



HAL
open science

CHAPTER 9. Civil Liability for Exploration and Exploitation of Offshore Oil and Gas in the Arctic: the situation in the Barents Sea

Kristoffer Svendsen

► **To cite this version:**

Kristoffer Svendsen. CHAPTER 9. Civil Liability for Exploration and Exploitation of Offshore Oil and Gas in the Arctic: the situation in the Barents Sea. Patrick Chaumette. Wealth and miseries of the oceans: Conservation, Resources and Borders Richesses et misères des océans: Conservation, Ressources et Frontières, GOMILEX, 2018, 978-84-17279-02-8. hal-01983712

HAL Id: hal-01983712

<https://hal.science/hal-01983712v1>

Submitted on 16 Jan 2019

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.



CHAPTER 9

Civil Liability for Exploration and Exploitation of Offshore Oil and Gas in the Arctic: the situation in the Barents Sea

Kristoffer SVENDSEN*

Ph.D. of the Arctic University of Norway (UiT),
Associate Member at the Aberdeen University Centre for Energy
Law, Scotland, UK,
Guest researcher of the Human Sea programme, University of
Nantes, France

Résumé : *Ce chapitre montre qu'il y a une incohérence dans l'exécution des demandes d'indemnisation des parties lésées russes, victimes du côté russe de la frontière maritime norvégienne-russe par une compagnie pétrolière norvégienne du côté norvégien de la frontière maritime. Cette incohérence place les parties lésées russes dans une situation où elles ne peuvent légalement faire valoir des demandes d'indemnisation contre les compagnies pétrolières norvégiennes (parties responsables) en dehors de la juridiction russe.*

Abstract: *This chapter shows that there is an inconsistency in the enforcement of compensation claims from Russian injured parties, injured on the Russian side of the Norwegian-Russian sea border by a Norwegian oil company on the Norwegian side of the sea border. This inconsistency puts Russian injured parties in an position where Russian injured parties in an position where Russian injured parties they cannot legally enforce compensation claims against Norwegian oil companies (harm-doers) outside of the Russian jurisdiction.*

* Dr. Kristoffer Svendsen, LL.B. (Bond), LL.M. (Bond), LL.M. (MGIMO-University of MFA), and PhD (UiT – Arctic University of Norway) is a guest researcher of the Human Sea Programme, University of Nantes: The development of human activities at sea? "For a new Maritime Law", ERC (European Research Council) 2013 Advanced Grant, SP2-Ideas, FP7 (Seventh Framework Programme) of the European Union (2007-2013) Agreement No. 340770, and an Associate Member at the Aberdeen University Centre for Energy Law.







Introduction

There is already a well-known appetite for drilling in the Arctic (when the oil price facilitates). Norway and Russia entered into the delimitation agreement¹ of 15 September 2010, which was ratified on 7 June 2011, about the sea border dispute in the Barents Sea.² The formerly disputed area is estimated to consist of as much as 62 billion barrels (Aker Solutions) of oil equivalents of oil and gas.³ Previous estimates of the area have been 12 billion barrels (Statoil) and 47.8 billion barrels (Russian estimates).⁴ In Norway, it is expected that large amounts of oil are produced close to the Russian border in the Barents Sea.⁵ Some of the larger fields cross the sea border and are located on each side of the border.⁶ To illustrate, the Fedynsky/Hjalmar Johansen block, with 18.7 billion barrels of oil, stretches from the Russian side over to the Norwegian side of the Norwegian-Russian sea border.⁷ As a consequence, the agreement has resulted in an increased focus on oil and gas exploration in the formerly disputed areas. However, the agreement does not mention or make any reference to a possible oil spill, pollution damage, or a cross-border pollution scenario. The delimitation agreement refers specifically to cross-border hydrocarbon deposits in Annex II and bases exploitation of a cross-border hydrocarbon deposit on concluding an unitisation⁸ agreement for cross-border unitisation⁹, according to which the parties from each of the two countries will explore the deposits.

Russian companies have started joint development efforts with foreign companies in the Arctic, and the Russian authorities have stepped up hydrocarbon mapping in the

1) The Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean (Murmansk, 15 September 2010).

2) MFA Norway, 'Delelinjeavtalen med Russland' (2011), retrieved 30 August 2017, from <http://www.regjeringen.no/nb/dep/ud/kampanjer/delelinje.html?id=614002>.

3) Stenberg, 'Snart blir avgjørelsen endelig' (31 August 2008), retrieved 30 August 2017, from http://www.petro.no/modules/module_123/proxy.asp?C=14&I=14881&D=2.

4) *Id.*

5) Rystad Energy, 'Petro foresight – 2030 aktivitetsnivået innenfor olje og gass i Nord-Norge (2013). See also Rystad Energy, 'Aktivitetsnivået innenfor olje og gass i Nord-Norge på lang sikt' (5 November 2013).

6) For example, the Fedyn Arch and Kurchatovskaya fields. See Stenberg, *supra* footnote 3.

7) Ramsdal, 'Fedynskyhøyden. Her kan Norge måtte dele gassen med Russland', TU Petroleum (13 November 2013), retrieved 10 March 2014, from <http://www.tu.no/petroleum/2013/11/13/dette-kan-bli-provesteinen-pa-samarbeidet-norge-russland>.

8) 'Unitization is the joint, coordinated operation of an oil and gas reservoir by all the owners of rights in the separate tracts overlying the reservoir or reservoirs.' See Weaver and Asmus, 'Unitizing oil and gas fields around the world: a comparative analysis of national laws and private contracts.' *Houston Journal of International Law* (2006) 28 (1), pp. 4 and 12.

9) 'Cross-border unitization: unitization which takes place for a reservoir underlying two or more countries that have a delimited border between them. Such unitization will typically involve two or more different licensees.' *Id.* at pp. 4 and 14.





KRISTOFFER SVENDSEN

Arctic, which has revealed significant new oil resources.¹⁰ However, joint cooperation has been suspended due to the US/EU imposed sanctions on Russia.¹¹ The sanctions are still on-going.

The first oil field in the Barents Sea, Goliat, was discovered in 2000 and started production on 12 March 2016.¹² Russia's first oil production on the Arctic continental shelf started in 2013.¹³ The production platform on location is the first Arctic-class ice-resistant oil platform in the world.¹⁴ Gazpromnefteshelf's pumps oil from the oil field Prirazlomnoe in the Pechora Sea, southeast of the Barents Sea.¹⁵

This chapter shows the impact of choice-of-law rules in cross-border pollution damage situations when the damage is caused by oil spills from offshore rigs and installations on the Norwegian Continental Shelf in the Barents Sea. Norway and Russia share the Barents Sea, and the ocean currents go from West to East. Therefore, the chapter shows the impact of an oil spill from a Norwegian licensee on the Norwegian side of the Barents Sea on a Russian harmed party on the Russian side of the Barents Sea. The Norwegian Petroleum Act enacts the *lex loci damni* principle with a unilateral extension of protection in delict law to Norwegian interests harmed in Russia, which protection is not extended to Russian injured parties harmed within the Russian jurisdiction, for situations where the source of harm is located on the Norwegian side of the Barents Sea. A Russian injured party forced to pursue a delict claim against a Norwegian licensee has no legal avenue to get compensation.

