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The Rome II-Regulation in a Maritime Context

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I. Land-based and maritime torts

The implementation of independent plans of different members of the human society may produce clashes. Where those clashes are intentional for all parties involved they will usually lead to some kind of arrangement and coordination; this is the domain of contract law. But the clashes may also be purely accidental if none of the parties or only one of them was driven by intention. It is then up to the law of torts to determine the economic consequences. Given the increasing density of population, the development of new technologies and risks, and economic growth, such unintentional clashes cannot be avoided in land-based activities. The law of torts therefore has flourished and brought about a great number of specific forms of liability throughout the last century. In private international law, this development is reflected by the evolution of specific conflict rules as laid down in Articles 4-9 of the Rome II-Regulation (1). Most of them are built on the assumption that the world is neatly divided into allotments of sovereignty called states and that it is possible to localize those clashes in a single allotment thereby establishing a clear link between the facts of that clash and the laws governing in that territory.

1. The role of the maritime venture

In respect of several afore-mentioned assumptions, maritime activities display peculiar features. First, contract is of a much greater significance for maritime life. Maritime ventures are based on contract almost without any exception. An unintentional clash such as a road accident which brings together people who never met each other in their lives before is not a very common occurrence in maritime life. Such clashes happen; think of collisions between vessels or between vessels and piers, underwater cables or drilling rigs, or think of oil spills emanating from ships and damaging the nearby coast.

But maritime torts are perhaps more frequent in a setting which is pre-established by contractual relations: The assault of a sailor by other crew members on board a ship; the negligent loss of cargo during a voyage by the carrier; injuries sustained by a passenger through the negligence of a steward. In all these cases a community of interests is created by contract prior to the commitment of the tort, and the effects of the tort do not reach beyond that community which has traditionally been designated as the maritime venture. For maritime life it would therefore appear appropriate to distinguish two general types of torts which may be designated as internal and external depending on whether their effects reach beyond the pre-existing maritime venture.

As a consequence Article 4 para. 3 second sentence Rome II is much more than an exception to the general conflict rule of Article 4 para. 1 in maritime life. The prevalence of the law governing the pre-existing relationship would rather appear as the basic rule for what has been called internal torts of the maritime venture here. Since that pre-existing relationship will often be of a contractual nature, the Rome I-Regulation on the law applicable to contractual obligations gains significance for non-contractual liability, too (2). Even where contract does not affect the law applicable to the tort, an internal tort occurring aboard a vessel is much more linked to this particular maritime venture than to the vessel's position on the high seas or in the territorial waters of any state. The maritime venture will then be considered as the pre-existing relationship for the purposes of Article 4 para. 3.

In the courts of the Contracting States

2. Zones of thinned sovereignty and the place of wrong

A second assumption that seems inaccurate or even inexistent for the private international law of maritime torts is the division of the world in spheres of sovereignty. While the laws of a state extend to its territorial waters (3), the regime governing the continental shelf (4) and the exclusive economic zone only grant reduced rights of sovereignty to the coastal state. They are particularly unclear in respect of the private law applicable to those parts of the sea. Finally, the High Seas is not subject to any claims of sovereignty (5).

What does the localisation put into effect by the conflict rules of the Rome II-Regulation mean in this context? The assessment of the lawful or unlawful character of a certain conduct and of its consequences depends on the rules and regulations that are in force at the place where that conduct occurs and the resulting harm is felt. Obviously a supplementary reflection is needed on how to fill the gap caused by the existence of spheres of reduced and absent sovereignty where no such rules are in force. The case law of the European Court of Justice on the interpretation of the Brussels Convention may provide some guidance as to how the Rome II-Regulation has to be interpreted in this field.

3. The role of uniform law

A third assumption underlying the Rome II-Regulation concerns the benefit of nationalising a tort in the international arena. That nationalization is helpful in respect of many land-based activities, since it assigns a transnational tort to one single legal system. This allows to take recourse to a legal framework that has evolved in repeated applications to the much greater number of purely national torts and thereby has reached a degree

of stability and clarity that increases legal security for transnational torts, too. In maritime torts, the nationalisation brought about by conflict rules is of limited use, however. Maritime activities are predominantly international. In most countries there is no abundant body of case law and legal literature that has grown in purely domestic maritime cases. Nationalisation of the transnational case therefore is of little help.

