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Rome II - Regulation and Maritime Torts

Kurt Siehr
Hamburg

It was a dark and stormy night" … and the M/V Lucona exploded in 1977 and went to the bottom of the Arabian Sea, off the Maldives Islands. This could be the beginning of my lecture on maritime torts because the Lucona – Affair involved several people of the Vienna high society charged and sentenced to jail because of murder in 6 cases and of insurance fraud by trying to collect money for the loss of an alleged "uranium factory" to be shipped to Hong Kong and lost during the voyage (1). This case is very unusual and not a typical maritime tort. Instead of this I want to tell you something about product liability, environmental damage and industrial action in maritime law based on the Rome II - Regulation.

I. Product Liability

Also the product "ship" may be incorrectly designed and therefore may cause a disaster as the sinking in the Baltic Sea of the ferryboat MS Estonia on September 28, 1994, exactly 14 years ago, shows. The ship was on route from Tallinn/Estonia to Stockholm/Sweden when rough weather (29-39 knots/33-45 mph) with a significant wave height of 3 – 4 metres came up. At about 1:00 a.m. the locks of bow visor broke under the strain of the waves and allowed water into the car deck destabilizing the entire ship. Within less than an hour the ship MS Estonia disappeared from the radar screens of other ships and about 850 passengers lost their lives by drowning and hypothermia.

The ship was built in 1979/80 by the Meyer Werft in Papenburg/West Germany and launched as MS Viking Sally for the Rederi Ab Sally (Viking Line) and registered in the Finish port of Mariehamn/Finland. At the time of the disaster the ship was owned by the Estline Marine Co. Ltd., sailed under the new acquired name MS Estonia and was registered in the Estonian port of Tallinn

Apart from rumours that there has been an explosion aboard the MS Estonia (2), the problem is whether the Meyer Werft in Papenburg/Germany is responsible for any incorrect design in building the ship, without providing any secure locks of the bow door and without monitoring any defect in the locks of the bow door on the bridge. Would there be any claim of survivors or relatives of drowned passengers to claim damages under the Rome II - Regulation?

1. Law Applicable: Article 5 Rome II - Regulation

After entry into force of the Rome II – Regulation on 11 January 2009 the applicable law has to be decided under Article 5 of the Regulation. This Article reads as follows:

> Article 5: Product liability
>
> 1. Without prejudice to Article 4 (2), the law applicable to a non-contractual obligation arising out of damage cause by a product shall be
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> (a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,
>
> (b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,
>
> (c) the law of the country in which the damage occurred, if the product was marketed in that country.
>
> However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).
>
> 2. Where it is clear from all the circumstances of the case that the tort/delict is

> manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connecting with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

According to Article 5 (1) sentence 1 product liability is governed by the country in which the person sustaining the damage had his or her habitual residence (a) / in the country in which the product was acquired (b) / or the country in which the damage occurred and the product was marketed in that country and the person claimed to be liable could have reasonably foreseen the marketing of the product or a product of the same type in that country. If the person claimed to be liable could not have reasonably foreseen the marketing of that good or a product of the same type in these countries, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident. Article 5 (2) provides an “escape clause” consisting of two parts. According to sentence 1, the law of the country with which the tort is “manifestly more closely connected” applies, and according to sentence 2 it is presumed that a pre-existing relationship between the parties may be a case in which there is a more close connection.

a) Article 5 (1) sentence 1 Rome II – Regulation

Also ships may be products for which a shipyard building these ships may be held liable under product liability. However, ships are not marketed like motorcars or other smaller vehicles. Ferry boats may be ordered to be built by a shipyard and are only marketed in that country in which the shipyard is located. This is here, in the case of MS Estonia, Germany. In all cases of Article 5 (1) sentence 1 Rome II – Regulation the product or a product of the same type must have been marketed either in the country in which the victims (about 501 Swedes, 280 Estonians, 10 Finns and some people of other nations) were habitually resident or in which the product was acquired (Germany) or in which the damage occurred (high seas). The person claimed to be liable could have foreseen that the damage occurred in the Baltic Sea but this is neither necessary nor sufficient. The marketing in these territories must have been foreseen. This the Meyer Werft could not have done.

b) Article 5 (1) sentence 2 Rome II – Regulation

If the producer of the product could not have foreseen the marketing of his products somewhere else outside of his country, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident. This is Germany in the case of the MS Estonia.

c) Article 5 (2) Rome II – Regulation

As there is no pre-existing relationship between the shipyard and the victims of the MS Estonia – disaster, only sentence 1 of Article 5 (2) applies. The only country with which the case may be “manifestly more closely connected” might be Estonia because the MS Estonia was flying the flag of this country. It is, however, very unlikely that with this country the case is more closely connected. Only 280 victims were of Estonia and all the others were from some other countries. The shipyard on the other hand had no connection at all with Estonia because it had, at the time of building the ship and later, no connection with Estonia. Therefore the “escape clause” does not apply and the law at the habitual residence of the shipyard [Article 5 (1) sentence 2], i.e. German law applies.

