Rome II at Sea
– General Aspects of Maritime Torts –

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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 Arts. 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 localise 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 undertakings. Maritime ventures are generally based on contract. An unintentional clash such as a road accident which brings together people who never previously met each other in their lives is not a very common occurrence in maritime life. Such clashes do 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 they are not frequent.

Maritime torts are arguably 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, sometimes a contract made between the perpetrator and the victim of the tort, sometimes contracts made between each of these parties and a third person, e.g. the shipowner or charterer. The effects of the

[1] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), O.J. L 199/40.

tort do not reach beyond that community which has traditionally been designated as the maritime venture. For the maritime world it would therefore appear appropriate to distinguish between 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.[2]

As a consequence and contrary to what is said in recital 18, Art. 4 (3) second sentence, Rome II is much more than an exception to the general conflict rule of Art. 4 (1) as far as maritime activities are concerned. The prevalence, under Art. 4 (3), of the law governing the pre-existing relationship would rather appear as the basic rule for what has here been called internal torts of the maritime venture. 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.[3] 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 should in those instances be considered as the pre-existing factual relationship for the purposes of Art. 4 (3).

2. Zones of diminished 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[4], the regime governing the continental shelf[5] 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.[6]

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[2] In substance, the same distinction is made by *Martin P. George*, Choice of Law in Maritime Torts: J. PIL 3 (2007) 137–172 who distinguishes "liability within the same vessel" (138 seq., 160 seq.) from "liability as between two vessels" (154 seq., 161 seq.).

[3] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), O.J. L 177/6.

[4] United Nations Convention on the Law of the Sea, Arts. 2 seqq., done at Montego Bay on 10. 12. 1982, 1833 UNTS 3 (hereinafter UNCLOS); compare also Convention on the Territorial Sea and the Contiguous Zone, done at Geneva on 29. 04. 1958, 516 UNTS 205.

[5] UNCLOS Arts. 76 seq; compare also Convention on the Continental Shelf, done at Geneva on 29. 4.1958, 499 UNTS 311; for the law of movable and immovable property applicable on the continental shelf and in the exclusive economic zone see *Wolfgang Wurmnest*, Windige Geschäfte?, Zur Bestellung von Sicherungsrechten an Offshore-Windkraftanlagen: RabelsZ 72 (2008) 236–262 (243–249).

[6] UNCLOS Art. 89; compare also Convention on the High Seas, Art. 2, done at Geneva on 29. 4. 1958, 450 UNTS 11.

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 consideration 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 benefits of nationalising a tort in the international arena. Such nationalisation is helpful in respect of many land-based activities, since it assigns a transnational tort to one single legal system. This allows taking recourse to a legal framework, i.e. the national law of torts of that jurisdiction, which 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 equally increases legal certainty for transnational torts. In maritime torts, the nationalisation brought about by conflict rules is, however, of limited use. 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.[7] National sovereigns began codifying maritime law at the national level in the late 17th century[8]; that movement culminated in the 19th century[9]. 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

[7] Compare *Gordon W. Paulsen*, Historical Overview of the Development of Uniformity in International Maritime Law: Tul. L. Rev. 57 (1983) 1065 (1068–1073); *George* (supra n. 2) 154 seq.; *Rudolf Wagner*, Handbuch des Seerechts[2] II (1906) 67–71.

[8] Ordonnance de la marine d'août 1681, reprinted in: Collection De Lois Maritimes Antérieures au XVIII. Siècle, ed. by *Jean Marie Pardessus* IV (Paris 1837) 325 seqq.

[9] Compare *Wagner* (supra n. 7) 78–99; *René Rodière*, Traité général de droit maritime, Introduction, L'armement (Paris 1976) 55–70; *Plinio Manca*, Commento alle convenzioni internazionali marittime I-III (Milano 1974); *Paulsen* (supra n. 7) at 1073.

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. This will allow for some conclusions in chapter IV.

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[10], the Oil Pollution Civil Liability Convention of 1969 (CLC)[11] as replaced by the 1992 Protocol[12], the Nuclear Liability Convention of 1971[13], and the Bunker Oil Convention of 2001[14] 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[15] which however has not entered into force.

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[10] International Convention for the unification of certain rules of law relating to collisions between vessels, done at Brussels on 23. 9. 1910, reprinted in: *University of Southampton Institute of Maritime Law* (ed.), The ratification of maritime conventions (Loose-leaf; London 1990) No. II.3.200 (hereinafter RMC).