10) Staalesen, 'Mapping reveals significant new oil resources' (22 November 2013), retrieved 30 August 2017, from: <http://barentsobserver.com/en/energy/2013/11/mapping-reveals-significant-new-oil-resources-22-11>

11) Hill, 'U.S. sanctions against Russia stymie Western oil companies' Arctic aspirations', The Washington Times (30 September 2014), retrieved 30 August 2017, from <http://www.washingtontimes.com/>

12) Eni Norge, 'Goliat on stream' (2017) retrieved 29 August 2017, from: <http://www.eninorge.com/en/field-development/goliat/>

13) Gazprom, 'Алексей Миллер: "Газпром" стал пионером освоения российского шельфа Арктики' (20 December 2013), retrieved 20 August 2017, from: <http://www.gazprom.ru/press/news/2013/december/article181128/>.

14) Wikipedia, 'Prirazlomnoye field' (24 August 2011), retrieved 10 October 2017, from: http://en.wikipedia.org/wiki/Prirazlomnoye_field

15) It should be noted however that Prirazlomnoe is located at a depth of 19-20 metres, and that the platform weights 500,000 tonnes. The platform sits on the ocean floor and is practically unmovable. Vasil'iev, 'Article of the Ambassador-at-large of the MFA of Russia representative of Russia in the Arctic Council A.V. Vasil'iev "international cooperation in the Arctic and Russia's approach" (mezhdunarodnoe sotrudnichestvo v Arktike i podkhodi Rossii)' Arctic News (10 January 2012), retrieved 10 August 2017, from: http://www.mid.ru/brp_4.nsf/newsline/ED626437EBBC719C44257981005590FE





1 Prelude

1.1 *Lack of an international regime*

There is no international legal liability regime for pollution damage caused by oil spills from offshore installations.¹⁶ The closest attempt at an international agreement on oil pollution damage from offshore subsoil activities is the regional Convention of Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (CLEE), 1977.¹⁷ The CLEE was an attempt to ensure adequate compensation for persons who suffer damage caused by 'oil pollution posed by the exploration for, and exploitation of, certain seabed mineral resources',¹⁸ and to 'adopt uniform rules and procedures for determining questions of liability and provide adequate compensation in such cases'.¹⁹ The convention was intended to be applicable to the North-East Atlantic and the Baltic Sea and was initially signed by Norway, the United Kingdom, and the Netherlands.²⁰ The convention is still open for signatures, but is not yet in force.²¹

The Council of Europe made an attempt to create a regional liability regime for damage resulting from activities dangerous to the environment through the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 1993.²² The Convention places objective liability on the operator for damage caused by dangerous activity²³ and aims at 'ensuring adequate compensation for damage resulting from activities dangerous to the environment'.²⁴ The Convention enacts non-fault liability and requires operators conducting a dangerous activity to participate in a compulsory financial security scheme,²⁵ a financial guarantee, an insurance

16) There is a multilateral agreement on cooperation on marine oil pollution preparedness and response in the Arctic, (Kiruna, 15 May 2013) and bilateral agreement between Norway and Russia concerning combatment of oil pollution in the Barents Sea, (Moscow, 28 April 1994).

17) Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, (London, 1 May 1977).

18) *Id.* at Preamble.

19) *Id.* at Preamble.

20) Norway, the United Kingdom, and the Netherlands signed the Convention 4 May 1977. Sweden signed 11 May 1977 followed by the Republic of Ireland 27 April 1978 and Germany 28 April 1978.

21) See participant status on Foreign & Commonwealth Office, UK, retrieved 15 October 2017, from: <http://www.fco.gov.uk/en/treaties/treaties-landing/records/03000/03006>

22) Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, (Lugano, 1993).

23) *Id.* at art. 6.

24) *Id.* at art. 1. While 'a dangerous activity means an activity performed professionally involving dangerous substances, genetically modified organisms or micro-organisms and operations concerning waste', art 9. See also articles 1.1. and 1.2 for definitions of 'dangerous activity' and 'dangerous substance'.

25) *Id.* at art. 12.





KRISTOFFER SVENDSEN

contract, or a financial co-operation between operators.²⁶ No country has yet ratified the Convention. Thus, both Norway's and Russia's signatures are absent from the Convention.²⁷

The applicable regional agreements to the Barents Sea do not assist in determining the compensability and extent of liability for oil spills from offshore installations. The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), 1992, applies geographically to the Barents Sea.²⁸ Norway is a contracting party to the Convention, while Russia has not yet signed and ratified the convention. The Norwegian Government sees the convention as the primary instrument in the North-East Atlantic region to comply with the obligations of Part XII of the United Nations Convention on the Law of the Sea (UNCLOS).^{29,30} OSPAR covers pollution from land-based sources,³¹ dumping at sea,³² pollution from offshore sources such as offshore installations,³³ etc. However, Annex III of the Convention only requires Contracting Parties to take appropriate measures to prevent pollution from accidents on offshore installations. Significantly, the Convention does not provide for the allocation of liability, insurance, or financial guarantees in relation to accidents from offshore installations.

UNCLOS leaves it to the states to form a system of compensation for environmental pollution.³⁴ Even though UNCLOS is signed and ratified by Norway³⁵ and Russia³⁶, this broad formulation does not assist in examining the legal impacts of an oil spill from an offshore installation in the Barents Sea.

In early 2012, the Legal Committee of the International Maritime Organization (IMO) examined the possibility of expanding the Organisation's Strategic Plan to include 'offshore oil exploration and exploitation activities'³⁷ and 'liability and compensation

28) Council of Europe, Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (8 March 1993) (ETS No. 150) Explanatory Report. Section 67.

27) Council of Europe, Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment CETS No. 150 (2012).

28) The Convention for the Protection of the Marine Environment of the North-East Atlantic, (Paris, 22 September 1992). The Barents Sea is labelled as region I – Arctic Waters.

29) United Nations Convention on the Law of the Sea, (Montego Bay, 10 December 1982).

30) NOU 2005: 10 Lov om forvaltning av viltlevende marine ressurser.

31) OSPAR, *supra* footnote 28, art. 3.

32) *Id.* at art. 4.

33) *Id.* at art. 5 and art. 1(k).

34) UNCLOS, *supra* footnote 29, art. 235.2. Article 235.3 encourages cooperation and development of international environmental liability law.

35) Ratified UNCLOS 24 June 1996.

36) Ratified UNCLOS 12 March 1997.

