy* from his album *The Future* released in 1992.

[202] The Greeks referred to this core substance as the *arche*; see e.g. Michael W Herren. *The Anatomy of Myth: The Art of Interpretation from the Presocratics to the Church Fathers*. Oxford University Press, 2017, p. 41 f.

[203] According to Bertrand Russell, "[p]hilosophy begins with Thales"; see Bertrand Russell. *History of Western Philosophy*. Routledge Classics, 2004, p. 15. Most parts of Thales' life and thoughts are, however, unknown. He is told to have foreseen a solar eclipse in 585 BCE, but the veracity of this is uncertain. He is also supposed to have identified the Little Bear (*Ursa Minor*) as a stellar constellation and described its use in navigation; see Anthony Kenny. *An Illustrated Brief History of Western Philosophy*. Wiley-Blackwell, 2006, p. 2 f. *Polaris*, i.e. the North Star, is a part of the constellation and has, because of its more or less direct alignment with the Earth's north celestial pole, been used since antiquity in order to navigate to the north and determine latitude in the northern hemisphere. Longitude was, before the introduction of the marine chronometer in the 18th century, impossible to measure at sea and in order to e.g. avoid dangerous waters that could lead to a shipwreck, mariners would thus navigate to a safe distance either west or east of a particular target, then navigate to the right latitude

things stem. He may have derived this conclusion partly from the observation that the Earth seems to rest on water, i.e. the sea, and, furthermore, from the fact that we have to drink water in order to survive.[204] The fact that Thales apparently attributed this role and importance to water, indicates its fundamental importance and role in antiquity.[205] We have also historically depended, and still depend, on the sea and waterways for transportation and oversea trade. It is easy to see that this is one of the explanations as to why this area of law developed at an early stage.[206]

3.1.1 Rhodian Law

One of the western civilization's first, more or less, coherent and influential legal frameworks is thought to have been the Rhodian law (*Lex*

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and, finally, sail the parallel to either east or west, maintaining the same latitude, in order to reach their destination. Since the alignment between the north celestial pole and *Polaris* is not perfect and varies, this is, however, a simplification. For a more detailed explanation of how latitude measurements were carried out in Medieval times, see Michael Hoskin. *The Cambridge Concise History of Astronomy*. Cambridge University Press, 1999, p. 80 f. For a popular presentation of the problems caused by the difficulties in measuring longitude and the development of the marine chronometer, see Dava Sobel. *Longitude: The True Story of a Lone Genius Who Solved the Greatest Scientific Problem of His Time*. Macmillan, 2005.

[204] See Patricia Curd (2018). "Presocratic Philosophy". In: *The Stanford Encyclopedia of Philosophy*. Ed. by Edward N. Zalta. Winter 2016. Metaphysics Research Lab, Stanford University, 2016. URL: https://plato.stanford.edu/archives/win2016/entries/presocratics/ (visited on 02/2018) and Aristotle (2018). *Metaphysics*. Trans. by William D Ross. Oxford: Clarendon Press, ≈ 350 BC. URL: http://classics.mit.edu/Aristotle/metaphysics.html (visited on 02/2018), Met. 1.983b.

[205] This interest is also echoed in our time. To illustrate this by one example, John F. Kennedy once remarked in a speech that: "I really don't know why it is that all of us are so committed to the sea, except I think it is because in addition to the fact that the sea changes, and the light changes, and ships change, it is because we all came from the sea. And it is an interesting biological fact that all of us have in our veins the exact same percentage of salt in our blood that exists in the ocean, and, therefore, we have salt in our blood, in our sweat, in our tears. We are tied to the ocean. And when we go back to the sea – whether it is to sail or to watch it – we are going back from whence we came"; John F. Kennedy (Sept. 14, 1962). *Remarks at the America's Cup Dinner Given by the Australian Ambassador*. URL: https://www.jfklibrary.org/Research/Research-Aids/JFK-Speeches/Americas-Cup-Dinner_19620914.aspx (visited on 02/2018).

[206] Cf. Mukherjee and Brownrigg, *Farthing on International Shipping*, p. 1 ff.

Rhodia).[207] It was probably in force around 800 BCE.[208] This collection of laws was, most likely, a codification of old customs of the sea and trade.[209] Of interest to note here is that it included rules on jettison or general average. These rules could be applied when cargo needed to be thrown overboard in order to lighten a ship in distress. The regulation was based on the notion that since the owner of the cargo had to make this sacrifice in order to save the ship and potentially other cargo from suffering a shipwreck, it was also reasonable that the owner of the sacrificed cargo received some compensation from the others since the ship and their cargo were saved as a consequence of this sacrifice.[210] The underlying function of this regulation has lived on and forms the basis for the regulation found in the York Antwerp Rules of 1864 that established the modern day approach to general average.[211] These rules are still, after some modifications and updates since then, adhered to

[207]There were, of course, also other legal regimes and civilizations apart from the western world that might be of interest to discuss in relation to maritime issues including wrecks and wreck removal. Since the study is focused on legal systems in Europe, these other dimensions will, however, not be discussed here. For an ingoing discussion of the history of international maritime law that also takes these dimensions and what the author denotes as "[e]urocentrism in law and thinking" into account, see Ram Prakash Anand. *Origin and Development of the Law of the Sea*. Martinus Nijhoff Publishers, 1983.

[208]Cf. Emilia Mataix Ferrándiz. "Will the Circle Be Unbroken? Continuity and Change of the Lex Rhodia's Jettison Principles in Roman and Medieval Mediterranean Rulings: Will the circle be unbroken? By and by, by and by?" In: *Al-Masāq, Journal of the Medieval Mediterranean* 29.1 (2017), p. 42 and William Tetley. "The General Maritime Law–The Lex Maritima". In: *Syracuse Journal of International Law and Commerce* 20 (1994), p. 107. The latter dates the Rhodian law to the 8th or 9th century BCE. It is of paramount importance to differentiate between the *Lex Rhodia* and the *Rhodian Sea Law*. The latter is a much later compilation of Byzantine origin dating from around the seventh to tenth century CE; Anderson III, "Risk, Shipping, and Roman Law", p. 205. The Rhodian Sea Law is discussed further down in connection with the development during the Middle Ages in section 3.3.

[209]Cf. Grönfors, *Fraktavtalet under etthundra år*, p. 35 f and Ferrándiz, "Will the Circle Be Unbroken? Continuity and Change of the Lex Rhodia's Jettison Principles in Roman and Medieval Mediterranean Rulings: Will the circle be unbroken? By and by, by and by?", p. 44.

[210]See Anderson III, "Risk, Shipping, and Roman Law", p. 206 and Dig. 14.2.1–10, Alan Watson. *The Digest of Justinian Vol. 1 / translation edited by Alan Watson – Rev. English language ed.* Philadelphia: University of Pennsylvania Press, 1998, p. 419 ff.

[211]Anderson III, "Risk, Shipping, and Roman Law", p. 207 f.

and the underlying rationale and function remain the same.[212] This is one example of how a regulation in place today can be traced back into earlier systems and even into antiquity.

3.1.2 Greek and Roman Civilization

The Rhodian law was formed at a stage that lay between two important periods in the history of the western world. The first period saw the expansion of the Greek civilization and its subsequent control over the Mediterranean, while the second marked the emergence and rise of the Roman Empire.[213] During the first period, an advanced maritime jurisdiction developed in ancient Greece.[214] It is, however, unclear whether is is possible to talk of any existing international maritime law, in the sense of encompassing different tribes or city states, during this time, but it is thought that there was dialogue and early forms of diplomacy between the different stakeholders in the area.[215] Representatives from

[212] Wolfgang Graf Vitzthum. "From the Rhodian Sea Law to UNCLOS III". in: *Ocean Yearbook Online* 17.1 (2003), p. 56 f. and see further Richard Cornah, John Reeder and Julian H. S. Cooke. *Lowndes & Rudolf: The Law of General Average and The York-Antwerp Rules*. Sweet & Maxwell, 2013.

[213] Western history does not, however, start with the Greek civilization. Prior to this, different maritime powers formed around the Mediterranean. Even though much is lost in history, the Minoans as well as the Egyptians, Phoenicians and the Mycenaeans were all maritime powers in their own right although perhaps not as dominant as the Greeks and Romans later came to be; George Chowdharay-Best. "Ancient Maritime Law". In: *The Mariner's Mirror* 62.1 (1976), p. 81. See also Pineus, "Sources of Maritime Law Seen From a Swedish Point of View", p. 85, where the Code of Hammurabi, a Babylonian collection of laws from 1700 BCE including regulations on maritime matters, is mentioned.

[214] See Edward E. Cohen. *Ancient Athenian Maritime Courts*. Princeton University Press, 1973, in general, on maritime law in ancient Greece.

[215] To distinguish, what can be described as, an international law in early times is difficult since the world was so fundamentally different at this point in time. An extensive view could, however, be taken where the positions and claims by states and their relations to each other in maritime matters coalesce into a prevailing international maritime law of sorts. In a similar fashion, it has been claimed that the international law of the sea up to the end of the 19th century was predominately made up of old customs between states, their respective claims of sovereignty and so on; Tullio Treves (2018). "Historical Development of the Law of the Sea". In: *The Oxford Handbook of the Law of the Sea*. Ed. by Donald Rothwell et al. Oxford University Press, 2015. URL: http://www.oxfordhandbooks.com/view/10.1093/law/9780198715481.001.0001/oxfordhb-9780198715481 (visited on 02/2018). Oxford Handbooks Online, p. 2.

different places in the area could thus gather and discuss e.g. pressing maritime issues.[216]

The second period is marked by the rise and subsequent dominance and control exerted by the Romans in the Mediterranean. The Greeks and the Romans had vastly different relations to the sea. While the Greek city states often were dependent on maritime trade and early on expanded over areas of the Mediterranean, establishing themselves as a maritime power, the Romans had no such original heritage to rest on.[217] On the contrary, their empire formed on land, based on agriculture, and they, instead, rather had to develop into a maritime power as a consequence of their extensive military campaigns and ambitions, not least during the Punic wars.[218]

In a similar way, instead of creating maritime law from scratch, the Romans, incorporated already conceived concepts of maritime law from the Rhodians and possibly from other maritime based cultures in the area as well.[219] In the wake of the third Punic war and the destruction of Carthage, the Romans come to dominate the Mediterranean and in that sense Roman law, with these incorporated maritime law concepts

[216]The Amphictyonic Council or the Amphictyonic League (Eng. *league of neighbours*) is an example of such an institution, although much about these assemblies are unknown; Chowdharay-Best, "Ancient Maritime Law", p. 82.

[217]On the Greek's relation to the sea, cf. Cohen, *Ancient Athenian Maritime Courts*, p. 6, also pressing the importance of the sea for transportation and communication in ancient Greece.

[218]Chowdharay-Best, "Ancient Maritime Law", p. 81, Anderson III, "Risk, Shipping, and Roman Law", p. 184 and Ferrándiz, "Will the Circle Be Unbroken? Continuity and Change of the Lex Rhodia's Jettison Principles in Roman and Medieval Mediterranean Rulings: Will the circle be unbroken? By and by, by and by?", p. 42.

[219]Anderson III, "Risk, Shipping, and Roman Law", p. 195 and Ferrándiz, "Will the Circle Be Unbroken? Continuity and Change of the Lex Rhodia's Jettison Principles in Roman and Medieval Mediterranean Rulings: Will the circle be unbroken? By and by, by and by?", p. 42. An example of this kind of influence is the use and regulation of transmarine loans in Roman law, a concept that originally came from a Greek tradition; see Anderson III, "Risk, Shipping, and Roman Law", p. 201 ff and cf. Cohen, *Ancient Athenian Maritime Courts*, p. 9. This also suggests that it was possible to adopt this concept, that came from another legal tradition, into the Roman legal system in order to regulate the same identified function; cf. the discussion above in section 2.2. This is thus another example of a concept or regulation that can be traced back from one system to another.

as developed, came to rule these waters.[220] The Romans also engaged in extensive maritime trade in these waters and the concept of *Mare Nostrum* should be understood in this light.[221]

The Rhodians thrived in-between the two described periods above and came, in that way, to attain an important position in their part of the Mediterranean.[222] Their position seems to have been strongly built upon their successful measures against piracy in the surrounding waters. It is unclear exactly how successful they were, but it is clear that the Rhodians developed effective techniques in order to deal with the problems associated with piracy, e.g. a convoy system in order to handle and mitigate its effects.[223] At this stage in time, the Rhodian law is believed to have formed.

3.2 Roman Law

Even though the Lex Rhodia is thought to have been a coherent and influential legal framework, little is known about it today. Its content can, however, be glimpsed from the provisions, or parts of them, that subsequently passed into Roman law.[224] Evidence of this is found in the Digest, a part of Justinian's compilation of Roman law.[225] The

[220]It has been claimed that it is not meaningful to refer to any international maritime law during this time for the simple reason that there was no other real maritime power present. The Roman supremacy was so immense that no such international dimensions was either possible or necessary; cf. Chowdharay-Best, "Ancient Maritime Law", p. 82 and Senior, "The History of Maritime Law", p. 265.

[221]Anderson III, "Risk, Shipping, and Roman Law", p. 184 f.

[222]These are, of course, the broad lines of history and thus a simplification. The periods are not distinctly separated and instead overlap. A testament to this is the fact that the Romans at a time regarded the Rhodians to have such status that they were the dominant commercial maritime power in the Mediterranean, a position which the Romans came to challenge; ibid., p. 205.

[223]Chowdharay-Best, "Ancient Maritime Law", p. 86.

[224]See Vitzthum, "From the Rhodian Sea Law to UNCLOS III", p. 56, Reeder, *Brice on Maritime Law of Salvage*, s. 1-12, p. 5 and Anderson III, "Risk, Shipping, and Roman Law", p. 195.

[225]Mukherjee and Brownrigg, *Farthing on International Shipping*, p. 2 f and Ferrándiz, "Will the Circle Be Unbroken? Continuity and Change of the Lex Rhodia's Jettison Principles in Roman and Medieval Mediterranean Rulings: Will the circle be unbroken? By and by, by and by?", p. 41 ff. On the Digest and the development of Roman law in general, see Anderson III, "Risk, Shipping, and Roman Law", p. 191 ff with further

discussion thus turns to Roman law and how this legal system dealt with maritime issues involving shipwrecks and the problems associated with them.

3.2.1 Influence of Lex Rhodia on Roman Law

The Rhodian law concept of jettison or general average is referred to and found in the Digest (Dig.) 14.2.1.[226] It is, moreover, famously quoted in Dig. 14.2.9 that Emperor Antoninus made the following remarks, on the Roman law's position in relation to the Rhodian law, when asked to rule on an issue of maritime law involving a shipwreck:

> "I am, indeed, the Lord of the World, but the Law is the Lord of the sea; and this affair must be decided by the Rhodian law adopted with reference to maritime questions, provided no enactment of ours is opposed to it."[227]

This clearly shows the importance attributed to the Lex Rhodia in Roman law, making it the default position in maritime matters should there be no specific derogation in Roman law, and also illustrates its importance in earlier times. How much of the Rhodian law that actually passed into Roman law is, however, impossible to determine, since its content, apart from the discussed law of jettison, is lost. It is, however, plausible to presume that the Rhodian law encompassed all the various issues that became relevant in relation to maritime commercial practice at that time.[228]

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references.

[226] The provision states in translation: "[t]he Rhodian law provides that if cargo has been jettisoned in order to lighten a ship, the sacrifice for the common good must be made good by common contribution"; Watson, *The Digest of Justinian Vol. 1 / translation edited by Alan Watson – Rev. English language ed.* P. 419.

[227] Samuel P. Scott (2019). *The Digest or Pandects of Justinian*. 1932. URL: https://droitromain.univ-grenoble-alpes.fr/Anglica/digest_Scott.htm (visited on 07/2019). In the translation edited by Watson, the passage has the same meaning although a slightly different phrasing; "I am master of the world, but the law of the sea must be judged by the sea law of the Rhodians where our own law does not conflict with it."; Watson, *The Digest of Justinian Vol. 1 / translation edited by Alan Watson – Rev. English language ed.* p. 421.

[228] Cf. Anderson III, "Risk, Shipping, and Roman Law", p. 205. Ferrándiz suggests that the terminology used in the Digest and elsewhere points to the fact that the

3.2.2 Variations in the Roman Concept of Jettison

As already discussed, the Rhodian law of jettison was included as a part of Roman law in the Digest. The concept was, however, not static and instead developed in light of the various different scenarios in which it could occur. The basic rationale behind the concept of jettison is that a party that has had to sacrifice cargo in order to save a ship and other cargo also has a valid claim for this loss against the other parties that have benefited from the sacrifice. Such damage has been referred to as common damage that needed to be averaged between the involved parties; hence, the modern day concept of *general average*.[229]

The underlying function of the concept of jettison or general average is clear and easy to grasp, but in practice it may not always be as clear cut. This is where the development of the concept comes into play. If cargo was jettisoned but this did not save the ship, no contribution from the involved parties was, for obvious reasons, given, since the sacrifice as such had no positive effects in that case.[230] The possibility of contribution was thus closely linked to the concept of success.[231] If, however, the ship and remaining cargo were lost or wrecked at a later stage because of some other reason external to the event involving

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Rhodian law was a general maritime regulation and not solely a regulation dealing with the issue of jettison; Ferrándiz, "Will the Circle Be Unbroken? Continuity and Change of the Lex Rhodia's Jettison Principles in Roman and Medieval Mediterranean Rulings: Will the circle be unbroken? By and by, by and by?", p. 44. Tetley, furthermore, refers to the Rhodian law as an oral *ius commune* and that the surviving regulation on jettison or general average in the Digest only ammount to "[...] small parts of this oral *ius commune*", Tetley, "The General Maritime Law–The Lex Maritima", p. 109. Cf., however, Robert D. Benedict. "The Historical Position of the Rhodian Law". In: *The Yale Law Journal* 18.4 (1909), p. 223 ff, for a more restrictive view on the influence of Rhodian law on Roman law based on the lack of surviving evidence.

[229]Cf. Anderson III, "Risk, Shipping, and Roman Law", p. 207.

[230]ibid., p. 206 and Dig. 14.2.5, Watson, *The Digest of Justinian Vol. 1 / translation edited by Alan Watson – Rev. English language ed.* P. 421.

[231]Success played an important role in the ancient application of the law of jettison and its interpretation in Roman law. It can be noted that this functional link to success also is of paramount importance in the law of salvage, which is another sphere of law closely related to shipwrecks. To make a long story short, success or a useful result is required in order to claim a salvage reward; cf. art. 12(1), The International Convention on Salvage, 1989. It is easy to see the functional resemblance between these dimensions of the concepts.

the sacrifice, contribution was still relevant since the sacrifice in fact had saved the ship and remaining cargo from peril regardless of the subsequent sinking.[232] The question of where to draw the line between an event associated with the sacrifice and an event that came at a later stage in time can, of course, be difficult to determine causing potentially complex and intricate cases when the regulation was to be applied.

It should also be noted that in the Roman concept of jettison, jettisoned cargo was not deemed to have been abandoned. It was thus not *res derelicta*.[233] Instead, jettison was functionally viewed as property that had been sacrificed in light of an emergency where the intention was to retrieve the property again if possible.[234] This is reflected in Dig. 14.2.8, where a person forced to jettison goods in order to lighten a ship in distress is likened to a "man with a heavy weight to carry who sets it down in the street and is soon going to return for it with others".[235] Consequently, should the jettisoned property be found, no contribution was possible under the law of jettison.[236]

Another important question, in relation to jettison, was how a sacrifice or remuneration was to be assessed. If the master deemed it necessary to place cargo on a lighter or similar structure in order to lighten a ship before entry into port and the lighter with the cargo sank, the value of the cargo seems to have been assessed in relation to its market price at the port of discharge. If, on the other hand, property was sacrificed in order to save the ship from peril in line with the law of jettison, the property was instead valued in relation to its original value or cost.[237] This latter solution is thus in line with the notion of

[232] Chowdharay-Best, "Ancient Maritime Law", p. 86 f.

[233] Dig. 14.2.2.8, Watson, *The Digest of Justinian Vol. 1 / translation edited by Alan Watson – Rev. English language ed.* P. 420.

[234] Ferrándiz, "Will the Circle Be Unbroken? Continuity and Change of the Lex Rhodia's Jettison Principles in Roman and Medieval Mediterranean Rulings: Will the circle be unbroken? By and by, by and by?", p. 47.

[235] Dig. 14.2.8, Watson, *The Digest of Justinian Vol. 1 / translation edited by Alan Watson – Rev. English language ed.* P. 421.

[236] Dig. 14.2.2.7, ibid., p. 420.

[237] Note, however, that the saved cargo was to be valued at market value when the contribution was assessed; Anderson III, "Risk, Shipping, and Roman Law", p. 207 and Dig. 14.2.2.4, Watson, *The Digest of Justinian Vol. 1 / translation edited by Alan Watson – Rev. English language ed.* P. 420. The rationale behind not assessing the sacrificed cargo

indemnifying the subject whose property had to be jettisoned, while the former instead remunerated the affected also taking lost profits into account.[238] A reasoning behind this could be the close linkage between the former situation and the discharge at a port and a subsequent sale at market price.[239]

3.2.3 Emerging Concept of Salvage

An area of interest in Roman law that relates to shipwrecks is salvage. Roman times saw the development of the law of salvage that later came to influence later systems. It has been claimed that owners of objects that had been saved as a result of salvage, in Roman law, had to remunerate the salvors that had engaged in saving the property. A slight variation is thought to have existed in the Eastern Empire, where it seems that the custom was that a salvor not only had the right to monetary compensation, but also a possibility to acquire a better right to the saved property in question provided that they had taken personal risks in the salvage process.[240]

These two variations lie close to the basic underlying function of salvage in its simplest form even if the version from the Eastern Empire clearly is a slight derogation from the general approach. Property is saved by salvors acting as volunteers and any potentially saved property forms a fund from which a salvage reward is paid. It is easy to see the, already mentioned, functional resemblance between these notions of salvage law and the ancient law of jettison from the Rhodian law. In that case, as discussed, the party that had to make a sacrifice also had

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at market value is explained in the following way in the Digest: "[i]t is immaterial if the property lost could have been sold at a premium, since what is to be made good is loss suffered and not gain foregone"; Dig. 14.2.2.4, ibid., p. 420.

[238] Chowdharay-Best, "Ancient Maritime Law", p. 87.

[239] These often intricate and perhaps sometimes confusing solutions in Roman law must be viewed in light of the complexity and the idiosyncrasies of Roman society; ibid., p. 87. It is crucial not to assess such solutions with too modern eyes; cf. Gadamer, *Truth and Method*, p. 322.

[240] Chowdharay-Best, "Ancient Maritime Law", p. 86 and see Anderson III, "Risk, Shipping, and Roman Law", p. 187 ff for a brief account of Roman history and the empire's division into two realms.

the right to compensation from the parties that had benefited from the sacrifice. This is also close in line with the general principle of avoiding unjust enrichment.[241]

3.2.4 Transmarine Loans

Another dimension of Roman law, linked to shipwrecks, was the use of transmarine loans. Roman law provisions on maritime issues often related to private law mechanisms connected to the financing of ships or the carriage of goods on board ships. Because of the perilous nature of maritime transportation, such enterprises came with an amount of risk. The risk varied depending on where the transportation took place, the time of year and other relevant factors. In order to deal with these risks, an advanced system of different kinds of securities and loans developed for ship financing and cargo. There were e.g. different regulations on interest rates and transmarine loans that were dependent on a ship arriving at discharge at a certain port within a certain amount of time.[242]

Shipwrecks played an important role in this system, since such events were not uncommon and fundamentally impacted on the relations between the involved parties if they occurred. If cargo was lost due to a shipwreck, this, of course, had an impact on the party that arranged for its transportation and the carrier that transported it. Other parties as well, such as lenders of potential loans for which the cargo was used as a security would also be affected. Thus, transmarine loans subjected to the perils of the sea, in Roman law, allowed for high interest rates, but were also at the risk of the lender in the sense that the debtor did not have to repay the loan should the ship not arrive as contracted. On the other hand, if the ship was not subject to the perils of the sea, the loan was not deemed transmarine, and the debtor would still stand the risk and would, thus, still have the repay the loan also following a shipwreck.[243] Roman law also enabled the use of cargo as

[241] Cf. Rose, *Kennedy and Rose on the Law of Salvage*, Cf. s. 1-003, p. 2.
[242] Anderson III, "Risk, Shipping, and Roman Law", p. 200 f.
[243] ibid., p. 200.

security in the form of hypothecation as security for a mortgage that could be attached to a transmarine loan for additional security.[244]

3.2.5 Provisions Regarding Shipwrecks

The discussed areas of law so far have dealt with issues that are closely related to or that involve shipwrecks in one way or another. There were, however, also provisions in Roman law that especially dealt with shipwrecks and their aftermath. There is a separate section of the Digest entitled "Fire, Collapse of Buildings, Shipwreck, Raft, and Ship Taken by Storm" that regulated these issues.[245] Most of these provisions concern prohibitions on unlawfully taking property in the wake of a shipwreck or storming a vessel in order to do so.[246] These provisions clearly show that the Romans identified a problem with people looting property following shipwrecks.[247] This is also indirectly covered in Dig. 47.9.10, that calls for caution to:

> "ensure that night fishermen do not, by display of light, deceive those at sea as though guiding them to some port, thereby leading the ship and its complement into danger and preparing for themselves a damnable prize".[248]

A functionally different kind of provision, dealing with a potential effect of a shipwreck, is, furthermore, found in Dig. 47.9.8. The provision states that:

> "[i]f your raft be brought onto my land by the force of the river, you will not be able to exert control over it unless

[244] The security was, however, still dependent on the precondition that the ship arrived at the chosen port within the specified time; ibid., p. 202 ff and cf. Dig. 22.2.6, Alan Watson. *The Digest of Justinian Vol. 2 / translation edited by Alan Watson – Rev. English language ed.* Philadelphia: University of Pennsylvania Press, 1998, p. 185 f.

[245] See Dig. 47.9, Alan Watson. *The Digest of Justinian Vol. 4 / translation edited by Alan Watson – Rev. English language ed.* Philadelphia: University of Pennsylvania Press, 1998, p. 282 ff.

[246] Cf. e.g. Dig. 47.9.1–7, ibid., p. 282 ff.

[247] This identified problem was recurrent also in other systems that followed the Roman one. The issue is discussed at greater length below in section 3.5.1.

[248] Dig. 47.9.19, Watson, *The Digest of Justinian Vol. 4 / translation edited by Alan Watson – Rev. English language ed.* P. 284 f.

> you first give me a *cautio* in respect of any prior damage to me".[249]

This suggests that should a drifting raft have caused damage when entering into someone's private land, the landowner may seize it and hold it as a security for any claim in relation to damage caused by the drifting of the raft. This construction can be classified as a variation of a right of retention on behalf of the landowner. Similar solutions are found in the present-day regulations of these issues, which will be discussed later on. This is thus another example of how similar constructions and patterns can be identified, in relation to shipwrecks and the problems that they can cause, in legal systems that are more than a thousand years apart.

3.2.6 Shipwrecks Affecting Many Areas of Law

There are, of course, other areas of law in Roman times, than the ones discussed, that could also be mentioned in relation to shipwrecks and the problems associated with them. The ones mentioned above are some examples of this impact and it is clear, already from the examples mentioned, that shipwrecks, directly or indirectly, played an important role and affected many different areas of Roman law.

The development of culture and society from Roman times into the Middle Ages and beyond, of course, impacted on how shipwrecks and related problems were handled and regulated. The idiosyncrasies of later societies and cultures also enabled bespoke solutions that had not been envisaged earlier. Many of the identified problems in Roman times were, however, still present in later systems just as the issue of jettison had been identified in the Rhodian law long before its future inclusion and development into Roman law. Attention now turns to these later systems from the Middle Ages and beyond.

[249] Dig. 47.9.8, Watson, *The Digest of Justinian Vol. 4 / translation edited by Alan Watson – Rev. English language ed.* P. 284.

3.3 Middle Ages

During the Middle Ages, aspects of earlier regulations were adopted and developed in the Medieval codes relating to maritime law. This point in time also saw the emergence of additional areas of regulation that responded to new structures and idiosyncrasies of society. In this text, some of the more influential codes are examined in light of the subject of the study. More specifically, issues relating to how to handle shipwrecks, jettison and related topics are discussed. The discussed elements are used as examples and illustrations of how shipwrecks played a part and had an impact on regulations from this time period. As a consequence of the limited scope of this discussion, however, many regulations, that would have been interesting to discuss, are not included. The codes of primary interest here are the Rolls of Oleron, the Wisby Town-Law on Shipping and the Gotland or Wisby Sea-Law. Occasional reference to other codes, for comparison, is also made.

3.3.1 Rolls of Oleron

One of the most influential regulations from this time period was the Rolls of Oleron, probably a codification of customary law that developed around the island of Oléron off the western coast of France.[250] The code's exact origin and date are unknown, but it is thought to have been French in original and dating from the end of the 13th century or before.[251] The Rolls of Oleron consist of 24 articles, although in some

[250] The regulation is often referred to by its French name, *les Rôles d'Oléron*; Edda Frankot. *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*. Edinburgh University Press, 2012, p. 11. Its form as a series of judgements has been explained by the fact that the rules were written as rulings to hypothetical situations; ibid., p. 13. Their form have, however, led some to believe that they are in fact preserved judgements from a maritime law court or courts on the island of Oléron; Timothy J Runyan. "The Rolls of Oleron and the Admiralty Court in Fourteenth Century England". In: *American Journal of Legal History* 19.2 (1975), p. 96. Another explanation behind the title could be that the rolls simply were kept or preserved at Oléron; Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 22.

[251] Frankot dates them to 1286 or slightly before; see ibid., p. 11, with further references to other datings. Earlier works tend to date them earlier in time. Thus, Runyan e.g. dates them to around the year 1200, Runyan, "The Rolls of Oleron and the Admi-

versions additional articles or judgments have been added to these, and they deal with issues and problems facing maritime ventures at the time.[252] The primary context, in which the rules were written and applied, was the wine trade in the region but they were also highly influential on various legal systems in Western Europe including English law.[253] Of particular interest, in relation to the discussion here, is that the rules included aspects of jettison and salvage as well as regulating events such as collisions and shipwrecks.[254]

3.3.1.1 Rights and Obligations in Relation to Shipwrecks

The Rolls of Oleron called for the master of a ship to counsel with his companions on whether to embark on a voyage or not in light of the current weather situation. The master was "bound to agree with the greater part of his companions" and if the master disregarded this and did not act in line with the majority, the master was liable to replace both the ship and the cargo should they be lost.[255] The article makes it clear that the event and risk of a shipwreck constantly had to be kept in mind when determining whether to embark on a voyage or not. It also illustrates the role of the master as having an obligation to consult with the crew, while still having the power to overrule any decision that went

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ralty Court in Fourteenth Century England", p. 98; see also Travers Twiss. *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part I*. vol. I. Longman & Company, 1871, p. lvii ff, where the issue is discussed at length.

[252] See Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 13 f, Runyan, "The Rolls of Oleron and the Admiralty Court in Fourteenth Century England", p. 98 f and Travers Twiss. *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part III*. vol. III. Longman & Company, 1874, p. xi ff.

[253] Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 36 f, Pineus, "Sources of Maritime Law Seen From a Swedish Point of View", p. 86 and James J. Donovan. "Origins and Development of Limitation of Shipowners' Liability". In: *Tulane Law Review* 53 (1979), p. 1005.

[254] Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 13. As noted, there are several versions of the rules. The discussion here is based on the version titled "The Charter of Oleroun of the Judgments of the Sea"; see Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part III*, p. 4 ff. In the text, they will, however, be referred to as "the Rolls of Oleron".

[255] Presumably, provided that they were lost as a consequence of the voyage, even though this is not explicitly stated; cf. Rolls of Oleron, art. 2; ibid., p. 7.

against the master's will. In this way, the master was to acknowledge the majority decision, but could also take a chance and embark on a voyage anyhow with the knowledge that liability would follow should the ship and cargo be lost.

The rules also regulated how the crew was to act in the event of a shipwreck. The mariners on board had a duty to save the most that they could from the ship and if they assisted in this way, the master, in turn, was bound to pay the mariners or, if the master had no money, to pledge some of the goods to them. The master also had to transport the mariners back to their country, i.e. a duty of repatriation, if they acted in the prescribed way. If the mariners, however, did not assist, the master had no further obligations in relation to them. In that case, they lost their wages upon the loss of the ship.[256]

The master also had a duty to the owners of the apparel of the ship in these cases and could not sell this property in lack of an explicit mandate from the owners. Instead, the master was to "place them in safe deposit" and act loyally towards the owners. Any act contrary to this would lead to the master being liable in relation to the owners.[257]

3.3.1.2 Rolls of Oleron and Jettison

The Rolls of Oleron deal, at some length, with the issue of jettison. The provisions are reminiscent of how the concept was regulated in Roman law, but also develops the concept in certain ways. Thus, if a ship encountered a storm while at sea and the ship could not "escape without casting overboard goods and wines", the master was to inform the merchants, if they were on board the vessel, that goods had to be jettisoned and ask for their stance on this matter. If the merchants agreed to jettison cargo, the goods could be cast overboard and the general law of jettison would be applied. Even if the merchants refused, however, the master could still cast overboard as much of the goods as the master saw fit in order to save the vessel provided that this was

[256] Rolls of Oleron, art. 4; ibid., p. 7.

[257] Rolls of Oleron, art. 4; ibid., p. 7; see also Runyan, "The Rolls of Oleron and the Admiralty Court in Fourteenth Century England", p. 101.

necessary and attested to by the swearing of an oath afterwards.[258]

The sacrificed goods were to be valued "at the market price of those which have arrived in safety", marking a deviation from the Roman take on jettison where assessment was made in relation to actual value of sacrificed goods as discussed above. To link the valuation to the goods that arrived in safety also meant that the valuation was based on other goods than the ones that had been sacrificed. This construction made sense in the context in which the rules were written, since they concerned the wine trade in the region and thus property that usually was, more or less, fungible in nature. It could, however, be problematic to apply this approach should other goods than wine have been cast or if the cast wine had another value than the preserved one.[259] The owners of the shared cargo, the master "at his choice" in the form of the ship or freight, and the mariners were to share in the contribution in relation to the sacrifice.[260]

The Rolls of Oleron also applied the principles of jettison when the master deemed it necessary to cut the ship's mast because of the weather in order to save the ship and its cargo. Jettison was also applied in situations where "cables are cut and anchors abandoned to save the ship and the goods". The merchants had to compensate in these events if the ship and the goods were saved as a consequence of the action.[261]

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[258] According to the article, the master could choose to sacrifice in contradiction to the will of the merchants provided that the master afterwards swore "himself and three of his companions upon the Holy Evangelists, when he has arrived in safety on shore, that he did not do it, except in order to save the lives and the ship and the goods and the wines"; Rolls of Oleron, art. 8, Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part III*, p. 13.

[259] Cf. Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 36 f.

[260] See Rolls of Oleron, art. 8, Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part III*, p. 13. There has been some confusion concerning the contribution by the ship and freight as this construction seems to have been a novelty in relation to other systems; see Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 39.

[261] Rolls of Oleron, art. 9; Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part III*, p. 15 and Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 33 ff.

3.3.1.3 Rolls of Oleron and Collisions

Another area of interest, in this discussion, is how the Rolls of Oleron regulated collisions between ships. Art. 15 states that if a ship struck another vessel at rest, moored in a roadstead, and there was damage, "the damage ought to be appraised, and divided by halves between the two ships". Furthermore, the wines on board the ships "ought to be halved for the damage between the merchants". The master of the vessel that had struck the other also had to swear that this was not done intentionally.[262]

This provision on collision was meant as an incentive to avoid the case of a master willingly placing a ship in a position where a collision was likely to take place in order to be compensated from the ship that collided with it. Sharing the damage for collisions was thus meant to discourage such behaviour from owners and master of older ships that were in search of a high compensation as a result of a collision.[263] The article does not state what the consequences of intent on behalf of the striking vessel's master were, but presumably this would be full liability on behalf of the master.[264] The construction of this provision on collisions shows that provisions on issues that related to shipwrecks could include underlying incentives for parties to act in a certain manner. As discussed later on, this approach to maritime law is a recurring theme.

There was, furthermore, a provision in the Rolls of Oleron concerning potential collisions in a harbour if two or three vessels were anchored close to one another. The provision called for liability on behalf of a master that did not raise the ship's anchor in order to avoid a

[262] These provisions must be read in light of the dichotomy between intent and accident in the law at this point in time. The notion of carelessness or recklessness was generally not applied; cf. ibid., p. 33 and p. 48.

[263] See Rolls of Oleron, art. 15, Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part III*, p. 21 ff. Frankot states that this suggests that the common practice in north-western Europe before the 13th century had been to make the master of the striking ship fully liable for a collision and that the Rolls of Oleron thus marked a shift in relation to this position, Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 48.

[264] Cf. ibid., p. 47 f.

collision.[265] Both of the above provisions show that collisions between ships, that could lead to shipwrecks, had to be regulated in light of the damaging behaviour of some masters. Also this can be said to constitute an underlying rationale behind various regulations dealing with wrecks and wreck removal. Variations on this theme are discussed throughout this study.

3.3.2 Wisby Town-Law on Shipping

The Wisby Town-Law on Shipping is an interesting piece of regulation including rules and obligations that governed the inhabitants of Wisby, the largest city on the Swedish island of Gotland. This code made certain provisions applicable to the inhabitants of the city that were not in force in other areas of the island at the time.[266] The rules are preserved in a copy that dates from the first half of the 14th century.[267] The rules as such, however, most likely go back further in time. The Wisby Town Law, or earlier versions of it, are thought to have inspired other regulations in the area including sections of *Bjärköarätten*, the town law of Stockholm dating from 1285–1296, and the town law of Riga dating from the beginning of the 13th century.[268]

3.3.2.1 Rights and Obligations in Relation to Shipwrecks

The rights and obligations of mariners in the case of shipwrecks are not regulated as detailed in the Wisby Town Law as in the corresponding

[265] Rolls of Oleron, art. 16; Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part III*, p. 23 and see the discussion in Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 48, where it is suggested that this, in fact, is a provision concerning carelessness on behalf of a master that refuses to raise the anchor; cf. the mentioned dichotomy above.

[266] Travers Twiss. *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part IV*. vol. IV. Longman & Company, 1876, p. xxiii.

[267] Twiss dates the version to about 1320; ibid., p. xxiii and cf. Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 34, assessing the date to between 1341–1344, and Pineus, "Sources of Maritime Law Seen From a Swedish Point of View", p. 88, where it is dated to the middle of the 14th century.

[268] Cf. Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 10 and 19.

article in the Rolls of Oleron. The code, however, ascertained the right of any freighters on board the vessel to "have the use of the boat to save their lives, their goods, and their tackle, just like the shipmaster". Thus, freighters on board were to have an equal standing to the master in this respect in the case of a shipwreck.[269]

The mariners on board the ship were, furthermore, obliged not to "separate from the shipmaster all the while that they [could] help the ship or the goods or the tackle", which is reminiscent of the duty of mariners according to the Rolls of Oleron to assist in a similar fashion. The provision, however, also differs since it goes on to state that in relation to any salvaged goods, "the use of them pertains to those whose property they are, unless there should have been an agreement otherwise". The mariners were also obliged to "follow to the next land or town or village, in order that the seaman may take leave of the shipmaster". The wages of the mariners were also regulated in the sense that only half of the wage was paid if the master had received half of the freight or less. A full wage was paid if the master had received more than half of the freight.[270]

The first part of the discussed provision deals with the freight to be paid in the case of shipwreck. If any goods were saved, full freight was to be paid for the goods. If goods were lost, however, curiously enough, half of the freight was to be paid anyway. In the same way, should the master already have been paid full freight, the master had to return half of the freight in relation to any goods that had been lost as a result of a shipwreck.[271] The Wisby Town-Law seems to have been the only example, of the preserved codes from this time period, where freight had to be paid for goods that had been lost as a result of a shipwreck.[272] This provision clearly is to the benefit of the master and the ship. It also serves as an illustration that provisions in maritime

[269]Wisby Town-Law, Chapter XII, Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part IV*, p. 403.
[270]Chapter XII, § 2, ibid., p. 403.
[271]Wisby Town-Law, Chapter XII, ibid., p. 403.
[272]Cf. Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 28 f.

matters, also in historical regulations, can favour certain interests, e.g. the cargo interest or the shipowner. This construction can e.g. be caused by structures of power in society or in the legislative process behind a regulation. Of course, there can also be regulations where the purpose is to balance different interests.[273]

3.3.2.2 Wisby Town-Law and Jettison

The Wisby Town-Law regulates jettison in a different way than the Rolls of Oleron. If a ship had to cast goods overboard in distress, the cargo should be "cast over proportionally, and the least costly goods". This thus marks a preference, which may appear obvious, to sacrifice low valued goods before goods of higher value. The ship and the goods were, furthermore, to "pay the value according to the utmost worth of them in the harbour where the ship arrives".[274]

If there was no consensus on board on whether to cast goods overboard or not, the majority decision prevailed.[275] This is in line with the early Scandinavian approach to shipping ventures, where everyone on board had an equal share of the enterprise.[276] The Wisby Town-Law does not, in light of this, contain a mandate for the master of the ship to overrule a majority decision, at the cost of potential liability, as in the Rolls of Oleron. There were also separate provisions on consequences when a ship came upon a bank and had to be lightened as a consequence of this.[277]

Another difference, when compared to the Rolls of Oleron, is the cutting of cables in case of emergency. If a ship were in such distress that cables were to burst, the Wisby Town-Law made clear that "the

[273] This aspect is important in maritime law, not least in relation to international conventions and their drafting. The issue is e.g. interesting to discuss in relation to the Wreck Removal Convention; see further in section 5.5.

[274] Wisby Town-Law, Chapter X § 1, Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part IV*, p. 401.

[275] Wisby Town-Law, Chapter X § 2, ibid., p. 401.

[276] Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 33 f.

[277] See Wisby Town-Law, Chapter X, § 3–4, Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part IV*, p. 401.

shipmaster shall support the loss, unless he can put the blame upon someone". Furthermore, the master alone bore the responsibility of a breakage of a cable or anchor.[278] Another situation that was regulated occurred when cables were cut "without the leave of the shipmaster". In such cases, the ones who had cut the cables were to compensate the master. If, however, it was the master that cut the cables, the master was to "support his own loss" in accordance with the general rule.[279] This approach of making the master responsible for the damage to the vessel is also in line with the early approach to these matters in Scandinavian law, where the owner or owners of a vessel alone bore the risk for potential damage to the ship.[280]

3.3.2.3 Provisions in Relation to Shipwrecks

The Wisby Town-Law includes several provisions that concern shipwrecks. One rule dealt specifically with ships being "aground in the harbour" of Wisby. If such a ship was "not fit to go to sea", the person responsible for it, was obliged to "set it out of the way" and "remove it from the harbour". The deadline for removal was dependent on the time of the year when the incident occurred. If it was during the summer, the ship had to be removed within a month. During winter, the deadline was extended to eight weeks. If the person responsible for the ship did not take the required action, compensation had to be paid to the town at the sum of twelve marks. Furthermore, if any damage was caused by the wreck after the relevant deadline, the provision made clear that the person "to whom the wreck belongs shall make compensation for it".[281]

In this way, wrecks were clearly identified as potential obstacles in

[278] Wisby Town-Law, Chapter XI, ibid., p. 401.
[279] Wisby Town-Law, Chapter XI, ibid., p. 401 ff.
[280] Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 43 f. This is not to be confused with the notion of the ones on board having an equal say when it came to the issue of jettison as discussed above.
[281] The provision goes on to state that if the person "has no property in it, he shall make compensation with his person and with bread and water"; see Wisby Town-Law, Chapter III, Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part IV*, p. 393.

the harbour of Wisby, hence the regulation's requirement to have them removed. The differences relating to time can probably be explained by the harbour being busier in the summer months than in the winter. This furthermore stresses the functional importance of recognizing wrecks as potential obstacles that had to be dealt with in the regulation. This is thus an early example of a regulation that regulates one of the identified wrecks in the classification, i.e. a wreck that causes a hazard to navigation. Several of the modern day variations of regulations concerning this category of wrecks have similarities with the regulation found in the Wisby Town-Law.[282]

3.3.2.4 Salvage and Regulating Finds

Also salvage and issues concerning the finding of wrecks or goods from wrecks, were regulated in the Wisby Town-Law. If a ship broke up within the bounds of Wisby, a person who participated in saving the goods was entitled to a salvage remuneration determined by a certain group or entity in the city. If a person that salved the property was not satisfied with this reward, the matter was to be referred to the court for settlement.[283]

When it came to the finding of wrecks or goods from wrecks, the code based the compensation to the finder on the geographical circumstances of the find. A provision, titled "[o]f things found on the sea", dealt explicitly with this issue. If goods were found adrift at sea and no land was in sight, the finder, after bringing the goods to land, was awarded "half for his labour". If, however, the finder could see land upon discovering the goods, only a third of the goods were given.[284] A further distinction was made in relation to goods found "on the ground, where he has to use oars and hooks". In this case, a third was given to the finder as well.[285]

[282] See further the discussion in chapter 6.

[283] The code phrases this as "should he not find it enough, both sides shall refer it to the settlement of the court"; Wisby Town-Law, Chapter IV, Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part IV*, p. 393.

[284] Chapter XIII, Wisby Town-Law, ibid., p. 405.

[285] Chapter XIII, § 1, ibid., p. 405.

A separate part of the provision concerned the case when a person found "a ship driving on the sea and no people are in it". If such a ship was brought to land, the finder was rewarded half of the surviving goods and ship.[286] Furthermore, if goods were driving towards land and a finder was able to wade to the location of the goods, an eighth of the goods was awarded the finder.[287] The same was true when someone found goods driven on to the shore. To not act in accordance with the provision and thus wrongfully deny that goods were found in this way was considered theft.[288]

The above is an example of a regulation of salvage and proprietary interests in relation to wrecks. It might seem peculiar to base potential proprietary claims on elements such as distance and geography, but it makes sense if one considers the context in which the rules were to be applied. In lack of modern salvage equipment, the distance and geographical circumstances involved would certainly impact on the involved difficulty and danger when taking control of a wreck or property from a wreck. In light of this, it is logical to award the finder a greater part of the find should it be found on the open sea and, likewise, to award a lesser part should it be found closer to the shore. The regulation also illustrates a recognition of potential proprietary conflicts in relation to wrecks.[289]

3.3.3 Gotland or Wisby Sea-Law

The final influential code or set of rules to be discussed is the Gotland or Wisby Sea-Law. It is hard to date the regulation. There is a printed copy preserved from 1505, printed in Copenhagen, but the original or

[286] The ship and goods were also to "remain outside the city's bounds"; Chapter XIII, § 2, ibid., p. 405.

[287] This is phrased as "he shall have of them the eighth penny"; Chapter XIII, § 3, ibid., p. 405.

[288] Chapter XIII, § 3, ibid., p. 405.

[289] In these cases, the conflict could be between the owner, any other party claiming better right to the ship or cargo or the public entity of the town and the finder. The present-day regulations on proprietary conflicts in relation to wrecks also build upon these or variations of these conflicts. See further the discussion in chapter 11.

first version of the regulation is lost.[290] The code as such is not thought to have emanated from Wisby in the sense that it was drafted there. The rules are, instead, thought to have been derived from other sources.[291] As seen in the following discussion, the rules follow the Rolls of Oleron closely on many issues.[292]

One likely explanation for the name of the regulation is that the codification was kept at Wisby on Gotland.[293] That Wisby was the centre for these laws is no coincidence, since the city had a key geopolitical position in the Baltic Sea as a centre for trade.[294] The rules also spread to other areas. As an example, a copy of the law was most likely sent, following a request, to Danzig, present day Gdansk, in the middle of the 15th century as the city was in search of a better code on maritime law.[295] It also influenced the subsequent maritime law in Sweden.[296]

[290]Various later versions of the rules have been preserved. See further Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 21 ff, Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part IV*, p. xxvii ff and Pineus, "Sources of Maritime Law Seen From a Swedish Point of View", p. 88. The text will refer to the version titled "The Gotland Sea-Laws" found in Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part IV*, p. 55 ff, unless otherwise stated.

[291]Cf. Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 22 and Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part IV*, p. xxvii.

[292]Pineus, "Sources of Maritime Law Seen From a Swedish Point of View", p. 88.

[293]Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 22. In a similar way, Pineus suggests that a probable explanation to its name is that the regulation was "presented and accepted at some conference of Gotland traders at [Wisby]"; Pineus, "Sources of Maritime Law Seen From a Swedish Point of View", p. 88.

[294]Twiss refers to Wisby as "[...] connecting the trade of the Baltic ports with that of the North Sea and the Atlantic ports"; Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part IV*, p. xxvii.

[295]See Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 106 f and Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part IV*, p. xxxiii.

[296]The Maritime Code of 1667 under Charles XI in Swedish law, in force for almost two centuries, was built on the Gotland or Wisby Sea-Law; Pineus, "Sources of Maritime Law Seen From a Swedish Point of View", p. 88 f.

3.3.3.1 Rights and Obligations in Relation to Shipwrecks

In line with the Rolls of Oleron, a master was to counsel with the ship's crew before venturing out to sea according to the Gotland or Wisby Sea-Law. If there were objections to sailing, the master was bound by the majority on board. As in the Rolls of Oleron, however, the master could override the majority decision with the consequence that the master was "liable to pay for the ship and goods, should they be lost".[297]

Also in relation to shipwrecks, the Gotland or Wisby Sea-Law follows the Rolls of Oleron closely. Thus, the mariners on board had a duty to "salve as much of the goods as they best and most can" following a shipwreck. If they helped in this endeavour, the master was "liable for their wages". A slight variation to the Rolls of Oleron, however, is that the Gotland or Wisby Sea-Law does not mention pledging the goods if the master was unable to pay. Instead, the provision only states that if the master has no money, the master "must bring them back to their country".[298] Should the mariners, however, not assist in the rescue work, the master was "not bound to them in any way" and the mariners were to "lose their wages just as if the ship was lost".[299]

As in the Rolls of Oleron, the master was to have no right to "sell the ship's tackle, unless he has leave from those to whom it belongs" following a shipwreck. The master also had an obligation to "act as truthfully throughout as he [could]". If the master breached this obligation, the master was "liable to make compensation".[300]

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[297] This provision is also followed by the slightly more nebulous "[...] and should he have enough to enable him", suggesting that there was a limit to the liability; Gotland or Wisby Sea-Law, art. 16 § ii; Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part IV*, p. 67 ff.

[298] However, the phrasing "should he have no money from the goods which they have helped to salve" suggests that the master was expected to sell any salvaged goods and from the proceeds pay the mariners. Thus, the end result would arguably be similar to that of the Rolls of Oleron. See art. 17 § iii; ibid., p. 69.

[299] Art. 17 § iii; ibid., p. 69.

[300] Art. 17 § iii; ibid., p. 69.

3.3.3.2 Gotland or Wisby Sea-Law and Jettison

The usual aspects of jettison or general average are dealt with in the Gotland or Wisby Sea-Law. Art. 11 sets out the basic principle of jettison in the sense that when goods are thrown overboard, as a consequence of distress of weather, "the ship and the persons who have goods on board the ship must pay for those goods proportionally according to what similar goods would be worth in the haven which they have in view".[301]

The case of jettison re-emerges subsequently in art. 22 § viii, that is clearly inspired or derived from the Rolls of Oleron. More or less the same wording, except for changing the relevant town in the provision, is used. Thus, the master was to inform the merchants of the necessity to cast goods overboard and seek their opinion on the matter. If they refused, the master could proceed with lightening the ship anyway provided that the master deemed it necessary and parts of the crew, subsequently, swore that this was necessary as well. Moreover, the sacrifice had to be made in order to save "lives, goods, and ship". Upon return to shore, the cargo that had been cast overboard was to be declared in order to assess the contribution. A difference to the corresponding provision in the Rolls of Oleron is that the obligation of the master or ship to also contribute is made more precise in the Gotland or Wisby Sea-Law. Thus, "the master is bound to contribute either for his ship or for his freight in any compensation" according to the Gotland or Wisby Sea-Law.[302]

There is, furthermore, a slight variation in the wording of the Gotland or Wisby-Sea Law compared to the Rolls of Oleron, when it comes to the subsequent swearing of the crew on the necessity of jettison. According to the code, it sufficed that "two or three of [the master's] comrades" swore that the sacrifice was necessary.[303] The Rolls of Oleron, instead, called for three of the master's companions to take an oath on

[301] Gotland or Wisby Sea-Law, art. 11; Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part IV*, p. 63.
[302] Gotland or Wisby Sea-Law, art. 22 § viii; ibid., p. 75 ff.
[303] ibid., p. 75 ff.

this issue.[304] This position, in both the Rolls of Oleron and the Gotland or Wisby Sea-Law, is different from the earlier approaches in Scandinavian law when it comes to the mandate of the master. Earlier systems instead stated that the majority on board simply decided whether goods were to be sacrificed or not. As discussed, this was also the case in the Town Law of Wisby.[305] This is explained by the context in which shipping ventures took place in those systems, where the persons on board were considered as having an equal position in relation to the venture and thus were also to have the same say. The differences in the Rolls of Oleron and the Gotland or Wisby Sea-Law thus point to a change in structure of the maritime enterprise with the master having a more prominent position and role in relation to the others on board.[306] This illustrates how different regulations are shaped and driven by the context in which they are formed.

There is a provision in the Gotland or Wisby Sea-Law that is similar to the regulation in the Rolls of Oleron when "the master of a ship hews down his mast in very bad weather". In this case, the merchants were to be informed of the necessity of this endeavour, i.e. "in order to preserve life and goods and safety". This was also applied if the master "cuts his cables and lets his anchors go". If this happened, the master was to be compensated by the merchants "before the master puts their goods out of the ship".[307]

[304] Rolls of Oleron, art. 8, Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part III*, p. 13.
[305] Cf. Wisby Town-Law, Chapter X § 2, Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part IV*, p. 401.
[306] Cf. Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 33 f and see ibid., p. 7 for a description of how shipping ventures are thought to have been organized during the Viking Age and onwards as well as the first recorded regulations of such activities.
[307] Gotland or Wisby Sea-Law, art. 23 § ix; Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part IV*, p. 77 ff.

3.4 Development of Concepts and Identified Problems

Many years have passed since the Rhodians dominated their area of the Mediterranean and the Greeks and Romans traded and regulated on maritime matters in the same region. The discussion in this chapter has, however, showed that parts of these regulations and systems were traded down or re-emerged in subsequent codes and regulations throughout antiquity and beyond. One example of this is the way that the Romans incorporated and adopted already conceived concepts of maritime law from a Rhodian and Greek tradition.[308]

The discussion has also illustrated how this process continued into the Middle Ages by the various medieval codes and town laws of the Baltic Sea. These codes, such as the Rolls of Oleron or the Wisby Town-Law on Shipping, made their own contributions and variations on themes such as jettison and collisions, but can also be viewed as one further step of development of the older principles. In today's society, also these codes are firmly rooted in history. As previously, however, parts of the provisions from those times linger on and are still applied after some modifications and further development. The prime example is, once again, the Rhodian concept of jettison that is still applied after some revisions in the form of general average.[309]

This section discusses and reflects upon how the rules and regulations have developed in light of the historical background. The purpose is to illustrate how a concept such as jettison has developed and re-emerged in various different systems over the years. The main focus is thus on jettison since the concept is of particular interest because of its indirect functional link to the concept of wreck. The recognition of ships or wrecks as obstacles is also discussed in this context.

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[308] Anderson III, "Risk, Shipping, and Roman Law", p. 195 and Ferrándiz, "Will the Circle Be Unbroken? Continuity and Change of the Lex Rhodia's Jettison Principles in Roman and Medieval Mediterranean Rulings: Will the circle be unbroken? By and by, by and by?", p. 42. See also the discussion in sec. 3.1.2.

[309] Anand, *Origin and Development of the Law of the Sea*, p. 11 f.

3.4.1 Jettison or General Average Developed

Jettison has its roots in the Rhodian Law of jettison. The concept was later incorporated and developed within Roman law and is thus an example of an adoption and development of an earlier regulation. After antiquity, the concept also found its way into the maritime codes of the Middle Ages. The underlying functions and relations between the involved parties, i.e. the person sacrificing cargo, the ship owner and the other cargo owners, however, remained the same and the regulatory solution was, more or less, intact.[310]

There were, however, modifications and developments. Roman law added on variations to the Rhodian concept as discussed above. Furthermore, the Rhodian Sea Law, subsequently, enlarged the Roman law approach to jettison, as incorporated and developed from the *Lex Rhodia*, introducing additional liability.[311] Thus, a merchant could be liable if the merchant had not provided the cargo at the agreed time and place for loading and a loss happened because of piracy, fire or wreckage.[312] In a similar fashion, a captain could be held liable for overloading the ship, causing the captain to pay any potential contribution in full.[313]

Different variations of jettison were also introduced and practised in different regional laws of Medieval Europe. There were, as discussed, regulations in e.g. the Rolls of Oléron, the Wisby Town-Law and the Gotland or Wisby Sea-Law as well as in other legal frameworks such as the Hamburg Ship Law.[314] As an example of how jettison was further developed, it was, more or less, imported into English law following the Conquest of 1066 and is still applied today in its current form.[315] As a final example of development, during the later stages of the Middle

[310]Cf. Ferrándiz, "Will the Circle Be Unbroken? Continuity and Change of the Lex Rhodia's Jettison Principles in Roman and Medieval Mediterranean Rulings: Will the circle be unbroken? By and by, by and by?", p. 50.
[311]ibid., p. 50.
[312]Cf. Rhodian Sea Law, III.28–29, Walter Ashburner. *The Rhodian Sea-Law*. Clarendon Press, 1909, p. 106 f.
[313]Cf. Rhodian Sea Law III.22, ibid., p. 102 f.
[314]See the discussion in Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 31 ff.
[315]Senior, "The History of Maritime Law", p. 263.

Ages, the notion of insurance also developed and came to encompass the risk of jettison as well.[316]

3.4.2 Recognising Wrecks as Obstacles

Another development of importance to this study is the recognition of ships or wrecks as obstacles. Many of the interests and conflicts identified in the classification were not relevant in earlier times and are thus not found when investigating the historical regulations. Thus, as an example, the notion of wrecks posing a threat to the environment is a modern conception that was recognised during the middle of the 20th century following the accidents that took place at that time.[317] One function that, however, developed during this time, was the notion that a ship or a wreck could constitute an obstacle e.g. in relation to other vessels in a harbour.

The already mentioned provision in the Town Law of Wisby specifically devoted to "[...] vessels aground" in the town's harbour is of interest in this context.[318] If a ship was aground, wrecked or otherwise aground and not fit to go to sea, the person responsible for the ship had to set it out of the way and remove it from the harbour. The deadline for removal depended on when the event took place. If it happened during the summer, the vessel had to be removed within a month. During the winter time, the deadline was instead within eight weeks. If the wreck was not removed, the person responsible for the wreck had to pay compensation to the town in the form of a fine.[319] The provision also states that should anything happen after the relevant time, i.e. the deadline for removal, any damage caused by the wreck shall be compensated by the person to whom the wreck belongs. This

[316] Ferrándiz, "Will the Circle Be Unbroken? Continuity and Change of the Lex Rhodia's Jettison Principles in Roman and Medieval Mediterranean Rulings: Will the circle be unbroken? By and by, by and by?", p. 50.

[317] Cf. the discussion in sec. 1.5.2.

[318] Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 30. In the surviving version of the law the provision has the title "[v]an scippen in der grunt"; Wisby Town Law, Chapter III, Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part IV*, p. 392 f.

[319] ibid., p. 392 f.

thus established liability on behalf of the person responsible for the wreck for any damage caused after the time of removal.[320] As will be discussed further on, there are similar regulations today in relation to ships and wrecks that pose navigational threats in the form of obstacles.

3.5 Common Grounds in the Regulations

There are some common grounds and themes that are found in different legal systems in relation to wrecks and wreck removal throughout history. This section discusses some of these issues with focus on provisions dealing with wrecks and how to approach them. It is obvious that certain issues, e.g. in relation to wreckers and wrecking, have been recognized as legal problems in various different systems. Furthermore, some elements of salvage are discussed along with a general reflection on which conclusions that can be drawn from these potential common grounds and themes.

3.5.1 Wreckers and Wrecking

A common conception throughout history has been that shipwrecks and cargo emanating from or found on board shipwrecks can be seized by anyone who encounters them.[321] Another way to view this, from a legal perspective, would be to treat shipwrecks and goods from them as *res derelicta* following a wreckage. To the local population involved in salvaging and sometimes looting shipwrecks, these legal delineations were, however, of less importance. There is ample evidence that comprehensive looting took place in coastal areas during the Middle Ages

[320] The provisions goes on to state that "if [the liable person] has no property in [the wreck], he shall make compensation with his person and with bread and water…"; ibid., p. 392 f.

[321] Kersti Lust. "Wrecking Peasants and Salvaging Landlords–Or Vice Versa? Wrecking in the Russian Baltic Provinces of Estland and Livland, 1780–1870". In: *International Review of Social History* 62.1 (2017), p. 73 and cf. Dromgoole and Gaskell, "Interests in Wreck", p. 376, where it is stated that "…in ancient seafaring tradition there was a belief that the coastal population had a legal right to wreck washed ashore".

and in later times.[322] One testament to this is the fact that some of the Medieval codes acknowledged and reflected these activities and tried to prevent them.[323]

One common way of exercising these activities was simply to take hold of any cargo that was either washed up on the shore following a shipwreck or that could be accessed from on board an actual wreck. It could, however, also take more violent forms such as deceiving ships onto shoals or into dangerous waters in order to cause a shipwreck to enable a subsequent looting. An even more grim version was to board, attack and plunder a ship.[324] As an illustrative example of how this kind of behaviour could manifest itself in practice, a magistrate claimed, but was not granted, a salvage reward in The Aquila, 165 E.R. 87 (1798), in English law, after having, among other things, sent "fifteen men, under the obligation of an oath, which he administered to them, to assist" in order to right a derelict vessel in a harbour while at the same time preserving the ship from plundering. In the current case, "two hundred persons who had come down [...] according to the custom of that coast, for plunder, were driven off" as a consequence of this assistance.[325]

Ashburner, in his introduction to the Rhodian Sea Law, refers to three major forms of dangers to navigation caused by man. The first is piracy, the second people that "cut a ship's cables or steal its anchors, or snap up a merchant or passenger or sailor who happens to go on land" and the third and final danger is what Ashburner denotes as *wreckers*, people that "not merely plunder ships which have been driven

[322] For a detailed account of the activity of wrecking in the eastern Baltic, also extending it to other instances involving wrecks and analysing the class structures in society that facilitated such events, see Lust, "Wrecking Peasants and Salvaging Landlords–Or Vice Versa? Wrecking in the Russian Baltic Provinces of Estland and Livland, 1780–1870", p. 67 ff; see also Cathryn J Pearce. *Cornish Wrecking, 1700-1860: Reality and Popular Myth*. Boydell Press, 2010, dealing with similar issues from an English perspective, focusing on Cornwall, at more or less the same point in time.

[323] Cf. Sjur Brækhus. "Retten til å berge". In: *Juridiske arbeider fra sjø og land*. Ed. by Thor Falkanger et al. Universitetsforlaget, 1968, p. 546.

[324] Cf. the discussion of the term wrecking in Lust, "Wrecking Peasants and Salvaging Landlords–Or Vice Versa? Wrecking in the Russian Baltic Provinces of Estland and Livland, 1780–1870", p. 67.

[325] The Aquila, E.R. 87 (1798), p. 46 ff.

on shore, but sometimes lure them to destruction by displaying false lights".[326] Brækhus paints a similar grim picture of early attitudes to shipwrecks and possible survivors from such events: "Long, long ago [...] ships in distress, wrecks and wreckage thrown up on a foreign shore were deemed the rightful booty of the coastal population. Those who happened to survive a shipwreck met a grim fate – they were slain or enslaved".[327] As discussed, this was not a novelty for the Middle Ages. Already in the Digest, there are provisions on the unlawfulness of plundering shipwrecks and the luring of ships into dangerous waters by displaying false lights.[328]

As time passed, the rulers and regulations throughout Europe tried to prevent and forbid these activities.[329] Instead, mariners that had suffered shipwrecks were to be rescued and any potential cargo saved along with the vessel. Often, a reward could be awarded to anyone involved in such rescue work, but the person was not allowed to acquire the actual cargo.[330] Provisions aimed at these situations are found in various medieval codes and subsequent regulations. The practice is e.g. reflected in Danish and Norwegian codes from the 17th century. Thus, Christian V's Danish and Norwegian code of 1682 and 1687 called for capital punishment for a person that "at night lights any fire, or sets

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[326] Ashburner, *The Rhodian Sea-Law*, p. cxliii. In similar words, the Act 26 Geo. II (c. 19) 1753 (the Act of 1753), in English law, addressed the "many wicked enormities [that] had been committed to the disgrace of the nation" despite of its laws and regulations. Those actions involved, as Rose states, "plundering and destroying vessels in distress and stealing goods" as well as "persons beating or wounding or wilfully obstructing the escape of those on board such vessels, and persons who put out false lights to lure vessels into danger". The mentioned legislation made felonies of such acts; see Rose, *Kennedy and Rose on the Law of Salvage*, s. 2-024, p. 58.

[327] Brækhus, "Salvage of Wrecks and Wreckage: Legal Issues Arising from the Runde Find", p. 43. Cf. also Rose Melikan. "Shippers, Salvors, and Sovereigns: Competing Interests in the Medieval Law of Shipwreck". In: *The Journal of Legal History* 11.2 (1990), p. 177 ff, footnote 107. There are also alleged later cases of this kind of behaviour; see e.g. Brækhus, "Retten til å berge", p. 547 f on an alleged incident during the First World War.

[328] Dig. 47.9.19, Watson, *The Digest of Justinian Vol. 4 / translation edited by Alan Watson – Rev. English language ed.* P. 284 f.

[329] Cf. Dromgoole and Gaskell, "Interests in Wreck", p. 376.

[330] Lust, "Wrecking Peasants and Salvaging Landlords–Or Vice Versa? Wrecking in the Russian Baltic Provinces of Estland and Livland, 1780–1870", p. 73 f.

up any signal on the cliffs or anywhere else on the shore to mislead sailors. . . ".[331] Also Swedish regulations at the time called for capital punishment for ship plundering.[332]

The basic purpose of the regulations on wreckers and wrecking was to prohibit wrecking, while often, at the same time, in some form entitle people that rescued property to claim some sort of reward.[333] Even though legal regulations prohibited wrecking and tried to change the attitudes in relation to wrecks from earlier times, the activity of wrecking still persisted in practice and was not always easy to overcome.[334]

Some legal systems operated with various time limits within which cargo had to be claimed by the rightful owners. If no claim had been made in the specified time, the holder of the land, e.g. in the form of a manorial lord, could claim the cargo instead and thus acquired better right to the property in this way.[335] Another variation was to assign wreck to the crown or the ruler of the land.[336] In English law, what constituted wreck of the sea belonged to the King if no rightful owner claimed it within the stipulated time limit.[337] As a part of the King's royal prerogative, the King could also transfer this right to others, e.g. the landowners of the land where a certain wreck came to shore. The mere holding of land, however, did not entail these rights as in some

[331] Brækhus, "Salvage of Wrecks and Wreckage: Legal Issues Arising from the Runde Find", p. 46.

[332] Lust, "Wrecking Peasants and Salvaging Landlords–Or Vice Versa? Wrecking in the Russian Baltic Provinces of Estland and Livland, 1780–1870", p. 76.

[333] This has e.g. been described as the underlying purpose of the Imperial Russian legislation on the same issue; ibid., p. 74.

[334] Cf. Brækhus, "Salvage of Wrecks and Wreckage: Legal Issues Arising from the Runde Find", p. 45 f.

[335] In English law e.g. the time limit was a year and a day within which the rightful owner had to claim; Lust, "Wrecking Peasants and Salvaging Landlords–Or Vice Versa? Wrecking in the Russian Baltic Provinces of Estland and Livland, 1780–1870", p. 74. The time period was counted from the taking or seizure of the property; see Sir Henry Constable's Case, 77 E.R. 218 (1600), 5 Cook Reports 106a.

[336] Cf. Stefan Brink and Neil Prince. *The Viking World*. Routledge, 2008, p. 455.

[337] As already discussed, this was also codified by statute. In the case The King (in his office of Admiralty) v Forty-Nine Casks of Brandy, 166 E.R. 401 (1836), 3 Haggard 257, it was further noted that "shipwrecks are declared to be the King's property by the prerogative statute 17 Ed. II, c. 11, and were so long before at the common law".

other systems.[338]

Another variation was to not allow the landowner to claim any right in relation to the wreck and instead have it sold at auction after or in order to pay any potential salvage remuneration to the salvors in lack of any claim from the original owners of the property. In Russia, as an example, had no claim by any rightful owner been made within two years, property would be sold at auction in order to pay any potential salvage remuneration. Any surplus would go to "public welfare".[339] This did not, however, prevent powerful landowners from using their hierarchical standing in society in order to acquire the position as salvors and thus making it possible to be paid the allowed remuneration for salvage.[340]

An additional variation was to award better right to the finder of a wreck or property from a wreck when there was no claim from any rightful owner. This variation has e.g. been described as illustrating the general US approach to items found at sea, although case law on the matter has not always been consistent.[341] Which approach that is taken in a legal system can be viewed as a normative stance as to which party to prioritise in this kind of conflict, i.e. the state in some form or the finder of an object. In The Aquila, an English case from 1798 involving unclaimed cargo from a Swedish wreck, this normative stance is described in the following way:

> "It is certainly very true that property may be so acquired [*in the case occupancy, i.e. acquiring better right, of derelict*]; but the question is, to whom is it acquired? By the law of nature, to the individual finder or occupant. But in a state of civil society, although property may be acquired by occupancy, it is not necessarily acquired to the occupant himself; for the

[338] Cf. Kenny and Hrusoff, "The Ownership of the Treasures of the Sea", p. 386 f. For a case on a grant of rights in relation to wreck of the sea, in English law, and how these issues were treated by the courts, see The King (in his office of Admiralty) v Forty-Nine Casks of Brandy, 166 E.R. 401 (1836), 3 Haggard 257.

[339] Lust, "Wrecking Peasants and Salvaging Landlords–Or Vice Versa? Wrecking in the Russian Baltic Provinces of Estland and Livland, 1780–1870", p. 74.

[340] ibid., p. 74.

[341] Cf. Kenny and Hrusoff, "The Ownership of the Treasures of the Sea", p. 383.

> positive regulations of the State may have made alterations on the subject; and may, for reasons of public peace and policy, have appropriated it to other persons, as, for instance, to the State itself, or to its grantees."[342]

Since potential conflicts between different subjects based on their claims in relation to wrecks can be complicated, it can be beneficial to assign a certain body or authority to specifically deal with these matters. In English law, the development of this area of law led to an amalgamation of control over found shipwrecks to a single body, titled the Receiver of Wrecks, in the middle of the 19th century. This structure is still in existence.[343]

3.5.2 Salvage and Wrecks

The line between salvage, as encouraged by law, and illegal activities in relation to shipwrecks, cargo or other property from them, i.e. wrecking, has varied between different regulations and systems. In practice, the line between salvage and wrecking might not have been evident in practice and it is also possible that salvage and wrecking were carried out at the same time. Lust states that "[s]alvage and wrecking were often practiced side by side, occupying the grey zone between legality and illegality".[344] As a further illustration of this, it is noted in The King (in his office of Admiralty) v Forty-Nine Casks of Brandy, 166 E.R. 401 (1836), 3 Haggard 257, in relation to a grant from the Crown concerning wreck of the sea to the lord of a certain land, that "[i]n most instances the wreck is given up to the lord, though it is to be feared that in some cases the inhabitants of the Isle of Purbeck, as well as those of other parts of the kingdom, might so far contest the lord's rights as to make away with the wrecked goods". Both salvage and wrecking could be profitable endeavours for those involved.[345]

[342] The Aquila, 165 E.R. 87 (1798), p. 41 f.
[343] Lust, "Wrecking Peasants and Salvaging Landlords–Or Vice Versa? Wrecking in the Russian Baltic Provinces of Estland and Livland, 1780–1870", p. 75. See further the discussion in chapter 11.
[344] ibid., p. 68 and cf. ibid., p. 81 f for examples from the Russian Baltic Provinces.
[345] ibid., p. 68 f.