[11] International Convention on Civil liability for Oil Pollution Damage (CLC 1969), done at Brussels on 29. 11. 1969, 973 UNTS 3; Protocol to the International Convention on Civil Liability for Oil Pollution Damage (CLC PROT 1976), done at London on 19. 11. 1976, 1225 UNTS 356; Protocol of 1984 to the International Convention on Civil liability for Oil Pollution Damage (CLC PROT 1984), done at London on 25. 5. 1984, 23 Int. Leg. Mat. 177.

[12] Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage (CLC PROT 1992), done at London on 27. 11. 1992, reprinted in: RMC (supra n. 10) at No. II.7.51. While most Contracting States of the 1992 Protocol have denounced CLC 1969 in accordance with Art. 31 of the 1992 Protocol amending the 1971 Fund Convention (reprinted in: RMC [supra n. 10] at No. II.7.111), CLC 1969 continues to be effective for them as amended under Art. 16 (4) of the 1992 Protocol.

[13] Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (NUCLEAR 1971), done at Brussels on 17. 12. 1971, 974 UNTS 255.

[14] International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER 2001), done at London on 23. 3. 2001, reprinted in: RMC (supra n. 10) at No. II.7.130.

[15] International Convention on Liability and Compensation for Damage in connection

The Salvage Conventions of 1910[16] and 1989[17] 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[18], the Hague Visby Rules[19] and the Hamburg Rules[20]. The Rotterdam Rules have been conceived to one day substitute these conventions[21]. For the carriage of passengers the Athens Convention of 1974[22] and its Protocols, the last one of 2002[23], 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.[24]

Finally, regard must be had of the Limitation Convention of 1976 which allows shipowners to limit their liability arising from various legal grounds in accordance with the size of the vessel.[25] The following remarks will be

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with the Carriage of Hazardous and Noxious Substances by Sea, done at London on 3. 5. 1996, 35 Int. Leg. Mat. 1406.

[16] International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, done at Brussels on 23. 9. 1910, reprinted in: RMC (supra n. 10) at No. II.3.210.

[17] International Convention on Salvage (SALVAGE 1989), done at London on 28. 4. 1989, 1953 UNTS 193.

[18] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, done at Brussels on 25. 8. 1924, 120 LNTS 155 (hereinafter Hague Rules).

[19] Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels on 25. 8. 1924, done at Brussels on 23. 2. 1968, 1412 UNTS 128 (hereinafter Hague Visby Rules).

[20] United Nations Convention on the Carriage of Goods by Sea, done at Hamburg, 31. 3. 1978, 1695 UNTS 3 (hereinafter Hamburg Rules).

[21] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules) done at Rotterdam on 23. 9. 2009, UN Doc. A/RES/63/122.

[22] Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea (PAL 1974), done at Athens on 13. 12. 1974, 1463 UNTS 20; amended by Protocol of 1976 to amend the 1974 Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea (PAL Prot 1976), done at London on 19. 11. 1976, 16 Int. Leg. Mat. 625; Protocol of 1990 to amend the 1974 Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea (PAL Prot 1990) done at London on 29. 3. 1990, reprinted in: RMC (supra n. 10) at No. II.5.201. For the significance of the Athens Convention for the EU see n. 23 below.

[23] Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, done at London on 1. 11. 2002, reprinted in: RMC (supra n. 10) at No. II.5.202. Most substantive provisions of the Athens Convention as amended by the 2002 Protocol have been declared applicable to the carriage of passengers by sea in the EU by Regulation (EC) no. 392/2009 of the European Parliament and of the Council of 23. 4. 2009 on the liability of carriers of passengers by sea in the event of accidents, O.J. L 131/24.

[24] Hague Visby Rules (supra n. 19) Art. 3; Hamburg Rules (supra n. 20) Art. 7 (1); PAL 1974 (supra n. 22) Art. 14.

[25] Convention on Limitation of Liability for Maritime Claims (LLMC 1976), done at London, 19. 11. 1976, 1456 UNTS 221; the Convention has been amended by the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC PROT 1996), done at London on 2. 5. 1996, 35 Int. Leg. Mat. 1433.

limited to the tort law conventions proper and, more precisely, to their respective scopes 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 Arts. 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 denounced the Convention in 1995.[26] In conformity with Art. 12 of the Convention some Contracting States have extended its rules to collisions involving vessels from non-Contracting States.[27] 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 where solid installations such as piers, off-shore windmills, underwater cables or drilling rigs are involved; non-contractual liability arising from collisions with such installations 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[28] 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.[29] But the Hague Rules is a special case: The Protocol of Signature explicitly al-

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[26] *Comité Maritime International*, Yearbook 2007/2008 (2008) at 376, available at: <http://www.comitemaritime.org/year/2007_8/pdffiles/YBK_07_08/cop.pdf>.