37) IMO Legal Committee, 'Any Other Business (i) Analysis of liability and compensation issues connected





issues connected with transboundary pollution damage resulting from offshore oil exploration and exploitation activities³⁸ into the IMO's Strategic Direction 7.2.³⁹ However, the proposal, set forth by Indonesia, was blocked at the 99th session of the IMO's Legal Committee held in April 2012 by countries, such as UK, USA, Norway, and Canada, as it fell outside the scope of the IMO.⁴⁰ Balkin, the Director of Legal Affairs and External Relations Division of the IMO, stated that regulation of offshore oil platforms by the IMO is not purely a legal issue, but rather financially and politically influenced. The IMO has addressed safety and construction aspects of offshore oilrigs, but not liability and compensation issues.

With the lack of international conventions, regional agreements, and other uniform rules of liability for oil spills from offshore installations, Norwegian and Russian law must be examined to see the effect of the two countries' regulation of the same legal area in the same geographical area through the same delict liability institute.⁴¹

1.2 *Applicable law*

Norway and Russia have independently enacted legislation which, among other things, specifically addresses compensation of harm caused by petroleum spills. This was not always the case. Norway and Russia enacted this legislation at different times, respectively in 1985 and 2013. The historical backdrop to these amendments indicates a difference in focus concerning the urgency of developing the Norwegian and Russian continental shelves and in regulating the compensation of harm arising from exploration and exploitation activities on the respective shelves.

Compensation for harm caused by oil spills from offshore oilrigs and installations is initially regulated by Chapter 7 of the Norwegian Petroleum Act⁴² with the corresponding article 22.2 of the Russian Federal Continental Shelf Law⁴³ and the

with transboundary pollution damage from offshore exploration and exploitation activities, including a re-examination of the proposed revision of Strategic Direction 7.2. LEG 99/13. Note by the Secretariat.' (5 January 2012), para. 1.

38) *Id.* at para. 1.

39) *Id.*

40) Ostman, 'IMO fails to prioritise global offshore liability regime' (2 May 2012), retrieved 17 September 2012, from: http://www.bellona.org/articles/articles_2012/1335958347.82

41) The EU Offshore Directive is too general to assist in determining questions of compensation raised in this article. Its applicability in Norway is also an issue. Directive 2013/30/EU on safety of offshore oil and gas operations and amending Directive 2004/35/EC (12 June 2013). The Directive points to the importance of a robust liability regime with accompanying sufficient physical, human and financial resources to prevent and limit the consequences of major accidents. Preamble, para. (63).

42) Lov om petroleumsvirksomhet (29 November 1996 Nr. 72).

43) Федеральный закон "О континентальном шельфе Российской Федерации" N 187-ФЗ (30 November 1995).





KRISTOFFER SVENDSEN

accompanying Federal Environmental Protection Law.⁴⁴ These statutes naturally interact with the delict law of the respective countries. Accordingly, Norwegian and Russian legislation places liability without fault⁴⁵ on the licensee⁴⁶ and the operator⁴⁷ for harm caused by petroleum spills from offshore oilrigs and installations.

1.3 Access to Norwegian courts

A harmed Russian party, injured in Russia as a result of cross-border pollution, initiating legal action against a Norwegian harm-doer domiciled in Norway, has access to Norwegian courts under the Lugano Convention, or in the alternative, the Norwegian Civil Procedure Act. A foreign party, initiating legal action in Norway, must fulfil the court's requirements for general jurisdiction in §4-4 to §4-6 of the Norwegian Civil Procedure Act,⁴⁸ the specific rule on jurisdiction over a dispute of international character in §4-3,⁴⁹ and the accompanying Lugano Convention.⁵⁰ The Lugano Convention is a 'parallel convention' to the Brussels Regulation⁵¹ and part of the Civil Procedure Act.⁵² The Convention prevails when in conflict with, for example, the rules in §4-1 to §4-8.⁵³ In the present scenario, a Russian not domiciled in an EEA country initiating legal action in Norway against a company domiciled in Norway would possibly fall within

44) Федеральный закон "Об охране окружающей среды" от 10.01.2002 N 7-ФЗ (10 January 2002).

45) Liability without fault contains several aspects. It is a mechanism to firstly compensate and mitigate a damage caused, but also to deter damage from occurring. It can also be seen as a liability mechanism that 'prices' behaviour, while negligence set a standard for behaviour, as a harm-doer's behaviour does not effect the imposition of liability without fault.

46) The Norwegian Petroleum Act separates between a licensee and an operator. A licensee is a 'physical person or body corporate, or several such persons or bodies corporate, holding a licence according to this Act or previous legislation to carry out exploration, production, transportation or utilisation activities.' Supra footnote 42 §1-6 j). An operator is 'anyone executing on behalf of the licensee the day-to-day management of the petroleum activities', §1-6 k).

47) The Federal Continental Shelf Law uses the term 'operating organisation', which is defined as the organisation that conducts exploitation, utilisation of artificial islands, installations, construction, and subsea pipelines, as well as realises drilling operations in the course of regional geological studies, geological studies, and exploration and production of hydrocarbon crude. The term also applies to transportation and storage of oil and oil products on the continental shelf. Supra footnote 43, art. 22.2 second sentence.

48) Lov om mekling og rettergang i sivile tvister (tvisteloven) (17 June 2005 nr 90).

49) Schei, et al., *Tvisteloven Kommentarutgave Bind I* (Universitetsforlaget, Oslo, 2 ed. 2013), p. 139 note 4.

50) Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, (Lugano, 30 October 2007).

51) European Communities, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (22 December 2000).

52) Lov om mekling og rettergang i sivile tvister (tvisteloven) (17 June 2005 nr 90). §4-8. The Lugano Convention is attached to the Civil Procedure Act through §4-8, which was implemented by the Ministry of Justice and Public Security, Lov om endringer i tvisteloven m.m. og om samtykke til ratifikasjon av Luganokonvensjonen 2007 om domsmyndighet og om anerkjennelse og fullbyrdelse av dommer i sivile og kommersielle saker (19 June 2009 Nr 79).

53) Lov om mekling og rettergang i sivile tvister (tvisteloven) (17 June 2005 nr 90), §1-2.





the Lugano Convention, if the Russian can show a connection to Norway other than the company's domicile. If not, the legal action falls within the Civil Procedure Act's requirement in §4-4 and §4-3.⁵⁴

1.4 Venue

Chapter 7 of the Petroleum Act contains specific rules on venue in §7-8, which applies the term 'legal venue' ('verneting'). The proper venue for legal claims arising from delict compensation for pollution damage is the court district where the effluence or discharge of petroleum has taken place or where damage has been caused. This also applies to the current scenario. The Court Act⁵⁵ opens for regulation which court districts have jurisdiction over facilities and constructions for exploration, extraction, storage, and transportation of submarine natural resources on the Norwegian continental shelf and in the Norwegian economic zone.⁵⁶ Regulation grants jurisdiction over facilities and constructions when located north of 68th latitude and 30 minutes (roughly in between Bodø and Tromsø) to Nord-Troms District Court⁵⁷ and Hålogaland Court of Appeal.⁵⁸ Even though the regulation does not specify which court districts hold jurisdiction over pollution damage, it would be natural and reasonable to also apply the regulation to the location of pollution damage, as defined in §7-1.