Different systems regulated salvage in slightly different ways. In early times, the notion of salvage in these cases was closely in line with the approach to the law of finds. Often the master and crew would perish with the ship and no owner could be traced, resulting in the entire value of the ship or wreck to be divided in accordance with the relevant regulation.[346] When it came to the compensation or salvage reward, salvage could be carried out in line with, more or less, fixed rates calculated in relation to the value of the saved property. Another variable that could affect the salvage remuneration was the distance from the shore to the salvaged ship or wreck. Thus, as an example, in Imperial Russian legislation, a salvage operation taking place within roughly one kilometre of the shore entitled the salvor to a remuneration amounting to a sixth of the value of the saved cargo, while a greater distance allowed the salvor to be remunerated a fourth of the value.[347]

This way of assessing potential rewards in relation to distance from the shore is recurring in several codes. The Wisby Town Law e.g. fixed remuneration for "[...] things found on the sea" based on whether the person finding it could see land or not at the moment of discovery. If a finder could not see land upon finding things afloat on the sea, the person was awarded half of the value for his labour. If the person, however, could see land, only a third was paid.[348] As another example, the Code of Maritime Law, drawn up at Lübeck, for the use of the Osterlings, differentiated between salvaged goods from ships lost on the open sea and those ships that foundered on reefs, in the sense of allowing for more remuneration should goods float on the ocean after a shipwreck, while less was paid should the salvors have brought goods from a ship that had been lost upon a reef.[349] It was also a

[346] Cf. Brækhus, "Retten til å berge", p. 548.

[347] Lust, "Wrecking Peasants and Salvaging Landlords–Or Vice Versa? Wrecking in the Russian Baltic Provinces of Estland and Livland, 1780–1870", p. 74.

[348] See further, Chapter XIII, Wisby Town Law, Twiss, *Monumenta Juridica: The Black Book of the Admiralty. Appendix – Part IV*, p. 405.

[349] See XIV, Maritime Law of the Osterlings, ibid., p. 367, stating that "[i]f a ship be lost in the open sea, so that persons find goods floating on the wide sea, and they salve them and bring them to land, they shall have the twentieth part. Should it be however, which God forbid, that an accident arrives at sea upon any reef, so that the ship is lost,

common argument in salvage cases that a salvor wanted high rewards as a consequence of the shipwreck being located far from the shore. Another occurring argument for a high reward was that the salvage had entailed a high degree of danger.[350]

In some systems salvors were entitled to fixed rates for their services, while no fixed rates were present in others. Landowners with grants to wrecks in England had to pay the salvors who had actually saved property, while the actual salvors in other places sometimes were only paid ordinary low wages as employees or representatives of the landowner in question. The latter was then viewed as the sole salvor and could claim the salvage reward in full. In this way, the power relations in society affected the distribution of salvage rewards.[351] In places where the landowner or manorial lord usually had the sole right to a salvage reward, whether directly or indirectly, there could also be conflicts between landowners or manorial lords should someone interfere in the other's land or waters.[352] This is an example of a proprietary conflict in relation to wrecks.

3.5.3 Derivation, Inspiration or Coincidence?

The discussion in this chapter has illustrated cases where the underlying function and context to a regulation seem to show common grounds between the studied systems. To return again to the issue of jettison, all major maritime nations seem to have developed the same or similar notions of jettison or general average as a response to the dangers caused by the sea as a medium for maritime commerce.[353] As discussed, this can also be viewed as a series of developments from the Lex Rhodia, through Roman law and into the Medieval codes and beyond.

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those who have brought the goods to land, shall receive the hundredth mark". For other related examples, see Brækhus, "Retten til å berge", p. 548.

[350] Lust, "Wrecking Peasants and Salvaging Landlords–Or Vice Versa? Wrecking in the Russian Baltic Provinces of Estland and Livland, 1780–1870", p. 80.

[351] Cf. ibid., p. 75.

[352] ibid., p. 78.

[353] Cf. Ferrándiz, "Will the Circle Be Unbroken? Continuity and Change of the Lex Rhodia's Jettison Principles in Roman and Medieval Mediterranean Rulings: Will the circle be unbroken? By and by, by and by?", p. 56 f.

These later adaptions had their own variations and idiosyncrasies, but their basic functionality and rationale in relation to jettison or general average remained the same.[354]

It may, however, be reasonable not to extrapolate too much on the basis of the above observation. The mere fact that an issue is regulated in, more or less, the same way in different legal systems does not necessarily mean that the regulations are inspired by each other or derived from earlier similar regulations. Frankot notes, as an explanation to why different legal systems have similar solutions in relation to certain legal problems, that "[t]here are, however, certain preconditions in every situation regulated by law, and only a limited number of solutions that law can offer".[355] In this way the occurrence of similar rules and provisions in different systems can also be coincidental and explained by the situations involved as well as the limited amount of ways in which certain issues can be regulated.

In the case of jettison and Roman law, however, the connection is obvious, since the provision on jettison makes explicit reference to the Lex Rhodia.[356] The same is true for several of the Medieval codes where the wording between different regulations is more or less the same, which strongly suggests that they were inspired or derived from each other or some earlier counterpart.[357]

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354 Cf. ibid., p. 57.

355 Cf. Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 27. The reasoning draws on the following quote by Landwehr from his influential work on general average titled *Die Haverei in den mittelalterlichen deutschen Seerechtsquellen*: "Gerade in der Seeschiffahrt gibt es jedoch naturgegebene Sachzwänge, die unabhängig von dem jeweiligen Stand der Rechtskultur und der geographischen Lage, zur Ausbildung inhaltlich übereinstimmender Regeln führen", ibid., p. 27.

356 Dig. 14.2.1, Watson, *The Digest of Justinian Vol. 1 / translation edited by Alan Watson – Rev. English language ed.* P. 419.

357 Cf. the discussion above in sec. 3.3.

Chapter 4

Wreck as a Legal Concept

It has already emerged from the discussion on the historical development, that shipwrecks and their various effects have been subject to regulation since antiquity in different ways. The concept of wreck can, however, denote different things and it is possible that its meaning and construction have changed substantially over time and still differ from one legal system to another.[358] There are also different approaches to the concept in the studied legal systems today.

This chapter examines the concept of wreck in more detail. The discussion follows the three research questions introduced in section 1.8. Thus, the chapter concerns how the notion of wreck as a legal concept has been defined and construed in the different legal systems as well as the question of whether it is possible to distinguish common denominators in these constructions. Furthermore, the discussion focuses on how these definitions and constructions relate to the concept of ship or vessel.

[358] Cf. Sarah Dromgoole. "A note on the meaning of 'wreck'". In: *International Journal of Nautical Archaeology* 28.4 (1999), p. 319.

4.1 The Meaning of Wreck

The legal concept of wreck can mean and denote different things.[359] Historically, the term has also been used in relation to a variety of different objects and situations. The different constructions of this concept, in the studied legal systems, are discussed here. Apart from distinguishing what is meant and denoted by the concept of wreck, it is also essential to understand when something is not considered to be a wreck. It might even be of greater importance to ask what is not considered to be a wreck in order to pursue the meaning of the term as a legal concept. In this discussion, a main division is made between the English approach, encompassing English law, and the Nordic approach, encompassing Danish, Finnish, Norwegian and Swedish law.

4.1.1 English Approach

One way of approaching the concept of wreck is to delineate between different subsets or subcategories that are deemed to fall within the concept. English law is an example of a legal system where this approach has been taken in various ways. There are a number of concepts, related to wrecks, that are important in the system's approach to wrecks. These include the concepts of wreck of the sea, flotsam, jetsam and the concept of ligan or lagan as well as derelict.[360] These different concepts stem from old statutes and case law, where the definitions of each subset or subcategory have been formed and developed.[361]

One should, furthermore, also keep in mind that the term wreck

[359] Cf. Dromgoole, "A note on the meaning of 'wreck'", p. 319 and Dromgoole and Gaskell, "Interests in Wreck", p. 345, where it is stated that "[t]he term 'wreck' has many different meanings". See also Tiberg, "Wrecks and Wreckage in Swedish Waters", p. 3.

[360] Cf. Rose, *Kennedy and Rose on the Law of Salvage*, s. 2-020, p. 56 and cf. the distinction referred to in Kenny and Hrusoff, "The Ownership of the Treasures of the Sea", p. 384. As to the concepts of ligan or lagan, the text will treat these as synonyms and refer to only lagan unless there is need to differentiate or by citation.

[361] To these mentioned categories, one further can be added in the form of deodands. This refers to "personal chattels which were the immediate cause of a person's death or were found upon a corpse floating on the sea or cast upon the shore"; Rose, *Kennedy and Rose on the Law of Salvage*, s. 2-020, p. 56.

sometimes is used to denote shipwrecks and property from shipwrecks in a more general sense.[362] In these cases, no further distinction is pursued as to the concept of a wreck from the sea as distinguished from jetsam, flotsam, lagan and derelict.[363] In this sense, the concept's meaning can also depend on the context in which it is used.[364] The different terms mentioned above and their development are studied in some depth here in order to illustrate how the concept of wreck has been approached in English law.

4.1.1.1 Historical Development and Shift

The approach in English law to the concept of wreck has changed and developed over time. The first definitions of the concept can be traced back to early case law and legal commentaries.[365] In early times, any property that could be classified as "shipwrecked goods" seems to have been treated as wreck. This was true regardless of where the goods were placed geographically. Thus, both property at sea and goods that were cast upon the shore were treated as wreck in the same way. All such property belonged to the Crown.[366]

With time, however, the above position changed in the sense that the Crown only had right to unclaimed wrecks.[367] Thus, in a statute

[362] This is true, not least, in ordinary language or in contexts where a strict legal sense of the concept is not pursued. Dromgoole and Gaskell note, also making reference to a dictionary entry, that wreck "[i]n common parlance [...] tends to mean a vessel washed up on the coast, or a sunken vessel". Cf. also Lillington, "Wreck or Wreccum Maris?", p. 267.

[363] Kenny and Hrusoff, "The Ownership of the Treasures of the Sea", p. 384 f.

[364] Cf. also Rose, *Kennedy and Rose on the Law of Salvage*, s. 19-003, p. 682, where the author refers back to an earlier discussion of the concept of wreck as concerning "wreck as a subject of salvage" indicating, potentially, that the concept has other meanings and connotations outside of that context. Another example is Lillington, "Wreck or Wreccum Maris?", p. 268, where Lillington refers to the legislative definition in the Merchant Shipping Act of wreck as "[t]he current definition of 'wreck' *for the purposes of the law of wreck and salvage* (emphasis added). Another example, from a Nordic perspective, is found in the case ND 1990, p. 8, where a distinction is made between the meaning of wreck in common parlance and its meaning from in an insurance perspective.

[365] Dromgoole, "A note on the meaning of 'wreck'", p. 319.

[366] Rose, *Kennedy and Rose on the Law of Salvage*, s. 2-017, p. 55.

[367] The change in approach took place gradually over time. Thus, under the reign of

from 1275, it was stated that no property could be considered wreck if a living being managed to escape from the ship in question. Instead, the owner of the property was to be handed the property back upon payment of potential salvage. It was also made clear that such goods that were claimed were not to be considered wreck. Wreck was thus, *e contrario*, limited to unclaimed property found at sea or cast upon the land.[368] With time, however, also this position changed and the concept was further narrowed down to encompass property that had been cast upon the land by the sea. The Crown was also able to transfer its right to such unclaimed property by individual grants to local lords of manors or to specific towns.[369]

In the development of the concept of wreck, a main distinction emerged between property that had been cast upon the shore in the wake of a shipwreck and property that was still at sea. The former is referred to as *wreccum maris*, while the latter is referred to as *adventurae maris*.[370] *Wreccum maris* came to encompass property from shipwrecks that had been cast ashore, while *adventurae maris* denoted the various kinds of objects that were still afloat. The latter included the concepts of flotsam, jetsam, lagan and derelict.[371] These concepts have developed through case law and the discussion thus turns to what can be derived

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Henry I (1100-1135) and Henry II (1154-1189), a ship was only considered a wreck provided that the crew perished in the shipwreck. Later, during the reign of Richard I (1189-1199), this was altered in the sense that also the heirs of the relevant owners could claim the ship and any surviving goods. The definition was further changed during the reign of Henry III (1216-1272) in the sense that a ship was only considered a wreck provided that no man, dog or cat survived the accident; Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 28.

[368]The Crown also had right to wrecks that were unclaimed and found on the high seas. This right was, at an early stage, granted to the Admiral. Subsequently, this evolved to the High Court of Admiralty having jurisdiction over all property that could be classified as wreck and that was found at sea whether unclaimed or not; Rose, *Kennedy and Rose on the Law of Salvage*, s. 2-019, p. 56.

[369]ibid., s. 2-019, p. 56. See also s. 241 Merchant Shipping Act 1995, stating that "Her Majesty and Her Royal successors are entitled to all unclaimed wreck found in the United Kingdom or in United Kingdom waters *except in places where Her Majesty or any of Her Royal predecessors has granted the right to any other person* (emphasis added)".

[370]Dromgoole and Gaskell, "Interests in Wreck", p. 345 f.

[371]ibid., p. 376.

from those cases.

4.1.1.2 Wreck as Established by Case Law

In Sir Henry Constable's Case from 1600, the various subcategories of property at sea were identified in the form of jetsam, flotsam and lagan. In other words, what had in early times been classified as wreck of the sea had now been classified into various subcategories reflecting the nature of the goods still afloat.[372] The main division in the case was between property in the form of wreck or wreck of the sea and property in the form of jetsam, flotsam or lagan still afloat. The former has been referred to as "wreck of the sea" and "property lost at sea which has come to shore".[373] Property of this kind is, as discussed, referred to as *wreccum maris*, while property still afloat falls under the concept of *adventurae maris*.[374] The distinction between the two kinds of property is noted in Sir Henry Constable's Case in the following way:

> "nothing shall be said *wreccum maris*, but such goods only which are cast or left on the land by the sea".[375]

This definition is, more or less, echoed in the case R v Forty-Nine Casks of Brandy, where Blackstone is quoted as stating that:

> "wreck, or shipwreck, legally 'wreccum maris', wreck of the sea, in legal understanding, is applied to such goods as, after a shipwreck, are by the sea cast upon the land".[376]

The case also refers back to the distinction between "wreccum maris, flotsam, jetsam and ligan" as explained in Sir Henry Constable's Case. As noted above, what would be considered as flotsam, jetsam and lagan while afloat, will instead be considered wreck when cast ashore. This can be further emphasized by another passage from the case where it was noted that:

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[372] Cf. Rose, *Kennedy and Rose on the Law of Salvage*, s. 2-020, p. 56.
[373] Kenny and Hrusoff, "The Ownership of the Treasures of the Sea", p. 384.
[374] Dromgoole and Gaskell, "Interests in Wreck", p. 345 f.
[375] Sir Henry Constable's Case, 77 E.R. 218 (1600), 5 Cook Reports 106a.
[376] The King (in his office of Admiralty) v Forty-Nine Casks of Brandy, 166 E.R. 401 (1836), 3 Haggard 257.

> "it is to be observed... that in order to constitute a legal wreck, the goods must come to land; if they continue at sea, the law distinguishes them be the uncouth appellations of jetsam, flotsam, and ligan. These three are, therefore, accounted so far a distinct thing from the former, that by the King's grant to a man of wrecks, things jetsam, flotsam, and ligan will not pass".[377]

There was thus, what could be described as, a functional approach to the property that could fall under the discussed concepts. Fundamentally, this functional approach differentiated between property by the developed dichotomy between the concepts *wreccum maris* and *adventurae maris*. If the property was still afloat it could fit into the subsets flotsam, jetsam or lagan as well as derelict. The same kind of property would, however, transform or instead be treated as wreck as soon as it was cast ashore.

The above distinction could be important in practice. It could, as an example, be the case that different subjects had rights in relation to property depending on it being either *wreccum maris* or *adventurae maris*. As an example, in the case R v Forty-Nine Casks of Brandy, the outcome of the case depended on whether the involved casks of brandy were cast ashore in such a way as to be considered as wreck of the sea or if they were still afloat or otherwise so that they were not to be considered as wreck of the sea.[378]

[377] The King (in his office of Admiralty) v Forty-Nine Casks of Brandy, 166 E.R. 401 (1836), 3 Haggard 257.

[378] The casks were found on different locations and the case deals with each find determining who has better right to each found cask in line with this distinction. Thus, e.g. some casks "were afloat between the high- and low-water marks, but being afloat, and never having even touched the ground, although in the *divisum imperium*, they had not become 'wreck of the sea' ", while other casks were "found aground – the tide being out – between high-and-low-water mark" and as a consequence of this they were deemed to be "wreck of the sea". In some cases, it may, however, not be evident whether an object is to be deemed wreck of the sea or not. A marginal instance in the actual case concerned "five casks which having taken the ground between high-and-low-water mark, though still moved by the waves – the sea at one time surrounding them, and, at another, leaving them dry". These casks, the case goes on to say, "– may be considered not as on the high sea, but as wreck of the sea". Of importance was the fact that the casks "had, it would seem, actually struck the ground; and though bumped about by

In the case The King v Two Casks of Tallow, the concept of derelict was added to the categories of property that can fall under the concept of *adventurae maris*.[379] The case made clear that:

> " *'Wreccum maris'* is not such in legal acceptation, till it comes ashore, until it is within the land jurisdiction; whilst at sea, it belongs to the King in his office of Admiralty, as derelict, flotsam, jetsam, or ligan".[380]

Having considered the main distinction between *wreccum maris* and *adventurae maris*, the discussion now turns to the specific subsets of property still afloat constituting *adventurae maris*, i.e. flotsam, jetsam, lagan and derelict that is afloat.

4.1.1.3 Flotsam, Jetsam, Lagan and Derelict

Flotsam has been referred to as the same property as wreck, but "still floating at sea".[381] In Sir Henry Constable's Case, flotsam is thus defined in the following way "*flotsam* is when a ship is sunk, or otherwise perished, and the goods float on the sea".[382] A slight variation is found in Palmer v Rouse (1858), where "the well known meaning of flotsam" was stated as "goods having been at sea in a ship and separated from it by some peril".[383]

Jetsam has been referred to as "sunken goods thrown overboard to save a ship".[384] In Sir Henry Constable's Case, jetsam is defined as follows: "*jetsam* is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards

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the waves, it seldom happens that the shore is without some portion of water upon its surface, or amongst the crevices of rocks". For further details, see The King (in his office of Admiralty) v Forty-Nine Casks of Brandy, 166 E.R. 401 (1836), 3 Haggard 257.

[379] Rose, *Kennedy and Rose on the Law of Salvage*, s. 4-054, p. 102 f.

[380] The King v Two Casks of Tallow, (1837), 3 Haggard 294.

[381] Kenny and Hrusoff, "The Ownership of the Treasures of the Sea", p. 384.

[382] Sir Henry Constable's Case, 77 E.R. 218 (1600), 5 Cook Reports 106a. This definition is also referred to in R v Forty-Nine Casks of Brandy (1836) as well as in The Cargo ex Schiller (1877).

[383] Rose, *Kennedy and Rose on the Law of Salvage*, s. 4-057, p. 103 f and Palmer v Rouse (1858) 3 H. & N. 505.

[384] Kenny and Hrusoff, "The Ownership of the Treasures of the Sea", p. 384.

notwithstanding the ship perish".[385] The concept of jetsam thus has clear functional links with the concept and law of jettison, but with the distinction that in relation to jetsam the sacrifice does not bear fruit since the ship perishes nonetheless.

Lagan has been described as "buoyed jetsam – the idea being that at some future time the owner will return to the buoy and retrieve his goods".[386] The notion of it being "buoyed jetsam" can be linked to its definition in Sir Henry Constable's Case, where it is held that:

> "*lagan (rel potius ligan)* is when the goods which are so cast into the sea [referring back to the definition of jetsam], and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy, or cork, or such other thing that will not sink, so that they may find them again".[387]

Derelict, finally, has been referred to as property that has been abandoned. The issue of when an actual abandonment has taken place has, however, been subject to some legal debate. It has been argued that this concept probably has the same meaning as its equivalent in salvage law.[388] In The Aquila it was held that:

> "it is by no means necessary to constitute derelict, that no owner afterwards appear. It is sufficient if there has been an abandonment at sea by the master and crew, without hope of recovery: I say without hope of recovery; because a mere quitting of the ship for the purpose of procuring assistance from shore, or with an intention of returning to her again,

[385] Sir Henry Constable's Case, 77 E.R. 218 (1600), 5 Cook Reports 106a. This definition is also referred to in R v Forty-Nine Casks of Brandy (1836) as well as in The Cargo ex Schiller (1877).

[386] Kenny and Hrusoff, "The Ownership of the Treasures of the Sea", p. 384.

[387] Sir Henry Constable's Case, 77 E.R. 218 (1600), 5 Cook Reports 106a. This definition is also referred to in R v Forty-Nine Casks of Brandy (1836) as well as in The Cargo ex Schiller (1877).

[388] Dromgoole, "A note on the meaning of 'wreck'", p. 319.

is not an abandonment."[389]

Thus, the notion of derelict was not dependent on there being no original owner of the property. Instead, property could be abandoned as a result of e.g. distress at sea. The crucial fact was thus that the vessel had been left "without hope of recovery".[390] To this notion, one further dimension can be added in the form of having no intention of returning to the property. In this way, Rose states that derelict is a description of an object that "is abandoned and deserted at sea by those who were in charge of it, without hope on their part of recovering it (*sine spe recuperandi*) and without intention of returning to it (*sine animo revertendi*)".[391]

In some other systems, derelict, defined broadly as abandoned property or wrecks, is not always included in the definition of wreck or salvage.[392] The fact that derelict, in English law, has been included in the construction of *adventurae maris* can be viewed in light of the proprietary claims that can be made in relation to such property since abandoned property at sea belongs to the Crown in English law. Thus, it was further held in *The Aquila* that "[...] I consider it to be the general rule of civilized countries, that what is found derelict on the seas, is acquired beneficially for the sovereign, if no owner shall appear".[393]

4.1.1.4 Current Legislative Stance

The early statutes binding the concept of wreck to whether something survived from the ship or not was challenged in the 18th century. It was, at this stage, held that even if no person or animal survived from

[389] The Aquila, 165 E.R. 87 (1798).

[390] The case also refers to older notions of derelict, citing Sir Leoline Jenkins' statement that derelict refers to "[b]oats or other vessels forsaken or found on the sea without any person in them: Of these the Admiralty has but the custody, and the owner may recover them within a year and a day".

[391] See the discussion in Rose, *Kennedy and Rose on the Law of Salvage*, See s. 4-059, p. 104 ff.

[392] Cf. Brækhus, "Retten til å berge", p. 546 on the difference between the approach in continental Europe to abandoned wrecks and the one in English law.

[393] The Aquila, 165 E.R. 87 (1798) and Kenny and Hrusoff, "The Ownership of the Treasures of the Sea", p. 390.

the ship, the right to the property still resided with the rightful owner should the owner claim the property.[394]

The current legislative stance to the concept of wreck is found in the Merchant Shipping Act 1995 (MSA 1995). The discussed division between flotsam, jetsam, lagan and derelict is still reflected in the legislation. The modern legislative approach, however, has been to conjoin these with the general concept of wreck. Thus, the interpretative definition now states that wreck as a concept "includes jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water".[395] No description or definition of these terms are, however, found in the MSA 1995 and the discussed cases are thus, presumably, still relevant in distinguishing between them as to their nature.

It should also be noted that the section states that the concept of wreck "includes" these concepts. It is thus not necessarily so that the concept is restricted to these terms and there can, consequently, be room for additional kinds of property falling under the concept of wreck.[396] This phrasing also reflects that the concept of wreck has been expanded as to also include wreck in its earlier meaning, i.e. *wreccum maris* or wreck of the sea along with flotsam, jetsam, lagan and derelict.[397]

The present approach, thus, goes further than the original stance from an admiralty law perspective as discussed above and illustrated in the mentioned cases. The current definition encompasses the designated property "found in or on the shores of the sea or any tidal water". There has been some confusion as to what this means, but a construction has been that it means "property found in territorial waters or on the foreshore".[398] Thus, the current approach encompasses property both cast ashore and still adrift. In this way, the present approach,

[394] Dromgoole and Gaskell, "Interests in Wreck", p. 377.

[395] S. 255(1) MSA 1995. This phrasing goes back to earlier versions of the act. It was introduced in the Merchant Shipping Act 1854, s. 2, and was repeated in the Merchant Shipping Act 1894, s. 510(1). The earlier Wreck and Salvage Act 1846 did not include the phrasing; see further ibid., p. 346 and Lillington, "Wreck or Wreccum Maris?", p. 268 f.

[396] Cf. Rose, *Kennedy and Rose on the Law of Salvage*, s. 4-058, p. 104.

[397] Lillington, "Wreck or Wreccum Maris?", p. 269.

[398] Dromgoole and Gaskell, "Interests in Wreck", p. 346.

consequently, combines the earlier distinguished concepts of *wreccum maris* and *adventurae maris* into one.[399] Also aircraft and hovercraft are included in the current approach to the concept.[400]

4.1.2 Nordic System Approach

The Nordic approach to wrecks differs considerably to the discussed English approach. While the English approach has developed gradually in cases and statutes over centuries, the Nordic approach and its development are harder to trace through history. There is, furthermore, no clear division into different subcategories or subsets as in the English approach.

4.1.2.1 Lack of Definition

A common denominator in the legal systems that make up the Nordic approach, is that there are no clear general legislative definitions of what a wreck is. This differentiate the systems from the discussed English approach, where the legal definition of wreck is more explicit and extensively defined. Instead, the common denominator, that seems to bind the Nordic legal systems to the concept, is what could be described as a state of destruction. Wrecks have generally been construed as vessels, ships or property from them that have been destroyed. In this way, it is also possible to view wrecks as the result of a transformation where a ship or vessel has turned into a wreck as a consequence of destruction. How this has been manifested is discussed here in some detail.

4.1.2.2 A Destroyed Vessel or Ship

There is, as mentioned above, no general legislative definition of what constitutes a wreck in the Nordic approach.[401] This makes it harder

[399] Cf. ibid., p. 346.

[400] See Aircraft (Wrecks and Salvage) Order (1938), art. 2(b) (S.R. & O. 1938, No. 136), Hovercraft (Application of Enactments) Order 1972 (S.I. 1972, No. 971), art. 8(1) and ibid., p. 346.

[401] It should, however, be noted that the WRC includes a definition of wreck that has been implemented in the systems. This is, however, not a general definition, as

to trace the concept back in history and an extensive discussion, like to one on the concept in English law, is therefore not possible.[402] A wreck has, however, been described as a vessel that has been destroyed. Other variations include vessels that are difficult to raise or salvage and that have been in the water for a long time.[403] There is, moreover, no definition of vessel, as a legal concept, in the Nordic Maritime Codes, but it follows indirectly that a vessel is to have a hull and steering gear.[404] This has also been formulated as a vessel being "equipped to be steered and having a hull supported in the water by enclosed air".[405] If any or both of these characteristics are permanently lost, it has been argued that the vessel can be considered a wreck.[406] The reasoning is that in these cases, the vessel as such is destroyed and thus becomes a wreck. This way of thinking has also been used in insurance contracts. As an example, the terms referred to in NJA 1944, p. 209 state, in relation to an assessment of total loss, that a vessel that has suffered a sinking, stranding, foundering or similar action can "to its original state become destroyed and consequently be regarded as wreck".[407]

Another way of distinguishing between what constitutes a destroyed vessel and not, is to relate the determination to the possibility of repair.[408] A vessel that is impossible to repair can be considered as destroyed and, consequently, also as a wreck. This terminology has also been used in relation to wrecks in case law.[409] This clearly, however, is

discussed further below, and it is also a novelty in the systems.

[402] It would, however, be interesting to return to this question in more depth in the future.

[403] According to Tiberg, "[a]n obviously vital criterion of wreckage is that the object is destroyed as a vessel, not merely abandoned"; Tiberg, "Wrecks and Wreckage in Swedish Waters", p. 3 and cf. Aminoff, "Salvage of Wrecks in the Baltic Sea – A Finnish Perspective", p. 99.

[404] Cf. e.g. 1:3 Swedish Maritime Code.

[405] Tiberg, "Wrecks and Wreckage in Swedish Waters", p. 3.

[406] ibid., p. 3.

[407] Sw. *"blivit till sin ursprungliga beskaffenhet förstört och således är att betrakta som vrak"*.

[408] Cf. Markku Suksi. "Government Action Against Wrecks – A Finnish Perspective in Light of International Law". In: *Regulatory Gaps in Baltic Sea Governance*. Ed. by Henrik Ringbom. Springer International Publishing AG, 2018, p. 138 f, discussing wrecks as litter in Finnish law in relation to the possibility to repair the vessel in question.

[409] See NJA 1929, p. 618 and NJA 1941, p. 209.

a restrictive construction of the concept, since it would only encompass vessels in such a state that they are impossible to repair. It is also difficult to establish where the line is to be drawn between a vessel that is repairable and one that is not. This view is closely in line with a construction which has been used from an insurance perspective, which is discussed further below.

4.1.2.3 Linked to the Possibility of Salvage?

A distinct characteristic of the Nordic approach is found in ND 1990, p. 8, a Swedish average statement, linking the definition of wreck to the possibility of salvage. In order to analyse this distinction and the chosen line of reasoning, the case is discussed here at some length. The case concerned the vessel Vinca Gorthon and the main issue was whether the hull insurer of the vessel was responsible for damage that the vessel had caused. In order to answer this, it was necessary to discuss and determine whether the vessel was to be considered as a ship or a wreck. The issue at hand was thus closely linked to questions of insurance.

The vessel, which was a ro-ro ship, sank in February 1988 in bad weather with rough seas and heavy winds en route from Sweden to the Netherlands. The crew had been forced to abandon the vessel and it subsequently sank around 300 meters from an oil pipeline. The ship, or some part of the ship, collided with the pipeline and caused damage to it. Following the sinking, the ship also broke in two parts and was thus no longer intact resting on the ocean floor.

The main question in the case was if the hull insurer of the vessel had any liability as a consequence of a specific provision in the general Swedish terms for hull insurance from 1987. More specifically, the issue was if the insurer had any potential financial liability in relation to third parties that could claim damages from the insured as a result of the damage caused to the oil pipeline. These issues of insurance and liability were linked to the concepts of ship and wreck as a consequence of the insurance terms. In the case, it was necessary to decide if the hull insurer no longer had any responsibility as a result of the vessel

becoming a wreck.[410] This related to the insurance terms, since they stated that the insurer was only liable for damages caused by the ship and, consequently, as argued in the case, not a wreck.[411]

In the average statement, the average adjuster first categorised different liabilities from an insurance law perspective. The hull insurer was, in the case, responsible for real or constructive total loss and had the right, after payment in accordance with the policy, to enter into the position of the insured in respect of the insured's right to the vessel. The insurer could also choose to abandon the wreck, which would have the effect that the ship-owner's P&I-insurance could cover potential liabilities in relation to the vessel. Should the insurer, however, choose not to abandon the wreck, the insurer would be responsible for the wreck as an owner. This potential responsibility was referred to, in the case, as the hull insurer's "special wreck responsibility". This responsibility would thus become relevant should the hull insurer declare the ship a total loss and at the same time choose not to abandon the wreck.[412]

The average adjuster, having set out the basic liability issues involved in the case, subsequently referred to a "twilight zone between what in common speech is meant with a wreck and the ship's qualification as a wreck from an insurance law perspective". It was in this context that it became relevant to assess the potential liability of the

[410] The parties involved were Ghorton Lines AB (Ghorton) and the hull insurer Sveriges Ångfartygs Assurans Förening (SÅAF). Ghorton claimed that SÅAF were responsible according to the terms of the hull insurance, since the damage to the pipeline had been caused as a result of a collision between the ship, or some part of it, and the pipeline. SÅAF, on the other hand, denied responsibility and argued that the ship, at the time of the collision, had become a wreck and that damage caused by a wreck on the ocean floor did not fall under the terms of the hull insurance as a result.

[411] The relevant paragraph in the hull insurance stated that the insurer was responsible for real or constructive total loss of the ship and, furthermore, that the insurer was liable for any damage that the insured incurred in relation to third parties as a consequence of tort law as to damages to property caused by direct collision between the ship and said property. In an attempt to escape liability, the hull insurer thus argued that the terms of the hull insurance were only relevant in relation to ships. Since the Vinca Ghorton had become a wreck or, to use the phrasing in the case, had been transformed into a wreck, the insurer was no longer responsible since she was no longer a ship.

[412] It was also argued that the insurance terms should be construed in a restrictive way, in this case, given the fact that the hull insurance primarily is an insurance based on property damage and not focused on third party liability.

hull insurer. The average adjuster held that there is a distinction between what, in general, is meant with the term wreck and the concept's meaning in insurance law. It does not, however, follow from the reasoning why this is so or the underlying rationale behind this distinction. This is not explained in the case. Drawing on this distinction, the average adjuster deemed it unnecessary to further dwell on the specific terms of the hull insurance. Instead, it is held in the case, without further motivation, that it follows from the "completed test of the current facts" and "the background of the current investigation" that the vessel "cannot be qualified as a wreck in the moment when the ship collided with the pipeline". This chosen phrasing clearly suggests that a wreck is something that a ship can qualify to be, under certain circumstances, and, supposedly, that the ship transforms into a wreck as an effect of this qualification.

Interestingly, prior to the final case, the average adjuster had in a "Preliminary Opinion 1988-08-16" stated that "[w]hen 'Vinca Ghorton' reached the stage of being submerged in the water to the extent that it must be said that she was beyond all help of being rescued from going down completely, the 'Vinca Ghorton' ceased to be a ship and became a wreck". In the average statement, however, the average adjuster changed his mind and stated that he could no longer agree with this preliminary opinion given the circumstances in the case. This is formulated in the sense that it would not be possible to uphold this position since it would mean that a ship would no longer be treated as a ship while sinking, which would have adverse effects in relation to the discussed terms of the hull insurance. A collision that takes place during this phase, argued the average adjuster, must be covered by the terms of the hull insurance. This reasoning is thus heavily based on the insurance context in the case.

Furthermore, the average adjuster argued that it "obviously is the case that there is a difference between what one in common speech is ready to accept as a wreck and the assessment that is necessary to do from an insurance law perspective when determining if the ship is a wreck". In this context, the average adjuster also referred to a prepara-

tory work in Swedish law, SOU 1975:81 concerning dangerous wrecks, and quoted the following passage "[a] ship that is left abandoned gradually looses its characteristics as a ship and turns into a wreck. The investigation [in the preparatory work] has not had the ambition to contribute to the intricate maritime law discussion on the criteria for this transformation".[413] The average adjuster stated, in relation to this, that it is not possible to claim that a ship is a wreck following the crew's abandonment of the ship after which it is left drifting. Furthermore, it is also not possible, according to the average adjuster, to make such a claim in relation to a ship that is in the process of sinking. It is, however, it is suggested, perhaps possible to accept at this stage that "the ship – at least in common speech – is deemed to constitute a wreck when it reaches the ocean floor and remains there".

The average adjuster stated further, in what seems like somewhat of an understatement, that the fact that "the ship is disintegrated and as in the current case broken in two parts increases the possibility to view the ship as a wreck".[414] It does not, however, follow clearly if the average adjuster related this to what has previously been described as the common speech construction or the discussed insurance law perspective. The average adjuster then concluded that the determining test in assessing whether or not the ship was to be considered a wreck, from an insurance law perspective, was the following test: "as long as the ship is possible to salvage and the issue is viewed from an insurance law perspective the ship is not a wreck". The possibility to salvage is thus central to this definition. It is, however, unclear why the average adjuster chose to anchor the assessment to this possibility. This becomes especially poignant since this is something that will vary depending on the technological development within the salvage industry. It is also uncertain what a possibility to salvage actually means.

[413] SOU 1975:81. *Farliga vrak*.

[414] It is interesting to note that this actually goes further than what Gorthon argued in the case. The company argued that the ship ceased to be a ship and, presumably, became a wreck upon being broken in two parts but also added that it was impossible to assess whether this happened prior or subsequent to the damage caused to the pipeline.

The average adjuster continued by referring to the act of balancing between "what in common speech is viewed as a wreck and what from an insurance perspective *really* makes the ship a wreck" (emphasis added). The use of the word *really* stresses that the latter construction is the correct and valid one in this context. This solution, however, leads to interesting consequences. At least from an insurance law perspective, there can thus be various cases where a ship will still be viewed as a ship, according to this construction, despite having suffered extreme damage and having sunk to the ocean floor provided that there is a possibility for salvage.[415] In such cases it might seem more relevant to treat the ship as a wreck and this would certainly be the case from an English law perspective as discussed above.

The case can be criticised from several perspectives. One point is the made distinction between the general concept of what a wreck is and its meaning in insurance law. It is not evident why this distinction is made. The same result would have been possible to reach had the concepts of ship and wreck not been treated as antonyms or dichotomies. This alternative construction could acknowledge that the term wreck also can be read into the term ship as described in the terms of the hull insurance. This would thus entail an extensive construction of the term ship. Such a construction would avoid the cumbersome reasoning where a vessel that has split in two parts resting on the ocean floor is not considered as a wreck. This could also be phrased as construing or viewing the concept in a functional way, i.e. asking what function the property has in the given situation from an insurance perspective.

Another area of peculiarity is the way the construction of wreck in the case is tied to the assessment of whether or not it is possible to salvage the vessel. This means that what constitutes a wreck will change depending on the technological development within the salvage industry. With the same applied reasoning, it could be argued that the Titanic was a wreck from her sinking in 1912 up until the time

[415] This can also be viewed in light of the statement in Gaskell and Forrest, *The Law of Wreck*, p. 5, where it is held that "virtually any wreck can be found and recovered" with the use of modern salvage technology.

when it became possible to salvage her; probably sometime around the 1980s following the discovery of the wreck. As of today, Titanic would, consequently, no longer be a wreck, from an insurance perspective, should the logic in the average statement be upheld and drawn to its extremes. It is hard to envisage a more restrictive and narrow definition or construction of the concept of wreck.

4.1.2.4 Wreck as the Result of a Transformation

A characteristic of the Nordic approach is to view the concept of wreck as an end result or as a transformed stage. In this sense, what once was a ship or vessel has, in some way, turned into a wreck. Thus, Tiberg refers to a wreck as a vessel that has been destroyed and denotes the change from vessel to wreck as a ”transition”.[416] In the Swedish Maritime Code there is also a passage, concerning limitation of liability, where limitation is allowed in relation to vessels that have ”become wrecks”, also indicating that a wreck is something that a vessel becomes as a result of a transition or transformation.[417]

The view of a wreck being distinct from the concept of vessel or ship, as a result of a transformation or transition, was also central in, the already discussed case, ND 1990, p. 8. The main argument, put forward by one of the parties in that case, was that the vessel in question had become a wreck and was thus no longer a ship. Thus, since the insurance terms relevant in the case related to a ship and not to a wreck, the terms were, it was argued, not relevant since the property in question was no longer a ship. It had, in other words, been transformed into a wreck. The other party in the case also based their argumentation on this notion, arguing that the terms of the relevant insurance did not preclude liability in a situation where ”a ship transforms into a wreck”.

[416] Tiberg, “Wrecks and Wreckage in Swedish Waters”, p. 3.
[417] Chapter 9 § 2 the fourth period, Swedish Maritime Code; Sw. *blivit vrak*.

4.1.3 Harmonized Approach

As discussed above, the approaches to the concept of wreck differ between English law and the Nordic legal systems. The implementations of the WRC in the different systems, however, mean that there is now one common denominator between the systems in relation to the concept of wreck. The systems now share the definition of wreck as stated in the convention. This means that when it comes to modern non-state wrecks that pose hazards to navigation or the environment, the systems will share the same definition of wreck in this respect. The definition, which is discussed in more detail in section 5.5, is extensive. A wreck under the convention is defined as a sunken or stranded ship, or any part of a sunken or stranded ship, including any object that is or has been on board such a ship; or any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea, or a ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken.[418] When compared to the Nordic approach, the harmonized definition is far from the earlier discussed constructions. While the definition in the WRC is extensively wide, the earlier discussed constructions are clearly restrictive.

In relation to the convention, the question arises as to whether this means that the definition in the convention will replace the already discussed approaches. This would mean a significant change in position, since the wreck concept, as suggested, is generally construed restrictively in the Nordic systems, while the English approach is more extensive and well defined. The definition in the WRC, on the other hand, is extensive to the point of even encompassing ships that have not yet sunk or stranded as wrecks if it is reasonable to conclude that such an incident is likely to happen. Arguably, the implementations of the WRC and its definition, will not extend the definition to the other parts of the systems where the concept of wreck is used or of relevance. The definition is designed to fit the convention and should thus also be

[418] Art. 1.4 WRC.

confined to the provisions where it is implemented.[419]

4.1.4 Monistic or Pluralistic Approach?

Another issue, closely in line with the above discussion, is whether the concept of wreck is to be construed as a monistic concept or a pluralistic one. A monistic concept would mean that there is only one notion of what a wreck is, whereas a pluralistic approach would mean that there can be several different variations of what a wreck is within a legal system. The monistic view can e.g. be glanced from the average adjuster's reasoning in ND 1990 p. 8, where reference is made to a preparatory work on abandoned vessels and their potential categorisation as wrecks. A phrasing from that preparatory work is used by the average adjuster to conclude that the argument put forth is also valid in the completely different case at hand, i.e. a case that did not deal with abandoned vessels in that way. An opposite view, however, would be that the concept of wreck can mean different things in a legal system depending on the given situation, the applicable provisions and so on. This is also the argued stance above when it comes to the implemented definition from the WRC.

4.2 Distinguishing Variations of Wrecks

4.2.1 Proprietary Dimension of Wrecks

In English law, the concept of a wreck is closely linked to proprietary claims in relation to the property at hand. As discussed, it was established in common law early on and later in statute, that wreck of the sea, i.e. wreccum maris, belonged to the Crown as a part of the Royal Prerogative, while flotsam, jetsam and lagan were to be handed to the Crown as droits of Admiralty. This was, however, the case provided that the property as such was not claimed, "within a year and a day" to

[419] Whether the implementations, in fact, will change the general approach to the concept of wreck can, however, be an interesting future issue to investigate.

quote the early approach already enshrined in statute by 1275.[420]

When it comes to *adventurae maris* it has been suggested that such property, in early times, belonged to the finder if not claimed. With time, however, this position changed and also unclaimed *adventurae maris* belonged to the Crown.[421] Thus, property that would fall under the respective categories could be claimed by the rightful owner or, expressed differently, the person with better right. This is noted already in Sir Henry Constable's Case, where it is stated that:

> "Note, reader, at first the common law gave as well wreck, *jetsam*, *flotsam*, and *lagan* upon the sea, as estray [...], treasure-trove, and the like to the King, because by the rule of the common law, when no man can claim property in any goods, the King shall have them by his prerogative".[422]

In the case The Cargo ex Schiller, this passage was cited by Brett L.J. to the effect that any property that could fall under any of the mentioned categories but had not yet come into possession of someone other than the owner or the person that had better right to the property, could not be classified as such. Thus, Scott L.J. stated that "[...] it seems to me that nothing can be considered to be flotsam, jetsam, or lagan, within any effective legal definition of those things, if it has never been taken possession of by any one but the true owner". In the case at hand, the cargo had sunk and the owners subsequently managed to retrieve it from the water by the use of divers. According to Scott L.J., this meant that the property:

> "[...] was once "derelict", but ceased to be so the moment the true owners of it resumed the exercise of their rights of

[420] See Great Britain. *The Statutes of the Realm: Printed by Command of His Majesty King George the Third, in pursuance of an address of the House of Commons of Great Britain. From original records and authentic manuscripts*. Ed. by Alexander Luders and others. Vol. 1. Reprinted in 1963 by Dawsons of Pall Mall. 1810, 3 Edward I, c. 4.

[421] A further distinction to *wreccum maris*, however, seems to have been that there was no possibility for a rightful owner to claim property that was considered *adventurae maris* once seized by the Crown. See Dromgoole and Gaskell, "Interests in Wreck", p. 376 f.

[422] Sir Henry Constable's Case (1600), 77 E.R. 218 (1600), 5 Cook Reports 106a.

> ownership and began to endeavour to recover it, whilst no one else was endeavouring to save it. This specie was, therefore, in my opinion not "wreck" within the meaning of the statute at the time when it was recovered by its owners".[423]

This construction of the concept thus links it to the actions of any owner of property that could be considered as wreck. Thus, information of the property as such is not sufficient in order to determine whether it is to be considered wreccum maris, flotsam, jetsam or lagan. The relation of the owner or the person that has better right to the property is thus instrumental in order to assess whether the property is to be regarded as such or not.

4.2.2 Approaches Based on Function

Another way to view the concept of a wreck is to link the definition to the effect or aftermath of an accident or similar event. Thus, in Medieval times in England, a ship was only considered a wreck provided that no-one on board survived. This was later altered in the sense that a ship was only considered a wreck as long as no man, dog or cat survived the vessel.[424] Thus, it is stated in c. IV of the Statutes of Westminster under Edward I from 1275 that:

> "Concerning Wrecks of the Sea, it is agreed, That when a Man, a Dog, or a Cat escape quick out of the Ship, that such Ship nor Barge, nor any thing within them, shall be adjudged Wreck; but the Goods shall be saved and kept by view of the Sheriff, Coroner, or the King's Bailiff, and delivered into the hands of such as are of the Town where the Goods were found; so that if any sue for those Goods, and [after prove] that they were his, or perished in his keeping, within a Year and a Day, they shall remain to the King, and

[423] The Cargo ex Schiller (1877).

[424] Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, p. 28 and Runyan, "The Rolls of Oleron and the Admiralty Court in Fourteenth Century England", p. 101.

> be seised by the [Sheriffs, Coroners, and Bailiffs,] and shall be delivered to them of the Town, which shall answer before the Justices of the Wreck belonging to the King; And where wreck belongeth to another than to the King, he shall have it in like manner. And he that otherwise doth, and thereof be attained, shall be awarded to Prison, and make Fine at the King's Will, and shall yield Damages also. And if a Bailiff do it [and it be disallowed by the Lord,] and the Lord [will not pretend any Title thereunto,] the Bailiff shall answer, if he have whereof; and if he have not whereof, the Lord shall deliver his Baliff's Body to the King."[425]

In this sense, the concept of wreck was thus linked to whether anyone survived or not from the vessel. If someone survived, the vessel was not considered a wreck. This could thus lead to somewhat unintuitive situations, where a ship lying on the bottom of the ocean floor was not considered a wreck since members of the crew survived.

A major shift in how to construe the concept of a wreck was caused by the rights or possibilities that the status of a wreck entailed. In earlier times, wrecks could be perceived as *res derelicta* or dead property in the sense that anyone could take possession of property that had suffered a shipwreck and keep it. Sometimes this was varied in the sense that anything could be taken from the wreck provided that no-one survived the accident. In this sense, the concept of a wreck could also be linked to these perceived rights and whether or not anyone survived an accident. Later on, during the Middle Ages, however, it was recognized that proprietary rights could persist even though there had been a shipwreck and no-one had survived.[426] In light of that recognition, the various definitions targeting whether anyone survived, either man, dog or cat, became meaningless since the functional importance of being

[425]Great Britain, *The Statutes of the Realm: Printed by Command of His Majesty King George the Third, in pursuance of an address of the House of Commons of Great Britain. From original records and authentic manuscripts*, 3 Edward I, c. 4.

[426]Brækhus, "Salvage of Wrecks and Wreckage: Legal Issues Arising from the Runde Find", p. 45.

recognized as a wreck, in light of the earlier conception of a wreck as *res derelicta* or dead property, was no longer relevant.

4.3 Relation Between Wreck and Ship or Vessel

A wreck can be viewed as functionally bound to a pre-existing ship or vessel. This can be manifested and phrased in different ways. It is evident that what is considered as a wreck found on the bottom of the ocean floor in the form of a ship was once this very ship. Less obvious may be the case where floating cargo is viewed as a wreck or flotsam, jetsam, lagan or derelict but also this property can be viewed as functionally being bound to an earlier ship or parts of a ship. This way of construing what a wreck is includes some sort of transformation, i.e. a ship is transformed into a wreck. This could also mean that property that could have the same attributes is not to be considered wreck, since the property does not originate from a ship and thus has not undergone this transformation. In this way, this approach to the concept is a more confined and restricted one compared to a construction that would allow any sort of object to be treated as a wreck.

That the Nordic approach envisages a transformation from a ship to a wreck has already been discussed. The approach of construing wreck as a transformed stage from what once was a ship or parts of a ship has also been expressed in other systems. In the American case Cope. v Vallette Dry Dok Co., quoted in The Gas Float Whitton No.2 (1897) A.C. 337, concerning salvage, a similar formulation is used.

The relation between ship and wreck can be viewed as a binary one. In this sense, a vessel is either a ship or a wreck. Close to this construction lies the view of a ship turning or transforming into a wreck because of some action. An alternative view, however, would be not to take this binary stance. Instead, the question of whether a vessel is to be considered as a ship or a wreck can be functionally dependent on the situation at hand. Is it feasible to construe the vessel as a wreck given the question and context at hand? In this way, it may be possible to conclude that the vessel is to be construed as a ship in one sense and

instead as a wreck in another sense. The precise nature of the property is thus not decisive for the construction. Instead it is the property's function in the given context, relation or question that is decisive as to whether the vessel is to be construed as a wreck or not. This is close in line with the general functionalistic approach to property and private law in the Nordic legal systems.[427]

[427] Cf. e.g. Martinson, "How Swedish Lawyers Think about 'Ownership' and 'Transfer of Ownership' – Are We Just Peculiar or Actually Ahead?", p. 69 ff.

Part II

Hazards

Chapter 5

Common Ground on Hazards

5.1 Purpose of the Chapter

The purpose of this chapter is to investigate and discuss the common ground between the legal systems in relation to wrecks that can pose hazards to navigation or the environment. The common ground is made up by international conventions. The main focus in this chapter is on the Wreck Removal Convention, since it specifically deals with wrecks that pose hazards to both navigation and the environment. The other conventions are discussed in less detail. The background and discussions in this chapter are necessary in order to provide context and to answer the research questions in subsequent chapters.

5.2 UNCLOS

UNCLOS is an abbreviation of the United Nations Convention on the Law of the Sea. Denmark, Finland, Norway, Sweden and the United Kingdom are all parties to UNCLOS and the convention has a broad coverage worldwide, the major exception being that the US is not a party to the convention.[428]

[428] See United Nations (2018). *Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements*. Nov. 2017. URL: http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (visited on 03/2018).

5.2.1 Sovereign Rights in Different Areas

An important part of UNCLOS is the rights that states have in different maritime zones. States have sovereignty over their territorial sea as defined in part II of UNCLOS.[429] For the purposes here, full sovereignty means that the state has power to freely regulate in this area e.g. in relation to wrecks and wreck removal. This sovereignty is, however, subject to limitations in UNCLOS and other rules of international law that the state adheres to.[430] An important limitation is the right of innocent passage through the territorial sea for foreign ships.[431] Another important aspect is that warships and other government ships operated for non-commercial purposes enjoy immunity.[432]

In the exclusive economic zone, the sovereignty is limited in accordance with art. 56 UNCLOS.[433] The article, however, provides a coastal state with jurisdiction with regards to the protection and preservation of the marine environment within the exclusive economic zone.[434] This can become relevant in relation to wrecks and wreck removal. Furthermore, on the continental shelf, the sovereign rights of a coastal state are limited to exploration and exploitation of natural resources.[435] On the high seas, no state has sovereignty in accordance with the freedom of the high seas.[436] The same is true of the Area and its resources being a common heritage of mankind.[437]

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[429] The territorial sea extends 12 nautical miles from the baselines; see further art. 1–16 UNCLOS.

[430] Art. 2(3) UNCLOS.

[431] See art. 17–26 UNCLOS.

[432] Art. 32 UNCLOS and see also art. 95 and 236 UNCLOS.

[433] The exclusive economic zone extends up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; see art. 57 UNCLOS.

[434] Art. 56(1)(b)(iii) UNCLOS.

[435] Art. 77 UNCLOS and see art. 76 UNCLOS for its definition.

[436] See art. 87 and 89 UNCLOS.

[437] See art. 136 and 137 UNCLOS. Of potential interest in relation to wrecks found in the Area is, moreover, that any object of an archaeological or historical nature is to be preserved and disposed of for the benefit of mankind as a whole. In doing so, however, "particular regard is to be paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin"; art. 149 UNCLOS.

5.2.2 Specific Provisions on Hazards

When it comes to environmental damage, art. 221 UNCLOS concerns measures to avoid pollution arising from maritime casualties. The article states that nothing in that part of UNCLOS shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.[438] The article thus states, indirectly, that there is a mandate for states to take proportional action in situations, e.g. involving wrecks, when there is a risk of major harmful consequences outside of the territorial sea in cases relating to environmental hazards. As already stated, states have full sovereignty over their territorial sea and can thus regulate and enforce these matters freely provided that there is no conflict with UNCLOS, e.g. the right of innocent passage, or some other rule of international law.

In conclusion, UNCLOS thus includes provisions on environmental hazards, which can be relevant in relation to wrecks. The convention is, however, less clear on the issue of navigational hazards. As already discussed, wrecks can also pose such hazards. It is, however, clear that the sovereignty in the territorial sea means that states are free to legislate as they please as long as there are no conflicts with other norms, i.e. also in relation to wrecks that pose navigational hazards. In other areas, however, the potential mandate in relation to wrecks that pose navigational hazards is less clear.[439] The Wreck Removal Convention plays an important role in ensuring rights for a state to act in the exclusive economic zone also in cases involving wrecks that pose navigational hazards.[440]

[438] Art. 221(1) UNCLOS.
[439] Cf. art. 2 UNCLOS.
[440] See further in sec. 5.5.

5.3 Salvage Convention

The Salvage Convention 1989 concerns the law of salvage and superseded the earlier 1910 Brussels Convention on the same subject.[441] Denmark, Finland, Norway, Sweden and the United Kingdom are all parties to the convention.[442] The convention encompasses salvage operations, general principles in the law of salvage and how salvage rewards are assessed. It would be outside the scope of this study to discuss these issues in detail. Instead, some key areas of relevance to the common ground are mentioned.

The convention is relevant when it comes to the relationship between a salvor and a ship owner as well as owners of other property on board a vessel. It is also of indirect importance when it comes to modern wrecks that pose environmental or navigational hazards, since salvage law will govern any potential salvage attempts of such vessels e.g. in the immediate aftermath of a maritime casualty. The convention can also have a more limited relevance in relation to older wrecks, since some states recognise the ability to salvage non-protected and, potentially, historical wrecks as well. It is, however, important to note that the convention itself does not explicitly deal with wrecks. There is no definition or even mention of the concept in the convention text. On the other hand, it does not exclude wrecks as potentially covered by the convention either.[443]

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[441] Francesco Berlingieri. "The Salvage Convention 1989". In: *Lloyd's Maritime and Commercial Law Quarterly* (2017), p. 26.

[442] IMO (2020). *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or the Secretary-General performs depository or other functions*. Comprehensive information on the status of IMO treaties including signatories, contracting States, declarations, reservations, statements and amendments. 2020. URL: http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020.pdf (visited on 10/2020).

[443] See Rose, *Kennedy and Rose on the Law of Salvage*, s. 4-064–4-066, p. 107, where it is also noted that the Salvage Convention "is generally inclusive" and that English law has historically viewed wrecks as being potential subjects of salvage. See also Gaskell and Forrest, *The Law of Wreck*, p. 158 f.

5.4 Conventions in Relation to Pollution

There are several international conventions dealing with the issue of pollution at sea in various ways. The ones that are relevant from a wreck perspective are briefly discussed in this section.

5.4.1 Intervention Convention

The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (INTERVENTION) ensures the right for a state to take action on the high seas in some cases.[444] More specifically, actions can be taken in relation to maritime casualties that result in the danger of oil pollution. Actions that are necessary in order to prevent, mitigate or eliminate such grave and imminent danger that may reasonably be expected to result in major harmful consequences can be taken.[445] Such action shall be proportionate to the actual or threatened damage and shall not go beyond what is reasonably necessary for its purpose in line with the convention.[446] The convention does not allow actions in relation to warships or other ships owned or operated by states and used for governmental non-commercial service.[447]

Consultations and notifications shall be carried out before a state takes any action under the convention.[448] There is, however, an exception in cases of extreme urgency that require immediate action. Under such circumstances, actions can be taken without any, otherwise required, consultations and prior notifications.[449] The convention does not include any liability provisions that allow a state to make claims for arising costs as a consequence of actions that have been taken. It does, however, include a provision on liability on behalf of a state that has taken action that goes beyond the mandate provided by the convention. The state will, in such cases, be liable for any damage that this action

[444] See Mukherjee and Brownrigg, *Farthing on International Shipping*, p. 271 ff.
[445] Art. I(1) INTERVENTION.
[446] Art. V(1)-(3) INTERVENTION.
[447] Art. I(2) INTERVENTION.
[448] See further details in art. III INTERVENTION.
[449] Art. III(d) INTERVENTION.

has caused.[450]

The provisions that stem from the Intervention Convention can thus be used in order to take action in relation to wrecks that pose environmental hazards provided that they fall under the described scenario. The main focus of the convention is events that take place on the high seas. It has, however, been argued that the convention, or at least corresponding provisions in international customary law, also are applicable in the exclusive economic zone, since this would correspond to the area that the convention was meant to cover when it was drafted and implemented. The exclusive economic zone, as a maritime zone, has developed subsequent to this.[451]

5.4.2 CLC- and Fund Convention

The International Convention on Civil Liability for Oil Pollution Damage (CLC) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND) both concern liability when it comes to oil pollution damage from ships that transport oil cargo. It would be outside of the scope of the study to discuss the conventions in detail here. It suffices to state that they deal with liability issues for ships that carry oil in relation to third parties.[452] The provisions that stem from the conventions can thus become relevant in relation to wrecks that pose environmental hazards of certain kinds.

5.4.3 Bunker Convention

The International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER) concerns liability in relation to pollution in the form of bunker oil.[453] The provisions that stem from the convention

[450] Art. VI INTERVENTION.
[451] See Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", p. 97. This point is further discussed in sec. 5.5 on the Wreck Removal Convention below.
[452] See Mukherjee and Brownrigg, *Farthing on International Shipping*, p. 302 ff.
[453] See further ibid., p. 318 ff.

can, in this way, be used in order to deal with bunker oil pollution and can thus be relevant in relation to wrecks that pose this kind of environmental hazard.

5.4.4 HNS Convention

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS) deals, as the title suggests, with liability for damage caused by hazardous and noxious substances following accidents at sea. The convention is not yet in force.[454] Should the convention enter into force, it will target ships that contain certain hazardous and noxious substances and will, consequently, be relevant in relation to wrecks that pose environmental hazards of this kind.

5.4.5 London Convention on Dumping

The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) aims to prevent dumping at sea. The provisions that stem from the convention may be of relevance in relation to wrecks and wreck removal operations provided that a situation involving a wreck or a wreck removal operation can be construed as dumping under the convention. This means that the provisions, arguably, can become relevant in relation to wrecks that pose environmental hazards as a consequence of dumping in some cases.

5.5 Wreck Removal Convention

In this section the Nairobi International Convention on the Removal of Wrecks (WRC) is introduced and discussed at some length.[455] Denmark,

[454] See ibid., p. 315 ff.

[455] Parts of this section draws on two earlier articles of mine; see Kern, "Wreck Removal and the Nairobi Convention – a Movement Toward a Unified Framework?" and Kern, "Den internationella vrakkonventionen – en bakgrund och analys inför ett svenskt tillträde". For an excellent and critical in-depth discussion of the convention, see

Finland, Sweden and the United Kingdom are all parties to the convention.[456] Norway is, at the time of writing, in the process of ratifying the convention and a legislative process is ongoing.[457] Consequently, this section is relevant in relation to all the discussed legal systems in the study. The convention as such is first introduced, discussed and analysed. Thereafter, the implementations in the different legal systems are discussed and compared in order to illustrate differences and idiosyncrasies in specific systems. The findings have bearing on the ensuing chapters on wrecks that pose hazards to navigation and to the environment.

5.5.1 Status of the Convention

The convention entered into force on the 14th of April 2015.[458] As of December 2020 the convention has 53 contracting states.[459] The convention has thus gathered broad support and has been successful in this respect. It has been held plausible that the leading shipping nations in Europe will become parties to the convention.[460] There is also a movement within the EU in this direction and EU member states have in a statement endorsed to ratify the convention.[461]

Gaskell and Forrest, "The Wreck Removal Convention 2007" and Gaskell and Forrest, *The Law of Wreck*, chapter 7–10.

[456] IMO, *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or the Secretary-General performs depository or other functions*.

[457] See LOV-2018-12-20-115 om endringer i sjøloven mv. (fjerning av vrak) & prop. 105 LS Endringer i sjøloven mv. (fjerning av vrak) og samtykke til tiltredelse til Den internasjonale Nairobi-konvensjonen om fjerning av vrak, 2007.

[458] Denmark ratified the WRC on the 14th of April 2014 and since Denmark was the tenth country to ratify the convention it entered into force 12 months afterwards in accordance with art. 18.1 WRC, i.e. on the 14th of April 2015.

[459] IMO, *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or the Secretary-General performs depository or other functions*.

[460] Yvonne Baatz, ed. *Maritime Law*. Taylor and Francis, 2014, p. 267.

[461] See Council Document No. 15859/08 ADD 1, 19 November 2008. *Statement by the Member States on Maritime Safety* and Ds 2015:16. *Avlägsnande av vrak*, p. 71.

5.5.2 Origin and Purpose

The Nairobi International Convention on the Removal of Wrecks was adopted after final negotiations in Nairobi, Kenya, between 14 and 18 May 2007.[462] Because of the geographical location and as a gesture of goodwill and appreciation towards Kenya for hosting the diplomatic conference, the convention was titled after the capital.[463] The convention had at that stage been in the making for a long time. Discussions on the need for regulation on this issue had been ongoing since the 1970s and the Legal Committee of the IMO had already worked on the topic with increased interest for more than twelve years prior to the conference.[464] This long period of time also makes the Nairobi Convention the convention within the IMO that has taken the longest time to develop.[465]

The purpose of the convention is to harmonize regulations on wreck removal in different legal systems and international law.[466] The con-

[462]Shaw, "The Nairobi International Removal Convention", p. 402. The convention was the last step in a long-term process within the IMO's Legal Committee focusing on maritime liabilities and the handling of financial securities in relation to such liabilities; Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 50.

[463]LEG/CONF.16/INF.6, p. 2. This was also the first diplomatic conference within the IMO to be held in Africa, LEG/CONF.16/INF.2, p. 2.

[464]Charles D. Michel. "Introductory Note to the Nairobi International Convention on the Removal of Wrecks". In: *International Legal Materials* 46.4 (2007), p. 694, Shaw, "The Nairobi International Removal Convention", p. 402 and Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 53. This was also highlighted by the then secretary general of the IMO. In an opening statement, the secretary general said that some of the questions, that were to be addressed at the conference, had already been subjects of consideration 35 years ago; LEG/CONF.16/INF.2, p. 1 f. For a detailed discussion on the history and development of the convention, see Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 52 ff, Gaskell and Forrest, *The Law of Wreck*, chapter 7 and Shaw, "The Nairobi International Removal Convention", p. 405 ff. For an insight into the decision making processes in the Legal Committee of the IMO, see Nicholas Gaskell. "Decision Making and the Legal Committee of the International Maritime Organization". In: *The International Journal of Marine and Coastal Law* 18.2 (2003), p. 155 ff.

[465]Mukherjee and Brownrigg, *Farthing on International Shipping*, p. 327. This fact also undoubtedly put some pressure on the delegates to actually reach a result. A hint of this pressure is manifested in another part of the then secretary general's opening statement, stating that "[o]nly one test remains, namely, that of your political will to put an end, this week, to more than three decades of expectations"; see LEG/CONF.16/INF.2, p. 5.

[466]This was put by Kenya's Minister for Transport, elected President of the conference,

vention is, furthermore, meant to fill a gap in international law by providing coastal states with a clear mandate to demand the removal of and removing wrecks that pose hazards to navigation or the environment and that are situated in the exclusive economic zone outside of territorial waters, while, at the same time, enabling compensation for incurred costs as the result of a removal.[467]

The gap is partly the result of an uncertainty as to what mandate a state has in relation to a wreck that is located outside of the state's territorial sea.[468] Within the territorial sea and in internal waters, the state has full sovereignty and can thus apply its domestic legislation provided that it does not conflict with any other regulation to which the state is bound either by national or international law.[469] The situation is less clear in the exclusive economic zone.[470] While art. 56 UNCLOS, as discussed above, allows for some limited rights of action in the exclusive economic zone, in order to protect and preserve the marine environment, no such rights are provided in relation to navigational or other hazards.[471]

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in the following way: "[b]y finally addressing the problem of removal of wrecks, we will be promoting uniformity in international maritime law in a very significant way…"; LEG/CONF.16/INF.3, p. 1.

[467]Michel, "Introductory Note to the Nairobi International Convention on the Removal of Wrecks", p. 694. In this sense, the convention can also be described as trying to fill two legal gaps, the first one being the mandate to act in the exclusive economic zone and the second one being the possibility to claim compensation and require shipowners to have insurance for such costs; Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 51.

[468]LEG/CONF.16/INF.2, p. 2 and cf. art. 56 UNCLOS.

[469]Cf. art. 2 UNCLOS and Shaw, "The Nairobi International Removal Convention", p. 404.

[470]Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", p. 266.

[471]Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 60 f. One could, however, possibly argue that a wreck that poses a threat to navigation in most instances also, in fact, will pose a hazard to the environment in one way or another. Should another ship collide with the wreck, there will be a risk of environmental damage in the sense that both ships are likely to carry dangerous substances, at the very least bunker oil, that may leak as a result of the accident. A counterargument would, however, be that this danger is too remote and that this is not a case of the major harmful consequences as envisaged in UNCLOS. Whether a situation reaches the threshold or not will, of course, depend on the circumstances in a given case. In assessing such a situation one should, however, keep in mind that it is possible to view the formulation

An example of the above-mentioned uncertainty arose after the sinking of the French vessel Mont Louis outside of Belgium in 1984. While the cargo, including nuclear content, was successfully removed in a salvage operation, the wreck itself was left as it was resting on a sandbank close to a pilot station. As a result, the wreck posed a hazard to navigation. Belgian authorities issued a wreck removal order, in order to have the wreck removed, even though it was located outside of Belgian territorial waters. It was unclear whether Belgium had jurisdiction to order a removal in this way, but the situation was resolved without any ruling on this issue.[472] Another similar example is the already-mentioned sinking of the Tricolor in 2002. The ship sank in the French exclusive economic zone and French authorities ordered the wreck to be removed, but doubts were raised as to their legal authority and ability to do so.[473]

As for the possibility to claim compensation for incurred costs, there have been several cases where a state has had to carry out an expensive wreck removal operation and thereafter been unsuccessful in effectively claiming compensation from the shipowner or an insurer. The ship An Tai that sank in Malaysia in 1997 and constituted both a navigational and an environmental hazard is one example. The state had to intervene since the shipowner had not acted in line with the wreck removal order that had been issued. Following the intervention, the state, however, failed to recover the incurred costs from the shipowner or the insurer. Another example is the Lagik that was stranded and blocked the port of Wisbech in 2000. The United Kingdom was unsuccessful in recovering the £1.25 million spent on removing the wreck and cleaning up the

in UNCLOS as enabling a construction where the major harmful consequences can be related to the chance or risk of such an incident; cf. ibid., p. 62 f.

[472] See Shaw, "The Nairobi International Removal Convention", p. 403 ff and Nicholas Gaskell. "Lessons of the Mont Louis, Part One: Prevention of Hybrid Accidents". In: *International Journal of Estuarine and Coastal Law* 1.2 (1986), p. 119 ff.

[473] See Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", p. 93. That wrecks like these have been a problem is also evidenced by reports that both the Netherlands and Germany have encountered difficulties with wrecks lying outside of territorial waters and have tried, possibly without or with unclear legal mandate, to regulate removal processes like these; Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 51.

site.[474] A clear liability regime, compulsory insurance and the possibility to claim the insurer directly are inclusions in the WRC that are meant to address and prevent this kind of situation.

The discussion above has highlighted that there are uncertainties in relation to these issues of wrecks and wreck removal in international law. Consequently, it also follows that it is unclear if the convention codifies already existing mandates that states have in line with customary international law, if it expands already existing mandates or if it creates entirely new mandates for states to act in these situations.[475]

5.5.3 Central Definitions

The WRC includes some central definitions that are of paramount importance in order to understand which wrecks that fall under its scope. These definitions of ship, maritime casualty, wreck, hazard and removal are discussed here.[476]

5.5.3.1 Ship

In the WRC a ship is defined in art. 1.2 as "... a seagoing vessel of any type whatsoever...". How the term *seagoing* is to be construed is, how-

[474] Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 52.

[475] A similar ambiguity arose in relation to the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties from 1969. The convention was a result of the debate that followed in the wake of the wreckage of the Torrey Canyon and the environmental effects that followed as a result of that accident. In responding to the accident, the United Kingdom intervened on the high seas as the wreck was positioned outside of the territorial sea as delimited at that time. There were subsequent discussions on the actual mandate for states to intervene in this way in order to save their coasts; see Shaw, "The Nairobi International Removal Convention", p. 403 and cf. Hill, *Maritime Law*, p. 424. Given the attitude and acceptance of the United Kingdom's actions by other states, it can be argued that the Intervention Convention merely codified already existing rules of international customary law. The same line of reasoning could potentially be valid in relation to the WRC; see Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", p. 94 f. Another possibility is that a new rule of customary international law was created as a result of the United Kingdom's actions and the acceptance by other states; Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 56.

[476] A broader discussion on the concept of wreck and other related issues is found in chapter 4.

ever, not entirely clear.[477] This wording was not present in the original draft of the convention that was prepared before the conference.[478] The term is, however, present in a proposal issued by Australia, Canada, Germany Norway, Portugal and the United Kingdom concerning the scope of the convention.[479]

It has been argued that the inclusion of the term seagoing means that the convention excludes ships that can solely navigate on rivers.[480] In English case law, the term has previously been construed as not encompassing ships that cannot navigate on the ocean in this way.[481] Such a construction would, as an example, affect ships solely navigating on trade routes along rivers in internal waters. Usually this will be in the form of barges or similar structures.[482] It could, however, also be argued that the term should be construed in another more extensive way. A more extensive construction of the term would be that *seagoing* means that the ship can be navigated on water. This view would extend the definition's scope and may be arguable especially in legal systems not directly connected with English law and the similar constructions and the case law in that system.[483] The same may be true for states that have not traditionally made any division or distinction between seagoing ships or transportation and ships used for river-going or in-

[477] Gaskell and Forrest have called the inclusion of the term seagoing as unfortunate since "it is inherently unclear what it means", Gaskell and Forrest, *The Law of Wreck*, p. 449.

[478] Cf. LEG/CONF.16/3, p. 1.

[479] See LEG/CONF.16/12, p. 2 ff.

[480] Gauci, "The International Convention on the Removal of Wrecks 2007 – a flawed instrument?", p. 206 and Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 70.

[481] Simon Rainey. "What is a 'ship' under the 1952 Arrest Convention". In: *Lloyd's Maritime and Commercial Law Quarterly* (2013), p. 50 ff.

[482] The traffic on internal waters is of importance in some parts of Europe, e.g. in the Netherlands, Germany and Belgium. There is also a strive towards extending the traffic on internal waters within the EU since it is deemed as a sustainable way of transport; see e.g. Trafikanalys (2018). *Godstransporter i Sverige, redovisning av ett regeringsuppdrag*. Rapport 2012:7. 2012. URL: https://www.trafa.se/globalassets/rapporter/2010-2015/2012/rapport_2012_7_godstransporter_i_sverige.pdf (visited on 02/2018), p. 23 ff.

[483] Cf. Gaskell and Forrest, *The Law of Wreck*, p. 449 for the position in English law.

land waterway transportation.[484] The fact that the term seagoing was included, however, arguably suggests that a narrower construction is envisaged.