[27] See for Germany § 734 of the HGB (Commercial Code).

[28] Supra n. 18.

[29] Compare *Peter Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) 199–231.

lowed 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 to 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 under its own rules of scope.[30] Under the dualist approach to international treaties, the implementation of the Convention in the domestic law of the forum is to be considered as an interpretation of the Convention by the national legislator which is binding on the national court. However, where the implementing provisions are unclear, recourse to the convention should be had, and it must be interpreted in accordance with Arts. 31–33 of the Vienna Convention on the Law of Treaties[31] and in the light of its application in other Contracting States.[32]

3. 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 immunises 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[33] and the Vienna Convention on civil liability for nuclear damage of 1963[34]. 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, the Convention applies if the maritime carrier might

[30] BGH 7. 11. 1960, VersR 1961, 77 (78); 11. 3. 1976, VersR 1976, 681.

[31] Done at Vienna on 23. 5. 1969, 1155 UNTS 331; see *Jürgen Basedow*, Uniform Private Law Conventions and the Law of Treaties: Unif. L. Rev. 2006, 731–747 (741 seq.).

[32] On the so-called "comparative interpretation" of uniform law instruments see *Jan Kropholler*, Internationales Einheitsrecht (1975) 278 seq.; *Urs Peter Gruber*, Methoden des internationalen Einheitsrechts (2004) 188 seq. It follows from the need to achieve a uniform interpretation and application of such conventions, see e.g. the dictum of Lord Wilberforce in *Buchanan* v. *Babco*, [1977] 3 All E.R. 1048, 1053 H.L.: "We should of course try to harmonise interpretation …" At p. 1060 of that judgment Lord Salmon points out: "If a corpus of law had grown up overseas which laid down the meaning of Art. 23, our courts would no doubt follow it for the sake of uniformity which it is the object of the convention to establish."

[33] Convention on Third Party Liability in the Field of Nuclear Energy, done at Paris on 29. 7. 1960, 956 UNTS 251.

[34] Vienna Convention on Civil Liability for Nuclear Damage, done at Vienna on 21. 5. 1963, 1063 UNTS 265.

be held liable in accordance with other rules of law. But the Convention does not require any geographical or other linking 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 when 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. But this issue is hypothetical since Art. 1 (2)(f) Rome II excludes liability arising out of nuclear damage from the scope of the Regulation. Where the courts of Member States which are not a party to the 1971 Convention have to deal with such liability, they would therefore apply neither that Convention nor the Rome II Regulation, but the otherwise controlling domestic choice of law rules.

4. Spills of oil carried as cargo: the CLC 1969

Over 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 been 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[35]; 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. In the Member States which are a Party to the Convention, it will apply irrespective of any choice of law considerations. Thus, Rome II will essentially remain insignificant in this context.

5. 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

[35] Supra n. 12; compare also *Rainer Altfuldisch*, Haftung und Entschädigung nach Tankerunfällen auf See (2007).

Council Decision 2002/762 the EU Member States shall take the necessary steps to ratify or accede to this Convention.[36] After the required number of ratifications had occurred, the Convention took 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.[37] 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.

6. 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 Art. 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 equally said to be covered by that provision since they all define their own scope of application by rules which are equivalent to conflict rules.[38] This view would lead to a most unwelcome petrification of the legal framework of maritime activities established by uniform law conventions since Art. 28 Rome II only gives priority to those international conventions to which Member States are parties at the time

[36] Council Decision 2002/762/EC of 19 September 2002 authorising the Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention), O.J. 2002 L 256/7; as to the Bunkers Convention in general compare *Ling Zhu*, Compulsory Insurance and Compensation for Bunker Oil Pollution Damage (2007).

[37] See supra n. 25.

[38] *Olaf Hartenstein*, Rom I-Entwurf und Rom II-Verordnung: Zur Bedeutung zukünftiger Änderungen im Internationalen Privatrecht für das Seerecht: TranspR 2008, 143 (146).

when the Regulation was adopted, i.e. on 11 July 2007. The later accession of a Member State to such a convention or the future conclusion of further uniform law conventions would not set aside the application of the Rome II Regulation in the Member States.