2 Choice-of-law rules

2.1 Introduction

Choice-of-law rules are national rules regulating whether to apply national or foreign law to a dispute heard in a national court. It is not uncommon that national courts hear cases governed by foreign law. A national court uses its national choice-of-law rules to determine the applicable law. The implication of applying one set of national delict

54) In-depth analysis in Kristoffer Svendsen, *Compensable damage ex delicto* as a result of harm in the Barents Sea caused by petroleum spills from offshore installations. A Norwegian and Russian comparative legal analysis of conflict of laws, the concept of harm, losses suffered by third parties, and environmental damage and its valuation and calculation, caused by petroleum spills from offshore oil rigs and installations in the Barents Sea (2015) Tromsø Ph.D. in law, Faculty of Law, UiT - Arctic University of Norway), part 5.3.3.

55) Lov om domstolene (domstolloven) (13 August 1915 Nr 5).

56) *Id.* at §26a. See also *Tvisteloven*, supra footnote 49, p. 138.

57) Nord-Troms District Court include the following municipalities: Tromsø, Balsfjord, Karlsøy, Lyngen, Storfjord, Kåfjord, Skjervøy, Nordreisa, Kvænangen. Forskrift om domssogns- og lagdømmeinndeling (16 December 2005 Nr 1494), 2a).

58) Forskrift om politidistrikt, namsmannsdistrikt, lagdømme og domssogn for utøvelse av politimyndighet, namsmannsmyndighet og domsmyndighet på kontinentalsokkelen og i norsk økonomisk sone, samt politimyndighet i havområdet utenfor Svalbards territorialfarvann (17 December 1999 Nr 1391), §1.





KRISTOFFER SVENDSEN

rules compared to another set of national delict rules can play a significant role in the outcome.

Norway and Russia share the Barents Sea. Chapter 7 of the Norwegian Petroleum Act⁵⁹ set forth specific choice-of-law rules applicable only to delict compensation for pollution damage caused by petroleum spills from offshore installations. This is different from the Russian Federal Continental Shelf Law⁶⁰ and the Russian Federal Internal Waters and Territorial Seas Law,⁶¹ which do not contain specific choice-of-law rules regulating the issue, but instead the Russian Civil Code⁶² contains general choice-of-law rules (called collision-of-law rules) for delict compensation involving a foreign element.

2.2 *The geographic scope of Chapter 7*

§7-2 is the specific rule of scope for Chapter 7, while §1-4 of the Petroleum Act contains the Act's general rule of scope. §7-2 indicates whether Norwegian courts should decide a case of compensation for pollution damage according to Norwegian- or a foreign state's law.⁶³ Chapter 7 of the Petroleum Act is 'applicable to liability for pollution damage from a facility'⁶⁴ when occurring:

[...] in Norway⁶⁵ or inside the outer limits of the Norwegian continental shelf⁶⁶ or affects a Norwegian vessel, Norwegian hunting or catching equipment or a Norwegian facility in adjacent sea areas. With regard to measures to avert or limit pollution damage it is sufficient that damage may occur in such area.⁶⁷

59) Lov om petroleumsvirksomhet, supra footnote 42.

60) Федеральный закон "О континентальном шельфе Российской Федерации", supra footnote 43.

61) Федеральный закон "О внутренних морских водах, территориальном море и прилежащей зоне Российской Федерации" N 155-ФЗ (31 July 1998).

62) Гражданский кодекс РФ (ГК РФ) от 26.11.2001 N 146-ФЗ - Часть 3 (26 November 2001).

63) U. Hammer, et al., *Petroleumsoven* (Universitetsforlaget, Oslo. 2009), p. 542.

64) Lov om petroleumsvirksomhet, supra footnote 42, §7-2.

65) The term 'in Norway' (i riket) includes mainland Norway, which includes Svalbard and Jan Mayen (Svalbard and Jan Mayen are excluded from the general scope of the Act in §1-4), and Norwegian internal waters. See Ot. prp.nr. 72. Lov om petroleumsvirksomhet. (1982-1983), p. 70.

66) §1-6) defines the terminology Norwegian continental shelf, see Lov om petroleumsvirksomhet, supra footnote 42.

67) Id. at §7-2. It should be noted however that this is not the full citation of §7-2. The second paragraph of §7-2 explains the scope of the Act as applicable to The Nordic Environmental Protection Convention (and Protocol), Stockholm. Implemented in Norwegian law through Lov av 9. april 1976 nr 21 om gjennomføring i norsk rett av miljøvernkonvensjon mellom Norge, Danmark, Finland og Sverige, undertegnet 19 februar 1974. The third paragraph of §7-2 grants the state the ability to 'issue rules relating to liability for pollution damage caused by petroleum activities pursuant to this Act' by agreement with a foreign state. Thus, the state may enter into a treaty about liability for pollution damage with a foreign state, and implement the convention into Norwegian law.





The applicability of Chapter 7 rules is limited to the geographic area of Norway and all waters as far as the outer limits of the Norwegian continental shelf. Additionally, only Norwegian interests outside of this area enjoy the protection of Chapter 7 rules. In contrast, the Chapter 7 liability without fault applies to installations and not geographic areas.⁶⁸

2.3 The law of the place of damage or harm

The place of harm (*lex loci damni*) governs the application of Chapter 7 of the Act,⁶⁹ and not where the delict was committed (*lex loci delicti commissi*), making the geographic location of the source of harm irrelevant. Thus, the connecting factor is the place of harm. Based on *lex loci damni*, harm caused outside of the legislative scope of §7-2 is compensated according to that state's delict compensation rules in which the harm occurred.

The Norwegian Government intentionally removed any requirement for a geographic location of the facility,⁷⁰ to also include pollution damage inflicted by facilities located on other states' continental shelves and the open sea.⁷¹ Thus, it is not decisive where the facility is located; for example, whether the harm-inflicting facility is located within the outer limits of the Norwegian continental shelf or within the outer limits of another state's continental shelf, such as the Russian continental shelf.⁷² This ability to impose liability for pollution damage within the outer limits of the Norwegian continental shelf due to the occurrence of harm on the Russian continental shelf is the implication of the extended definition of scope by §7-2 compared to the Petroleum Act's general definition of scope in §1-4.

§7-2 is the continuance of §38 of the old and repealed 1985 Petroleum Act.⁷³ If the legislator had continued the same wording of §38 in full, the rules would have been clearer. §38 clarifies situations where the Nordic Convention on Environment Protection of 1974 and other bilateral treaties do not apply:

For pollution damage that occurs outside the areas as specified in the first and second paragraphs, the delict compensation rules in that state in which the harm occurred shall apply.⁷⁴

68) Lov om petroleumsvirksomhet, supra footnote 42, §7-3.