2. Law Applicable: Article 4 Rome II – Regulation?

As under German law claims on product liability expire after 10 years after the product has been placed in the market (§ 13 Act on the Liability for Unsafe Products of 1989) and the ship was delivered to the first owner in 1980, there is no claim on German product liability. The problem is whether the same persons may base their claim on torts in general, either under the same rule of Article 5 Rome II – Regulation or under the general rule of Article 4 Rome II - Regulation. This is a matter of construction of the Rome II – Regulation.

a) Rome II - Regulation

Whether Article 5 Rome II – Regulation is limited to strict product liability or extends to all cases of damages caused by a product, is a matter of construction of the Regulation. Article 5 does not limit the application of products liability to strict products liability. It simply speaks of a “non-contractual obligation arising out of damage caused by a product”. This implies also tort claims which are based on the normal rules of torts.

This is confirmed by consideration no. 11 which says in sentence 3 that the “conflict-of-law rules set out in this Regulation should also cover non-contractual obligations arising out of strict liability.” From this it may be taken that the provisions of the Regulation does not distinguish between strict and tort liability based on fault but is rather based on the distinction between different factual situations as, e.g., liability for products, unfair competition or environmental damage.

b) Hague Convention of 1973

The Hague Convention of 2 October 1973 on the Law Applicable to Product Liability had also to decide whether this Convention applies only to strict product liability or also to tortious liability based on fault. The Convention itself does not raise this problem but says that only contractual obligations between the parties are excluded [Article 1 (2)] and the rest is governed by the law applicable under this Convention. Therefore also tortious products liability is covered by the Convention.

c) National Conflicts Rules

There are also some specific national conflicts rules on products liability (3). It is also settled in these States that products liability is exclusively dealt with in these provisions and that the general conflicts rules for torts cannot e applied (4).

3. Intermediate Summary

Article 4 Rome II – Regulation is not applicable in cases of products liability. Article 5 Rome II – Regulation also applies if liability of the producer can only be bases on tort or delict because strict liability is excluded because of lapse of time. Therefore Article 5 Rome II – Regulation also applies if the shipyard Meyer in Papenburg/Germany can be blamed of having negligently design the MS Estonia.

II. Environmental Damage

In recent years the damage done to the environment by oil tankers spilling their cargo has arisen considerably. The "Torrey Canyon" sank in the British-French Channel on March, 18, 1967 and polluted 100 km of sea shore in Britain and France, the “Amoco Cadiz” ran aground on the Breton coast on March 16, 1978 and the entire cargo of 227 000 tonnes of crude oil was spilled (5), and the “Exxon Valdez” hit the Prince William Sound’s Bligh Reef off the coast of Alaska on March 24, 1989 and spilled 10.8 million gallons of crude oil into the sea (6). Let me take the “Amoco Cadiz” disaster and ask whether the ship, the owner or the company running this oil tanker may be held responsible under the Rome II – Regulation.

1. Law Applicable: Article 7 Rome II – Regulation

Unless the problem of liability is solved by international conventions on substantive law (7) the law applicable to environmental damage is governed by Article 7 Rome II – Regulation. This Article reads as follows:

> Article 7: Environmental damage
> The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4 (1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

Article 4 (1) to which reference is made in Article 7 reads:

> Article 4: General rule
> 1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

The liability for environmental damage is governed by the general rule of Article 4 (1) Rome II – Regulation but the person seeking compensation may choose to base his claim on the law of the country in which the event giving rise to the damage occurred. Article 7 is one of the very few rules of the Rome II – Regulation in which a plaintiff may unilaterally choose the applicable law according to a favor laesi.

a) Substantive Law

It has to be emphasized that oil pollution is mainly governed in the European Union by international conventions on substantive law according to which the owner of a ship, who need not be the national of a Contracting State, is liable for any pollution damage caused by the ship as a result of an incident, irrespective of fault (8). Such an international conventions, as leges speciales, take precedents over the Regulation.

b) General Rule

If the law applicable has to be fixed, Article 7 Rome II – Regulation applies. According to this provision the general rule of Article 4 (1) is applicable and hence the lex loci damni applies, the law of the country in which the damage occurs. In the Amoco Cadiz case French would govern the compensation of damage suffered in France because of the pollution of the French coast.

c) Choice by the Person Seeking Compensation

The person seeking compensation may choose to base his claim on the law of the country in which the event giving rise to the damage occurs. If the ship was in territorial waters, this is the law of the country to which the territorial waters belong. If, however, the oil tanker broke on the high seas, it is the law of the country the flag of which were flying on the ship. This would have been Liberia in the case of the Amoco Cadiz.

2. Intermediate Summary

Most cases of oil pollution of ship will be governed by international conventions on substantive law. If there is any need to apply national law, Article 7 Rome II – Regulation is applicable.