When it comes to barge-like structures in general, these are likely to fall under the convention.[485] This is also in line with English case law where barge-like structures without propulsion have been considered ships.[486] Art. 1.2 WRC, furthermore, includes an enumeration of what kinds of structures that are encompassed in the convention. It follows from the article that hydrofoil boats as well as air-cushion vehicles and submersibles are included in the definition. Submersibles, however, are, to a large extent, likely to be warships and on that ground excluded from the application of the convention in line with art. 4.2 WRC unless a state has chosen to extend the scope of application to also include its warships in accordance with art. 4.3 WRC. The two last examples in the enumeration are floating craft and floating platforms. In all of the above-mentioned cases, the underlying demand on the vessel being seagoing, in line with the relevant construction, has to be fulfilled. The two latter cases are, finally, not considered as ships under the convention while they are "... on location engaged in the exploration, exploitation or production of seabed mineral resources". In this way large parts of the offshore industry's vessels are excluded while in operation.[487]

5.5.3.2 Maritime Casualty

In order for a ship to turn into a wreck, in accordance with the convention, what is denoted as a maritime casualty has to have occurred. According to art. 1.3 WRC, a maritime casualty is defined as "... a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it, resulting in material damage

[484] Cf. Ds 2015:16, *Avlägsnande av vrak*, p. 56.
[485] Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 70.
[486] Gauci, "The International Convention on the Removal of Wrecks 2007 – a flawed instrument?", p. 206.
[487] Cf. Shaw, "The Nairobi International Removal Convention", p. 408 and Gaskell and Forrest, *The Law of Wreck*, p. 395 ff.

or imminent threat of material damage to a ship or its cargo".[488]

This is undoubtedly a wide definition and it is hard to envisage situations where a wreckage has taken place that is not at the same time also the result of a maritime casualty as defined.[489] One important observation that can be made, however, is that a consequence of the definition seems to be that it does not encompass ships that have been abandoned, unless there is some other incident that also causes them to suffer a maritime casualty. One example of this could be abandoned ships that are merely drifting, where no maritime casualty, as such, has yet occurred. This would mean that the convention's scope of application is restricted in relation to such objects, which can be problematic since they can be hazardous as well.[490] It has, moreover, been argued that the definition also entails that the regulation is not applicable in relation to ships that have been dumped or sunk for operational reasons.[491]

5.5.3.3 Wreck

As noted above, the term wreck is linked to the already discussed concepts of ship and maritime casualty in the sense that a wreck is the result of a ship that has suffered a maritime casualty. A wreck is defined in art. 1.4 as a sunken or stranded ship; or any part of a sunken or stranded ship, including any object that is or has been on board such a ship; or any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea; or a ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken.[492] Apart from the ship as such, the definition thus also covers parts of a ship

[488] This is, in substance, the same definition as found in art. 221.2 UNCLOS and art. II(1) in the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.

[489] Shaw, "The Nairobi International Removal Convention", p. 409.

[490] This may, very well, have been an unintended restriction of the convention's scope, caused by the use of the term maritime casualty in the drafting process; cf. the discussion in Gaskell and Forrest, *The Law of Wreck*, p. 398 ff.

[491] Cf. Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 69.

[492] Art. 1.4(a–d) WRC.

and objects that have been on board but are lost at sea. How this is to be construed has been the subject of some discussion. A floating container is an example of an object that may be lost at sea in line with the phrasing of the convention and that, consequently, is treated as a wreck.[493]

It is interesting to note that the definition in art. 1.4 WRC does not make any reference to the cargo of a ship. At the same time, the notion of cargo is mentioned in other parts of the convention.[494] One could argue that cargo will fall under what is referred to as an *object* in the definition. As Gaskell and Forrest have pointed out, however, this does not textually fit very well with bulk cargoes like iron ore or fertilisers.[495] What would the *object* in the definition's sense be in such cases? Despite of this lack of clarity language-wise, a functional and extensive construction of the definition is that cargo does fall under the definition. If such a construction is valid, logically, this has to be the case when cargo is on board a ship that is raised and removed under the convention. Arguably, the construction is also valid in instances where cargo is to be removed independently from the hull. Such a construction, furthermore, ensures that the definition and, as a consequence, the convention and the regulations emanating from it can be effectively used in practice.[496]

A complicating factor on the issue of cargo, however, is that cargo owners are not liable under the convention.[497] The question of whether or not the cargo interest should have to pay contribution, as a result of a removal, was discussed to and fro for several years, but such a provision was, in the end, omitted with the argument that it, among other things, would cause too much complexity from a legal point of view.[498] One could argue that the fact that this issue was discussed at all indirectly gives support to the claim that the definition in the convention also

[493]Gaskell and Forrest, *The Law of Wreck*, p. 396.
[494]See e.g. art. 1.3, art. 5.2(d) and art. 6(h) WRC.
[495]Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 90.
[496]Cf. the preamble to the convention.
[497]Cf. art. 10 WRC.
[498]See Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 92 ff.

covers cargo removal.[499]

The chosen definition of wreck, as can clearly be seen from the enumeration of what constitutes a wreck, is broad. Apart from ships that are stranded or sunk, as discussed, also objects that were on board such ships are encompassed by the convention along with objects that have been lost overboard.[500] Note, however, that a sunken aircraft or similar property will not fall under the convention, since the definition of wreck is tied to the concept of ship.[501] The final part of the definition extends the concept of wreck also to cases where the ship has not yet sunk or stranded, but where the situation is such that the ship is about to, or may reasonably be expected to, sink or strand provided that effective measures to assist the ship or any property in danger are not already being taken.[502]

The words effective measures in art. 1.4(d) WRC were included in order to prevent a coastal state from intervening in a scenario where a competent salvor is already engaged in an effective way. The salvor will then be viewed as a salvor in possession, under salvage law, and any intervention by another actor can lead to liability on behalf of the intervening party.[503] It should be noted that, in the case of salvage, the Salvage Convention and national salvage law will apply in relation to the remuneration or compensation payable to salvors and not the provisions in the WRC.[504]

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[499]See, on this issue, the long discussion, with extensive references to preparatory works, in ibid., p. 89 ff and Gaskell and Forrest, *The Law of Wreck*, p. 421 ff, where it is claimed that the definition does cover cargo removal also independently from the hull. Provided that this argumentation holds water, and one should keep in mind that it is primarily based on what follows from preparatory works to the convention, the result is that the provisions from the convention, in some cases, can be used to remove cargo, e.g. in cases that fall outside of other conventions like the CLC or HNS, should it come into force, and still channel liability to the registered owner of the ship. The owner, however, may have a right of recourse against third parties, in accordance with art 10.4 WRC when applicable, but it is uncertain when such a right of recourse might practically be viable in these cases.

[500]Art. 1.4(b) WRC.

[501]Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 70.

[502]Art. 1.4(d) WRC.

[503]Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 71 f and Shaw, "The Nairobi International Removal Convention", p. 409.

[504]See art. 11.2 WRC and Gaskell and Forrest, "The Wreck Removal Convention

An important observation to make in relation to the inclusion of the term effective measures, moreover, is that it seems to follow from the position of the term in the definition that it is only relevant in relation to the instances in art. 1.4(d), i.e. a ship that is about or may reasonably be expected to sink or to strand. In other words, the other parts of the definition in art. 1.4(a)–(c) seem not to be encompassed despite of the fact that salvage services can be rendered in relation to such situations as well. In this way, the earlier scenarios seem to be treated as wrecks even if they are subject to effective measures taken by a salvor in a salvage operation.[505] Another way to construe the formulation would be to read the definition as a whole and in that way affix the notion and exception involving effective measures also to the other parts of the definition. Arguably, this would, however, stretch the textual construction of the article too far, because why would the term then be placed in the final part of the definition and not in the beginning phrase before the listed instances? If this alternative view was envisaged by the drafters, such a formulation would have been more reasonable from a textual point of view.

The last part of the definition of wreck, targeting ships that are about or may reasonably be expected to sink or strand, can lead to intricate assessments as to when a ship is to be considered a wreck in these situations. When is a ship about to sink or strand and when can it reasonably by expected to do so? The convention is silent on how these assessments are to be made and by whom. In the end, it will thus be up to the affected state and the courts, that are to rule on these issues, to decide.[506] This also means that the notions of when a ship is a wreck and when effective measures are being taken are likely to vary somewhat depending on the affected state in question and what is decided in arising legal conflicts.[507]

Another important question, when it comes to the concept of wreck

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2007", p. 68.

[505] Cf. Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 71.

[506] Cf. ibid., p. 71 f.

[507] How such constructions are made and potential nuances between legal systems will be an interesting question to study in the future.

in the convention, is to which objects the definitions in the convention apply. This was an issue that was subject to some debate during the conference. The United States criticised the wording in art. 2 WRC, that concerns a state's right to take measures when it comes to a wreck that the state deems to constitute a hazard according to the convention in the convention area.[508] The fact that the article does not clearly state that it solely deals with wrecks from other state parties suggests, it was argued, that the rights of states that are not parties to the convention are compromised. The United States pointed to the fact that measures that a state can take within the exclusive economic zone, in relation to a wreck from another state, are limited according to international customary law as reflected in UNCLOS.[509]

Art. 221.1 UNCLOS states that coastal states have the right to take and enforce measures beyond the territorial sea provided that they are proportionate to the actual or threatened damage to protect their coastline, and other interests enumerated in the article, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences. The WRC, however, by the wording of art. 2.1 WRC, seems to extend the possibility of coastal states to take action since the article seems to cover wrecks in general no matter where they come from. It also extends the possibility to act to other scenarios than pollution. Apart from when there is an environmental hazard, the WRC also allows a coastal state to take action in relation to a wreck that constitutes a hazard to navigation. As already discussed, there is no corresponding provision in UNCLOS to this effect.

In order to deal with the above perceived problem, the United States proposed that it should be included in art. 16 WRC that nothing in the convention shall prejudice the rights and obligations that follows

[508]The notions of hazard and the convention area are discussed, in detail, further below.

[509]This phrasing, i.e. international customary law as reflected in UNCLOS, shall be read in light of the fact that the United States has not ratified UNCLOS; see Martin Dixon. *Textbook on International Law*. Oxford University Press: Oxford, 2007, p. 208.

from UNCLOS and customary international law of the sea for states that are not parties to the convention.[510] The wording of the article was, however, not modified in this way. Instead, the article in its final version reads: "[n]othing in this Convention shall prejudice the rights and obligations of any State under [UNCLOS] and under the customary international law of the sea". Consequently, the question posed is still relevant and one could argue that it, from the convention text, is still somewhat unclear how the convention deals with wrecks from states that are not parties to the convention. One line of reasoning is that it follows from art. 16 WRC, being directed at *any State*, that the provisions in the convention have no effect should they differ from international law or international customary law when it comes to states not being parties to the convention.

The wording of art. 16 WRC, in fact, becomes curious should it not be construed as relevant for states that are not parties to the convention, since the convention undoubtedly results in changes for the states that are parties to it when compared to what would otherwise have been the case, e.g. according to UNCLOS and international customary law. This is, after all, the whole point of the convention.[511] If art. 16 WRC was not aimed at states that are not parties to the convention, it would, in this way, seem to refute itself.[512] The better view seems to be that the convention does not alter the rights and obligations of states that are not parties to the convention in the suggested way. This is also in line with art. 34 of the Vienna Convention stating that a convention cannot bind third-parties without their consent.[513]

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[510] LEG/CONF.16/6, p. 1 ff.

[511] One could, however, possibly argue that the convention merely codifies already existing rules of customary international law as to the possibility to intervene in the exclusive economic zone in relation to hazardous wrecks of various kinds, but one could hardly argue that this was also the case concerning the provisions on liability and especially not when it comes to compulsory insurance.

[512] Cf. the statement by the United States in LEG/CONF.16/15, p. 2.

[513] See the discussion in Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 64 ff. It can, however, be noted, as a contrasting example, that it has been claimed that it is generally observed that the CLC is applicable to all ships, i.e. also in relation to ships from flag states that are not parties to the convention; ibid., p. 61.

5.5.3.4 Hazard

The preamble to the convention states that the parties are "[c]onscious of the fact that wrecks, if not removed, may pose a hazard to navigation or the marine environment". The concept of hazard is thus central to the convention and is defined in art. 1.5 WRC as "... any condition or threat that: (a) poses a danger or impediment to navigation; or (b) may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more States".[514] The convention thus focuses on two specific kinds of hazards and thereby indirectly two kinds of wrecks.[515] In this way, the convention focuses on two of the identified categories of wrecks in the classification in section 1.6.[516] It is important also to note that it is the affected state that is to decide whether a wreck constitutes a hazard in light of the convention or not.[517]

A hazard to the marine environment, as defined in art. 1.5(b) WRC, in fact includes two dimensions. The first concerns conditions and threats that may reasonably be expected to result in major harmful consequences to the marine environment, while the second part of the

[514] It is open for discussion what a navigational hazard, in line with the convention, actually is. Wrecks that are positioned in a busy traffic lane, like the Tricolor, will certainly fall under the definition. Other instances that are less clear can, however, also be envisaged. One example is a ship that has sunk in an area where dredging work is to be carried out in order to deepen a fairway or a harbour and that poses a danger or impediment to this work. One could question whether such a wreck really would constitute a danger or impediment to navigation in light of the convention. This will depend on how the term navigation is construed; cf. Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", p. 108 with examples of historical wrecks that have constituted obstacles like this.

[515] The two kinds of hazards and wrecks have been in focus since the formation of the convention. In an opening statement, the then secretary-general of the IMO said that a convention on wreck removal had been a priority for several governments for a long time and that "[t]hese governments clearly saw the removal of wrecks as a task of paramount importance to ensure safe navigation and environmental protection off their coasts"; LEG/CONF.16/INF.2, p. 2.

[516] That wrecks that pose navigational and environmental hazards can cause problems have already been discussed in section 1.5.

[517] As discussed, this can cause different constructions and nuances in the different legal systems that implement and apply the regulation; cf. art. 6 WRC and Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", p. 102.

article relates to damage to the coastline or related interests of one or more states. This latter part seems, by the article's wording, to be distinguished from the former. In other words, the final part of art. 1.5(b) seems not to be covered by the demand for major harmful consequences that is a prerequisite in relation to the first dimension concerning the marine environment. Instead, it seems to suffice that there is damage to the coastline or related interests. It has been suggested that this probably was not the original intention when drafting, but it seems to be the logical way to read the provision given the use of the word *or* in the article.[518]

When it comes to conditions or threats that may reasonably be expected to result in damage to related interests of one or more states, these interests are defined in art. 1.6 WRC as "the interests of a coastal State directly affected or threatened by a wreck, such as: (a) maritime coastal, port and estuarine activities, including fisheries activities, constituting an essential means of livelihood of the persons concerned; (b) tourist attractions and other economic interests of the area concerned; (c) the health of the coastal population and the well-being of the area concerned, including conservation of marine living resources and of wildlife; and (d) offshore and underwater infrastructure". These resemble art. II(4) of the Intervention Convention from 1969 with the exception of part (d) concerning offshore and underwater infrastructure that is not found in that convention.[519]

The fact that the definition of related interests in art. 1.6 WRC relates to the notion of a *coastal state* instead of an *affected state* shall be read in the light of the definition in the latter part of art. 1.5(b) WRC pointing to the "related interests of one or more States". A situation is thus envisaged where a wreck can impact more than one state, while being positioned in the convention area of the affected state as defined by convention. This requires that the states co-operate with each other, which has also been added as an obligation on behalf of the state parties

[518]Cf. Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 72 f.
[519]See Shaw, "The Nairobi International Removal Convention", p. 409.

in art. 2.5 WRC.[520] Situations can also be envisaged where different legal regimes allow for several states to act simultaneously in a given situation. It seems reasonable to presume that the parties involved in such instances will, generally, benefit from close co-operation.[521]

5.5.3.5 Removal

A removal is defined in art. 1.7 WRC as "any form of prevention, mitigation or elimination of the hazard created by a wreck". The words *remove*, *removed* and *removing* shall be construed in light of this. The removal as such is thus focused on the hazard that the wreck causes and not on the wreck itself. It is, consequently, possible to argue that the convention, in fact, does not primarily concern the removal of wrecks but rather the removal of hazards that wrecks can cause.

A consequence of the definition of removal is that a full-scale wreck removal operation may not be necessary in order to remove the hazard that a wreck poses. Operations and removal processes that demand far less action may suffice. As an example, it may, in some cases, be enough to remove the bunkers or specific cargo from a sunken wreck in order to deal with the hazard at hand, while leaving the rest of the wreck as it is.[522] This also means that the convention, in practice, may not lead to the consequences and results that some may conclude from its title, i.e. the removal of wrecks.

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[520] The convention's use of the term *affected state* can, indeed, become somewhat strange in this context since the affected state, defined in the convention as the state in whose convention area the wreck is located, shall endeavour to co-operate with other states that are *de facto* also affected by the wreck but that are not considered as affected states in light of the convention. Gaskell and Forrest have argued that a better solution would have been to simply use the term *coastal state* throughout the convention; Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 75.

[521] One such example could be a wreck that is located in the exclusive economic zone and, consequently, in the convention area of one state, while at the same time posing a grave and imminent danger to another state. In that case, the wreck is not positioned in the exclusive economic zone of the other state, but that state may be able to invoke the rights found in the Intervention Convention in relation to the ship, while the first state, at the same time, can take action in accordance with the WRC; see ibid., p. 73.

[522] Cf. Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", p. 102.

5.5.4 Scope of the Convention

The convention's scope of application is related to what is labelled as the *convention area*. The convention area is defined as "the exclusive economic zone of a State Party, established in accordance with international law or, if a State Party has not established such a zone, an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured".[523] This wording is the same as the one used in art. 2(a)(ii) of the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001. In the Bunker convention, the definition, however, forms a part of its scope of application and there is no mention of a *convention area* as a separate term. This is a novelty in the WRC.[524]

The fact that the convention area is defined as the exclusive economic zone, or a corresponding area, means that the convention, *e contrario*, does not cover the territorial sea, internal waters or the high seas.[525] From the outset, the convention thus covers an area between 12

[523] Art. 1.1 WRC; this wording should be seen in light of the fact that a state must claim or declare an exclusive economic zone; cf. Dixon, *Textbook on International Law*, p. 215 and Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 74.

[524] The latter part of art. 1.1 WRC, furthermore, is the same as the definition of the exclusive economic zone in art. 57 UNCLOS. The formulation, in this way, also enables a view of the exclusive economic zone as created by customary international law; ibid., p. 74.

[525] There were, however, other more extensive suggestions for the scope of the convention before its final stage. Mexico suggested that the definition of what is to be viewed as an *affected state* should be "... a State in whose Convention area a wreck is located *or effects of a maritime casualty are in evidence*" (emphasis added). The purpose of this seems to have been to highlight and acknowledge the effects that a wreck can cause at a distance. Probably, the delegation envisaged a situation where a wreck is located outside of the convention area but still affects the state. An example of this could be a situation where tides and currents are transporting emissions from a wreck. In this way, the wreck can pose a hazard to the environment of a state even though being located outside of its convention area; see ANNEX LEG/CONF.16/4, p. 2.

The proposal did not, however, lead to any change. A phrasing like that would *de facto* mean that the scope of the convention would be extended outside of the exclusive economic zone into the high seas. This would have the effect that the convention area and the affected state's possibility to take action in a given situation, and of course indirectly also the rights of the shipowner and other relevant actors, would vary

and 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. In fact, this means, despite of what has been stated above, that the convention could potentially indirectly regulate parts of the high seas. Since the scope of application is 200 nautical miles from the baselines also for states that have not established or claimed an exclusive economic zone, the area between 12 and 200 nautical miles that corresponds to the definition of the exclusive economic zone in UNCLOS would in fact represent the high seas according to international law for these states and thus coincide with the convention area.[526]

Another issue, on a similar theme, is that it has been argued that the Intervention Convention, despite the wording of its art. 1, allowing state parties to take "measures on the high seas", is also applicable in the exclusive economic zone due to the fact that no such zone existed when the convention was drafted and since the obvious purpose of the convention was to allow actions to be taken just outside of territorial waters.[527] This means that the application of the two conventions can overlap. It follows, however, from art. 4 WRC that the convention does not apply to measures taken under the Intervention convention. In fact, one can view the inclusion of the Intervention convention in the list of exclusions in art. 4 WRC as indicating, indirectly, that an application of the Intervention Convention in the exclusive economic zone is implied.

Since the Intervention Convention, arguably, seems to have a higher threshold, demanding "grave and imminent danger" from pollution, according to its art. 1, in order to take measures, there may, however, despite of this be instances where a situation will fall under the WRC but not under the Intervention Convention.[528] Another consequence

depending on the current state of the water. Such a scope of application would be hard to reconcile with the general principles of making law predictable and foreseeable. It would also, most likely, lead to further uncertainty and entail various problems of interpretation.

[526]See Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", p. 99.

[527]ibid., p. 97.

[528]See ibid., p. 104 and Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 58.

of this is that the Intervention Convention, in light of the exclusion in the WRC, may be applicable in relation to wrecks that pose grave and imminent danger of pollutions when located in the exclusive economic zone. Such an order could be viewed as more preferable, in some situations, by a coastal state, since the Intervention Convention seems to have less limitation as to the actions that a state can take when compared to the WRC.[529]

The definition in the WRC of the convention area will have effects on the kinds of wrecks that will fall under the convention. The water in the exclusive economic zone is often deep. Consequently, ships that founder and sink are less likely to pose a hazard to navigation since they will, generally, tend to be submerged in such a way as to not cause hazards of this kind. Instead, it is more likely that wrecks that pose a hazard to the environment will fall under the convention, since that hazard can be relevant even if the wreck has sunk to great depths.[530]

Another consequence of the scope of application is that incidents that occur close to shore are not covered. This is problematic since most incidents occur close to shore either in the territorial sea or in the internal waters of a state.[531] In order to enable states to encompass also these wrecks in their implementation of the convention, it includes an opt-in provision in art. 3.2 WRC that allows a state to extend the convention's scope of application to wrecks located within its territory

[529]Cf. Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 67.

[530]Baatz, *Maritime Law*, p. 266.

[531]Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 51, Søfartsstyrelsen (Eng. Danish Maritime Authority). *J.nr. 2012002641, "Forslag til Lov om ændring af søloven, lov om skibes besætning, lov om tillæg til strandingslov af 10. april 1895 og forskellige andre love samt ophævelse af lov om registreringsafgift for fritidsfartøjer (Gennemførelse af vrag fjernelseskonventionen, tilpasninger som følge af passagerrettighedsforordningen, gebyr for sønærings- og kvalifikationsbeviser, indførelse af en årlig afgift for skibe optaget i skibsregistrene og sanktionering af skibsførerens forpligtigelse til at redde de ombordværende m.v.)" (Eng. abbreviation: "Proposal to Change the Danish Maritime Code and Implement the Wreck Removal Convention").* 2012, p. 12, Herbert, *The Challenges and Implications of Removing Shipwrecks in the 21st Century*, p. 11 and Gauci, "The International Convention on the Removal of Wrecks 2007 – a flawed instrument?", p. 211. See also Axel Luttenberger, Biserka Rukavina and Loris Rak. "The Implementation of the Nairobi Convention on the Removal of Wrecks, 2007 in the Croation law". In: *14th International Conference on Traffic Science, University of Ljubljana, Faculty of Maritime Studies Portoroÿ (7891-3522)* (2011), p. 2 and LEG/CONF.16/12, p. 1.

including the territorial sea.[532] The wording used in the article: "[a] State Party may extend the application of this Convention to wrecks located within its territory, including the territorial sea…" indicates that, apart from the territorial sea, also internal waters are included in the definition. Why would the convention text otherwise explicitly state that the application within the territory *also* includes the territorial sea? A logical construction is that also other areas than the territorial sea are included and, consequently, that the scope of application also extends to internal waters.[533] The opt-in provision and whether or not states choose to use it, result in a shift of balance concerning what kinds of wrecks that will be covered by the different implementations. In the territorial sea and internal waters, the water depth is generally shallower and, as a consequence, more wrecks are likely to pose a hazard to navigation in those systems when compared to an implementation that is limited to the exclusive economic zone.

Less than half of the contracting states have chosen to extend the scope of the convention.[534] Considering that a wreckage is most likely to occur close to shore, it is clear that this development is a problem for the convention's effect in practice.[535] The fact that many states have chosen not to extend the scope of application also means that the overall

[532] If a state chooses to extend the convention's scope of application, some of the provisions in the convention are not applicable in the state's territory including the territorial sea; see art. 4.4(a) WRC.

[533] In practice, states have also interpreted the convention in this way; see Prop. 2016/17:178. *Skärpt ansvar för fartygsvrak*, p. 27 ff and Ds 2015:16, *Avlägsnande av vrak*, p. 52. See also Gauci, "The International Convention on the Removal of Wrecks 2007 – a flawed instrument?", p. 210.

[534] See IMO, *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or the Secretary-General performs depository or other functions* for the specific declarations from the contracting parties.

[535] Another dimension of this is that if more states would use the opt-in provision, this could also lead to a discussion of the right to a place of refuge for ships in distress. In that case, there would be insurance cover when it comes to ships that are in danger of sinking within a state's territorial sea or internal waters. This would, arguably, make states more willing to grant places of refuge for ships in distress instead of refusing entry or rejecting the ship. The sinking of the Prestige shows that the latter can have disastrous effects; see Shaw, "The Nairobi International Removal Convention", p. 416 and Verena Lahmer. "The 2007 Nairobi International Convention on the Removal of Wrecks". In: *Enforcement of International and EU Law in Maritime Affairs*. Ed. by Peter Ehlers and Rainer Lagoni. LIT Verlag, 2008, p. 180.

goal of striving towards harmonization and a uniform framework, as clearly expressed in the preamble of the convention, is undermined. In light of this, the inclusion of an optional additional scope of application may seem counterintuitive.[536] The inclusion has also been criticised on this basis. As is often the case in international conventions, however, the clause was the result of a compromise in the final stages of the negotiations between states and organizations that argued for a more extensive scope of application and others who were in favour of a more confined area of application.[537]

The idea that prevailed in the final compromise was, however, not new. A similar provision had earlier been included in a draft version of the convention, but had been removed in 2005.[538] The question of extending the convention to territorial and internal waters had thus been raised earlier in the development of the convention. A report from the CMI International Working Group, submitted to the Legal Committee of the IMO in 1996, suggested that the different national regulations on wreck removal were so similar as to enable also territorial waters to be a part of the convention's scope of application. The report argued further that a majority of wrecks will be positioned within the territorial sea and that it is important to strive for unification between states when it comes to the regulations by which they can be removed. Therefore, it was argued, the convention should encompass also these national waters. It is interesting to note that the report, in fact, suggested to include national waters in the convention's scope of application, while

[536]The article also lacks in clarity from a semantical point of view. Shaw has described the wording of the article as cumbersome, while Dromgoole and Forrest have called its structure "rather awkward"; see Shaw, "The Nairobi International Removal Convention", p. 410 and Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", p. 113.

[537]Cf. Kurt Grönfors. "Den konventionsbundna lagstiftningens problem". In: *JT* 1991/92.3 (1992), p. 418. That the question of extending the scope of the convention or not was to be a difficult question to agree on was clear from the outset. In the opening statement from the then secretary general of the IMO, the question of extending the convention to the territorial sea was described as a key issue to handle during the conference: "...I am aware that the Conference will still have to decide on some key points, most specifically whether to extend the convention's provisions to the territorial sea"; see LEG/CONF.16/INF.2, p. 3.

[538]See Shaw, "The Nairobi International Removal Convention", p. 406.

allowing state parties to exempt such waters from its application.[539] In the end, the final construction of the convention became the opposite, i.e. the scope of application is the exclusive economic zone, but the state parties can choose to extend the scope to their territory as well using the opt-in provision.

The criticism against extending the convention must be viewed in relation to the fact that a state has full sovereignty in the territorial sea and, thereby, far-reaching possibilities to regulate wrecks and wreck removal in this area. Certain states were reluctant to give away such powers and leave the regulation to the convention. The compromise in the final version of the convention includes the possibility to extend the scope of application, while at the same time limiting the regulatory regime in the extended area by omitting certain provisions.[540]

The opt-in provision can be viewed as an incentive for states to extend the convention's scope of application. This enables the convention to still be acceptable for those states who did not wish for an extended application. It has, however, been argued that the opt-in provision, as a compromise, seems a bit ambiguous and unnecessary, since states that are in favour of an extended scope of application can enact corresponding provisions within their own jurisdictions given that they have full sovereignty in this area.[541] This argument was addressed in a statement concerning the opt-in provision, issued by Australia, Canada, Germany, Norway, Portugal and the United Kingdom, during the conference. According to the statement, it would not be possible for a state to unilaterally legislate when it comes to the financial provisions of the convention and the provisions concerning compulsory insurance and the ability to claim the insurer directly.[542] This seems to be the

[539] See ibid., p. 405 f.

[540] See Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", p. 99 ff and art. 3.2 & 4.4(a) WRC. The issue of extending the convention or not had been highly contentious before this compromise; Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 55.

[541] William Irving. "Nairobi Convention: Reforming Wreck Removal in New Zealand". In: *Austl. & NZ Mar. LJ* 24 (2010), p. 84 and see also Luttenberger, Rukavina and Rak, "The Implementation of the Nairobi Convention on the Removal of Wrecks, 2007 in the Croation law", p. 3.

[542] LEG/CONF.16/12, p. 1; these issues are discussed in more depth further below.

better view, since a state would, without the existence of an opt-in provision, have difficulties unilaterally claiming an insurer, situated in another state, for an incident that has occurred in the territorial sea of the former state should the convention not enable an extension of the scope of application.[543] A state could, of course, unilaterally try to legislate to this effect, but it would unlikely be viewed as binding by subjects outside of that state.

5.5.5 Actions to be Taken

Art. 2 WRC allows states to take action in relation to wrecks that constitute hazards in the convention area. This thus requires that all the necessary requirements are present in a given situation in accordance with their definitions in art. 1 WRC. In other words, the property must be located in the convention area as defined in art. 1.1 WRC, it must be within the definition of a ship in art. 1.2 WRC and it must have been involved in what qualifies as a maritime casualty in art. 1.3 WRC. This maritime casualty shall have resulted in a wreck, as defined in art. 1.4 WRC, and this wreck must be deemed to constitute a hazard as defined in art 1.5 WRC.

When all requirements are present the wording of art. 2 WRC, furthermore, provides that a "State Party may take measures" emphasising that there is no obligation on a state to act in a situation where all the requirements are present. The convention instead provides a possibility for the state to act. The actions that can be taken involve locating, marking and, subsequently, removing the wreck.

5.5.5.1 Reporting the Wreck

Before the state can take any action, it needs to be informed of the existence of a wreck. When a ship has become a wreck, following upon a maritime casualty, the master and the operator both have a duty to report the incident to the affected state, i.e. the state in whose

[543] Cf. Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 109.

convention area the wreck is located.[544] *E contrario*, the registered owner therefore has no such duty.[545] It suffices that either the owner or the operator reports the incident. The operator of a ship is defined in art. 1.9 WRC as "the owner of the ship or any other organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the owner of the ship and who, on assuming such responsibility, has agreed to take over all duties and responsibilities established under the International Safety Management Code, as amended".[546]

A wreck may, of course, affect more than one state even though being located in the convention area of only one or, indeed, have impact

[544]See art. 5.1 WRC. It can thus be noted that while the convention contains an obligation to report a ship that has been involved in a maritime casualty resulting in a wreck, it does not include an obligation to report the discovery of a wreck, e.g. a discovered drifting wreck that may pose a hazard. The UNESCO Convention on the Protection of the Underwater Cultural Heritage, as a comparison, includes, in its art. 9.1(a), such a duty to report the discovery of underwater cultural heritage, e.g. a historic shipwreck; see Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", p. 117.

[545]This is the case despite of the fact that the duty to act and the financial responsibility are, ultimately, channelled to the registered owner; art. 9.2 and art. 10 WRC. There seems to have been suggestions to impose a duty to report also on the registered owner, but this was not adopted; Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 77.

[546]The definition is, in other words, wide. It can be noted that the definition makes reference to the International Safety Management Code (ISM), which is somewhat unusual, since conventions normally do not make references to other conventions in light of the fact that it is not certain that the contracting states also are state parties to such a referenced convention. Shaw has argued that since the ISM is part of the SOLAS Convention, with a broad application globally, this is unlikely to pose a problem in practice but has also pointed out the difference between the WRC and ISM in the sense that the ISM is applicable in relation to ships of 500 gross tonnage and above, while the limit in the WRC for compulsory insurance is 300 gross tonnage; see Shaw, "The Nairobi International Removal Convention", p. 409. It should, however, be noted that the other provisions in the WRC, other than the compulsory insurance, are applicable on all ships regardless of tonnage.

Other similar inclusions of this sort are the reference to the LLMC in art. 10.2 WRC and the reference to the provisions on dispute settlements in UNCLOS found in art. 15 WRC. The United States raised severe objections in relation to the inclusion of the latter, which, of course, must be viewed in light of the fact that the United States is not a party to UNCLOS; see LEG/CONF.16/18, p. 2, where the United States made the following strong objection: "[t]he United States does not accept that the inclusion of such provision in this Convention, particularly one without an opt-out provision and adopted under improper procedures, is a precedent for future IMO conventions…".

on another state than the one in whose convention area it is located. The definition in the convention does not take this into account and is instead only geographically defined. In such a case, the reporting will therefore have to be directed towards the affected state as defined in the convention.[547] This also means that the affected state may vary over time should the wreck, as an example, be drifting and still fall under the convention.[548] In these circumstances, it consequently seems necessary to report the wreck more than once.

The report shall include what is stated in art. 5.2 WRC and enable the affected state to assess whether the wreck poses a hazard in light of the convention or not.[549] This include information concerning the ship's registered owner and other information that is necessary for the affected state to make this determination. The enumeration in the article includes the precise location of the wreck, its type, size and construction as well as what kind of damage that has occurred and the wreck's condition. Information concerning what cargo the ship carries is also relevant and particularly so if it includes any hazardous or noxious substances as well as information on different oils, including bunker oil and lubricating oil, on board the ship. The enumeration correlates with the criteria that are to be taken into account according to art. 6 WRC when the affected state determines if the wreck constitutes a hazard in light of the convention.

5.5.5.2 Locating and Marking the Wreck

When an affected state becomes aware of a wreck, it shall, according to art. 7.1 WRC, use all practicable means to warn mariners and states concerned of the nature and location of the wreck as a matter of urgency.[550] It follows indirectly from art. 7.2 WRC that this is the case

[547] As stated earlier, the convention, however, also includes an obligation on states to co-operate when a wreck may pose a danger to more than one state; cf. art. 1.5(b), art. 1.6 and art 2.5 WRC.

[548] See Shaw, "The Nairobi International Removal Convention", p. 409 f.

[549] Art. 5.2 and 6 WRC.

[550] This obligation extends the duty in art 24.2 UNCLOS of the state to give knowledge of dangers to navigation in its territorial sea. In the WRC, this is thus extended to

regardless of whether the wreck is ultimately considered to be a hazard, in light of the convention, or not. The affected state thus has a duty to warn when receiving e.g. reports of a wreck. Another issue, of course, is that the affected state will not always have such information.[551]

If the affected state has reason to believe that the wreck poses a hazard, it shall, furthermore, ensure that all practicable steps are taken to establish the precise location of the wreck.[552] The assessment of whether or not the wreck constitutes a hazard shall be carried out in accordance with art. 6 WRC that includes an enumeration of different factors to take into account.[553] The way in which art. 7.2 WRC is formulated suggests that the affected state shall assess the situation not only in relation to the state itself, but also in relation to other states.[554] The focus of the assessment thus seems to be whether or not the wreck constitutes a hazard to any state. The convention is silent on the issue of whether this determination by the state can be challenged or not. It is, furthermore, unclear in which form the determination is to be made, e.g. by a court or by a statement from the state or its authorities. Arguably, it should be possible to challenge the state's assessment at some stage, especially given the fact that the determination is linked to the liability provisions that make the registered owner liable for incurred costs that result from the actions that follow upon a determination to this

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the exclusive economic zone; see further Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 78 f.

[551] In a practical sense, the article should therefore be viewed in relation to art. 5 WRC on the duty to report wrecks. Since there is no duty to report discovered wrecks in general, i.e. on other actors than the master and the operator, the information that the affected state receives may be limited in this regard. Art. 7 should, furthermore, be read in line with the definition of wreck and maritime casualty in art. 1.3–4 WRC. Wrecks that fall outside of the definitions, abandoned wrecks that have not suffered a maritime casualty as the most obvious example, therefore seem to fall outside of this duty.

[552] Art. 7.2 WRC.

[553] Such factors as the type, size and construction of the wreck, the depth of the water in the area, tidal range and currents are to be taken into account. Furthermore, the wreck's location in relation to shipping routes and the traffic in the area are relevant along with the content of the wreck in the form of cargo, bunker oil and other types of oil on board. Note also art. 6(o) WRC that allows for the state to take into account "any other circumstances that might necessitate the removal of the wreck".

[554] Cf. Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 79.

effect.[555]

When an affected state has determined that a wreck constitutes a hazard, in light of the convention, it shall ensure that all reasonable steps are taken in order to mark the wreck according to art. 8 WRC.[556] The wording of this article differs from art. 7 WRC in the sense that art. 8 WRC is only relevant if the wreck has been determined to constitute a hazard. This forms a sort of pattern or chain of events, where the affected state first is to be informed about a wreck in accordance with art. 5 WRC. Thereafter, the affected state shall warn those who are at risk and also locate the wreck if the state has reason to believe that the wreck constitutes a hazard. Finally, the stage of marking the wreck follows, after it has been determined to pose a hazard according to the affected state.

When marking the wreck, the affected state shall, according to art. 8.2 WRC, take all practicable steps to ensure that the markings conform with the internationally accepted system of buoyage in use in the area where the wreck is located. In 2006 the IMO recommended the testing of a new kind of buoy specifically designed for wrecks.[557] The marking of the wreck shall, according to art. 8.3 WRC, be promulgated by the affected state by nautical publications and other appropriate means.

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555 Cf. Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 85.

556 This obligation on the affected state to mark a wreck in the exclusive economic zone goes further than what follows from art. 56 UNCLOS, on the rights and duties of coastal states, and may prove onerous for states given the size of the convention area. Note, however, that the actions that are to be taken shall be reasonable, according to the article, which provides some leeway in this respect; see Shaw, "The Nairobi International Removal Convention", p. 412 and Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 79.

557 IMO. *Emergency Wreck Marking Buoy, SN.1/Circ.259*, p. 1 ff. The buoy is called an emergency wreck marking buoy and is designed to facilitate navigation both visually and by radio. The buoy shall be placed as close to the wreck as possible, alternatively around the wreck in a pattern and within other marks that are used. The buoy is coloured in vertical stripes of blue and yellow and has a top mark in the form of a standing or upright yellow cross; see ibid., ANNEX, p. 3.

5.5.5.3 Removing the Wreck

Following the reporting, warning, locating and marking of the wreck, the actual wreck removal is to be carried out. When an affected state has determined that a wreck in its convention area constitutes a hazard in light of the convention, the state shall immediately inform the state of the ship's registry and the registered owner.[558] Thereafter, the state shall consult with both the state of the ship's registry and other states that may be affected by the wreck on the measures that are to be taken in relation to the wreck.[559]

The registered owner is responsible for the removal.[560] This is expressed in art. 9.2 WRC as "[t]he registered owner shall remove a wreck determined to constitute a hazard". This may sound as a far-reaching obligation on behalf of the registered owner. It is, however, crucial to construe this article in light of how the term removal is defined in the convention. The term removal is, as already discussed, defined in art. 1.7 WRC as "any form of prevention, mitigation or elimination of the hazard created by the wreck". Given this definition, it follows that the owner's responsibility in these cases may be quite different from what art. 9.2 WRC might suggest. Anyone who envisages that the registered owner will necessarily have to remove a wreck and restore the site to its earlier state, following an implementation of the convention, may be disappointed. Far less extensive measures may, in many situations, suffice and still be in line with the convention given how removal is defined.[561] In light of this, one could argue that the wording of art. 9.2 WRC is misleading. Instead of removing the wreck as such, the convention focuses on removing the hazard that the

[558] Art. 9.1(a) WRC.

[559] Art. 9.1(b) WRC. The latter part of the article can be viewed in relation to art. 2.5 WRC on the co-operation between state parties, although the formulation in art. 9.1(b) WRC seems not to exclude states that are not parties to the convention.

[560] Details on the responsibility of the owner, in this respect, are discussed in the next section.

[561] To give a couple examples, it may be sufficient to leave the hull of the wreck as it is and instead remove some of its cargo and bunkers or, possibly, to plug it or seal any leaks from the wreck; cf. Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 80.

wreck causes. A clearer and less misleading way to phrase this in the convention would have been to link the removal to the hazard instead of to the wreck.[562]

It can, furthermore, be noted that the convention is silent on what is to happen to a wreck after it has been removed. There are no regulations concerning the disposal of the wreck, a subsequent sale or potential recuperation of expenses that were incurred during the removal process from the proceeds of a sale.[563]

5.5.6 Responsibility and Liability

Two central issues when it comes to wreck removal are responsibility and liability. The convention channels responsibility to the registered owner of a wreck. The owner has a duty to remove the wreck, in accordance with the convention, and is, to a certain degree, free to arrange for the removal process. There are, however, also provisions that deal with instances when the owner, for some reason, does not want to participate, is passive or cannot be contacted. The convention also allows for the affected state to intervene in certain cases based on how the wreck is being handled or removed. The owner is financially liable for costs incurred in relation to the actions taken in accordance with the convention, but the convention also allows the owner to limit liability if this is possible in the legal system. These aspects are discussed further in this section.

5.5.6.1 The Owner is Responsible

The responsibility of removing the wreck rests with the registered owner according to art. 9.2 WRC.[564] The registered owner is defined in art. 1.8 WRC as "the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship at the time of the maritime casualty". It is thus the time of

[562] Cf. Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 80.

[563] Shaw, "The Nairobi International Removal Convention", p. 416.

[564] This follows the pattern of other maritime law conventions like the CLC and the Bunker convention.

the maritime casualty that is decisive when it comes to the question of ownership should there be no registered owner. A subsequent sale of the ship or wreck apparently does not shift responsibility to the new owner or owners in this case.

5.5.6.2 A Duty and Limited Freedom to Remove

When removing a wreck, the registered owner has the right, according to art. 9.4 WRC, to contract with "any salvor or other person" and is thus, to a large extent, free to conduct the wreck removal operation in the owner's own way.[565] There are, however, also provisions that limit this freedom and allow for an interplay between the registered owner and the affected state. In this way, art. 9.4 WRC allows for the affected state to lay down certain conditions for the removal to the extent it is necessary to ensure that the removal of the wreck proceeds in a manner that is consistent with considerations of safety and the protection of the marine environment. When the actual removal operation has begun, the possible actions for the affected state are reduced. The affected state may then only intervene, according to art. 9.5 WRC, to the extent necessary to ensure that the removal proceeds effectively in a manner that is consistent with considerations of safety and the protection of the marine environment and can thus no longer lay down conditions.

[565]The fact that the registered owner has the right to contract with *any* salvor is important since it is not uncommon for states to have national regulations to the effect that only the state's own salvage contractors are allowed to carry out salvage operations. A state does not have sovereignty to do this in the exclusive economic zone and the article is, therefore, formulated in this way in order to enable the registered owner, or the relevant P&I-club, to contract with any salvor; see Shaw, "The Nairobi International Removal Convention", p. 412. When it comes to states that have chosen to extend the convention's scope of application, a modified version of the provision comes into play in relation to the state's territory including the territorial sea. It follows from art. 4.4(b) WRC that the article is modified in the following way in relation to this area: "[s]ubject to the national law of the Affected State, the registered owner may contract with any salvor or other person to remove the wreck determined to constitute a hazard on behalf of the owner". In other words, the convention allows for the above-mentioned national regulation in a state's territory, including its territorial sea, when the state has chosen to opt in to the extended scope of application, but not in the exclusive economic zone. Note also that such a national regulation must follow from *national law* and other means will therefore not suffice.

The removal actions, under the convention, will normally be carried out by commercial salvage or wreck removal companies, whether they be contracted by the registered owner or the affected state. The actions that are taken may, in these situations, fall under salvage law. In order to not create any friction between the provisions in the WRC and those under salvage law, it follows from art. 11.2 WRC that if the taken measures "are considered to be salvage under applicable national law or an international convention, such law or convention shall apply to questions of the remuneration or compensation payable to salvors to the exclusion of the rules of this convention".[566] This provision is formulated in a general way, but the convention in focus is the Salvage Convention and its implementation in different national laws.[567]

5.5.6.3 If the Owner is not Active

The fact that the registered owner is responsible for the removal of a wreck has little value should the owner not want to take an active part in the removal process. This could, to give two examples, be the result of the owner not wanting to play a part in the removal process at all or a situation when it is not possible to contact the owner. In order to deal with instances like these, the convention states in art. 9.6.a WRC that the affected state shall set a reasonable deadline within which the wreck is to be removed. The length of this deadline shall be set in relation to the nature of the hazard that the wreck poses. Furthermore, the affected state shall inform the registered owner in writing of the deadline and specify that the affected state may choose to remove the wreck at the registered owner's expense should the owner not remove it within this time period.[568] The affected state shall also inform the registered owner in writing that the state intends to intervene immediately should the hazard become particularly severe.[569]

If the owner is not successful in removing the wreck within the

[566] Art. 11.2 WRC.
[567] Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 83.
[568] Art. 9.6.b WRC.
[569] Art. 9.6.c WRC.

reasonable deadline that is set by the affected state or should it not be possible the contact the owner, the affected state may commence the wreck removal according to art. 9.7 WRC by the most practical and expeditious means available provided that it is consistent with considerations of safety and the protection of the marine environment.[570] The affected state may also commence the removal prior to this, according to art. 9.8 WRC, if immediate action is required, provided that the state of the ship's registry and the registered owner have been informed.[571] Thus, it would seem that art. 9.8 WRC is not applicable should it be impossible to contact the owner.

The possibilities the affected state have to lay down conditions for the removal process and to intervene in certain instances, as discussed above, create fairly strong mandates for the affected state in relation to shipowners and, thereby indirectly, to flag states. This shift in power towards affected states was an issue of concern, for flag states and shipowners, during the discussions that led up to the convention. As a compromise and in order to balance this relation, it was added in art. 2 WRC, dealing with objectives and general principles of the convention, that all measures taken by an affected state in these situations shall be proportionate to the hazard.[572] Such measures shall, furthermore, "not go beyond what is reasonably necessary to remove a wreck which poses a hazard and shall cease as soon as the wreck has been removed".[573]

There are thus important notions of proportionality and reasonableness that an affected state must take into account when taking measures

[570] A problem in relation to this, however, can be that the affected state misjudges the situation and intervenes with e.g. the argument that the wreck removal is progressing too slowly. The affected state may not, however, be competent enough to adequately assess whether this is the case. Wreck removal operations may be complicated and can demand advanced equipment and a time schedule that, among other things, takes notice of weather conditions and tidal effects. These conditions are perhaps not known to the officials in the affected state that want a quick fix to the problems that the wreck causes. It can therefore be crucial that the subject that carries out the wreck removal clearly communicates and has a dialogue with the affected state on these involved difficulties; see Shaw, "The Nairobi International Removal Convention", p. 412 f.

[571] States may, however, be reluctant to do so due to lack of expertise or equipment; see ibid., p. 413.

[572] Art. 2.2 WRC.

[573] Art. 2.3 WRC and bear in mind the definition of removal in art. 1.7 WRC.

in accordance with the convention.[574] Such measures must also, finally, not unnecessarily interfere with the rights and interests of other States including the State of the ship's registry, and of any person, physical or corporate, concerned.[575] Even though the convention thus gives an affected state fairly strong mandates to act, these actions are not totally at the state's own discretion. Instead, they must be viewed and balanced in relation to the above requirements of proportionality and reasonableness. Of course, it may, in practice, prove difficult to make these assessments and especially so in pressing situations when the time to act is limited. The interplay between the registered owner and the affected state can thus prove intricate in practice since it may be hard to make the assessments necessary to apply the regulation.

It should be noted that, as a consequence of art. 4.4(a) WRC, both art. 9.7 and 9.8 WRC are not applicable on the territory of a state, including the territorial sea, if the state has chosen to extend the scope of the convention in line with art. 3.2 WRC.[576] This may seem strange but should be viewed in light of the fact that the state already has full sovereignty in this area and can thus regulate to this effect on its own.[577]

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[574] See also Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 81 f.

[575] Art. 2.3 WRC.

[576] The articles that are omitted from such an application are art. 2.4, art. 9.1, 5, 7–10 and art. 15 WRC. Note, however, that the provisions in art. 2.2 and art. 2.3 WRC are not included in this list, which arguably means that the demands for proportionality and reasonableness according to those provisions, *e contrario*, are still in force in relation to the territory, including the territorial sea, of a state that has opted in. This may in fact be an infringement on the state's discretionary powers in this area that may limit the measures that the state can take. This could potentially work as an incentive for states not to extend the convention's scope of application; cf. Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 110.

[577] This rather confusing structure was, apparently, the result of last-minute drafting; see Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", p. 113. Shaw has argued that the logical place for these exclusions would have been in art. 3 WRC and it is easy to agree with him on this point; Shaw, "The Nairobi International Removal Convention", p. 411.

5.5.6.4 Strict Liability

The registered owner is, according to art. 10.1 WRC, liable for the costs incurred by locating, marking and removing the wreck in art. 7–9 WRC.[578] Since the liability is linked to these articles, the term costs is effectively also confined to these measures.[579] This means that the liability will not e.g. cover environmental damage or other damages like economic loss.[580] To make the registered owner liable for costs in this way is in line with other liability conventions in maritime law.[581] It should, however, be noted that the WRC differs from e.g. the CLC in the sense that it only regulates the cost of the removal, ultimately allowing the affected state to claim this liability, while the latter concerns third party liability with the possibility of individual claims.[582]

The owner has strict liability in the sense that the owner is presumed liable for the costs of removing the wreck.[583] The owner can, however, be exonerated from this presumed liability on three grounds.[584] Ac-

[578] As Gaskell and Forrest note, the costs of locating and marking the wreck alone can be considerable; Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 83.

[579] It should also be noted that compensation for these costs can only be claimed under the convention, according to art. 10.3 WRC, and not by any other means. Other claims, e.g. based on the law of torts, cannot be allowed to be directed towards the shipowner in this sense since this would be in conflict with the purpose of the convention. It is, however, possible to direct claims for costs that fall outside of the linked provisions on locating, marking and removing the wreck; cf. ibid., p. 86. This is also acknowledged specifically in art. 10.3 WRC in relation to a state's territory, including the territorial sea, when the state has opted in to extend the convention's scope of application.

[580] ibid., p. 83 f. Another aspect of this is that the liability does not encompass any costs other than those that the affected state has incurred; cf. Gauci, "The International Convention on the Removal of Wrecks 2007 – a flawed instrument?", p. 210. Several borderline cases can be envisaged, where actors that are in close connection with the state but separated from a legal point of view are involved in a wreck removal. This can lead to uncertainties in this respect; cf. Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 86 and, in relation to expenses incurred by salvors, ibid., p. 87.

[581] Irving, "Nairobi Convention: Reforming Wreck Removal in New Zealand", p. 207 and Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 83.

[582] ibid., p. 86.

[583] This strict liability does not, however, prevent the registered owner from any right of recourse against third parties; see art. 10.4 WRC.

[584] A possible fourth ground would also be to argue that the measures taken by the affected state were not proportional or reasonably necessary in order to remove the hazard as required by art. 2.2–3 WRC; cf. Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 84.

cording to art. 10.1.a WRC, the owner is exonerated if the owner proves that the maritime casualty that caused the wreck was the result of an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character.[585] These are standard cases of exoneration found in maritime law conventions.[586] Given modern technology and weather forecasting, it may be difficult to show that a natural phenomenon was exceptional, inevitable and irresistible. Tsunamis and similar events may, arguably, fulfil these demands.[587]

Furthermore, the owner can be exonerated by art. 10.1.b WRC, provided that the owner proves that the maritime casualty was wholly caused by an act or omission done with intent to cause damage by a third party or, according to art. 10.1.c WRC, by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of the function.[588] These possibilities of exoneration also follow what is usually included in maritime law conventions.[589]

5.5.6.5 Limitation of Liability

The registered owner has the right to limit liability if this is possible in the legal system.[590] This is expressed in art. 10.2 WRC in the sense

[585] It was suggested that the term terrorism should be included in the enumeration in relation to exclusion for war, but this did not receive enough support. In this way, most acts of terrorism will probably fall outside of this exclusion; Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 84 and see Gard (2018). *Member Circular No. 08/2014, Entry into Force of the Nairobi International Convention on the Removal of Wrecks*. Nov. 2014. URL: http://www.gard.no/Content/20749954/MemberCircular_8_2014.pdf (visited on 02/2018), p. 2.

[586] See Shaw, "The Nairobi International Removal Convention", p. 413.

[587] Cf. Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 84.

[588] Acts of terror may arguably fall under the former exclusion, i.e. acts done with the intent to cause damage by a third party. The crux is that the maritime casualty in that case, according to the article, must be wholly caused by the third party and the registered owner must be able to prove this. Any contributory negligence, which is not uncommon in maritime casualties, would seem to make the exclusion inapplicable; see ibid., p. 84.

[589] See e.g. art. III(2)(c) CLC.

[590] The right to limit liability means that there is a cap on the amount of possible liability on behalf of the responsible party. This is a usual inclusion in liability regula-

that nothing in the convention affects the registered owner's right to limit liability under any applicable national or international regime. The article also expressly mentions the Convention on Limitation of Liability for Maritime Claims (LLMC) as amended by the protocol of 1996, which is the major convention on limitation of liability that, in general, will be relevant when it comes to limitation.[591] Given the high costs that are involved in wreck removal operations, it is plausible to presume that there will be many instances where the limitation amount is substantially lower than the actual cost of the removal operation.[592]

An issue of paramount importance in relation to limitation of liability is that the LLMC includes an opt-out provision concerning limitation of liability for costs associated with wreck removal.[593] Several states have chosen to use this opt-out provision. In these legal systems the registered owner will thus not be able to limit liability even though the phrasing in the WRC might seem to indicate this.[594] The United Kingdom and Germany, as two examples, have made reservations to this effect.[595] The wording in art. 10.2 WRC also enables the registered owner to limit liability according to a national system of limitation of liability, i.e. either an implemented version of the LLMC or another separate national regulation, but it is, of course, not certain that such

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tions in maritime law; see e.g. art. V CLC and art. 6 Bunker convention. One of the arguments that is commonly used in order to defend the right to limit liability is that it would be hard to otherwise be provided insurance cover; see Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 97. Limitation of liability is further discussed in chapter 12.

[591] See IMO, *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or the Secretary-General performs depository or other functions* and Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 97.

[592] Cf. the examples of limitation levels for different ships in ibid., p. 98 ff.

[593] See for a full description art. 18.1 and art. 2.1.d–e LLMC 1976 as amended by the protocol of 1996. The protocol of 1996 did not change this.

[594] Herbert, *The Challenges and Implications of Removing Shipwrecks in the 21st Century*, p. 9.

[595] Hill, *Maritime Law*, p. 402, Mukherjee and Brownrigg, *Farthing on International Shipping*, p. 328 and Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 98. See also IMO, *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or the Secretary-General performs depository or other functions* and, furthermore, Gauci, "The International Convention on the Removal of Wrecks 2007 – a flawed instrument?", p. 215 f for a line of reasoning as to why such a reservation can be reasonable.

national systems will exist in all legal systems.[596]

The registered owner is, furthermore, according to art. 11 WRC not liable for costs, as defined in art. 10.1 WRC, if such costs would be in conflict with the CLC, HNS, the conventions on nuclear liabilities or the Bunker convention. As to limitation of liability, the first of these have their own funds and specific limitations laid down in the conventions. The Bunker convention, however, restricts liability to the limitation amount that follows from the LLMC just as the WRC when applicable. Should a wreck therefore cause costs that fall under both the Bunker convention and the WRC, arising claims from these, and indeed other claims that would fall under the LLMC, will need to share and compete in the limitation fund provided that the legal system allows for limitation of liability in relation to wreck removal costs.[597]

5.5.7 Enforcement in Practice

In order to secure that it is possible to use the provisions that the convention allows the contracting parties to implement, it includes

[596] The fact that there may be situations where there is no system of limitation at all was highlighted by the International Group of P&I Associations (P&I Clubs) together with the International Chamber of Shipping (ICS) in a statement at the conference. The statement points out that conventions in maritime law normally include a balance between strict liability, the defences available to the owner for exoneration or exculpation from this liability and a possibility to limit liability; LEG/CONF.16/15, p. 2. The fact that there evidently will be differences as to the right of limitation is, one could argue, in stark contrast with the underlying goal of harmonizing the regulations on wreck removal. Considering the fact that wreck removal operations often are expensive, the question of whether or not it is possible to limit liability is of great importance. Since the LLMC allows to opt-out of limitation in this respect and given the fact that the convention expressly makes reference to the convention, it is clear that this line of reasoning had no decisive impact during the conference.

Another consequence of the phrasing in the convention is that a situation can be envisaged where a state allows for low limits of liability. This point seems to have been highlighted by Mexico in a proposal stating that an owner should only be allowed to limit liability according to a national system of limitation if the limit of liability does not fall below the limit as stated in the international conventions on the area and first and foremost as stated in the LLMC; see LEG/CONF.16/4, p. 6. No change was, however, made to this effect. There would also have been problems with such a phrasing, since one could argue that it would result in the convention binding states indirectly to international conventions, and in practice to the LLMC, to which the states would not necessarily be parties to.

[597] Shaw, "The Nairobi International Removal Convention", p. 414.

certain mechanisms in order to secure their enforcement in practice. The arguably most important inclusion is the demand for compulsory insurance on behalf of the registered owner and the possibility to claim the insurer directly for incurred costs.

5.5.7.1 Compulsory Insurance

The convention includes provisions on compulsory insurance in order to secure that it is also possible to enforce the registered owner's liability. The registered owner of a ship of 300 gross tonnage and above flying the flag of a state party is, according to art. 12.1 WRC, required to have an insurance.[598] Besides ordinary insurance, other financial securities like bank guarantees are also allowed but the normal type of insurance will be P&I-cover. The insurance or security shall cover the owner's liability in line with the convention to an amount that equals the available limitation of liability under the applicable national or international limitation regime. In all cases, however, the amount shall not exceed the limitation amount as calculated in line with the LLMC as amended by the protocol of 1996.[599]

The cap on the insurance will thus ultimately be based on the LLMC. This will consequently be the case also in states that have chosen to opt-out of the possibility to limit liability for costs associated with wreck removal in the LLMC.[600] Since wreck removal operations, as discussed,

[598] The set limit of 300 gross tonnage and above has been described as relatively low; see ibid., p. 414. It should be emphasised that the tonnage limit is only relevant in relation to the compulsory insurance. The rest of the convention is applicable to all ships that fall under it regardless of tonnage; Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 70.

[599] See art. 6.1.b LLMC.

[600] How one should view this compulsory limit or cap in this situation is a bit unclear. The cap is not formulated as a limitation amount or fund as would have been the case following limitation according to the LLMC. One could, in this way, argue that the insurer in this case has a duty to pay in relation to the limit, as calculated in accordance with the LLMC, in relation to the claimant of the wreck removal costs and that the limit up to the cap is not to be shared with other claimants like claims from cargo interests or other claims in relation to the ship. This is fundamentally a result, one could argue, from the fact that the cap of the compulsory insurance is decided *in relation* to the LLMC but is still separated from it and not under the convention as such. In this way, it may be necessary to establish two separate funds, one of which is solely dedicated to

tend to be expensive operations that may substantially exceed the limitation amount, as calculated in line with the LLMC, this solution will affect the degree of compensation that will be available for the aggregated costs from the compulsory insurance. It is thus not necessarily so that the compulsory insurance will lead to all claims being met. In fact, it is plausible to presume that in many cases this will not be the case because of this reason.

A certificate, attesting that insurance or other financial security is present, shall be issued to each ship in accordance with art. 12.2 WRC. This certificate shall show that the ship fulfils the demands as laid out in art. 12.1 WRC. An enumeration of what is to be stated in the certificate is found in art. 12.2.a–g WRC. The certificate is to be kept on board the ship and will normally be evidenced in practice by Blue Cards issued by P&I-clubs.[601]

5.5.7.2 Possibility to Claim the Insurer

An important inclusion, that complements the compulsory insurance, is that the costs incurred as a result of a wreck removal can be claimed directly from the insurer or some other person that provides the financial security. The insurer is then free to use, more or less, the same defences as the registered owner and may also invoke the defence that the maritime casualty was caused by the wilful misconduct of the registered owner. The insurer, like the registered owner, also has the right to limit liability.[602] When the insurer exercises the right of limitation,

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the wreck removal claimant under the WRC.

In the same way, but the other way around, should the state not have opted out of the possibility to limit liability for costs associated with wreck removal, the cap seems to be in the form of a limitation of liability in accordance with and under the LLMC, which would lead to a joint limitation fund where claimants would need to share *pro rata* if the limitation amount is not enough to satisfy all claims. The issue is unclear. One could also argue that it is not coherent for there to be two funds in the first instance, should that be a valid interpretation, but not in the second instance in light of the purposes of the convention; see further the argumentation in Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 105.

[601] Art. 12.5 WRC.

[602] Although it is a bit unclear when this will be practically relevant in light of the fact that the insurance amount, as discussed, only needs to cover the limitation amount in

this ability is not dependent on the owner's right to do so.[603]

An important inclusion to note in art. 12.10 WRC is that the insurer is not allowed to invoke "any other defence which the defendant might have been entitled to invoke in proceedings brought by the registered owner against the defendant". This wording means in practice that an insurer will not be able to invoke a defence using what is called a *pay to be paid-clause*, as found in most of the different sets of rules that P&I-clubs use, i.e. contractual provisions in relation to the insured in insurance terms. What the clause fundamentally states, though often phrased in different ways, is that a club will only pay, to the owner, what the insured owner already has been able to pay using funds belonging to the owner unconditionally and not by way of loan or otherwise.[604] The club can, however, choose, at its own discretion, to make such payments.

What the *pay to be paid-clause* thus leads to is a tactical advantage for the clubs, in the sense that they can invoke the clause in relation to insured shipowners that are insolvent and therefore unable to pay any claims.[605] Since the insured shipowner in such a case has not been able to pay anything to a claimant, the club has no contractual duty to pay under the P&I-insurance unless it chooses to do so at its own discretion. Considering the fact that wreck removal operations tend to

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the LLMC.

[603]See art. 12.10 WRC for the exact wording of these rights and possibilities.

[604]For a Swedish case, where a *pay to be paid-clause* was decisive for the outcome, see ND 1994 p. 28. The case involved a bulk vessel that had sunk close to Åland. In the aftermath of the sinking, the ship owner contracted for the wreck to be removed in line with an order issued by the local authorities. Since the ship owner had no funds available, however, no payment was made to the firm that had carried out the operation. The ship owner claimed compensation from the P&I-club, claiming that the action was within the P&I-cover. The P&I-club, however, rejected payment arguing that the ship owner had not made any payment to the hired firm which was a prerequisite to payment in accordance with the P&I-terms, i.e. the *pay to be paid-clause*. The average adjuster in the case agreed with the P&I-club and held that the club had no responsibility to pay under the cover since no payment had been made by the shipowner. The ship owner's argument that the *pay to be paid-clause* was in breach of § 36 in the Swedish Act on Contracts (Sw. *avtalslagen*) was rejected by the average adjuster.

[605]The members of P&I-clubs are here treated as insured shipowners for the sake of clarity.

be expensive and the prevalence of one-ship-companies in the shipping sector, it is easy to envisage situations where the clause may be relevant as a means for a club to escape payment. The possibility to claim the insurer directly in art. 12.10 WRC and the specific formulation that the insurer shall not be able to invoke any other defence is meant to avoid these situations and thus to make the *pay to be paid-clause* unusable.[606]

The compulsory insurance and the possibility to claim the insurer directly enable states to claim compensation in instances where this would otherwise not be possible. Since wrecks often have no value in the sense that the costs of removing them tend to be far greater than their potential value and the fact that ships are often owned in the structure of one-ship companies, it is likely to be difficult for an affected state to claim compensation from an owner, that is likely to become insolvent following a wreckage, without these provisions.[607]

The possibility to claim the insurer directly will, however, effectively be limited by the cap as calculated under the LLMC. Gaskell and Forrest have argued that it may be problematic for a state to accede to the convention as a consequence of this. The argument builds on the costs of wreck removal operations, that often go beyond the limits of the LLMC, and how insurers may argue in the wake of the convention. What the convention will lead to is a situation where a state party has been provided rights of intervention in the exclusive economic zone in relation to wrecks that pose a hazard to navigation or to the environment along with the related interests as phrased in the convention. At the same time, the private law possibilities to claim compensation for the associated costs result in a possibility to claim the shipowner, possibly without limit if the state has opted out of the LLMC, while only being able to claim the insurer directly up to the limit in the LLMC. For a state that has opted out of the possibility to limit liability in these instances, the state now finds itself in a situation where it may very well

[606] See further the discussion in Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 100 ff.

[607] Shaw, "The Nairobi International Removal Convention", p. 402 and Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 51.

have the right of full compensation from the shipowner, but this person is likely to become insolvent and will in most cases not be able to pay the incurred costs. The state is then left with the insurer, who will pay only up to the limitation amount. The potential remaining sum, up to the real wreck removal cost, will therefore in the end be left to the state.

The above scenario must, however, also be seen in the context of the state having unclear mandates, without the convention, to act at all in this way in the exclusive economic zone. The argument becomes more pressing should the state choose to also opt in to the extended scope of application in the WRC. In this case the state has full sovereignty to regulate these matters. An extension, in this way, will mean that the state ensures strict liability on behalf of the owner, who is likely to not pay anything anyway because of insolvency, and, furthermore, a limited compensation from the insurer up to the cap in the LLMC. What the state potentially loses, is the possibility in national legislation to implement a regulation that allows for direct claims in relation to an insurer without limits. An insurer will, following an implementation of the convention, likely argue, should such a legislation anyhow be in effect, that the convention explicitly sets a cap for the compulsory insurance and that other claims that exceed this will not have to be paid. In this sense, an extension may in practice lead to the effect that the state has less ability to claim compensation in some cases. This, however, also implies that the insurer in other cases would have been able and willing to pay and that the insurer would not have invoked a *pay to be paid-clause*.[608]

This criticism is not relevant in relation to states that have not opted out of the possibility to limit liability under the LLMC for wreck removal costs since no claims above the limitation amount would then be possible. It should also be balanced with the notion that there are uncertainties in many states as to the regulations in place in relation to wreck removal in general. An implementation of the convention and an extension of its scope of application would, in these cases, provide

[608] Cf. ibid., p. 114 ff.

more certainty in these matters.

On the whole, the convention thus offers some certainty and rights of action, but may for some states also lead to that the final compensation gained will be less than what could have been possible without the convention. There are, however, several unclear variables to take into account in these situations. One should, finally, also note the goal of harmonizing the legal frameworks on this issue. This is something that might merit an implementation of the convention also in states that have opted out of the possibility to limit liability for wreck removal claims.

5.5.7.3 Certificates for all Ships

An important provision in order to ascertain compliance with the compulsory insurance is that a state party, according to art. 12.12 WRC, shall ensure, under national law, that insurance or other security is in force in respect of any ship of 300 gross tonnage and above, wherever registered, entering or leaving a port in its territory, or arriving at or leaving from an off-shore facility in its territorial sea. The wording means that this is to be the case no matter where the ship is registered, i.e. also in relation to ships registered in states that are not parties to the convention. This can be seen as controversial, given the fact that the convention in this way also indirectly affects states that are not parties to it.[609] That such an indirect effect has been reached is perhaps evidenced by that fact that several leading flag states, like Liberia, Malta and the Marshall Islands have acceded to the convention. Major flag states would otherwise perhaps have little interest in acceding to a convention that means exposing ships, from the flag state, to binding removal claims in the exclusive economic zone of other state parties. Claims that, without an accession, arguably could have been rejected.[610] An argument that can be used to support this provision is that insurance or other security for ships from states that are not

[609] Cf. art. 34 in the Vienna Convention on the Law of Treaties that states that a treaty cannot create rights or obligations for a third state without that state's recognition.

[610] Cf. Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 66.

parties to the convention is only needed for ships that call at a port or off-shore facility in the territorial sea.[611] In those cases, the state has full sovereignty and can legislate to this effect.

5.5.8 Time Limits

The convention includes specific time limits and states that a claim for costs incurred, as a result of measures taken in accordance with the convention, shall be brought within three years from the date "when the hazard has been determined in accordance with this convention".[612] This likely refers to when the affected state has determined the wreck to constitute a hazard in accordance with art. 8.1 WRC. There is, furthermore, a general time limit of six years counted from the time of the maritime casualty resulting in the wreck. The affected state must act within these six years in order to recover any costs. If the maritime casualty consists of a series of events, the six-year period is counted from the first event in the series. These time limits are in line with time limitations in other liability conventions.[613]

An effect of the time limits is that wrecks that have sunk after the entry into force of the convention and its relevant implementation, will need to pose a hazard within a specified time period in order to fall under the regulation. When it comes to wrecks that predates to convention, the regulation does not cover these.[614] Indeed, it follows from art. 31.1 of the Vienna Convention, on the non-retroactivity of treaties, that a convention's provisions, unless a different intention appears, "do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party". In relation to the WRC, this clearly means that the imposed liability provisions and the compulsory insurance cannot be invoked in relation to wrecks that

[611] See Michel, "Introductory Note to the Nairobi International Convention on the Removal of Wrecks", p. 695 f.
[612] Art. 13 WRC.
[613] Shaw, "The Nairobi International Removal Convention", p. 415.
[614] See Søfartsstyrelsen, p. 12 and Gauci, "The International Convention on the Removal of Wrecks 2007 – a flawed instrument?", p. 8.

predate the convention.

A possible distinction can, however, be made in relation to the applicability of the convention in this sense. One could claim that one part of the convention concerns the liability provisions, compulsory insurance and so on, while another part deals with a state's right of intervention in the exclusive economic zone. Using this distinction, one could argue that while it is clear that the first part can only be applied to maritime casualties and wrecks that arise after the implementation of the convention, the second part, on the power of intervention on behalf of the state, can be relevant also to wrecks that are already in place. Such wrecks could be viewed as ongoing occurrences and have thus not already taken place or ceased to exist. In this way, one could argue for a potential applicability in relation to already existing wrecks.[615] The convention, however, clearly focuses on future wrecks and it is far from certain that the above-mentioned argumentation would hold water if put to the test.[616]

5.5.9 Implementations in the Legal Systems

This section analyses how the different legal systems have implemented the convention into national legislation in the legal systems.

5.5.9.1 English Law

The WRC is implemented into English law, by the Wreck Removal Convention Act 2011, in the Merchant Shipping Act 1995 and came into force on the 14 April 2015.[617] The relevant provisions of the convention have been turned into a separate part in the Merchant

[615] See further Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", p. 94 and p. 104 ff.

[616] See, however, again ibid., p. 92 ff on a possible application in relation to hazardous historic shipwrecks. They also argue that even though the convention may not have such a possible application, the convention as such can be used as a template in order to regulate wrecks that pose hazards in general; see ibid., p. 106.

[617] Wreck Removal Convention Act 2011 and Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 111.

Shipping Act 1995 titled part 9 A.[618] At the same time, the original text of the convention is inserted as a separate schedule titled Schedule 11ZA. Part 9 A Merchant Shipping Act 1995 also includes reference to the convention in the sense that the concepts there used shall be construed in light of the definitions in the WRC.[619]

Part 9 A follows the structure of the convention. It uses the term "the Wrecks Convention" to abbreviate the WRC.[620] The duty on behalf of the master and operator to report a wreck in the convention area, means in English law that the responsible person shall report to the Secretary of State.[621] The responsible person is the master and the operator, but it suffices that one of them reports.[622] If the wreck is located in the convention area of another state, the report is to be made to the government of that state.[623] The report shall include the data that is described in art. 5.2 WRC provided that it is known.[624] Failure to report is an offence and will make the person liable to pay a fine.[625]

When it comes to locating and marking wrecks, the Secretary of State shall ensure that the United Kingdom complies with the measures in art. 7 and 8 of the WRC.[626] In order to do so, the Secretary of State may direct a general lighthouse authority, a harbour authority or a

[618]The methodology as to the implementation of maritime law conventions in the MSA 1995 has varied over time. While some conventions, like the LLMC and the Salvage Convention, have been included full-length as schedules to the MSA 1995 and been given the force of law, others have been redrafted into national law. Both approaches have advantages and disadvantages. To insert a whole convention and to give it the force of law, means that the often carefully balanced and negotiated convention text is not meddled with, but, on the other hand, to give a convention text the force of law may also be misleading, since it is not always possible to apply convention text as such on a national level. There may also be reservations that are not reflected in the convention text. To redraft the convention text into national law, on the other hand, allows for fine-tuning the convention text into suitable national legislation. At the same time, this may prove difficult to do and the above-mentioned balance, as reflected in the negotiated text, might be distorted. See further ibid., p. 111.

[619]S. 255R(1) Part 9A MSA 1995.