69) Id. at §7-2.

70) Ot.prp.nr.43. Om lov om petroleumsvirksomhet (1995-1996), p. 56.

71) Ot. prp.nr. 72. Lov om petroleumsvirksomhet (1982-1983), p. 70.

72) It should be noted that §7-2 also includes pollution from facilities located onshore. This was an extension of the 1985 Act, which only applied to pollution from offshore facilities. See Ot.prp.nr.43. supra footnote 70, p. 56.

73) Lov om petroleumsvirksomhet (repealed) (22 March 1985 nr 11).

74) Id. at §38.





KRISTOFFER SVENDSEN

Keeping this enactment in §7-2 was 'according to the Ministry's view unnecessary next to the rule in §7-2 third paragraph',⁷⁵ as the Government can enter into agreements about compensation for pollution damage with other countries.

The current §7-2 does not contain any requirement for a connecting factor between a Norwegian harm-doing company and harm inflicted in countries not part of the Nordic Convention on Environment Protection, such as in Russia.⁷⁶ Thus, the removal of §38 reduces the ability to cover all choice-of-law scenarios and to an extent amputates the choice-of-law heading of §7-2.

2.4 Compensation of pollution damage to Norwegian interests only in adjacent sea areas

§7-2 contains a unilateral extension of privilege granting 'Norwegian interests' protection in delict law under Chapter 7 for pollution damage suffered in adjacent sea areas.⁷⁷ The term 'Norwegian interests' means the three groups eligible for compensation under §7-2 when pollution damage is suffered in adjacent waters, namely: 1) a Norwegian vessel, 2) Norwegian hunting or catching equipment, or 3) a Norwegian⁷⁸ facility. The preparatory works emphasise that harm and injury to personnel and/or equipment located on a vessel (group 1) or a facility (group 3) are included in the scope of §7-2.⁷⁹

This privilege started as discrimination against all countries, except countries adhering to the Nordic Convention on Environment Protection. The Lugano Convention granted their members equal footing, which left Russian interests as the only unprotected interests under Chapter 7. Chapter 8 of the Petroleum Act contains a similar unilateral extension of privilege expressly requiring fishermen to be Norwegian to claim delict

75) Ot.prp.nr.43. supra footnote 70, p. 56.

76) Cordero-Moss, *Internasjonal Privatrekt på formurettens område* (Universitetsforlaget, 2013), p. 357.

77) *Lov om petroleumsvirksomhet*, supra footnote 42, §7-2.

78) Neither the Petroleum Act nor the preparatory works define the terminology Norwegian with respect to vessels and facilities. However, the Norwegian Maritime Code sets out conditions for nationality of vessels (§1), drilling ships (§4), and drilling platforms and similar mobile constructions (§507). The general rule requires registration of vessels and facilities in the Norwegian Ordinary Ship Register (NOR) or the Norwegian International Ship Register (NIS), (§§ 11, and 507) see Norwegian Maritime Authority, NIS-NOR, *The Norwegian International Ship Register*. §7-2 does not appear to require actual registration in one of the registers as long as the conditions for nationality are fulfilled. However, for further information on the issue of registration and fulfilment of the conditions of nationality, as well as the non-appliance of the conditions of nationality to fixed facilities, see Hammer, et al., supra footnote 63, p. 540, and Bull and Falkanger, *Sjørett* (Sjørettsfondet Akademisk, Oslo, 7 ed. 2010), chapter 2.

79) Ot. prp.nr. 72., supra footnote 71, p. 71. Neither §7-2 nor the preparatory works differentiate between Norwegian or foreign nationals. Thus, nationality does not affect a claim for personal injury or damage to equipment when on a Norwegian vessel or Norwegian facility (within the Norwegian or other state's continental shelf). However, both Norwegian and foreign nationals would be ineligible to claim for personal injury and damage to equipment if located on a foreign vessel or facility outside the Norwegian continental shelf. See Hammer, et al., supra footnote 63, p. 541.





compensation for inconveniences as a result of petroleum activities.⁸⁰ The application of Chapter 7 rules does not discriminate as to ownership or nationality when harm is inflicted in Norway or within the outer limits of the Norwegian continental shelf, but only when Norwegian and Russian interests are harmed in the Russian jurisdiction. The Norwegian party receives the protection of Chapter 7 even though harmed in the Russian jurisdiction, while the Russian party must seek remedy in Russian legislation and, as a result, is left without legal enforcement of such remedy.

The term 'in adjacent sea areas' received some attention by the bodies entitled to comment on the bill when passed through the legislative process, as many found the terminology confusing.⁸¹ The committee stated that the term 'sea areas' which border to the Norwegian continental shelf includes 'other states' continental shelves⁸² that have a common dividing line with the Norwegian continental shelf [as well as] nearest adjoining states' continental shelves, and the immediate high seas ('frie havområder').⁸³ The Ministry of Petroleum and Energy emphasised that the terminology 'adjacent sea areas' 'does not only think about the sea areas to the states that have a common dividing line with the Norwegian continental shelf, but also other parts of the North Sea, Norwegian Sea and the Barents Sea.'⁸⁴ These statements were made long before the Norwegian-Russian delimitation agreement came into effect, and appear to be aimed at ensuring the unsettled dividing-line dispute was included in the scope of the Act. Based on these clarifications and the fact that the source of pollution may be located outside the Norwegian continental shelf (for example, on another country's continental shelf), the rules in Chapter 7 reach widely.

2.5 Compensation of measures to avert or limit pollution damage to the Norwegian jurisdiction when initiated in Russia

A factor in compensating reasonable measures⁸⁵ executed to avert or limit pollution damage is the intention to encourage the execution of necessary measures to limit

80) Chapter 8 of the Petroleum Act does discriminate with respect to nationality when compensating fishermen for inconveniences as a result of petroleum activities. The Chapter only applies Norwegian fishermen, which are 'persons registered in the registration list of fishermen and owners of vessels listed in the registry of Norwegian fishing vessels subject to registration licences'. Chapter 8 does not apply to Chapter 7 pollution damage and compensate financial losses for 1) occupation of fishing fields, 2) pollution and waste, or 3) damage caused by a facility or actions in connection with the placing of a facility. See Lov om petroleumsvirksomhet, supra footnote 42, §8-1.

81) Ot. prp.nr. 72., supra footnote 71, p. 71.

82) The committee considers the continental shelf of other states to include 'the assumed territorial waters and the internal waters'. See Hammer, et al., supra footnote 63, p. 540.

83) NOU: Erstatningsansvar for forurensningsskade som følge av petroleumsvirksomhet på norsk kontinentalsokkel. 1981:33, p. 36.

84) Ot. prp.nr. 72., supra footnote 71, p. 71.

85) §7-1 defines pollution damage as, amongst others, '...costs of reasonable measures to avert or limit such damage or such loss...' Lov om petroleumsvirksomhet, supra footnote 42.