This is reflected by the idea prevailing over centuries that there is a general maritime law which is not linked to the legislative authority of a single state (6). National sovereigns started to codify maritime law at the national level in the late 17th century (7); that movement culminated in the 19th century (8). This nationalisation was in clear contrast to the needs of the maritime community for a general, transnational maritime law. It is not surprising, therefore, that the efforts made by the international community for the unification of law by means of treaties were especially successful in the field of maritime commerce. The conventions usually establish uniform substantive rules, not conflict of laws rules, both for contractual and for non-contractual relations. An assessment of the Rome II-Regulation has to take account of these conventions.

This paper will first take a closer look at some uniform law conventions in the field of maritime torts, see below chapter II. Chapter III will then explore the significance of the case law of the European Court of Justice on the Brussels I-Convention and Regulation for determining the locus delicti in maritime cases.

II. Uniform law conventions on maritime torts

1. Survey

There is no international convention that deals with non-contractual liability in maritime matters in a comprehensive way. However, several conventions cover single aspects of such liability. In particular, the Collisions Convention of 1910 (9), the Oil Pollution Civil Liability Convention of 1969 (CLC) (10) as replaced by the 1992 Protocol (11), the Nuclear Liability Convention of 1971 (12) , and the Bunker Oil Convention of 2001 (13) have taken effect for a certain number of Member States. The liability for the spills of certain chemicals has been dealt with by the HNS Convention of 1996 (14) which however has not entered into force.

The Salvage Conventions of 1910 (15) and 1989 (16) cover an activity which nowadays is mainly contractual. In the field of contract law several conventions on the carriage of goods by sea must be taken into account: the Hague Rules (17), the Hague Visby Rules (18) and the Hamburg Rules (19). For the carriage of passengers the Athens Convention of 1974 (20) and its Protocols, the last one of 2002 (21), should be added. Most of the carriage conventions make clear that claims based on tort law cannot exceed the limitations laid down in the carriage conventions (22).

Finally, regard must he had of the Limitation Convention of 1976 which allows ship-owners to limit their liability arising from various legal grounds in accordance with the size of the vessel (23). The following remarks will be limited to the tort law conventions proper and, more precisely, to their respective scope of application.

2. The Collisions Convention of 1910

The Collisions Convention of 1910 applies to collisions between sea-going vessels or between sea-going vessels and vessels of inland navigation when all the vessels concerned belong to Contracting States, see Articles 1 and 12. The Convention has been ratified by more than 80 states worldwide, among them 22 Member States of the European Union. Thus, most collisions between vessels flying the flag of a Member State will be covered by the Convention.

Recourse to national law is necessary, however, if for example a Swedish ship is involved, since Sweden has denounced the Convention in 1995 (24). In conformity with Article 12 of the Convention some Contracting States (25) have extended its rules to collisions involving vessels from non-Contracting States. It is submitted, however, that such extension by single Contracting States is a matter of national law which is only applicable when referred to by the conflict rules of the forum state. The situation is analogous if solid installations such as piers, off-shore windmills, underwater cables or drilling rigs are involved; non-contractual liability arising from such collisions is entirely a matter of national law as designated by choice of law rules.

While many countries have given direct effect to the Collisions Convention, others, like Germany, have implemented it into their national legislation. Such implementation inevitably generates some divergences between the national text and the original Convention. Would the application of the implementing rules of a Contracting State therefore depend on a prior choice of law analysis? Would a court in a Member State that is also a Contracting Party to the Collisions Convention apply the German rules on the collision of vessels only if the Rome II-Regulation designates German law as being applicable to the collision?

In the case of the Hague Rules (26) this has been the general practice for many years; so-called clauses paramount contained in the bills of lading often refer to the Hague Rules as implemented in a specific national law (27). But the Hague Rules is a special case: The Protocol of Signature explicitly allowed for an implementation in the internal laws and the necessary adjustments; as substantial divergences emerged in the course of time, choice of law issues became inevitable. Usually, the implementation in the internal law is meant to adhere to the text of a convention as much as possible, and divergences that may arise, are therefore of minor significance. Consequently, the courts of Contracting Parties of the Collisions Convention should apply the Convention (or the implementing provisions of their internal law) without a prior choice of law analysis, provided that the Convention is applicable (28).

