The Rome II Regulation and Specific Maritime Torts: Product Liability, Environmental Damage, Industrial Action

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Contents

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"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 Viennese high society who were charged and sentenced to jail because of six cases of murder and insurance fraud perpetrated 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] The *Lucona* 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[2].

I. Product Liability

The product of a "ship" may also be incorrectly designed and therefore cause a disaster. This happened when the ferryboat MS *Estonia* sank in the Baltic Sea on 29 September 1994, almost 16 years ago. The ship was en 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 arose. At about 1:00 a.m. the locks of the bow visor broke under the strain of the waves and allowed water into the car deck, destabilising 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 from drowning and hypothermia.

The ship was built in 1979/80 by the shipyard Meyer Werft in Papenburg/West Germany, first launched as MS *Viking Sally* for the Rederi Ab Sally (Viking Line) and initially 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 newly acquired name MS *Estonia* and was registered in the Estonian port of Tallinn.

Apart from rumours that there had been an explosion aboard the MS *Estonia*,[3] 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 damages

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[1] *Hans Pretterebner*, Der Fall Lucona, Ost-Spionage, Korruption und Mord im Dunstkreis der Regierungsspitze, Ein Sittenbild der Zweiten Republik[2] (1988); *Helmut Schödel*, Schaut euch ins Blut, Männer!, Ein Besuch bei Udo Proksch, Österreichs prominentestem Häftling: Die Zeit, 26 April 1996, p. 45.

[2] 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.

[3] *Jutta Rabe*, Die Estonia, Tragödie eines Schiffsuntergangs (2002) 30 et seq.

by survivors or relatives of drowned passengers under the Rome II Regulation?

1. Law applicable: Art. 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 Art. 5 of the Regulation. This Article reads as follows:

> "Article 5: Product liability
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> 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,
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> (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.
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> 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).
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> 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 Art. 5 (1) sentence 1 product liability is, by a cascade of rules on the applicable law, governed by the law of 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 (c), whereby the product was marketed in that country and, in addition, 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" consist-

ing 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.

2. Article 5 (1) sentence 1 Rome II Regulation

a) Habitual residence of the victims

With MS *Estonia* 501 Swedish citizens, 280 Estonian citizens, 19 Finnish citizens and some people of other nations drowned. These victims had different habitual residences and therefore their relatives have to be compensated according to different national laws. The victims had contracts with the transport company but no contract with Meyer Werft. Therefore, the exception clause of Art. 5 (2) Rome II Regulation does not apply. As there is no general exception with respect to mass-disasters providing for the application of the same law regardless of where the victims may be resident, these different laws at the habitual residence of the victims apply provided that the ship was "marketed" in these countries.

b) Marketing of the product

Ships as well may be products for which a shipyard, which built these ships, may be held liable under product liability. But are ferry boats really "marketed" in different countries?[4] Are they distributed in the public market as any other merchandise? Of course, ships may be offered in the internet and put on sale in international fairs like the Hamburg "Bootsmesse" and also the contracts for the construction of big ships may be finalised at the place of international trade fairs, e.g. the bi-annual SMM (shipbuilding, machinery & marine technology) in Hamburg. However, ferry boats of more than some million € of value are not marketed like motorcars or other smaller vehicles, i.e. they are not sold by the producer himself or by any other channels in various countries to customers of ships of a certain type. The customers have to conclude a shipbuilding contract (based on forms like the SAJ Form) with the shipyard.[5] Shipbuilding contracts are normally qualified as contracts for the sale of goods,[6] but this does not mean that ships are marketed like any other product. Ferry boats may be ordered to be built by a shipyard and are only marketed in that country in which the shipyard is

[4] As to this expression "marketed" see extensively *Andrew Dickinson*, The Rome II Regulation, The Law Applicable to Non-Contractual Obligations (2008) 371 et seq.

[5] *Simon Curtis*, The Law of Shipbuilding Contracts[3] (2002) 273 et seq.

[6] *Curtis* (previous note) 1 et seq.

located. This was the case here. Thus, while the ship was ordered in 1980 by a ship owner with special wishes as to the use of the boat for the originally intended and practiced ferry boat traffic between Finland and Sweden,[7] the ferry boats of the Meyer Werft were actually only marketed in Papenburg/Germany.

In all cases of Art. 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 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 (Meyer Werft) 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* Meyer Werft could not have done.

3. Article 5 (1) sentence 2 Rome II Regulation

If the producer of the product did not market his products abroad or if he 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*.