[620]S. 255A(1)(A) Part 9A MSA 1995.

[621]S. 255B(1)-(6) Part 9A MSA 1995.

[622]S. 255B(4) & (6) Part 9A MSA 1995.

[623]S. 255B(3) Part 9A MSA 1995.

[624]S. 255B(5) Part 9A MSA 1995.

[625]S. 255B(7)-(8) Part 9A MSA 1995.

[626]S. 255C(2) Part 9A MSA 1995.

conservancy authority to take specified steps in relation to a wreck if it is within the area where they have mandates to act.[627] A general lighthouse authority is given a wider area and mandate in this case.[628] Such a direction may be that the authority takes action or does not take action in the relevant area in line with their respective powers in s. 252 and 253 MSA.[629] The direction shall be in writing, but may, when this is not reasonably practical, also be oral, but must then be confirmed in writing as soon as reasonably practical.[630] The relevant authority must comply with the direction from the Secretary of State.[631]

It is the Secretary of State that is to determine whether or not a wreck poses a hazard, in light of the convention, in the convention area.[632] If this is the case, the Secretary of State must take all reasonable steps to give notice, defined in the act as a "Wreck Removal Notice", requiring the registered owner to act in accordance with art. 9.2-3 WRC.[633] This notice must be in writing and shall also include the set deadline for the removal as well as the information that is to be given to the registered owner in accordance with the convention.[634] If a registered owner, without reasonable excuse, fails to comply with a notice that has been given, this constitutes an offence and the registered owner will be liable to pay a fine.[635]

When it comes to the conditions that an affected state can impose in relation to a removal, the Secretary of State may, upon giving a wreck removal notice, impose conditions as to the removal of a wreck in accordance with art. 9.4 WRC.[636] Such a condition is imposed by giving notice of it to the registered owner.[637] If a registered owner

[627] S. 255C(3) Part 9A MSA 1995.
[628] S. 255C(5) Part 9A MSA 1995.
[629] S. 255C(4) Part 9A MSA 1995.
[630] S. 255C(6) Part 9A MSA 1995.
[631] S. 255C(7) Part 9A MSA 1995.
[632] Cf. s. 255D(1) Part 9A MSA 1995.
[633] S. 255D(2) Part 9A MSA 1995.
[634] S. 255D(3) Part 9A MSA 1995.
[635] S. 255D(4)-(5) Part 9A MSA 1995.
[636] S. 255E(1)-(2) Part 9A MSA 1995.
[637] S. 255E(3) Part 9A MSA 1995.

fails, without reasonable excuse, to comply with such a condition, this constitutes an offence and the registered owner will be liable to pay a fine.[638]

If the registered owner fails to remove a wreck within the given deadline, if the owner cannot be contacted or if immediate action is necessary, in line with art. 9.7-8 WRC, the Secretary of State may remove the wreck.[639] This is called a "Removal in default" in the act.[640] In these cases, the Secretary of State also has the mandate to delegate this action to a general lighthouse authority, a harbour authority or a conservancy authority with the limitation that a direction must be given in relation to the respective authority's area.[641] Lighthouse authorities are, yet again, given a wider area in this respect.[642] A direction of this sort shall be in writing or, if this is not reasonably practicable, oral and then confirmed in writing as soon as reasonably practicable.[643] If a direction is given, the relevant authority must comply with it.[644]

When it comes to liability, when a ship has been involved in an accident and the ship or anything from it has become a wreck in the convention area and costs have been incurred as a result of the actions taken in accordance with s. 255C-255F, the person who has incurred such costs is entitled to recover them from the ship's registered owner unless the owner can show that one of the exceptions to the strict liability in the convention is present.[645] Note here that the act states that *any person* is entitled. This will mean that port authorities and similar will be entitled to recover costs. One could, however, also argue that a salvor may qualify as such a person. Gaskell and Forrest have, however, argued that the better view, in this case, is that the right to recover in s. 255G(2) falls on the authority with the primary duties to

[638] S. 255E(4)-(5) Part 9A MSA 1995.
[639] S. 255F(1) Part 9A MSA 1995.
[640] S. 255F Part 9A MSA 1995.
[641] S. 255F(2)-(3) Part 9A MSA 1995.
[642] S. 255F(4) Part 9A MSA 1995.
[643] S. 255F(4) Part 9A MSA 1995.
[644] S. 255F(6) Part 9A MSA 1995.
[645] S. 255G(1)–(2) Part 9A MSA 1995.

carry out the taken actions and not on other parties that may have been involved like sub-contractors.[646]

The registered owner is not liable for costs that adhere to the exceptions in the WRC or if the Secretary of State has specified this by order.[647] If there has been an incident with two or more ships and the registered owners are liable for incurred costs but the costs for which each is liable cannot be reasonably separated, the registered owners shall be jointly liable for the total cost.[648] Should a general lighthouse authority have incurred costs and not been able to recover them under s. 255G Part 9A MSA 1995, the costs shall be paid out of the General Lighthouse Fund.[649]

The time limits in the WRC are found in s. 255H Part 9A MSA 1995. It is interesting to note that the first limit of three years is counted from the date on which a wreck removal notice was given in respect of the wreck.[650]

The provision on compulsory insurance is found in s. 255J Part 9A MSA 1995 and states that all ships, with a gross tonnage of 300 or more, from the United Kingdom may not leave or enter a port in the United Kingdom if they do not have insurance evidenced by a certificate.[651] Likewise, a foreign ship, with a gross tonnage of 300 or more, may not enter or leave a port in the United Kingdom without such an insurance evidenced by a certificate.[652] If the master or the operator of a ship fails to insure the ship, they are each guilty of an offence should the ship enter or leave a port in the United Kingdom or if anyone attempts to navigate the ship into or out of a port in this way.[653] A person

[646]Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 112.
[647]S. 255F(3) Part 9A MSA 1995 and see art. 11.1 WRC.
[648]S. 255F(4) Part 9A MSA 1995.
[649]See further s. 255I Part 9A MSA 1995.
[650]S. 255H(a) Part 9A MSA 1995.
[651]S. 255J(1)-(2) Part 9A MSA 1995.
[652]S. 255J(1)-(3) Part 9A MSA 1995. For details on the certificates, see s. 255J(4)-(5) and for details on the issuing of certificates see s. 255N Part 9A MSA 1995. The act also opens up for the future possibility to use electronic certificates; see s. 255Q Part 9A MSA 1995.
[653]S. 255K(1) Part 9A MSA 1995.

guilty of such an offence will be liable to pay a fine.[654] A ship may, furthermore, be detained should anyone attempt to navigate it out of a port in contravention of s. 255J.[655]

The compulsory insurance is evidenced by a certificate. It is the master of a ship that must ensure that the certificate is carried on board.[656] Upon request from an officer of Revenue and Customs, an officer of the Secretary of State or, if the ship is a United Kingdom ship, a proper officer, the master of the ship must produce the certificate.[657] To fail to do so constitutes an offence and will make the person liable to pay a fine.[658] The possibility to claim the insurer directly is regulated in s. 255P Part 9A MSA 1995. A person who is entitled to recover incurred costs under s. 255G may instead recover them from the insurer.[659] The available defences and the right to limit liability follow from s. 255P(3)-(6) Part 9A MSA 1995.

The provisions in Part 9A MSA 1995 are not applicable in relation to warships or ships for the time being used by a state for non-commercial purposes only.[660] It is, however, noted in s. 255S(2) Part 9A MSA 1995 that the rules will apply to such ships if specified in a notice under the WRC. The United Kingdom has not given such a notice.[661]

The convention area under Part 9A MSA 1995 follows from the Merchant Shipping (United Kingdom Wreck Convention Area) Order 2015.[662] It comprises the UK, UK waters and the exclusive economic zone of the UK.[663] This means that the United Kingdom has used the opt-in provision in the WRC in order to extend the convention.[664]

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[654]S. 255K(2) Part 9A MSA 1995.
[655]S. 255L Part 9A MSA 1995.
[656]S. 255M(2) Part 9A MSA 1995.
[657]S. 255M(3) Part 9A MSA 1995.
[658]S. 255M(4) Part 9A MSA 1995.
[659]S. 255P(2) Part 9A MSA 1995.
[660]S. 255S Part 9A MSA 1995.
[661]IMO, *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or the Secretary-General performs depository or other functions*.
[662]Cf. s. 255R(6) Part 9A MSA 1995.
[663]See also Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 113.
[664]See also IMO, *Status of multilateral Conventions and instruments in respect of which*

5.5.9.2 Swedish Law

Sweden has acceded to the Wreck Removal Convention following a vote in the Swedish parliament.[665] The Swedish Maritime Administration[666] is the responsible authority under the convention and the implemented provisions.[667]

The convention is implemented as chapter 11 a in the Swedish Maritime Code.[668] The chapter consists of 26 sections or paragraphs. It starts in 1 § with a set of definitions that are in line with the convention. Thereafter, the scope of application is handled in 2–5 §§. The duty to report follows from 6 § and the measures that are to be taken in relation to a wreck are regulated in 7–15 §§. Liability is regulated in 16–17 §§, the right to limit liability in 18 § and when it comes to the time limits in the convention there is a reference to another part of the Maritime Code where this is handled in 19 §. Insurance issues and the possibility to claim the insurer directly are, finally, regulated in 20–26 §§.

An interesting anomaly in the Swedish proposal is that the duty to

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the International Maritime Organization or the Secretary-General performs depository or other functions.

[665]See for relevant preparatory works Ds 2015:16, *Avlägsnande av vrak*, Prop. 2016/17:178, *Skärpt ansvar för fartygsvrak* and also 2016/17:CU18. *Civilutskottets betänkande*. For the actual vote and the result, see 2016/17:CU18. *Votering betänkande*, punkt 2.

[666]Sw. *Sjöfartsverket*.

[667]It is notable that among all the consultative bodies (Sw. *remissinstanser*) that commented on the proposal concerning the responsible authority, the Swedish Maritime Administration alone rejected it – although to no effect. The argument from the Swedish Maritime Administration was that the provisions that, at that time, already existed allowing the authority to remove wrecks, were old and, furthermore, that a responsibility of this kind was not compatible with the authority at its current form as a profit-making organisation (Sw. *affärsdrivande verk*). The government, however, argued that it was not possible to not take into account the mandate that the authority already had in relation to the removal of wrecks in certain situations and the authority's central function when it comes to maritime safety in public fairways, since most hazardous wrecks are likely to be positioned in those areas. Therefore, it is argued that the authority is the most suitable option to be the responsible authority; see Prop. 2016/17:178, *Skärpt ansvar för fartygsvrak*, p. 33 f. This had also been proposed in the first investigation and preparatory work that preceded the government's proposition; see Ds 2015:16, *Avlägsnande av vrak*, p. 63 ff.

[668]The legislation entered into force on the 3 February 2018 and is also supplemented by an ordinance on Liability for Wrecks (Sw. *Förordning (2017:1240) om ansvar för vrak*).

report has been formulated somewhat differently than in the convention. While the convention in art. 5.1 WRC states that a state party shall require the master and the operator of a ship flying its flag to report to the affected state without delay when the ship has been involved in a maritime casualty resulting in a wreck, the Swedish proposal states that the master of a ship is to make the report and the operator shall only make a report should the master not already have done so. The onus is thus first put on the master and only if the master fails to report, a duty to report falls on the operator.[669] This is clearly a departure from the convention text where the subjects are treated on an equal level.

The differences in this respect is motivated by the fact that there already existed a responsibility for the master to report certain incidents in Swedish law. Instead of creating a separate system for reporting wrecks, which it is argued in the preparatory works would create additional administrative costs, the duty to report has been tied to the already existing provision and then supplemented by a provision aimed at the operator in the implementation of the WRC that is only applicable should the master not have acted in line with the already existing provision on reporting.[670]

5.5.9.3 Norwegian Law

Norway is in the process of acceding to the Wreck Removal Convention and will implement it, pending legislative approval, as a separate chapter in the Norwegian Maritime Code.[671] Since the process is ongoing, no further remarks are made in this context.

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[669] See Chapter 11 a § 6 SjöL.

[670] See Prop. 2016/17:178, *Skärpt ansvar för fartygsvrak*, p. 36 f.

[671] See LOV-2018-12-20-115 om endringer i sjøloven mv. (fjerning av vrak), prop. 105 LS Endringer i sjøloven mv. (fjerning av vrak) og samtykke til tiltredelse til Den internasjonale Nairobi-konvensjonen om fjerning av vrak, 2007 & chapter 10 a Norwegian Maritime Code.

5.5.9.4 Finnish Law

Finland has acceded to the Wreck Removal Convention and implemented it as chapter 11 a in the Finnish Maritime Code.[672] The implementation follows the structure of the convention, but is considerably shorter consisting only of eight sections or paragraphs. The applicability of the convention in Finland is dealt with in the first section. The duty to report is handled in the second section, while provisions on the warning and localisation of wrecks are treated in section three. Section four concerns the assessment on whether or not a wreck poses a hazard in light of the convention as well as the marking of a wreck. The fifth section regulates the measures that are to be taken when removing a wreck, while the sixth section concerns the compulsory insurance. Certification is handled in the seventh section and the eight section, finally, concerns how decisions issued by the relevant authority in Finland are to be enforced. These eight sections or paragraphs, of limited length, in Finnish law can be compared to the 21 sections that are found in the English implementation and the 26 sections or paragraphs in the Swedish implementation.

Interestingly enough, it is stated in the act that "the provisions in the WRC and this chapter are applicable in Finland and in the Finnish exclusive economic zone".[673] This wording seems to suggest that both the convention text and the implemented text in the chapter have the force of law in Finland.[674] In other words, it would seem that Finland has chosen to both incorporate and implement the convention by transformation. This would explain why the Finnish implementation is relatively short e.g. compared to English law. It would, however, be a rather unusual stance, since the need for implementing the convention text in the chapter would seem not to be necessary, if the relevant authorities and the national specifics are disregarded, should the con-

[672] Sjölag, 674/1994.

[673] My translation of Chapter 9 a § 1, 674/1994, Sjölag. In Swedish: "Bestämmelserna i Nairobikonventionen och i detta kapitel tillämpas i Finland och inom Finlands ekonomiska zon".

[674] Cf. Suksi, "Government Action Against Wrecks – A Finnish Perspective in Light of International Law", p. 134 f.

vention text as such also be applicable. This, however, seems to be the most reasonable textual interpretation of the chosen wording and would mean that it is possible to apply the implemented chapter as well as the convention text in a Finnish perspective.[675] The relevant authorities in Finland, for the various measures, are outlined in the implementation and this can partly motivate the chosen technique.

Another peculiarity in the Finnish implementation, concerns the duty to locate the wreck. As previously discussed, this may prove to be an onerous task if it is not certain where the wreck is positioned in the convention area. According to the convention text, when an affected state has become aware of a wreck in its convention area and has reason to believe that it poses a hazard, the state shall ensure that all practicable steps are taken to establish the precise location of the wreck. In the Finnish implementation, however, the Traffic Office[676] shall urge[677] the registered owner to take all the necessary actions that are possible in order to establish the precise location of the wreck and also to set a time limit for this. If the registered owner fails to establish the location within the deadline, then the Traffic Office shall take all possible measures to locate the wreck at the registered owner's expense.[678]

The Finnish implementation, when it comes to locating a wreck, is thus quite different from the wording of the convention and one could argue that the implementation quite clearly goes beyond what is stipulated in the convention text. The convention text does not explicitly contain a duty on behalf of the registered owner to locate the wreck. The onus is on the affected state in art. 7.2 WRC to take

[675] In English law, as discussed, the convention has been implemented in a specific chapter and the convention text has been included as a schedule to the act. The difference between this and the Finnish solution, should the above interpretation be valid, is that the convention text in the schedule is not, at least arguably, applicable in English law. The application of the regulation is confined to the specific sections in the chapter; cf. Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 111 f. It should, however, be noted that the implementation in English law makes references to the convention as included in the schedule.

[676] Sw. *Trafikverket*.

[677] Sw. *uppmana*.

[678] Chapter 9 a § 3, 674/1994, Sjölag.

all practicable steps to establish the precise location of the wreck. One could potentially argue that urging the registered owner to locate the wreck is a part of these practicable steps, but it is hard to support this shift of onus from one party to another in the convention and especially given the fact that the provision is to apply in the exclusive economic zone as well. If the above line of reasoning concerning the applicability of both the convention text and the implementation of it in Finnish law is valid, this becomes even more problematic since the provisions then seem to say two different things. The notion of a deadline in relation to the process of locating a wreck is also something that is not mentioned in the convention.

When it comes to state vessels, the Finnish implementation does not seem to acknowledge the possibility that some states may choose to extend the scope of application also to state vessels as seen in the implementation into English law.[679] Curiously enough, the only time state vessels are mentioned is in relation to the compulsory insurance.[680] In that context, the act states that the provisions on compulsory insurance are not applicable in relation to warships or other ships that are owned or used by the state and that solely are used for non-commercial purposes. It is unclear whether this means *e contrario* that the other parts of the convention are relevant in relation to state vessels. This would be one way of interpreting the construction of the Finnish implementation, but it would indeed be a strange one. Finland has not made a notice concerning any application on state vessels in general, so this is, most likely, not the envisaged approach.[681] Another potential interpretation, however, if the convention text as such is applicable in Finnish law, would be that the possibility for an application in relation to states that have chosen to extend the convention in this way is possible.

Finally, it should also be mentioned that the responsible authority in Finnish law is the Traffic Office. This authority also has the right to

[679] Cf. Part 9A s. 255S(1)–(2) MSA 1995.

[680] Chapter 9 a § 6 third paragraph, 674/1994, Sjölag.

[681] Cf. IMO, *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or the Secretary-General performs depository or other functions*.

be assisted by the Finnish armed forces, customs and the emergency services when removing a wreck.[682]

5.5.9.5 Danish Law

In Danish law, the WRC is implemented in chapter 8 a of the Danish Maritime Code.[683] There is also an instruction[684] from the Ministry of Industry, Business and Financial Affairs[685] on special provisions in relation to the compulsory insurance that emanates from the convention.[686] The implementation follows the structure of the convention.

An interesting variation in the Danish implementation is that the compulsory insurance has been extended in relation to ships registered in Denmark and flying the Danish flag that are of 20 gross tonnage and above. These are not covered by the provisions that govern the vessels that shall evidence their insurance by certificate, but insurance or other guarantee is still mandatory.[687]

5.5.9.6 Comments on the Implementations

It is clear, from the observations above, that the different legal systems have chosen to implement the convention in slightly different ways. Whereas both English and Swedish law have implemented the convention at some considerable length, and especially so in English law, the implementation in the other systems and particularly in Finland are shorter. In Finland this might be explained by the fact that the implementation, in fact, also may be an incorporation, making the convention text, as such, applicable as well.

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[682] Sw. *"Trafikverket har rätt att få behövlig handräckning från försvarsmakten, Tullen och räddningsverken för utförande av sina uppgifter enligt denna paragraf"*, Chapter 9 a § 5, sixth paragraph, 674/1994, Sjölag.

[683] LBK nr 75 af 17/01/2014 (Søloven); LOV nr 1384 af 23/12/2012.

[684] Dan. *bekendtgørelse*.

[685] Dan. *Erhvervs- og Vækstministeriet*.

[686] BEK nr 27 af 20/01/2015.

[687] See 1 § BEK nr 27 af 20/01/2015 and chapter 8 a § 164 Stk. 5, LOV nr 1384 af 23/12/2012.

5.6 Reflections on the Common Ground

This chapter is meant as a foundation for the ensuing chapters in this part. The main conclusion to draw at this stage and that has to be kept in mind in the ensuing chapters, is the fact that there are several international conventions that may be relevant in relation to wrecks. These different conventions can be relevant in various ways.

UNCLOS is a convention that serves an underlying general background in the sense that it provides the basic mandate to take action in some situations in certain maritime areas. The convention, consequently, becomes relevant provided that a situation involving a wreck falls under this mandate. Other conventions are more specific, but do not, at the same time, regulate wrecks as such. Instead, the conventions become relevant in situations that might occur in relation to a wreckage and will, in this sense, have indirect effects on wrecks. The conventions in question are the Intervention convention, the Dumping convention, the CLC and FUND convention as well as the Bunker convention. As an example, implemented provisions from the Bunker convention can become relevant in a situation involving a wreck when there is bunker oil pollution. Corresponding situations can be envisaged for the other conventions as well.

A central building block, that is important for the ensuing chapters, is the framework in the Nairobi International Convention on the Removal of Wrecks. This convention is specifically aimed at wrecks and its relevance is thus direct in contrast with the other above-mentioned conventions. It provides a, more or less, comprehensive framework to deal with wrecks that pose navigational or environmental hazards. A wreck that falls under the convention shall be reported, localised and marked. The hazard that the wreck poses shall subsequently be removed. The framework, furthermore, establishes liability on behalf of the registered owner. If the state, in whose convention area the wreck is located, determines that it constitutes a hazard under the convention, the registered owner has a duty to remove the wreck within a stipulated time period. If this is not carried out or if immediate action is necessary,

the affected state can carry out the necessary action instead. In order to ensure compliance, the convention also calls for mandatory insurance, on behalf of the registered owner, for the costs of the actions taken under the act. Another step to ensure compliance and compensation is the possibility to claim the insurer directly for costs incurred under the framework.

Another aspect that can be noticed from the discussions above is that the different legal systems have implemented the Wreck Removal Convention in slightly different ways. This suggest that there are certain varying characteristics in the legal systems that are reflected in the different implementations. One such example that has already been mentioned is the bespoke solution concerning insurance found in the Danish implementation of the WRC. This variation can be seen as an innovative and creative solution form the Danish system. This illustrates that different characteristics can be seen in the implementations of international conventions. Differences in the studied legal systems will be further discussed and highlighted in the following chapters.

Chapter 6

Wrecks as Navigational Hazards

This chapter concerns wrecks that pose navigational hazards and the legal frameworks that deal with this issue. The navigational problems associated with wrecks have already been discussed in chapter 1.5. The Tricolor and the Baltic Ace are both illustrative examples of modern wrecks that have caused navigational hazards in busy shipping lanes.

6.1 Elaboration of the Research Question

The research question for this chapter is how wrecks that pose navigational hazards can be handled from a legal point of view. In order to adress the question and to put it into a perspective, it can be broken down into different dimensions. This process also functions as a demarcation of this chapter.

The dimensions in focus are:

- Purpose and functions
- Wrecks covered in the studied regulations
- Scope of application
- Responsibility and removal

- Liability issues and compensation

The analysis is focused on each of these dimensions in turn.

6.2 Purpose and Functions

The common denominator for all wrecks discussed in this chapter is the fact that they, in some way, pose navigational hazards as identified in the classification in section 1.6. The underlying function to solve or fulfil when it comes to these wrecks, is to secure that they can be handled and removed.

There are various ways in which this can be carried out. Such an action can entail removing the wreck in total, but it may also suffice to only remove the actual hazard that the wreck poses. This may be possible to achieve without having to remove the entire wreck. As an example, in the case of the Norwegian platform the West Gamma, that posed a navigational hazard, it sufficed to conduct a removal operation by which sufficient space above the platform was secured.[688] A good example of an operation that required a total removal of the wreck, on the other hand, is the discussed case with the Tricolor.[689]

For an affected coastal state or some other actor that has taken action, in relation to a hazardous wreck of this kind, it is, furthermore, of interest to have a possibility to recover the costs of a conducted operation from a responsible party. This can make the underlying function twofold in the sense that a regulation should be able to handle the removal of the wreck, while at the same time also enabling a financial solution for the involved parties. These issues are discussed further down in more detail.

[688] Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 70.

[689] ibid., p. 51. For details on the sinking and the complicated wreck removal operation that followed, see Brynildsen, *TRICOLOR – The collision, sinking and wreck removal*.

6.3 Wrecks Covered in the Studied Regulations

It follows from the classification in section 1.6 that a wreck, that poses a navigational hazard, can be either a state or a non-state wreck. This can affect how the wreck can be handled. Furthermore, the additional divisions within these two categories can impact on the handling of the wreck. Thus, if the wreck is a non-state wreck, it is of interest to know whether it has a known owner, if the owner is unknown or if the owner does no longer exist. Likewise, in relation to state wrecks, it is of interest to know if the wreck is recognized by a state or if the state has seized to exist.

In this sense, there are six different kinds of wrecks in relation to the navigational hazards that wrecks can pose. If the dimension of time is included in the categorisation, this amount increases to 18 wrecks since there are three dimensions in relation to time depending on whether the wreck is a historical, non-protected or modern wreck. The regulations in the studied legal systems only deal with some of these categories of wrecks and they do so to various extents.

6.3.1 General Structures and Approaches

Two main approaches can be identified when it comes to how the legal systems have regulated wrecks that pose navigational hazards. The first one is an approach where the regulation focuses and is built on the notion that there is supposed to be an owner, or some other person, that can be held responsible in a given situation. The implementations of the WRC, as well as the domestic regulations in Swedish and Finnish law share this characteristic. A potential disadvantage of this approach, however, is that wrecks that have no owners, or some other responsible person, stand the risk of not being covered by the frameworks in an adequate way. Another distinguishing factor is that these systems tend to be angled towards modern wrecks, since these are the ones that, most likely, will have owners or other persons that can be held responsible for them.

The second approach is to construct the regulation in a broader more

general sense and, thereby, to allow it to encompass wrecks also without focusing or presupposing that there is to be an owner or some other person that is responsible. This will, in general, allow the responsible authority, under the regulation, to unequivocally take action in relation to wrecks also in cases where there is no owner or responsible party. In these broader regulations, there is also no danger of risking a situation where a given situation falls outside of an already fixed model of how the regulation is meant to be applied, e.g. a case where the regulation is designed to be applied in relation to non-state wrecks with known owners. This more general approach is, thus, more likely to include several categories of wrecks in its application. Particularly English law, but also Danish and Norwegian law are examples of this latter approach.

6.3.2 Focus on an Accountable Person

Wreck Removal Convention

The WRC is an example of a regulation focused on a person or subject that is accountable and liable for a wreck removal situation. The decisive actions under the convention involve the registered owner defined as:

> "[...] the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship at the time of the maritime casualty. However, in the case of a ship owned by a State and operated by a company which in that State is registered as the operator of the ship, "registered owner" shall mean such company".[690]

Thus, the registered owner can also denote a person or several persons that owned the ship at the time of the maritime casualty if it is unregistered. It can also denote the operator of a ship provided that it is a ship owned by a state and operated by a company in the defined way. The operator of a ship is defined as:

[690] Art. 1.8 WRC.

> "[...] the owner of the ship or any other organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the owner of the ship and who, on assuming such responsibility, has agreed to take over all duties and responsibilities established under the International Safety Management Code, as amended".[691]

The potentially involved actors under the convention are, thus, clearly delineated in the text of the convention.

The actions available under the WRC are closely linked to the registered owner as defined in the convention. An exception is the duty to report wrecks. This duty is instead put on the master and the operator of the ship. In the convention, this is phrased as an obligation put on a state party to "require the master and the operator of a ship flying its flag to report to the Affected State without any delay when that ship has been involved in a maritime casualty resulting in a wreck".[692] This action is thus also combined with an accountable person although a different one. When an affected state has determined that a wreck poses a hazard in light of the convention, several actions come into play.[693] The key provision in the convention is, however, that the registered owner shall remove a wreck that has been determined to pose a hazard, in light of the convention, by an affected state.[694]

The enforceability of the actions under the WRC is, furthermore, built around the compulsory insurance, as required by the convention, for ships of 300 gross tonnage and above flying the flag of a state party as well as the possibility to claim the insurer directly.[695] The other parts of the convention are, however, relevant also in relation to smaller vessels that fall within the scope of the convention, although enforceability might be a problem in these cases since there might be

[691] Art. 1.9 WRC
[692] Art. 5.1 WRC.
[693] Cf. art. 4–8 WRC.
[694] Art. 9.2 WRC.
[695] Art. 12.1 & 12.10 WRC.

no insurance cover. All in all, the provisions in the convention are thus directed towards specific persons and, primarily, the registered owner as responsible for removing the wreck and having the compulsory insurance when applicable.

In this way, the underlying presumption is that only wrecks that have known owners are in fact covered in these cases. However, it can also be argued that the convention enables states to take action also in relation to other wrecks with the difference that the specific provisions in the convention that deal with the registered owner cannot be invoked.[696]

When it comes to state wrecks, it follows directly from the convention that it is not applicable in relation to any "warship or other ship owned or operated by a State and used, for the time being, only on Governmental non-commercial service, unless the State decides otherwise".[697] A state party can thus choose the extend the application of the convention to its warships and other ships as described above, but the default position is that they are not covered.[698]

The construction of the WRC thus reflects a system where focus is put on an accountable person or several of them. As discussed, the convention, in its default position, is directed towards modern non-state wrecks that have known owners. If the extensive view offered by Dromgoole and Forrest is taken, also other categories of wrecks can be encompassed in relation to time, thus potentially including historical as well as non-protected wrecks.[699] It is also possible to argue that a state can take action, under the convention, even if no owner is identified or if the owner has seized to exist. This will, however, have the consequence that one of the main functions of the convention, channelling financial responsibility to a registered owner, is lost. In this limited way, it may, however, be possible to apply the convention in relation to non-state wrecks that have unknown owners or where the owner no longer exists.

[696] Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", p. 104 ff.
[697] Art. 4.2 WRC.
[698] See art. 4.3 WRC.
[699] Cf. ibid., p. 104 ff.

In regards to state wrecks, the default position, as discussed, is that state wrecks are not covered by the convention unless a state party chooses to apply the convention to its own state vessels. There is, thus, a potential application of the convention in this way. The category of state wrecks that can be covered by the convention is, thus, state wrecks that are recognized by the state party as state vessels to that state. Even though some variations, in this way, can be contemplated, the default and most likely position, however, is that the convention will only be relevant in relation to modern non-state wrecks that have known owners. It is in relation to such wrecks that the convention has been designed.

Swedish System

In Swedish law, some attention has been directed to the issue of ships posing problems in public harbours. The legal framework that can be of interest in relation to wrecks that pose navigational hazards, in this respect, is the Act on the Removal of Vessels in Public Harbours.[700]

The act deals with vessels by its wording, but it has been argued that it is also applicable, by analogy, in relation to wrecks.[701] The act does not contain any provision that defines what kinds of ships or, potentially, wrecks that are covered by the regulation. In the preparatory works, it is stated that it has not been deemed appropriate to set out a general definition of what a ship is in Swedish law, but that the term, in the act, shall be construed in an extensive way.[702] No further guidance is, however, provided as to what this means or how extensive such a construction is to be made. An extensive construction of the act's scope of application, extending it to wrecks, seems reasonable given the aim and purpose of the act in preventing vessels and ships from causing navigational problems in public harbours. It would be hard to justify the act being applicable in relation to vessels and ships but

[700] Sw. *lag (1986:371) om flyttning av fartyg i allmän hamn*.
[701] Ds 2015:16, *Avlägsnande av vrak*, p. 59 and Hugo Tiberg. "Vem äger vrak och gods?" In: *Svensk Juristtidning* (2000), p. 975.
[702] Prop. 1985/86:122. *[O]m flyttning av fartyg i allmän hamn*, p. 22.

not in relation to wrecks given this purpose. As stated, there is also doctrinal as well as preparatory works that indicate this position.[703]

In order for actions to be taken under the act, a notification needs to be issued in relation to a responsible person, party or entity. The construction of 3 § in the act, however, ensures that the act can also be applied in relation to situations where the owner is unknown. A notification can in those cases be made by publication. In this way, the act, given that it is applicable in relation to wrecks, encompasses at least two of the modern non-state wrecks that pose navigational hazards, i.e. wrecks with known and unknown owners. Arguably, the same should be the case in relation to non-protected and historical wrecks provided that these wrecks would fit in to the description as well.

Even if a strict semantic construction of the act would lead to it not being applicable in relation to the third category in the classification, i.e. a wreck that has no owner, this would probably not be the case in practice, since it is hard to envisage how a wreck with an unknown owner is to differentiate from a wreck that has no owner considering the construction of the provisions in the act. In such a case, a notification, as in relation to an unknown owner, will still be made by publication, after which actions can be taken. This issue is not dealt with in the preparatory works directly, but there are statements concerning abandoned ships. These ships, it is argued, will in general, most likely, be positioned in such a way as to be in conflict with the rules and provisions of the harbour and are, therefore, subject to the actions that can be taken under the act.[704] This provides additional support for the view that the act is applicable in relation to wrecks that have no owners at least in some cases. It does not, however, follow unequivocally that this is so. Hence, there is still some uncertainty in this respect. An explicit inclusion of abandoned vessels in the act would have avoided this uncertainty. The act will, furthermore, have different effects depending on whether the owner or operator is known or unknown as discussed

[703]Tiberg, "Vem äger vrak och gods?", p. 975, Prop. 1985/86:122, *[O]m flyttning av fartyg i allmän hamn*, p. 22 and Ds 2015:16, *Avlägsnande av vrak*, p. 59.
[704]Prop. 1985/86:122, *[O]m flyttning av fartyg i allmän hamn*, p. 14.

further on.

When it comes to state wrecks, it is not clear how the act is meant to apply. A construction of the wording of the act, entails that all ships, whether non-state fishing vessels or state warships, are included. This would mean that all three categories of state wrecks, i.e. those that are recognized by states, not recognized by states and those where the state no longer exists are covered. In practice, however, a harbour master may very well run into difficulties if the act is applied in relation to a state vessel or a state wreck. The state to which the wreck belongs, may, as an example, claim that it is a sovereign object that cannot be moved in light of sovereign immunity. The act will, for obvious reasons, be easier to apply in relation to a state wreck that emanates from a state that no longer exists and, likewise, to a state wreck where the wreck is no longer recognised by the state. In such circumstances, it follows from the definitions of the categories that no objections are likely to be made to a removal under the act. These situations are, however, arguably unlikely to occur considering the act's scope of application that requires that the vessel, in some way, has been moved into a public harbour and subsequently been left there in contradiction with the act.

Another regulation in Swedish law, in relation to wrecks that pose navigational hazards, is an ordinance by the government on the removal of wrecks that obstruct shipping or fishing.[705] The ordinance gives power to the Swedish Maritime Administration[706] to remove or have removed, wholly or partly, vessels or other large obstructions that have sunk in public fairways and that constitute an obstacle or danger to navigation.[707]

The wording of the ordinance seems to presuppose that there is an existing master, operator or owner of the vessel that is to be removed, since the act becomes applicable should a master, operator or owner not take immediate action. Curiously enough, the ordinance, even

[705] Sw. *förordning (2011:658) om undanröjande av vrak som hindrar sjöfart eller fiske*.
[706] Sw. *Sjöfartsverket*.
[707] § 1 the first paragraph, Ordinance on the Removal of Wrecks that Obstruct Shipping or Fishing.

though titled to deal with wrecks that pose obstacles, only refers to vessels or other large objects in the relevant provision. This could be interpreted as suggesting that the terms vessel and wreck are to be used as synonyms in this respect. Such terminology can, however, be misleading and especially since a wreck traditionally under Swedish law has been more narrowly thought of as a vessel or ship that has been destroyed.[708] Nonetheless, in relation to the ordinance, the term wreck appears to encompass both vessels and other large objects. It is unclear what constitutes a large object under the ordinance, but, arguably, a functional line of reasoning would be to construe the term as an object large enough to constitute a navigational obstacle in a given situation.

A restrictive construction of the wording in the ordinance, consequently, suggests that it is only applicable in relation to modern wrecks that have known owners when it comes to non-state wrecks. When applicable, it would also be relevant in relation to non-protected and historical wrecks provided that they fit the description. It could, furthermore, be argued that it will also be relevant in relation to wrecks where the owners are unknown, since such an owner will not take the required action to remove the wreck and this failure will allow the Swedish Maritime Administration to take action under the ordinance. A more functional wording of the ordinance would, arguably, have been to clearly allow for a removal also in cases where there is no master, operator or owner and in cases where these are unknown. In this way, more categories of wrecks would be covered in a certain way. Perhaps it is possible to reach such a result by a teleological and extensive construction of the ordinance, allowing actions to be taken also in relation to wrecks with no owners, but this would be against the strict wording of the ordinance. The two first categories of non state wrecks, i.e. wrecks with known owners and unknown owners, thus most clearly fall under the ordinance.

[708] Tiberg, "Wrecks and Wreckage in Swedish Waters", p. 3 and cf. the discussion above in chapter 4. In a similar way, the WRC treats a wreck as the end-result of a ship, or some other property from it, following a situation where the ship has suffered a maritime casualty; cf. art. 5.1 WRC.

As with the previously discussed Act on the Removal of Vessels in Public Harbours, the ordinance is silent on the issue of whether it is applicable in relation to state wrecks or vessels. For the same reasons as above, taking action under the ordinance in relation to state vessels may result in a conflict should another state claim sovereign immunity in relation to the wreck. Since the wording of the ordinance seems to require a master, operator or owner, to whom an order of removal can be given, this would mean that probably only wrecks where this is relevant are encompassed. In relation to state wrecks, this means that the most likely scenario for wrecks covered under the ordinance will be wrecks that are claimed or recognized by states, since it is unlikely for there to be a master, operator or owner of a wreck that is considered a state wreck but that is not recognized or claimed by a state or that originally belonged to a state that no longer exists.[709] The same line of reasoning as above, concerning a potential teleological and extensive construction of the act, is, however, relevant also in relation to these categories of wrecks.

The implementation of the WRC in Swedish law makes the provisions relevant in relation to modern non-state wrecks that have known owners. This is a result of how the convention is drafted, focusing on liability on behalf of the registered owner of a ship that has turned into a wreck after having suffered a maritime casualty. Even though the convention allows for an application in relation to modern state wrecks, Sweden intends to make no such notification and the regulation will thus not cover modern state wrecks from Sweden at all in this sense.[710] It is, however, possible that the regulation will be relevant in relation to state wrecks from other states should those states have chosen to apply the convention to its warships, and other relevant state vessels, in line with art. 4.2 WRC. This possibility is, however, not reflected in the implemented provisions in Swedish law. On the contrary, it is explicitly stated that the implemented provisions are not applicable in relation to

[709] Odd examples can, of course, be envisaged.
[710] Prop. 2016/17:178, *Skärpt ansvar för fartygsvrak*, p. 27.

warships or other state vessels.[711] If this anyhow should be the case in line with the convention, such an application will, in a practical sense, be limited to modern state wrecks that are recognized by states that have chosen to extend the scope of application to these wrecks. The convention only allows for this category of state wrecks to be included because of its construction. If a teleological and extensive view is taken, it might, however as already discussed, be possible to extend the application of the convention to other categories than modern wrecks as well.[712] The most likely scenario, however, will be a situation involving a modern non-state wreck with a known owner.

Finnish System

In Finnish law, there are provisions in the Water Traffic Act that can be relevant when a wreck poses a hazard to navigation.[713] The provisions concern the removal of watercraft or other goods that pose a danger to navigation in some cases. Watercraft is defined as any vessel, vehicle or equipment used for navigating on water.[714]

The act gives mandates to a party maintaining a public fairway to order a watercraft to be moved should it disturb, impede or endanger the water traffic in the area.[715] The provision is general in its scope and, thus, relevant in relation to watercraft that poses a hazard to navigation in a public fairway in this way. Moreover, the owner of a watercraft or other goods, or the party in whose control the watercraft or goods are, has a duty of removal if such property has sunk, drifted or got stuck in a fairway or some other area used in water traffic if the watercraft, a part

[711] Chapter 11 a § 3 the first paragraph, Swedish Maritime Code. The preparatory works do not give clarity on this issue; cf. Prop. 2016/17:178, *Skärpt ansvar för fartygsvrak*, p. 27.

[712] Cf. Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks".

[713] Sw. *782/2019 Sjötrafiklag*. This act replaces the earlier provisions, to similar effect, in 30.11.1979/846, Ordinance on the Marking of Fairways, Sw. *Förordning om utmärkning av farlederna*, that is now repealed; cf. RP 197/2018 rd. *Regeringens proposition med förslag till sjötrafiklag och till vissa lagar som har samband med den*, p. 87 f.

[714] 1:3(1) Water Traffic Act.

[715] The same is true in relation to the responsible party for a canal or a movable bridge area; 2:20 Water Traffic Act.

of it or the other property is hazardous or harmful to water traffic.[716]

In the same way as the above-mentioned Swedish Ordinance on the Removal of Wrecks that Obstruct Shipping or Fishing, the Finnish provision, in 2:21 Water Traffic Act, seems to presuppose that there is an owner or some other person that has possession of the watercraft or the goods in question. Actions can be taken if the person who was supposed to handle the situation has not done so, which also seems to emphasise that the act primarily deals with situations where a watercraft has a known owner. On the other hand, the provision is broader when it comes to the property that can fall under it, since it is also applicable in relation to parts of a watercraft as well as other goods. This makes its coverage broader than e.g. the Swedish Act on Removal of Vessels in Public Harbours and possibly also the Ordinance on the Removal of Wrecks that Obstruct Shipping or Fishing. The latter, however, does cover large objects that cause obstruction, which could be construed in line with what is denoted as parts of a watercraft or goods in the Finnish act. It also follows from 2:21 of the act that it is subsidiary to the Finnish implementation of the WRC.[717]

In light of the above, since the mandate given by 2:20 of the act is so general in nature, it would seem to extend to different categories of wrecks as long as they fit the description of watercraft in the act. The main category of wrecks that will fall under 2:21 of the act is modern non-state wrecks with known or unknown owners since the provision focuses on the existence of an accountable person in the described way. Arguably, also non-protected or historical wrecks could fall under the provision provided that they would fit this description.

As for the implementation of the WRC in Finnish law, this will have the same effects as discussed above in relation to Swedish law. The Finnish implementation, like the Swedish one, does not seem to acknowledge a possible application in relation to state wrecks from states that have chosen to apply the regulation to their state vessels. The phrasing of chapter 11 a in the Finnish Maritime Code, however, seems

[716] 2:21 Water Traffic Act.
[717] The implementation is found in chapter 11 a of the Finnish Maritime Code.

to suggest that also the convention as such is applicable in Finnish law by incorporation.[718] If this is to be construed as the text of the convention having been given the status of law, this might change the situation, since the possibility to apply the regulation in relation to state wrecks, when notice has been given in relation to such wrecks from the relevant state, is found in the convention text. Contrary to the Swedish implementation, where it is explicitly stated that the provisions are not applicable in relation to state wrecks, the transformation in Finnish law is silent on this issue. There is, consequently, no conflict between the implementation and the convention text, should the argument of incorporation hold water. As discussed, this would lead to an application in relation to modern state wrecks that are recognized by the states that have chosen to apply the convention to their state vessels.

6.3.3 Less Focus on an Accountable Person

Danish System

The Danish system is an example of a regulation that is not as fixed or focused on the owner or some other responsible person as the regulations in Swedish and Finnish law. When a ship has sunk or stranded in Danish waters, or in the exclusive economic zone, in such a way as to cause a hazard or severe disruption[719] to shipping or fishing, certain actions can be taken in accordance with the Act on Stranding.[720] In such an event, the Ministry of Defence[721] shall mark the wreck, if necessary, as soon as it is notified of it, provided that it has not already been marked.[722] This would thus seem to be applicable in relation to all categories of wrecks given the general phrasing of the provision. It is, in other words, not focused on an accountable person in this sense.

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[718] Cf. chapter 11 a § 1 the second paragraph, Finnish Maritime Code.

[719] Dan. *fare eller væsentlig ulempe.*

[720] See 6 § and 14 a § Stk. 1 LBK nr 838 af 10/08/2009, "Bekendtgørelse af lov om tillæg til strandingsloven af 10. april 1895" and the amendment in 2 § LOV nr 1384 af 23/12/2012.

[721] Dan. *Forsvarsministeriet*.

[722] 6 § Stk. 1 LBK nr 838 af 10/08/2009, "Bekendtgørelse af lov om tillæg til strandingsloven af 10. april 1895".

After the above-mentioned action has been taken, the ministry shall communicate with the owner, or the representatives of the owner or someone else that has rights in respect of the wreck, in line with the provisions in the act. If the ministry has not found out who the owner, or another relevant person, is or if the person does not take the required action under the act, the ministry can itself carry out this action.[723] If urgent action[724] is needed given the nature of the hazard, the ministry can take action in the immediate aftermath of the stranding or sinking.[725]

The initial part of the Danish regulation thus enables the relevant ministry to take action in order to mark the wreck. The ministry is also free to take action on its own if it is not possible to find out who the owner, or some other relevant person, is, if this person or entity does not take the required action under the act or if immediate action is necessary. The ministry shall, however, also communicate with the owner, or some other responsible person, and the act is flexible in the sense of also facilitating operations where it is the owner, or some other responsible person, that is to carry out action in relation to the wreck. The regulation is thus multi-layered in the sense that one part is angled at situations where there is a known owner to give directions to, while another part is more general allowing for the ministry to handle the situation by itself. The system is thus less focused on an accountable person, party or entity and is instead a mixture of a general approach and the more person oriented solutions in Swedish and Finnish law.

The Danish Act on Stranding is silent on the issue of state wrecks. A textual interpretation of the provisions is thus that they are applicable in relation to wrecks in general. The same line of reasoning as above can thus be applied in this case. Actions taken in relation to state wrecks may thus lead to problems should another state claim sovereign immunity. For the same reason as above, this will functionally be

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[723] 6 § Stk. 2 LBK nr 838 af 10/08/2009, "Bekendtgørelse af lov om tillæg til strandingsloven af 10. april 1895".

[724] Dan. *aldeles påtrængende omstændigheder*.

[725] 6 § Stk. 3 LBK nr 838 af 10/08/2009, "Bekendtgørelse af lov om tillæg til strandingsloven af 10. april 1895".

interesting in relation to a state wreck that is recognized by a state. In other cases, i.e. state wrecks not recognized by a state and state wrecks where the state no longer exists, it follows from the definition in the classification that these are unlikely to pose problems if actions are taken under the act since no one is likely to object.

Danish law is also similar to Swedish and Finnish law when it comes to the implementation of the WRC. Like the Swedish and Finnish implementation and incorporation, there seems to be no acknowledgement of a potential application in relation to state wrecks when a state has chosen to extend the convention to its own state vessels. As with the Swedish implementation, but contrary to the Finnish, however, it is explicitly stated in Danish law that the relevant provisions are not applicable in relation to warships or other state vessels.[726] The same line of reasoning as discussed in relation to the Swedish implementation above is thus relevant for Danish law in this respect.

Norwegian System

There is no uniform act in Norwegian law that deals with wrecks that pose navigational hazards. Instead, there are different provisions that can be relevant in various acts. Primarily, these are found in the Act on Harbours and Navigable Waters.[727] The purpose of the act is, among other things, to secure the easy movement and safe passage through Norwegian waters as well as their use and governance.[728] There is no specific chapter or part of the act that deals with wrecks. The provisions are instead found in the section that concerns Norwegian waters.[729] The act also includes a definition of what a ship is. According to 3 § in the act, ship is defined as all floating objects that can be used as a

[726] See Chapter 8 a /*S* 164 Stk. 5 LOV nr 1384 af 23/12/2012.

[727] Nor. *LOV-2019-06-21-70, Lov om havner og farvann* or *Havne- og farvannsloven*. This act replaces an earlier version from 2009 and has condensed the earlier regulation on these issues; cf. 34–37 §§ LOV-2009-04-17-19, Lov om havner og farvann (havne- og farvannsloven).

[728] 1 § Act on Harbours and Navigable Waters.

[729] In the previous version of the act, the provisions were instead found in the section that governed the mandates and duties of harbour authorities; Runde, "Vrakfjerning", p. 13.

means of transportation on water.[730]

The act deals with relevant measures that can be taken in relation to maritime casualties and other events that take place in navigable waters. No one is allowed to use or abandon a ship, or some other similar property, in a way that can constitute a hazard or that creates a danger to the possibility of navigating through Norwegian waters or in a harbour, unless allowed under the act.[731] If a ship or similar property is used or abandoned in conflict with this provision, the person that is responsible shall take certain actions.[732] The relevant authority can also order the person responsible to take measures.[733] Apart from the person that has taken the specific action, the owner of the ship or the similar property at the time when the object was used or abandoned is also responsible as well as the owner at the time of the order.[734] If an order is not followed by the responsible person, the relevant authority can take action instead. If it is necessary in order to secure the safety and access to navigable waters, the ministry may also take such action immediately.[735]

The above provisions include elements that presuppose that there is a person that is responsible for the situation.[736] In this way, the provisions are primarily applicable in relation to non-state wrecks that have known or unknown owners. Since no-one, by definition, is responsible, at least *prima facie*, for a non-state wreck that has no owner, this category, on the other hand, does not seem to be encompassed by the act. The second sentence of the first paragraph in 18 § of the act,

730 No. *Enhver flytende innretning som er laget for å bevege seg gjennom vannet*. This marks a change to the previous version of the act, where a ship instead was defined as all floating objects that can be used as a means of transportation, mode of transport, lifting device, abode, place of production or storage as well as submersibles; No. *Med fartøy menes i denne loven enhver flytende innretning som kan brukes som transportmiddel, fremkomstmiddel, løfteinnretning, oppholdssted, produksjonssted eller lagersted, herunder undervannsfartøyer av enhver art*, 4 § LOV-2009-04-17-19, Lov om havner og farvann (havne- og farvannsloven).

731 17 § the first paragraph, Act on Harbours and Navigable Waters.

732 17 § the second paragraph, Act on Harbours and Navigable Waters.

733 17 § the third paragraph, Act on Harbours and Navigable Waters.

734 Both the owner and the *reder* are included in the provision; 17 § the third paragraph.

735 18 § the first paragraph, Act on Harbours and Navigable Waters.

736 See 17–18 §§ Act on Harbours and Navigable Waters.

however, allows for the relevant authority to take immediate action even if no order has been issued to handle a wreck if this is necessary due to the safety or possibility to navigate through the navigable waters. In this way, it is possible for parts of the application of the act to also extend to this category of wrecks. This also merits that Norwegian law is placed in the category of systems less focused on an accountable person, party or entity since this possibility is provided by the regulation. One could, however, also argue that the system is somewhere in-between given its construction.

In relation to state wrecks, the above discussion means that the act is primarily relevant in relation to wrecks that are claimed or recognized by states. If urgent action is required it, however, seems to be possible for an application to extend to the other classified categories of state wrecks as well. However, all possible application will, once again, be subject to potential claims of sovereign immunity from the other relevant state. It also explicitly follows from 2 § that the act is applicable subject to the limitations that follow from international law and the potential objection of sovereign immunity can be one such limitation.

English System

The English system can also be categorised as being less focused on an accountable person, party or entity. Powers to deal with wrecks are given to both harbour and conservancy authorities as well as lighthouse authorities under the Merchant Shipping Act 1995. Harbour or conservancy authorities have the right to take actions under the act when a:

> ...vessel is sunk, stranded or abandoned in, or near any approach to, any harbour or tidal water under the control [of the authority] in such a manner as, in the opinion of the authority, to be, or be likely to become, an obstruction or danger to navigation or to lifeboats engaged in lifeboat services in that harbour or water or approach thereto.

The powers of lighthouse authorities in relation to wrecks are regulated

in s. 253 MSA 1995. These are subsidiary to the powers of the harbour and conservancy authorities, since they are only relevant when the latter authorities have no powers.[737] When s. 252 MSA 1995 is not applicable, lighthouse authorities can, consequently take action when any vessel is sunk, stranded or abandoned in any fairway or on the seashore or on or near any rock, shoal or bank in the United Kingdom or any of the adjacent seas or islands.[738] If the general lighthouse authority for the place in or near which the vessel is situated deems that the vessel is, or is likely to become, an obstruction or danger to navigation or to lifeboats engaged in lifeboat services, it is to have the same powers as the harbour and conservancy authorities have in s. 252 MSA 1995.

As in Norwegian and Finnish law, the English act includes a definition, or means of interpretation, when it comes to the property that is governed by these provisions. In s. 255(1) MSA 1995 a vessel is defined as including "any ship or boat, or any other description of vessel used in navigation" while wreck includes "jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water".

Another act of relevance in these cases is the Harbours, Docks and Piers Clause Act 1847. The act includes provisions relevant in relation to wrecks situated in the vicinity of a harbour, dock or a pier.[739] In line with s. 56 of the act, a harbour master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof.

The English provisions in both the Merchant Shipping Act 1995 and the Harbours, Docks and Piers Clause Act 1847 are broad in the sense that they do not require an existing owner, operator or any similar person in order to be applicable. Instead, they are more general and give power to the relevant authority to take action if a vessel is sunk, stranded or abandoned in such a way as to cause obstruction or danger to navigation. In this sense, all the categories of non-state wrecks are

[737] See s. 253(1)(b) MSA 1995.
[738] S. 253(1) MSA 1995.
[739] This act is generally incorporated into Private Acts which makes it applicable in relation to many individual ports; see Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 113.

covered by the provisions. The categories of state wrecks also fit the phrasing of the provisions. As in relation to the other systems, such a potential application may, however, result in conflict should a state, that recognizes such a wreck, object to an application in light of sovereign immunity.

As for the implementation of the WRC in English law, the implementation follows the pattern of the other discussed systems. One notable exception, however, is that the implemented chapter in the Merchant Shipping Act 1995 explicitly states in s. 255S(2) that the provisions are applicable in relation to warships, or ships for the time being used by a state for non-commercial purposes only, if so specified in a notice in line with the convention. This will be relevant in relation to state wrecks recognized by a state that has extended the scope of application of the WRC in this fashion. As discussed, this explicit acknowledgement is missing in Swedish, Finnish and Danish law.

6.3.4 Different Ways to Approach Wrecks

From the analysis above, it is clear that the legal systems have used different structures, techniques and ways in which to regulate what kinds of wrecks that are covered by the regulations. These differences impact which wrecks that are covered by the respective regulations. Some of the systems have regulations that build on the fact that there needs to be some person, party or entity to hold accountable for the wreck in question. This is functionally most aligned with the category of non-state wrecks that have known owners. While this often allows for extensive actions to be taken, it may also indirectly result in less clear situations that do not fit into the model. If a regulation is based upon the existence of a known owner, there might be no legal solutions at all for wrecks that fall outside of this category.

Other systems can have more general approaches and may encompass more situations than a system that solely focuses on an identified person, party or entity. These can thus include provisions that are relevant also in cases when there is no owner or some other person to

hold accountable, e.g. situations involving non-state wrecks that have unknown owners or where the owner has seized to exist. A characteristic of a more general system is to include provisions for all three or two of the categories of non-state wrecks.

A system could be imagined that functions as the complete opposite of the one described above, i.e. a system that focuses on a responsible person, party or entity. Such a system would be completely general in the sense that it does not at all target an individual party in relation to the wreck. The study of the different systems has, however, shown that this method has not been chosen even by the systems that are more general in their scope. Instead, the more general approaches tend to include provisions that also partly focus on individual parties. It is thus more reasonable to refer to these more general approaches as being less focused on an accountable person. A reasonable explanation behind this structure can be that the regulations that focus on a responsible person, party or entity tend to enable effective actions to be taken under the right circumstances.

Another difference between the systems, in relation to general structures and approaches, is that some systems include definitions of the relevant concepts, while others are silent on this issue. This can have an impact on which categories that actually fall under a specific regulation. Systems that have definitions will be, more or less, clear on which categories that will fall under them, while systems that lack definitions can be more unclear. Depending on whether the terms and concepts in the regulations are construed in an extensive or a restrictive way, the regulations may cover more or fewer categories of wrecks. It might be hard to know or assess how such constructions will be carried out, e.g. in a court or by a responsible authority that is to take action. This might also be affected by the contextual nature of the legal system. In this sense, the legal tradition of the legal system, the kind of court, cultural dimensions and other aspects can impact on how the construction is made. This variation and uncertainty can make it hard to predict how an issue will be handled in a legal system. Of course, it might also be possible to make extensive or restrictive constructions of the regulations

that include definitions, but in general the existence of the definitions themselves will provide more certainty when compared to the systems that do not include definitions at all.

6.4 Scope of Application

A regulation's scope of application is important since it decides when actions can be taken and, as important, when actions cannot be taken under the regulation. A legal system may allow for extensive actions in relation to wrecks, but these can be of limited use should the scope of application be so narrow as to only cover a minority of the potential wrecks in practice. How the legal systems relate to this notion, in relation to wrecks that pose navigational hazards, is discussed in this section.

The legal systems can, in this part, be divided into roughly two separate groups. The first group includes systems with regulations that share a wide scope of application. This usually means that the scope of application equals a maritime area, like the territorial sea, internal waters and sometimes also the exclusive economic zone. Due to this broad scope of application, these systems can be referred to as *extensive systems*. The second group includes regulations that have a narrower scope of application. An example of this would be a regulation that is only relevant in specific areas, like harbours or fairways. Such systems can be labelled as *fragmentary systems*. Furthermore, there is also a middle ground between these two systems. In this case, the legal system includes elements that fit into the description of the fragmentary system, in the sense that different pieces of legislation concern specific, more or less, narrow areas, but the individual fragments together coalesce into what effectively is an extensive system.

6.4.1 Extensive Systems

Danish System

One of the legal systems that has a broader scope of application, and thus belongs to the first group, is Danish law. The specific regulation on wrecks that pose navigational hazards has been conjoined with the specific provisions of the WRC in the Danish Maritime Code. This has some interesting effects, since the scope of application of the entire relevant act[740] has been extended to Danish territory as well as the exclusive economic zone in relation to wrecks that pose navigational hazards.[741] It could, however, be argued that the applicability and the actions that follow from 6 § in the act partly go beyond the ones found in the WRC. While the convention is applicable in relation to wrecks that pose either an environmental or navigational hazard, the Danish act is applicable in relation to ships that have sunk or stranded in such a way as to cause a hazard or major disturbance to shipping or fishing, i.e. elements that may not squarely fit within the WRC even though one could argue that they fall under the related interests as defined in the convention.[742]

Furthermore, the act goes on to state that the Ministry of Defence shall mark a wreck as soon as it becomes aware of an incident.[743] This may very well be in line with the mandate given by the WRC in respect of the wrecks that are meant to be covered by those provisions. It is, however, unclear how they are to, or indeed can, be applied in relation to wrecks from other states that are not parties to the convention and that, consequently, do not fall under it. The scope of application of the provisions on liability, discussed further below, in relation to owners of cargo and other property, however, are limited to the territorial sea and internal waters.[744] Thus, the same issue does not arise in relation

[740] Dan. *Lov om tillæg til strandingsloven af 10. april 1895.*

[741] 6 § and 14 a § LBK nr 838 af 10/08/2009, "Bekendtgørelse af lov om tillæg til strandingsloven af 10. april 1895" as amended by 2 § LOV nr 1384 af 23/12/2012.

[742] Cf. art. 1(6) WRC.

[743] 6 § Stk. 1 LBK nr 838 af 10/08/2009, "Bekendtgørelse af lov om tillæg til strandingsloven af 10. april 1895".

[744] 7 § and 14 a § LBK nr 838 af 10/08/2009, "Bekendtgørelse af lov om tillæg til

to those provisions since Denmark has full sovereignty to legislate in those areas. As for the direct provisions stemming from the WRC and their implementation in chapter 8 a of the Danish Maritime Code, these are applicable on Danish territory as well as in the Danish exclusive economic zone. For Danish ships, they are to be applied wherever the ship is positioned.[745]

There are thus some uncertainties as to the scope of application of the relevant provisions in Danish law. It is, however, clear that the system strives for a broad and extensive scope of application enabling action to be taken in many different scenarios. This results in far-reaching possibilities within territorial and inland waters of Denmark, since the state has full sovereignty in those areas. As noted, there is also an extension of the applicability to the exclusive economic zone in some cases. In total there can thus be no doubt that the Danish system should be classified as an extensive system in relation to its scope of application.

Norwegian System

A similar broad scope of application is found in Norwegian law. According to the Act on Harbours and Navigable Watersj, it is applicable in Norway's territorial and internal waters, although only on rivers and inland lakes provided that they are possible to navigate to with ships from the sea or to the extent that the relevant ministry decides.[746] Even though the application is wide, it thus differs somewhat from Danish law in the sense that the rules are not extended to the exclusive economic zone. The act, however, includes a possibility for the government to extend its scope of application, either in whole or in parts, to the exclusive economic zone of Norway as well.[747]

The act also includes some provisions that may work to narrow its

strandingsloven af 10. april 1895" e contrario as amended by 2 § LOV nr 1384 af 23/12/2012.

[745] Chapter 8 a, 164 § the Danish Maritime Code as amended by 1 § LOV nr 1384 af 23/12/2012.

[746] 2 § Act on Harbours and Navigable Waters.

[747] See further 2 § Act on Harbours and Navigable Waters.

scope of application. The relevant ministry can e.g. narrow the act's scope of application when it comes to areas and actions associated with the military.[748] The act also explicitly states that it is only applicable in so far as it is complying with bilateral agreements and general international law.[749] The discussed provisions in the act, furthermore, are applicable in relation to vessels and other objects on navigable waters and in harbours.[750]

The Act on Harbours and Navigable Waters thus includes some variations and possible limitations in relation to its scope of application. On the whole, however, it is clear that the Norwegian system is an extensive system, in the sense that it allows for broad application. The specific provisions on actions to be taken in relation to a vessel or similar object that poses a hazard to navigation are applicable in navigable waters and in harbours, enabling far-reaching possibilities to act. There can thus be no doubt that also the Norwegian system is to be treated as an extensive one in relation to its scope of application.

English System

The provisions in English law also have a wide scope of application, but are more detailed than the already discussed systems. Thus, harbour and conservancy authorities have mandates to take action should any vessel be sunk, stranded or abandoned in, or in or near any approach to, any harbour or tidal water under the control of a harbour authority or conservancy authority.[751] Furthermore, lighthouse authorities have mandates to take action if a vessel is sunk, stranded or abandoned in any fairway or on the seashore or on or near any rock, shoal or bank in the United Kingdom or any of the adjacent seas or islands.[752] As for the Harbours, Docks and Piers Clauses Act 1847, it is applicable if a wreck creates an obstruction to the harbour, dock, or pier, or the approaches

[748] No. *sjø- og landområder samt arbeid, anlegg og tiltak knyttet til forsvarsformål*; 2 § Act on Harbours and Navigable Waters.
[749] 2 § Act on Harbours and Navigable Waters.
[750] 17 § Act on Harbours and Navigable Waters.
[751] S. 252(1) MSA 1995.
[752] S. 253(1) MSA 1995.

to the same.[753] Finally, the WRC is to be applied in the United Kingdom, in United Kingdom waters and the United Kingdom's exclusive economic zone.[754] This means that both territorial and internal waters are encompassed in the scope of application as well when it comes to the implementation of the WRC.

In total, the above provisions in English law jointly result in a broad scope of application in relation to wrecks that pose navigational hazards. Even though the different relevant provisions are partly applicable in specific areas, apart from the implementation of the WRC, and thus can be said to be more in line with the fragmentary systems, they together result in a conjoined broad scope of application that effectively makes English law an extensive system in this respect.

6.4.2 Fragmentary Systems

Finnish System

A more narrow scope of application is found in Finnish law.[755] The provisions in relation to wrecks that pose navigational hazards in the Water Traffic Act are applicable when property, that falls under the act, has sunk, drifted or got stuck in a fairway or some other area used in water traffic provided that the watercraft, a part of it or some other related property is hazardous or harmful to water traffic.[756] This is thus a more narrow scope of application compared to a regulation that extends to navigable waters, internal waters or the territorial sea, or even the exclusive economic zone, as in some of the systems discussed above. The Finnish system seems to require that there is shipping or some other shipping activity in the area. This may not be the case in the

[753] S. 56 Harbours, Docks and Piers Clauses Act 1847.
[754] S. 255B(1)–(2) MSA 1995 & The Merchant Shipping (United Kingdom Wreck Convention Area) Order, SI 2015/172.
[755] The national regulation of wrecks and wreck removal in Finnish law has also been described as fragmentary elsewhere; see Suksi, "Government Action Against Wrecks – A Finnish Perspective in Light of International Law", p. 118 and cf. p. 121.
[756] 2:21 Water Traffic Act.

place where a hazardous wreck is situated.[757] In this way, the Finnish system can be described as more fragmentary when compared to the Danish, Norwegian and English system. When it comes to the WRC, however, it is applicable in Finland and in the Finnish exclusive economic zone and, consequently, allows for a broad scope of application for the wrecks that fall under it, i.e. in the default position modern non-state wrecks with known owners.[758]

Swedish System

The most narrow scope of application is found in Swedish law. The Act on the Removal of Vessels in Public Harbours is, as the title suggests, only applicable in public harbours.[759] Public harbours are regulated in the Act on the Establishment, Expansion and Cancellation of Public Fairways and Public Harbours.[760] A public harbour can be established if it is of paramount importance to the public good and is characterised by the fact that it is open to everybody and not only to some parties. An example of the latter, and thus an example of a harbour that is not a public one, could be an industrial harbour to which access is only granted to some.[761] This means that the act is *e contrario* not applicable in private harbours or anywhere else on Swedish territory.

Another regulation with a clearly delimited scope of application is the Ordinance on the Removal of Wrecks that Obstruct Shipping or Fishing. The ordinance is only applicable if a vessel or some other large object has sunk in a public fairway or, alternatively, in certain fishing areas should the vessel or object pose severe obstructions to

[757] Cf. Markku Suksi. "Government and Wrecks – On the Obligation of Public Authorities and/or of the Owner to Remove or Make Harmless Wrecks and Their Cargoes". In: *Shipwrecks in International and National Law – Focus on Wreck Removal and Pollution Prevention*. Ed. by Henrik Rak and Peter Wetterstein. Åbo Akademi University, 2008, p. 146.

[758] Chapter 11 a § 1 Finnish Maritime Code.

[759] 1 § Act on the Removal of Vessels in Public Harbours.

[760] Sw. *lag (1983:293) om inrättande, utvidgning och avlysning av allmän farled och allmän hamn*.

[761] See SOU 2007:058. *Hamnstrategi. Strategiska hamnnoder i det svenska godstransportsystemet*, p. 11; for a list of public harbours in Sweden, see SJÖFS 2013:4.

important fishing.[762] Public fairways are also regulated in the Act on the Establishment, Expansion and Cancellation of Public Fairways and Public Harbours.[763] This means that if a wreck is positioned anywhere else, e.g. slightly outside of a public fairway or along the shore, it will not be covered by the ordinance since it is not located in a public fairway or a recognized fishing area.

According to a statement issued by the Swedish Maritime Administration, the Ordinance on the Removal of Wrecks that Obstruct Shipping or Fishing is rarely used, which can, at least partly, be explained by its narrow scope of application.[764] All in all, the construction of the ordinance and its scope of application thus mean that it rarely becomes relevant in practice. The ordinance is, furthermore, not applicable if the area is under control of another specific administrative authority.[765] One such instance could be areas that are under control of the Swedish Armed Forces.[766] This could have implications on a potential application of the ordinance in relation to state wrecks, e.g. warships. This is thus another dimension that might limit its scope of application.

If a wreck poses a hazard to navigation in all other areas except for public harbours, public fairways and certain fishing areas, Swedish law is, consequently, silent on the issue and provides no instruments as to how the situation is to be solved. The implementation of the WRC, however, has made this situation clearer, since those provisions are now applicable in both the exclusive economic zone, the territorial sea and in internal waters. It thus allows for a broad scope of application in this respect for wrecks that fall under the convention.[767] The other piecemeal regulations in relation to these wrecks, however, highlight the general fragmentary approach to these issues in Swedish law.

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[762] 1 § Ordinance on the Removal of Wrecks that Obstruct Shipping or Fishing.

[763] Sw. *lag (1983:293) om inrättande, utvidgning och avlysning av allmän farled och allmän hamn*; for a list of public fairways in Sweden, see SJÖFS 2013:4

[764] M2012/1824/R, *Sjöfartsverkets yttrande över Miljödepartementets promemoria om flyttning av båtar eller skrotbåtar (Eng. The Swedish Maritime Authority's Statement on the Ministry of the Environment's Memorandum on the Removal of Boats or Scrap Boats)*, p. 1.

[765] 2 § Ordinance on the Removal of Wrecks that Obstruct Shipping or Fishing.

[766] Sw. *Försvarsmakten*.

[767] Prop. 2016/17:178, *Skärpt ansvar för fartygsvrak*, p. 25 ff.

6.4.3 Different Scopes of Application

The scopes of application in the different legal systems thus vary and while most of them have, more or less, broad coverage, there are systems, like Finnish and Swedish law, that have more narrow scopes of application depending on the relevant wreck. English law is a form of hybrid version of the two groups, as identified above, in the sense that it contains separate parts that have their own scopes of application. Taken as a whole, however, the different provisions together result in a wide scope of application similar to the other legal systems in the first group, effectively making it an extensive system.

The legal system in the extensive group that stands out is Denmark. The regulation seems to suggest a wide scope of application for various actions, some of which, it could be argued, are outside of the WRC, extending outside of Danish territory to the exclusive economic zone. This question will be dealt with further below in the section that deals with the actions that can be taken when a wreck poses a navigational hazard. A final reflection is that the systems that have implemented the WRC all have enabled a broad scope of application in relation to the wrecks that may fall under the convention, i.e. primarily modern non-state wrecks with known owners and in some cases modern state wrecks recognized by a state where the state has acknowledged that the convention is to be applied in relation to them.[768]

6.5 Responsibility and Removal

The regulations in the legal systems include different measures and actions that can or shall be taken when a wreck that poses a navigational hazard falls under a specific regulation in order to remove or handle the wreck. Closely related to such actions is the question of who that is responsible for any action. These issues are discussed and compared in this section. The systems have, in this part, been divided based on their

[768] Note, however, in relation to this, the discussion above on the fact that this possibility is not unequivocally recognized in Swedish, Finnish and Danish law, while stated explicitly in English law; cf. sec. 6.3 above.

respective characteristics. As explained and discussed in the following, a division has been made between elaborate systems, mixed systems, innovative systems and direct systems.

6.5.1 An Elaborate System

One of the more elaborate regulations is found in Norwegian law. The provisions in the Act on Harbours and Navigable Waters contain the possibility to take various actions. The act includes a duty on seafarers that encounter an object that poses a hazard to safe navigation or passage to give notice of the hazard to ships nearby and also to notify the relevant authority. Furthermore, other persons that encounter a navigational hazard shall notify the police.[769] There are similar provisions in relation to maritime casualties involving ships in 475 § of the Norwegian Maritime Code and 47 § of the Act on Ship Safety.[770]

As already discussed, the act also states that no one is allowed to use or abandon a ship, or some other similar property, in a way that can constitute a hazard or that creates a danger to the possibility of navigating through Norwegian waters or in a harbour, unless this is allowed under the act.[771] If a ship or similar property is used or abandoned in conflict with this provision, the responsible party shall remove the property or take action in order to remove the danger or inconvenience that the property causes. The measures shall, however, be proportional to the danger or inconvenience.[772]

The relevant authority can also order the responsible party to take action.[773] If the responsible party does not take the ordered action, the relevant authority can take action instead. Such action can also be taken immediately if it is necessary to secure the safety and access to navigable waters.[774] In doing so, the authority can use the property of the responsible party. The authority can also ask assistance from

[769] 11 § Act on Harbours and Navigable Waters.
[770] No. *sjøloven* and *skipssikkerhetsloven*.
[771] 17 § the first paragraph Act on Harbours and Navigable Waters.
[772] 17 § the second paragraph Act on Harbours and Navigable Waters.
[773] 17 § the third paragraph Act on Harbours and Navigable Waters.
[774] 18 § the first paragraph Act on Harbours and Navigable Waters.

the police in these matters.[775] The authority can also demand that the responsible party covers incurred costs or damages as a consequence of the actions.[776] While taking the measures in line with 18 §, the authority also has the power to use property belonging to a third party provided that this is necessary to secure or provide access to navigable waters. The expected result of the taken measures must also clearly outweigh the damage or inconvenience suffered by the third party.[777] The third party can also claim compensation for such damage from the authority.[778]

There is thus a duty to report observed hazards to safe navigation or shipping. The person that is accountable for a wreck shall, moreover, take action in order to handle and remove or limit the effects of the danger or inconvenience. If the person is passive, the authorities can order the person to take such actions. At the same time, this is balanced by the fact that the actions that are to be taken have to be proportional to the danger or inconvenience. If immediate action is necessary, the relevant authority can take action, regardless of any order to the responsible party, provided that this is necessary in light of security and the possibility to navigate in Norwegian waters.