2. The Nuclear Liability Convention

The 1971 Convention relating to civil liability in the field of maritime carriage of nuclear material does not provide for, but immunize the carrier against, liability arising from sea-borne transport of nuclear material. It supplements the Paris Convention on third party liability in the field of nuclear energy of 1960 (29) and the

Vienna Convention on civil liability for nuclear damage of 1963 (30). All three instruments pursue the objective of channelling liability to the operator of a nuclear installation. That liability is a condition for the exoneration of the maritime carrier under the 1971 Convention.

In the courts of the Contracting States, among them 11 Member States of the European Union, it applies if the maritime carrier might be held liable in accordance with other rules of law. But the Convention does not require any geographical or other link of the case with a Contracting State. Thus, choice of law is of little relevance in the Contracting States of this Convention. A difficult issue might arise in the courts of other EU Member States if the Rome II-Regulation refers to the law of a Contracting State of the 1971 Convention. Is that Convention part of the lex causae designated by the Rome II-Regulation? The uniform law character of the 1971 Convention would appear to militate in favour of this view.

3. Spills of Oil Carried as Cargo: the CLC 1969

Throughout the last 50 years oil spills have turned into the most spectacular type of maritime tort. As to the spills of oil carried as cargo, a multi-layered system of compensation has developed. Its foundation is the Convention on civil liability for oil pollution damage of 1969 (CLC) which has been amended by a Protocol of 1992 (31); this Protocol is in force for 23 EU Member States. Subject to certain monetary limits, these instruments establish the non-fault liability of the owner of a ship from which cargo oil has escaped or been discharged. The Convention applies to pollution damage caused in the territory, the territorial sea and in the exclusive economic zone of a Contracting State. Given the commitment of all coastal Member States of the European Union to the Convention it is rather unlikely that litigation arising from a maritime oil spill will be conducted in a Member State that is not a Contracting State of the Convention.

4. The Bunkers Convention of 2001

Another source of oil pollution is bunker oil. In 2001 a Convention on civil liability for bunker oil pollution damage was adopted under the auspices of the International Maritime Organization. In accordance with Council Decision 2002/762 the EU Member States shall take the necessary steps to ratify or accede to this Convention (32). After the required number of ratifications has occurred, the Convention takes effect for 21 states including 13 Member States on 21 November 2008.

It establishes the non-fault liability of the owner, bareboat charterer, manager and operator of a ship, but leaves the limitation of liability to other regimes, in particular to the London Convention on limitation of liability for maritime claims of 1976. The liability rules of the Bunkers Convention apply to pollution damage caused in the territory, the territorial sea and in the exclusive economic zone of a State Party. Given the obligation of accession that is incumbent on Member States under Decision 2002/762 the Bunkers Convention will sooner or later be the uniform law of all Member States.

5. The remaining significance of choice of law

What is the significance of choice of law rules in general and the Rome II-Regulation in particular in areas covered by these conventions? Four functions are conceivable:

a) Choice of law as a general precondition? - One might argue that the application of substantive rules of law, whether of domestic or international origin, is conditional upon a prior application of choice of law rules. From this point of view, the relationship between the Rome II-Regulation and the uniform law conventions would be a matter of Article 28 Rome II. While this provision refers to international conventions “which lay down conflict of law rules relating to non-contractual obligations”, uniform law conventions are said to be covered by that provision since they all define their own scope of application by rules which are equivalent to conflict rules (33).

It is submitted that this approach is mistaken. Under its Article 1 para. 1 the Rome II-Regulation shall apply “in situations involving a conflict of laws”, “dans les situations qui comportent un conflit de lois”, “in de gevallen waarin tussen de rechtsstelsels van verschillende landen moet worden gekozen”. With much less clarity the German version requires “eine Verbindung zum Recht verschiedener Staaten“, and not necessarily a conflict. But in most official languages of the Community the wording of Article 1 para. 1 and its purpose leave no doubt that a conflict of laws is a condition for the application of the Regulation’s conflict of laws rules. To the extent that uniform law conventions are applicable, there is no conflict of laws, and the Rome II-Regulation including its Article 28 is therefore inapplicable. In general this would also extend uniform law conventions which contain isolated choice of law rules to supplement the uniform substantive rules.