4. 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 Art. 5 (2) applies. The 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 the case is more closely connected with this country. Only 280 victims were from 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 (Art. 5 [1] sentence 2), i.e. German law, applies.

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[7] *Claus Wilde*, Konsequenzen aus einer Katastrophe: Hansa 132 (1995) No. 4, p. 6–10; *id.*, Estonia, Tragödie und Verantwortung: Hansa 135 (1998) No. 1, p. 5.

5. Law applicable: Art. 4 (1) Rome II Regulation?

As under German law claims on product liability expire 10 years after the product has been placed in the market (§ 13 Act on the Liability for Unsafe Products of 1989[8]) and the ship here was delivered to the first owner in 1980, there is no claim under German product liability law. The problem is whether the same persons may base their claim in tort in general, either under the same rule of Art. 5 Rome II Regulation or under the general rule of Art. 4 Rome II Regulation. This is a matter of construction of the Rome II Regulation.

Whether Art. 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 also implies 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 do not distinguish between strict and tort liability based on fault but is rather based on the distinction between different factual situations as, for example, liability for products, unfair competition or environmental damage. Therefore only Art. 5 applies to products liability.[9]

Also the Hague Convention of 2 October 1973 on the Law Applicable to Product Liability[10] had to decide whether the Convention applies only to strict product liability or also to tortious liability based on fault. The Convention itself does not raise this problem but only provides that the Convention does not apply where the product was transferred to the person suffering damage by the person claimed to be liable.[11] Therefore, tortious products liability is covered by that Convention as well.

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[8] § 13 of the Gesetz über die Haftung für fehlerhafte Produkte (Produktehaftungsgesetz – ProdHaftG) of 15 December 1989, BGBl. 1989 I 2198.

[9] *Dickinson* (supra n. 4) 370 (No. 5.17).

[10] Cp. Recueil des conventions/Collection of Conventions (1951–2009) (2009) No. 22. This Convention is upheld by Art. 28 (1) of Rome II Regulation, but, as between member states, the Regulation takes precedence: Art. 28 (2) Rome II Regulation.

[11] Article 1 (2) of the Hague Convention (previous note). As to the interpretation of this provision cp. *Manfred Wandt*, Internationale Produkthaftung (1995) 59 (marginal note 37). – Also the Brussels Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (O.J. 2001 L 12/1) is interpreted restrictively with respect to Art. 5 No. 1. The European Court of Justice held that Art. 5 No. 1 Brussels Convention/Regulation does not apply to product liability claims

National conflicts law also contains some specific national conflicts rules on products liability. 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 be applied.[12]

6. Intermediate summary

Article 4 (1) Rome II Regulation is not applicable in cases of products liability. Article 5 Rome II Regulation also applies if the liability of the producer can only be based on tort or delict because strict liability is excluded because of lapse of time. Therefore Art. 5 Rome II Regulation also applies if the shipyard Meyer in Papenburg/Germany can be blamed for having negligently designed the MS *Estonia*.

II. Environmental Damage

In recent years damage done to the environment by oil tankers spilling their cargo has risen considerably. The "Torrey Canyon" sank in the British-French Channel on 18 March 1967 and polluted 100 km of sea shore in Britain and France, the "Amoco Cadiz" ran aground on the Breton coast on 16 March 1978 and the entire cargo of 227 000 tonnes of crude oil was spilled,[13] and the "Exxon Valdez" hit the Prince William Sound's Bligh Reef off the coast of Alaska on 24 March 1989 and spilled 10.8 million gallons of crude oil into the sea.[14] 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.

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against a person who has no direct relations with the claimant: ECJ 17. 6. 1992 – Case 26/91 *(Handte ./. TMCS)*, E. C. R. 1992, I-3967.

[12] For Italy and Art. 63 Italian PIL Act: *Tito Ballarino/Andrea Bonomi*, Diritto internazionale privato[3] (1999) 730 et seq.; for Switzerland and Art. 135 Swiss PIL Act: *Kurt Siehr*, Das Internationale Privatrecht der Schweiz (2002) 372.

[13] Cp. *Werner Pfennigsdorf*, "Amoco Cadiz" vor Gericht, Zehn Jahre und kein Ende: VersR 1988, 1201–1207; La catastrophe de l'Amoco Cadiz, Rapport de la Commission d'enquête du Sénat (1978).