Furthermore, there is also a mandate in the legislation for the relevant authority to use the property of the accountable party and even the property of a third person in some cases. The latter can, however, only be done if the benefits in doing so clearly outweigh the damage or inconvenience caused to the third person. Norwegian law also includes provisions that aim at taking preventive action in acute situations. The ministry can thus order the owner, operator or master of a ship that is in danger or that threatens the security in the navigable waters to take certain actions in order to avert the situation.[779]

In this way, Norwegian law enables far-reaching possibilities to act that, at the same time, are balanced by the use of assessments of

[775] 18 § the second paragraph Act on Harbours and Navigable Waters.
[776] 18 § the fourth paragraph Act on Harbours and Navigable Waters.
[777] 19 § the first paragraph Act on Harbours and Navigable Waters.
[778] 19 § the second paragraph Act on Harbours and Navigable Waters.
[779] 20 § Act on Harbours and Navigable Waters.

proportionality. The regulation gives the impression of having been constructed with care in the sense that the various possible actions and interests involved have been identified and weighed against one another. This has resulted in a comprehensive system that includes functional checks and balances.

6.5.2 Mixed Systems

Other systems are more mixed in the sense that they partly contain more elaborate provisions, but lack a similar approach in other areas. Both Swedish and Finnish law are examples of this characteristic.

Swedish System

Swedish law is similar to the stance taken in Norwegian law when it comes to the Swedish Act on the Removal of Vessels in Public Harbours. A vessel in a public harbour can be moved by the harbour master[780] if the vessel is an obstacle to the function of the harbour or permanently, or for a long time, is placed in contradiction with the terms of the harbour.[781] There are thus two main instances when the act is applicable. An example of a vessel that constitutes an obstacle under the act, is a vessel that is placed in such a way as to prevent other vessels from calling or entering the harbour.

When it comes to the other part of the provision, its application will depend on if the vessel has been positioned in conflict with the terms long enough. It is not clear how long a vessel needs to be positioned in conflict with the terms of the harbour before this becomes relevant. Arguably, the provision can be construed in a flexible way. A short duration of time is probably not sufficient considering the actions that can be taken. Consequently, a longer period of time is probably needed in order for the act to become applicable. Similar arguments are found in the preparatory works, where it is stated that a vessel that in an initial phase is not considered an obstacle under the act can become one

[780] Sw. *hamninnehavare*.
[781] 1 § Act on the Removal of Vessels in Public Harbours.

should the vessel be stationary in the same position for a long period of time.[782]

Arguably, the construction of the provision also has to take into account the specific placement of the ship or wreck in the harbour. If a vessel is positioned in a sensitive or congested area and in such a way as to prevent other vessels from calling or entering the harbour, it will reasonably become an obstacle in a fairly short amount of time. On the other hand, a vessel that is positioned in a less crowded area, although in conflict with the terms of the harbour, is likely to require a longer time period in order for the provision to become applicable. An example of this would be a vessel that is positioned at a remote quay that is not busy while in conflict with the terms of the harbour. Such a vessel may have been abandoned by its owner and abandoned vessels in general can pose problems of this kind. The act does not explicitly deal with vessels that have been abandoned, but it is stated in the preparatory works that such vessels will probably in most cases be positioned in a way that in fact is in conflict with the terms of the harbour.[783] In this way also abandoned vessels can be affected by the act, but there may also be instances when this is not the case.

If the act is applicable, there are further provisions on how the vessel is to be removed in 2–8 §§. A removal cannot be conducted until the owner or operator has been notified and given the opportunity to remove the vessel within a reasonable deadline.[784] If the matter is urgent, it is, however, possible to remove the vessel without any prior notification. In such an event the owner or the operator shall be notified as soon as possible about the removal.[785] A removal and subsequent storage of a vessel shall be carried out with care so that no unnecessary

[782]Prop. 1985/86:122, *[O]m flyttning av fartyg i allmän hamn*, p. 14.
[783]ibid., p. 14.
[784]Such a notification shall also include information on the liability that follows under the act as well as the possibilities to sell or destroy the vessel in accordance with the provisions; 2 § the first and third paragraph and cf. 3 and 6 §§ Act on the Removal of Vessels in Public Harbours.
[785]2 § the second and third paragraph Act on the Removal of Vessels in Public Harbours.

damage or inconvenience occurs.[786]

The owner or operator that has been notified is liable to the harbour master for the costs involved in the removal process and for potential storage costs.[787] The vessel can also be held as security by the harbour master for the incurred costs.[788] The harbour master also has the possibility to sell the vessel if incurred costs are not paid or if no other security is provided. Notice, however, has to have been given to the owner of the vessel, in accordance with the act, before a sale and three months have to pass following the notice until the sale can take place.[789] A sale is to be carried out with care and if the proceeds of the sale, after the cost of the sale has been discounted, are higher than the incurred costs by the harbour master, the surplus is to be given to the owner of the vessel.[790]

The harbour master also has the possibility to destroy or get rid of a vessel that obviously has no commercial value instead of removing or selling it.[791] The provision is structured in such a way as to secure that the harbour master can destroy or get rid of a vessel without first having to remove it in line with the other provisions in the act.[792] It is, however, not entirely clear what is meant with a vessel that has no commercial value. What is probably envisaged is a situation where a sale is not possible or would result in a net loss for the harbour master, since a vessel will most likely have some sort of value, e.g. the value of its steel or construction as scrap.[793] In the statement from the judicial preview, in the legislative process, it is argued that a vessel is to be deemed as obviously having no commercial value if a harbour master has tried to sell the vessel in a usual fashion but has failed to do so

[786] 4 § Act on the Removal of Vessels in Public Harbours.
[787] 5 § the first paragraph Act on the Removal of Vessels in Public Harbours.
[788] 7 § the first paragraph Act on the Removal of Vessels in Public Harbours.
[789] 7 § the second paragraph Act on the Removal of Vessels in Public Harbours.
[790] The sale can either be done privately (Sw. *under hand*) or by public auction; see 8 § Act on the Removal of Vessels in Public Harbours.
[791] Sw: *skaffa bort*; 9 § Act on the Removal of Vessels in Public Harbours.
[792] Prop. 1985/86:122, *[O]m flyttning av fartyg i allmän hamn*, p. 35.
[793] It is also possible that the value of a wreck changes and potentially increases over time; Dromgoole and Forrest, "The Nairobi Wreck Removal Convention 2007 and hazardous historic shipwrecks", cf. P. 92.

because of lack of interest.[794]

An interesting omission in the act, however, is that there is no provision on liability on behalf of the owner or some other relevant person when a vessel has been destroyed or got rid of.[795] The judicial preview noted this in its statement during the legislative process, but did not discuss the issue further.[796] The actions involved in destroying or getting rid of a vessel will, reasonably, result in costs for the harbour master, but since the act lacks a provision in relation to compensation for these costs, they will have to fall on the harbour master provided that liability on behalf of the owner cannot be established on some other ground. It is unclear whether this was contemplated by the legislator or if it was merely a miss in the legislative process.

The act thus provides a variety of actions in relation to the vessels that fall under it. A ship can be moved by the harbour master if it obstructs the use of the harbour or if it is positioned in breach of its regulations. The owner shall be notified and given a sufficient time limit within which the ship is to be removed. If immediate action is necessary, the ship can also be removed before the owner has been notified. There is, furthermore, as in the Norwegian legislation, inclusions in order to balance these actions that can be taken. Thus, a removal and storage of a ship shall be carried out with care in order to prevent any unnecessary damage or disturbance. The act can thus be described as quite elaborate in its construction.

The above systematic is, however, not found elsewhere in Swedish law with the exception of the implementation of the WRC which has a similar structure for the wrecks that fall under that regulation. The Ordinance on the Removal of Wrecks that Obstruct Shipping or Fishing, however, is much less clear on these issues. The ordinance gives power to the Swedish Maritime Administration to remove or have removed, wholly or partly, vessels or other large obstructions that have sunk in a public fairway. Such a removal can take place if it is deemed appropriate

[794] Sw: *Lagrådet*; Prop. 1985/86:122, *[O]m flyttning av fartyg i allmän hamn*, p. 35.
[795] Cf. 9 § Act on the Removal of Vessels in Public Harbours.
[796] Prop. 1985/86:122, *[O]m flyttning av fartyg i allmän hamn*, p. 35.

and the vessel or obstruction is an obstacle or danger to navigation, provided that the owner, operator or master does not immediately remove it.[797] Further details on how the wreck is to be removed, any balancing between the different parties or what is to happen to the wreck after it has been removed, however, are not included in the ordinance. This observed paucity in the regulation is another example of how Swedish law in some cases comes across as fragmentary.

Finnish System

The relevant provisions in Finnish law are found in the Water Traffic Act. The act gives mandates to a party maintaining a public fairway to order a watercraft to be moved should it disturb, impede or endanger the water traffic in the area.[798] Moreover, the owner of a watercraft or other goods, or the party in whose control the watercraft or goods are, has a duty of removal if such property has sunk, drifted or got stuck in a fairway or some other area used in water traffic if the watercraft, a part of it or the other property is hazardous or harmful to water traffic.[799] This person shall, furthermore, if necessary, mark the object or take similar action in order to warn other seafarers and also, without delay, report the incident.[800] There are, moreover, provisions in the specific act on liability in Finnish law on liability as a result of negligence in the sense of failing to act in accordance with the act.[801] Furthermore, the relevant authorities have the right to take any required action in order to avoid or to remove the hazard or obstacle at the expense of the liable person.[802]

Finnish law is thus, like Norwegian law and partly Swedish law, fairly straightforward in the sense of putting a duty on the owner, or

[797] 1 § the first paragraph Ordinance on the Removal of Wrecks that Obstruct Shipping or Fishing.
[798] The same is true in relation to the responsible party for a canal or a movable bridge area; 2:20 Water Traffic Act.
[799] 2:21 Water Traffic Act.
[800] 2:21 the first and second paragraph Water Traffic Act.
[801] 31.5.1974/412, Act on Liability (Sw. *Skadeståndslag*) and 2:21 the fourth paragraph Water Traffic Act.
[802] 2:21 the fifth paragraph Water Traffic Act.

some other accountable person that is in possession of the property, to remove a ship, a part of a ship or goods that have sunk in a fairway or some other shipping area if it causes a hazard or disturbance to water traffic. If necessary, the sunken object shall also be marked and the owner shall report the incident. The authorities can also take action instead at the liable persons expense. As already discussed, there may, however, be cases that fall outside of the act's scope of application. The implementation of the WRC has, however, extended the possibility in relation to such cases when it comes to wrecks that fall under the convention.

6.5.3 An Innovative System

In Danish law, the relevant provisions are found in the Act on Stranding. When the act is applicable, the Ministry of Defence shall mark the wreck, if necessary, as soon as it is notified of it, provided that it has not already been marked. The ministry shall then ask the owner, or the representatives of the owner or someone else that has rights in respect of the wreck, if there are any plans for the wreck's removal or salvage. At the same time, the ministry shall inform the relevant person of the space that is required between the wreck and the surface of the water, along with a time limit within which action must be taken in order to provide this sufficient space. If the ministry has not found out who the owner, or the other relevant person, is or if the person does not carry out the above-mentioned operation or fails to do so within the specified time limit, the ministry can itself carry out the operation.[803] If there is need for urgent action[804] given the nature of the hazard, the ministry can take action in the immediate aftermath of the stranding or sinking.[805]

Costs incurred as a consequence of actions taken under the act shall

[803] 6 § Stk. 2 LBK nr 838 af 10/08/2009, "Bekendtgørelse af lov om tillæg til strandingsloven af 10. april 1895".
[804] Dan. *aldeles påtrængende omstændigheder*.
[805] 6 § Stk. 3 LBK nr 838 af 10/08/2009, "Bekendtgørelse af lov om tillæg til strandingsloven af 10. april 1895".

be paid by the registered owner of the ship or its insurer in line with the implementation of the WRC in chapter 8 a of the Danish Maritime Code.[806] If the wreck is located in Danish territorial waters, the owner of any potential cargo, or some other property, is also liable, provided that the cargo or other property in itself creates a hazard or major disturbance to shipping or fishing.[807] This liability is limited to the value of the property at hand and there is no personal responsibility on behalf of its owner.[808] The state has priority for its claims in relation to all the property for the above costs prior to all other claims.[809] If the ministry itself has taken action in order to remove the hazard and in doing so removed or salvaged the ship or other property, the ministry has the right to sell the property at public auction and cover its losses out of the proceeds of the sale. It is also possible to seize or arrest the property.[810]

Consequently, in Danish law the discussed issues are handled slightly differently when compared to the other legal systems. In the Danish system, the wreck shall first be marked by the Ministry of Defence. Thereafter, the accountable person shall be approached and asked whether any salvage or removal operations are planned to take place in relation to the wreck. The accountable person shall also be notified of the amount of space that is necessary between the wreck and the surface of the water in order for the wreck to be deemed secure. Obviously, this aims at situations where a ship has sunk and not e.g. stranded in such a way as to be above the water line. This distance is to be achieved, and the wreck thus secured, within a given time period. If the required action is not taken, or if the accountable person cannot be contacted

[806] 7 § Stk. 1 LBK nr 838 af 10/08/2009, "Bekendtgørelse af lov om tillæg til strandingsloven af 10. april 1895" as amended by 2 § LOV nr 1384 af 23/12/2012.
[807] 7 § Stk. 2 LBK nr 838 af 10/08/2009, "Bekendtgørelse af lov om tillæg til strandingsloven af 10. april 1895" as amended by 2 § LOV nr 1384 af 23/12/2012.
[808] 7 § Stk. 2 LBK nr 838 af 10/08/2009, "Bekendtgørelse af lov om tillæg til strandingsloven af 10. april 1895" as amended by 2 § LOV nr 1384 af 23/12/2012.
[809] 7 § Stk. 2 LBK nr 838 af 10/08/2009, "Bekendtgørelse af lov om tillæg til strandingsloven af 10. april 1895" as amended by 2 § LOV nr 1384 af 23/12/2012.
[810] 7 § Stk. 3 LBK nr 838 af 10/08/2009, "Bekendtgørelse af lov om tillæg til strandingsloven af 10. april 1895" as amended by 2 § LOV nr 1384 af 23/12/2012.

at all, the ministry can take action in order to secure the wreck. If immediate action is necessary, the ministry can, furthermore, act in the immediate aftermath of a stranding or sinking without having to first go through the previous procedure.

Danish law is unique, among the studied systems, in specifically regulating the notion of a required space between the wreck and the water surface in order to guarantee that the wreck is secure. This is one example of the innovative and creative solutions often found in Danish law in these matters as shown in this work. Also the clear inclusion of a dialogue between the ministry and the accountable person is interesting. In a sense, this could be viewed as a dimension of balance between the affected parties as in some of the other systems. In those systems, however, this often takes the form of the authorities taking into account the position of the other party or assessing the reasonableness and proportionality of a certain action. The Danish regulation seems to more clearly point towards a communication and dialogue between the parties, which may be helpful in order to deal with a situation in an effective way.

6.5.4 A Direct System

English law can be classified as a direct system when it comes to wrecks that pose navigational hazards. The relevant provisions are found in the Merchant Shipping Act 1995 and the Harbours, Docks and Piers Clauses Act 1847. When it comes to the Merchant Shipping Act 1995, the actions that a harbour or conservancy authority can take when the act is applicable follow from s. 252(2) and are:

(a) to take possession of, and raise, remove or destroy the whole or any part of the vessel and any other property to which the power extends;

(b) to mark the location of the vessel or part of the vessel and any such other property until it is raised, removed or destroyed; and[811]

[811] The original phrasing instead of "mark the location of" was "light and buoy". The

(c) [...] to sell [under certain circumstances], in such manner as the authority think fit, the vessel or part of the vessel so raised or removed and any other property recovered in the exercise of the powers conferred by paragraph (a) or (b) above;

(d) to reimburse themselves, out of the proceeds of the sale, for the expenses incurred by them in relation to the sale.

The authority is thus given a clear mandate to handle the wreck, in whole or in part, in order to remove the navigational hazard that it poses. It can also mark the wreck, which can be an important move in order to prevent other vessels from e.g. colliding with it.[812] The location can be marked by the use of buoys, lights or other physical devices, as well as by the transmission of information about the location.[813] The term "other property" refers to the equipment of the vessel as well as cargo, stores and ballast.[814]

As noted, the harbour or conservancy authority also has the possibility to sell the wreck or parts of it following a raising or removal. This is an interesting part of the regulation in this chapter, since it plays a part in claiming compensation when a wreck that poses a navigational hazard has been removed. Before a sale can take place the authority, however, has to wait until at least seven days of notice have been given of the intended sale.[815] Notice is to be given by advertisement in a local newspaper circulating in or near the affected area. One exception to this, however, is if the property is of a perishable nature. In such a case there is no need to wait in this way. Should there be a surplus following the sale, this part of the proceeds shall be held by the authority on trust for the persons entitled thereto.[816]

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substitution took place by the Marine Navigation Act 2013 s. 11, which also added a separate subsection to s. 252 that regulates how the marking can be executed, see s. 252(3A) MSA 1995.

[812] That this can be problematic is well illustrated by the collisions that followed the sinking of the Tricolor, as mentioned above.

[813] S. 252(3A) MSA 1995.

[814] S. 252(3) MSA 1995.

[815] S. 252(5) MSA 1995.

[816] S. 252(4) MSA 1995.

If the owner of the wreck, or some other property concerned, so wishes, that person has the right to have the wreck, or the property, delivered to him on payment of its fair market price.[817] The market value can be determined in two ways. Either the authority and the owner can agree on a fair market price, or, alternatively, a person appointed by the Secretary of State for this purpose can determine the price.[818]

The above concerned harbour and conservancy authorities. Attention now turns to lighthouse authorities. The powers of lighthouse authorities in relation to wrecks are regulated in s. 253 MSA 1995. These are subsidiary to the powers of the harbour and conservancy authorities, since they are only relevant when the latter authorities have no powers.[819] When s. 252 MSA 1995 is not applicable, lighthouse authorities can, consequently take action when any vessel is sunk, stranded or abandoned in any fairway or on the seashore or on or near any rock, shoal or bank in the United Kingdom or any of the adjacent seas or islands.[820] If the general lighthouse authority for the place in or near which the vessel is situated deems that the vessel is, or is likely to become, an obstruction or danger to navigation or to lifeboats engaged in lifeboat services, it is to have the same powers as the harbour and conservancy authorities have in s. 252 MSA 1995.

If the lighthouse authority has incurred expenses while exercising its powers under the act, these can be reimbursed from the proceeds of a sale of the property. If the proceeds are not sufficient to cover the costs, it may also recover the amount from the relevant person.[821] Alternatively, if the lighthouse authority has not exercised the power of selling the property, the full amount of the expenses can be recovered from the relevant person.[822] The relevant person refers to the owner of the vessel at the time of the sinking, stranding or abandonment of the

[817] S. 252(6) MSA 1995.
[818] S. 252(7) MSA 1995.
[819] See s. 253(1)(b) MSA 1995.
[820] S. 253(1) MSA 1995.
[821] S. 253(2)(a) MSA 1995.
[822] S. 253(2)(b) MSA 1995.

vessel.[823] As a further step, should the expenses not be covered by the proceeds of the sale or be recoverable from the relevant person, there is a specific fund called the General Lighthouse Fund from which the expenses shall be paid.[824]

Should there be any confusion as to whether a harbour or conservancy authority or a general lighthouse authority has mandate to deal with a given situation, that question shall be referred to the Secretary of State for decision.[825] Such a decision is final.[826]

As stated, there are also provisions in the Harbours, Docks and Piers Clauses Act 1847 in relation to wrecks situated in the vicinity of a harbour, dock or a pier.[827] In line with s. 56 of the act, a harbour master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof. The expenses of removing such a wreck, obstruction or floating timber is to be compensated by the owner. The harbour master may also detain such a wreck or floating timber as security for the expenses. There is, furthermore, also a possibility to sell the wreck or floating timber and to use the proceeds of the sale to compensate the incurred costs. Should there be a surplus, this is it be paid to the owner on demand.

When scrutinizing the above provisions, it is clear that English law stands out from the other systems in the sense that it is not so occupied with the balance between the involved parties. It can therefore be described as more direct than the others. It allows for far-reaching possibilities on behalf of the relevant authority to take possession of, raise, remove or destroy the whole or any part of a wreck or any other property that is an obstruction or danger to navigation. In that sense English law is an elaborate system, but one in lack of the balancing

[823] S. 253(4) MSA 1995.
[824] S. 253(3) MSA 1995 and see also s. 213 MSA 1995.
[825] S. 254(1) MSA 1995.
[826] S. 254(2) MSA 1995.
[827] This act is generally incorporated into Private Acts which makes it applicable in relation to many individual ports; see Gaskell and Forrest, "The Wreck Removal Convention 2007", p. 113.

notions found in e.g. Norwegian law. A more balanced approach will, however, have to be taken should the situation fall under the WRC, since those provisions include demands for proportionality and balance to certain extents as already discussed in section 5.5.

The English regulations are detailed and specific. The different mandates and competences are also clearly demarcated and positioned against one another. The provisions give the impression of having been in formation and tested for a long period of time. This is also not surprising, given the age of the English system and the fact that the system, reasonably, has had more exposure to these situations when compared to the other systems.

6.5.5 Available Actions

The analysis has showed that there are a number of different actions that can be present when a wreck poses a navigational hazard. One of the most prevalent ones is a notification or order to an accountable party, often the owner of the wreck but sometimes also the operator or some other relevant person, that states that the wreck is a navigational hazard and that it has to be removed by the person. Sometimes this notification or order is also combined with a specified time limit within which the wreck is to be removed. Furthermore, if the accountable person does not take the required action, the systems usually include a mandate for some responsible authority to remove the wreck instead. This may also be an option should the person have taken action, but done so in a non-satisfactory way. In cases of emergency, there is sometimes also the possibility to have a wreck removed without contacting or waiting for the accountable person to carry out any action.

Another dimension of actions, that are more supplementary in nature, concerns the marking of a wreck that poses this kind of hazard as well as a duty to notify other seafarers of the danger. This communication, in the sense of marking and notifying seafarers, can be of utmost importance in order to prevent other vessels from e.g. colliding with the wreck. Another inclusion in this dimension can be a duty to

localise a wreck that has been reported or has come to the attention of the authorities in a system for some reason. These actions are similar to the approach taken in the WRC, where a wreck that poses a hazard to navigation is to be reported, located, marked and then removed.[828] The registered owner is to remove the wreck, but the affected state can take action on its own if the wreck is not removed within a set time period or if immediate action is needed. In this sense, the systems that have implemented or incorporated the WRC have access to a, more or less, comprehensive system to deal with wrecks that fall under the convention. When it comes to the other specific regulations in the systems, however, the picture is sometimes, as shown, less clear.

6.6 Liability Issues and Compensation

An issue closely related to the previous issue of actions that can be taken, is the issue of liability and compensation. Some aspects of this have already been discussed in the section above, since the provisions are functionally closely linked to the actions that can be taken. This section will focus in some more depth on this issue alone.

6.6.1 Two Main Dimensions

The provisions concerning liability and compensation can be divided into two main dimensions or parts. The first one is concerned with establishing liability on behalf of an accountable person and, thus, allowing an affected authority, or some similar body, to claim compensation from that person. The second one goes further and additionally provides the affected authority with the possibility to sell or have the wreck sold and then to recuperate any incurred losses from the proceeds of the sale. Another variation on this second theme, is to enable the affected authority to seize or arrest the wreck in order to hold it as a security for a claim. In other words, the latter solution aims at establishing a

[828] Or, more correctly, the hazard that the wreck poses shall be removed; see above in section 5.5.

right of retention in relation to the wreck. Since such a right does not include a right to sell the wreck, it is a solution that goes less far than the first alternative. There are, however, also hybrid versions, where both variations occur and where the regulation thus provides both for a right of retention and then a subsequent right of sale if the security is not enough. One could also view this as an extended form of a right of retention, but it can also be argued that this option of selling the wreck is something that goes beyond what is usually referred to as a right of retention and that it, therefore, is more reasonable to define such a regulation as a hybrid of the two variations.

The Swedish Act on the Removal of Vessels in Public Harbours is an example of this hybrid variation, where the harbour master may hold the ship as a security for a claim for incurred costs with an additional option to sell the wreck if the claim is not paid or if no other security is put in its place and three months have passed. Of course, the successful use of these two discussed variations depends on the wreck having an actual value. If it has no commercial value, or if it has been damaged or destroyed in such a way as to result in more loss than gain, it will most likely not be advantageous to sell the wreck. Such a wreck will most likely also not work as a security for a claim.

Both Swedish and English law allow for wrecks to be sold should they be positioned in certain harbours. The discussed Swedish Act on the Removal of Vessels in Public Harbours is similar to the provisions found in English law concerning the mandate and powers given by s. 252 and 253 MSA 1995, as well as the provisions in the Harbours, Docks and Piers Clauses Act 1847. When it comes to the ordinance in Swedish law, which in its application has some resemblance to s. 253 MSA 1995, this does not, however, as discussed, contain any provision on liability or compensation.

The Water Traffic Act, in Finnish law, contains more features than the ordinance already discussed in Swedish law and expressly deals with the question of liability, making the owner of the ship, or the one in whose possession the ship or cargo was at the time of the sinking, responsible. The act also clearly states that this person shall be

responsible for required actions that the relevant authorities have to take in relation to the wreck. This question is altogether missing in the Swedish ordinance, making it unclear whether it is possible to claim responsibility in this way.

6.6.2 Different Orders of Action

Another distinction that can be made between the legal systems has to do with time and the order in which actions are to or can be taken. Some legal systems are more adamant than others on that the accountable person shall act first in a situation where a wreck poses a hazard to navigation. This can take the form of only allowing the relevant authority to take action when it comes to selling the wreck or retaining it as a security for a liability claim upon failure on behalf of the accountable person to take the necessary action. Norwegian law is an example where the accountable person first is supposed to act in accordance with a given order aimed at removing the hazard posed by the wreck. If the person fails to do so, the relevant authority can take action instead and the responsible party will become liable for incurred costs as a consequence of this.

Norwegian law, however, also includes a possibility for the authorities to take immediate action if necessary and also to claim compensation from the accountable person in such an event. This is thus another variation where the provisions, like in the first case discussed above, are aimed at the person taking action, but where the relevant authority also retains the possibility to act if immediate action is necessary. The WRC is another example that includes provisions to this effect in the sense of stating that the registered owner first is responsible to remove a wreck and that the affected state only shall take action if the owner fails in this duty or if immediate action is necessary. At the other end of the spectrum there is, finally, also a variation where the relevant authority at its own discretion can take action regardless of the behaviour of the accountable person.

6.6.3 Cultural Differences in the Systems

Differences in the legal cultures of the legal systems also result in that the function of liability and the possibility to get compensation are handled somewhat differently. As an example, the English provisions in s. 252 and s. 253 MSA 1995 use the concept of a trust in order to deal with any potential surplus of a sale following compensation for incurred costs. This surplus is meant to be handed to the owner. In the Harbours, Docks and Piers Clauses Act 1847 this is handled somewhat differently. Under that regulation, any surplus is to be given to the owner on demand. The owner thus needs to act in the latter case, while the relevant authority under the MSA 1995 has an active obligation to set up a trust.

The concept of a trust does not exist in the other legal systems, but arguably the end result will often be, more or less, functionally the same. In the Swedish system, as an example, it follows from the Act on the Removal of Vessels in Public Harbours that any potential surplus is to be given to the owner. A similar result as the trust provides in English law can, moreover, be reached in Swedish law by a deposit using the Act on Deposit of Money in Escrow.[829] The means to get there may thus vary, but the end result will probably be functionally similar or the same in the systems.

6.6.4 Time Limits

Another aspect where there are differences between the legal systems, concerns the time limits in relation to a sale. As an example, the limits are short in English law. It suffices to give notice by advertisement in a local newspaper seven days in advance in s. 252 and s. 253 MSA 1995. As a comparison, the Swedish Act on the Removal of Vessels in Public Harbours states a time limit of three months following notice to the owner. It therefore does not suffice to merely give notice by advertisement as in the English act and then wait seven days.

[829] Sw. *lag (1927:56) om nedsättning av pengar hos myndighet*.

The different time limits do not in themselves affect the fulfilment of the function of sale, since the end result is that a sale is possible when enough time has passed. The difference does, however, affect the relation of strength between the involved parties since the relevant authority will be able to take action earlier in systems with shorter time limits. Thus, since the time limit is much longer in Swedish law, that regulation is more beneficial to the owner in this respect. The English system, on the other hand, is more efficacious in relation to the relevant authority that can take action.

6.6.5 Different Approaches

All the legal systems, in one way or another, include elements that result in the possibility to establish liability when wrecks pose navigational hazards. All the legal systems thus handle the function of compensation in relation to wrecks that pose a hazard to navigation in some sense. They, however, do so to various extents. A notable example, where such a possibility is missing, however, is the Swedish Ordinance on the Removal of Wrecks that Obstruct Navigation or Shipping, which is silent on this issue. There is also an uncertainty in relation to Swedish law on its applicability as well as the limited scope of application should it be applicable. The implementation of the WRC has, however, made this situation clearer in relation to the wrecks that fall under that regulation.

Chapter 7

Wrecks as Environmental Hazards

This chapter concerns wrecks that pose environmental hazards. The fact that ships and wrecks can pose such hazards is well illustrated by the major accidents that have caused substantial oil spills in the 20th century and onwards. The already discussed accidents involving the tankers Erika and Prestige are examples of this in recent years.[830]

Legal attention first substantially arose in relation to these issues in the wake of the Torrey Canyon accident in 1967 that sparked the development of the first international legal instruments meant to deal with marine pollution at sea.[831] The Torrey Canyon was a Liberian oil tanker that ran aground outside the southwest coast of England on the Seven Stones Reef in March 1967. The accident lead to an oil spill of about 50 000–80 000 tons of crude oil that had severe impact on the environment and affected a large area of coastline. After an initial failed salvage attempt, the Royal Air Force bombed the wreck attempting to improve the situation by burning the cargo. Detergents were also used in order to try to mitigate the effects of the oil spill, but were probably also harmful to the environment. The accident and the legal issues

[830] See above in sec. 1.5.3.

[831] The issue of oil pollution at sea had, however, already been discussed in an international setting in the middle of the 1950s; Hill, *Maritime Law*, p. 424.

and claims that followed made it clear that this was an area of law that needed to be developed.[832]

Gaskell and Forrest refer to the Torrey Canyon accident as "the catalyst for the development of modern marine pollution law".[833] Subsequent to the accident, a range of international conventions, like the Intervention convention and the CLC, were developed to deal with the various dimensions of oil pollution and the resulting liabilities.[834] This development has continued and the Bunker convention as well as the WRC are, in this sense, further steps along this line originating in the aftermath of the Torrey Canyon.[835]

Wrecks can, however, cause environmental hazards also in other circumstances. Already existing wrecks on the seabed are constantly subject to corrosion. In time the hull of the wreck will deteriorate and may cause a spill of any oil still inside. Such spillage has been observed from a number of wrecks. One example is the already mentioned warship Blücher that was sunk during the Second World War and continuously leaked oil with an observed increase in the 1990:s.[836] Another example is the Norwegian ship Skytteren that was in arrest in the port of Gothenburg in 1942. She was attacked by a German warship just outside of Swedish territorial waters as she was trying to escape to England. The ship suffered damage in the attack and the master decided to scuttle her. The wreck is now positioned at a depth of 74 meters and has continuously leaked bunker oil.[837]

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[832] Cf. Gaskell and Forrest, *The Law of Wreck*, p. 6 ff, with further references, on details of the accident and the legal aftermath. See also Mukherjee and Brownrigg, *Farthing on International Shipping*, p. 301.

[833] Gaskell and Forrest, *The Law of Wreck*, p. 6.

[834] Mukherjee and Brownrigg, *Farthing on International Shipping*, p. 271 f. and p. 301 ff.

[835] Gaskell and Forrest, *The Law of Wreck*, p. 6.

[836] A removal process was conducted by Norway in order to remove the existing oil; see section 1.5.3 above.

[837] The amount of oil that still remains in the wreck is unknown; Sjöfartsverket (2018b). *Miljörisker sjunka vrak II – Undersökningsmetoder och miljöaspekter*. Dnr: 1399-14-01942-6. 2014. URL: http://www.sjofartsverket.se/upload/Listade-dokument/Rapporter_Remisser/SV/2015/MiljoriskerSjunknaVrakII.pdf (visited on 02/2018), p. 35. Skytteren is one of the wrecks that was subject to an investigation by the Swedish Maritime Administration and others with the purpose of identifying wrecks that may pose environmental hazards. The investigation identified 17 000

This chapter will look at provisions that deal with wrecks that pose environmental hazards of this kind, but will not primarily focus on the implementation of the, already mentioned, various international conventions that target oil pollution.

7.1 Elaboration of the Research Question

The research question for this chapter is how wrecks that pose environmental hazards can be handled from a legal point of view. In order to adress the question and to put it into a perspective, it can be broken down into different dimensions. This process also functions as a demarcation of this chapter.

The dimensions in focus are:

- Purpose and Functions
- Wrecks covered in the studied regulations
- Scope of application
- Responsible parties
- Available actions
- Liability issues and compensation

The analysis is focused on each of these dimensions in turn.

7.2 Purpose and Functions

All the different regulations in the legal systems, on this issue, deal with pollution of some sort. That is the common denominator between

different objects or wrecks around the Swedish coast and these were later reduced, taking account of available information about the wrecks such as their age, position and the type of ship, to around 2 700 objects. These wrecks could not be disregarded from the investigation without further information. Among the 2 700 objects, 316 wrecks were identified that posed potential environmental hazards. These were, finally, reduced further to 31 wrecks that were deemed to pose threats to the environment; Sjöfartsverket, *Miljörisker från fartygsvrak*, p. 2 and p. 41 ff. Actions have been taken in relation to some of these wrecks in order to deal with this danger in a preventive way.

the regulations and the reason is obvious since this category of wrecks consists of wrecks that pose environmental hazards. The main interests and the relevant values to protect are therefore related to pollution in different ways. Even if nothing is mentioned, it is often clear that the provisions serve this purpose. The systems, however, have expressed the purposes and interests that are to be protected in somewhat different ways.

Several different functions or dimensions can be identified when it comes to wrecks that pose environmental hazards and the purpose of the regulations that govern such instances. Some regulations are accident related, in the sense that they focus on provisions that are applicable in relation to accidents of different kinds. Another dimension is a broader sense of environmental protection which can be more extensive than a mere focus on accidents. Another angle is to focus on wastes and to, potentially, include wrecks in the definition of waste. Finally, there is also a variation where provisions on ship source pollution can become relevant in relation to wrecks that pose environmental hazards as well.

7.2.1 Accident Related

In English law, the Marine Shipping Act 1995 includes provisions in relation to environmental hazards in the form of safety directions that can be given in certain situations. The provisions are found in Schedule 3A of the act.[838] As is discussed below, these provisions can be relevant in relation to wrecks that pose environmental hazards. This regulation is an example of an accident related or oriented framework. The schedule has no manifest purpose, but it is evident from the regulation that its primary concern is to reduce or handle pollution from ships following an accident, some other precarious situation or when there is a risk to safety.[839] There is thus a clear link to the occurrence of an accident or some similar incident and the need to handle or mitigate

[838] Inserted by the Marine Safety Act 2003.
[839] Cf. para. 1(1), para. 2(1) and para. 3(1) MSA 1995, Schedule 3A.

the danger from such a situation.

Another regulation that can be applicable in relation to wrecks that pose environmental hazards and that is centred on accidents is the Act on the Protection Against Accidents in Swedish law.[840] The act is, however, not specifically focused on ship source pollution or environmental hazards. Instead, the approach and purpose are more general in the sense of an ambition to provide a satisfying and equal protection against accidents throughout Sweden.[841] In the same way as with the previously mentioned schedule in English law, this Swedish piece of legislation is thus also focused on accidents of different kinds. The Swedish act goes on to state that the life and health of individuals are protected under the act along with property in general and the environment.[842]

7.2.2 Environmental Protection

Other regulations have more specific purposes focused on protecting the environment. These are often expressed in general terms. Thus, the Norwegian Pollution Act, that can be relevant in these cases, has the purpose of protecting the external environment from pollution and to reduce already existing pollution.[843] The act is also meant to secure that pollution does not cause health issues or other negative effects on the surroundings.[844]

Similar stances are taken in both Finnish and Danish law in the specific regulations that are relevant in these situations. The Finnish Environmental Protection Act[845] has a similar general purpose in the form of preventing and stopping pollution and the risk of pollution to

[840] Sw. *Lag (2003:778) om skydd mot olyckor*.
[841] Chapter 1 § 1 Act on the Protection Against Accidents.
[842] Chapter 1 § 1 Act on the Protection Against Accidents.
[843] No. *Lov om vern mot forurensninger og om avfall; forurensningsloven*; chapter 1 § 1 Pollution Act.
[844] No. *"Loven skal sikre en forsvarlig miljøkvalitet, slik at forurensninger [. . .] ikke fører til helseskade, går ut over trivselen eller skader naturens evne til produksjon og selvfornyelse"*; Chapter 1 § 1 Pollution Act.
[845] Sw. *Miljöskyddslag 27.6.2014/527*.

the environment.[846] The same is the case with the Danish Act on the Protection of the Maritime Environment.[847] Its purpose is to protect nature and the environment in such a way as to guarantee a readiness to act in the event of pollution in the water, on coastlines or in harbours.[848]

7.2.3 Wastes

Another underlying purpose or focus in some regulations is waste management in different ways. The already referred to Norwegian Pollution Act has an additional angle in its purpose related to wastes. The purpose of the act, to this extent, is to reduce the amount of waste and improve waste management. Moreover, the act shall also secure that wastes do not cause health issues or other negative effects on the surroundings.[849]

In close similarity to this additional purpose related to wastes in the Norwegian act, the Act on Wastes in Finnish law can be indirectly relevant in relation to wrecks that pose environmental hazards as well. The objective of the act is to prevent danger and damage to human health and the environment stemming from waste and waste management. Its purpose is, furthermore, to reduce the amount of waste and its damage and also to support a sustainable use of natural resources, to ensure a functioning waste management and to prevent littering.[850]

7.2.4 Ship Source Pollution

Two acts in Swedish and Finnish law concern protection against ships or wrecks that pose environmental hazards. Both the Swedish Act on Measures Against Pollution from Ships[851] and the Finnish Act on

[846] § 1(1) Environmental Protection Act.
[847] Dan. *Bekendtgørelse af lov om beskyttelse af havmiljøet, LBK nr 1165 af 25/11/2019.*
[848] § 1 Act on the Protection of the Maritime Environment.
[849] This is conjoined in the legal text with the purpose of securing nature's own ability to produce and replenish itself; No. *[. . .] at forurensninger og avfall ikke fører til helseskade, går ut over trivselen eller skader naturens evne til produksjon og selvfornyelse"*. See chapter 1 § Pollution Act.
[850] Sw. (17.6.2011/646) *Avfallslag*; 1 § Act on Waste.
[851] Sw. *lag (1980:424) om åtgärder mot förorening från fartyg.*

the Prevention of Pollution from Ships[852] have the purpose of taking measures in order to prevent pollution from ships.[853] If the acts are construed in an extensive way, they may be relevant in relation to wrecks.

7.2.5 Different Approaches to Purpose and Functions

It is clear from the above discussion that the regulations have slightly different functions and focus, but that they all in some way relate to pollution. One category focuses on accidents and centres the environmental protection around handling the accident as such. A second category focuses on protection against pollution in a more general way and, in close resemblance, a third category has a similar scope but is focused on wastes and their environmental impact. The fourth and final category is the regulations that specifically are aimed at pollution from ships. These different vantage points can functionally coalesce into the common goal of preventing ships or wrecks from posing environmental hazards.

7.3 Wrecks Covered in the Studied Regulations

One main distinction that can be made when it comes to the wrecks that are encompassed in the regulations, is the difference between a regulation that deals specifically with wrecks and a regulation that does not have wrecks as its main focus. In the latter case, the application in relation to wrecks is thus indirect. In this way, a division can be made between regulations that directly concern wrecks and regulations where wrecks are regulated indirectly.

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[852] Sw. (Nr 300./1979) *Lag om förhindrande av vattnens förorening, förorsakad av fartyg*. See also the Act on Oil Pollution Response, Sw. (1673/2009) *Lag om bekämpning av oljeskador* and Suksi, "Government Action Against Wrecks – A Finnish Perspective in Light of International Law", p. 118 ff.

[853] See chapter 1 § 1 Act on Measures Against Pollution from Ships and § 1 Act on the Prevention of Pollution from Ships.

7.3.1 Regulations Directly Concerned with Wrecks

When it comes to the legal systems, only the provisions that stem from the WRC can be counted to the former group in relation to wrecks that constitute environmental hazards. These provisions are specifically aimed at wrecks of this kind.[854] This also means that only wrecks that fall under that regulation are subject to this category of regulations. As discussed in relation to wrecks that pose hazards to the navigation of other vessels, the default position is, consequently, that primarily modern non-state wrecks with known owners are covered. A further possibility is state wrecks recognized by states provided that the states in question have extended the scope of application to their own state vessels. Potentially one could, however, as discussed, also argue that the provisions can be relevant in relation to other categories of wrecks as well enabling a state to take action, but this would mean that the provisions on e.g. insurance, compensation and so on will be unable to function.

7.3.2 Indirect Regulation of Wrecks

All the other studied domestic regulations in the legal systems share the latter approach in the sense that they are not explicitly related or directed to wrecks as such. The coverage is thus indirect.

In this way, the Schedule 3A of the Marine Shipping Act 1995 deals with ships in certain situations involving an accident. It is also relevant in relation to some other occurrence that motivates directions under the Schedule as well as when there is a risk to safety.[855] The regulation may thus become relevant in relation to ships that are in risk of becoming or that are in the process of becoming a wreck. Consequently, modern wrecks will fall under its application given that there is someone to which an order can be given. This does not, however, necessarily mean that only modern wrecks with known owners are encompassed, since the act is wide when it comes to the different persons that can be subject

[854] For a detailed discussion on the convention in this respect, see section 5.5.
[855] Cf. the definitions in para. 22(1) Marine Shipping Act 1995, Schedule 3A.

to orders as discussed further below. All the different categories of modern non-state wrecks can potentially be covered. When it comes to state vessels, the act states that a direction may not be given to a ship of Her Majesty's Navy or a Government ship.[856] There is a further restriction in relation to foreign vessels exercising the right of innocent passage or the right of transit passage through straits used in international navigation.[857]

It is clear from the definitions in the act that its main focus is modern wrecks that are in operation. The provisions would thus not seem to be relevant in relation to older wrecks, but it is possible that a construction where also such wrecks fall under the schedule can be made if the same risks and conditions are present. This could, in that case, extend the amount of wrecks that could be covered under the act also to non-protected and perhaps historical wrecks as well. The primary aim of the legislation, however, is ships in operation where an accident of some sort has occurred or where action needs to be taken.[858]

Another similar example is the Swedish Act on Measures Against the Pollution from Ships. That act focuses on ships in operation and pollution that may be caused as a result of this. Thus, there is some uncertainty as to whether the act is to be applicable in relation to wrecks at all. Arguably, the act will become relevant in approximately the same situations as when the mentioned schedule in the Marine Shipping Act 1995 in English law is relevant, i.e. when something has happened to a ship that leads to pollution or an acute risk of pollution.[859] The case is similar when it comes to another relevant piece of legislation in Swedish law, the Act on the Protection Against Accidents. That act is, however, more general in its scope, since it will become applicable as soon as oil or other hazardous substances have been released into the water.[860] No specific type of wreck is therefore covered, but the general scope means that also other instances than ships in operation

[856] Para. 21, Marine Shipping Act 1995, Schedule 3A.
[857] Para. 20(1), Marine Shipping Act 1995, Schedule 3A.
[858] Cf. the definitions in para. 22(1), MSA 1995, Schedule 3A.
[859] Cf. chapter 1 § 1 Act on Measures Against the Pollution from Ships.
[860] Chapter 4 § 5 Act on the Protection Against Accidents.

that are about to become wrecks can be covered. Thus, an older wreck that suffers a collapse that leads to the release of oil will arguably be covered by the regulation, allowing this act to potentially encompass more wrecks than the Act on Measures Against Pollution from Ships.

The most common feature of the studied regulations, in this respect, is that they focus on ships. Thus, the Finnish Act on the Prevention of Pollution from Ships has this specific focus explicitly in its title. That act is thus not directed in relation to wrecks and is instead focused on ships.[861] Another example in Finnish law is the Environmental Protection Act that also includes provisions that are relevant in relation to ships, other marine units and also aircraft.[862] The Finnish Act on Waste also focuses on ships, but also other objects that constitute waste.[863] A similar stance is found in the Danish Act on the Protection of the Maritime Environment. That act includes provisions that are relevant in relation to ships as well.[864] A more general stance is, finally, found in the Norwegian Pollution Act. The act is applicable in relation to pollution or waste located in Norway in general, but specifically also in relation to Norwegian ships or facilities in Norway's exclusive economic zone.[865]

7.4 Scope of Application

The regulations in the legal systems share the fact that they are applicable in relation to ships or wrecks that pose environmental hazards of some sort. These hazards, however, differ between the different regulations. This section studies this issue in further detail.

[861] Cf. Chapter 1 § 1 Act on the Prevention of Pollution from Ships.
[862] § 18 Environmental Protection Act.
[863] Cf. § 72 Act on Waste.
[864] See §§ 2 & 5 Act on the Protection of the Maritime Environment.
[865] See Chapter 1 § 3 Pollution Act.

7.4.1 Oil Pollution

Some of the regulations are focused heavily on oil or other hazardous substances in order for them to become applicable. Thus, the relevant provision in the Swedish Act on the Protection Against Accidents is applicable if there has been a release of oil or some other hazardous substance in the area where the act is applicable. Any leak, spill or release is covered by the legislation in this respect.[866] The Swedish Act on Measures Against Pollution from Ships has a similar application. The relevant provisions in that act are applicable should oil or some other hazardous substance have been released from a ship.[867] As an additional requirement for application, the act, however, also demands that there is a legitimate reason to presume that Swedish territory, Swedish airspace or Sweden's interests in general will suffer severe harm as a result of the incident.[868]

7.4.2 Pollution in General

Some regulations do not specifically mention oil in the relevant provisions. In this way, the Danish Act on the Protection of the Maritime Environment merely states that it is applicable should an environmental damage occur.[869] In a similar fashion, the Act on the Prevention of Pollution from Ships in Finnish law is applicable should a ship sink, strand, leak, suffer engine failure or encounter some other situation where there is a risk for pollution.[870] Both of these regulations thus target pollution in a more general sense.

7.4.3 An Extensive Approach

The perhaps most general regulation is the one found in English law in the Schedule 3A of the Marine Shipping Act 1995. The regulation

[866] Chapter 4 § 5 Act on the Protection Against Accidents.
[867] Chapter 7 § 5 Act on Measures Against Pollution from Ships.
[868] Chapter 7 § 5 Act on Measures Against Pollution from Ships.
[869] Cf. § 47 c the first paragraph Act on the Protection of the Maritime Environment.
[870] § 6 Act on the Prevention of Pollution from Ships.

is broad and becomes applicable as soon as an accident has occurred to or in a ship and the accident has created a risk to safety or a risk of pollution by a hazardous substance and a direction is necessary to remove or reduce the risk.[871]

An accident in this respect is defined as a collision of ships, a stranding, another incident of navigation or another event, whether on board a ship or not, which results in material damage to a ship or its cargo or in an imminent threat of material damage to a ship or its cargo.[872] A hazardous substance shall be construed as oil, as defined in s. 151(1) of the MSA 1995, as well as any other substance which creates a hazard to human health, harms living resources or marine life, damages amenities or interferes with lawful use of the sea. There is also a possibility for the Secretary of State to prescribe a substance as hazardous.[873] Pollution is defined as significant pollution in the United Kingdom, United Kingdom waters or an area of the sea specified under s. 129(2)(b) in the act.[874] A risk to safety, finally, is defined as a risk to the safety of persons, property or anything navigating in or using United Kingdom waters.[875]

Also in cases where the previous provisions following an accident are not applicable, a direction can be given by the Secretary of State in respect of a ship provided that it, in the opinion of the Secretary of State, is necessary for the purposes of securing the safety of the ship or

[871] Para. 1(1) Marine Shipping Act, Schedule 3A.
[872] Para. 22(1) MSA 1995, Schedule 3A.
[873] Para. 22(2) MSA 1995, Schedule 3A.
[874] Para. 22(1) MSA 1995, Schedule 3A.
[875] Para. 22(1) MSA 1995, Schedule 3A. The regulation may thus also be relevant for other identified categories of wrecks in the classification used here. Since the regulation may be relevant also from a safety perspective, it may be relevant also in situations where a wreck poses a navigational hazard or when the wreck itself is dangerous for other reasons than pollution. Since the provisions, however, primarily deal with pollution they are treated in this chapter. It should be noted that there is also a specific restriction in the act when it comes to directions in relation to ships that are a risk to safety. Thus, a direction under para. 1 or 2 may, in this case, only be given in relation to a ship that is in United Kingdom waters and, furthermore, provided that it is not a qualifying foreign ship or, alternatively, if it is a qualifying foreign ship, if, in the Secretary of State's opinion, it is neither exercising the right of innocent passage or the right to transit passage through straits used for international navigation; see para. 19 MSA 1995, Schedule 3A.

of other ships, securing the safety of persons or property or preventing or reducing pollution.[876] This situation is different from the one above in the sense that no accident has occurred enabling the other provisions to be applicable. This sort of direction can be given to the owner of the ship, a person in possession of the ship or the master of the ship.[877]

7.4.4 Preventive Action

The ability to apply a regulation, as in the above example from English law, before an accident or some similar event has occurred, raises the interesting question of whether it is possible to take preventive actions under the regulations. There is no doubt that the above-mentioned English solution is the widest among the legal systems in allowing for this kind of preventive action.

Preventive action is, however, also possible to a certain extent in Swedish law under both the Act on the Protection Against Accidents and the Act on Measures Against Pollution from Ships. The former is, as already noted, possible to apply when oil or some other hazardous substance has been released into the water.[878] The provision is, however, furthermore possible to apply should there be an imminent threat[879] of such a release, spill or leak. According to a report from the Swedish Agency for Public Management[880] this requirement shall be construed in a restrictive way.[881] The chosen words indicate that a short period of time is envisaged before an actual release, leakage or spill in order for the provision to be applicable and perhaps as short as a few hours.[882] This means that the provision will only be applicable in relation to already existing wrecks when they are about to leak and the act, therefore, seems to exclude the possibility of taking, at least strong,

[876] Para. 3(1) MSA 1995, Schedule 3A.
[877] Para. 3(2) MSA 1995, Schedule 3A.
[878] Chapter 4 § 5 Act on the Protection Against Accidents.
[879] Sw. *överhängande fara*.
[880] Sw. *Statskontoret*.
[881] This opinion is not binding, but can in the absence of other legal sources give guidance.
[882] Statskontoret (2018). *Vrak och ägarlösa båtar*. 2008:6. 2008. URL: http://www.vrbk.se/files/Vrak_herrelosa_boats.pdf (visited on 02/2018), p. 32.

preventive action in relation to such wrecks even though the phrasing allows for at least some actions to be taken more or less immediately before a leakage.

The act is, in other words, designed to be applicable in more or less acute situations. Another aspect that strengthens this view is that the mere existence of hazardous substances on board a ship or wreck is, according to the preparatory works, not sufficient in order for the provision to be applicable. The threat must be more substantial and acute. There needs to be a real risk[883] of leakage. That risk is to be assessed based on all the circumstances in the case including the current state of the vessel, its position, the amount of traffic nearby, currents, the weather in the area and similar aspects.[884]

The other regulation in Swedish law, the Act on Measures Against Pollution from Ships, has a slightly different wording than the Act on the Protection Against Accidents. The relevant provision in the act regulates actions that can be taken when oil or some other hazardous substance has been released from a ship.[885] The provision is, however, also applicable if there is a reasonable cause to presume that such a release is going to occur.[886] Compared to the phrasing in the earlier mentioned act on the Protection Against Accidents it should, arguably, not require as much to fulfil this test, i.e. reasonable cause to fear that such a release is going to happen, compared to the demands of an imminent threat of release, leakage or spill as in the act on the Protection Against Accidents.

The above alone does not, however, suffice in order for the provision to be applicable. Furthermore, as noted above, there also has to be a legitimate reason to presume that Swedish territory, Swedish airspace or Sweden's interests in general will suffer severe harm as a result of the incident.[887] How this is to be interpreted and applied is not clear. The

[883] Sw. *reell risk*.
[884] See Prop. 2002/03:119. *Reformerad räddningstjänstlagstiftning*, p. 116.
[885] Chapter 7 § 5 Act (1980:424) on Measures Against Pollution from Ships.
[886] Sw. *kan det skäligen befaras att så kommer att ske*.
[887] Sw. *grundad anledning att anta att svenskt territorium, svenskt luftrum eller svenska intressen i övrigt på grund av detta kan skadas i avsevärd mån*; chapter 7 § 5 Act on

wording, arguably, envisages a serious situation given that it requires there to be a legitimate reason to presume severe harm in line with the provision. The sparse case law that exists, however, suggests that the provision can be applied in quite an extensive and preventive way. In the case ND 1997 p. 53, the Administrative Court of Appeal in Jönköping, held that the risk of leakage of oil from a ship alone sufficed in order for there to be a legitimate reason in accordance with the act. Given the wording of the provision and the kind of reasoning found in the case, it seems clear that situations threatening substantial oil leaks from a wreck, or situations where a wreck is loaded with munitions or other dangerous cargo, would satisfy the requirement in the act.

The wording in the relevant provision in the Act on Measures Against Pollution from Ships thus seems more extensive than the phrasing used in the Act on the Protection Against Accidents and may, consequently, enable an earlier and more preventive application in a given situation. This position is, however, as noted, balanced by the fact that there is also a requirement of a legitimate reason to presume that Swedish territory, Swedish airspace or Sweden's interests in general will suffer severe harm as a result of the incident, which might, in itself, potentially limit an application.[888] Given the extensive application in the case discussed above, the better view, however, seems to be that the act in fact can be used extensively in order to take preventive action and, in this way, probably more so than the Act on the Protection Against Accidents since the wording in that act is more restrictive. Both of the regulations, however, fall short of the broad potential preventive measures that can be taken in English law as discussed above.

7.4.5 When the Ship or Wreck is the Danger

Another type of regulation concerns situations where it is not the oil or some other hazardous substance on board the ship or wreck that is the issue, but rather the ship or wreck itself. An example of this could

Measures Against Pollution from Ships.

[888] Chapter 7 § 5 Act on Measures Against Pollution from Ships.

be that the ship or wreck has been abandoned or has become static in its position for other reasons. The ship or wreck can, in this way, be seen as a type of waste enabling certain actions to be taken. There are specific provisions in Swedish, Norwegian and Finnish law to handle wastes and, consequently, wrecks that may fall under this category.

In Swedish law, the Environmental Code contains a provision that prohibits littering outside in an area that the public can access or see.[889] In a similar way, the Norwegian Pollution Act includes provisions that are applicable should anyone empty, leave behind or transport wastes in a way that is unsightly or disfiguring[890] or that causes damage or harmful consequences in general[891] to the environment.[892] Finnish law is more specific and has a separate Act on Waste that also concerns ships. The act is applicable should a ship or some other object have been abandoned in a way that may lead to disfigurement of the surroundings, less comfort, a risk of damage to people or animals or some similar risk or disturbance.[893] In both of these latter cases, aesthetic values or appearance plays an important part in the applicability of the provisions. In this situation, the ship or wreck may thus not actually pose an environmental hazard in the sense that it causes any danger. Instead, the ship or wreck can be seen as a problem because it affects the surroundings in a negative way from an aesthetic point of view.

When it comes to abandoned wrecks, there is also a specific provision in Finnish law that prohibits the sinking or abandonment of ships, other marine units or aircraft.[894] A functionally, more or less, equivalent solution is found in the already discussed Norwegian act that is relevant should someone leave behind waste in the form of a ship.[895]

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[889] Sw. *Miljöbalk (1998:808)*; chapter 15 § 26 Environmental Code.
[890] No. *skjemmende*.
[891] No. *ulempe*.
[892] Chapter 5 § 28 the first paragraph Pollution Act.
[893] Sw. *osnygghet, förfulning av landskapet, minskad trivsel, risk för att människor eller djur skadas eller någon liknande risk eller olägenhet*; § 72 Act on Waste.
[894] § 18 the second paragraph Environmental Protection Act.
[895] Cf. Chapter 5 § 28 the first paragraph Pollution Act.

7.5 Responsible Parties

This section concerns the parties that are responsible in relation to actions under the relevant provisions in the legal systems. There are different dimensions that can be taken into account when analysing who decides what in a given situation and there are different ways to construct a regulation. One way is to have several authorities or responsible parties that are specialized in different areas and then assign specific duties or responsibilities to these subjects within these domains. The opposite variation would be to centralize power and decision-making to more or less a single body.

A related topic is also how general the deciding body or bodies should be. One alternative is to have regional control over the issue. That arrangement allows for decision-making close to the scene at hand. The opposite solution would be to channel power to more general and national institutions. That solution can, generally, allow for stronger actions, since national agencies and the like are more likely to have stronger resources and, in some cases, also better competence. The perhaps greatest advantage with channelling power to one party is, however, that such a regulation is predictable in the sense that it is clear which authority that is responsible, while at the same time ensuring that quick action can be taken provided that the regulation allows for that.

7.5.1 Centralized Regulations

The perhaps best example among the legal systems, where the power has been channelled to one body is English law. The Schedule 3A in the Marine Shipping Act 1995 results in the Secretary of State having sole control of the actions that can be taken under the schedule.[896] The Act on the Protection of the Maritime Environment in Danish law and the Finnish Environmental Protection Act are two other examples where power is channelled to one responsible authority under the respective

[896] Cf. para. 1-4 Marine Shipping Act 1995, Schedule 3A.

acts in a similar way.[897] In the former case, the Minister of Defence can also become involved in a way that slightly resembles the role of the Secretary of State in English law.[898] The Act on the Prevention of Pollution from Ships in Finnish law is another example where the power is channelled to one authority in the form of the Maritime Agency.[899] The agency shall also make contact with other relevant parties, like the owner of the ship and the representatives from the relevant insurer if possible without causing harmful delay.[900]

All the above regulations can thus be classified as centralized in the sense that they channel power and the possibility to take action to one clear authority.

7.5.2 A Mixed System

An example of a mixed system, where both national and regional interests are explicitly taken into account, is the Norwegian Pollution Act. Both the local municipality and the Waste Authority[901] have mandates under the act.[902] In a similar fashion, also in relation to wastes, the Finnish Act on Waste channels power to the relevant municipal authority for the environment to take action.[903] An argument in favour of channelling power to local or regional bodies in relation to waste, is that such an order makes sense since the waste is most likely to pose a problem in the local area. This can be compared to a larger spill of oil or some other hazardous substance. The impact of such pollution can often have far greater consequences and can, therefore, also merit a more national and centralized response.

[897] Cf. § 47 c the seventh paragraph Act on the Protection of the Maritime Environment (Danish law) and § 175 the first period Environmental Protection Act (Finnish law).
[898] Cf. § 47 f the second and third paragraph Act on the Protection of the Maritime Environment.
[899] § 6 Act on the Prevention of Pollution from Ships.
[900] § 6 Act on the Prevention of Pollution from Ships.
[901] No. *Forurensningsmyndigheten*.
[902] Cf. chapter 5 § 37 the first and second paragraph Pollution Act.
[903] § 75 Act on Waste.

7.5.3 To Decentralize and Fragment?

The primary example of a regulation that channels power and decision-making in several directions and to different authorities is Swedish law. The Act on the Protection Against Accidents, channels responsibility to the Swedish Coast Guard should a release of oil or some other hazardous substance have taken place or if there is an imminent risk of a release, provided that the ship is located in Swedish territorial waters or in Sweden's exclusive economic zone.[904] If the ship, however, is located in streams, canals, harbours or in other lakes than Vänern, Vättern and Mälaren, it is instead the local municipality that is to take action.[905] In these areas, the relevant municipality will thus instead be responsible for any accidents involving the release of oil or other hazardous substances into the water.

This shift in responsibility has to do with the fact that the municipalities are deemed to be better situated to deal with incidents that occur in the mentioned areas, like harbours and smaller lakes within a municipality. On the other hand, the municipalities have been considered to have less ability when it comes to accidents that occur in larger lakes, i.e. the three mentioned in the act, as well as in Swedish territorial waters and in the exclusive economic zone. Consequently, the state, in the form of the Coast Guard, is responsible in these areas instead.[906] This construction also means that the responsibility can shift in a given situation should e.g. oil, that has been released in the territorial sea, drift into an area where a municipality is responsible.[907] This, of course, will in practice, reasonably, require some sort of coordination between the involved parties.

As has already been discussed, the other Swedish regulation on Measures Against Pollution from Ships can also become applicable in these situations. In that case, it is instead the Transport Agency,[908]

[904] Chapter 4 § 5 Act on the Protection Against Accidents.
[905] Sw. *vattendrag, kanaler, hamnar och andra insjöar än Vänern, Vättern och Mälaren*; chapter 4 § 5 Act on the Protection Against Accidents.
[906] Prop. 2002/03:119, *Reformerad räddningstjänstlagstiftning*, p. 75 f. and p. 85.
[907] Prop. 1985/86:170. *[O]m räddningstjänstlag m.m.* p. 78.
[908] Sw. *Transportstyrelsen*.

or some other authority appointed by the government, that can take actions and give directions under that act.[909] In this context, it can also be noted that should there be an accident involving an aircraft, yet another authority in the form of the Swedish Maritime Administration has mandate to take action.[910] The Swedish Maritime Administration will also be the responsible authority in situations that fall under the implemented provisions from the WRC.[911]

There are thus various different authorities and actors that can become relevant in situations involving vessels and wrecks that pose environmental hazards in Swedish law. This means that the system as a whole can be classified as decentralized, in the sense that not all power resides at one authority. However, it is hard to escape the impression that the plurality of different authorities and the different deciding factors behind the application of a certain regulation or the activation of a certain authority, lead to a system that can easily come across as scattered and fragmented in this sense. This is especially true in light of the discussed uncertainty as to when specific provisions are applicable and in relation to which kinds of wrecks.

7.6 Available Actions

This section concerns the different actions that can be taken in relation to a wreck that constitutes a hazard to the environment. There are different ways to structure such regulations and the variations entail different solutions. A main distinction can be made between two kinds of regulations. The first one operates using orders directed at accountable parties for a given situation and can potentially also in-

[909] Chapter 7 § 5 Act on Measures Against Pollution from Ships.

[910] See chapter 4 §§ 2-3 Act on the Protection Against Accidents and chapter 4 §§ 2–10 in the Ordinance on the Protection Against Accidents; Sw. *förordning (2003:789) om skydd mot olyckor*. For a thorough examination of Swedish law in relation to aviation and maritime accidents and the regulatory framework concerning the ensuing investigations after such incidents, see Lars-Göran Malmberg. *Haveriutredningar: en rättslig studie över undersökningar i samband med olyckor i luften och till sjöss*. Norstedts Juridik, 2000.

[911] Cf. Chapter 11 a §§ 6–14 Swedish Maritime Code.

clude possibilities for the responsible authority within the system to intervene on its own account. The second one operates without the use of orders, in this way, and instead includes other mechanisms in order to handle a situation.

7.6.1 Regulations Without Orders

An example of a regulation where the mechanism based on giving orders or directions to a responsible party is not included, is the Swedish Act on Protection Against Accidents. That act gives the relevant authority mandate to take action in order to handle a given situation where the act is applicable. Various actions can be taken under the act such as using oil booms or sorbents[912] as well as facilitating to lighter any oil or substance[913] to another ship and protecting the environment in different ways in the beginning stages or in the wake of an accident.[914]

A functionally similar regulation is found in Finnish law, where the Maritime Agency[915] can order rescue operations and other actions deemed necessary in order to prevent or limit pollution in a given situation.[916] In these cases, the Maritime Agency shall make contact with the owner of the ship and the representatives from the relevant insurer before taking such actions provided that this is possible without causing harmful delay.[917] The wording does not, however, include orders directed to the owner or some other responsible party as the regulations discussed below, hence why it can be classified as a regulation without orders.

The studied Danish regulation is also functionally similar to the above-mentioned systems. The Act on the Protection of the Maritime Environment states that all practically available actions shall be taken by the person that is responsible in order to limit the extent of environmental damage and pollution. The responsible authority shall see to

[912] Sw. *lägga ut länsor*.
[913] Sw. *förbereda läktring*.
[914] Cf. Prop. 2002/03:119, *Reformerad räddningstjänstlagstiftning*, p. 116.
[915] Sw. *Sjöfartsstyrelsen*.
[916] § 6 Act on the Prevention of Pollution from Ships.
[917] § 6 Act on the Prevention of Pollution from Ships.

that the necessary actions are taken.[918]

7.6.2 Regulations Including Orders and Intervention

A system of first giving orders or directions and then potentially intervening or, alternatively, intervening directly if motivated, is found in English law. Thus, the Secretary of State can give directions to a wide range of persons in various situations. A direction can be given to the owner of the ship, a person in possession of the ship, its master, a pilot, a salvor in possession and also a servant or agent of a salvor in possession provided that the person is in charge of the salvage operation. In some cases, if the ship has been directed to move into waters under the control of a harbour authority, a direction can also be given to the relevant harbour authority or harbour master.[919] A direction can, among other things, consist of ordering the person to take or refrain from certain actions, to use land or facilities in order to handle a situation, to direct the ship to take or not to take a certain route or even concern making arrangements for the sinking or destruction of the ship.[920] In relation to situations where an accident has not yet occurred, the direction can be aimed at moving or not moving the ship to or from a specific place in United Kingdom waters, to have it moved or not over a specified route or having it removed altogether from United Kingdom waters.[921]

Should the Secretary of State be of the opinion that a situation is such that a direction can be given, but that it is not likely that a direction would achieve a sufficient result, the Secretary of State can take such action as appears necessary or expedient for the purposes of which the direction could have been given.[922] Thus, if there is danger for delay in this sense, the Secretary of State can take action instead. Furthermore, the Secretary of State may also take action should a direction have been given, but the direction, in the opinion of the Secretary of State, has not

[918] § 47 c the first and seventh paragraph Act on the Protection of the Maritime Environment.
[919] Para. 1(2)(a)-(g) Marine Shipping Act 1995, Schedule 3A.
[920] See para. 1–4 Marine Shipping Act 1995, Schedule 3A.
[921] Para. 3(3) MSA 1995, Schedule 3A.
[922] Para. 4(1) Marine Shipping Act 1995, Schedule 3A.

achieved a sufficient result.[923] In this way, the English regulation allows for all the aspects of a regulation involving orders and intervention as introduced above. It allows for the relevant authority, the Secretary of State in this case, to give directions to a wide range of possible responsible parties. Should there not be enough time in order to give directions in a meaningful way, the responsible authority can take action instead and this can also be done should the direction not have had a beneficial result.

More or less the same systematic, although less specific and detailed, as the above English example, is found in the Swedish Act on Measures Against Pollution from Ships. The Transport Agency,[924] or some other authority appointed by the government, can declare prohibitions and directions or order actions aimed at preventing or limiting pollution in a case where the act is applicable.[925] The provision includes an enumeration of examples of what these directions can be. For the purposes here, the seventh period is of interest since it calls for orders to lighter oil or other hazardous substances.[926] If action is not taken as a consequence of the order or if the person cannot be contacted and a delay in notifying the person would undermine the purpose of the order, the authority can carry out the action instead.[927] The provision in the act has, furthermore, been used in order to remove ships that have sunk or ships that were about to sink following collisions.[928] Those actions are not included in the enumeration, but the use of the word *can* seems to indicate that the enumeration is not exhaustive. In ND 1997 p. 53, the Administrative Court of Appeal in Jönköping held that a removal or a salvage operation[929] is one of the actions that can be contemplated under the act. Consequently, various types of measures can fall under the provision provided that it is applicable.

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[923] Para. 4(2) Marine Shipping Act 1995, Schedule 3A.
[924] Sw. *Transportstyrelsen*.
[925] Chapter 7 § 5 Act on Measures Against Pollution from Ships.
[926] Chapter 7 § 5 Act on Measures Against Pollution from Ships.
[927] Chapter 7 § 9 Act on Measures Against Pollution from Ships.
[928] Statskontoret, *Vrak och ägarlösa båtar*, p. 42.
[929] Sw. *bärgning*.

In a similar fashion, Norwegian law allows municipalities to order anyone who has abandoned something in breach of § 28 of the Pollution Act to remove the property or to have it cleaned up within a certain deadline.[930] Such an order can thus focus on a wreck or parts of a wreck that have been handled in this way. It, furthermore, follows from the act that the Waste Authority[931] also can order a removal or that a site is to be cleaned up by the owner of a ship that is abandoned in the way described above. The order can be directed to the owner at the time when the ship was abandoned or to the owner at the time when the order is given.[932] The provision in § 28 of the act contains two alternative grounds for action. The first is relevant if the property is unsightly or disfiguring. This ground thus alludes, in some sense, to aesthetic values.[933] The second ground is relevant when the property causes damage or has harmful consequences for the environment.

It is possible that the alternative grounds may render different actions. According to the provision's third paragraph, the person that is in breach of the provision shall be responsible for making sure that the site is cleaned up as much as necessary.[934] In relation to a wreck that causes damage or has harmful consequences for the environment, it is likely to suffice to remove e.g. the content that causes this damage or hazard, e.g. the bunker oil or some other hazardous substances. In such a case it would not seem necessary or proportional to remove the wreck as such.[935] If it, on the other hand, is an aesthetic issue, then a removal process will clearly have to be conducted that aims at neutralising the negative effects that the wreck has in its current state. It is more difficult to foresee how far-reaching such a removal may need to be. If the wreck is situated in a position that causes severe negative effects of this kind, it might be feasible to order the wreck to be removed in its entirety

[930] Chapter 5 § 37 the first paragraph Pollution Act.
[931] No. *Forurensningsmyndigheten*.
[932] Chapter 5 § 37 the second paragraph Pollution Act.
[933] Cf. the introductory purpose of the act in securing that wastes do not have negative effects on the surroundings.
[934] No. *nødvendig opprydding*.
[935] Cf. Falkanger, Bull and Brautaset, *Scandinavian Maritime Law – The Norwegian Perspective*, p. 265.

based on this aesthetic argument, while the similar result would not be possible should the line of reasoning be based on the other ground of action, i.e. that the wreck causes damage or has harmful consequences for the environment.

If the Waste Authority has issued an order for a removal that is not followed by the shipowner, the authority can itself carry out the necessary actions.[936] Such actions can also be taken if the matter is urgent or if it is uncertain who is responsible.[937] In taking such actions, the authority may use the ship or wreck in question and may also, if necessary, damage the property.[938]

In Finnish law, finally, a person that contravenes the Environmental Protection Act can be ordered to carry out the relevant obligations and the authority can also forbid a person to continue to repeat the action.[939] This phrasing is somewhat different from the other regulations, but equivalent results can, as an example, be reached under the broad application in English law. The possibility to forbid a person to continue a certain behaviour is also similar to the possibility of ordering prohibitions under the Swedish Act on Measures Against Pollution from Ships. The responsible authority in Finnish law can, furthermore, order the responsible party to restore the environment to its original state or to remove the caused disturbance.[940] When it comes to wastes in particular, the relevant municipal authority for the environment can also order the responsible party to take action under the Act on Waste.[941]

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[936] Chapter 9 § 74 the first paragraph.
[937] Chapter 9 § 74 the second paragraph.
[938] Chapter 9 § 74 the third paragraph; see also the fourth and the fifth paragraph concerning the authority's possibility to issue guidelines as to how the provision is to be applied as well as its relation to international law when it comes to intervention on the high seas.
[939] § 175 the first period Environmental Protection Act.
[940] § 175 and cf. §§ 176–179 Environmental Protection Act.
[941] § 75 Act on Waste.

7.6.3 Different Ways to Structure a Regulation

The legal systems share common denominators when it comes to the actions that can be taken when a wreck poses a hazard to the environment. They all concern different measures that can be taken in order to deal with the hazard at hand with the aim of either removing it or mitigating its effect. The main difference is instead how the actions are brought about. As discussed, this can be achieved by orders or directions from a responsible authority under a regulation aimed at the responsible party to take action. Another alternative is that the responsible authority itself takes action.