It is submitted that this approach is mistaken. Under its Art. 1 (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 between those laws. But in most official languages of the Community the wording of Art. 1 (1) and its purpose leave no doubt that a conflict of laws is a condition precedent for the application of the Regulation's conflict of laws rules. To the extent, however, that uniform law conventions are applicable, there is no conflict of laws, and the Rome II Regulation including its Art. 28 is therefore inapplicable. In general this would also apply to uniform law conventions which contain isolated choice of law rules for supplementing 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 the uniform law convention in question. In other Member States the conflict of laws situation is not excluded by the existence of a uniform law instrument; therefore the Rome II Regulation will apply (except for Denmark, see Art. 1 (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 Art. 7 (2) of the Convention on the international sale of goods

of 1980[39], the same interpretive rule would also follow from general principles of treaty interpretation.[40] 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 Art. 4 (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 activities, a similar conflict rule is contained in Art. 5 (1) letter c. The same is true with regard to liability for environmental damage, but here the victim may also choose to base his or her claim "on the law of the country in which the event giving rise to the damage occurred". With regard to industrial action between shipowners and sailors and their respective organisations, Art. 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 the maritime world which make them equivocal and uncertain when applied to maritime torts: 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 judgments 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 the same employer for three months on board a floating crane deployed in Danish territorial waters for the construction of a bridge over

[39] United Nations Convention on Contracts for the International Sale of Goods, done at Vienna on 11. 4. 1980, 1489 UNTS 3.

[40] *Jürgen Basedow*, Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts: Unif. L. Rev. N.S. 5 (2000) 129 (133 seq.).

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 Art. 5 no. 1 of the Brussels Convention.[41]

In its judgment the Court of Justice pointed out that this provision is not applicable to contracts of employment performed entirely outside the territory of the Contracting States, 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.[42] For answering the question whether work carried out on the continental shelf was performed in the coastal state, the Court referred to Art. 29 of the Vienna Convention on the Law of Treaties[43] and to the 1958 Geneva Convention on the Continental Shelf[44]. Since Arts. 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 Art. 5 no. 1 of the Brussels Convention.[45]

At first sight this judgment might be interpreted as prescribing a general equivalence of the continental shelf and the territory of a coastal state for purposes of Art. 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 (Art. 5 (1)) and such ships are subject to its exclusive jurisdiction on the High Seas (Art. 6 (1))".[46]

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[41] ECJ 27. 2. 2002, case C-37/00, *(Herbert Weber* v. *Universal Ogden Services Ltd.)*, E. C. R. 2002, I-2013, at para. 26.

[42] ECJ 27. 2. 2002 (previous note) at para. 27 seq.

[43] See above at n. 31.

[44] Supra n. 5. UNCLOS was not applicable to that case since the Netherlands acceded to UNCLOS only two years after the proceedings were initiated. However the findings regarding the 1958 Geneva Convention on the Continental Shelf equally apply to UNCLOS, compare AG Jacobs, opinion in *Herbert Weber* v. *Universal Ogden Services Ltd.* (supra n. 41) delivered on 18. 10. 2001, para. 18.

[45] *Herbert Weber* v. *Universal Ogden Services Ltd.* (supra n. 41) at paras. 29, 30, 32 and 35.

[46] AG Jacobs, opinion in *Herbert Weber* v. *Universal Ogden Services Ltd.* (supra n. 41) at para. 30.

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 which was 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 the immobilisation of the Tor Caledonia and the leasing of a replacement ship.

The Court of Justice was addressed by the Employment Tribunal which referred preliminary questions relevant for both proceedings. The Court decided that a litigation over the legality of industrial action is covered by Art. 5 no. 3 of the Brussels Convention.[47] As a consequence, the Court's previous interpretation of Art. 5 no. 3 granting jurisdiction, at the plaintiff's choice, to the court of the place where the damage occurred (place of damage) and to the place of the event giving rise to it (place of acting)[48] also applies to the assessment of the illegality of industrial action.

The Court was further asked where the damage sustained by the shipowner occurs in such a case. The Court of Justice pointed out that the place where the event likely to give rise to liability sounding in tort 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.[49] With regard to the place where the damage occurred, the Court of Justice instructed the national court to inquire whether the financial loss had arisen at the place where the plaintiff shipowner is established. The Court of Justice held that "in the course of that assessment by the national court, the flag state, that is

[47] ECJ 5.2. 2004, case C-18/02, *(DFDS* v. *Sjöfolk)*, E.C.R. 2004, I-1417, at para. 28.