b) Member States other than Contracting Parties. - What has been said above will of course only apply in Member States which are at the same time a Contracting Party to a uniform law convention in question. In other Member States the conflict of laws situation is not excluded by the accession to a uniform law instrument; therefore the Rome II-Regulation will apply (except for Denmark, see Article 1 para. 4).

c) Cases not covered by a uniform law convention. - Where a country is both an EU Member State and a Contracting Party to a uniform law convention, the choice of law rules of the Rome II-Regulation will govern any litigation that may arise outside the scope of the uniform law convention. To take the example of the Collisions Convention, collisions between solid oil rigs and vessels are not governed by the Convention. Liability therefore has to be assessed under the national law applicable in accordance with the Rome II-Regulation.

d) Filling of gaps. - Finally, no uniform law convention contains a complete regulation of all issues that may arise in its application. Gaps are inevitable. They should be filled by general principles underlying the convention; while this is explicitly stated in Article 7 para. 2 of the Convention on the international sale of goods of 1980 (34), the same interpretive rule would also follow from general principles of treaty interpretation (35). Where no general principles underlying the respective convention can be traced, recourse must be had to the national law designated by private international law.

III. Localising maritime torts

1. Territorial connecting factors in Rome II

Most connecting factors employed by the conflict rules of the Rome II-Regulation are territorial in nature. Under Article 4 para. 1 “the law of the country in which the damage occurs” will apply. In respect of product liability which may also be relevant in maritime life, a similar conflict rule is contained in Article 5 para. 1 letter c. The same is true with regard to liability for environmental damage, but here the victim may also choose to base its claim “on the law of the country in which the event giving rise to the damage occurred”. With regard to industrial action between ship owners and sailors and their respective organisations, Article 9 refers to “the law of the country where the action is to be, or has been, taken”.

These territorial connections are clear in respect of land-based activities. But there are two peculiarities of maritime life which make them equivocal and uncertain: The absence and reduction of sovereignty in the major part of the oceans, and the occurrence of acts giving rise to liability on vessels, i.e. moving objects which cannot simply be ascribed to the coastal state through whose waters they are plying.

2. Weber v. Ogden: Jurisdiction over the continental shelf

In the context of the Brussels Convention on the jurisdiction and enforcement of judgements in civil and commercial matters the Court of Justice had to struggle with similar problems in two cases. In Weber v. Ogden the German plaintiff had been employed as a cook by the defendant on mining installations and vessels flying the Dutch flag and operating mainly on the waters above the Dutch part of the continental shelf. However, he had also worked for three months on board a floating crane deployed in Danish territorial waters for the construction of a bridge over the Great Belt. The Court was asked by the Dutch Hoge Raad whether work carried out in the North Sea above the Dutch part of the continental shelf was equivalent to work carried out in the Netherlands for the purposes of Article 5 no. 1 of the Brussels Convention (36).

It pointed out that this provision is not applicable to contracts of employment performed entirely outside the territory of the Contracting States (37), but requires that the individual contract of employment under which the employee carries out his work has a connection with the territory of at least one Contracting State. For answering the question whether work carried out on the continental shelf was performed in the coastal state, the Court referred to Article 29 of the Vienna Convention on the Law of Treaties (38) and to the 1958 Geneva Convention on the Continental Shelf (39). Since Articles 2 and 5 of that Convention extend the jurisdiction of the coastal state to the continental shelf as far as the exploration and exploitation of natural resources is concerned, the Court held that work carried out in that context is to be regarded as work carried out in the territory of the coastal state for the purposes of Article 5 no. 1 of the Brussels Convention (40).

At first sight this judgement might be interpreted as prescribing a general equivalence of the continental shelf and the territory of a coastal state for purposes of Article 5 no. 1 of the Brussels Convention or even beyond. The court narrows its own statement only by implication, in particular by pointing to the focus of the plaintiff’s work in the mining business. This allows the inference that maritime activities which are not related to the exploration or exploitation of natural resources are not within the sovereignty of the coastal state. In this respect the opinion of Advocate General Jacobs makes clear that “the situation might… be different in the case, for example, of a vessel flying the flag of another State and sailing on the high seas over the continental shelf. Under the Convention on the High Seas, … the flag State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag (Article 5 (1)) and such ships are subject to its exclusive jurisdiction on the high seas (Article 6 (1))” (41).