KRISTOFFER SVENDSEN

the extent of pollution damage.⁸⁶ '[I]t is sufficient that damage may occur in such areas.'⁸⁷ As discussed earlier, 'such areas' include adjacent sea areas. Measures executed in adjacent sea areas seem compensable when executed to avert or limit pollution damage to within the Norwegian jurisdiction. The preparatory works state that:

'[E]xpenses for measures to avert or limit pollution damage should also be covered by the act when the measure is initiated in adjacent sea areas to hinder pollution damage occurring [in internal waters, territorial waters, the continental shelf] or on the Norwegian mainland.'⁸⁸

The preparatory works continue by stating that the licensee should compensate expenses for measures to avert or limit pollution damage by a source located outside the Norwegian continental shelf, for which the measures are initiated to combat petroleum pollution before the petroleum enters the Norwegian continental shelf.⁸⁹ The same applies if petroleum drifts from within the Norwegian continental shelf to outside the Norwegian continental shelf, and threatens to drift back into the Norwegian continental shelf.⁹⁰ The first example appears problematic. If Russian fishermen or the Coast Guard execute measures that avert or limit damage, which may occur on the Norwegian continental shelf from a Russian oilrig on the Russian side of the Barents Sea, §7-2 allows for Russian claims of compensation in a Norwegian court against a Russian licensee. Enforcing a Norwegian court judgment against a Russian licensee in Russia is difficult, as well as enforcing a court judgment in Norway against a Russian licensee without assets in Norway. Likewise, if Norwegian fishermen and/or the Norwegian Coast Guard cross the sea border to assist their Russian colleagues in the liquidation of the oil spill, the Norwegian participants may then claim compensation for measures in a Norwegian court with the same challenge, namely, to enforce a Norwegian judgment against a Russian licensee in Russia.

Measures executed in the Russian jurisdiction to avert or limit pollution damage to Norwegian interests (three groups) located in the Russian jurisdictions (seas) appear not compensable. As such, it would be better for these Norwegian interests to suffer damage. As an example, a Norwegian trawler accruing expenses to save its trawl from pollution damage in the Russian part of the Barents Sea is excluded from compensation under Chapter 7.⁹¹ Similarly, if a foreign trawler salvages Norwegian fishing equipment in the Russian jurisdiction, the expenses are likely not compensable.⁹² If the foreign trawler suffers pollution damage (such as property damage), the trawler is likely also

86) Ot. prp.nr. 72., supra footnote 71, p. 71.

87) Lov om petroleumsvirksomhet, supra footnote 42, §7-2.

88) Ot. prp.nr. 72., supra footnote 71, p. 71.

89) Id.

90) Id.

91) Hammer, et al., supra footnote 63, p. 541.

92) Id.





not eligible for compensation under Chapter 7.⁹³ This is likely not the legislator's intent, which was to encourage the execution of necessary measures.⁹⁴

3 Recognition and enforcement of foreign judgments

3.1 Introduction

A Russian injured party will be unsuccessful in pursuing a claim of compensation in a Norwegian court against a Norwegian licensee that inflicted harm in Russia from the Norwegian side of the sea border in the Barents Sea. The Russian injured party can always, as an alternative, sue the same party under Russian law in a Russian court for the same harm. Russian law is straight forward on compensation of this kind. Assuming that a claimant, injured from a Norwegian licensee, receives a favourable court judgment in a Russian court under Russian law against the Norwegian licensee, the claimant would presumably like to actually receive the money. The Russian injured party must take the Russian court judgment to Norway and ask a Norwegian court for recognition and enforcement.

The inability to recognise and enforce a foreign judgment in the country in which the assets of a harm-doer are located may severely limit an injured party's ability to obtain a remedy. An important aspect of harm inflicted across borders in the Barents Sea is whether Norwegian and Russian courts will recognise and enforce each other's judgments. In and of themselves, court decisions from one state have no force in another state.⁹⁵ States recognise and enforce foreign judgments differently; some states require a valid international agreement with the state of the rendered judgment, while other states recognise and enforce foreign judgments similar to domestic judgments.⁹⁶ States are under no obligation to recognise and enforce foreign judgments in the absence of an international agreement under international law, and even though many states do recognise and enforce foreign judgments on a regular basis, such state practice is not specific enough to create rules of customary international law.⁹⁷

93) *Id.*

94) *Ot. prp.nr. 72., supra footnote 71, p. 71.*

95) Michaels, 'Recognition and Enforcement of Foreign Judgments'. *Max Planck Encyclopedia of Public International Law [MPEPIL]* (March 2009), retrieved 28 August 2017, at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1848?rskey=4Sjuxc&result=10&prd=EPIL>, #1.

96) *Id.* at #10.

97) *Id.* at #11. 'However, the enforcement of foreign judgments can violate international law if the judgment itself is incompatible with international law.' (See #12).





KRISTOFFER SVENDSEN

3.2 European recognition and enforcement regimes of foreign judgments in civil and commercial matters

The international principles of comity and reciprocity were introduced with the arrival of the ideas of sovereignty to facilitate the recognition and enforcement of foreign judgments.⁹⁸ The Russian Commercial Court relies on these principles today. Enforcing foreign judgments only based on either comity or reciprocity was considered either too vague or too strict and, as a result, European countries started entering into enforcement treaties, with the treaty between France and Swiss communities in 1715 as the first.⁹⁹

Currently, the European picture of recognition and enforcement of foreign judgments is painted through a couple of multilateral agreements. There is currently no effective global treaty on the recognition and enforcement of foreign judgments. The Hague Conference on Private International Law (HCCH)¹⁰⁰ started the work on a global instrument with several failed attempts.¹⁰¹ Another attempt to negotiate a global project on unifying the rules of international jurisdiction and foreign judgments in civil and commercial matters came about in June 1993.¹⁰² This attempt can also be considered unsuccessful.¹⁰³

Multilateral agreements in Western Europe on recognition and enforcement are traditionally the 2001 Brussels I regulation¹⁰⁴ in the EU (formerly, with a separate extension agreement with Denmark) and the Lugano Convention linking the EU

98) Id. at #6-9.

99) For an overview over the earliest enforcement treaties in Europe, see: id. at #9.

100) Russia and Norway are both part of the HCCH. Norway joined the HCCH 15 July 1955 and Russian Federation re-joined the HCCH 6 December 2001.

101) Convention on the jurisdiction of the selected forum in the case of international sales of goods (s-Gravenhage, 15 April 1958), art. 5. Convention on the Choice of Court (the Hague, 25 November 1965). Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (the Hague, 1 February 1971). This is to some extent in force between Cyprus, the Netherlands, Portugal and Kuwait. However, the Brussels I regulation has displaced large parts of the dynamics of the Convention.