A system that enables a responsible party to act in accordance with an order means that it enables that person to rectify the situation without any further interference from the relevant authority. This will also mean that this authority does not have to take unnecessary action in situations where the responsible person takes the required action. At the same time, most regulations that include orders or directions given to the responsible party, also allow for the relevant authority to take action should an order or direction not be followed or if it is not executed in a satisfying way. In this way, the relevant authority can oversee the situation and intervene should the taken action, as an example, not be sufficient. This system thus also allows for some flexibility as to how to handle a situation.

Some regulations do not mention the ability to instruct, order or give directions to a responsible party and instead only regulate what the authority, as such, can do in a given situation. This can, of course, be effective, but it also does not have the potential positive effects of the former type of regulation in delegating actions to the accountable person and thus not having to deal with situations where adequate action could have been taken by the person responsible. In this sense, such a system can thus become less efficient when compared to other systems and especially one that allows for both orders and intervention.

7.7 Liability Issues and Compensation

In this section, liability issues and compensation are discussed in relation to the different regulations in the legal systems. Liability in this context refers to the possibility of claiming responsibility in some form from a person that can be held accountable for a given situation involving a wreck that poses a hazard to the environment. This can be in the form of having financial liability for the costs involved in handling the hazard that the wreck poses or compensating incurred costs for actions that a responsible authority already has taken. The issue of liability is important since actions taken in connection with wrecks that pose environmental hazards tend to be expensive.[942]

7.7.1 Regulations Without Liability Provisions

The Swedish Act on the Protection Against Accidents does not include any provisions on giving orders or directions to persons that are accountable. Consequently, the act does not regulate liability or who is personally responsible for a given situation either. There are no provisions concerning any compensation for costs incurred as a consequence of taking action under the act. The same is the case for the Act on the Prevention of Pollution from Ships and The Environmental Protection Act in Finnish law.

7.7.2 An Elaborate System of Liability

A more elaborate regulation, concerning liability, is found in the Schedule 3A of the Marine Shipping Act 1995 in English law. It contains a detailed regulation on possible compensation in various cases. This is related to the wide range of actions that can be taken in a given situation and also the many different persons to whom a direction can be given. The effect of the regulation in relation to the accountable person is that a person that has been given a direction must act accordingly and thus stand the cost that this entails. However, any person to whom

[942] See the discussion above in sec. 1.5.2.

a direction is given is entitled to recover the costs of his compliance from the owner of the ship.[943] The same is true for any person in charge of coastal land or premises that has incurred costs as a result of action taken by virtue of paragraph 4 in the Schedule related to those areas.[944]

Compensation can thus be sought from the owner of the ship in various situations. The Secretary of State is also entitled to recover, from the owner of the ship, any costs incurred in connection with the giving of a direction, in connection with actions taken under paragraph 4 of the schedule and should the Secretary of State have paid any other person that could seek compensation from the owner of the ship in accordance with the paragraph.[945] As an exception, this is not relevant should costs be recoverable by another enactment, by virtue of an agreement or under salvage law.[946] There are thus far-reaching possibilities to claim compensation from the shipowner under the regulation.

7.7.3 Other Liability Structures

Less detailed than the regulation in English law is the Swedish Act on Measures Against Pollution from Ships, but the legislation is functionally similar when it comes to the relation between the responsible authority and the responsible party in relation to the ship. Thus, the owner of the ship or the operator is liable for the costs incurred as a result of taking action under the act.[947] The Norwegian Pollution Act is similar in this respect. The cost of actions taken by the Waste Authority, after an issued order that has not been complied with, can be claimed from the person that is responsible for the pollution or waste. This is also the case should the matter have been urgent or if it was uncertain at the time who was responsible.[948] Moreover, in Norwegian law the relevant municipality can issue an order to anyone who has abandoned

[943] Para. 15(2) Marine Shipping Act 1995, Schedule 3A.
[944] Para. 15(3) Marine Shipping Act 1995, Schedule 3A.
[945] See the discussion above and para. 15(5) Marine Shipping Act 1995, Schedule 3A.
[946] Para .15(6) Marine Shipping Act 1995, Schedule 3A.
[947] Chapter 7 § 9 Act on Measures Against Pollution from Ships and chapter 7 § 10 Ordinance on Measures Against Pollution from Ships.
[948] Chapter 9 § 76 Pollution Act.

something in breach of § 28 in the Pollution Act to remove the property or to clean it up within a certain deadline or, alternatively, decide that the accountable person shall be liable to cover the reasonable expenses that someone else has had in order to remove or clean up the site.[949]

Also Danish law includes liability provisions that make the person that is responsible for the operation of a ship liable. Thus, any expenses incurred as a result of actions taken under the Act on the Protection of the Maritime Environment shall be paid by this person.[950] A special inclusion in the Danish system is, moreover, the role that the Minister of Defence has. The minister can order the person that is responsible for the operation of a ship to provide security for relevant costs and can also detain the ship until such security is provided.[951] There is also a possibility for the minister, should no security have been provided by that person, to order the owner of the ship, should this be another person, to provide security for the incurred costs and the minister can also in this case detain the ship until such security is provided.[952]

7.7.4 Extending Liability to Affected Parties

A peculiar feature of the Norwegian system is that if the responsible party cannot pay or if it is unknown who that person is, there is a further possibility to claim a person that has suffered negative effects as a result of the ship, that presumably has since then been removed or handled in some way as an effect of the taken action, or any other person in whose interest the actions have been taken.[953] That this suggests that a person that has suffered negative consequences, as a result of the ship, also can become liable under the act might seem unintuitive. It could, however, be motivated by the fact that the actions that the compensation concern have been taken in order to alleviate or remove the negative impacts that the person has had. Thus, the taken actions

[949] Chapter 5 § 37 the first paragraph Pollution Act.
[950] Cf. § 47 f-g the first paragraph Act on the Protection of the Maritime Environment.
[951] § 47 f the second paragraph Act on the Protection of the Maritime Environment.
[952] § 47 f the third paragraph Act on the Protection of the Maritime Environment.
[953] Chapter 9 § 76 Pollution Act.

have improved the position of the person and should compensation not be possible from the responsible party for the ship, compensation can instead be claimed from the person that no longer suffers any negative effects from the ship in question.[954] Another way of phrasing such an explanation could be to claim that the person would benefit from an unjust enrichment as a consequence of the taken action, but one could also question whether this potential benefit should result in a liability. Another counterargument is that such a stance is inconsistent, since the possibility to claim liability in these cases is subsidiary to the default position of liability under the act.

A somewhat similar regulation is found in Finnish law in relation to a ship that has been abandoned in a harbour. If a person fails to remove an object or to clean up a site within a harbour, the harbour master has a responsibility to take these actions instead provided that the litter is a consequence of the usage of the harbour.[955] In this way, the harbour master thus takes on, or rather shares, the responsibility of the owner of the ship because of the geographical placement of the vessel. This is reminiscent to the discussion above, where the person who has suffered negative consequences of a ship also can become liable. In this case as well this will presumably be the effect of the ship being positioned on or in the vicinity of land owned or controlled by that person.

7.7.5 Different Liability Structures

As evidenced by the above discussion, the question of liability is closely linked to how the regulations are structured in relation to the actions that can be taken when a wreck poses an environmental hazard. The regulations that only state that an authority can take action without any reference to giving orders or directions to a responsible party, will not have corresponding liability provisions. Such provisions are, however, often present in other regulations where orders or directions can be given and where the authority itself can take action should an order not

[954] That person may, of course, as a result of tort law or other relevant provisions have a claim against the accountable person for the ship, but that is another issue.
[955] § 74 the first period Act on Waste.

be followed or if it is executed in an unsatisfying way or, alternatively, when there is no time to await a response. Further inclusions in such systems are to include the possibility to use the property in question or to hold on to it as a security. Finally, they may also include possibilities to extend liability to other parties that are involved or that may be affected by a given situation.

Part III

Protection

Chapter 8

Dangerous Wrecks

8.1 Elaboration of the Research Question

The research question for this chapter is how dangerous wrecks can be handled from a legal point of view. In order to adress the question and to put it into a perspective, it can be broken down into different dimensions. This process also functions as a demarcation of this chapter.

The dimensions in focus are:

- Protected values and interests
- Wrecks covered in the studied regulations
- Scope of application
- Ways to handle dangerous wrecks
- Enforcement

The analysis is focused on each of these dimensions in turn.

8.2 Protected Values and Interests

In English law, the Protection of Wrecks Act 1973 is meant to secure the protection of wrecks in territorial waters and the sites of such wrecks

from interference by unauthorised persons and can be used in order to protect wrecks that are dangerous in certain situations. The preamble of the act states that it is meant to "secure the protection of wrecks in territorial waters and the sites of such wrecks, from interference by unauthorised persons; and for connected purposes". In relation to dangerous wrecks in particular, they can fall under the act if they "ought to be protected from unauthorised interference" as a consequence of the vessel being "in a condition which makes it a potential danger to life or property".[956] The purpose of this part of the regulation is thus to protect life and property. Another similar regulation in English law when it comes to protected values and interests, and that is potentially of interest in relation to dangerous wrecks, is the Dangerous Vessels Act 1985. It is applicable should a vessel or its content in a harbour pose grave and imminent danger to the safety of any person or property.[957] In this sense, the act is thus meant to protect the safety of life and property and is, consequently, similar to the Protection of Wrecks Act 1973.

Other regulations can be more general and not directly targeted at vessels or wrecks. This also means that the protected values and interests can be more general. The Swedish Ordinance on Sea or Maritime Traffic is an example of this.[958] Directions under the act can have various purposes, e.g. maritime safety and the protection of the environment.[959] There is, however, no specific value or interest expressed in relation to dangerous wrecks. The same is the case with the Marine and Coastal Access Act 2009 in English law. The act has no specific value or interests to protect in relation to dangerous wrecks. It does, however, set certain requirements and requires a licence when it comes to certain actions, as discussed further below, that can be relevant in relation to dangerous wrecks.[960] An underlying interest thus seems to be to ensure that only competent actors can carry out these activities.

[956] S. 2(1)(a)-(b) Protection of Wrecks Act 1973.
[957] S. 1(1)(a) Dangerous Vessels Act 1985.
[958] Sw. *Sjötrafikförordning (1986:300)*.
[959] Cf. chapter 2 § 1–2 Ordinance on Sea or Maritime Traffic.
[960] Cf. s. 66(1)(8)-(9) Marine and Coastal Access Act 2009.

8.3 Wrecks Covered in the Studied Regulations

There are two main scenarios that can be identified, in light of the studied regulations in relation to dangerous wrecks. The first one concerns wrecks that are already present in a geographical area, while the second relates to ships and other property that may turn into wrecks as a consequence of an accident or similar action. Another way of phrasing the latter is to state that such regulations concern potential wrecks.

The distinction has consequences in relation to which wrecks that may fall under the regulations. A regulation aimed at already existing wrecks may potentially cover all the identified categories of wrecks. A regulation concerning potential wrecks, however, will by definition only concern modern wrecks in the sense of encompassing ships or other property that is about to turn into a wreck. The wreck will, in that sense, always be new, but the ship or property in itself can, of course, be older. Finally, there can also be regulations that are so general that they encompass both of these identified scenarios. This is a consequence of the fact that the regulations are not aimed at wrecks. In this sense, the fact that they are general can also be phrased as not aiming at or targeting wrecks as such.

8.3.1 Already Existing Wrecks

The Protection of Wrecks Act 1973, in English law, concerns wrecks that are already present within the act's scope of application. This is phrased in the act as "a vessel lying wrecked".[961] The act does not distinguish between different kinds of dangerous wrecks in relation to time, possession or proprietary interests. In this sense, all the identified categories of wrecks can, potentially, fall under the act provided that they meet the requirement of lying wrecked.

[961] S. 2(1) Protection of Wrecks Act 1973.

8.3.2 Potential Wrecks

The Dangerous Vessels Act 1985, in English law, includes measures that can become relevant in relation to ships that may turn into dangerous wrecks. It is thus an example of the second scenario discussed above. The act allows harbour masters to prohibit vessels from entering into the jurisdiction of their specific harbour authorities. It also allows for a harbour master to require a vessel to be removed should it be dangerous or obstruct navigation.[962] The act does not deal with wrecks as such, but concerns ships that may founder and become wrecks.[963] In this way, the act can be classified as handling potential wrecks. This also means that it will be applicable in relation to modern wrecks, since the act becomes relevant in relation to ships that can turn into wrecks.

Certain vessels are, however, exempted from the application of the act and it is also secondary to other directions in certain cases. Thus, no directions under the act can be given in relation to state vessels including any such vessel in the possession of a salvor.[964] Furthermore, directions will not be applicable in relation to any pleasure boat of 24 meters or less in length.[965] The directions of the harbour master are also secondary in relation to safety directions given by or on behalf of the Secretary of State in Schedule 3A of the MSA 1995.[966] In this way, the act is not applicable in relation to state wrecks at least from the United Kingdom. A potential application in relation to foreign state vessels, even if not explicitly regulated, may face objections of sovereign

[962] S. 1(1) Dangerous Vessels Act 1985. In this way, the act also concerns the above-mentioned problem with wrecks that pose a hazard to navigation. Since the act primarily, however, is linked to dangerous vessels, it is handled in this context.

[963] See also the broad definition of the term vessel in s. 7 Dangerous Vessels Act 1985 including (a) a ship or boat, or any other description of craft used in navigation; (b) a rig, raft or floating platform, or any other moveable thing constructed or adapted for floating on, or partial or total submersion in, water; and (c) a seaplane, a hovercraft within the meaning of the Hovercraft Act 1968 or any other amphibious vehicle.

[964] This is phrased in the act as: "any vessel belonging to Her Majesty, or employed in the service of the Crown for any purpose"; S. 6(a) Dangerous Vessels Act 1985.

[965] S. 6(b) Dangerous Vessels Act 1985.

[966] S. 6A Dangerous Vessels Act 1985. For details on these safety directions see Rose, *Kennedy and Rose on the Law of Salvage*, s. 1–076 to 1–082 and the discussion above in section 7.6.2.

immunity.

8.3.3 Regulations Combining the Scenarios

The Ordinance on Sea or Maritime Traffic, in Swedish law, is an example of a general regulation that can encompass both of the scenarios discussed above. It enables orders or directions on prohibition of access to a given site in certain cases and could thus be used to prohibit access to both an existing wreck and also to a site where an accident or some similar event has taken place resulting in a potential wreck.[967] In this sense, all the categories of wrecks could, potentially, fall under the regulation. Another regulation with a similar general stance is the English Marine and Coastal Access Act 2009. The act states that a licence is required in order to carry out certain actions that can be relevant in relation to dangerous wrecks. Since no specific kinds of wrecks are targeted, the regulation can be categorised as general and could thus, potentially, encompass all the identified categories of wrecks.

8.4 Scope of Application

Two main variations of regulations can be identified in relation to their scope of application when it comes to dangerous wrecks. The first variation consists of general regulations that have a wide scope of application in the form of a maritime zone or some other larger defined area, while the second concerns regulations that are focused on a more specific or narrow area or similar structure, e.g. harbours.

8.4.1 General Regulations

The Protection of Wrecks Act 1973 is an example of a general regulation since it is applicable in relation to dangerous wrecks "lying wrecked in United Kingdom waters".[968] United Kingdom waters is defined as "any part of the sea within the seaward limits of United Kingdom

[967] See Chapter 2 § 2 Ordinance on Sea or Maritime Traffic.
[968] S. 2(1) Protection of Wrecks Act 1973.

territorial waters and includes any part of a river within the ebb and flow of ordinary spring tides".[969] Also the Marine and Coastal Access Act 2009 has a similar general scope of application. It is applicable in the UK marine licensing area. This area consists of the UK marine area with the exception of the Scottish inshore region.[970] The UK marine area includes the area of sea within the seaward limits of the territorial sea adjacent to the United Kingdom, any area of sea within the limits of the exclusive economic zone as well as the area of sea within the limits of the UK sector of the continental shelf provided that this does not contravene any international obligation binding on the United Kingdom or Her Majesty's government.[971] Another example of a general regulation is the Ordinance on Sea or Maritime Traffic in Swedish law. The ordinance is applicable in Swedish territorial waters including the territorial sea and internal waters.[972]

8.4.2 Specific Regulations

The Dangerous Vessels Act 1985 is an example of a more specific regulation as a consequence of it being applicable in relation to vessels either about to enter into or already present in the areas of jurisdiction of harbour authorities.[973] The act is thus confined to these areas and target actions taking place in connection with harbours.[974] The scope of application is thus considerably more narrow when compared to, as an example, the Protection of Wrecks Act 1973, which is applicable in relation to United Kingdom waters.

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[969] See further s. 3(1) Protection of Wrecks Act 1973.

[970] S. 66(2)(4) Marine and Coastal Access Act 2009. The Scottish inshore region, in turn, refers to the area of sea within the seaward limits of the territorial sea adjacent to Scotland; s. 322(1) Marine and Coastal Access Act 2009.

[971] For the full definition of the area see s. 42 Marine and Coastal Access Act 2009.

[972] Sw. *Sveriges sjöterritorium*; Chapter 2 § 2 Ordinance on Sea or Maritime Traffic and § 1 Act on Swedish Territorial Waters and Maritime Zones, Sw. *lag (2017:1273) om Sveriges sjöterritorium och maritima zoner*.

[973] See the preamble to the Dangerous Vessels Act 1985.

[974] Cf. s. 1 Dangerous Vessels Act 1985.

8.5 Ways to Handle Dangerous Wrecks

There are several ways in which dangerous wrecks can be handled. One way is to take action in relation to the wreck in order to make it safe. Another way of offering protection can be restricting access to the wreck in different ways. How the regulations deal with potential actions or ways to handle dangerous wrecks is dependent on the structure of each regulation. Thus, a regulation that is focused on certain mandates to a responsible authority will generally focus on the specific actions that the authority can take or order. A regulation not focusing specifically on wrecks as such will have more indirect effects and will thus not deal with actions directly aimed at protecting dangerous wrecks.

Three main approaches can be identified from the regulations when it comes to ways of handling dangerous wrecks. The first one concerns prohibiting access to the site where the wreck is located. By doing this, potential harm is removed by not allowing access to the site thus avoiding any damage. This way of handling the wreck, however, does not target or deal with the danger at hand and, consequently, does not affect the wreck as such. It is instead aimed at preventing people from accessing the wreck in different ways. The second approach centres around taking specific actions in relation to a dangerous wrecks by issuing orders. The orders can aim at affecting the wreck or vessel in some way and this thus separates the approach from the one above. Finally, the third approach is represented by a regulation that does not target dangerous wrecks or vessels specifically. Instead, it has mechanisms that are relevant in relation to certain actions that can have effects on situations involving dangerous wrecks. Thus, the protection that such a regulation provides is indirect.

8.5.1 Prohibiting Access

The protection of Wrecks Act 1973 enables the Secretary of State to issue an order of prohibition on approaching dangerous wrecks.[975] The

[975] For details on how an order shall be made, see s. 3(3) Protection of Wrecks Act 1973.

Secretary of State may by order designate an area round a vessel, lying wrecked in United Kingdom waters, as a prohibited area if two main requirements are fulfilled.[976] Firstly, the vessel must contain something which makes it a potential danger to life or property or, alternatively, the condition of the vessel itself shall have this effect.[977] Secondly, the assessment shall be made that the vessel ought to be protected from unauthorised interference as a consequence of its condition or what it contains.[978] Such an order shall identify the vessel and the place where it is lying.[979] In more detail, the prohibited area shall be all within such distance of the vessel as specified by the order, excluding any area above high water mark of ordinary spring tides.[980] The distance specified shall be whatever the Secretary of State thinks appropriate to ensure that unauthorised persons are kept away from the vessel.[981] Access to the area is prohibited after a designation unless the Secretary of State has given written authority to enter the area.[982]

The Ordinance on Sea or Maritime Traffic, in Swedish law, also enables a prohibition of access to a given site in the form of diving prohibitions. The County Administrative Board[983] can issue orders or directions[984] prohibiting anchoring or concerning other limitations of the right to use an area of water for racing, water-skiing, diving or similar activities within Swedish territorial waters.[985] The relevant parts in this context are the possibilities to prohibit anchoring and to limit diving on certain sites. Before issuing a prohibition or limitation, the County Administrative Board shall consult with the Swedish Maritime Authority and the Transport Agency.[986] After such consultations have

[976] S. 2(1) Protection of Wrecks Act 1973.
[977] S. 2(1)(a) Protection of Wrecks Act 1973.
[978] S. 2(1)(b) Protection of Wrecks Act 1973.
[979] S. 2(2) Protection of Wrecks Act 1973.
[980] S. 2(2)(a) Protection of Wrecks Act 1973.
[981] S. 2(2)(b) Protection of Wrecks Act 1973.
[982] S. 2(3) Protection of Wrecks Act 1973.
[983] Sw. *Länsstyrelsen*.
[984] Sw. *föreskrifter*.
[985] Chapter 2 § 2 and the first paragraph in the Ordinance (1986:300) on Sea or Maritime Traffic. For how this is to be published, see Chapter 2 § 4 in the ordinance.
[986] Sw. *Sjöfartsverket* and *Transportstyrelsen*; in certain cases also other authorities shall

been made, the County Administrative Board can also allow temporary grants that allow actions to be taken despite of these orders or directions.[987]

The County Administrative Board can, furthermore, after the same above-mentioned consultation with the Swedish Maritime Authority and the Traffic Agency, issue orders or directions concerning other limitations or prohibitions concerning the right to use a water area in Swedish territorial waters in relation to sea or maritime traffic, provided that they are necessary due to the environment, because of other security reasons or in order to protect fishing or facilities for aquaculture. This, however, cannot be done in relation to commercial shipping in public fairways.[988] The County Administrative Board can also, finally, after the same consultations as above, issue other orders or directions when it comes to the use of Swedish territorial waters provided that they are temporary.[989] Following a prohibition or limitation, navigation marks can also be used in order to mark the site.[990] A fairly broad mandate is thus given in these cases to issue orders and directions and these can target dangerous wrecks, e.g. in the form of a diving prohibition on the site.

8.5.2 Issuing Orders

Another way to deal with dangerous wrecks is to issue orders in relation to them in various ways. Under the Dangerous Vessels Act 1985, a harbour master can prohibit vessels from entering into the jurisdiction of a specific harbour authority or order a vessel already present to be removed should it be dangerous or obstruct navigation.[991] It is thus

be consulted, see chapter 2 § 3 in the Ordinance (1986:300) on Sea or Maritime Traffic.

[987]Chapter 2 § 2 and the first paragraph in the Ordinance (1986:300) on Sea or Maritime Traffic.

[988]Chapter 2 § 2 and the second paragraph in the Ordinance (1986:300) on Sea or Maritime Traffic.

[989]Chapter 2 § 2 and the third paragraph in the Ordinance (1986:300) on Sea or Maritime Traffic.

[990]For details, see Chapter 2 § 6 in the Ordinance (1986:300) on Sea or Maritime Traffic.

[991]S. 1(1) Dangerous Vessels Act 1985.

up to the harbour master to assess whether the situation at hand fulfils the requirements in the act. This assessment can be made either in relation to the condition of the vessel or, alternatively, in relation to the nature or condition of anything that the vessel contains.[992] In order for the harbour master to issue directions, it must be his opinion that the presence of either the vessel or its content in the harbour might involve grave and imminent danger to the safety of any person or property.[993] Another possibility is if the presence might involve grave and imminent risk that the vessel may, by sinking or foundering in the harbour, prevent or seriously prejudice the use of the harbour by other vessels.[994]

When the harbour master is to make his assessment, he shall take into consideration all the circumstances of the case and, in particular, the safety of any person or vessel including persons or vessels outside of the harbour and the vessel in question.[995] The directions may be given by the harbour master in any such reasonable manner as the harbour master may think fit.[996] When the harbour master gives direction to a person in this way, he shall also inform the person of the ground for giving them.[997] A direction by the harbour master can be given to the owner of the vessel or to any person in possession of the vessel, to the master or to any salvor in possession of the vessel, or a servant or agent of this person, and who is in charge of the salvage operation.[998]

The Secretary of State can countermand directions given by a harbour master for the purpose of securing the safety of any person or

[992] S. 1(1) Dangerous Vessels Act 1985.
[993] S. 1(1)(a) Dangerous Vessels Act 1985.
[994] S. 1(1)(b) Dangerous Vessels Act 1985. As stated earlier, this makes this part of the act also relevant in relation to wrecks that pose hazards to navigation, as discussed in chapter 6. In this case, however, the mandate that is given to the harbour master in order to avoid this is functionally linked to the condition of the vessel or its content being in some sense dangerous. Therefore, it is relevant to discuss the provision in this context.
[995] S. 1(3) Dangerous Vessels Act 1985.
[996] S. 1(4) Dangerous Vessels Act 1985.
[997] S. 1(5) Dangerous Vessels Act 1985.
[998] S. 1(2) Dangerous Vessels Act 1985. Note that the end of the section explicitly states that a pilot does not fall under the concept master.

vessel, including the vessel to which those directions relate.[999] The Secretary of State can require the harbour master to permit the vessel to enter and remain or, if those were the circumstances in the case, to remain in the harbour in question.[1000] Furthermore, the Secretary of State may require the harbour master to take such action as may be specified in the directions given by him, for the purpose of enabling the vessel to do so or for any connected purpose.[1001] In both instances, the directions given by the harbour master shall cease to have effect.[1002]

If the Secretary of States countermands the directions of the harbour master, it is the harbour master's duty to give notice of this in respect to the vessel in question to the person to whom the original directions were given or, if not possible, to any other subject of the ones mentioned above, in any such reasonable manner as the harbour master may think fit.[1003] The harbour master, furthermore, has a duty to take any action in relation to the vessel in line with the new directions from the Secretary of State.[1004] The harbour master and the harbour authority also have a duty to take all such further action as may be reasonably necessary to enable the specific vessel to enter and remain, or to remain, in the harbour.[1005] This regulation thus enables far-reaching possibilities to issue orders in relation to vessels that fall under the act and also includes a balance of power between harbour masters and the Secretary of State allowing for the Secretary of State to countermand the harbour master. This provides a possibility to handle vessels that risk becoming dangerous wrecks in the discussed area.

8.5.3 Indirect Protection

Another variation is a regulation that provides indirect protection in relation to dangerous wrecks. The English Marine and Coastal Access

[999] S. 3(1) Dangerous Vessels Act 1985.
[1000] S. 3(1)(a) Dangerous Vessels Act 1985.
[1001] S. 3(1)(b) Dangerous Vessels Act 1985.
[1002] S. 3(1) Dangerous Vessels Act 1985.
[1003] S. 3(2) Dangerous Vessels Act 1985.
[1004] S. 3(2)(a) Dangerous Vessels Act 1985.
[1005] S. 3(2)(b) Dangerous Vessels Act 1985.

Act 2009 is an example of this. The act states that a license is required in order to remove any substance or object from the sea bed within what is referred to as the UK marine licensing area.[1006] A license is also required in order to carry out any form of dredging in this area regardless of whether any material is removed.[1007] Both of these actions can be relevant in relation to wrecks and potential diving taking place on them. Protection can thus be provided indirectly, in this way, in relation to dangerous wrecks since there needs to be a license in order to conduct the activities mentioned in the act.

8.6 Enforcement

Since the regulations on the protection of dangerous wrecks often include prohibitions or restrictions in various ways, it is important that any contravention also can be enforced. The regulations handle the issue of enforcement in more or less similar ways.

When it comes to the Protection of Wrecks Act 1973, it is prohibited to enter an area that has been designated by the Secretary of State as a protected wreck under the second section of the act whether on the surface or under water, unless authority has been granted in writing by the Secretary of State. A person commits an offence should this section not be followed.[1008] There are, however, some exceptions to this. A person will not commit an offence if the taken action had the sole purpose of dealing with an emergency of any description.[1009] The same is true should the person have taken the action while exercising, or seeing to the exercise of, functions conferred by or under an enactment, local or other, on him or a body for which he acts.[1010] The same, finally, is the case should the action have been taken out of necessity due to

[1006] S. 66(1)(8) Marine and Coastal Access Act 2009.
[1007] S. 66(1)(9) Marine and Coastal Access Act 2009.
[1008] S. 2(3) Protection of Wrecks Act 1973. For details on the consequences of an offence, see s. 3(4) Protection of Wrecks Act 1973.
[1009] S. 3(3)(a) Protection of Wrecks Act 1973.
[1010] S. 3(3)(b) Protection of Wrecks Act 1973.

stress of weather or navigational hazards.[1011]

In relation to the Dangerous Vessels Act 1985, to contravene or fail to comply with directions given under the first section of the act is criminalised as an offence and a person who without reasonable excuse does this will be liable to a fine.[1012] An available defence for a person charged with this is, however, that the person took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.[1013]

When it comes to the actions falling under the Marine and Coastal Access Act 2019, it is not allowed to conduct an activity, or to cause or permit someone else to carry out such an activity, except in accordance with a marine license granted by the relevant authority.[1014] Any person who is in breach of the above commits an offence.[1015] A person guilty of an offence will be liable to pay a fine and can also be sentenced to up to two years imprisonment.[1016]

Finally, anyone who contravenes an order or direction under the Ordinance on Sea or Maritime Traffic, in Swedish law, either with intent or by negligence, will be fined.[1017] The ordinance is, however, subsidiary to other criminal legislation in Swedish law.[1018] Thus, should an action e.g. already be penalised under the Swedish Penal Act, other forms of sentencing can be relevant as well.

[1011] S. 3(3)(c) Protection of Wrecks Act 1973.
[1012] S. 5(1) Dangerous Vessels Act 1985.
[1013] S. 5(2) Dangerous Vessels Act 1985.
[1014] S. 65(1) Marine and Coastal Access Act 2009. For exceptions, see s. 65(2) and s. 74–77 Marine and Coastal Access Act 2009.
[1015] S. 85(1) Marine and Coastal Access Act 2009. For more details, see s. 85 Marine and Coastal Access Act 2009 in full. A person can, in some situations, argue that the action was taken in an emergency as a defence; see s. 86 Marine and Coastal Access Act 2009.
[1016] S. 85(4)(a)-(b) Marine and Coastal Access Act 2009.
[1017] Chapter 5 § 1 the third period, Ordinance on Sea or Maritime Traffic.
[1018] More specifically, no sentence under the ordinance will be given should an action already be penalised by the Swedish Penal Act (Sw. *Brottsbalken*), the Swedish Maritime Code (Sw. *Sjölagen*) or the Act on Protection (Sw. *Skyddslagen*); Chapter 5 § 1 the third section, Ordinance on Sea or Maritime Traffic.

Chapter 9

Wrecks Containing Human Remains

9.1 Elaboration of the Research Question

The research question for this chapter is how wrecks that contain human remains can be handled from a legal point of view. In order to adress the question and to put it into a perspective, it can be broken down into different dimensions. This process also functions as a demarcation of this chapter.

The dimensions in focus are:

- Protected values and interests
- Wrecks covered in the studied regulations
- Scope of application
- Ways to protect human remains
- Enforcement

The analysis is focused on each of these dimensions in turn.

9.2 Protected Values and Interests

The wrecks in focus for this chapter are wrecks that contain human remains. As a consequence of this, these wrecks may be in need of protection. This is also the common denominator between the studied regulations when it comes to values and interests. It is, however, expressed in slightly different ways depending on regulation.

The Protection of Military Remains Act 1986, in English law, is meant to protect the remains of military aircraft and vessels that have crashed, sunk or been stranded, as well as any associated human remains, from unauthorised interference.[1019] In this sense, the act is meant to protect human remains in relation to military objects.

The other legal systems have put less focus on the issue of protecting wrecks containing human remains. One main exception to this, however, is the wreck of MS Estonia that is protected.[1020] An international agreement between Sweden, Estonia and Finland forms the basis for this protection of the wreck as a gravesite.[1021] The agreement was the result of a joint effort trying to protect the wreck, recognizing it as a gravesite and introducing domestic legislation in the affected states criminalising anyone who disturbs the sanctity of the wreck.[1022] The preamble of the agreement thus states that the contracting parties wish "to protect M/S ESTONIA, as a final place of rest for victims of the disaster, from any disturbing activities" and, furthermore, urge "the public and all other States to afford appropriate respect to the site of the M/S ESTONIA for all time".[1023]

The purpose of protecting the wreck and recognising it as a gravesite is echoed in the national implementations of this agreement. Thus, the Swedish Act (1995:732) on the Protection of Grave Sanctity at the Wreck

[1019] See the preamble to the Protection of Military Remains Act 1986.
[1020] See on MS Estonia the discussion in sec. 1.5.5.
[1021] Prop. 1994/95:190. *Skydd för gravfriden vid vraket efter passagerarfartyget Estonia*, p. 1 and p. 14; see also 1994/95:JUU23. *Gravfrid över m/s Estonia*, p. 1 ff.
[1022] Prop. 1994/95:190, *Skydd för gravfriden vid vraket efter passagerarfartyget Estonia*, p. 7.
[1023] See ibid., p. 14.

of the Passenger Vessel Estonia[1024] is meant to protect the area around the wreck. Finland has implemented and transformed the agreement in the Act on Protection of the Wreck of the Passenger Ship Estonia.[1025] The act states that the wreck after the passenger ship is a final resting place for the victims. The wreck and an area in its vicinity is therefore protected under the act.[1026] Also Denmark has chosen to follow the international agreement and has implemented it into Danish law by the Act on Protection of the Grave Sanctity of the Wreck after the Passenger Ship M/S Estonia. The aim of the act is to protect the grave sanctity at the site of the wreck.[1027] The United Kingdom has also acceded to the agreement.[1028] All these implementations thus concern the protection of the wreck as a gravesite and it is this value and interest that is protected by the different acts.

9.3 Wrecks Covered in the Studied Regulations

When it comes to the protection of wrecks that contain human remains, the regulations target different kinds of wrecks. The Protection of Military Remains Act 1986 specifically targets certain military objects, i.e. state vessels, while the implementations of the international agreement concerning MS Estonia specifically deal with that ship, making the legislation only relevant to one single wreck.

9.3.1 State Wrecks

The Protection of Military Remains Act 1986 is applicable in relation to military objects and thus solely focuses on state wrecks as defined

[1024] Sw. *Lag (1995:732) om skydd för gravfriden vid vraket efter passagerarfartyget Estonia*.
[1025] Sw. *lag om fredning av vraket efter passagerarfartyget Estonia*.
[1026] § 1 Act on Protection of the Wreck of the Passenger Ship Estonia.
[1027] Dan. *Lov nr 823 af 25/11/1998 om beskyttelse af gravfreden ved vraget efter passagerskibet 'M/S Estonia'*. The act entered into force in 1999; see § 4 Act on Protection of the Grave Sanctity of the Wreck after the Passenger Ship M/S Estonia and BKI nr 33 af 20/05/1999, Bekendtgørelse om Danmarks tiltrædelse af overenskomst af 23. februar 1995 mellem Estland, Finland og Sverige om M/S Estonia.
[1028] See the Protection of Wrecks (M/S Estonia) Order 1999. The discussion here will, however, focus on the enactments found in the Nordic legal systems.

in the classification. This makes it unique since no other regulation in this study focuses solely on such objects. The act focuses on two main forms of protection in the form of controlled sites and protected sites.[1029] These are aimed at protecting sites after military wrecks. The act is applicable also in relation to any aircraft which has crashed while in military service.[1030] In this way, the act is automatically applicable in relation to military aircraft.[1031]

The Secretary of State may designate a vessel as a vessel under the act if it appears to have sunk or been stranded while in military service.[1032] The Secretary of State may, furthermore, designate an area as a controlled site if it appears to contain a place comprising the remains of, or of a substantial part of, an aircraft to which the act applies or a vessel which has sunk or been stranded.[1033] The designation shall be done by order made by statutory instrument and is not dependent on knowledge of the situation of the remains of the vessel.[1034]

The act is aimed at protecting vessels, aircraft and sites that are relatively recent, which separates it from other regulations that cover historical wrecks as discussed further below in chapter 10. Thus, the Secretary of State shall only designate a vessel as a vessel under the act if it appears to him that the vessel sank or was stranded on or after the 4th August 1914.[1035] The application is thus fixed to the date on which the United Kingdom declared war on Germany in the outbreak of the First World War. In relation to vessels which were in service with, or being used for the purposes of, a country or territory outside the United Kingdom, the act is only applicable if the remains are located in United Kingdom waters.[1036]

The possibility to designate controlled sites is somewhat wider. Such

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[1029] See art. 1(3)-(4) and art. 1(6) Protection of Military Remains Act 1986.
[1030] S. 1(1) Protection of Military Remains Act 1986.
[1031] Rose, *Kennedy and Rose on the Law of Salvage*, s. 19-041.
[1032] This is also relevant for vessels that have sunk or stranded before the passing of the act; see s. 1(2)(a) Protection of Military Remains Act 1986.
[1033] S. 1(2)(b) Protection of Military Remains Act 1986.
[1034] S. 1(2) Protection of Military Remains Act 1986.
[1035] S. 1(3)(a) Protection of Military Remains Act 1986.
[1036] S. 1(3)(b) Protection of Military Remains Act 1986.

a site can be designated by the Secretary of State if it appears to him that less than two hundred years have elapsed since the crash, sinking or stranding.[1037] If the controlled site comprises land that has owners and occupiers, a site can only be designated provided that they do not object to the terms of the designating order.[1038] Again, should the vessel or aircraft have been in service with, or used for the purposes of, a country or territory outside the United Kingdom, the remains must be located in the United Kingdom or United Kingdom waters.[1039]

9.3.2 Regulating a Single Wreck

The main example of regulations directed at a single wreck is the implemented domestic regulations stemming from the international agreement between Sweden, Estonia and Finland on the protection of MS Estonia. These regulations protect the area where the wreck is positioned as a gravesite. In some ways, these regulations are similar to the protection that can result from an application of the Protection of Military Remains Act 1986 in English law. In fact, the parts of the act that concern protection by designation are similar to the method chosen in relation to MS Estonia. The main difference is that the regulations on MS Estonia are individual acts, while the designations under English law are made in relation to the Protection of Military Remains Act 1986 as a main framework. In this sense, the latter approach, arguably, enables more sites to be protected since there is no need to create new legislation in order to provide protection.

9.4 Scope of Application

The scope of application of the regulations depend on the target of the regulation in question. A distinction can be made between general regulations and those focusing on specific areas or a certain site.

[1037] S. 1(4)(a) Protection of Military Remains Act 1986.
[1038] S. 1(4)(b) Protection of Military Remains Act 1986.
[1039] S. 1(4)(c) Protection of Military Remains Act 1986.

9.4.1 General Scope of Application

The Protection of Military Remains Act 1986, in English law, is a general regulation in the sense that it has a defined large area as its scope of application. The provisions on controlled sites are applicable in the United Kingdom and United Kingdom waters but also on international waters in certain circumstances.[1040] A protected place, under the act, is defined as a place in the United Kingdom, in United Kingdom waters or in international waters that comprises the remains of, or of a substantial part of, an aircraft or vessel to which the act applies.[1041] It must also be on or in the seabed or the place, or in the immediate vicinity of the place, where the remains were left by the crash, sinking or stranding of the aircraft or vessel.[1042] A place in international waters is not a protected place if the vessel or aircraft was in service with, or used for the purposes of, a country or territory outside the United Kingdom. In other words, in order for there to be a protected place in international waters, the military object must have been in service with or used for the purposes of the United Kingdom.

9.4.2 Specifically Protected Area

The domestic implementations of the agreement on the protection of MS Estonia are examples of regulations that target a specifically defined area. Thus, the coordinates of the protected site are found in the respective acts.[1043] The position of the wreck in international waters, however, causes some jurisdictional limitation as to the efficacy of the different acts.[1044] The fact that the wreck is outside of territorial

[1040] S. 1(2)(b) Protection of Military Remains Act 1986.
[1041] S. 1(6)(a) Protection of Military Remains Act 1986.
[1042] S. 1(6)(b) Protection of Military Remains Act 1986.
[1043] See § 1 Act on the Protection of Grave Sanctity at the Wreck of the Passenger Vessel Estonia (Sweden), § 2 Act on Protection of the Wreck of the Passenger Ship Estonia (Finland) and § 1 Stk. 2 Act on Protection of the Grave Sanctity of the Wreck after the Passenger Ship M/S Estonia (Denmark).
[1044] Prop. 1994/95:190, *Skydd för gravfriden vid vraket efter passagerarfartyget Estonia*, p. 8. At the time of sinking, the wreck was situated on the Finnish continental shelf since Finland, at that time, had not yet declared an exclusive economic zone. As of today, the wreck is positioned in the exclusive economic zone of Finland; cf. Tiberg,

waters also means that the possibility to regulate the situation is limited. It is argued in the preparatory works, in Swedish law, that the Swedish version of the act does not impact on the right of free navigation, but it is, at the same time, held that any diving or underwater activity would disturb the sanctity of the gravesite.[1045]

9.5 Ways to Protect Human Remains

The discussion now turns to how wrecks that contain human remains are protected in the studied regulations, i.e. the Protection of Military Remains Act 1986 and the different implementations of the agreement on the protection of MS Estonia.

9.5.1 Military Remains in English Law

The Protection of Military Remains Act 1986 focuses on two main forms of protection in the form of controlled sites and protected places.[1046] The extent of a controlled site shall be appropriate for the purpose of protecting or preserving the remains, or on account of the difficulty of identifying the place, and it is up to the Secretary of State to decide this.[1047] There are thus two factors that may affect the size of the area, the first being protection or preservation, while the second relates to how difficult it is to find the remains. If the controlled site is located in international waters, two points in the boundary must not be more than two nautical miles apart.[1048] *E contrario*, no such limit is relevant should the site be in the United Kingdom or in United Kingdom waters. The provision on protected places is relevant in relation to any vessel to which the act applies. There is, however, no need to specify any coordinates for these places. It suffices to designate the place by

"Why Cover the Wreck of a Sunken Ship?", p. 485 f and Sw. *(26.11.2004/1058) Lag om Finlands ekonomiska zon*, Act on the Exclusive Economic Zone of Finland.

[1045]Prop. 1994/95:190, *Skydd för gravfriden vid vraket efter passagerarfartyget Estonia*, p. 8.

[1046]See art. 1(3)-(4) and art. 1(6) Protection of Military Remains Act 1986.

[1047]S. 1(4)(d) Protection of Military Remains Act 1986.

[1048]S. 1(4)(d) Protection of Military Remains Act 1986.

reference to the vessel or aircraft in itself.[1049] As noted above, military aircraft crashed while in military service are automatically protected as a consequence of s. 1(1) of the act.[1050]

The act enables protection in the sense that it is prohibited to tamper with, damage, move, remove or unearth any remains protected under the act.[1051] It is, furthermore, forbidden to enter any hatch or other opening in any of the remains which enclose any part of the interior of an aircraft or vessel.[1052] This is the case both in relation to controlled sites and protected places.[1053] It is also prohibited to excavate, to conduct diving or salvage operations at a controlled site for the purposes of investigating or recording details of any remains of an aircraft or vessel.[1054] This is also prohibited if it is carried out for the purpose of committing an offence under s. 2(2) of the act.[1055] The regulation thus offers protection in the sense that if forbids certain actions in relation to a protected wreck.

9.5.2 Protection of MS Estonia

MS Estonia is the subject of the already discussed international agreement between Sweden, Estonia and Finland aimed at protecting the wreck. The agreement is aimed at protecting the wreck and the surrounding area, as defined in the agreement and the different acts, as a final resting place for the victims of the disaster.[1056] The agreement

[1049] Rose, *Kennedy and Rose on the Law of Salvage*, s. 19-041, p. 696 f.
[1050] The current designated vessels and controlled sites are found in the Protection of Military Remains Act 1986 (Designation of Vessels and Controlled Sites) Order 2019 (S.I. 2019, No 1191).
[1051] S. 2(2)(a) Protection of Military Remains Act 1986.
[1052] S. 2(2)(b) Protection of Military Remains Act 1986.
[1053] See s. 2(1)(a) Protection of Military Remains Act 1986.
[1054] S. 2(3)(a) Protection of Military Remains Act 1986. For excavations, see s. 2(3)(c) Protection of Military Remains Act 1986.
[1055] Enforcement is discussed further below; s. 2(3)(b) Protection of Military Remains Act 1986.
[1056] See art. 1 and 2, Agreement between the Republic of Estonia, The Republic of Finland and the Kingdom of Sweden regarding the M/S Estonia, found in Prop. 1994/95:190, *Skydd för gravfriden vid vraket efter passagerarfartyget Estonia*, p. 14.

also states that the parties agree that MS Estonia is not to be raised.[1057]

In the implementations of the agreement, protection is granted in, more or less, the same way. The Swedish act prohibits any diving or other underwater activity within the wreck or in the designated area as defined in the act.[1058] As an exception to this, measures in order to cover or protect the wreck, as well as measures to prevent pollution to the environment from the wreck are allowed provided that they are taken by an authority in Estonia, Finland or Sweden or, alternatively, by someone else under delegation by the mentioned authorities.[1059]

The Finnish implementation states that it is prohibited to dive in the protected area and no actions can be taken in order to salvage remains from victims or property on board the wreck or located on the seabed. It is also prohibited to disturb the wreck and the peace that is granted the wreck as a gravesite in any other way.[1060] The authorities can, however, take actions in order to cover the wreck or in order to prevent pollution to the environment.[1061] In a similar way to both the Swedish and Finnish implementations, the Danish implementation of the agreement states that it is forbidden within the protected area, as defined in the act, to dive or undertake any other underwater activity.

[1057] Art. 3, Agreement between the Republic of Estonia, The Republic of Finland and the Kingdom of Sweden regarding the M/S Estonia, found in ibid., p. 15.

[1058] § 2 Act (1995:732) on the Protection of Grave Sanctity at the Wreck of the Passenger Vessel Estonia.

[1059] § 2 Act (1995:732) on the Protection of Grave Sanctity at the Wreck of the Passenger Vessel Estonia. The owner of the wreck at the time of the accident was Estline Marine Company Ltd established in Cyprus. This company was, in turn, owned by Estonia Shipping Company, with the Estonian state as owner and a Swedish company, Nordström & Thulin AB, in equal parts. At the time of the accident, the ship was chartered under a bareboat charter to an Estonian company, but this charter was terminated following the sinking. The hull insurer did not claim any rights in relation to the ship. The owner of the ship declared in writing to the governments of Sweden and Estonia that the governments were free to acquire rights to the wreck or to execute rights associated with the wreck as they saw fit. The owner also had no objections to the proposal of covering the wreck. Since the owner thus had no objections in relation to the proposed measures, the specific provision on the prohibition of diving and underwater activity does not mention the owner or allow the owner to take any action in relation to the wreck. See Prop. 1994/95:190, *Skydd för gravfriden vid vraket efter passagerarfartyget Estonia*, p. 6 ff.

[1060] § 3 Act on Protection of the Wreck of the Passenger Ship Estonia.

[1061] § 4 Act on Protection of the Wreck of the Passenger Ship Estonia.

The prohibition is, however, not relevant in relation to actions taken by authorities in Estonia, Finland or Sweden in order to cover the wreck or prevent pollution from it.[1062]

It is interesting to note that the acts, implementing the agreement, do not allow for any diving or underwater activity with the purpose of examining the wreck not even by the authorities under the act. In this sense, all diving and underwater activity, apart from covering the wreck or preventing pollution from it, is forbidden. At the time of writing, a legislative process is initiated in Sweden in order to change the act, in this respect, as a consequence of the discovery of two new holes in the hull of the wreck. In light of this new information, the Swedish Accident Investigation Authority has requested that the government amends the act in order to enable new investigation measures, including divings and underwater activity, on the site.[1063]

9.6 Enforcement

As in the case with dangerous wrecks, the protection that can be extended to wrecks that contain human remains is also combined with different rules on enforcement in the studied regulations. This is discussed in this section.

9.6.1 Enforcing the Protection of Military Remains

The Protection of Military Remains Act 1986 includes several provisions on enforcement relating to the possible protection under the act. It is an offence if a person tampers with, damages, moves, removes or unearths any remains protected under the act.[1064] It is also an offence to enter

[1062] § 2 Act on Protection of the Grave Sanctity of the Wreck after the Passenger Ship M/S Estonia.

[1063] Swedish Accident Investigation Authority (2020). *Preliminary assessment of new information about the sinking of the passenger ship M/S Estonia, S-200/20.* Dec. 2020. URL: https://www.havkom.se/en/investigations/civil-sjoefart/preliminaer-bedoemning-av-nya-uppgifter-om-foerlisningen-av-passagerarfartyget-estonia (visited on 12/2020).

[1064] S. 2(2)(a) Protection of Military Remains Act 1986.

any hatch or other opening in any of the remains which enclose any part of the interior of an aircraft or vessel.[1065] This is the case both in relation to controlled sites and protected places.[1066] It is also prohibited to excavate, to conduct diving or salvage operations at a controlled site for the purposes of investigating or recording details of any remains of an aircraft or vessel.[1067] This is also prohibited if it is carried out for the purpose of committing an offence under s. 2(2) under the act.[1068] The enforcement is, in this way, linked to the protection that can be offered under the act.

As an exception to the offences above, it is possible for the Secretary of State to grant a license, which may include specific conditions, to carry out such actions.[1069] If the alleged offence was committed in relation to a protected place, it is a defence for the person if he can show that he believed on reasonable, but in fact false, grounds that the circumstances were such that the place would not have been a protected place.[1070] Such a defence is not possible in relation to controlled sites, since these are designated and public by the relevant order. It is also a defence if the action taken was urgently necessary in the interest of safety or health or to prevent or avoid serious damage to property.[1071]

9.6.2 Enforcing the Protection of MS Estonia

The international agreement to protect the wreck site of MS Estonia as a gravesite calls for the contracting parties to introduce domestic legislation to criminalise "any activities disturbing the peace of the final place of rest, in particular any diving or other activities with the purpose of recovering victims or property from the wreck or the sea-

[1065] S. 2(2)(b) Protection of Military Remains Act 1986.
[1066] See s. 2(1)(a) and note the requirements on the person believing or having reasonable grounds for suspecting in relation to protected places in s. 2(1)(b) Protection of Military Remains Act 1986.
[1067] S. 2(3)(a) Protection of Military Remains Act 1986. For excavations, see s. 2(3)(c) Protection of Military Remains Act 1986.
[1068] S. 2(3)(b) Protection of Military Remains Act 1986.
[1069] See s. 4 and s. 2(4) Protection of Military Remains Act 1986.
[1070] S. 2(5) Protection of Military Remains Act 1986.
[1071] S. 2(6) Protection of Military Remains Act 1986.

bed".[1072] The agreement also calls for imprisonment as the form of punishment for an offence.[1073]

In the Swedish implementation of the agreement, it is criminalised to act in contravention with the act and to do so may lead to a fine or imprisonment for up to two years.[1074] It is, furthermore, possible to seize items that have been taken from the wreck in violation of the act, or their value if relevant, as well as any equipment that has been used in the process of violating the act.[1075] The Finnish implementation states that anyone who contravenes the prohibitions in the act, with intent, commits an offence and will be sentenced to a fine or imprisonment for up to one year.[1076] Should anyone come into possession of property following a breach of the act, such property or its value shall be confiscated[1077] to the state.[1078] The Danish implementation, finally, states that it is a criminal offence to contravene the act and a person who does this with intent will be sentenced to a fine, a minor form of imprisonment[1079] or imprisonment for up to one year.[1080]

When it comes to the different regulations on the protection of the wreck of MS Estonia, Sweden thus stands out as the system where the potential sentence is the longest. In Swedish law, a contravention of the act will lead to a fine or imprisonment for up to two years, while in both Finnish and Danish law, the sentence will either be a fine or imprisonment for up to one year.[1081] A peculiarity of the Danish legal

[1072] Art. 4(1), Agreement between the Republic of Estonia, The Republic of Finland and the Kingdom of Sweden regarding the M/S Estonia, found in Prop. 1994/95:190, *Skydd för gravfriden vid vraket efter passagerarfartyget Estonia*, p. 16.
[1073] Art. 4(2)–(3), Agreement between the Republic of Estonia, The Republic of Finland and the Kingdom of Sweden regarding the M/S Estonia, found in ibid., p. 16.
[1074] § 3 Act (1995:732) on the Protection of Grave Sanctity at the Wreck of the Passenger Vessel Estonia.
[1075] § 4 Act (1995:732) on the Protection of Grave Sanctity at the Wreck of the Passenger Vessel Estonia.
[1076] § 5 Act on Protection of the Wreck of the Passenger Ship Estonia.
[1077] Sw. *förverkad*.
[1078] § 6 Act on Protection of the Wreck of the Passenger Ship Estonia.
[1079] Dan. *hæfte*.
[1080] § 3 Act on Protection of the Grave Sanctity of the Wreck after the Passenger Ship M/S Estonia.
[1081] § 3 Act on the Protection of Grave Sanctity at the Wreck of the Passenger Vessel Estonia (Swedish law), § 5 Act on Protection of the Wreck of the Passenger Ship Estonia

system is, furthermore, that they also have a minor form of imprisonment[1082] that is also a possibility when it comes to offences under the act on MS Estonia.[1083] In all the implementations there is, furthermore, a possibility to seize or arrest potential property from the wreck.

(Finnish law) and § 3 Act on Protection of the Grave Sanctity of the Wreck after the Passenger Ship M/S Estonia (Danish law).

[1082] Dan. *hæfte*.

[1083] § 3 Act on Protection of the Grave Sanctity of the Wreck after the Passenger Ship M/S Estonia.

Chapter 10

Wrecks of Historical Importance

10.1 Elaboration of the Research Question

The research question for this chapter is how wrecks of historical importance can be handled from a legal point of view. In order to adress the question and to put it into a perspective, it can be broken down into different dimensions. This process also functions as a demarcation of this chapter.

The dimensions in focus are:

- Protected values and interests
- Wrecks covered in the studied regulations
- Scope of application
- Ways to protect wrecks of historical importance
- Enforcement

The analysis is focused on each of these dimensions in turn.

10.2 Protected Values and Interests

This chapter concerns wrecks that are historical and that may need protection as a consequence of this. This is reflected in the values and interests that are expressed in the studied regulations.

The Protection of Wrecks Act 1973, in English law, is meant to secure the protection of wrecks in territorial waters and the sites of such wrecks from interference by unauthorised persons and can, consequently, be used in order to protect historical wrecks. The act can enable protection based on the historical, archaeological or artistic importance of a wreck and is thus centred on protecting these values and interests.[1084] Another similar regulation in English law is the Ancient Monuments and Archaeological Areas Act 1979, that concerns ancient monuments and enables the investigation, preservation and recording of matters of archaeological or historical interest.[1085] Its purpose is thus to protect these values and interests in relation to potential wrecks that can fall under the regulation.

In the Nordic systems, the Act on the Cultural Environment, in Swedish law, can enable protection in relation to historical shipwrecks.[1086] The main purpose of the act is to ensure that the current and coming generations get access to a plurality of cultural environments.[1087] The Norwegian Act on Cultural Heritage has a similar purpose and aims to protect cultural heritage and cultural environments in respect of their uniqueness and variation.[1088] In Finnish law, the Antiquities Act contains provisions in relation to wrecks.[1089] The act is not as clear, as the other mentioned regulations, when it comes to which values or interests that are protected. It is, however, stated in relation to ancient

[1084] S. 1(1)(a)-(b) Protection of Wrecks Act 1973.
[1085] See the preamble to the Ancient Monuments and Archaeological Areas Act 1979. In relation to Scotland and Northern Ireland see instead the Marine (Scotland) Act 2010 and the Historic Monuments and Archaeological Objects (Northern Ireland) Order 1995.
[1086] Sw. *Kulturmiljölagen (1988:959)*.
[1087] Sw. *tillgång till en mångfald av kulturmiljöer*; Chapter 1 § 1 Act (1988:959) on the Cultural Environment.
[1088] No. *Lov om kulturminner (kulturminneloven)*; chapter 1 § 1 Act on Cultural Heritage.
[1089] Sw. *(17.6.1963/295) lag om fornminnen*.

monuments that these are protected as memories of earlier habitation and history of Finland.[1090] It is thus clear that the protected values or interests in the act concern historical aspects.

In Danish law, the Act on Museums aims at securing cultural and natural heritage.[1091] There are provisions in the act that are relevant in relation to wrecks. It is thus similar to the other corresponding regulations in Swedish, Norwegian and Finnish law in light of its protected values and interests. The thing that stands out in comparison is the manifest focus on museums and their role in securing this aim.[1092] In a sense, the act therefore also aims at protecting or maintaining museums with objects.

10.3 Wrecks Covered in the Studied Regulations

Wrecks of historical importance are regulated in different ways in the studied regulations. One key difference between the systems is whether the specific regulation, and the wrecks that fall under it, operates with the use of time limits or not. One main distinction can thus be made between regulations without time limits and regulations with time limits in different ways. These variations will affect which wrecks that potentially will fall under the regulations. Another difference in the regulations is that some operate by the way of designation, while others offer automatic protection of historical wrecks. This will also have an effect on which wrecks that will fall under the regulations.

10.3.1 Regulations Without Time Limits

English law stands out as an exception when compared to the other systems, since it is not primarily focused on different time limits in relation to the wrecks that can be protected. The Protection of Wrecks Act 1973 enables the protection of historical wrecks, in the form of vessels lying wrecked on or in the sea bed, by designation provided that

[1090] Chapter 1 § 1 Antiquities Act.
[1091] Dan. *Museumsloven*; § 1 Act on Museums.
[1092] Cf. chapter 1 § 1 Act on Museums.

the site ought to be protected from unauthorised interference because of the historical, archaeological or artistic importance of the vessel, or of any objects contained or formerly contained in it which may be lying on the sea bed in or near the wreck.[1093]

Around 60 wrecks are protected by order under the act. Among them are wrecks like the Mary Rose, that sunk in 1545, and the VOC ship, i.e. a ship from the Dutch East India Company, Amsterdam that sunk in 1749.[1094] There is, however, no time limits in the act and also more recent wrecks, not classified as historical in the classification used here, could thus also fall under the act. In this way, all the classified categories of wrecks could in fact fall under the application of the act. Most of the designated wrecks under the act are, however, historical wrecks and mainly from the sixteenth to the nineteenth century. In some cases, the wrecks are even older. There are, however, exceptions to this. Two examples are the HM Submarine A1 that sank in 1911 and Holland V that sank in 1912, both of which are designated and protected under the act.[1095]

The same is true for the potential application of the Ancient Monuments and Archaeological Areas Act 1979. The act enables the protection of monuments. This term is, among other things, to be interpreted as referring to any site comprising, or comprising the remains of, any vehicle, vessel, aircraft or other movable structure or part thereof.[1096] Consequently, a wreck can be considered as a monument under the act. Such a site is, however, not considered a monument unless the situation of any object or its remains in that particular site is a matter of public interest.[1097] The act is, furthermore, secondary to the Pro-

[1093] S. 1(1)(a)-(b) Protection of Wrecks Act 1973.
[1094] See Maritime & Coastguard Agency (2018d). *Protected wrecks in the UK: wrecks designated under Section 1 of the Protection of Wrecks Act 1973 in England, Wales and Northern Ireland*. June 2017. URL: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/619725/Copy_of_Protected_wrecks_in_the_UK_under_S1_15-06-2017.pdf (visited on 02/2018).
[1095] See ibid.
[1096] S. 61(7)(c) Ancient Monuments and Archaeological Areas Act 1979. This is the case provided that it is not already considered as a monument under s. 61(7)(a) Ancient Monuments and Archaeological Areas Act 1979.
[1097] S. 61(8)(a) Ancient Monuments and Archaeological Areas Act 1979.

tection of Wrecks Act 1973 in the sense that any site that comprises a vessel, or the remains of a vessel, which is protected under the first section of that act will not be considered as a monument under the Ancient Monuments and Archaeological Areas Act 1979.[1098] If applicable, however, the act is another example of a regulation without time limits, in this respect, and all the classified categories of wrecks could thus potentially fall under it. The act is, however, aimed at ancient monuments and archaeological sites and it is, therefore, reasonable to presume that it predominately will be relevant in relation to what has here been classified as historical wrecks.

10.3.2 Variations of Time Limits

The studied regulations in the Nordic systems differ from the approach in English law in the sense that they operate with different time limits. There are, however, some differences between the systems as evidenced in the following.

In Swedish law, historical sites can be protected under the Act on the Cultural Environment. One of the sites or monuments that the act protects is remnants of shipwrecks.[1099] In the following, this will be referred to as historical shipwrecks. Such a site is, however, not protected if it can be presumed that the ship sank in the year 1850 or later.[1100] The ship, in other words, must have sunk before the year 1850. As an exception to this, however, the County Administrative Board can declare a ship that has sunk after this date as a protected site, if there are particular reasons to motivate this in respect of the site's importance from a cultural heritage point of view.[1101] The time limit was implemented in the act in 2014 and was motivated with the argument that it is important to have a clear boundary between older and newer sites or remains of different kinds. The act is meant to target

[1098] S. 61(8)(b) Ancient Monuments and Archaeological Areas Act 1979.
[1099] Sw. *fartygslämningar*; chapter 2 § 1 the second paragraph and eight period Act (1988:959) on the Cultural Environment.
[1100] Chapter 2 § 1 a first paragraph Act (1988:959) on the Cultural Environment.
[1101] Sw. *Länsstyrelsen*; chapter 2 § 1 a second paragraph Act (1988:959) on the Cultural Environment.

older remains or sites, which can motivate the time limit. Setting a fixed general date is also meant to increase the predictability of the regulation, e.g. in relation to the use of land. The specific date of 1850 was chosen, according to the preparatory works, since important societal reforms took place in Sweden around the middle of the 19th century.[1102]

Before the insertion of the time limit of 1850, there was a separate provision concerning shipwrecks that protected sites if more than 100 years had passed since the ship had become a wreck. This specific provision was, however, removed and replaced by the general time limit without any real motivation as to why.[1103] Earlier in the legislative process, a specific provision had been suggested that would have protected shipwrecks if it could be presumed that the ship had sunk before 1900.[1104] This option was, however, not kept in the final version of the act.

The time limit of 1850 results in that various types of older wrecks will not be protected under Swedish law. All the wrecks from the two world wars as well as the historically interesting wrecks from the latter part of the 19th century will belong to this group. As mentioned above, there remains, however, a possibility for the County Administrative Board to declare protection in relation to a later site if there are particular reasons for this. This may be the case, according to the preparatory works, should the remains or the site be part of an important context from a cultural heritage point of view or if the site or remains can contribute and provide important knowledge that complements written sources.[1105] This alternative, however, must be balanced against the above-mentioned underlying aim of setting a clear line between what is protected and what is not.

[1102]It is described in the preparatory works that the modern Swedish society emerged around this time in the form of a secular, industrial and urban society, which differentiated it from its earlier state of being traditional, agrarian and rural; see Prop. 2012/13:96. *Kulturmiljöns mångfald*, p. 44 f. In an earlier preparatory work in the legislative process, the date 1750 had been suggested instead; ibid., p. 42.
[1103]ibid., p. 45.
[1104]ibid., p. 42.
[1105]ibid., p. 48.

The Norwegian regulation, that can be relevant in relation to historical wrecks, also includes a time limit. Under Norwegian law, this is set to 100 years.[1106] This limit is phrased as encompassing ships, remains, accessories, cargo or other items that have been on board or parts of such items provided that they are more than 100 years old.[1107] The deciding factor, in relation to time in Norwegian law, is thus the age of the object as such and not the time of the object's sinking. The act also includes the possibility to protect vessels of special cultural and historical value.[1108] This protection is aimed at ships that are still used in various ways.[1109] It thus falls slightly outside of the focus here, since the protection is not directed at wrecks as such.

In Finnish law, a wreck, in the form of a ship or some other kind of vessel, or part of a wreck, is protected under the act if found in the sea or inland waters and provided that it can be presumed that the ship or vessel, sank at least one hundred years ago.[1110] The provisions on ancient monuments in the act are applicable, as far as relevant, in relation to such wrecks or parts of them.[1111] In relation to objects that are found in wrecks, as defined in the act, or when it is obvious that they originate from such a wreck, the provisions on movable ancient objects are applicable as far as relevant.[1112] Anyone who discovers a wreck or a part of a wreck, as defined in the act, shall notify the National Board of Antiquities and Historical Monuments without delay.[1113] The Finnish Border Control is also a responsible authority in relation to found shipwrecks.[1114]

The time limit in Danish law is similar to the Finnish regulation. The provisions in the act become applicable should anyone find a shipwreck

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[1106] See chapter IV § 14 Act on Cultural Heritage.
[1107] No. *mer enn hundre år gamle båter, skipsskrog, tilbehør, last og annet som har vært ombord eller deler av slike ting*.
[1108] No. *båter av særlig kulturhistorisk verdi*; chapter IV § 14a Act on Cultural Heritage.
[1109] See Chapter IV § 14 a Act on Cultural Heritage.
[1110] Chapter 3 § 20 first paragraph Antiquities Act.
[1111] Sw. *fasta fornlämningar*; chapter 3 § 20 first paragraph Antiquities Act.
[1112] Sw. *lösa fornföremål*; chapter 3 § 20 third paragraph Antiquities Act.
[1113] Sw. *arkeologiska kommissionen*; chapter 3 § 20 fourth paragraph Antiquities Act.
[1114] Sw. *gränsbevakningsväsendet*; chapter 3 § 20 fifth paragraph Antiquities Act.

or the remains of a wreck that can be presumed to have sunk more than one hundred years ago.[1115] The act is applicable in internal waters, lakes and the territorial sea as well as the continental shelf but not further out than 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.[1116]

Of the studied regulations, the Swedish system stands out in relation to the others in respect of its time limit of 1850. The limits in Danish and Finnish law converge, since they both protect wrecks from ships that have sunk either more than one hundred years ago, in Danish law, or at least one hundred years ago in Finnish law. The time limits in these systems thus differ from the Swedish regulation by several decades.

On a more substantial note, the underlying structure of the regulations concerning time limits also differ in the sense that the Danish and Finnish systems relate to a specific time period, while Swedish law has anchored the regulation based on a specific date set in stone. Thus, while the Danish and Finnish regulations will continue to expand to additional wrecks with the passing of time, encompassing new wrecks that will have sunk in accordance with the time limits, the Swedish regulation is locked in time and will not cover any more wrecks than the ones already protected by the set time limit. The Swedish system is, evidently, foreseeable and clear in the sense that there is no question of what is protected and what is not in relation to time. This was also one of the underlying reasons for the time limit as argued in the preparatory works.[1117] The main drawback of this, however, is that no other wrecks, that with the passing of time will become relevant to protect for historical reasons, will be protected. This is hardly tenable in a long-term perspective.

Norwegian law, finally, stands out in another way, since wrecks are there protected if the property itself is at least one hundred years old.[1118] In this sense, the regulation focuses on how old the property as

[1115]Chapter 8 § 28 the first paragraph Act on Museums.
[1116]Chapter 8 § 28 the first paragraph Act on Museums.
[1117]Prop. 2012/13:96, *Kulturmiljöns mångfald*, p. 44 f.
[1118]Chapter IV § 14 the first paragraph Act on Cultural Heritage.

such is and not how long ago the ship sank as in the Danish, Finnish and Swedish systems. Consequently, the age of the ship must be taken into account. Ships that already are at least one hundred years old and that sink will thus be protected by the regulation even though the sinking takes place now. An advantage of this system is that it focuses on the age of the ship. This makes sense, since it is, arguably, the historical value of the ship in itself and its content that is of interest and not the fact that the ship and its content have sunk at a given period in time. Another view, however, that could be relevant in some cases, is that it also can be the wreck site as such, including the wreck and other property on the site, that is of interest to protect. This dimension is more present in the other Nordic regulations, where the time limits have more focus on the ship in its sunk state and the wreck site as such.

10.3.3 Automatic Protection Versus Designation

It follows from the discussion above that a key difference between the legal systems is how historical wrecks fall under the regulations. This can follow automatically or by the way of designation or similar action. The legal system that mainly operates by the way of designation is English law. In the Nordic systems, protection is instead generally provided automatically as a consequence of the wreck reaching a certain age. As discussed above, this time limit varies between the regulations and it can also be phrased in different ways.

These different variations in how a wreck is protected affect how the regulations function in different ways. Evidently, an automatic protection enables more wrecks to be encompassed, since all wrecks that fall under the applicability of the specific regulation are covered as a consequence of their age or status. A more extensive protection can thus be the result. The variation with designation, however, is in some sense a more public approach, since it is explicit and clear which wrecks that are protected under the regulation. The individual designations will generally follow from legal documents, like statutory instruments in English law, that can be easily obtained. In this way, it

will, generally, be easier to see which wrecks that are protected. On the other hand, this may not always have positive effects. Quite to the contrary, a public designation may, depending on its content, enable people to easier locate and access the protected site. Depending on the situation at hand, this might cause problems and instead, in effect, risk to undermine the protection of the wreck.

The efficacy of a system that operates on the basis of designation, moreover, is dependent on the speed in which the government or some other relevant authority acts in relation to wrecks that need protection. If there is delay in the designation or if this is not a prioritised issue, this will, of course, have negative effects on the protection of historical wrecks. On the other hand, if designations are carried out in an effective and timely manner, this will not be a problem. There are thus advantages and disadvantages with both variations.

10.4 Scope of Application

As with the other studied regulations concerning the protection of wrecks, the scope of application of regulations on historical wrecks can be divided into two main groups. The first includes regulations that have broad scopes of application in the sense that they offer protection in relation to an area or to all wrecks fulfilling the criteria for protection in that area, while the second includes regulations that target specific objects or wrecks individually.

The regulations in the Nordic systems can be classified as belonging to the first group. The Act on the Cultural Environment in Swedish law, the Act on Cultural Heritage in Norwegian law, the Antiquities Act in Finnish law and the Act on Museums in Danish law all operate in line with the first described group, i.e. wrecks are protected in the respective act's area of application if they meet the criteria stipulated in the act.

As for the latter group, this includes the two regulations in English law, i.e. the Protection of Wrecks Act 1973 and the Ancient Monuments and Archaeological Areas Act 1979. In these acts, protection can be

granted in relation to wrecks provided that they are designated in some sense. In relation to the scope of application, this means that the scope is narrowed to the particular sites that have been designated.

10.5 Ways to Protect Wrecks of Historical Importance

There are different ways in which wrecks of historical importance can be protected. One way is to centre a regulation on a responsible authority that is to designate certain sites or objects that are deemed to be worthy of protection under the regulation. Another way of structuring a regulation is to, instead of designation, focus on some other basis for establishing protection. This can be in the form of certain requirements that need to be fulfilled in order for a site or an object to be protected. In this way, once all the requirements are met, the site will automatically be protected. As an example, the requirement for protection can be linked to the age of the site or the object.

10.5.1 Protection by Designation

Under the Protection of Wrecks Act 1973, the Secretary of State can, in certain cases, order that a designated area around the site of a wreck shall be restricted, i.e. protected, provided that there is, or may prove to be, a site where a vessel is lying wrecked on or in the sea bed.[1119] If on account of the historical, archaeological or artistic importance of the vessel, or any objects contained or formerly contained in it which may be lying on the sea bed in or near the wreck, the site ought to be protected from unauthorised interference such an area can be designated.[1120] An order shall identify the site of the wreck.[1121] Before issuing such an order, the Secretary of State shall also consult with such persons as

[1119] S. 1(1)(a) Protection of Wrecks Act 1973. The term sea bed includes any area submerged at high water of ordinary spring tides; s. 3(1) Protection of Wrecks Act 1973.

[1120] S. 1(1)(b) Protection of Wrecks Act 1973.