[14] *Charles B. Anderson*, Recent Developments in the Exxon Valdez Case: Dir. marit. 1995, 528–531. The latest developments in the Exxon Valdez case are these: The Federal District Court awarded $ 5 billion for punitive damages. On 25 June 2008 the United States Supreme Court in *Exxon Shipping Co.* v. *Baker* , 128 S.Ct. 2605 (2008), reduced the punitive damages to the amount of compensatory damages. See to this judgment *Christopher Kende*, La Cour Suprême des États-Unis statue dans l'affaire *Exxon Valdez*, Regard sur les *"punitive damages"* et le droit maritime américain: Le Droit Maritime Français 2008, 1045–1047; *Peter C. Thomas/Stephan Wilske*, Die *Exxon Valdez*, Entscheidung des U.S. Supreme Court und deren Bedeutung für die künftige Höhe von Punitive Damages: RIW 2008, 668–672

1. Law applicable: Art. 7 Rome II Regulation

Unless the problem of liability is solved by international conventions on substantive law, the law applicable to environmental damage is governed by Art. 7 Rome II Regulation.[15] This Article reads as follows:

> "Article 7: Environmental damage
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> 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 Art. 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 Art. 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

The Rome II Regulation does not prejudice the application of international conventions to which one or more member states are parties at the time when the Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations. There are international conventions with respect to oil pollution, but these conventions do not lay down

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[15] In many cases courts and lawyers do not discuss the problem of the governing law. They only deal with the substantive law of the country in which the environment had been damaged. See, e.g., Conseil d'État 16. 1. 2008, Petites affiches 26. 5. 2009, p. 18, and *Laurent Neyret*, Naufrage de l'Erika – vers un droit commun de la réparation des atteintes à l'environnement: Recueil Dalloz 2008, 2681–2689; *Isabelle de Silva*, Naufrage de l'Erika et droit des déchets: Petite affiches 26. 5. 2009, p. 10–18. Different: *Sergio Carbone/Lorenzo Schiano de Pepe*, Uniform Law and Conflicts in Private Enforcement of Environmental Law, The Maritime Sector and Beyond: Dir. marit. 2009, 50–80 (75–79).

conflict-of-law rules with respect to civil liability for oil pollution.[16] They provide for jurisdiction and recognition of foreign judgments but do not fix the law applicable to oil pollution damages. They contain in this respect only substantive rules on civil liability for oil pollution in certain cases which have connection with state parties. Only pollution damage caused in the territory, including the territorial sea, and in the exclusive economic zone of a State Party is regulated by these conventions, which also take precedence under the Vienna Convention on the Law of Treaties of 1969. This is confirmed by the European Union which authorised the Member States to ratify or accede to the 2001 Bunker Oil Convention.[17]

It has to be emphasised 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.[18] Such international conventions, as *leges speciales*, take precedence over the Regulation.

b) General Rule

If the law applicable has to be fixed, Art. 7 Rome II Regulation applies. According to this provision the general rule of Art. 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, if France was not a Contracting State of the Oil Pollution Conventions, French law 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 of the flag which the ship was flying. This would have been Liberia in the case of the Amoco Cadiz.

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[16] See especially the International Convention of 27 November 1992 on Civil Liability for Oil Pollution Damage, 1992 (1992 Liability Convention), BGBl. 1994 II 1150; and the International Convention of 27 November 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (1992 Fund Convention), BGBl. 1994 II 1150. In addition to these conventions cp. also the International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage, BGBl. 2006 II 578. See generally *N. N. Tsimplis*, Marine Pollution from Shipping Activities: J. Int. Marit. L. 14 (2008) 101–152.

[17] Council Decision of 19 September 2002, O.J. L 256/7.

[18] Cp. the 1992 Liability Convention (supra n. 16).

2. Intermediate summary

Most cases of oil pollution from ships will be governed by international conventions on substantive law. If there is any need to apply national law, Art. 7 Rome II Regulation is applicable according to which the victim may base the claim for compensation either on the law where the damage occurred or the law of the country in which the event giving rise to the damage occurred.

III. Industrial Action

Industrial action in maritime law is very often supported by the International Transport Workers' Federation (I. T. F.). 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.[19] 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 and the improvement of their wages.

1. Law applicable: Art. 9 Rome II Regulation

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

> "Article 9: Industrial action
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> 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 Art. 9 reads as follows:

[19] *Ulrich Drobnig/Hans-Jürgen Puttfarken*, Arbeitskampf auf Schiffen fremder Flagge, Das anwendbare Recht, das Streikrecht Panamas (1989) 12 et seq.; *Kurt Siehr*, Billige Flaggen in teuren Häfen, Zum internationalen Arbeitsrecht auf Seeschiffen mit "billiger Flagge", in: FS Frank Vischer (1983) 303 (310 et seq.).