102) To read more about the Hague Convention, see: Lau, 'Update on the Hague Convention on the Recognition & Enforcement of Foreign Judgments', Annual Survey of International & Comparative Law (2000) 6(1), pp. 13-25. Baumgartner, The Proposed Hague Convention on Jurisdiction and Foreign Judgments (Germany, Mohr Siebeck, 2003). Ralf Michaels, Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions, Conflict of Laws in a Globalizing World: A Tribute to Arthur von Mehren (2006).

103) The negotiation ended in an amputated version of the original concept titled: Convention on Choice of Court Agreements (the Hague, 30 June 2005). Mexico is the only ratified party, while EU (except for Denmark) signed in 2009 and the US signed in 2007.

104) Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Official Journal of the European Communities L 12/1 16.1.2001. EC.





countries (except for Denmark) with Iceland, Switzerland, Norway and Denmark.¹⁰⁵ The EU adopted a recast Brussels I regulation¹⁰⁶ in 2012, which takes effect in 2015. In 2013, Denmark informed the Commission it would implement the Brussels I regulation (recast).¹⁰⁷ The EU also has regulations for uncontested claims and payments procedures,¹⁰⁸ as well as judgments opening insolvency proceedings.¹⁰⁹

Most of the former Soviet countries have entered into similar agreements through the following two Commonwealth of Independent States (further CIS)¹¹⁰ agreements: the Multilateral Agreement on Recognition and Enforcement of Foreign Judgments¹¹¹ and the Agreement on a Procedure for Commercial Dispute Settlements.¹¹²

3.3 Recognition and enforcement of foreign judgments in Norway

In Norway a judgment (or arbitral award) holds no legal force unless legally authorised by law¹¹³ or based on an agreement ('overenskomst')¹¹⁴ with the rendering court's

105) The Lugano Convention is an example of an international agreement about the recognition and enforcement of foreign judgments as well as of the legal authority to demand recognition and enforcement. The Civil Procedure Act §19-16 states that foreign judgments hold legal force in Norway in accordance with law or international agreements. The section confirms that the Lugano Convention is Norwegian law according to §4-8. See: Lov om mekling og rettergang i sivile tvister (tvisteloven) (17 June 2005 nr 90), §19-16 and §4-8.

106) (12 December 2012). Regulation (EU) no. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) OJ L 351.

107) Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 79/4) (21 March 2013).

108) Regulation (EC) No 805/2004 of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims (21 April 2004). Regulation (EC) No 1896/2006 of the European Parliament and of the Council creating a European order for payment procedure (12 December 2006).

109) Council regulation (EC) No 1346/2000 on insolvency proceedings (29 May 2000), art. 16.

110) Members are Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, and Uzbekistan.

111) Convention of 22 January 1993 on Legal Aid and Legal Relations in Civil, Family and Criminal Cases. Adopted at Minsk, Belarus, on 22 January 1993 and amended on 28 March 1997. Came into effect on 19 May 1994.

112) Agreement of 20 March 1992 on Procedure of Settling Disputes with Regard to Carrying on Business Activities, Kyiv.

113) As an example, Norway does to a large extent recognise and enforce foreign judgments with the absence of international agreements in the area of family law. Even foreign judgments in the area of family law without basis in an Act or an international agreement would be to a large extent recognised and enforced. NOU 2001:32 A. Rett på sak, pp. 414-415. See also the Acts concerning foreign divorce and separation, and parental responsibility and return of children: Lov om anerkjennelse av utenlandske skilsmisser og separasjoner (6 February 1978 Nr 38) and Lov om anerkjennelse og fullbyrding av utenlandske avgjørelser om foreldreansvar m v og om tilbakelevering av barn (barne bortføringsloven) (8 July 1988 Nr 72). The latter implements into Norwegian law European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Luxemburg, 20 May 1980) and also Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980).





KRISTOFFER SVENDSEN

state.¹¹⁵ Family law is an area authorising recognition and enforcement of foreign court decisions by law.¹¹⁶ Interestingly, Norway had multilateral agreements with many countries covering recognition and enforcement of foreign judgments in civil matters (which would have included compensation judgments for pollution damage from an offshore source of pollution damage located within Norwegian jurisdiction), except with Russia. Before the Lugano Convention, Norway had entered into two agreements, namely, the Convention between Norway and the United Kingdom providing for the reciprocal recognition and enforcement of judgments in civil matters¹¹⁷ and the Convention between Denmark, Finland, Iceland, Norway and Sweden on the recognition and enforcement of judgments.¹¹⁸ The latter Convention was updated in 1977 by the Convention between Denmark, Finland, Iceland, Norway and Sweden on the recognition and enforcement of judgments in civil matters¹¹⁹. However, the Lugano Convention supersedes these three Conventions, which are all listed in Annex VII, to the extent the Lugano Convention covers the same matters as the three Conventions.¹²⁰

Schei, et al., *Tvisteloven*, supra footnote 49, §19-16 para. 5.

114) This chapter does not try to define the meaning of agreement ('overenskomst'), but an agreement ('overenskomst') is called by many names when entered into, such as 'treaty', 'convention', and 'agreement' in front of which words like 'international', 'multilateral', and 'bilateral' stand. The agreement must be entered into with a foreign state. The chapter also does not elaborate on international legal terminology 'foreign state'.

115) Lov om gjennomføring i norsk rett av Luganokonvensjonen om domsmyndighet og fullbyrding av dommer i sivile og kommersielle saker [luganoloven] (repealed) (8 January 1993 Nr. 21), §1. See also: Lov om mekling og rettergang i sivile tvister (tvisteloven) (17 June 2005 nr 90), §19-16, §19-15, §19-14 and §1-2.

116) The Ministry of Children, Equality and Social Inclusion (the Ministry of CES) can recognise fatherhood and motherhood issues based on foreign (Russian) court decisions on a case-by-case basis, according to the Children Act §85 (Lov om barn og foreldre (barnelova) (8 April 1981 Nr. 7)). This was the case in a 27 February 2009 decision, in which the Ministry of CES that the Norwegian citizen B was the father of C. The court noted that there was no regulation or agreement between Norway and Russia within this area. The case illustrates the process by which a Russian court decision may be evaluated for recognition in Norway. The courts can then verify the correctness of the Ministry's decision and rule for or against recognition and enforcement of the Russian decision. The court in obiter dictum referred to the principle of reciprocity but did not apply it without examining the facts of the case and the procedural approach by the Russian court. The court further expressed a hesitation to trust a first instance court decision (case in question: Luga Municipal Court in St. Petersburg on 28 October 2004). Such distrust is not in the spirit of recognition and enforcement of foreign judgments; in other words, there should be no requirement that the parties need to appeal their case once or twice to receive the court's trust to recognise and enforce the foreign judgment. Frostating Appellate Court of Norway (LF 2011 Nr. 160687).

117) The Convention between Norway and the United Kingdom providing for the reciprocal recognition and enforcement of judgments in civil matters (London, 12 June 1961).

118) The Convention between Denmark, Finland, Iceland, Norway and Sweden on the recognition and enforcement of judgments, Copenhagen. The Convention is relevant only for judgments, which are older than 1978 and with relation to Iceland (16 March 1932).