[1121] See s. 1(2) Protection of Wrecks Act 1973 for details on how this is to be done.

he considers appropriate having regard to the purposes of the order, but this is not necessary if the case is such that an order should, in the opinion of the Secretary of State, be made as a matter of immediate urgency.[1122]

It is, however, possible for the Secretary of State to grant a license that allows access to the site. Such a license shall be in writing and can only be given under certain circumstances.[1123] A license can only be given to a person that appears to be competent, and properly equipped, to carry out salvage operations in a manner appropriate to the historical, archaeological or artistic importance of the specific wreck or any objects contained or formerly contained in the wreck.[1124] A license can, furthermore, be given if the person appears to have any other legitimate reason for doing in the area that which can only be done under the authority of a license.[1125]

If a license is granted, it may be subject to conditions or restrictions, and may be varied or revoked by the Secretary of State at any time after giving not less than one week's notice to the licensee.[1126] If the licensee does anything that is contrary to any condition or restriction of the license, this is treated as something that is done otherwise than under the authority of the license.[1127] Should, finally, a license have been granted, it is an offence for any other person to obstruct the licensee, or cause or permit the licensee to be obstructed, in doing anything which is authorised by the license provided that the action does not fall under the exceptions as expressed in s. 3(3) in the act.[1128]

10.5.2 Automatic Protection

Under Swedish law, a site of a historical wreck, that fulfils the requirements in the Act on the Cultural Environment, is protected including

[1122] S. 2(4) Protection of Wrecks Act 1973.
[1123] S. 1(5) Protection of Wrecks Act 1973.
[1124] S. 1(5)(a)(i) Protection of Wrecks Act 1973.
[1125] S. 1(5)(a)(ii) Protection of Wrecks Act 1973.
[1126] S. 1(5)(b) Protection of Wrecks Act 1973.
[1127] S. 1(5)(c) Protection of Wrecks Act 1973.
[1128] S. 1(6) Protection of Wrecks Act 1973.

an area on the seabed that is necessary in order to preserve the site and to provide it with sufficient space in relation to its kind and importance.[1129] It is the County Administrative Board that will assess the size of this area should a question arise about its scope.[1130] The act, furthermore, forbids anyone to, without consent, interfere with, remove, excavate, cover or change or damage a protected site by construction, plantation or similar means.[1131] In order to take any such action, consent must be given by the County Administrative Board.[1132] The Central Board of National Antiquities[1133] or a County Administrative Board can also take certain measures if necessary in order to protect and to care for a protected site.[1134] When it comes to shipwrecks in particular, the same authorities have the mandate to salvage it.[1135] The County Administrative Body can also delegate this mandate and thus give permission to someone else to carry out a salvage operation according to terms set by the County Administrative Body.[1136] If a shipwreck, that is a protected site, is salvaged, it will belong to the state if it has no owner.[1137] The government, or some other authority that the government appoints, can give directions as to how the public should approach the protected site or the surrounding area.[1138]

Regardless of who has the better right to property that fall under the Norwegian Act on Cultural Heritage, the responsible authority under the act can excavate or dig up, move, inspect or salvage[1139] this kind

[1129]Chapter 2 § 2 Act (1988:959) on the Cultural Environment.
[1130]Chapter 2 § 2 the second paragraph Act (1988:959) on the Cultural Environment.
[1131]Sw. *rubba, ta bort, gräva ut, täcka över eller genom bebyggelse, plantering eller på annat sätt ändra eller skada en fornlämning*; chapter 2 § 6 Act (1988:959) on the Cultural Environment.
[1132]See chapter 2 §§ 12–15 Act (1988:959) on the Cultural Environment.
[1133]Sw. *Riksantikvarieämbetet*.
[1134]See chapter 2 § 7 Act (1988:959) on the Cultural Environment.
[1135]Chapter 2 § 8 the first paragraph Act (1988:959) on the Cultural Environment.
[1136]Chapter 2 § 8 the second paragraph Act (1988:959) on the Cultural Environment. See also chapter 2 § 7 the third and fourth paragraph as well as chapter 2 § 8 the third paragraph on duties to inform persons that own land or water areas etc when applying these provisions and the possibility to receive monetary compensation should costs or damage befall such a party.
[1137]Chapter 2 § 8 the fourth paragraph Act (1988:959) on the Cultural Environment.
[1138]Chapter 2 § 9 Act (1988:959) on the Cultural Environment.
[1139]No. *ta opp*.

of property in order to protect or preserve it. Neither the owner of the property or someone else is allowed to take this kind of action, or indeed any other action that may damage the property, without permission from the responsible authority under the act. Such a permission may be subject to certain terms. Before any action is taken, the owner or the person working the land where the action is to be taken shall, if possible, be notified of it.[1140]

In Finnish law, the fact that the provisions concerning ancient monuments are applicable in relation to wrecks entails that it is prohibited, without permission, to excavate, cover, change, damage, remove or in any other way disturb a protected wreck.[1141] An area of land is included in the protection of the ancient monument and its size is based on how much space that is necessary in order to preserve the monument. Furthermore, the nature of the monument and its importance can have an impact when it comes to determining the size of this area.[1142]

The National Board of Antiquities and Historical Monuments[1143] has a mandate to investigate a wreck and mark it. It can also delegate this action to someone else.[1144] Should a canal or something similar be planned in the vicinity of a protected wreck, it appears that an investigation must be conducted to determine if the taken actions will affect the wreck or not. If such an effect will be caused by the action, the National Board of Antiquities and Historical Monuments shall be consulted.[1145] If a wreck is found while work is underway for some reason, the work that affects the wreck shall immediately cease and the National Board of Antiquities and Historical Monuments shall be notified of the situation in order to take the necessary action.[1146]

[1140]Chapter IV § 14 the second paragraph Act on Cultural Heritage. See also §§ 9–11 in the act.
[1141]Sw. *utgrävas, överhöljas, ändras, skadas, borttagas eller på annat sätt rubbas*; Chapter 1 § 1 Antiquities Act.
[1142]Chapter 1 § 4 first paragraph Antiquities Act.
[1143]Sw. *arkeologiska kommissionen*.
[1144]Chapter 1 § 10 Antiquities Act.
[1145]Sw. *rådplägning*; cf. chapter 1 § 13 Antiquities Act.
[1146]Cf. chapter 1 § 14. If the work is of the nature treated in Chapter 1 § 13 Antiquities Act, the actions that are regulated there shall be taken in relation to the wreck.

There is also some possibility to claim compensation for the cost of an investigation from a company that is conducting the actions that have led to the need to carry out the investigation.[1147] An example of work, that perhaps can give rise to the situations described above, is dredging work in the vicinity of a wreck. If a wreck causes an undue encumbrance or impediment in relation to its significance, it is possible to apply for permission to interfere with the wreck.[1148]

When it comes to the Danish regulation, no changes are allowed to be made to the current state of a wreck that is protected as a cultural heritage in internal waters, lakes or in the territorial sea or on the continental shelf out to a limit of 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.[1149] The Minister of Culture can decide that this also shall apply to wrecks that have sunk less than one hundred years ago.[1150] It is, furthermore, possible for the minister to make exceptions to the prohibitions in the act.[1151]

The Minister of Culture can also, in connection with construction or similar activities on the seabed, demand that the party responsible for the work shall carry out a marine-archaeological investigation.[1152] If a wreck or some other cultural heritage is found during such work, the Minister of Culture shall be notified of this and the work shall stop.[1153] It is thereafter up to the Minister of Culture to decide within four weeks from the notification whether the work can continue or if a marine-archaeological investigation is to be conducted. Such an investigation shall be done as fast as possible. Certain provisions can also be set up in relation to the continuation of the work that was underway before the find.[1154] The person that is responsible for the construction or other activity is liable for the costs associated with an investigation and the

[1147]Chapter 1 § 15 Antiquities Act.
[1148]See chapter 1 § 1 Antiquities Act.
[1149]Chapter 8 a § 29 g the first and second paragraph Act on Museums.
[1150]Chapter 8 a § 29 g the third paragraph Act on Museums.
[1151]Chapter 8 a § 29 j Act on Museums.
[1152]Chapter 8 a § 29 g the fourth paragraph Act on Museums.
[1153]Chapter 8 a § 29 h the first paragraph Act on Museums.
[1154]Chapter 8 a § 29 h the second paragraph Act on Museums.

potential process of securing the found property.[1155]

10.5.3 Approaches to Responsible Authorities

How the regulations relate to responsible authorities is important for the practical application of the involved provisions. As follows from the above discussion, different approaches are found in the legal systems in this respect. Generally, a regulation can either strive towards having one single responsible authority that is relevant or, alternatively, several different authorities that are involved. There may, of course, also be regulations that include both approaches in different parts. The main advantage of the first approach is that competence and power are channelled to one single authority. The mandate thus becomes clear and there are no potential overlaps between different authorities or any problems with coordination. The latter approach, however, allows for several different authorities that may specialise in different areas and the end result may, consequently, be a better handling of the protection. Several involved authorities may, however, also result in uncertainty as to which authority that is to act as well as a lack of coordination.

English law is the main example of the first approach. The Secretary of State plays an important role under the Protection of Wrecks Act 1973, since protection is designated by order from him. The Secretary of State shall consult with appropriate persons, but, in the end, it is the Secretary of State that decides which parties to consult with and the Secretary of State can also, at his own discretion, choose not to carry out such consultation should designation be necessary as a matter of immediate urgency.[1156] The power and status of the Secretary of State is thus profound in this regulation.

The main example of the second approach is Swedish law. Here, the Central Board of National Antiquities, the relevant County Administrative Board, the government or some other authority that the government appoints, the Police Agency as well as the Swedish Coast Guard all have

[1155] Chapter 8 a § 29 h the third paragraph Act on Museums.
[1156] S. 2(4) Protection of Wrecks Act 1973.

different mandates in the Act on the Cultural Environment alone.[1157] The other Nordic regulations can be classified as somewhere between the English and the Swedish system in this respect. In Norwegian law, the Directorate for Cultural Heritage[1158] will in many cases be the relevant authority under the act, but there are also mandates for the local police as well as the relevant ministry.[1159] In a similar way in Finnish law, the National Board of Antiquities and Historical Monuments plays an important role in the Antiquities Act.[1160] Also the Finnish Border Control is involved when it comes to shipwrecks in Finnish law.[1161]

In the Danish regulation, finally, it is the Minister of Culture that is the main person involved in the act.[1162] The fact that the minister as such is given such importance makes the Danish system stand out among the Nordic regulations. This aspect makes the Danish regulation more similar to the English legal system and its reliance on the Secretary of State, since both regulations focus on a specific person in this way.

10.5.4 Enabling Access to Protected Wrecks

Protecting a historical wreck does not necessarily mean that access to it also must be prevented. As already discussed, the legal systems have protective regulations that in various ways allow for certain actions in relation to protected wrecks. This can be in the form of granting licenses to take certain actions in relation to such wrecks or restricting the enumerated prohibited actions in the provisions that regulate the protection. Another approach, in relation to historical wrecks, is to

[1157] See e.g. chapter 2 § 7 (Central Board of National Antiquities and relevant County Administrative Board), chapter 2 § 9 (government or other authority that the government appoints), chapter 2 § 1 a the second paragraph (relevant County Administrative Board) and chapter 2 § 5 the first paragraph (relevant County Administrative Board, the Police Agency and the Swedish Coast Guard) Act on the Cultural Environment.
[1158] No. *Riksantikvaren*.
[1159] See FOR-1990-04-30-351 (Directorate for Cultural Heritage), chapter IV § 14 the third paragraph (local police) and chapter IV § 14 (local police and relevant ministry) Act on Cultural Heritage.
[1160] See e.g. chapter 1 §§ 10 & 13-14 Antiquities Act.
[1161] Chapter 3 § 20 Antiquities Act.
[1162] See e.g. chapter 8 § 28 the fifth paragraph, chapter 8 § 28 a the fifth paragraph and chapter 8 a § 29 j Act on Museums.

actively work to enable access to such wrecks. This can e.g. be in the form of encouraging divers to dive on the wrecks by facilitating such actions. In this way, the historical and archaeological value of the wreck and the wreck site can be shared. In a sense, this means that the wreck site is given the character of an underwater museum or an exhibition.

There may, however, also be difficulties with providing access to protected wrecks. When a ship sinks and becomes a wreck it often also results in human casualties. There can be ethical problems, in light of this, should divers be encouraged to dive on a wreck that has claimed human lives or that contains human remains. This conflict will be augmented if there are relatives that oppose such diving activities on the wreck. Time will also, arguably, be decisive when approaching these issues. Historical wrecks that are old, or even ancient, will result in less strong emotional bonds to relatives or possible descendants. In this way, a wreck from the Second World War is more likely to face objections than a wreck from Roman times.

10.6 Enforcement

Enforcement is regulated in, more or less, similar ways in the studied regulations when it comes to historical wrecks. Under the Protection of Wrecks Act 1973, a person commits an offence if the person, without the authority of a license granted by the Secretary of State, in a restricted area tampers with, damages or removes any part of a vessel lying wrecked on or in the sea bed, or any object formerly contained in such a vessel.[1163] The same is the case if the person carries out diving or salvage operations directed to the exploration of any wreck or to removing objects from it or from the sea bed, or if the person uses equipment constructed or adapted for any purpose of diving or salvage operation.[1164] Finally, this is also relevant if a person deposits, so as to fall and lie abandoned on the sea bed, anything which, if it were to fall on the site of a wreck, whether it falls or not, would wholly or

[1163] S. 1(3)(a) Protection of Wrecks Act 1973.
[1164] S. 1(3)(b) Protection of Wrecks Act 1973.

partly obliterate the site or obstruct access to it, or damage any part of the wreck.[1165] It is also an offence to cause or permit any of the above things to be done by others in a restricted area if there is no license from the authority.[1166] There are, however, some exceptions to this. A person will not commit an offence if the taken action had the sole purpose of dealing with an emergency of any description.[1167] The same is true should the person have taken the action while exercising, or seeing to the exercise of, functions conferred by or under an enactment, local or other, on him or a body for which he acts.[1168] The same, finally, is the case should the action have been taken out of necessity due to stress of weather or navigational hazards.[1169]

Under the Act on the Cultural Environment in Swedish law, it is criminalised to take, buy, hide, damage, change or sell items that are to belong to the state or that should be offered to the state in accordance with the act if done with intent or by negligence. The sentence can be either a fine or up to six months in prison.[1170] The same is the case should someone without consent interfere with, remove, excavate, cover or change or damage a protected site by construction, plantation or similar means.[1171] If the offence has been conducted with intent and is serious, the sentence can be imprisonment up to four years.[1172] The regulation is somewhat similar in Norwegian law. A person who contravenes the act with intent or by negligence will be sentenced to a fine or imprisonment for up to one year.[1173] Similarly, to act in contravention of the Danish Act on Museums can constitute a criminal offence in line with the provisions in the thirteenth chapter of the act. Depending on the action, such an offence will lead to a fine or, if serious,

[1165] S. 1(3)(c) Protection of Wrecks Act 1973.
[1166] S. 1(3) Protection of Wrecks Act 1973.
[1167] S. 3(3)(a) Protection of Wrecks Act 1973.
[1168] S. 3(3)(b) Protection of Wrecks Act 1973.
[1169] S. 3(3)(c) Protection of Wrecks Act 1973.
[1170] Chapter 2 § 21 the first paragraph the first period Act on the Cultural Environment.
[1171] Chapter 2 § 21 the first paragraph the second period Act on the Cultural Environment.
[1172] For details, see chapter 2 § 21 Act on the Cultural Environment.
[1173] Chapter VI § 27 Act on Cultural Heritage.

up to imprisonment for one year.[1174]

To act in contravention of the Finnish Act on Antiquities also constitutes an offence if done with intent or by negligence and will result in a fine.[1175] The different authorities that are relevant in relation to the provisions are regulated in the fourth chapter of the act. As a consequence of the fact that historical shipwrecks and finds from them belong to the state in Finnish law, criminal responsibility for theft can become relevant as well.[1176] This was the case in ND 2016 p. 86, where items from a historical protected wreck had been raised and taken by an individual. Responsibility for acting in contravention of the Antiquities Act could have been relevant in the case, but too much time had passed since the incident as the statutory time limit was two years.[1177] The crime had thus been subject to statute of limitation. Instead, the court of appeal[1178] found the person to be guilty of theft, since the items belonged to the Finnish state as a consequence of the regulation in the Antiquities Act.[1179] This offence has a longer limitation period and was thus not barred by statute. The provisions on proprietary issues in relation to historical wrecks in Finnish law consequently enabled the person to be sentenced to theft instead. This is an example of how the proprietary provisions concerning historical wrecks can indirectly impact on enforcement in this respect.

[1174] See for details chapter 13 § 40-40 a Act on Museums.
[1175] See for details chapter 4 § 25 Antiquities Act.
[1176] Chapter 28 § 1 Finnish Penal Code (19.12.1889/39), (*Sw. Strafflag*).
[1177] Chapter 8 § 1 the fourth period Finnish Penal Code and cf. chapter 4 § 25 Antiquities Act.
[1178] Sw. *Helsingfors hovrätt*.
[1179] Apparently, the court, in this way, also deemed the items to be in the state of Finland's possession, since this is a requirement for theft to be relevant according to chapter 28 § 1 Finnish Penal Code.

Part IV

Private and Public Interests and Conflicts

Chapter 11

Proprietary Interests and Conflicts

This chapter discusses proprietary interests and conflicts in relation to wrecks. The law of finds' application on wrecks is discussed as well as the differences in approach between the Nordic and the English system. Furthermore, proprietary claims from states, primarily in relation to historical wrecks, are discussed. Finally, the issue of dereliction or abandonment is analysed in the wreck context.

11.1 Finding Wrecks

Since the emergence of maritime law, the issue of how to deal with the finding of wrecks has been reflected in existing regulations.[1180] Such finds can cause proprietary conflicts on different levels. The finder of a wreck may claim a right to it in the form of occupation. An original owner of the wreck may, at the same time, claim a better right to the same wreck. The state, or in some cases the Crown, can also claim a better right in relation to wrecks that have been found in some circumstances. How the legal systems regulate these matters are discussed in this section.

[1180] Cf. the discussion above in chapter 3.

11.1.1 Nordic Approach

Finds in the Nordic context can be exemplified by the Swedish legal system. The finding and raising or salvage[1181] of ships, remains of ships or accessories and property belonging to ships[1182] are regulated in the Act on Certain Provisions Regarding Finds at Sea.[1183] The act is applicable regardless of whether the wreck or object has been raised from the bottom, found floating or been cast upon the shore.[1184] Anyone who finds a wreck or object that falls under the act, has a duty to inform the Police, the Coast Guard or Customs of the find.[1185] As a slight variation to this, should this kind of find be raised or salvage by a ship while on a voyage, the master has a duty to hand over the find to the Police Authority along with an account of how the raising or salvage was made.[1186]

Following a notice of a raising or salvage to the Police Authority, the authority shall review the find[1187] and make it public by listing it in a publication titled *Notifications for Seafarers*.[1188] If there are special reasons for doing so, a find can also be made public by other means. The publication shall, furthermore, call on the owner of the object to contact the Police Authority within 90 days from publication. This deadline can also be extended to up to a year at the Police Authority's discretion.[1189]

If the raised or salvaged object cannot be handled without danger

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[1181] Sw. *bärgning*.

[1182] Sw. *övergivna fartyg eller fartygslämningar eller redskap eller gods som hör till fartyg*.

[1183] Sw. *lag (1918:163) om vissa bestämmelser om sjöfynd*.

[1184] 1 § Act on Certain Provisions Regarding Finds at Sea.

[1185] Sw. *Polismyndigheten, Kustbevakningen eller Tullverket*; if someone at the Coast Guard or Customs has been informed of such a find in accordance with the act, that person shall also immediately notify the Police of the find; 1 § Act on Certain Provisions Regarding Finds at Sea.

[1186] 2 §, the first paragraph, Act on Certain Provisions Regarding Finds at Sea. If the ship does not call at a Swedish port, the master shall instead make contact with consular staff at the next foreign location where the ship is heading and calls at a port. If no such consular staff is available, some other relevant authority is to be contacted; 2 §, the second paragraph, Act on Certain Provisions Regarding Finds at Sea.

[1187] Sw. *besiktiga fyndet*.

[1188] Sw. *UFS – Underrättelser för sjöfarande*.

[1189] 3 §, the first paragraph, Act on Certain Provisions Regarding Finds at Sea.

of deterioration, it shall be sold at public auction. There is also a possibility to sell it by the use of other means should a public auction for some reason not be suitable. When the deadline for the owner to contact the Police Authority has passed, any proceeds from a sale shall be handed over to the person who raised or salvaged the object.[1190] If, however, the owner of the object contacts the Police Authority in line with the publication and can prove that he or she is the owner, the find or the proceeds from any sale shall be handed over to him or her provided that the owner pays the cost of making the publication, any costs associated with taking care of the object as well as any potential salvage reward. Should the parties not agree on a potential salvage reward, the issue shall be handed over to the courts to decide.[1191] If the owner, however, does not contact the Police Authority after publication, the finder will have better right to the object provided that the finder pays the above-mentioned costs.[1192]

Should the find after being reviewed by the Police Authority, the Coast Guard or Customs not be valued to more than 100 SEK, the Police Authority can, without further investigation and publication, hand over the find to the finder. This is, however, not applicable should the Police Authority decide that the find for some special reason is to be treated in another way. There is thus some discretion on behalf of the Police Authority in these cases.[1193]

A finder commits an offence should he or she not inform the relevant authorities in line with the act. The same is true should a master not inform of a raising or salvage in accordance with 2 § of the act or should he or she embezzle or hide proceeds from a sale of such a find.[1194] It is also an offence, subject to a fine, to, with false intent, leave incorrect information concerning a raising or salvage of an object. The same is

[1190] 3 §, the second paragraph, Act on Certain Provisions Regarding Finds at Sea.
[1191] 4 §, the first paragraph, Act on Certain Provisions Regarding Finds at Sea.
[1192] 4 §, the second paragraph, Act on Certain Provisions Regarding Finds at Sea. These paragraphs and line of events are also relevant should the find have been handled in line with the second paragraph of 2 §; see 5 § Act on Certain Provisions Regarding Finds at Sea.
[1193] 7 § Act on Certain Provisions Regarding Finds at Sea.
[1194] 8 §, the first paragraph, Act on Certain Provisions Regarding Finds at Sea.

true should a person take any action with the object with false intent or not take the required action under 2 § of the act in order to hand over the object or proceeds of a sale.[1195] In cases of misconduct in the above sense, it is also possible for the courts to nullify any potential salvage reward or to reduce such a reward below what would otherwise have been an appropriate level.[1196]

The Act on Certain Provisions Regarding Finds at Sea also includes a provision on appeal. Any decision by the Police Authority under the act can be appealed to a General Administrative Court.[1197] In order to appeal to a higher instance after that, leave of appeal is required.[1198]

The Act on Certain Provisions Regarding Finds at Sea also includes a provision informing of other acts that can also become relevant in these situations. In this way, this provision does not really add anything to the act itself, but rather informs of the existence of other acts. The provision makes reference to the Act on the Cultural Environment, the general Act on Finds as well as an act on sunken or stranded timber. Finally, reference to the act on the right of being a sole salvor is also made.[1199]

11.1.2 English Approach

The regulation concerning finds of wrecks in the English context is, in many ways, similar to the Nordic approach as exemplified by the Swedish regulation on findings at sea. In English law, the regulation, however, centres around an office known as the Receiver of Wreck, whose task it is to weigh the interests between the involved parties. This differentiates the system from the Swedish one. The Receiver of Wrecks is appointed by the Secretary of State acting with consent of

[1195] If the offence is punishable in a stricter way in the Penal Code, that code shall have precedence in these matters; 8 §, the second paragraph, Act on Certain Provisions Regarding Finds at Sea.
[1196] 8 §, the third paragraph, Act on Certain Provisions Regarding Finds at Sea.
[1197] Sw. *allmän förvaltningsdomstol*.
[1198] 8 a § Act on Certain Provisions Regarding Finds at Sea.
[1199] Sw. *kulturmiljölagen (1988:950)*, *lagen (1938:121) om hittegods*, *lagen (1919:426) om flottning i allmän flottled and lagen (1984:983) om ensamrätt till bärgning*.

the Treasury.[1200] For practical reasons, the office of the Receiver of Wreck is now allocated to the Maritime and Coastguard Agency at Southampton.[1201]

Upon finding or taking possession of a wreck in United Kingdom waters or upon bringing a wreck within those waters in such a way, the finder has a duty to give notice to the receiver. If the finder is the owner of the wreck, the finder must state the find and describe the wreck's marks by which it may be recognised.[1202] If the finder is not the owner of the wreck, the finder shall give notice to the receiver of finding or taking possession of the wreck and, upon instruction from the receiver, either hold it to the receiver's order or deliver it to the receiver.[1203] There is thus room for flexibility as per the instruction of the Receiver of Wrecks. In this way, some wrecks may be better positioned where they are found and need not be delivered physically to the receiver. This may e.g. be a reasonable approach in relation to older wrecks of historical importance.[1204]

To not act in accordance with the discussed provisions, without reasonable excuse, constitutes an offence and a person acting in this way will be liable to a fine.[1205] Moreover, if the person is not the owner of the wreck, any claim to salvage is forfeited and the person will be liable to pay twice the value of the wreck.[1206] The compensation is to be paid to the owner of the wreck if it is claimed.[1207] If it is not claimed, the compensation shall instead be made to the person entitled to the wreck.[1208]

A person must thus contact the receiver upon finding or taking possession of a wreck. Likewise, should a vessel be wrecked, stranded

[1200] S. 248(2) MSA 1995.
[1201] Rose, *Kennedy and Rose on the Law of Salvage*, s. 19–005, p. 682.
[1202] S. 236(1)(a) MSA 1995.
[1203] S. 236(1)(b) MSA 1995.
[1204] This marks a change to the earlier position in English law, where wrecks simply were to be delivered to the receiver; see Rose, *Kennedy and Rose on the Law of Salvage*, s. 19–011, p. 685.
[1205] See s. 236(2) MSA 1995.
[1206] S. 236(2)(a)-(b) MSA 1995.
[1207] S. 236(2)(b)(i) MSA 1995.
[1208] S. 236(2)(b)(ii) MSA 1995.

or in distress at any place on or near the coasts of the United Kingdom or any tidal water within United Kingdom waters, the receiver is to be delivered any cargo or other articles belonging to or separated from the vessel which are washed on shore or otherwise lost or taken from the vessel.[1209] A person commits an offence and will be liable to a fine if any such cargo or article is concealed or kept in possession in breach of the provision.[1210] The same is true, should a person refuse to deliver any such cargo or article to the receiver or to any person authorised by the receiver to require delivery.[1211] The receiver, or any person authorised by the receiver, may also take any such cargo or article from a person who refuses to deliver it and may use force, if necessary, to do so.[1212]

These provisions should be read in light of the earlier prevalent problem with wrecking and the looting of wrecked ships and goods.[1213] In this sense, this aspect of the regulation on finding wrecks is a clear remnant of the older regulations and identified problems in relation to wrecks. The problem of wrecking is, however, not as acute today, which means that the provisions are less well suited to deal with wrecks that pose other kinds of problems, e.g. historical wrecks.[1214]

If the receiver takes possession of a wreck, the receiver must, within 48 hours, make a record describing the wreck and any marks by which it is distinguished.[1215] Moreover, if the value of the wreck is estimated to exceed £5 000, assessed by the receiver, a similar description shall be transmitted to the chief executive officer of Lloyd's in London.[1216] The record made by the receiver shall be available for inspection by any person during reasonable hours without charge.[1217] If a description has been transmitted to Lloyd's in London, the chief executive officer of Lloyd's shall post the notice in some conspicuous position for

[1209] S. 237(1) MSA 1995.
[1210] S. 237(2)(a) MSA 1995.
[1211] S. 237(2)(b) MSA 1995.
[1212] S. 237(3) MSA 1995.
[1213] See the discussion in section 3.5.1.
[1214] Cf. the discussion in Dromgoole and Gaskell, "Interests in Wreck", p. 352.
[1215] S. 238(1)(a) MSA 1995.
[1216] S. 238(1)(b) MSA 1995.
[1217] S. 238(2) MSA 1995.

inspection.[1218]

An owner that wants to claim a wreck that has been taken in possession by the receiver, shall establish the claim to the satisfaction of the receiver within one year from the time when the wreck came into the receiver's possession. This provision is the modern equivalent of the discussed historical regulation where a wreck had to be claimed within a year and a day.[1219] If the receiver is satisfied with the presentation by the claimant, the person is entitled to have the wreck delivered or the proceeds of sale paid provided that the claimant pays any salvage, fees or other expenses that are due.[1220]

There is also a specific provision in relation to foreign ships. If a foreign ship has been wrecked on or near the coasts of the United Kingdom, the appropriate consular officer shall, in the absence of the owner and of the master or other agent of the owner, be treated as the agent of the owner for the purposes of the custody and disposal of the wreck and such articles. The same is true in relation to any articles belonging to or forming part of or of the cargo of a foreign ship which has been wrecked on or near the coasts of the United Kingdom that are found on or near the coasts or are brought into any port.[1221]

In some cases, the receiver has the ability to sell a wreck before the end of the time period in which a rightful owner can claim it. In this way, if the receiver finds that it is unlikely that any owner will establish a claim to the wreck within that year and no statement has been given to the receiver under s. 242(1) of the act in relation to the place where the wreck was found, the wreck can be sold before this time.[1222] The mentioned statement refers to any person that is entitled to unclaimed wrecks in a certain part of the United Kingdom.[1223] The receiver can

[1218] S. 238(3) MSA 1995.
[1219] See e.g. the discussion in section 4.2.
[1220] S. 239(1) MSA 1995.
[1221] S. 239(2) MSA 1995. The "appropriate consular officer" is to be construed as the consul general of the country to which the ship or, as the case may be, the owners of the cargo may have belonged or any consular officer of that country authorised for the purpose by any treaty or arrangement with that country; s. 239(3) MSA 1995.
[1222] S. 240(1A) MSA 1995.
[1223] Cf. s. 241–242 MSA 1995.

also sell a wreck in other circumstances. Should the receiver assess that a wreck in possession is worth under the value of £5 000, the receiver may sell it at any time.[1224] The same applies should the wreck be damaged or of such perishable nature that the wreck cannot with advantage be kept as it is.[1225] It is also possible for the receiver to sell a wreck that is not of sufficient value to pay for storage.[1226]

If a wreck is not claimed, the wreck, provided that it is found in the United Kingdom or in United Kingdom waters, belongs to the Crown, i.e. to Her Majesty and Her Royal successors.[1227] This is, however, not the case in relation to unclaimed wrecks outside of territorial waters.[1228] It is also possible to transfer this right to others. Thus, the Crown will only have right to unclaimed wrecks provided that Her Majesty or any of Her Royal predecessors has not granted the right to unclaimed wrecks in a place to any other person.[1229] If a person has been given such a right and is thus entitled to unclaimed wrecks found in a place in the United Kingdom or in United Kingdom waters, that person shall provide the receiver with a statement containing the particulars of the entitlement.[1230] If such a statement has been given to the receiver, and the entitlement is proved to the satisfaction of the receiver, the receiver shall send the person a description of a wreck found in the relevant place and of any marks distinguishing it within 48 hours.[1231] If a wreck is not claimed within the specified year, a person entitled to it, by transfer of rights from the Crown, may claim it provided that the above-mentioned statement satisfies the receiver. The wreck shall then be delivered to that person upon payment of all expenses, costs, fees and salvage due in respect of it.[1232] If the wreck, however, is not

[1224] S. 240(1)(a) MSA 1995.
[1225] S. 240(1)(b) MSA 1995.
[1226] S. 240(1)(c) MSA 1995.
[1227] S. 241 MSA 1995.
[1228] Pierce v Beamis (The Lusitania) [1986] Q.B. 384 & Rose, *Kennedy and Rose on the Law of Salvage*, s. 19–017, p. 687.
[1229] S. 241 MSA 1995.
[1230] The statement shall also specify an address to which notices may be sent; s. 242(1) MSA 1995.
[1231] S. 242(2) MSA 1995.
[1232] S. 243(1)–(2) MSA 1995.

claimed by such a person, the receiver shall sell the wreck and pay the proceeds for the benefit of the Crown following deductions made for the expenses of the sale, other expenses and fees as well as any salvage to be paid by the receiver.[1233]

11.1.3 Comparing the two Approaches

The Nordic systems, as exemplified by Swedish law, and English law have similar approaches when it comes to finding wrecks and the mechanisms that come into play. There are, however, also some key differences that separate the systems. Both approaches relate to the basic problem or function concerning finds of wrecks, i.e. a wreck has been found and a regulation must in some sense try to make such a find public in order for an entitled owner or similar party to make a claim in relation to the wreck. They also include provisions on how a wreck is to be handled in this process along with repercussions should the regulation not be followed. These aspects are highlighted in the following.

11.1.3.1 Finds Concerned

Both approaches concern situations where wrecks are found. There is, however, one main difference between the approaches when it comes to the kinds of finds that the regulations concern. The Swedish approach is functionally linked to the salvage or raising of a find. The English law approach, on the other hand, also focuses on the actual finding of the wreck. Thus, also the finding of a wreck, without any raising or salvage of the find, will make the English approach applicable. In this sense, the English approach will encompass more situations than the Swedish system.

11.1.3.2 Making the Find Public

Both approaches build on the notion of making a find public, the underlying purpose being that an entitled owner or some other party shall

[1233] See for details, s. 243(3)–(6) MSA 1995.

have the possibility to be made aware of the find and, as a consequence, claim the wreck. This is handled in similar ways in both approaches. In the Nordic approach, publication is made by the Police Authority in a certain journal and publication. In this way, the public is informed of a find since the journal and publication are available to the public. A find can also be made public in other unspecified ways should there be reasons to do so. The English approach is similar, but does not channel publicity through a specific journal or publication. Instead, the Receiver of Wrecks shall make a record, where the wreck is described and any marks by which it is distinguished. If the wreck is estimated to be worth an amount exceeding £5 000, Lloyd's in London shall also be involved and make a description of the wreck easily available for anyone to inspect. The aim of the approaches is thus the same, i.e. to inform the public of the find, although they use slightly different ways in which to achieve it.

11.1.3.3 Process of Claiming a Found Wreck

Both systems regulate how a find is to be claimed by a rightful owner. The main difference here is the deadlines involved for a rightful owner to claim. In the Swedish system, a rightful owner shall contact the Police Authority within 90 days of the already discussed publication. It is, however, also possible for the Police Authority to extend this deadline up to a year. In the English system, this latter exception in the Swedish system is the default position. Thus, a rightful owner has the possibility to claim the wreck within a year. In other words, the time scale involved in the Swedish approach is much shorter, about three months, than the deadline of a year in English law. This can, of course, impact on the handling of the wreck, related costs for storage and so on. The possibility of a rightful owner to become aware of the wreck will, reasonably, also increase in line with the longer time frame in English law.

Another common denominator in the approaches is that a rightful owner that claims the wreck is entitled to it provided that costs asso-

ciated with the process and potential salvage is paid. In this way, the rightful owner makes compensation for the benefit that he or she has gained as a consequence of the regulated process.

11.1.3.4 Possibilities to Sell Finds

Both approaches, furthermore, recognise that there can be situations when it is untenable for a wreck to be preserved during the time period when a rightful owner can claim it. Thus, both approaches allow for found wrecks to be sold at an earlier stage. One instance, reflected in both systems, is if the wreck is of perishable nature. The English system, however, expands further on this point and also allows for a found wreck to be sold should the Receiver of Wreck be of the opinion that it is unlikely that an owner will establish a claim within the time frame. Furthermore, a wreck in the English system can also be sold at any time should the Receiver of Wreck assess it to be worth less than £5 000. The same is the case should the wreck be damaged or if its value is not sufficient to pay for storage. Consequently, the Receiver of Wreck, in English law, is more free to arrange a sale of a found wreck when compared to the Swedish system. One thing to keep in mind, when comparing the two systems in this respect, is the distinctly shorter default time period envisaged in Swedish law of about three months. The increased time period up to a year in English law arguably merits that the receiver has more freedom to have the wreck sold when compared to the shorter time frame in the Swedish system.

The possibility to sell, in English law, a vessel assessed to be worth less than £5 000 has an indirect resemblance in the Swedish system. In the Swedish regulation, the Police Authority has the ability to directly hand over the wreck to the finder, without any further investigation or publication, should the wreck be estimated not to be worth more than 100 SEK. This is, however, not a sale as such and will instead terminate the process. The rationale behind this possibility is clearly the low value of such an object and the argument that it would, in general, not be motivated to go through the regulated process in relation to a wreck

of such low value. The main difference in the Swedish system is that the wreck in these cases is to be delivered to the finder. This highlights the key difference between the two approaches as discussed below in relation to the right of unclaimed wrecks.

11.1.3.5 Right of Unclaimed Wrecks

The key difference between the two approaches is how unclaimed wrecks are handled. In the Swedish system, wrecks that are unclaimed after the stipulated deadline, in which a rightful owner can claim the wreck, will pass to the finder provided that the finder pays the costs associated with the find as previously discussed. The finder of the wreck will thus, by statute, acquire better right to the wreck following failure by a rightful owner to claim within the time limit.

In English law, however, unclaimed wrecks belong, by statute, to the Crown or to any person entitled to unclaimed wrecks in a specific area from the Crown. The fact that unclaimed wrecks belong to the Crown should be viewed in its historical context as discussed at further length in sec. 4.1.1.1. One exception to this is unclaimed wrecks found outside of territorial waters. In these cases, the English position instead mirrors the Nordic approach in the sense that the finder then can acquire better right to the found property should no other rightful owner succeed in making such a claim.[1234]

11.1.3.6 Offences

A final similarity between the approaches is that both contain provisions on the consequences of not acting in line with the prescribed process. Thus, in both approaches to not act in accordance with the discussed acts constitutes an offence. A variation in English law is that a person that acts, without reasonable excuse, in contravention of the regulation can be liable to pay twice the value of the wreck to a rightful owner that later claims it. These consequences should be viewed in the historical

[1234]Pierce v Beamis (The Lusitania) [1986] Q.B. 384 & Rose, *Kennedy and Rose on the Law of Salvage*, s. 19–017, p. 687.

context in which they emerged, i.e. the extensive wrecking taking place from antiquity and onwards and not least during the Middle Ages. This context has influenced earlier regulations that have been passed down to the current systems.[1235]

11.2 State Claims on Historical Wrecks

One kind of wreck that is of particular interest when it comes to proprietary interests and conflicts is historical wrecks. The various ways in which the legal systems regulate the protection of historical wrecks have already been discussed.[1236] How the systems, in some cases, have chosen to deal with the proprietary dimension of historical wrecks is discussed here.

The regulations in relation to historical wrecks in the Nordic systems differ from each other in various ways, but they all in some sense regulate state claims in relation to historical wrecks, the rationale for this being that if a wreck is sufficiently old or of importance from an archaeological, cultural or historical point of view, the state, in some cases, can acquire proprietary interest in the wreck in some way.

There are provisions in the Swedish Act on the Cultural Environment on what happens if remains or historical sites are found. An item that is found on or in connection to a protected site, or if it is found in another context and can be presumed to belong to the time period before 1850, is denoted with the term *fornfynd*.[1237] If such an item is found on or in connection to a protected site, it belongs to the state of Sweden.[1238] If it is found in another context, it instead belongs to the person who found it. That person, however, has a duty to offer the state of Sweden to purchase it in certain circumstances. This is relevant should the finding include an item that consists in whole or partly of gold, silver, copper, bronze or some other alloy using copper,

[1235] See further the discussion in sec. 3.5.1.
[1236] See chapter 10.
[1237] Chapter 2 § 3 Act (1988:959) on the Cultural Environment.
[1238] Chapter 2 § 4 the first paragraph Act (1988:959) on the Cultural Environment.

or, alternatively, if the find consists of two or several items that can be presumed to have been put together.[1239]

When it specifically comes to maritime objects, if a person finds an item underwater outside of the boundaries of national jurisdiction and it is salvaged by a Swedish ship or is taken to Sweden, the item shall belong to the state.[1240] A shipwreck that is found underwater outside of the boundaries of national jurisdiction and that is salvaged by a Swedish ship or is taken to Sweden, belongs to the state if it can be presumed that the ship sank before 1850.[1241] If a person finds either an item or a shipwreck that can belong to the state in this way, the finder shall as soon as possible notify the County Administrative Board or the Police Authority of the find. If the find is a shipwreck, such a notification can also be given to the Swedish Coast Guard.[1242] If required the finder must also hand over the find against a receipt and shall also give information as to where, when and how the person came into contact with the find.[1243]

The Act on Cultural Heritage in Norwegian law contains similar provisions in its fourth chapter that deals with the finding and protection of ships. The Norwegian state has ownership over ships, hulls of ships, accessories, cargo and other property that has been on board or the remains or parts of such property, provided that the property is at least one hundred years old and that it is clear, due to the circumstances in the case, that there is no reasonable possibility to find out if there is another owner of the property.[1244] A way to phrase this differently is to state that the Norwegian state acquires better right in relation to such property if no other owner can be identified in the way the provision is phrased.

Anyone who finds property that is protected under the act, has a

[1239]Chapter 2 § 4 the second paragraph Act (1988:959) on the Cultural Environment. For how the price is to be estimated, see chapter 2 § 16 Act (1988:959) on the Cultural Environment.
[1240]Chapter 2 § 4 the third paragraph Act (1988:959) on the Cultural Environment.
[1241]Chapter 2 § 4 the fourth paragraph Act (1988:959) on the Cultural Environment.
[1242]Chapter 2 § 5 the first paragraph Act (1988:959) on the Cultural Environment.
[1243]Chapter 2 § 5 the second paragraph Act (1988:959) on the Cultural Environment.
[1244]Chapter IV § 14 the first paragraph Act on Cultural Heritage.

duty to report the find to the local police or to the relevant authority under the act. If the state is the owner of the property, the authority can also, after an examination of the property, choose to hand it over in whole or in part to the finder or the owner of the land where it was found.[1245] There is also a possibility for the relevant ministry to set a discretionary reward for the find to be rewarded to the finder. In relation to this provision, a finder is defined as a person that shows an earlier unknown find or gives notice of such a find.[1246]

When it comes to Finnish law, an object from a wreck that is protected under the Antiquities Act shall without delay be handed over to the National Board of Antiquities and Historical Monuments in its current state along with information concerning where and how it was found.[1247] If it is obvious from the external circumstances in the case that an owner has abandoned a wreck as defined in the act or a part of such a wreck, the wreck or part shall belong to the state of Finland.[1248] An object that originates from a wreck as defined in the act also belongs to the state and no compensation needs to be paid from the state to the possible current possessor of such an object.[1249]

In ND 2005 p. 67, the finders of the wreck Vrouw Maria, a Dutch vessel that sank in 1771 on a voyage between Amsterdam and St. Petersburg, claimed ownership of the wreck by occupation. The state of Finland, however, claimed that such occupation was not possible since the wreck, as a consequence of the Antiquities Act, belonged to the state. The Court of Appeal[1250] held that it, in general, is possible to acquire a better right to a wreck, phrased as a possibility to acquire ownership, by occupation in a situation where a wreck is an abandoned vessel and that possession, defined as actual control,[1251] also is an additional prerequisite to a better right. In the present case, however, the

[1245]Chapter IV § 14 the third paragraph.
[1246]Chapter IV § 14 the third paragraph Act on Cultural Heritage; see also Chapter V § 13 the third paragraph Act on Cultural Heritage for how this is calculated.
[1247]Chapter 2 § 16 the first paragraph Antiquities Act.
[1248]Chapter 3 § 20 second paragraph Antiquities Act.
[1249]Chapter 3 § 20 second paragraph Antiquities Act.
[1250]Sw. *hovrätten*.
[1251]Sw. *faktiskt välde*.

finders were not able to acquire a position that would enable occupation as a consequence of the discussed regulation on protection in the Antiquities Act. Thus, the wreck belonged to the state of Finland as a consequence of Chapter 3 § 20 the second paragraph in the Antiquities Act. The line of reasoning in the case suggests that it is not possible to consider a wreck as abandoned, which could potentially enable a claim of a better right by occupation, if it is a historical wreck in light of the protective provisions in the Antiquities Act.

Under Danish law, anyone who finds a shipwreck or the remains of a wreck that can be presumed to have sunk more than one hundred years ago shall notify the find to the Minister of Culture.[1252] Such wrecks or parts of such wrecks belong to the state of Denmark provided that no other owner has proven his or her right as owner.[1253] If the wreck belongs to the state, the Minister of Culture can instigate an archaeological investigation of the wreck.[1254] Anyone who salvages property like this or that comes into possession of such property shall hand the property over to the Minister of Culture. The minister will then proportion the items to various museums.[1255] The person who has salvaged such property does not have the right to a salvage reward. The Minister of Culture can, however, discretionary decide to pay some sort of compensation.[1256] Certain provisions in the Act on Stranding are also relevant in relation to these wrecks.[1257]

The Danish act, furthermore, includes provisions that are extraterritorial. In this way any find on the deep seabed[1258] of a wreck or remains

[1252] Dan. *kulturministeren*; chapter 8 § 28 the first paragraph Act on Museums.
[1253] Chapter 8 § 28 the second paragraph Act on Museums.
[1254] Chapter 8 § 28 the third paragraph Act on Museums. In special circumstances the minister can neglect the time limit of one hundred years when it comes to the instigation of archaeological investigations; Chapter 8 § 28 the fourth paragraph Act on Museums.
[1255] It is, once again, interesting to note the way in which the Danish regulation relates to the responsible minister in this way. This clearly separates the regulation from the other Nordic systems in this respect. In many ways this way of regulating is more reminiscent of English law and the functions that the Secretary of State and the Receiver of Wreck have under the different discussed regulations.
[1256] Chapter 8 § 28 the fifth paragraph Act on Museums.
[1257] See Chapter 8 § 28 the sixth paragraph Act on Museums.
[1258] Dan. *den dybe havbund*.

of a wreck that can be presumed to have sunk at least one hundred years ago made by a Danish citizen or from a ship registered in Denmark, belongs to the state of Denmark unless some other state or person can prove rights of ownership.[1259] The deep seabed, in this context, is defined as the deep seabed and its sub-layers outside of national jurisdiction.[1260] The Minister of Culture shall be notified of any such find.[1261] The current state of any such underwater cultural heritage that belongs to the Danish state, a Danish citizens or legal entities from Denmark may not be changed without permission from the Minister of Culture. Danish citizens or legal entities from Denmark may, moreover, not change any underwater cultural heritage that belong to other parties in any way without their permission.[1262] Anyone who salvages property that belongs to the state or that comes into possession of such property, shall hand the property over to the Minister of Culture. The person that has salvaged the property cannot claim a salvage reward.[1263] The Minister of Culture can also decide that wrecks or remains of wrecks that have sunk less than one hundred years ago are also to be covered by the provision.[1264]

All of the studied regulations in the Nordic systems thus include elements concerning proprietary claims by the state in certain circumstances relating to historical wrecks. In English law, however, the situation is slightly different. The default position is here that title to a wreck stays with the original owner of the vessel even though it has turned into a wreck. This remains the case also in relation to historical wrecks.[1265] Another issue is that an original owner may have abandoned the wreck.[1266] Should a wreck be found, it will thus be handled

[1259]Chapter 8 § 28 a the first paragraph Act on Museums.
[1260]Chapter 8 § 28 a the second paragraph Act on Museums.
[1261]Chapter 8 § 28 a the third paragraph Act on Museums.
[1262]Chapter 8 § 28 a the fourth paragraph Act on Museums.
[1263]Chapter 8 § 28 a the fifth paragraph Act on Museums.
[1264]The minister can also specify further regulation of the provisions in Chapter 8 § 28 a the third to sixth paragraphs Act on Museums; see chapter 8 § 28 a the seventh paragraph Act on Museums.
[1265]Baatz, *Maritime Law*, p. 267.
[1266]This is discussed below in section 11.3.

in accordance with the process discussed above in relation to the law of finds. If the wreck is unclaimed in the end, it will thus belong to the Crown. The protective element, as expressed in the above regulations in the Nordic systems, is, however, not lost in English law. The Secretary of State can choose to designate particular wrecks in order to protect them under the Protection of Wrecks Act 1973, the Protection of Military Remains Act 1986 or possibly the Ancient Monuments and Archaeological Areas Act 1979 as previously discussed. In this way, protection can be provided in relation to such wrecks anyhow.

11.3 Abandoned Wrecks

Wrecks can be abandoned by their original owners. Another word for this is dereliction. An abandonment or a dereliction will have different legal consequences depending on the circumstances in the case. There are also different cases or categories of abandonment and dereliction. A crew may abandon a vessel in distress, but this will, in most cases, not be seen as an abandonment by the owner of the vessel as such. A notice of abandonment or similar public declaration may, however, lead to such a result. Another issue is that such an abandonment may not enable the rightful owner to escape some kind of liability in relation to the wreck.[1267] It is, furthermore, possible that the process of abandonment differs somewhat between different kinds of objects. There may be a difference between state an non-state wrecks in this way as discussed further below.

The above issues are discussed in this section. The issue of dereliction or abandonment is not regulated in the same way as the other issues previously discussed. There is also a limited amount of relevant legal material from the legal systems on these issues. There are, in other words, many uncertainties when it comes to the abandonment of wrecks.[1268] As a consequence, the issue and potential lines of reasoning will be discussed in a general sense that can be relevant to all systems.

[1267] Cf. Dromgoole and Gaskell, "Interests in Wreck", p. 363 f.
[1268] ibid., p. 366.

11.3.1 Process of Abandonment

The abandonment of a ship can take many forms. These can, however, be divided into two main categories. The first category is straightforward in the sense that it requires some sort of action or declaration from a rightful owner that the wreck is to be deemed as abandoned. One way is to simply leave the vessel or wreck with no intention of returning to it and to make this known. A similar case is to make a notice of abandonment and in that way publicly announce that the rightful owner has no further interest in the wreck. As mentioned above, this is a variation of abandonment or dereliction, but it does not necessarily mean that such a person is also free from any potential liability as a result of a wreckage.[1269]

The other category is abandonment or dereliction without taking any action or making any declaration as in the first category. Instead, dereliction or abandonment can here be seen as a consequence of not taking any action or making any declaration in relation to the wreck. In other words, long term passivity on behalf of the rightful owner may lead to the wreck being treated as abandoned. After a certain amount of time it may, in other words, be reasonable to infer abandonment in relation to a wreck. It can, however, be difficult to estimate how long time that is needed for this to be the case as well as which other factors that can be taken into account.

11.3.2 First Category

As stated above, the first category in relation to dereliction and abandonment is fairly straightforward. It consists of any action or declaration from a rightful owner that the owner no longer wishes to have any interest in the wreck. Such an action or declaration will mean that the owner has given up title to the wreck. In turn, this means that better right to the wreck can be claimed by occupation provided that this is allowed in the legal system and that there are no statutory provisions that regulate the ownership of the wreck in some other way.

[1269] ibid., p. 364.

11.3.3 Second Category

While the first category, in general, is unlikely to lead to any particular difficulties as to the actual dereliction or abandonment, the second category is significantly more problematic. The complexity arises out of the fact that what is to be inferred is based on inaction rather than any manifest action or declaration on behalf of the rightful owner. Some of these issues have been dealt with in case law in the legal systems and some tentative lines of reasoning can be derived from this as discussed in the following.

In the Norwegian case ND 1970 p. 107, concerning a German submarine that sunk off the coast of Norway in 1917, the issue of abandonment in relation to a state wreck became relevant to assess.[1270] The submarine U-76 sank in shallow waters outside of Hammerfest in the north of Norway. The conflict in question arose more than forty years later between two parties who both claimed better right to the wreck. A diving company claimed that it had acquired better right to the property by occupation since the wrecked submarine was an abandoned wreck with no owner. The other party in the case, Høvding, claimed to have bought the wreck from the Norwegian state following the confiscation of German property in Norway after the Second World War.[1271] The case related to abandonment because the court deemed it necessary to answer the question if Germany had abandoned the submarine before the point in time when the German property passed to Norway at the end of the war. This fact determined whether Høvding was the rightful owner of the submarine or not since only property belonging to Germany passed to Norway in the discussed way. In other words, if Germany had in fact abandoned the submarine before this point in time, the submarine would not be included in said property and better right could thus be acquired by occupation from someone else.

The court ruled in Høvding's favour and consequently held that

[1270] Also published as Høyesterett – dom – Rt-1970-346.
[1271] At the time of purchase in 1957, Høvding bought the wreck from *den norske Krigsforsikring for Skib*.

Germany had not abandoned the wreck. In the ruling, it was emphasised that German authorities had claimed better right to the wreck following the sinking in relation to other parties that tried to interfere with the wreck. Thus, in 1923 a salvage company tried to salvage the wreck which led to a protest from the German delegation in Oslo. It was alleged that Germany had made no further interventions later on in relation to other salvage attempts, but the court found that it was uncertain whether there had been additional salvage attempts and stated that if there had been any such attempts inaction from Germany could be explained by the fact that German authorities had not been informed of these actions. It had also been claimed that the fact that Germany had not raised the wreck during the Second World War in itself constituted an abandonment of the wreck, but this was also rejected by the court since that kind of raising would have required a lot of work at an exposed site both in relation to the weather conditions and potential enemies in the area. The assumption that there most likely also were other more suitable wrecks for raising by German salvors at this point in time also played a part in the rejection of this argument.

The ruling, furthermore, states that it is possible that long-term passivity on behalf of an owner can, depending on the circumstances, lead to the wreck being considered as abandoned. This is similar to the position taken in Robinson v Western Australian Museum, where it was accepted that if a rightful owner is passive over a long period of time and does not take any steps in order to claim possession or similar in relation to the property, it can be deemed to have been abandoned.[1272]

In making the assessment of abandonment in ND 1970 p. 107, the events and circumstances following the sinking were considered by the court along with a balancing of interest between the interest of the original owner on the one hand, and the other person claiming ownership by occupation on the other. The assessment of passivity

[1272] In the actual case, this was, however, not assessed to be the case even though the ship in question was wrecked in 1656. The final outcome was, however, determined on the basis of applicable legislative provisions dealing with ownership in the case; Robinson v Western Australian Museum (1977) 51 A.L.J.R. 806 and Dromgoole and Gaskell, "Interests in Wreck", p. 365.

that can lead to abandonment is thus multi-layered. A simple objective test of passivity based on a specific number of years in order to assess abandonment was rejected in the case. Instead, the court found that a combined assessment of the facts at hand led to the conclusion the Germany had not abandoned the wreck before the point in time when German property passed to Norway in 1945. Apparently, the protest directed at the attempted salvage attempt in 1923 sufficed in order for Germany not to have abandoned it before 1945. In other words, the 22 years of passivity on behalf of Germany was not enough in order for the state to be deemed as having abandoned the submarine.

The ruling in ND 1970 p. 107 was not unanimous and the dissenting opinion raises interesting questions in relation to the issue of passivity and abandonment of state wrecks. The dissenting judge based his opinion on the fact that the case concerned the wreck of a warship that had entered Norwegian neutral territory as a part of a war operation. This made the case different from other similar cases such as merchant ships with foreign owners, i.e. non-state wrecks with known owners. As a consequence, the dissenting judge claimed that special rules, based on international law relating to war and neutrality, were to be applied in the case. This is thus another way in which it could be argued that state wrecks, in some cases, are to be treated differently when compared to non-state wrecks.

In the actual case, the dissenting judge found that a reasonable stance in relation to this kind of situation was that should a warship or some other war material have entered and subsequently been interned by a neutral state, the state that has possession of the property[1273] will acquire better right to the property unless the state from which the property originates makes some sort of request or claim the property after the end of the war. In this sense, the judge also claimed that in order for a belligerent state to retain better right in relation to property located on the neutral territory of another state, the state has to take some sort of action in relation to the property within a reasonable amount of time. A mere declaration of interest, such as the protest in

[1273] No. *har det i sin besittelse*.

relation to the salvage attempt in 1923, was not sufficient and especially not since it was not followed by any positive action during the ensuing years.

The judge also stated that it would be offensive and unreasonable for a foreign state to be continuously passive and still retain better right in relation to war material located in the territory of another state.[1274] For the present case, this meant, according to the dissenting judge, that Germany had abandoned ownership of the wreck before 1940. In this way, the most natural solution would be for the state of Norway to have acquired better right following the abandonment, but since there was no explicit support for this in Norwegian law and considering the fact that the Norwegian state had made no claim in relation to the wreck, the dissenting judge found that the wreck was to be considered as having no owner. Since the judge was in minority, the opinion refrains from reaching a conclusion as to the conflict at hand, but the fact that the wreck was to be considered as abandoned and to have no owner would, arguably, enable a claim of acquired better right by occupation.

The differences in reasoning above illustrate that issues of abandonment can be complicated and require various interests between the involved parties to be taken into account. A tentative conclusion to be drawn is that passivity on behalf of a party for a long period of time along with not taking any action in relation to the wreck may very well cause it to be deemed as abandoned. All relevant circumstances in the case may, however, affect such an assessment. Examples of such circumstances are the location of the wreck, how long its location has been known, how easy it is to access it and other such relevant factors.[1275]

11.3.4 Differences Between State and Non-State Wrecks

It is plausible that there is a difference between abandoning a state wreck and a non-state wreck. As illustrated by the case above, many states claim rights in relation to their own state wrecks, e.g. in the form

[1274] This can be construed as a narrow take on sovereign immunity, which could be a basis for defending what the dissenting judge is ruling out.
[1275] Cf. Dromgoole and Gaskell, "Interests in Wreck", p. 365 f.

of warships, irrespectively of where the wreck is located. One rationale for treating state wrecks differently from non-state wrecks is the special characteristic of the wreck in light of sovereign immunity. In this sense, it could be argued that more is required in order to infer abandonment or dereliction in relation to state wrecks. The other way around, it may, consequently, be easier to infer abandonment or dereliction in relation to non-state wrecks. This would thus imply that a test of abandonment or dereliction may be less strict in relation to non-state wrecks. It is, of course, still difficult to draw an exact line as to when a wreck is deemed to have been abandoned. In these cases as well there, arguably, needs to be a comprehensive analysis into the reasons behind the abandonment, the geographical location of the wreck, information regarding the wreck site, the amount of time that has passed since the sinking and how passive the original owner has been as well as other relevant factors.

Chapter 12

Limitation of Liability

One important dimension in the interests and conflicts involved in wreck removal situations is the possibility for a liable party to limit liability. The principle of limitation is an important aspect in many fields of maritime law and can be motivated in various ways as will be discussed further below. The possibility to limit liability will differ between legal systems. This chapter discusses its role in relation to wrecks and wreck removal operations as well as the different approaches to this issue in the studied legal systems.

12.1 Historical Background

The right to limit liability has a long history even though its exact origin is hard to trace.[1276] There are inclusions in Roman law that bear resemblance to the right to limit liability in the form of escaping liability by handing over the property in question that has caused a damage or loss.[1277] Different systems of limitation rules developed

[1276] On the history of the right to limit liability, see in general Donovan, "Origins and Development of Limitation of Shipowners' Liability", p. 999 ff.

[1277] This refers to the principle of *noxae deditio*; see Gotthard Gauci. "Limitation of liability in maritime law: an anachronism?" In: *Marine Policy* 19.1 (1995), p. 65 and John Gustav Gissberg. "Civil Liability for Oil Pollution Damage from Tankers and other Ocean-Going Vessels". PhD thesis. University of Michigan, 1972, p. 9 but cf. the doubts expressed in Donovan, "Origins and Development of Limitation of Shipowners' Liability", p. 1000 that also states that there is no proof of any framework concerning

in later systems, e.g. in the medieval codes, also specifically aimed at the right to limit liability for shipowners.[1278] In this way, limitation systems were developed in what is now parts of Italy, Spain and France. Similar systems that allowed the shipowner to limit liability spread to most maritime jurisdictions in Europe during the 16th and 17th century with English law being the main exception.[1279]

Two main systems of limitation was developed. The first limited potential claims to the value of the shipowner's vessel. Upon handing the vessel and its value over to potential creditors, the shipowner was exonerated from further liability. This was e.g. the effect in regulations of limitation in the Hanseatic Ordinances, the Statutes of Hamburg and the Swedish Maritime Code of 1667.[1280] More or less the same approach was taken in an ordinance from Louis XIV in France 1681. The ordinance made the shipowner liable for the master's deeds, but also allowed the owner to abandon this liability following abandonment of the vessel and freight. The regulation subsequently found itself into the Code Napoléon and from there into various legal systems in Europe and Latin America based on the civil law tradition.[1281]

English law stood out in comparison with the above systems since it did not include any possibility for a shipowner to limit liability. One reason for this was the influence of the Rolls of Oleron on English law. The Rolls of Oleron did not include any provisions on the right of limitation on behalf of the shipowner. It is, however, also important to note that these rules were much older when compared to the other systems noted above from the 16th and 17th century. The Rolls of Oleron goes back several hundred years before that and probably back to the end of the 13th century.[1282] In a similar fashion, manifest provisions on

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the right of shipowners to limit liability in Roman law.

[1278]Cf. Gauci, "Limitation of liability in maritime law: an anachronism?", p. 65, William Tetley. "Shipowners' Limitation of Liability and Conflicts of Law: The Properly Applicable Law". In: *Journal of Maritime Law and Commerce* 23.4 (1992), p. 586 f and Donovan, "Origins and Development of Limitation of Shipowners' Liability", p. 1001.

[1279]ibid., p. 1001 ff.

[1280]ibid., p. 1003.

[1281]ibid., p. 1004.

[1282]Cf. the discussion above in section 3.3.1.

a right to limit liability on behalf of the shipowner are missing in the Gotland or Wisby Sea-Law.[1283]

The lack of a possibility to limit liability in English law meant that shipowners in the continental systems, that did allow for limitation, were better off in this respect. This created momentum for a shift in policy. In 1733 a statute was passed that exculpated shipowners from liability caused by the deeds of the master and crew of the vessel provided that the actions had been carried out without privity or knowledge of the owner. This was a response to a case where shipowners had been held personally liable for the loss of cargo that has been stolen by the master of a ship. Other systems in Europe allowed for different ways of limiting or relieving liability for the shipowner in such cases in order to create incentives for the shipping industry. This difference was one of the reasons behind the shift in the English position.[1284] A continued difference between English law and the continental systems, however, was the way in which the limitation was calculated. English law based the liability of the owner on the value of the ship before the incident that had taken place. The continental systems, on the other hand, based the liability on the remaining value after the incident. The English system thus had the strange side-effect that it created incentives to use old ships of less value and to be restrictive with repairs since such action could augment the liability.[1285]

The system of limitation was further elaborated and extended in English law over the following years to the current position as discussed further below.[1286] Also before limitation of liability was possible, the practical reality, however, often meant that the perhaps unlimited liability, in practice, was limited to the actual value of the ship and cargo since the shipowner often lacked any other assets and thus became insolvent as a consequence of the wreckage. In this sense, the unlimited

[1283]Donovan, "Origins and Development of Limitation of Shipowners' Liability", p. 1005 ff.
[1284]ibid., p. 1005 ff.
[1285]ibid., p. 1008.
[1286]ibid., p. 1008 f.

liability was in fact limited to this value.[1287]

12.2 Interests Involved

In the early days of shipping, the main purpose of allowing a right to limit liability was to encourage business at sea, which was a precarious enterprise considering the many dangers involved that could leave the shipowner insolvent as a consequence of a maritime casualty.[1288] In this way, Tetley refers to the right of limitation as a "universal concept amongst shipping nations [that] recognizes the potentially perilous nature of maritime transport".[1289] Since the right to limit liability focuses on maritime enterprises it can also enable trade protection.[1290] Limitation has also been held to be a matter of public policy.[1291] In the case The Bramley Moore, the right was described by Lord Denning as "not a matter of justice. It is a rule of public policy which has its origin in history and its justification is convenience".[1292]

It has been argued that limitation can also be of interest to a creditor in the sense that a limitation regime provides certainty as to the actual limits involved and thus a possibility for the creditor to be compensated within the realms of this system. This could be held preferable in comparison with a situation where the shipowner may have unlimited liability, but where the creditor, at the same time, may have no predictability as to the potential payment of this unlimited claim or the process in which it is to be paid.[1293] Knowledge and predictability in relation to potential liability levels may also enable insurance cover. One rationale behind the possibility to limit liability has thus been to

[1287] Hill, *Maritime Law*, p. 394.
[1288] ibid., p. 394 and cf. Donovan, "Origins and Development of Limitation of Shipowners' Liability", p. 999.
[1289] Tetley, "Shipowners' Limitation of Liability and Conflicts of Law: The Properly Applicable Law", p. 585.
[1290] Cf. Gaskell and Forrest, *The Law of Wreck*, p. 96.
[1291] Patrick Griggs, Richard Williams and Jeremy Farr. *Limitation of Liability for Maritime Claims*. 4th ed. Informa Law, 2005, p. 1 and Gauci, "Limitation of liability in maritime law: an anachronism?", p. 69.
[1292] [1963] 2 Lloyd's Rep. 429.
[1293] Cf. Hill, *Maritime Law*, p. 394.

enable insurance cover for incidents that otherwise would be impossible or unreasonably difficult to insure if the potential liability was unlimited.[1294] In this sense, a right to limit liability also serves to the benefit of the insurer in enabling an easier calculation of the potential liability that can befall an insured shipowner.[1295]

Other involved interests can be seen from the process that led to the creation of the LLMC.[1296] There was, at the time of its drafting, consensus that a balance was needed in relation to limitation issues between claimants and shipowners. The former group should be able to successfully claim compensation that was suitable, while the latter group should be able to limit liability in a way that enabled shipowners to insure this liability to a cost that was reasonable. The system was also meant to minimise litigation, which had been a problem with earlier frameworks dealing with limitation issues.[1297] The result in the LLMC was higher limitation amounts compared to the earlier systems along with a strong right to limit liability. Only in exceptional circumstances will limitation not be possible. In the convention this is phrased as the right being lost only if it is proved that the loss resulted from an act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.[1298] Griggs, Williams and Farr refer to the right of limitation under the LLMC as "virtually unbreakable".[1299] The convention can also be seen as the result of a compromise between English and Continental legal views.[1300]

[1294] Gaskell and Forrest, *The Law of Wreck*, p. 96.
[1295] Tetley, "Shipowners' Limitation of Liability and Conflicts of Law: The Properly Applicable Law", See p. 585.
[1296] The convention, as such, is discussed further below.
[1297] Griggs, Williams and Farr, *Limitation of Liability for Maritime Claims*, p. 1.
[1298] Art. 4 LLMC.
[1299] ibid., p. 1.
[1300] Pineus, "Sources of Maritime Law Seen From a Swedish Point of View", p. 92.

12.3 Convention on Limitation of Liability for Maritime Claims

The Convention on Limitation of Liability for Maritime Claims (LLMC) from 1976 is the main legal instrument on limitation of liability in maritime matters.[1301] It has been revised in the form of a protocol from 1996 and there are 60 contracting states to this revised version amounting to almost 70 % of the gross tonnage of the world's merchant fleet.[1302] The coverage is thus broad, but it is not global. Most of Europe, including the systems of main interest in this study, i.e. Danish, English, Finnish, Norwegian and Swedish law, is party to the convention. One notable exception in Europe is Italy. Also the US has taken this approach and is not a contracting state to the convention.[1303] Since the revised

[1301] The convention was preceded by the 1957 Convention on the Limitation of Liability of Owners of Sea-going Ships and there was also an earlier convention from 1924; Hill, *Maritime Law*, p. 394 f and Griggs, Williams and Farr, *Limitation of Liability for Maritime Claims*, p. 1. Another convention of interest, in the context of limitation, is the Strasbourg Convention of 2012 on the Limitation of Liability in Inland Navigation. This convention, which is an update and revision of an earlier convention from 1988, builds on the LLMC and provides a framework for limitation of liability for vessels operating in inland navigation on inland waterways. The convention entered into force in 2019 and is currently in effect for five member states. Since none of the main legal systems discussed in the study is party to the convention, it is not further discussed in this context. For further information, see Central Commission for the Navigation of the Rhine (2020). *Strasbourg Convention on the limitation of liability in inland navigation*. 2020. URL: https://www.ccr-zkr.org/12060400-en.html (visited on 12/2020). Cf. also art. 15.2 LLMC and CMI (2020). "Implementation and Interpretation of the 1976 LLMC Convention". In: *CMI Yearkbook 2000*. Comité Maritime International, 2000. URL: https://comitemaritime.org/wp-content/uploads/2018/06/2000-YEARBOOK-ANNUAIRE-SINGAPORE-I.pdf (visited on 12/2020), p. 485 ff.

[1302] As of June 2020, IMO, *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or the Secretary-General performs depository or other functions*. When dealing with issues of limitation it must, however, be observed that some states may only be parties to the original convention from 1976. Some states that are contracting parties to the protocol from 1996 have not denounced the original convention, which may lead to difficulties; see further Gaskell and Forrest, *The Law of Wreck*, p. 96. The need for updating and revising the framework has been driven by the need for higher levels of limitation as well as taking inflation into account; cf. Griggs, Williams and Farr, *Limitation of Liability for Maritime Claims*, p. 1.

[1303] In areas where the convention is not applicable, there may be domestic solutions dealing with limitation of liability; Gaskell and Forrest, *The Law of Wreck*, p. 96 f and see IMO, *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or the Secretary-General performs depository or other*

convention is applicable in the studied legal systems in this study, the main focus in this chapter is on LLMC. The convention, however, also allows for some flexibility as to how it is adopted in the contracting states. Thus, it is of importance to look into the specific systems and the domestic implementations when dealing with limitation issues.[1304]

12.3.1 Scope of Application

The convention is applicable in relation to seagoing ships.[1305] This term is, however, not defined. Hovercraft and floating platforms are excluded from its application, but it is possible for individual states to extend the application also to such property. The UK, as an example, has done so and in this way allowed for limitation also in relation to hovercraft as well as ships that are not sea-going.[1306] The provisions in the LLMC allow for owners, charterers, managers, operators, salvors and insurers to limit liability.[1307] One notable exception in this enumeration is cargo owners that do not have the possibility to limit liability unless they are also to be classified as one of the other groups, e.g. a cargo owner that is also a charterer.[1308]

12.3.2 Claims Associated with Wrecks and the LLMC

The LLMC allows for limitation of liability for claims associated with wreck removal, but also enables states to opt-out of this ground for limitation. Some states have chosen to opt-out in this way and provided that an exception for these sorts of claims has been successfully implemented in the system, this means that no limitation is possible.

The right to limit liability covers different claims that can become relevant following a wreckage. Such claims can be based on damage to property, the raising of the wreck and cargo. The different claimants

functions for details on the contracting parties to the convention.
[1304]Griggs, Williams and Farr, *Limitation of Liability for Maritime Claims*, p. 1.
[1305]Cf. art. 1(1) LLMC.
[1306]Gaskell and Forrest, *The Law of Wreck*, p. 97 f.
[1307]Cf. art. 1 LLMC.
[1308]Gaskell and Forrest, *The Law of Wreck*, p. 98 f.

will share and compete in relation to the relevant limitation amount. Some of these claims, e.g. claims for property losses, will concern the relations that exist as a consequence of the operation of the vessel or the maritime adventure, i.e. relate to pre-existing relations associated with the vessel. Other claimants can, however, be in the form of external parties. One example of this is claims for wreck removal costs.[1309]

One important distinction to keep in mind when discussing limitation amounts in the wake of a wreckage, is that any claims that fall under the scope of the CLC will not be subject to limitation under LLMC.[1310] This is the case since the CLC has its own system of limitation built into that convention. This means that pollution from oil tankers is treated differently in this respect.[1311] Salvage claims or claims related to special compensation do not fall under the scope of the convention either.[1312] Claims associated with pollution from hazardous cargo, e.g. chemical tankers, are not excluded from the LLMC provided that they fall under the possible claims in the convention. An entry into force of the HNS 2010, however, will change this and subject such claims to the limitation system in that convention. Claims arising under the Bunker Convention 2001, on the other hand, are subject to limitation under LLMC.[1313]

The effects of the applicability and structure of the LLMC mean that maritime casualties that can lead to massive claims are treated differently depending on what has happened in the actual case. This will determine whether the LLMC is applicable in relation to arising claims, if there are also other systems of limitation that will become relevant or, indeed, if limitation is not possible in relation to certain claims at all. Arising claims as a consequence of a wreckage involving a chemical tanker, as an example, can be huge and comparable with those following the sinking of an oil tanker. The difference between these two scenarios, however, is that claims arising as a consequence of

[1309] Gaskell and Forrest, *The Law of Wreck*, p. 99 f.
[1310] Art. 3(b) LLMC.
[1311] Gaskell and Forrest, *The Law of Wreck*, p. 100.
[1312] Art. 3(a) LLMC.
[1313] Gaskell and Forrest, *The Law of Wreck*, p. 100 ff.

the former will be subject to the limitation system under the LLMC and thus compete with various other potential claimants in that case, while the latter will be subject to its own system under the CLC. Another example that could lead to massive damage and arising claims that will compete under the LLMC for the same limitation amount is the sinking of a large container vessel.[1314]

12.4 Implementations of the LLMC

All of the studied legal systems are contracting states to the convention and its protocol from 1996. In this way, the states have denunciated the original convention and are parties to the protocol of 1996 to amend the convention on limitation of liability for maritime claims, 1976 (LLMC Prot 1996).[1315] There are, however, some slight differences between the systems as discussed below.

12.4.1 Systems With Reservations

As already mentioned, the convention allows states to opt-out of the possibility to limit liability for wreck removal claims. Three of the studied legal systems have chosen to do so, although to various degrees.