"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: Art. 4 (2) Rome II Regulation

It is very unlikely that the owner of a ship and the crew have the same habitual residence under Art. 23 Rome II Regulation. According to Art. 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: Art. 23 (1) sentence 2 Rome II Regulation.

The same habitual residence is unlikely since most crew members are nationals and habitual residents of the Philippines or other States which support the engagement.[20] 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 ascertained 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:[21] 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, rep-

[20] *Siehr* (previous note) 307 et seq.

[21] 415 U.S. 104 (1974). Similar cp. *American Radio Assn* v. *Mobile S.S. Assn*, 419 U.S. 215 (1974).

resented 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 of 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 paras. 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 and were not trying, by their collective action, to improve their wages and working conditions. They were, rather, engaged in picketing foreign vessels in order to draw the public's attention to 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 House of Lords. In *N. W. L. Ltd.* v. *Woods*.[22] The I. T. F. told the agent of the vessel *Nawala* carrying iron ore for delivery in Redcar (North Yorkshire) that she would be blocked on entering the port unless the I. T. F. conditions of employment were 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 sec. 29 (1) of the Trade Union and Labour Relations Act 1974. It was qualified as a trade dispute even though it was pursued for other motives, i.e. to prevent

[22] [1979] 1 W.L.R. 1294.

ship owners from using flags of convenience to the detriment of any member of the crew.

3. Unjust enrichment

After having been blocked by the I. T. F. and payments having been made, lawsuits for recovery of payments may be initiated. If this lawsuit is qualified as one of unjust enrichment, Art. 10 Rome II Regulation is applicable and fixes the law to be applied in such cases.

a) Law applicable: Art. 10 Rome II Regulation

Article 10 on unjust enrichments reads as follows:

"Article 10: Unjust enrichment

1. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with the unjust enrichment, it shall be governed by the law that governs that relationship.

2. Where the law applicable cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country shall apply.

3. Where the law applicable cannot be determined on the basis of paragraphs 1 and 2, it shall be the law of the country in which the unjust enrichment took place.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply."

This provision is, except for Art. 11 on *negotiorum gestio* and Art. 12 on *culpa in contrahendo*, the only in the Rome II Regulation which is not devoted to tort or delict. It distinguishes two different kinds of lawsuits based on unjust enrichment: first, based on a pre-existing relationship between the parties (para. 1) or, second, without such a relationship (paras. 2 and 3). In the last case the law at the common habitual residence applies (para. 2) or, if there is none, the law of the country in which the unjust enrichment took place (para. 3). For both cases para. 4 provides an escape clause.

b) Unjust enrichment in industrial action cases

As an example one may take the case of *Universe Tankships* v. *I. T. F.*, decided in 1983 by the House of Lords.[23] The *Universe Sentinel*, a ship owned by the plaintiff owners and flying the Liberian flag, could not leave Milford Haven because the defendant I. T.F blocked it and, consequently, no tugs were available so that the ship could set sail. Finally, for fear of disastrous economic consequences, the owners of the ship paid about $ 80.000 by way of back pay for the crew and about $ 6.000 to the Seafarers' International Welfare Protection and Assistance Fund ("welfare fund"). Then the ship could sail. A few days later the owners filed a lawsuit against the I. T. F. and asked for return of their payments. The courts did not deal with the conflicts problem and the law to be applied. They rather decided that the back payments in favour of the crew were not to be returned because these payments were in trust for the crew members and these payments were privileged by the Trade Union and Labour Relations Act 1974. This is a different result than with the payments to the welfare fund. They were to be returned.

If the law governing such a claim had to be determined, restitution and unjust enrichment would have to be taken into account as well.[24] As the parties were already connected by a pre-existing relationship, the law governing this relationship would be applied (Art. 10 (1) Rome II Regulation). If this relationship were held to be governed by English law, this law would also govern the claim of then owners against I. T. F. for return of the welfare payments.

4. 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. Claims in unjust enrichment are governed by the law applicable under Art. 10 Rome II Regulation.

IV. Summary

With respect to product liability and industrial action there are no 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 tort or strict liability and whether the industrial action is tortious or not. In the field of environmental damage the major problem is

[23] [1983] 1 A.C. 366 (H.L.).

[24] *Thomas Krebs*, Restitution at the Crossroads, A Comparative Study (2001) 162.

solved by international conventions on substantive law. Conflict of laws has very little influence on the problem of oil pollution by tankers. Industrial action are governed by Art. 9 Rome II Regulation or, if based on unjust enrichment, by Art. 10 Rome II Regulation.