[48] ECJ 30.11. 1976, case 21/76, *(Handelskwekerij G.J. Bier BV* v. *Mines de potasse d'Alsace SA)*, E.C.R. 1976, 1735 (at paras. 24 seq.).

[49] *DFDS* v. *Sjöfolk* (supra n. 47) at para. 41.

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."[50]

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.[51] 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 deal with issues of jurisdiction in contractual and delictual matters. They 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 Art. 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

[50] *DFDS* v. *Sjöfolk* (supra n. 47) at para. 44.

[51] AG Jacobs, opinion in *DFDS* v. *Sjöfolk* (supra n. 47) delivered on 18. 9. 2003, at paras. 76 and 78.

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 Art. 4 (3) second sentence Rome II, see above chapter 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 was related, however, 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. Avoiding 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 outside any sphere of sovereignty or plying the Danish waters of the Great Belt or passing through the Kiel Canal in Germany. 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 shipowner, the place of registration, the homeport and 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 Art. 4 (3) Rome II. Accidents involving previously unaffiliated users of maritime resources cannot be subjected to the law governing a single maritime venture. Here the place where the damage occurred (Art. 4 (1) Rome II) should be determined by the position at sea where the damage was sustained. The localisation required under Art. 4 (1) or other provisions of the Rome II Regulation may however be facilitated by the principles of the Weber judgment. 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, Art. 4 (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.[52] 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, in fish farms for example, 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 Art. 56 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".[53] 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 in-

[52] Compare CLC PROT 1992 (supra n. 12) Art. 3 letter a (ii).
[53] See UNCLOS (supra n. 4) Art. 56 (1).

ternational law. Over time, courts have applied the *lex fori*[54], the law of the common flag of the vessels involved[55], the law of the defendant vessel when the flags differed, [56] or, in that case, have chosen from the two flag state laws the one which is more favourable to the plaintiff.[57] While the latter solution has been in line with the benefit granted by German private international law to the victim of a tort seeking compensation,[58] it is not supported by the Rome II Regulation which grants such benefit only in the context of environmental liability, see Art. 7. For ordinary accidents Art. 4 does not favour the plaintiff but designates the law of the place where the damage occurred as being applicable.

In the cases under review, that place is located in *mare liberum* or *terra nullius*, which has two consequences: First, there is no forum delicti under Art. 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 Art. 2 or the court of the country where the vessel was arrested[59]. Second, if that conclusion is drawn for jurisdiction under Art. 5 no. 3 Brussels I, it should equally be drawn in respect of the applicable law.

This conclusion is underpinned by international law. In *terra nullius* and *mare liberum* there is no tort law in force. While ships are subject to the "ex-

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[54] Even when the vessels involved fly the same flag, English courts will apply general maritime law, see *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1883), 10 QBD 521, 537 per Brett L.J.; it has however correctly been pointed out that such a body of law "does not exist at all" and "means nothing more than English law", see *George* (supra n. 2) 157 with further references. Recourse to the *lex fori* is advocated where the vessels involved fly different flags, by *René Rodière*, Traité général de droit maritime, Événements de mer (Paris 1972) 116 seq. with a comparative survey and many further references.

[55] See for Italy Art. 12 of the preliminary provisions of the Codice della navigazione of 30 March 1942: "Legge regolatrice delle obbligazioni derivanti da urto di navi o aeromobili. Le obbligazioni derivanti da urto di navi o di aeromobili in alto mare o in altro luogo o spazio non soggetto alla sovranità di alcuno Stato sono regolate dalla legge nazionale delle navi o degli aeromobili, se è comune; altrimenti dalla legge italiana." American courts, too, have preferred to apply the law of the flag state to general maritime law, where two vessels flying the same flag were in a collision on the high seas, see *Alkmeon Naviera S.A.* v. *M/V "Marina L"*, 633 F2d 789, 792–793 (9th Cir. 1980); compare also *Thomas J. Schoenbaum*, Admiralty Jurisdiction and Maritime Law[2] (St. Paul, Minn. 1994) § 12–9, p. 755. The same choice of law rule has been applied in France, see *Rodière* (previous note) 115 with further references.

[56] RG 6.7.1910, RGZ 74, 46; OLG Hamburg 27.9.1973, IPRspr. 1973 no. 29; compare also *Rodière* (supra n. 54) 116 with further references.