The United Kingdom has reserved the right to exclude the application of art. 2 paragraph 1(d) and (e) of the LLMC, i.e. the possibility to limit liability for claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such a ship as well as claims in respect of the removal, destruction or the rendering harmless of the cargo or the ship.[1316] The effect of the reservation in English law is regulated in the Merchant Shipping Act 1995. The

[1314]ibid., p. 100.
[1315]IMO, *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or the Secretary-General performs depository or other functions*. In English law, the implementation is found in the Merchant Shipping Act 1995. In Danish, Finnish, Norwegian and Swedish law, the implementation is found in the respective maritime codes.
[1316]ibid.

convention, as such, is included in Part 1 of Schedule 7 of the act, which means that the right to limit liability in accordance with art. 2(1)(d) is found in the schedule. S. 185(1) Merchant Shipping Act 1995 states that these provisions shall have the force of law in the United Kingdom. This force of law is, however, subject to the provisions found in the second part of the schedule according to s. 185(2) Merchant Shipping Act 1995. In the second part of the schedule, it is, in turn, stated that:

> "[p]aragraph 1(d) of article 2 shall not apply unless provision has been made by an order of the Secretary of State for the setting up and management of a fund to be used for the making to harbour or conservancy authorities of payments needed to compensate them for the reduction, in consequence of the said paragraph 1(d), of amounts recoverable by them in claims of the kind there mentioned, and to be maintained by contributions from such authorities raised and collected by them in respect of vessels in like manner as other sums so raised by them".[1317]

No such fund seems to have been created in this way and the mentioned paragraph is thus not applicable. The result is that it is not possible to limit liability for wreck removal claims under the LLMC in English law.[1318]

Another state that has made this kind of reservation is Denmark. In 2018, Denmark made a reservation to opt-out of the possibility to "limit liability for maritime claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship".[1319] Denmark has, however, not made any change to the

[1317]Schedule 7, Part II, s. 3(1) Merchant Shipping Act 1995.
[1318]There may, however, be some uncertainty as to whether non-statutory claims are wholly excluded and if it is possible for some related claims to instead fall under the other parts of art. 2(1) LLMC that are in force. The issue is not discussed further in this context. See Griggs, Williams and Farr, *Limitation of Liability for Maritime Claims*, Article 2(1)(d) and Johanna Hjalmarsson. "What is the UK limit of liability for wreck?" In: *Lloyd's Shipping & Trade Law* 17.10 (2017).
[1319]IMO, *Status of multilateral Conventions and instruments in respect of which the*

legislation to the effect of not allowing for limitation like in English law. Thus, the right to limit liability also for these costs is maintained.[1320] Instead, Denmark has raised the limitation amount as discussed further below. The same is true for Norway that has also made a reservation enabling an exclusion of art. 2, paragraph 1(d) and (e) of the LLMC.[1321] As in the case with Denmark, Norway has not excluded the possibility to limit liability for wreck removal and other related claims but has instead raised the limitation amount.

12.4.2 No Reservations

The other studied legal systems have not opted out of the possibility to limit liability for wreck removal costs. Consequently, neither Finland or Sweden has made reservations to this effect.[1322]

12.4.3 Different Limits

The limitation amounts differ slightly between the systems that allow for limitation. Sweden and Finland follow the general raised limit of 1.51 million SDR for ships not exceeding 2 000 gross tonnage.[1323]

As already mentioned, Norway and Denmark, however, have varied the limitation amount in different ways when it comes to claims associated with wrecks and wreck removal. Thus, for ships of over 300 gross tonnage, in Norway, the limitation amount is raised in relation

International Maritime Organization or the Secretary-General performs depository or other functions.

[1320] See Chapter 9 § 172(4) Danish Maritime Code.

[1321] See IMO, *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or the Secretary-General performs depository or other functions*. It can, however, be noted that this reservation is listed as made in relation to the 1976 convention. No such reservation is listed in relation to the protocol amending the convention in contrast with other states; cf. ibid. It, however, follows from the reservation that it is made in relation to "the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996…". The presentation of the reservation may, however, be viewed as unclear given the fact that Norway has denunciated the 1976 convention; ibid.

[1322] ibid.

[1323] See further Chapter 9 § 5(3) Swedish Maritime Code and Chapter 9 § 5(3) Finnish Maritime Code.

to claims in respect of raising, removal, destruction or the rendering harmless of a ship which is sunk, stranded, abandoned or has become a wreck as well as all that is on board or has been on board such a ship.[1324] The same is true in relation to removal, destruction or the rendering harmless of cargo from the vessel.[1325] Finally, this is also the case in relation to claims in respect of measures taken to avert or minimize loss for which the person liable would have been able to limit according to the regulation as well as further loss that is caused by such measures.[1326] The limitation amount is in these cases raised to 2 000 000 SDR for ships up to 1 000 gross tonnage.[1327]

In Danish law, the limit has been raised when it comes to claims in respect of the localisation, marking or removal of a wreck in relation to ships of up to 1 000 gross tonnage.[1328] This alteration was made in the wake of the Danish implementation of the WRC and the claims and costs referred to above, i.e. locating, marking and removing the wreck, correlate with the obligations under that convention. It follows from the preparatory works, that the change is meant to increase the possibilities to claim compensation for wreck removal costs in light of the fact that these can be high and, in this way, to reduce the risk of the state bearing such costs.[1329] Passenger ships that operate on fixed routes are, however, not subject to this raised limit.[1330]

[1324] § 172 a (1) Norwegian Maritime Code; No. *hevning, fjerning, ødeleggelse eller uskadeliggjørelse av et skip som er sunket, strandet, forlatt eller blitt vrak, samt alt som er eller har vært om bord i skipet*.

[1325] § 172 a (2) Norwegian Maritime Code; No. *fjerning, ødeleggelse eller uskadeliggjørelse av skipets last*.

[1326] § 172 a (3); No. *tiltak truffet for å avverge eller begrense tap som ansvaret ville vært begrenset for etter bestemmelsen her, samt tap som skyldes slike tiltak*.

[1327] This is also raised further for ships of more than 1 000 gross tonnage; see further § 175 a Norwegian Maritime Code.

[1328] As in the Norwegian system, this is also raised further for larger ships; see Chapter 9 § 175 Stk. 3 Danish Maritime Code.

[1329] See *Forslag til Lov om ændring af søloven og lov om sikkerhed til søs m.v. (Justering og klarificering af reglerne om udenlandske ejeres adgang til at få skibe under dansk flag, forenklet registrering afrettigheder i mellemstore fritidsfartøjer, ansvarsbeløb ved vragfjernelse, gennemførelse af internationale sanktioner vedrørendeskibsregistrering, privatretlige havneafgifter m.v.)* of 4 October 2017, p. 8 ff.

[1330] This is motivated with the argument that it is rare for such ships to be involved in accidents that result in these claims, i.e. the risk is lower for this kind of vessel.

12.5 Variations in Claims that can be Limited

There have been some uncertainty in the past as to which claims that can be subject to limitation in various ways. The position in English law was earlier that only claims arising as a consequence of damages were subject to limitation, while any costs arising as a consequence of statute were not since they instead were in the form of a debt. The LLMC and the revision in the Merchant Shipping Act 1995 altered this position in the sense of allowing limitation for claims "whatever the basis of liability may be".[1331]

In Norwegian law, however, the Server case has raised issues about in what sense claims can be limited. In that case, the state issued a wreck removal order for the wreck in question, but the owner refuted it with the argument that such action would greatly exceed the limitation fund that had been created as a result of the wreck. The court, however, held that the right to limit liability is only relevant in relation to monetary claims and not orders that follow as a consequence of statute. The fact that the costs associated with complying with the order from the state would be higher than the limitation fund was thus not relevant as an argument for avoiding compliance with the order. Instead, the court reasoned, the owner could remove the wreck and then make a monetary claim against the limitation fund for the costs. It thus follows that it is not possible to use the limitation fund as a means to avoid taking action upon a wreck removal order from the state in Norwegian law.[1332]

This follows from the preparatory works; see *Forslag til Lov om ændring af søloven og lov om sikkerhed til søs m.v. (Justering og klarificering af reglerne om udenlandske ejeres adgang til at få skibe under dansk flag, forenklet registrering afrettigheder i mellemstore fritidsfartøjer, ansvarsbeløb ved vragfjernelse, gennemførelse af internationale sanktioner vedrørendeskibsregistrering, privatretlige havneafgifter m.v.)* of 4 October 2017, p. 9. The phrasing in the regulation is, however, less clear since it could also be read as the provision being applicable in relation to ships that only operate on fixed routes provided that they are not passenger ships; cf. *Dan.* "[a]nsvarsgrænsen for krav i anledning af et vrags lokalisering, afmærkning og fjernelse er 2.000.000 SDR for skibe, som ikke er passagerskibe, der udelukkende sejler i fast rutefart.

[1331] See further Griggs, Williams and Farr, *Limitation of Liability for Maritime Claims*, Article 2(1).

[1332] Cf. Falkanger, Bull and Brautaset, *Scandinavian Maritime Law – The Norwegian Perspective*, p. 265.

Chapter 13

Salvage and Wreck Law

A point that has already been mentioned in relation to wrecks that pose hazards to navigation and the environment as well as those in need of protection, is the relation and boundary between salvage and wreck law. This chapter will further discuss how these different areas of law can be approached when it comes to wrecks. More specifically, the chapter will discuss different ways to view salvage and wreck law both in relation to how they are distinguished from one another and how they can be said to relate. Furthermore, the possibilities to approach wrecks within salvage law is discussed. Since this is an area of much uncertainty, the issues are discussed in a more open and tentative way with different lines of reasoning. No detailed legal analysis is thus conducted in this chapter.

Whether or not a situation amounts to salvage or not is important not least from a private law perspective since the possibility of a salvage reward and potential security for such a claim, i.e. in the saved property, can be decisive factors in the decision on whether to take action or not as a potential salvor. If there is uncertainty as to the possibility of a salvage reward, this will have mitigating effects on the willingness to engage. In some situations, however, incentives to salvors may not be in the public interest. One such case could be in relation to historical wrecks in need of preservation and protection. Such wrecks can have valuable cargo that would be commercially viable to raise from the

wreck provided that the salvor acquires a salvage reward.[1333]

13.1 Boundary Between Salvage and Wreck Removal

This section will raise some issues and lines of reasoning that can be used when discussing the relation between salvage and wreck removal as well as the boundary between them.

13.1.1 General Distinctions

It can be difficult to draw a clear line between salvage and wreck removal and there are various different parameters that may be relevant to take into account when doing so. An initial observation is that salvage law can become relevant in situations involving wrecks in various ways. When it comes to a modern wreck that has suffered a maritime casualty, salvage law can become relevant e.g. in the immediate aftermath of an accident. An example could be a salvage operation where the bunkers of a ship are removed giving rise to a salvage reward. This is handled within salvage law. Subsequently, the wreck as such may need to be removed, e.g. following a wreck removal order, and this will be carried out contractually outside of the sphere of salvage law. Another way to phrase this is to state that the subsequent action amounts to wreck removal within wreck law that falls outside of the law of salvage.

The above example illustrates that salvage and wreck removal can take place in relation to the same incident. Another consequence of this is that e.g. the removal of bunkers, like in the above example, may seem to resemble a wreck removal in many ways. There are, however, major differences between salvage and wreck removal that will affect how a situation is approached and handled. It is thus important to be able to distinguish between salvage and wreck removal in a given situation and to know when a situation turns from a salvage operation into wreck

[1333] Another variation would be for the person raising the object to acquire proprietary interest in relation to the raised property. This is, however, not an issue of salvage. It is, instead, related to the law of finds.

removal territory.[1334]

The boundary between salvage and wreck removal can be difficult to assess and there can be different views on when a situation is to constitute salvage and not. The three main requirements in salvage law, i.e. voluntariness, danger and success, can be helpful in sorting out whether a situation is within the realm of salvage or not, but may not always provide an answer. Another question is whether it is necessarily so that salvage must preclude a situation of wreck removal and vice versa. An alternative view would be for both salvage and wreck removal to co-exist.

One practical way of distinguishing between salvage and wreck removal is to focus on the commercial aspect of the salvage sphere. Salvors will engage to salve property provided that it is in the commercial interest for them to do so.[1335] In other words, if the value of the property and thus, in effect, the size of the potential salvage reward are attractive compared to the costs of carrying out the salvage services, salvors will, in general, be happy to engage. One delineation would be to treat all these wrecks that are commercially attractive for salvors, i.e. where there are incentives for salvors to take action, as falling within the sphere of salvage law. This would be an extensive and functional approach to delineating the topic. It could, however, also have drawbacks, since it may not be in the public interest to have some of these wrecks salved, e.g. historical wrecks.

Another way to distinguish between the two fields would be to focus on the contractual dimension. Salvage is, by definition, not contractual or at least not pre-contractual. Wreck removal operations, however, are contractual and often long-term contractual operations. In some cases there may be several different contracts for the wreck removal as a whole, e.g. a care-taking contract meant to control the situation and keep the wreck in check, while a bidding process is initiated and completed for the more long-term operation of removing the wreck or parts of it. A line could thus be drawn between salvage as non-

[1334]Gaskell and Forrest, *The Law of Wreck*, p. 567.
[1335]Cf. Shaw, "The Nairobi International Removal Convention", p. 402.

contractual and wreck removal as contractual. However, this would run into difficulties since salvage operations, although being by definition non-contractual or at least not pre-contractual in nature, often are contractual in practice. A salvor will often enter into a contract with the appropriate party as a prerequisite for engaging in salvor services, e.g. relying on the standard form LOF. In this way, the salvor knows that the salvage operation will fall within the standard system of Lloyd's with all that this entails.

A maritime casualty can often lead to the initiation of a salvage operation in order to preserve the ship or perhaps to minimise damage to the environment. If the vessel sinks or strands, despite of this operation, the next step could be to enter into a care-taking contract with a party that can render such services while a bidding process for a long term wreck removal operation is carried out. Following this process, the winning bidder will be able to carry out the wreck removal operation and the care-taking contract comes to and end. This raises an interesting question as to the nature of the care-taking contract. Should this contract be viewed as a part of the wreck removal operation and, in this way, terminate the period of salvage? Compensation would be set in the contract and would not be in the form of a salvage reward. If this is the preferred view it would mean that the salvage period ends when the parties enter into this contract.

Thus, one way to make a distinction between salvage and wreck removal could be to relate it to parties entering into this kind of contract. In other words, should the view be correct that this contract is not within salvage law, this would mean that when the parties enter into a contract that would be required in order to claim compensation for rendered services the salvage period would end.[1336] This is the case since a contract of salvage services would not be necessary in order for the salvor to claim compensation in the form of a salvage reward

[1336]This would also be true should the previous salvor be the one that enters into such a contract, since it is possible for such a party to continue to render services although outside of the realm of salvage; cf. Rose, *Kennedy and Rose on the Law of Salvage*, p. 177, s. 5-051.

following a successful preservation of the res. Under a care-taking, or a wreck removal contract for that matter, the contract would be necessary in order for the party that renders the involved services to successfully be able to claim compensation.[1337]

A variation that in practice is close in line with the above approach, would be to focus on the time factor in relation to the actions taken on a wreck. Salvage operations will in most cases be relevant in the immediate aftermath of a maritime casualty or incident. When this acute phase has ended, either by the successful rescue of parts of the vessel or a failure to do so, the wreck removal period will ensue. This works reasonably well in relation to modern wrecks, i.e. ships operating on the oceans today and that suffer maritime casualties. It works less well with already existing wrecks and potential salvage attempts in relation to them. For these wrecks, the acute situation following the maritime casualty has, of course, already passed. An argument based on the notion that it is an acute phase as long as the wreck is stranded or sunk, reminiscent of the argument justifying salvage of historical wrecks since they are subject to danger by being sunk, is hardly tenable since this would be true also during a wreck removal operation. If one takes the position that it is not possible to salvage older wreck, this would, however, be possible to combine with this approach.

Another issue that can be raised in this context is the above mentioned question on whether it is necessary for there to be a distinct line between salvage and wreck removal at all. Perhaps it would be possible for both spheres to exist at the same time? Another related issue is whether it is possible for a situation to fluctuate, provided that there is a clear line between the two spheres, i.e. can a situation that has turned into a wreck removal phase go back into the sphere of salvage again? Consider the example of a care-taking contract, aimed at keeping the wreck in check, while the bidding process for the wreck removal is underway. If the wreck deteriorates at this stage and causes unforeseen difficulties and dangers that are outside of what the parties envisaged

[1337] This, however, disregards a potential claim based on the principle of *negotorium gestio*.

when entering into the care-taking contract, this could arguably justify the situation turning into a situation of salvage in line with art. 17 of the Salvage Convention 1989 on services rendered under existing contracts. In a case where the services rendered by the party that has entered into the care-taking contract exceed what can be reasonably considered as due performance under that contract, this would seem to be the appropriate stance given the salvage convention.

The potential co-existence of salvage and a wreck removal operation also raises the issue of whether this would actually cause any problems or difficulties. If salvage and wreck removal would take place at the same time, this would mean that the party that carries out the wreck removal operation also can claim a salvage reward and benefit from the potential securities that a position as salvor would provide. A wreck removal contractor, however, would reasonably already have made sure that he or she is compensated and protected in an appropriate way under the wreck removal contract. On the other hand, it could be the case that a potential salvage award would be higher than the contracted sum. One could, however, question how likely this scenario would be. Any potential salvage reward or security for such a claim is dependent on the value of the wreck in question and the need for a wreck removal operation would in most cases mean that the costs involved in removing the wreck will be higher than the remaining value of the wreck and potential cargo. In this sense, a contractor would in most cases in any event not have any use for a potential applicability of salvage law save for e.g. special compensation or remuneration under SCOPIC.

13.1.2 Voluntary and Compulsory Actions

Another demarcation line between salvage and wreck removal relates to the nature of the services rendered in a given situation. As already discussed, one of the main elements in salvage is voluntariness. This means that a salvor will perform salvage services as a volunteer adventurer and then, upon potential success, claim a reward if property at danger was saved as a consequence of the actions taken. In other words,

the actions associated with salvage operations are voluntary. Wreck removal, on the other hand, is in general the result of a wreck removal order or some other compulsory regulatory requirement in the state in whose waters the wreck is located.[1338] The point here is that wreck removal is normally triggered by a compulsory demand requiring the wreck to be removed. In practice this is also when wreck removal costs will fall under P&I-cover since it is only if the actions are mandatory that they are covered.

Another side of the same argument is that since salvage is a voluntary action, it also follows that the right to a salvage reward does not have to follow from a contractual relationship between the salvor and the owner of ship or other property. It is, instead, a right that arises as a consequence of the fact that property has been saved and that the owners of such property shall make compensation in light of this. However, in practice salvage operations are often conducted based on contract but this does not alter the fact that the right to a salvage reward per default is a non-contractual right as a consequence of the basic element of voluntariness. Wreck removal, on the other hand, will always be governed by contract. This is a result of the fact that the independent right to a reward for performed services is limited to the realm of salvage.[1339]

Furthermore, this also means that the remuneration method is also altered when comparing salvage and wreck removal. The wreck removal operations will be the result of a contract entered into between the relevant parties, normally following a bidding process where several potential contractors have suggested solutions to the wreck removal project. The terms of a wreck removal contract will thus be affected by the relation between the parties in question. This will, in turn, also have effects on how the costs are calculated. Salvage services, on the other hand, do not fall under the same logic since these are independent of contract. The compensation is instead, unless expressed derogation, based on the principles of salvage law. This will entail that a court or

[1338] Cf. Gaskell and Forrest, *The Law of Wreck*, p. 567.
[1339] Unless there can be a successful claim based on the principle of *negotiorum gestio*.

an arbitrator, depending on the circumstances, will look to these main principles when assessing the salvage reward. This also means that the level of compensation is uncertain before this assessment is made. In a wreck removal contract, on the other hand, the terms of payment will follow from the contract and there will thus, in general, be more predictability as to its level.

Another effect in regards to payment that is tied to the differences in nature between salvage and wreck removal is, furthermore, that the salvage reward will be tied to the property that has been saved. It is this property that makes up the fund from which the salvage reward is to be paid. Consequently, if no property has been saved there will be no salvage reward and thus no potential claim in relation to the owner of the ship or some other property. In a wreck removal situation, however, compensation is instead based on contract and will be paid by the relevant party under that contract without any link or connection to the value of the property at hand unless the contract, for some reason, should state so. Phrased differently, the contracting party is liable to pay according to the contractual terms.

13.1.3 Contextual Impact

The context in which an incident occurs can also affect whether salvage or wreck removal will be relevant and the choice of action. This can refer to the specifics of the case, e.g. the dangers involved and how likely the salvor thinks a salvage reward can be acquired, but also to the negotiation position between the parties involved.

In the immediate aftermath of an incident, the primary focus is to save lives. This is also an obligation that is present regardless of any salvage attempt. A salvor in the vicinity of an incident has a duty to render assistance in order to save lives.[1340] When this phase has passed, however, the situation changes. The salvor has no duty or obligation to save property and will evaluate the situation in order to assess how likely it is that a salvage reward can be gained. In a scenario where

[1340] Art. 10.1 Salvage Convention.

there is a low risk or no risk at all that the ship sinks, a salvor may take immediate action in relation to the ship and relevant property in order to gain such a reward. If the situation is more precarious, however, the salvor may be more hesitant and might insist on certain security arrangements in order to e.g. secure suitable payment for actions taken even if the ship sinks and there is no preservation of property. One such choice could be to insist on an LOF with SCOPIC in order to assure some compensation in relation to actions that are to be taken in order to prevent damage to the environment.[1341]

13.1.4 Salvage Transforms Into Wreck Removal

It follows from the tentative discussion above that the boundary between salvage and wreck removal is not always obvious. When a sinking or stranding is taking place, events can unfold rapidly and it may be difficult to assess the situation at the time. It may only be afterwards that it is possible to determine when there was no longer any possibility of success or a useful result and thus the possibility of a salvage reward. In many situations there may, as discussed, be an initial salvage operation targeted at certain property, after which a more long-term wreck removal operation will commence. This means that in some cases salvage services will be followed by actions of wreck removal. Another variation is that salvage services are rendered by a salvor that after a while realises that the risks involved are not reasonable in relation to a possible reward or that, in fact, all hopes are out for preserving anything from the wreck. In these scenarios the salvage may transform into wreck removal. In some cases a transformation may not be needed at all. Should a vessel rapidly sink and there are no prospects for saving the vessel, its cargo or bunkers, no salvage attempt is likely to be instigated. Instead, a potential wreck removal operation will be the first stage in this scenario.[1342]

[1341] Cf. Gaskell and Forrest, *The Law of Wreck*, p. 568.
[1342] Cf. ibid., p. 595.

13.2 Salvage of Wrecks

Another area of interest concerning salvage law and wrecks is the possibility to salvage wrecks and how salvage law relates to the different kinds of wrecks classified in this study. A main distinction can be made between modern and non-protected wrecks, on one side, and historical wrecks on the other.

13.2.1 Modern and Non-Protected Wrecks

As discussed, situations that involve ships that may end up as wrecks will often include aspects of salvage. In that sense, there is a clear connection between maritime casualties and salvage. Another question is, however, how salvage relates to ships that have turned into wrecks and especially ships that have sunk. One view is that salvage law is applicable to such wrecks as well. It is, however, important to note that the Salvage Convention itself does not explicitly deal with wrecks. There is no definition or even mention of the concept in the convention text. On the other hand, it does not exclude wrecks as potentially covered by the convention either.[1343]

The above is, arguably, unproblematic in relation to modern wrecks. It would be hard to support a position where the saving of property from such wrecks would not enable a salvage claim when such a claim would have been possible should the vessel still have been afloat.[1344] The owner of the property saved is, after all, put in the same position after such a result. Arguably, the same is true in relation to non-protected wrecks provided that there are owners that benefit from such actions because of the same reason. The question, however, becomes more difficult in relation to historical wrecks as discussed below.

[1343] See Rose, *Kennedy and Rose on the Law of Salvage*, s. 4-064–4-066, p. 107, where it is also noted that the Salvage convention "is generally inclusive" and that English law has historically viewed wrecks as being potential subjects of salvage. See also Gaskell and Forrest, *The Law of Wreck*, p. 158 f.
[1344] Cf. ibid., p. 158.

13.2.2 Historical Wrecks

Historical wrecks differ from modern and non-protected wrecks since there are additional interests to take into account based on e.g. archaeological or historical values. In this sense, the state can have interests in relation to a wreck for historical and cultural reasons. It may also be difficult to determine ownership claims in relation to historical wrecks.[1345] These added interests and potential conflicts make it more difficult to assess how historical wrecks relate to salvage law and to answer the question if it is possible to salvage a historical wreck.

The Salvage Convention allows for a state party to reserve its right to not apply the provisions of the convention when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed.[1346] This could be construed as meaning that the default position under the convention therefore is that its provisions are applicable in relation to historical wrecks. In English law, moreover, wrecks have generally been regarded as subjects of salvage and since the convention does not explicitly exclude wrecks, the convention can become relevant in relation to modern, non-protected and, potentially, historical wrecks. In English law there, furthermore, has to be property in danger in order for salvage law to become applicable. Sunken property can and has been viewed as being in danger.[1347] This is, however, a position that can be debated. An argument could be that the danger in fact has passed since the property has already sunk. Another way of looking at it, however, is that property that has sunk is still in danger as a consequence of the fact that the owner cannot access it at his or her will.[1348]

In the Nordic maritime codes, the prerequisite for danger is also present. Salvage, however, also becomes relevant in relation to actions taken to a ship that has suffered an accident. The concepts of accident

[1345] Cf. ibid., p. 159.
[1346] Art. 30.1.d Salvage Convention 1989.
[1347] Cf. Rose, *Kennedy and Rose on the Law of Salvage*, s. 4-066, p. 107.
[1348] Cf. Gaskell and Forrest, *The Law of Wreck*, p. 159.

and danger are thus included as separate grounds in the regulations.[1349] The scope of application could thus be described as extended in these systems. Consequently, in the Finnish case ND 2005 p. 67, the Court of Appeal held that the corresponding provisions on salvage in the Finnish Maritime Code were applicable on the historical wreck Vrouw Maria and stated explicitly that property that has suffered an accident and that is not in danger also falls under the application of the provisions. Thus, the court held that the term salvage was not to be construed as solely dealing with "saving something from danger". Finnish law thus applies the law of salvage on historical wrecks as well. The same approach has been suggested to be valid from a Swedish perspective as well.[1350]

Under Swedish law, the case ND 2003 p. 54 may, however, lead to a different conclusion. The case was a forum issue and concerned a contract on the raising or salvage[1351] of property from the wreck JÖNKÖPING, a vessel that was torpedoed and sunk by a German submarine in 1916. The issue in the case was which forum that was the correct one for a dispute between the parties of the contract. One of the parties claimed that the issue dealt with salvage regulated in the Swedish Maritime Code and that, consequently, a specific maritime court[1352] in Stockholm was the right forum for the dispute in line with the regulation. The Court of Appeal, however, ruled that the contract at hand had been entered into by the parties in order to raise or salvage[1353] the wreck and that "[t]he current dispute does not seem to concern salvage of the kind envisaged in Chapter 16 of the Swedish Maritime Code". Instead, the court found that the contract was based on an application of general rules of contract. Thus, the maritime court in Stockholm was not the right forum for the case.

The case is interesting, since it is possible to construe it as stating that the salvage of older wrecks will not fall under the implemented

[1349] See e.g. Chapter 16 § 1 the first period Swedish Maritime Code.
[1350] Cf. Tiberg, "Vem äger vrak och gods?", p. 972 f.
[1351] Sw. *bärgning*.
[1352] Sw. *sjörättsdomstol*.
[1353] Sw. *bärgning*.

provisions of the salvage convention. Given the phrasing in the case, it is possible to construe the outcome as either depending on the fact that the parties had entered into a contract on the salvage or, alternatively, that it concerned an older wreck. It is, however, possible to question the logic and phrasing of the decision if the former rationale is the correct one, since salvage operations, although capable of being non-contractual in nature, often are contractual and could still be subject to salvage law. It is, consequently, hard to see why the court would reach the conclusion that the implemented salvage provisions were not applicable as a result of a contract being made between the parties on the salvage. This leaves the possibility that the court decided that salvage was not relevant since the wreck in question had been sunk at a much earlier stage, i.e. in 1916. Such a conclusion could suggest that salvage in Swedish law would not encompass older wrecks.

There is, however, no clear phrasing to this effect in the case and the above reasoning is based on a number of presumtions. In light of this and given the brief line of reasoning in ND 2003 p. 54, the fact that the case was not primarily focused on the issue of salvage law and since it is from the Court of Appeal, it is hard to draw any conclusions from the case as to the possible applicability of the implemented provisions on salvage on historical wrecks in Swedish law. The question thus remains open as, indeed, many others questions remain open relating to salvage and wrecks as, hopefully, evidenced by this chapter.

Conclusions

Chapter 14

Conclusions and Concluding Remarks

This final chapter sums up the different parts and research questions in order to draw conclusions. There are also some suggestions for future inquiry in this field of law.

14.1 Introductory Research Questions

Two introductory research questions have formed and delineated the subject matter and structure of the study. The first question relates to the interests and conflicts that are involved in relation to wrecks and wreck removal, while the latter concerns how wrecks functionally can be classified.

14.1.1 Involved Interests and Conflicts

Several different potential interests and conflicts, in relation to wrecks and wreck removal, have been identified in the study. These can be divided into a number of general categories. Several examples show that wrecks can pose a hazard to the navigation of other vessels. One group of wrecks is thus wrecks that pose navigational hazards. There are, furthermore, various examples of wrecks that have posed hazards to the

environment. Another group is thus wrecks that pose environmental hazards. Wrecks can also in themselves be dangerous, e.g. because of their content, resulting in that dangerous wrecks is another category of wrecks that can be identified.

Wrecks may also be in need of protection for various reasons. This might be caused by the fact that the wreck contains items that are of interest from an archaeological, historical or cultural point of view. Another reason for protection can be that the wreck is to be regarded as a gravesite that should be protected from unauthorised diving or similar activities.

The study has also shown that there are various different interests that can become relevant in respect of a wreck. The owner of the ship, cargo or some other property on board the wreck may have an interests in relation to it, but also other parties like the state, in whose territory the wreck is located, may have an interest in the wreck along with other external potential stakeholders. Another important recognition, in this respect, is that there can also be missing interests in relation to a wreck in the sense that certain parties are not present. Thus, the wreck may have no owner or the owner may be unknown.

The mentioned interests can also be affected by the nature of the wreck in question. A main distinction can be made in this context between state wrecks, i.e. wrecks belonging to the state or where the state has a decisive influence, and non-state wrecks that are not of this kind. Also this distinction may affect which interests that are relevant in a certain case.

Another important dimension is the age of the wreck. Time is thus an important factor to take into account when assessing interests and conflicts in relation to wrecks and wreck removal. In this sense, a situation involving an old historical wreck can be very different from a case involving a modern chemical tanker. A general division can be made between historical wrecks and modern wrecks. In between, there are also wrecks that are not treated as historical, by the relevant regulations that protect such wrecks, while at the same time not being modern. This category of wrecks, situated between these positions, has

been referred to in the study as non-protected wrecks.

The above mentioned hazards and the identified cases of protection along with the various interests that may be directed in relation to a wreck as well as the element of time, can lead to different problems and conflicts. These problems and conflicts may be subject to regulatory solutions. Large parts of the study concern how such regulatory solutions have been constructed in the studied legal systems and how they compare to one another.

14.1.2 Classification of Wrecks

The study has built on a classification based on the identified interests and conflicts. The classification centres around the proprietary interests that are relevant in relation to wrecks as well as the problems and conflicts that wrecks can cause.

As to the proprietary interests involved, the main division between state and non-state wrecks is important. The proprietary interests will vary depending on the nature of the wreck in this sense. In relation to state wrecks, the state may claim or recognize a wreck as a state object. In other cases, the opposite may be true, i.e. a state that does not claim or recognize a wreck. Additionally, there may also be situations where the state in question, for some reason, does not exist any longer. When it comes to non-state wrecks, slightly different distinctions can be made. Such a wreck may have a known owner, e.g. a registered owner of a modern wreck. The owner may, however, also be unknown. As a third and final variation, the owner of a non-state wreck may also no longer exist. These different categories, in light of the proprietary interests involved, are covered to various extents in the studied regulations as discussed throughout the study.

When it comes to the problems that wrecks can create, the study has identified four major categories of wrecks in this sense. Wrecks may pose navigational hazards. They may also pose environmental hazards or be dangerous in themselves. Finally, wrecks may also contain human remains that may impact on how they can be handled and approached.

These identified problems can be relevant for all wrecks to various extents. This means that the problems may be relevant in relation to all the different categories of wrecks relating to proprietary interests. In this way, both spheres can be combined resulting in multiple combinations.

As an additional factor in classifying these different wrecks, it is also important to take time into consideration. The study has used the division between historical, non-protected and modern wrecks in order to illustrate this dimension. The wrecks that have been identified in relation to the relevant proprietary interests and problems can thus also be related to time in this way, creating additional combinations of wrecks.

This classification of wrecks can be functionally related to the four main identified problem areas, i.e. wrecks that pose navigational and environmental hazards as well as wrecks that are dangerous and contain human remains. To these, a further category can be added in the form av historical wrecks in need of protection. In this way, the identified problems that state and non-state wrecks can pose can be divided into two main fields consisting of hazards and protection. This has formed the structure of the study.

The classification model can also be functionally related to time. Historical, non-protected and modern wrecks can all constitute hazards in accordance with the classification, although to different extents depending on the situation at hand. It is more likely that modern wrecks and, to a certain extent, non-protected wrecks will pose hazards to the environment. Because of their age, it is less likely that historical wrecks will pose such hazards. When it comes to navigational hazards, moreover, it is, most likely, modern wrecks that will pose a problem in practice since these are the vessels that operate on the oceans today. There can, however, also be instances where also non-protected wrecks or even historical wrecks can pose such problems. In relation to the field of protection, the definition used when classifying wrecks in relation to time entails that protection because of age is directed towards historical wrecks. It should, however, be noted that the other categories

in relation to time will also fall into the field of protection should they be either dangerous or contain human remains as discussed above.

The functional division of the problem area, both in relation to problems and time, also has to be viewed against the backdrop of the proprietary interests. Thus for each non-state wreck, it is crucial to identify if there is a known owner, if the owner is unknown or if the wreck has no owner. Likewise, in relation to state wrecks, the situation will vary depending on whether the wreck is claimed or recognized by a state or if the state no longer exists.

14.2 History and Concept

The third and fourth chapter discussed the historical background to this field of law as well as the general concept of wreck. The purpose of these chapters was to delineate a context as a backdrop for the ensuing parts of the study.

14.2.1 Historical Regulations

The discussion in chapter three showed that water and the oceans were of great significance in antiquity not least due to the importance of oversea trade and transportation. This also caused this area of law to be developed at an early stage. Both the Greeks and Romans developed advanced regulations of this kind and the same was likely true for others in the region like the Rhodians even though there are few remnants of this today.

The study has discussed various regulations from antiquity relating, in one way or another, to wrecks and wreck removal. In the Rhodian law, probably in force around 800 BCE, the surviving principle of jettison is the main inclusion that has an indirect functional link to situations involving shipwrecks. It is possible, and perhaps even likely, that there also were other aspects dealing with wrecks and wreck removal in the Rhodian law, but since the law of jettison is the only part of it that has survived this cannot be ascertained. In Roman law there were various

elements relating to shipwrecks. It regulated jettison, incorporating the already mentioned regulation from the Rhodian law with some added variation, but it also included elements of salvage law and transmarine loans, the latter drawing on a Greek tradition. Shipwrecks played an important role in these cases, since such events would trigger various consequences in respect of these regulations. There were also provisions in Roman law specifically relating to shipwrecks. These included e.g. prohibitions on unlawfully acquiring property from a shipwreck or storming a ship in order to do so.

During the Middle Ages, there were various regulations concerning wrecks and wreck removal. The study has studied the Rolls of Oleron, the Wisby Town-Law on Shipping and the Gotland or Wisby Sea-Law in order to illustrate how these issues were regulated.

The Rolls of Oleron was one of the most influential regulations from this time. It included provisions on the role of the master and the master's potential liability should the ship and the cargo be lost e.g. because of a shipwreck. There were also provisions on how mariners should act in the wake of a shipwreck, stating that as much as possible was to be saved from the ship. If the mariners acted in line with the regulation, they were to be compensated and repatriated, but if they failed to act in this way, they lost their wages and the master had no further obligations in relation to them.

Jettison was also regulated in the Rolls of Oleron in a similar way as in Roman law. The concept was, however, also further developed in certain respects e.g. concerning how sacrifices were to be made as well as the evaluation of jettisoned property. Other instances that jettison also covered were if it was necessary to cut the ship's mast in order to save the ship and cargo, if cables had to be cut or if anchors needed to be abandoned in order to save the ship and cargo.

Another area that was regulated in the Rolls of Oleron was collisions. The provisions on this concerned how incurred damages were to be valued and remunerated between the involved parties. The general position was that the vessels were to share the costs involved. This was meant as an incentive to avoid anyone from willingly placing a ship

in a position where a collision was likely to occur. The regulation also included provisions on potential collisions in harbours where ships were anchored close together. A master that did not raise the ship's anchor in order to avoid a collision could be held liable.

The second studied regulation from the Middle Ages is the Wisby Town-Law on Shipping that was applicable in Wisby on the Swedish island of Gotland. Also this framework included regulations on how the mariners on board a ship were to act in the wake of a shipwreck. Any freighters on board were to have the same possibility as the master to save themselves and their goods. The mariners, furthermore, were obliged to help save the ship and cargo and to not separate themselves from the master. Also the payable freight following a shipwreck was regulated. Full freight was to be paid for saved goods and, curiously enough, half of the freight was to be paid even if the goods were lost. This seems to be the only regulation from this period where this master or ship owner-friendly position was held.

Jettison was also regulated in the Wisby Town-Law and in a slightly different way when compared to the Rolls of Oleron. When sacrificing cargo, low valued goods were to be sacrificed first. There were also provisions on evaluation of the property and how a sacrifice was to be decided. In contrast with the Rolls of Oleron, the Town-Law of Wisby did not allow for the master to overrule a decision of the majority not to sacrifice. Instead, the majority decision was decisive, echoing the early Scandinavian approach of shipping ventures where all stakeholders held an equal share of the enterprise. The regulation also covered the cutting of the ship's mast as well as cables and the abandonment of anchors, although in different ways when compared to the Rolls of Oleron making the master responsible in general for such actions, which was a position also in line with the default approach to these matters in Scandinavian law.

There were also specific provisions concerning shipwrecks in the Town-Law of Wisby. The system identified wrecks as potential obstacles in the harbour of Wisby and thus included provisions aimed at securing a removal of such property. A person responsible for such a ship had a

duty to remove it and became liable if the necessary actions were not taken.

Other areas that were regulated in the Wisby Town-Law were different aspects of salvage and findings of wreck. If a person saved goods from a ship, a salvage remuneration was paid as decided by a certain group or entity in the city and this issue could also be tried in court. The regulation based the compensation to the finder on the geographical location of the find. This resulted in higher levels of compensation if the find was hard to reach, while lower levels of compensation were awarded for finds that were on the shore or close to the shore.

The third and final regulation studied from the Middle Ages was the Gotland or Wisby Sea-Law. This regulation follows the Rolls of Olreon closely when it comes to the position of the master and mariners on board the ship as well as jettison with some minor modifications.

14.2.2 To Trace Concepts or Identified Problems

From the conclusions that can be drawn from the first research question, it is clear that the studied historical regulations identified similar problems and conflicts. In some cases it is also possible to trace concepts from one regulation to another. The most obvious example is the principle of jettison that is found in all the studied legal systems in one way or another. In this way, the regulation in the Rhodian law was incorporated into Roman law where it was further modified as discussed. These solutions were further developed and differentiated as seen in the studied regulations from the Middle Ages. The underlying rationale of jettison was kept in the regulations, but the discussion suggests that the context and idiosyncrasies of the different legal systems caused alterations and modifications as to how the issue was regulated.

Another example of a concept and regulation that can be traced from one system to another is the use of transmarine loans in Roman law that was based on a solution used earlier in Greece. Also the view of wrecks as obstacles is a problem that was identified in both Roman law and the Town-Law of Wisby although in different ways.

14.2.3 Common Grounds

The discussion in the study suggests that there are various common grounds that can be distinguished between the studied legal systems in this section. The identified rationale behind jettison is a common ground that, as discussed, has resulted in different regulations sharing the purpose of compensating a party that has made a sacrifice in order to save a ship and cargo. The same is true for the other discussed regulations concerning the roles of the master and mariners in the relevant systems as well as the rules on collisions.

Another common ground concerns the issue of wreckers and wrecking. The comprehensive looting that took place in the wake of shipwrecks seems to have triggered regulations on this issue in various systems. This behaviour was prohibited in both Roman law as well as in some of the Medieval codes. The basic principle in these regulations was to forbid these activities, while at the same time enabling some sort of reward for persons who rescued property.

A third and final common ground concerns salvage and wrecks that were found. These two areas often converged since the master and crew often perished with the ship. Salvage could be carried out with an awarded payment in line with the value of the saved property. Another solution was to base the salvage reward on the geographical position of the wreck or find. In this sense, higher compensation was given for more remote wrecks and finds and vice versa. These solutions are found in several of the studied legal systems in this context.

It is clear that the studied regulations concern conflicts and problems that are similar or the same. This does not, however, necessarily mean that they are in fact derived from one another. It could also be the case that the contexts in which the regulations were formed meant that these problems and conflicts had to be regulated and that similar solutions were chosen. In some cases, however, as with the Rolls of Oleron and the Gotland Sea-Law, it is obvious that the rules share a common ground, since they, more or less, share the same wording in certain cases. The same is true for the connection between the Rhodian

law and Roman law when it comes to jettison.

14.2.4 Definitions and Constructions of Wreck as a Legal Concept and Common Denominators

The study has discussed the notion of wreck as a legal concept from an English and a Nordic perspective in order to answer the research questions relating to the notion of wreck as a legal concept.

The term wreck, as a legal concept, can mean and denote different things and its construction varies between the two studied perspectives and its meaning can also vary depending on context. English law has an approach to the term which can be described as identifying and delineating between different subsets or subcategories that fall within the concept. In this way, the concepts of wreck of the sea, flotsam, jetsam and ligan or lagan as well as derelict are relevant in order to establish how to view wreck as a legal concept in English law.

The position in English law in relation to the concept of wreck has also changed throughout history, affecting which parties that have better rights to items identified as wrecks. Thus, in early times the Crown had right to property that was shipwrecked. This was later modified in the sense that the Crown only had right to unclaimed property of this kind. In an additional shift, this was further changed to the Crown only having right to unclaimed property of this kind that had been cast upon the land by the sea. This also illustrates a main distinction between property cast upon the land and property that was still afloat. The former was referred to as *wreccum maris*, while the latter was referred to as *adventurae maris*. The property that was still afloat was further distinguished by the concepts of flotsam, jetsam, lagan and derelict. Flotsam refers to goods that have been on board a ship that has perished and that subsequently float on the sea. Jetsam refers to goods that have been thrown overboard in order to save a ship. Lagan refers to goods that have been thrown overboard and that have been marked in some sense in order for the mariners to come back and collect them. It can also be described in the same way as jetsam with the difference that the

property has been marked, e.g. by a buoy. Derelict, finally, refers to property that has been abandoned.

The current legislative approach to the concept of wreck in English law is found in the Merchant Shipping Act 1995. The distinctions between flotsam, jetsam, lagan and derelict are kept in the legislation as a way of interpreting the concept of wreck in the sense that wreck is to include these concepts but potentially also other kinds of property. The meaning of wreck has also been extended to encompass both *wreccum maris* and *adventurae maris*. In this sense, both property still afloat and property cast ashore will be regarded as wreck under the current stance in English law.

The Nordic approach, to the concept of wreck, differs considerably from the English position. It is hard to trace the development through time and the approach does not differentiate between different subsets or subcategories like the English system. Instead, a common denominator in the Nordic systems is that there is a lack of definition when it comes to the concept of wreck. A shared characteristic of wrecks in the Nordic approach, however, is that the wreck is, in some sense, a consequence of a destructive event. Another way to phrase this is that a wreck is the end process of a vessel or ship that has been destroyed. In this sense, should a vessel lose its fundamental characteristics, it can be viewed as a wreck. Likewise, if a vessel is damaged in such a way that it is impossible to repair, it could also be viewed as a wreck. The construction of wreck can also be linked to the possibility of salvage. This has been held to be the case from an insurance perspective in the Nordic approach, but the reasoning in this particular case can be criticised from several perspectives. Another common denominator is to view the wreck as the result of a transformation. Something happens to a vessel or a ship that transforms it into a wreck or the ship or vessel becomes a wreck because of these actions.

If follows from the discussion that the approaches to the concept of wreck differ substantially between English law and the Nordic systems. The latter can be described as, more or less, restrictive and vague, while the English approach is more open and well defined. The implementa-

tion of the WRC in the legal systems has, however, resulted in common denominators in relation to modern non-state wrecks. For these wrecks, falling under the scope of the implemented provisions, the extensive definition in the WRC will be applicable. Arguably, this does not, however, mean that the construction in the WRC is extended to the other areas of law in the systems given the fact that the definition in the convention is designed to fit for the purposes of the convention. Even though there now are common denominators between the approaches, there thus still remain differences.

14.2.5 Relation Between Wreck and Ship or Vessel

The concept of wreck relates to the definition of a ship or vessel in different ways. In some cases, the connection between a wreck and a ship or vessel is obvious, e.g. in the sense that a sunken wreck was once a ship. Other kinds of property that also fall under the definition of wreck in different circumstances, e.g. floating or abandoned cargo, may be less obviously tied to a ship or vessel. It can, however, be viewed as functionally bound to a vessel or ship in the sense that the property originally belonged to it or was transported by it before the actions took place that turned the property into a wreck. This view is closely in line with the approach of construing the concept of wreck as the result of a transformation. Something has happened to a ship or a vessel that has caused it to transform into a wreck.

The relation between the definitions and constructions of what a wreck is and the concept of ship or vessel can be viewed as a binary one. This way of approaching the issue means that a given property is either a wreck or a ship or a vessel. There is thus no middle ground and no possibility of the property being both a wreck and a ship or a vessel at the same time. This approach is connected with the view of a ship or vessel transforming into a wreck. An alternative approach could, however, be not to take this binary stance. The question of whether certain property is to be considered as a wreck could be functionally dependent on the situation at hand. This would allow for a given prop-

erty to be viewed as either a ship or a vessel or as a wreck depending on the present issue. This would be in line with the general functionalistic approach to property and private law in the Nordic legal systems.

14.3 Hazards

14.3.1 Wrecks as Navigational Hazards

The study has showed that the way that the studied legal systems have handled wrecks that pose navigational hazards can be divided into different dimensions. These correspond to the purpose and function of a particular regulation, the wrecks that are covered by it and its scope of application. Furthermore, other dimensions are how responsibility and removal are regulated as well as issues concerning liability and compensation.

The purpose or function of a regulation aimed at handling wrecks that pose navigational hazards is generally to mitigate this particular danger. This can be carried out in various ways and it may be the case that it is not necessary to remove a wreck in its entirety in order to remove the navigational hazard. Instead, it may suffice to remove some parts of the wreck. Another purpose or function can be to ensure compensation in relation to someone who has taken action in relation to a wreck that poses a navigational hazard.

When it comes to the wrecks that are encompassed by a regulation, there are several possible approaches. The chosen approach can impact on how many of the identified categories of wrecks that fall under the regulation. A regulation can focus on the presumption that there is an owner or some other person that is responsible for a given situation. A problem in relation to such an approach, however, is that wrecks that have no owner or where the owner is unknown may fall outside of the regulated area. Another possible approach is therefore to have a broader or more general stance, where more wrecks are encompassed. A way of structuring this is to give a broad mandate to the state or the responsible authority to unequivocally take action in relation to these

wrecks also in cases where there is no owner.

Among the legal systems studied here, the Swedish and Finnish systems have regulations that are focused on an accountable party and thus are examples of regulations that, in some sense, suppose that there is an owner or some other accountable party. In particular English law, but also Danish and Norwegian law are, on the other hand, examples of systems that have less focus on an accountable subject and that are thus more general in the sense described above.

When it comes to the scope of application of a regulation, it may be extensive in the sense that it has a wide scope of application. Another possibility is a more fragmentary system, where there are regulations with more narrow scopes of application. Danish, Norwegian and English law are examples of systems that can be classified as extensive in regards to their scope of application in this way. Among these, the English system stands out in the sense that it includes different regulations that by themselves have more narrow scopes of application. Taken together, however, they coalesce into an extensive system. Finnish and Swedish law, on the other hand, can be viewed as fragmentary systems.

Central to the issue of wrecks that pose navigational hazards are questions of responsibility and how such wrecks can be removed. The study distinguishes between elaborate, mixed, innovative and direct systems in this respect. Norwegian law is an elaborated system in the sense that it enables far-reaching possibilities to act. These are, however, also balanced in the regulation by the use of assessments of reasonableness and proportionality. This has resulted in a system that is comprehensible and that includes functional checks and balances. The Swedish and Finnish systems are examples of mixed systems, in this respect, in the sense that they partly contain elaborate regulations in certain areas, but lack a similar approach in other areas. The Danish system is an example of an innovative system because of its special handling of these issues, including the notion of a required space between the wreck and the surface of the water in order to guarantee that the wreck does not pose a hazard of this kind as well as a legislated demand for an active dialogue between the authorities and the responsible party. English

law is, finally, an example of a direct system in the sense that clear mandates are given to the relevant authorities to take various action in relation to wrecks that pose navigational hazards. When compared to the other systems, where a balance between the involved parties are often manifested in the regulations, English law is more direct without such clear manifestations. This taken together with the wide mandate to take possession of a wreck, to raise, remove or destroy it or any other property that is an obstruction or danger to navigation makes it a direct system.

The available actions in relation to wrecks that pose navigational hazards may vary between systems. One way to structure a regulation is to notify or order an accountable person to remove a wreck that poses a navigational hazard. This can be combined with a deadline within which the wreck must be removed. Such a regulation can be further strengthened by allowing for the state, e.g. in the form of a relevant authority, to have the wreck removed should such a notification or order not be fulfilled at the expense of the responsible party. To make sure that actions can be taken in acute situations, a regulation may also include possibilities to intervene or take direct action in relation to a wreck by the state regardless of how the responsible party has acted in severe cases. Other actions may include locating and marking a wreck as well as communicating its existence in various ways.

In relation to liability and compensation, a distinction has been made between two different dimensions in the legal systems. The first encompasses systems where liability is established in relation to an accountable person that can be claimed by e.g. an authority that has taken action in respect of a wreck. The second, moreover, allows for the state to sell or have the wreck sold and then to recuperate any incurred losses from the proceeds of the sale. A slightly less comprehensive variation is to allow the state to seize or arrest the vessel and then hold on to it as a security for its claims on the accountable party.

Another issue concerns the order in which actions are to be taken and which party that is to act first. A system may state that an accountable person is to first take action and that the state can only intervene

upon proven failure to act in accordance with the regulation. Another variation, however, is to allow the state to take immediate action if this is necessary and also to grant the state the possibility to claim compensation from the accountable person for any arising costs associated with such an action. A further aspect relates to the time that is given to the accountable person to act in accordance with the regulation before allowing the state to intervene. This period of time can be long or short depending on how the system weighs the interests of the accountable person and the state in this regard.

14.3.2 Wrecks as Environmental Hazards

The way in which wrecks that pose environmental hazards can be handled can be broken down into different dimensions. These relate to the purpose and function of a regulation, the wrecks that are covered, the scope of application of the relevant regulation as well as the issue of determining who is responsible for a wreck. Furthermore, central aspects of a regulation concern the actions that can be taken in relation to wrecks that pose environmental hazards as well as the issue of liability and compensation.

When it comes to purpose and function, there are several common denominators between the legal systems when it comes to wrecks that pose environmental hazards. All the regulations, in some way, relate to the underlying purpose or function of making some person or party responsible in a situation where a wreck poses a hazard to the environment. One main purpose is, in this way, to handle the issue of pollution. This main purpose is, however, approached in somewhat different ways in the studied regulations. Some systems are accident oriented, in the sense that they centre around provisions that are applicable in relation to accidents of different kinds. There are examples of this approach in both English and Swedish law. Another variation is to build a regulation on a specific purpose of protecting the environment. These regulations are often of a more general nature, as evidenced by the various acts on pollution in the legal systems. Furthermore, another approach is to

focus a regulation on managing waste of different kinds and to include wrecks in this concept. There are examples of such regulations in both Norwegian and Finnish law. Finally, a regulation can also be more narrow and precise in the sense of focusing on ship source pollution. There are regulations in both Swedish and Finnish law where this approach is taken.

When it comes to the wrecks that are covered in the studied regulations, one main distinction can be made between regulations that directly concern wrecks and regulations where wrecks are regulated indirectly. Of the studied systems, the different implementations of the WRC are examples of the former category, i.e. a regulation directly aimed at wrecks that pose environmental hazards. The other regulations are examples of structures where wrecks are indirectly regulated in the sense that they fall under regulations that are more general. There are variations of this approach in all the studied legal systems.

The scope of application of different regulations can relate to the particular environmental hazard that a wreck poses. In this way, one way of regulating the scope is to heavily focus the regulation on oil pollution. Solutions in Swedish law are examples of this approach. Another, more general approach is to focus the regulation on pollution in general without a sole focus on oil pollution. There are variations in both Danish and Finnish law to this extent. An even broader approach is found in English law that can be referred to as an extensive system, in this respect, as a consequence of being applicable as soon as there has been an accident that has created a risk to safety or risk of pollution by a hazardous substance and a direction is necessary to remove or reduce the risk. These different ways of structuring a regulation can impact on the possibility to take preventive action in relation to a hazardous wreck. A final approach to this issue is to relate a regulation to situations where the ship or wreck itself is the danger in contrast with e.g. oil or any other hazardous substance onboard. Regulations that focus on wrecks as wastes that amount to environmental hazards are examples of this.

When it comes to responsible parties in a regulation, it can be centralized in the sense that the power to take action can be channelled to

one clear authority. This is the case in English law, but there are also similar solutions in both Danish and Finnish law. Another approach is to have a mixed system, where several dimensions can be taken into account e.g. both national and regional interests. In this way, the responsibility can be divided on different levels depending on the severity of the situation. A final variation and approach is to have a decentralized system with a more fragmented regulation as to the responsible parties involved. Swedish law is an example of this approach.

The actions that are possible to take in relation to wrecks that pose environmental hazards vary between regulations. One way to structure a regulation in this sense, is to build it on orders that can be directed in a given situation. An opposite way would be to not link the regulation to orders of this kind. There are regulations in Swedish, Finnish and Danish law that do not operate based on orders given to a responsible party. English law, on the other hand, focuses on giving orders and directions to a responsible party. In some cases it is also possible to intervene directly if this is motivated. There are also variations of this approach in Swedish, Norwegian and Finnish law.

Liability provisions can be formed in different ways. One approach is to simply not include any liability provisions. There are examples in both Finnish and Swedish law where regulations on wrecks that pose environmental hazards do not include any provisions on liability. There are, however, also more elaborate systems when it comes to liability. English law is an example of this. It includes different possibilities of compensation in various cases. There are also other structures that do not go as far but that also include liability provisions. This is evidenced in Swedish, Norwegian and Danish regulations. A final, somewhat different, approach is to infer liability on a person that no longer suffers negative consequences as a result of wreck. This perhaps unintuitive solution can be motivated by the fact that potential actions that have been taken in order to remove the wreck have been taken in this person's interest.

14.4 Protection

14.4.1 Dangerous Wrecks

The question of how to deal with wrecks that are in themselves dangerous can be broken down into different dimensions. These relate to values and interests that are protected by regulations of this kind, the wrecks that are covered by such regulations and their scope of application. Furthermore, the ways in which dangerous wrecks can be handled is an important dimension along with the possibility to enforce a regulation.

The protected values and interests behind regulations that deal with dangerous wrecks can vary. One main distinction can be made between regulations that specifically target dangerous wrecks and those that cover them only indirectly. It is in the former category that values and interests are found and they relate to the nature of the dangerous wrecks in question. Thus, the specific part of the Protection of Wrecks Act 1973 in English law has a clearly stated purpose, in this sense, by offering protection to wrecks that ought to be protected from unauthorised interference since they are dangerous to life and property. Other regulations may be more general in nature. These may cover dangerous wrecks, but will not have a designated purpose to solely handle such wrecks. There are examples of this kind of regulation in Swedish law where no specific value or interest is expressed.

When it comes to the wrecks that fall under the regulations, there are two main scenarios involving dangerous wrecks that have effect on this. Firstly, a wreck may already be present that is dangerous. Secondly, a ship or property may be a potential wreck in the sense that there is a risk that the ship or property turns into a dangerous wreck. The Protection of Wrecks Act 1973 is an example of the former approach, i.e. a regulation targeted at already existing wrecks. The Dangerous Vessels Act 1985, however, also in English law, is an example of a regulation that covers potential wrecks. A more general approach, that encompasses both these scenarios, is found in the Ordinance on Sea or Maritime Traffic in Swedish law. That regulation can be applied

in order to prohibit access in relation to a wreck regardless of whether it has been present a long time or is the result of an accident.

The scope of application of different regulations can be either general or specific. A general regulation covers a large geographical area defined in some sense in the regulation. An example of this is the Protection of Wrecks Act 1973 that is applicable in relation to designated dangerous wrecks "lying wrecked in United Kingdom waters". A specific regulation has a more narrow scope of application targeted at specific places. The Dangerous Vessels Act 1985 is an example of this. The relevant provisions are, in this case, applicable in relation to vessels either about to enter into or already present in the areas of jurisdiction of harbour authorities.

The actions that can be taken in relation to dangerous wrecks can be aimed at making a wreck as such safe, but can also focus on restricting access to the wreck in different ways. One approach is to prohibit access to a dangerous wreck. In this sense, an area can be identified that is forbidden to enter or where it is not allowed to take certain actions. There are examples of this solution in both English and Swedish law. Another approach is to issue orders in relation to a vessel in order to prohibit it from entering a specific area. An example of this is the Dangerous Vessels Act 1985 in English law, where a harbour master can prohibit a vessel from entering the jurisdiction of a specific harbour authority. A final approach is to provide indirect protection to a dangerous wreck. This effect can be reached by a more general regulation, like the English Marine and Coastal Access Act 2009, where a license is needed in order to remove any substance or object from the sea bed. This more general approach will thus have the indirect effect of also extending protection to dangerous wrecks, since a license is needed in order to approach also these objects in this case.

When it finally comes to the issue of enforcement, a regulation may state that any contravention of the regulation will result in a fine or some other punishment. There are various examples of this in the studied regulations. In some cases, it may be relevant to provide potential defences that a person can raise in response to such an enforcement, e.g.

if reasonable precautions were taken in order to avoid committing any offence.

14.4.2 Wrecks Containing Human Remains

To investigate how wrecks that contain human remains can be handled, a division can be made between different dimensions. These relate to the values and interests that are protected by a regulation, the wrecks that are covered by it as well as its scope of application. Furthermore, the ways in which to protect these wrecks is an important dimension along with the possibility to enforce the protection in different ways.

When it comes to protected values and interests, these are in different ways combined with the underlying purpose of protecting human remains. This can be tied to human remains found on board military objects as in the Protection of Military Remains Act 1986 in English law. Another approach is to more specifically regulate in respect of a particular wreck. The international agreement and the different implementations concerning the wreck of MS Estonia are examples of this approach, where protection has been put in place with the purpose of protecting a specific wreck.

The wrecks that are covered in regulations on this topic can vary depending on approach. One way is to extend a protection to a certain category of wrecks. This is the effect of the regulation found in the Protection of Military Remains Act 1986. Since the act is applicable in relation to military objects it focuses solely on state wrecks. Another approach is to specifically target particular wrecks such as the protection in relation to MS Estonia.

The scope of application follows the same structure as described above. Thus, an approach can have a general scope of application in the sense that the regulation affects wrecks in a large geographical area. Once again, the Protection of Military Remains Act 1986 is an example of this. Another approach is to specifically target a defined area that is protected. This is the case with the different solutions when it comes to protecting MS Estonia in the legal systems where this is implemented.

When it comes to the ways in which these wrecks can be protected, the regulations in some sense are aimed at protecting the site in question. This can be structured in different ways. One way is to prevent certain actions in relation to the wreck. Thus, the Protection of Military Remains Act 1986 forbids anyone to tamper with, damage, move, remove or unearth any remains protected under the act. It is also forbidden to enter any hatch or other opening in any of the remains which enclose any part of the interior of an aircraft or vessel. In a similar way, the implementations concerning MS Estonia prohibit any diving or underwater activity in a specified area where the wreck is located with some limited exceptions, e.g. in relation to pollution from the wreck.

Protection in relation to wrecks that contain human remains can be enforced in different ways. One approach is to make any contravention an offence. A variation to this approach is, furthermore, to allow for some limited defences in certain cases. Examples of this are found in the Protection of Military Remains Act 1986. An example of the former is the different implementations in place concerning the protection of MS Estonia.

14.4.3 Wrecks of Historical Importance

To investigate how wrecks of historical importance can be handled, a division can be made between different dimensions. These relate to the values and interests that are protected by a regulation, the wrecks that are covered by it as well as its scope of application. Furthermore, the ways in which to protect these wrecks is an important dimension along with the possibilities of enforcing the protection in different ways.

When it comes to the values and interests behind a regulation, these can be aimed at enabling protection based on historical, archaeological or artistic importance. These values and interests are included in the Protection of Wrecks Act 1973 in English law. Likewise, the Ancient Monuments and Archaeological Areas Act 1979, in English law, has the purpose to investigate, preserve and record matters of archaeological or historical interest. The regulations found in the Nordic systems follow

a similar path, enabling protection in order to ensure that current and future generations can access these wrecks in different ways. This can be expressed in slightly different ways as evidenced by the different phrasings used in the regulations in the Nordic systems.

One main distinction can be made between regulations where the age of the wreck in question is decisive, as to whether the wreck is to be protected or not, and regulations that are not built around such time limits. English law stands out as an example of the latter approach. The Protection of Wrecks Act 1973 is not constrained to time limits in this way. Instead, it offers protection as a consequence of designation. The Nordic systems are, on the other hand, examples of regulations where time limits are used. The specific limits vary somewhat between the systems, but they share the common denominator that the age of the wreck or the time that has passed since the wreckage is a decisive factor for extending protection to the wreck in question. This time limit can either be set in the form of a specific date, as in the Swedish regulation, or in the form of a time limit as in the Danish and Finnish regulations.

When it comes to scope of application, a regulation can have a broad scope of application or, alternatively, offer protection in relation to specific wrecks. The regulations in the Nordic systems are examples of the former, while the English approach is an example of the latter where designations are needed in order for protection to be extended.

The ways in which to protect wrecks of historical importance follow the above distinction between general regulations and those where designation is necessary. In the regulations where designation is a requirement for protection, there will be a known area that is protected from unauthorised interference. In some cases, a license can be given in relation to someone who wants access to the site thus enabling access in some cases. The approaches that are not built on designation, share that the protection is general in the sense that the regulation can offer automatic protection for the wrecks that fall under the regulation. This protection can include prohibitions on interfering with the wreck, removing it and so on. Also in these cases it is possible to allow for certain exceptions should there be consent to take certain actions in

relation to the protected wreck.

A complimentary approach in these cases may also be to actively enable access to protected wrecks of this kind, e.g. in the form of organised diving or similar activities in connection with protected wrecks. This approach is in line with an underlying ambition of ensuring access to wrecks of historical importance. This can, however, also raise questions when it comes to wrecks of historical importance that also contain human remains. The issue of allowing access to the wreck must then also be balanced against a potential interest of protecting the wreck as a gravesite.

When it comes to enforcement of a protection, regulations may state that any contravention of a prohibition will constitute an offence. There can also be various defences available that may result in an action not being regarded as an offence. The issue of enforcement is, furthermore, affected by the way in which a regulation is constructed. In relation to the approach where designation is used, it will be well known which wrecks that are covered by a protection since these will be publicly available. This might be less clear in an approach where automatic protection is granted depending on age or time limit.

14.5 Private and Public Interests and Conflicts

14.5.1 Finding Wrecks

The study has compared the Nordic approach to regulating finds in relation to wrecks, as exemplified by the Swedish regulation, to the English approach. The Nordic approach differs from the English approach in certain cases, but they both share a common denominator in the sense that the finding of a wreck is to be made public in some way in order for a rightful claimant to claim the wreck. One difference between the approaches is that publication in the Nordic context is to be made by the police authority in a certain journal and publication, while it is the duty of the Receiver of Wreck in English law to keep a record where the find is described. When it comes to claiming a wreck,

the main difference is the deadlines in place. The default position in the Nordic approach, as illustrated by Swedish law, is much shorter than the default position under English law. This difference may impact on how the wreck can be handled e.g. in relation to storage.

Another common denominator between the approaches is that a rightful claimant may have to pay certain costs associated with the process in order to access the wreck. Both systems also allow for wrecks to be sold in certain cases, but the possibilities are more elaborate in the English system. One key difference is, furthermore, how unclaimed wrecks are handled. In the English approach, these wrecks belong to the Crown or any person entitled to unclaimed wrecks in a specific area from the Crown. In the Nordic approach, unclaimed wrecks will instead pass to the finder provided that any incurred costs are paid. Finally, both approaches regulate consequences should anyone not act in accordance with the regulations with some slight variations.

14.5.2 State Claims on Historical Wrecks

A main distinction can be made between English law and the Nordic systems when it comes to state claims in relation to historical wrecks. The main difference is that in the latter ones, the regulations in one way or another grant better right to the state by statute when it comes to historical wrecks. This can be regulated in slightly different ways, but the systems share this common denominator. English law differs in the sense that it enables protection without any proprietary mechanisms. Findings of historical wrecks will be handled in the same way as other finds and designated protection can be extended to such wrecks.

14.5.3 Abandoning Wrecks

There are a lot of uncertainties when it comes to the abandonment of wrecks. Such an abandonment can take many forms but can be divided into two main categories. The first category requires some sort of action or declaration in order for the wreck to be deemed as abandoned, while the second category refers to wrecks where abandonment or dereliction

occurs without any action or declaration. In other words, passivity leads to abandonment in the latter category.

The first category is straightforward in the sense that a clear action or declaration to the effect that a wreck is abandoned is easy to understand and communicate. This will cause the rightful owner to renounce any interest in the wreck and enable occupation if there are no other legal restraints. The second category, however, may lead to a variety of problems. This is a result of the difficult question as to when and how to infer an abandonment as a result of inaction or passivity. In these cases, several aspects such as the time that has passed since the sinking and the reaction and behaviour from the original owner may play a part in assessing the question of abandonment as well as the geographical location of the wreck. The assessment may also be affected by whether the wreck is a state or a non-state wreck. It could be argued that more is required in order to infer abandonment or dereliction in relation to state wrecks as a consequence of their special nature and sovereign immunity.

14.5.4 Limitation of Liability

One important dimension in wreck removal situations is the possibility to limit liability. This is a possibility that has a long history within maritime law and that can also be relevant in relation to wrecks and wreck removal. The right to limit liability has been defended and motivated in different ways, but the possibility has also been questioned. The current main system of limitation is found in the LLMC that allows for limitation in relation to claims associated with wrecks and wreck removal in certain ways. The convention, however, also enables states to opt-out of this possibility to limit liability. The United Kingdom, and thus English law, Denmark and Norway have made reservations in relation to maritime claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such a ship. Denmark and Norway have, however, not excluded the possibility to

limit liability in their implementations, but have raised the limitation amount. English law, on the other hand, states that no limitation is possible. When it comes to Finland and Sweden, neither of them have made reservations to this effect.

14.5.5 Salvage and Wreck Law

Situations involving wrecks and wreck removal may fall under both salvage and wreck law. The question of which law that is to be applicable, or both, is important, since different regulatory frameworks will be applicable depending on which law that is to govern a situation. If an action falls under salvage law, this will enable a salvage claim, whereas a wreck removal, that is outside of salvage law, will require a contractual solution in order to ascertain e.g. payment. It might, however, be difficult in practice to draw a clear line between salvage and wreck removal. The basic components of voluntariness, danger and success, within salvage law, can be helpful in making this distinction. Another method is to take commercial aspects into account. Salvage is based on the incentives that the system generates and one way to view salvage law would thus be to include all the wrecks where this commercial incentive is present. Another variation would be to focus on the contractual dimension since salvage, by definition is non-contractual or at least not pre-contractual, while wreck removal operations are long-term contractual operations. A distinction could also be made based on time or the different kinds of contracts that become relevant. In some ways it may also be possible to view the two areas as converging. There are also instances where salvage may transform into wreck removal.

Another issue relating to salvage and wrecks is which wrecks that may fall under the scope of salvage law. An application is, arguably, unproblematic in relation to modern and non-protected wrecks. The issue, however, becomes more problematic in relation to historical wrecks. In these cases, the state in whose territory the wreck is located may have interests in relation to the wreck that may affect a potential applicability of salvage law. A difference between English law and the

Nordic systems, in this respect, is that the latter do not require danger as a prerequisite to salvage. This is the case in English law and it is thus necessary to view a sunken historical wreck as being in danger in order for it to fall under the sphere of salvage. Despite of the fact that there have been some cases dealing with salvage and historical wrecks, there are still uncertainties as to whether and to what extent salvage law is applicable in relation to such wrecks.

14.6 Concluding Remarks and Future Inquiry

It could be tempting to suggest that the study has exhaustively answered the research questions posed in section 1.8, thus enabling an unequivocal view as to how interests and conflicts can be handled and regulated in relation to wrecks and wreck removal. This could be thought of as the ultimate goal of the study and perhaps be phrased in the sense that "the end of all our exploring will be to arrive where we started and know the place for the first time".[1354] But this would greatly underestimate the complexity and the difficulties involved and also, for that matter, overestimate what can be achieved in a work like this. No such claim is made here. Hopefully, however, the study has managed to shed some light on these issues and enabled a model, a structure or a construction of this field of law. Needless to say, however, there are still many stones unturned and questions that merit future inquiry. Some brief comments are made here on such potential areas of research.

Wreck as a legal concept has been analysed in the study and it can be noted that while it is fairly easy to trace the concept back in time in English law, the issue is more challenging and nebulous when it comes to the Nordic systems. An interesting area for future research would thus be to more closely investigate this matter and, perhaps in particular, in relation to the historical regulations in place around the Baltic Sea and their development over time. The potential interplay between the Nordic systems and the systems that later developed into

[1354] Little Gidding, Four Quartets – T.S. Eliot.

English law is another such interesting area of possible future research on this issue.

When it comes to more modern regulations, an interesting future area of study will be how the different implementations of the WRC will be applied in practice. In particular, it will be interesting to analyse how the concepts and the terminology, used in the convention and the implementations, will be construed by responsible authorities and courts in the contracting states. This is especially so in relation to the assessment of when a wreck poses a hazard and the definition of removal.

Another related issue, to study in the future, is if the general concept of wreck, as such, will be altered in the contracting states due to the extensive definition in the WRC that has now been implemented. This inclusion can potentially affect how the concept is construed in the systems in general, something which becomes particularly interesting in systems where the concept of wreck has been generally conceptualised in a restrictive way. Another possible future inquiry, in relation to the WRC, is to study how drifting abandoned wrecks can be handled and especially those that may affect more than one state. As discussed in section 5.5, there may be cases of drifting abandoned wrecks that do not fall under the convention. How to deal with such wrecks is also an interesting issue for further discussion.

The study has also focused on wrecks that are in need of protection for various reasons. There are many aspects of this dimension that merit future discussion and analysis. One such aspect is how to handle and approach state wrecks, such as wrecks from warships considered to be war graves, that pose problems and hazards that affect other states. Also ethical aspects that need to be considered while salvaging or conducting some other work in relation to wrecks that contain human remains can be subject to future inquiry. Another related area of research is to more closely analyse how the involved interests are to be balanced when it comes to historical wrecks in order to offer adequate protection to them, while, at the same time, also ensuring that the value that they represent, as cultural heritage, can be shared to the public or accessed in some

way.

There are thus several areas, and many more than the ones mentioned here, that can be subject to future inquiry. In this sense, this work can, hopefully, lead to new beginnings and inspire future investigations in this exciting field of law. Even though the study leaves some stones unturned, it may thus, at the same time, open up avenues for future research and new points of departure. Thus, to echo Eliot's words:

> What we call the beginning is often the end
> And to make an end is to make a beginning.
> The end is where we start from. . . [1355]

[1355] Little Gidding, Four Quartets – T.S. Eliot.

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