3. DFDS Torline v. Sjöfolk: The flag as a relevant factor

The second case involved the Danish Ship Owners Association acting on behalf of DFDS Torline as plaintiffs and the Swedish Congress of Trade Unions acting on behalf of Sjöfolk, one of its member trade unions, as defendant. The defendant had submitted to the plaintiffs a collective agreement for Polish sailors working on board the ship Tor Caledonia owned by DFDS, registered in the Danish International Ship Register and providing services between Göteborg in Sweden and Harwich in the United Kingdom. When DFDS rejected the request for a collective agreement, Sjöfolk instructed its Swedish members not to accept employment on the Tor Caledonia and called for sympathy action by other trade unions. Following that request the Swedish Transport Workers Union called upon its members to refuse any work whatsoever relating to the Tor Caledonia which would prevent the ship from being loaded or unloaded in Swedish ports. In response, DFDS brought two actions, one in the Danish Employment Tribunal (Arbejdsret) seeking an order that the two trade unions acknowledge that the principal and sympathy actions were unlawful and had to be withdrawn by the unions. The other against Sjöfolk before the Maritime and Commercial Court of Denmark claiming that the defendant was liable in tort for unlawful industrial action. It alleged losses suffered as a result of immobilising the Tor Caledonia and of leasing a replacement ship.

The Court of Justice was addressed by the Employment Tribunal which however referred preliminary questions relevant for both proceedings. The Court decided that a litigation about the legality of industrial action is covered by Article 5 no. 3 of the Brussels Convention (42). As a consequence, the Court’s interpretation of Article 5 no. 3 granting jurisdiction, at the plaintiff’s choice, to the court of the place where the damage occurred and to the place of the event giving rise to it (43), also applies to the assessment of the illegality of industrial action.

The Court was further asked where the damage sustained by the ship owner occurred in such a case. The Court of Justice pointed out that the place where the fact likely to give rise to tortuous liability could only be Sweden in this case, since that was the place where the defendant union had its head-office and published the notice of industrial action (44). With regard to the place where the damage occurred the Court of Justice referred to the national court to inquire whether the financial loss had arisen at the place where the plaintiff ship-owner is established. The Court of Justice held that “in the course of that assessment by the national court, the flag state, that is the state in which the ship is registered, must be regarded as only one factor, among others, assisting in the identification of the place where the harmful event took place. The nationality of the ship can play a decisive role only if the national court reaches the conclusion that the damage arose on

board the Tor Caledonia. In that case the flag state must necessarily be regarded as the place where the harmful event caused damage." (45)

It should be noted that the Court, in accordance with Advocate General Jacobs, considers the ascertainment of the place where the damage occurred as a question of fact left to the national court (46). But it is even more remarkable that the Court of Justice, going beyond the Advocate General's opinion, made a comment on the role of the flag in this assessment. This comment might be relevant for cases where the industrial action, e.g. the refusal to unload the ship, leads to the loss of perishable goods laden on board. It should finally be pointed out that the Court's comment on the significance of the flag in such situations was not qualified by any reference to the position of the ship in territorial waters or on the high seas. Provided that the damage occurs on board the ship, her nationality and not the allocation of the port in a foreign state was held to be a relevant factor.

4. Inferences to be drawn for choice of law

The opinions reported above do not provide a comprehensive picture of the localisation of maritime torts. But they hint at the future development of the law also in respect of the Rome II-Regulation. This is perhaps less so for the DFDS opinion since Article 9 Rome II excludes that the effects of unlawful industrial action will be assessed in accordance with the law of the country where the damage occurs. Yet, the Court's dicta as to the role of the flag might provide some guidance for other maritime torts.