119) The Convention between Denmark, Finland, Iceland, Norway and Sweden on the recognition and enforcement of judgments in civil matters (Copenhagen, 11 October 1977).

120) Lugano Convention, supra footnote 50 at art. 65 and Annex VII. See also art. 63(2), 66, and 67.





The term 'legal force' ('rettskraft') and 'capable of being enforced' ('tvangskraft') must initially be commented upon. Even though a plaintiff's/defendant's court judgment is final, the judgment may not necessarily be legally enforceable.¹²¹ A court judgment or other court decision receives legal force ('rettskraft') when the judgment cannot be disputed with regular judicial relief.¹²² The common regular judicial relief is appeal. Generally, when the parties stop appealing, the judgment is granted legal force after a specific period of time. A court decision of legal force is legally binding on the parties, and possibly on other associated parties.¹²³ A foreign court judgment or decision is granted legal force when provided by a Norwegian statute or an agreement with that specific country.¹²⁴ Commonly, court judgments and decisions of legal force, imposing a duty to omit or execute an action, are basis for enforcement.¹²⁵ The Legal Enforcement Act also grants legal basis to enforce civil and public legal decisions of foreign courts or authority, foreign governmental out-of-court settlements and arbitration decisions, which by agreement with the foreign state or by law are enforceable in Norway.¹²⁶ The applicant must petition the District Court for enforcement of the foreign judgment.¹²⁷ The foreign judgment is taken into consideration without any recognition procedure. The courts will assess whether the foreign judgment can be considered equal to a Norwegian judgment based on an international agreement, national legislation, or the absence of both.¹²⁸ This formal control is called an *exequatur*. When the foreign judgment is a final and enforceable judgment, the Norwegian courts will not assess its substantive 'correctness'.¹²⁹ However, the foreign judgment must be determined final and enforceable according to the foreign understanding of the rules of final and enforceable and not upon the Norwegian legal understanding of final and enforceable.¹³⁰ The foreign court judgment has legal force and is enforceable with the *exequatur*.

121) Bratholm and Hov, *Sivil Rettergang* (Oslo, Universitetsforlaget, 1987), p. 434.

122) Lov om mekling og rettergang i sivile tvister (tvisteloven) (17 June 2005 nr 90), §19-14(1).

123) *Id.* at §19-15(1). For more information about this separation between 'legal force' ('rettskraft') and 'capable of being enforced' ('tvangskraft') in Norwegian law, see: Schei, et al., *Tvisteloven*, supra footnote 49, pp. 841 ff. Michelsen, *Sivilprosess* (Oslo, Ad Notam Gyldendal AS, 1999), pp. 245 ff. Skoghøy, *Tvisteløsning* (Oslo, Universitetsforlaget, 2014), pp. 1003 ff. Bratholm et al, supra footnote 121, pp. 586 ff.

124) Ot.prp.nr.51 (2004-2005) Om lov om mekling og rettergang i sivile tvister (tvisteloven), p. 442, §19-16.

125) See the Legal Enforcement Act (the special procedural statute about enforcement) (Lov om tvangsfullbyrdelse (tvangsfullbyrdelsesloven) (26 June 1992 Nr. 86)), §4-1.

126) *Id.* at §4-1f).

127) *Id.* at §7-3 third part, §8-3 second part, §9-3, §10-3, and §13-3 first part.

128) A legally enforceable judgment of a claim is without substantive discussion relied upon in a new case where the court has to consider the claim to decide the case. Furthermore, the court will dismiss a new case between the same parties concerning a claim which has been rendered legally enforceable, unless the plaintiff, due to a dispute about the decision's legally binding character or other particular circumstances, still has legal standing. See §§19-15 (2) and (3) of (17 June 2005 nr 90). Lov om mekling og rettergang i sivile tvister (tvisteloven). Norway.

129) Schei, et al., *Tvisteloven*, supra footnote 49, §19-16 para. 6.

130) Hambro, *Jurisdiksjonsvalg og lovvalg i norsk internasjonal kontraktsrett* (Oslo, Universitetsforlaget, 1957), pp. 118-119 (§147).





KRISTOFFER SVENDSEN

The Civil Procedure Act does not, however, state the effect of a foreign court judgment when Norway has not entered into an agreement with the country of the rendering court. The foreign court judgment does not hold the same strong position as a foreign court judgment from a country with which Norway entered into an agreement.¹³¹ However, these foreign court judgments from non-agreement countries must hold some value. The foreign court judgment is precedence in the rendering country and between the parties of the foreign judgment, which contains an argumentative aspect not usually contradicted by other decisions. Thus, the foreign court judgments from non-agreement countries hold degrees (stronger or weaker) of argumentative power creating a presumption of right or correctness without creating anything more.¹³²

A foreign court judgment from a non-agreement country generally receives legal force in Norway when a Norwegian court tries the subject matter of the judgment again, based upon which enforceability is imposed.¹³³ Remedies are then enforced based on the Norwegian judgment, and not on the foreign court judgment.

Russia and Norway have not yet entered into a bilateral agreement on the recognition and enforcement of foreign judgments in civil and commercial matters,¹³⁴ and the two states do not share membership in any one convention explicitly on the recognition and enforcement of foreign judgments.

4 Conclusion

The chapter has shown that there are small hurdles to jump for a Russian harmed party to get access to Norwegian courts. *Lex loci damni* is the principle enacted in Chapter 7, with a unilateral extension of protection in delict law to Norwegian interests harmed in Russia, which is not extended to Russian injured parties harmed within the Russian jurisdiction, for situations where the source of harm is located on the Norwegian side of the Barents Sea. This privilege has resulted in discrimination against only Russian interests, which in some situations do not enjoy delict law protection under Chapter 7. A Russian injured party forced to pursue a legal claim against a Norwegian licensee without assets in Russia may receive no compensation, because there is no agreement about recognition and enforcement of foreign court judgments between Norway and Russia. The best of reasons argues for a legislative amendment by the Norwegian Parliament to allow also Russian injured parties to pursue compensation claims

¹³¹) Id. at p. 120 (§149).

¹³²) Id.

¹³³) Id.

¹³⁴) Norway and Russia (through the USSR) have both ratified, however, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York City, United Nations, 1958) (Came into effect for the USSR 22 November 1960 and for Norway 12 June 1961).





IX. Civil Liability for Exploration and Exploitation of Offshore Oil and Gas in the ...

against Norwegian licensees inflicting pollution damage in Russia from oil spills on the Norwegian Continental shelf. This ability to forum shop could have preventive and restorative functions.¹³⁵ Such a choice could have a positive effect on limiting cross-border pollution, from which the neighbouring country will have difficulty protecting itself.¹³⁶



¹³⁵) NOU 1982: 19 Generelle lovregler om erstatning for forurensningsskade, p. 49.

¹³⁶) *Id.* at p. 50.