III. Industrial action

Industrial action in maritime law is very often supported by the International Transport Workers' Federation (ITF). When seamen of ships flying a flag of convenience (Liberia, Panama etc.) arrive in European ports, they try to improve their salary and working conditions by picketing the ships (9). The question is whether such an industrial action is illegal and may give rise to a claim for damages.
The same is true if local unions are going to picket foreign-flag vessels because they are employing foreign seamen and paying them substandard wages and benefits and thereby damaging local seamen with their wage standards. In these cases the industrial action has nothing to do with the complaint of the foreign seamen und the improvement of their wages,.

1. Law Applicable: Article 9 Rome II - Regulation

Industrial action may amount to a tort/delict and the applicable law for industrial actions is regulated in Article 9 Rome II – Regulation. This provision reads:

> Article 9: Industrial action
> Without prejudice to Article 4 (2), the law applicable to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be or has been taken.

Article 4 (2) Rome II – Regulation to which reference is made in Article 9 reads as follows:

> Article 4 (2): General rule: Habitual residence in the same country
> However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

a) Common habitual residence: Article 4 (2) Rome II - Regulation

It is very unlikely that the owner of a ship and the crew have the sane habitual residence within Article 23 Rome II – Regulation. According to Article 23 (1) the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of their central administration unless the event giving rise to the damage, occurs in the course of operation of a branch, agency or any other establishment, then the place of that branch, agency or other establishment shall be treated as the place of habitual residence: Article 23 (1) sentence 2 Rome II – Regulation.
This is unlikely because most of the crew members are nationals of the Philippines and habitually resident there and other States which support the engagement of their people at a very low maximum wage (10). Also the ship owners are not habitually resident at the place of the industrial action, they are located elsewhere.

b) Article 9 Rome II – Regulation: place of industrial action

The place of industrial action is located without problems. It is the harbour where the industrial action takes place. More difficult to answer may be the question whether an industrial action is in fact tortious or not.

2. Substantive Law

Labour disputes per se are not tortious activities. They are normal means of collective labour law

designed to improve wages and working conditions of the union members. But this may be different in some cases.

a) Tortious Activity

In the American case Windward Shipping v. American Radio Assn. the facts were these (11): Two vessels, the Northwind and Theomana were ships of Liberian registry carrying cargo between foreign ports and the United States. The crew of both vessels were composed entirely of foreign nationals, represented by foreign unions and employed under foreign articles of agreement. When the foreign vessels arrived at the port of Houston, Texas in October 1971, American maritime unions representing a substantial majority if American merchant seamen, decided to undertake collective action against foreign vessels which they saw as a major cause of their business recession. The unions agreed to picket foreign ships, calling attention to the competitive advantage enjoyed by such vessels because of a difference between foreign and domestic seamen wages.
The Texas state courts had declined jurisdiction because it was pre-empted by the Labor Management Relations Act (LMRA). The Supreme Court of the United States, by majority opinion, held the collective action taken by the American maritime unions was no activity “affecting commerce” as defined in §§ 2 (6) and (7) of the National Labor Relations Act (NLRA), as amended by the LMRA, and therefore did not preclude state jurisdiction. Hence the Texas state courts had to decide whether the industrial action of the American unions were tortious activity or not. The American unions did not represent the foreign seamen trying, by their collective action, to improve their wages and working conditions. They rather were engaged in picketing foreign vessels by drawing attention to the public of the low wages and benefits paid to foreign seamen aboard foreign vessels and thereby causing damage to American seamen represented by the unions.

b) No Tortious Activity

A different case was decided some years later by the Hose of Lords. In N.W.L. Ltd. v. Woods (12). The International Transport Workers’ Federation (I.T.F.) told the agent of the vessel Nawala carrying iron ore for delivery in Redcar (North Yorkshire), that she would be blacked on entering the port unless the I.T.F. conditions of employment was complied with. The Nawala was registered in Hong Kong and she flew the British flag. The crew was recruited in Hong Kong at wages that were very low by European standards. Most of the new crew were not members of a trade union.

The ship owners applied for an injunction restraining the I.T.F. from issuing instructions for or encouraging any interference with the free passage of the Nawala. The injunction was refused by the High Court and an appeal against that refusal was dismissed by the Court of Appeal. The House of Lords dismissed the appeals. It decided that the dispute concerned terms and conditions of employment and therefore fell within the ambit of section 29 (1) of the Trade Union and Labour Relations Act 1974. It was qualified as a trade dispute even though it was pursues for other motives, i.e. to prevent ship owners from using flags of convenience to the detriment of any member of the crew.

3. Intermediate Summary

The law applicable to industrial action is fixed very easily. The main problem is the decision whether the action is tortious or a simple labour dispute not covered by the Regulation.

IV. Summary

With respect to product liability and industrial action there are not special problems on conflicts law. The law applicable can be easily fixed and with respect to substantive law the courts have to decide whether the producer is responsible in torts or strict liability and the industrial action is tortious or not. In the field of environmental damage the major problem war solved by international conventions about substantive law. Conflict of laws has very little influence on the problem of oil pollution be tankers.