a) Internal torts. - First the DFDS opinion appears to provide some support for a distinction between torts which exclusively produce damage on board a single vessel and torts which produce damage either on several ships or outside a ship, e.g. to solid installations like oil rigs or piers or the environment. In the first group of cases the nationality of the vessel is of particular relevance irrespective of where the vessel is afloat, whether in territorial waters or on the high seas. If not only the damage, but also the damaging event occurs on board of one and the same vessel, the relevance of her nationality would already follow from the pre-existing relationship of the parties in accordance with Article 4 para. 3 second sentence Rome II, see above sect. I/1. This solution provides for a continuous tort law regime aboard a vessel, i.e. a regime for internal torts that does not change as she sails through the territorial waters of different states. If the place of damage of internal torts were however related, not to the vessel, but to her position in territorial waters or on the high seas, the law applicable to torts would change as she pursues her course. To avoid such an oscillation of the tort law regime appears important for the maritime venture which is the same regardless of whether the vessel is cruising in the North Sea or passing through the Kiel Canal. Moreover, this continuity relieves the plaintiff from the burden of proof in respect of the time and place of the commission of the tort which would otherwise be incumbent on him.

Where internal torts are committed on solid constructions, in particular drilling rigs flying a national flag, similar considerations apply. However, such installations are often not registered in the ship's register and do not fly a national flag. It can be inferred from the Weber opinion of the Court of Justice that in such cases the law of the coastal state will govern a tort even if the rig is placed outside the territorial waters on the continental shelf or in the exclusive economic zone.

In many cases the flag will indicate the vessel's nationality, as suggested in the DFDS opinion. But in view of open registries and flags of convenience this can only be a presumption which may be rebutted by other connecting factors such as the central administration of the ship-owner, the place of registration, the homeport or the nationality of the master, the officers or the parties to the dispute. A weighing of contacts appears inevitable in such situations.

b) External torts occurring on the continental shelf and in the exclusive economic zone. - Where the facts giving rise to liability sounding in tort are not limited to a single vessel or a single installation, it will often be impossible to ascertain a pre-existing factual relationship as referred to in Article 4 para. 3 Rome II. Accidents involving previously unconnected users of maritime resources cannot be subjected to the law governing a single maritime venture. Here the place where the damage occurred (Article 4 para. 1 Rome II) should be determined by the position at sea where damage was sustained. The localisation required under Article 4 para. 1 Rome II-Regulation may however be alleviated by the principles of the Weber judgement. In the case of a collision between a ship and a drilling rig on the continental shelf or in the exclusive economic zone, at least one of the parties pursues mining objectives which are covered by the jurisdiction of the coastal state; therefore the law of torts of that state should apply.

This reasoning is also valid in respect of the spill of oil or chemicals by a merchant vessel outside territorial waters. If that spill causes damage to the territory of the coastal state or in its territorial waters, Article 4 para. 1 Rome II clearly designates the law of that state as being applicable to supplement an international convention or, in the absence of such an instrument, to govern liability.

The solution might be more complicated if the damage, not being connected with mining activities, occurs outside territorial waters, e.g. to a fish farm operating above the continental shelf.

However, the 1992 Protocol amending the 1969 Convention on civil liability for oil pollution damage has unequivocally extended the application of the law of the coastal state to pollution damage caused in the exclusive economic zone (47). The widespread approval of this principle which is reflected by the ratification of the 1992 Protocol by all coastal Member States of the European Union would appear to allow for an analogy in the field of choice of law: Where damage occurs outside territorial waters, for example in fish farms, as a consequence of a spill of chemicals which is not covered by any convention in force, the law of the coastal state should apply. This would also be in line with the extension of jurisdiction and sovereign rights of the coastal state in the exclusive economic zone laid down in Article 5 b UNCLOS.

c) External torts occurring on the high seas - The localisation of maritime torts will fail outside territorial waters when no activities are involved which justify an extension of jurisdiction by coastal states, i.e. if none of the activities involved are carried out "for the purpose of exploring and exploiting, conserving and managing the natural resources" above the sea-bed, of the sea-bed itself and of its subsoil, "and with regard to other

activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds" (48). This concerns shipping in particular.

The collision of merchant vessels flying different flags on the high seas including, for this purpose, the waters above the continental shelf and in the exclusive economic zone, has always posed difficult problems in private international law. Over time, courts have applied the lex fori or have chosen between the two laws of the flag the one which is more favourable to the plaintiff (49). While the latter solution has been in line with the favour granted by German private international law to the victim of a tort seeking compensation (50) it is not supported by the Rome II-Regulation which grants that favour only in the context of environmental liability, see Article 7. For ordinary accidents Article 4 does not favour the plaintiff but designates the law of the place where the damage occurred as applicable.