[57] *Staudinger (-Bernd von Hoffmann)*, Kommentar zum Bürgerlichen Gesetzbuch[13] (2001) Art. 38–42 EGBGB Art. 40, paras. 222–227 with many references to this solution which is espoused by many writers in Germany.

[58] See Art. 40 (1) of the EGBGB (Introductory Law of the German Civil Code).

[59] See Art. 7 (1) of the International Convention Relating to the Arrest of Sea-Going Ships, done at Brussels on 10.5.1952, 493 UNTS 193, reprinted in: RMC (supra n. 10) at No. II.2.10.; the application of that Convention is not affected by the Brussels I Regulation, see its Art. 71.

clusive jurisdiction" of the flag state on the High Seas[60], this can only refer to the internal relations between the various interests involved in the maritime venture and to external relations between vessels of the same nationality. 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 Art. 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.

What are the consequences to be drawn for private international law? It is the absence of any effective private law in *terra nullius* and *mare liberum*. To the extent that acts committed on the High Seas are likely to produce external effects transcending their author's maritime venture and affecting vessels subject to the jurisdiction of a different state, there is no tort law that could provide guidance. In this situation one might favour the application of the law of the flag state of each vessel involved in a collision in respect of the damage sustained by that ship. Thus, damage suffered by a French ship in a collision with a Swedish ship on the High Seas would be assessed under French law while Swedish law would govern in respect of the damage sustained by the Swedish vessel. Would this not be in line with Art. 4 (1) Rome II? It is submitted that it would not.

All choice of law rules of the Rome II Regulation refer to a single applicable law, not to two or more different laws being applicable to the same tort. Such *dépeçage* may engender serious problems and even grave injustice where the laws being applicable to the damage sustained by each party provide, for example, for different periods of prescription, or divergent rules on vicarious liability or set-off. When advocating such *dépeçage* for the law of torts, one should keep in mind that it has deliberately been abolished for contract law. Unless the parties to a contract explicitly agree on *dépeçage* under Art. 3 (1) Rome I, their contract is subject to a single law under Art. 4; the possibility of *dépeçage* acknowledged by Art. 4 (1) of the Rome Convention[61] was not continued by the Rome I Regulation.

As a consequence, Art. 4 Rome II would appear to be inapplicable to collisions of vessels flying different flags on the High Seas. The principle of the

[60] UNCLOS (supra n. 4) Art. 92 (1), 1st sentence.

[61] Convention on the law applicable to contractual obligations, done at Rome on 19. 6. 1980, consolidated version in: O.J. 2005 C 334/1.

lex delicti commissi postulated by recital 15 of Rome II is meaningless in this context. One might even argue that the collision of two vessels occurring on the High Seas does not involve a conflict of laws as required by Art. 1 (1) of the Rome II Regulation. It would follow that the matter, not being covered by the Rome II Regulation, is left to national choice of law rules 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. Such interpretation of Art. 1 (1) would perhaps excessively narrow down the scope of the Rome II Regulation. If it were rejected, a similar reasoning would nonetheless prevail within the framework of the Rome II Regulation: to the extent that the conflict rules of the Rome II Regulation do not designate any specific law, a court sitting in a Member State of the European Union would not be under any obligation to disregard its own law and would therefore be justified in applying the *lex fori*.

IV. Conclusions

(1) Maritime torts are characterised by two peculiarities. First, the place where the damage occurs as referred to in Art. 4 (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 position of the vessel may be inside territorial waters, but may also be outside on the high seas where no tort law is in force.

(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 ("internal torts"), its position within the territorial waters of state A or state B or on the High Seas is irrelevant. Such internal torts are primarily subject to the law governing the maritime venture as a pre-existing relationship under Art. 4 (3) Rome II. Alternatively, the country in which the damage occurs as set forth in Art. 4 (1) Rome II is presumed to be 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 be 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 law of the sea grants the coastal state 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 should 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 (CLC 1969/1992) which has been ratified by all coastal EU Member States.

(8) Collisions occurring outside territorial waters between ships flying the flags of different states occur in *terra nullius* which includes the High Seas. The jurisdiction of the flag state established by Art. 92 UNCLOS is limited to internal torts of each vessel involved; it does not extend to collisions of vessels flying different flags. Since such collisions occur outside any sphere of sovereignty, there is neither a *forum delicti* under Art. 5 no. 3 Brussels I nor an obligation incumbent on Member State courts and flowing from the Rome II Regulation to apply foreign law, and damages claims have to be assessed under the *lex fori*.