# The Saga of the SERVER

The Norwegian Supreme Court clarifies the right to limit liability under Norwegian law, and the application of the criteria required to support a wreck removal order.

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The bulker MV SERVER grounded on Norway's west coast during heavy weather in January 2007. The vessel broke in two causing a substantial bunker oil spill. The bow section of the vessel was quickly recovered. The aft section sank. Thankfully, all crewmembers were rescued with no serious injuries and the spill was cleaned up. The vessel was entered with Gard for P&I risks.

The Norwegian authorities issued a wreck removal order for the aft section. The owners and Gard opposed the order based on the following:

• The aft section was fully submerged, out of sight and represented no hazard to navigation.

• All oil products had been removed from the wreck so it posed no threat to the marine environment and no obstruction to navigation.

The challenge of the wreck removal order was first the subject of an administrative process involving the Norwegian Coastal Authority and the Ministry of Transportation, followed by litigation for about four years at all levels of the Norwegian courts, i.e. the District Court, the Court of Appeals and the Norwegian Supreme Court, the latter in January 2017.

The litigation has been necessary to clarify several important principles including the scope of the right to limit liability under Norwegian law, and the respective roles and authorities of the government and courts in relation to a wreck removal order. This is a summary of these important issues as determined by the Supreme Court in February 2017.

## Limitation of liability versus duty to take action

Owners and Gard established a limitation fund in 2012 thus exercising their right to limit liability under Norwegian law (ref. section 172 a Norwegian Maritime Code (NMC)). In this regard, it was assessed that clean-up costs and compensation claims for the spill, plus costs of the initial response measures, were likely to consume the limitation fund. Hence, any substantial additional wreck removal costs would cause the total claims that could be brought against the limitation fund to greatly exceed it. Owners and Gard argued that the right to limit applied also to any wreck removal costs and that the duty to comply with an order issued pursuant to the Norwegian Pollution Act could go no further than the limitation amount. The Norwegian State argued that the right to limit liability only concerned monetary claims and did not affect the duty of the owner of the wreck to comply with a lawful order to remove it. Furthermore, the State highlighted that the owner would, after having complied with the order, have a right to bring the costs incurred as a claim against his own limitation fund and as such obtain a contribution from the fund in competition with other valid and limitable claims.

The Supreme Court essentially affirmed the arguments brought forward by the State and ruled that an owner cannot use the right to limit liability under the NMC as a defence against a duty to comply with a valid wreck removal order.

## Roles and authorities concerning a wreck removal order

The Norwegian Pollution Act allows the environmental authorities (here the Norwegian Coastal Administration (NCA) and Ministry of Transport (Ministry)) to order a vessel owner to remove a wreck if it is unsightly **or** if it may cause damage or inconvenience to the environment. Initially, the NCA issued a wreck removal order based on an allegation that the wreck posed a threat to the marine environment. Owners appealed the decision to the Ministry who maintained the removal order, but did so explicitly on the basis that the wreck was unsightly. In its decision, the Ministry expressly stated that it had not considered whether the wreck caused any damage or inconvenience to the marine environment and that it did not consider such an assessment to be required in the circumstances.

Owners and Gard opposed the validity of the decision from the Ministry and argued that the wreck could not be considered unsightly, because no part of the wreck was above the water surface at low tide, and could not be seen as it was submerged with the highest point on the wreck being four metres below the water surface at low tide. The State argued before the District Court and Court of Appeals that the wreck removal order was valid based on arguments that it posed a sufficient risk to the environment, i.e. a legal basis that the Ministry had expressly not applied in its order. The Supreme Court agreed with owners and Gard that the lower courts were not authorised to review the validity of the wreck removal order on a different legal basis than the actual basis applied by the Ministry. In short, the courts were not authorised to act as an administrative authority, but to exercise powers of legal control with administrative decisions. Hence, the Supreme Court referred the case back to the Court of Appeals with the mandate to determine if the wreck removal order issued by the Ministry was legally valid on the basis that the wreck was unsightly at the time the order was issued (in 2012).

It is not yet clear whether the State intends to pursue the action before the Court of Appeals on that basis, or, alternatively, request the NCA to reassess whether the aft section represents a threat of damage or inconvenience to the marine environment as of today, and thereby issue a revised wreck removal order. If so, owners and Gard have a right to challenge the basis of the order and to provide new evidence as to the environmental impact today - 10 years after the SERVER's aft section came to rest on the sea floor.

What does the SERVER judgment tell us? We now know that in Norway, an owner's right to limit liability cannot be used as a defence to costs to be incurred in removal of a wreck. What we do not know yet, is whether there is a legal duty for the owner under applicable law in Norway to remove the SERVER's aft section. We do not know whether the State will argue before the Court of Appeals on remand that the wreck is "unsightly". Nor do we know whether the State (NCA) intends to issue a revised order for removal of the aft section based on arguments that it currently represents an environmental risk. If so, such an order would set a threshold for environmental risk at a substantially lower level than found in other countries.

Clearly, the Saga of the SERVER continues. We will keep our readers updated.

We thank Gaute Gjelsten of Wikborg Rein for his kind assistance in producing this article and Nina M. Hanevold-Sandvik of Wikborg Rein for providing the photograph showing the location of the aft section.

*the* Gard Editorial Team . *We are always happy to consider topics suggested by our readers. If you have any suggestion for future articles, please contact us.*