In the cases under review that place is located in terra nullius which has two consequences: First, there is no forum delicti under Article 5 no. 3 of the Brussels Convention or the Brussels I-Regulation, and the competent court will usually be the one of general jurisdiction under Article 2. Second, if that conclusion is drawn for jurisdiction, it should equally be drawn in respect of the applicable law. In terra nullius including the high seas there is no tort law in force. While ships are subject to the "exclusive jurisdiction" of the flag state on the high seas (51), this can only refer to the internal relations between the various interests involved in the maritime venture. If it also referred to collisions between vessels flying different flags, the jurisdiction exercised by the flag state over a vessel would no longer be exclusive because each of the flag states involved would extend its jurisdiction to the vessel flying the foreign flag, and both vessels would therefore be subject to the concurrent jurisdiction of both flag states which however would be in contradiction to the clear wording of Article 92 UNCLOS. It has to be inferred from this line of reasoning that the jurisdiction of the flag state does not include the civil liability arising from a collision of vessels flying different flags on the high seas. To the extent that such collisions are not governed by the 1910 Collisions Convention it would rather appear that the jurisdiction of none of the States involved covers those cases.

The consequence to be drawn for private international law is the absence of any effective private law in terra nullius including the high seas. If that is true, the collision of two vessels occurring on the high seas does not involve a conflict of laws as required by Article 1 para. 1 of the Rome II-Regulation. Therefore, the Rome II-Regulation would appear to be inapplicable in these cases. It would follow that the matter is left to national law, and that, in the absence of a conflict of laws, there is no reason for a national court to apply foreign law. Thus, the lex fori would apply, and the plaintiff, by choosing the competent court, would also determine the applicable law.

IV. Conclusions

(1) Maritime torts are characterized by two peculiarities. First, the place where the damage occurs as referred to in Article 4 para. 1 Rome II may be a vessel, i.e. a moving object that changes her position from one sphere of sovereignty to another as time goes by. Second, the allocation of the vessel may be within territorial waters, but also outside on the high seas.

(2) The unification of substantive private law has had a considerable impact on maritime law including maritime tort law. In particular collisions and oil spills are dealt with by uniform law conventions which have been ratified or acceded to by most EU Member States. The choice of law analysis is not a precondition to their application, but may supplement them to fill their gaps.

(3) Where the effects of a tort committed on board a vessel are entirely limited to that ship, its position within the territorial waters of state A or state B or on the high seas is irrelevant. Consequently, the country in which the damage occurs as set forth in Article 4 para. 1 Rome II is presumed to be the law of the flag state of that vessel. The presumption may be rebutted in respect of ships flying a flag of convenience or being registered in an open registry.

(4) These rules should also be applied to solid installations such as artificial islands or drilling rigs to the extent that they fly the flag of a state.

(5) In all other cases the place where the damage occurs has to identified, not on a vessel or installation, but on the surface. To this end, territorial waters are treated like the territory of a state.

(6) On the continental shelf and in the exclusive economic zone, the coastal state has a limited jurisdiction over all activities related in particular to the exploration and exploitation of natural resources above and on the sea-bed and in the subsoil. For all activities serving those purposes the continental shelf and the exclusive economic zone must be treated, for the purposes of private law, as parts of the coastal state. Collisions between installations such as offshore-windmills or drilling rigs and vessels are therefore subject to the law of the coastal state.

(7) Torts other than collisions emanating from merchant vessels plying the waters above the continental shelf or in the exclusive economic zone, and causing damage in those areas, are equally subject to the law of the coastal state. This would follow from the reasoning above (sub 6) or from an analogy to the Convention on civil liability for oil pollution damage of 1969 and its 1992 Protocol which has been ratified by all coastal EU Member States.

(8) Collisions occurring outside territorial waters between ships flying the flags of different states are allocated in terra nullius including the high seas. The jurisdiction of the flag state established by Article 92 UNCLOS is limited to internal torts of each vessel involved; it does not extend to collisions. Since such collisions occur outside any sphere of sovereignty, there is neither a forum delicti under Article 5 no. 3 Brussels I nor a conflict of laws as required by Article 1 para. 1 Rome II and many national laws for the application of conflict rules. Thus, there is no reason for the application of foreign law, and damages claims have to be assessed under the lex fori.

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