Beachcombing for liability limits? Wreck and cargo removal claims in private international law

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Abstract

Despite international conventions, differences remain among States regarding the law on (the limitation of) liability for wreck and cargo removal claims. Private international law rules on jurisdiction and the applicable law are required. The Brussels Ibis Regulation and the Rome II Regulation give rise to difficulties in the case of wreck and cargo removal outside territorial waters. The reference to the place where the harmful event occurred does not lead to a competent court in the case of a wreck or cargo loss on the high seas. The reference to the place where the damage occurs does not refer to an applicable law to a tort claim for damage on the high seas. Given the gaps that exist in EU private international law for maritime cases, it would be advisable to create jurisdiction and conflict of law provisions for incidents outside territorial waters. A possibility could be to regard the continental shelf and the exclusive economic zone of a State as the territory of that State for the application of jurisdiction and conflict of law rules relating to external torts. Additionally a conflict of law rule for global limitation should refer to the lex fori.

1. Introduction

Container vessel MSC Zoe lost more than 300 containers on its way from Antwerp to Bremerhaven in January 2019. Part of the cargo washed ashore on the Dutch Wadden Islands such as on Terschelling. A large number of containers sank in the North Sea and removal operations followed.[1] Incidents like this give rise to the question of who pays for the removal costs.

Maritime cases have numerous international angles. The incident involving MSC Zoe took place at sea in the border area between the Netherlands and Germany. The ship sailed under the Panamanian flag and MSC has its headquarters in Switzerland. Because of the international nature of shipping, a large number of conventions containing international uniform law have been adopted. Under the auspices of the International Maritime Organization (IMO) the Nairobi Wreck Removal Convention and a number of conventions on the limitation of liability for maritime claims have been adopted.[2] Despite the existence of international uniform law differences between national laws on the liability for wreck and cargo removal claims still remain. The reasons for this are threefold. States are party to different limitation of liability conventions, the conventions offer the possibility to deviate from the conventions in national

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1 See https://www.rijkswaterstaat.nl/water/vaarwegenoverzicht/waddenzee/opruimactie-containers-waddenzee-en-noordzee/index.aspx; https://www.kustwacht.nl/nl/msczoe; www.msc.com.

2 See www.imo.org.

law and the interpretation of the conventions is left to the national courts. As a consequence some national laws have higher limits or even unlimited liability. One illustration given in this paper is the Dutch legislative proposal for unlimited liability for wreck and cargo removal claims that is currently under consideration in Parliament.[3]

Private international law rules on jurisdiction and the applicable law play an important role in the outcome of a case on wreck and cargo removal claims. The EU jurisdiction and conflict of law rules were not specifically drafted for maritime cases. A reference to 'the place where the harmful event occurred' does not provide clarity if an incident takes place on the high seas. This paper analyses how the EU jurisdiction rules and conflict of law rules can better accommodate maritime cases like wreck and cargo removal claims.[4]

2. Nairobi Wreck Removal Convention

2.1 Introduction

The IMO's Legal Committee adopted a wreck removal convention at a Diplomatic Conference held in Nairobi in 2007. This Nairobi International Convention on the Removal of Wrecks (WRC) entered into force on the 14th of April 2015.[5] Over 40 States including China, Germany, Liberia, Panama and the United Kingdom have ratified the Convention.[6] The Convention entered into force for the Netherlands (in Europe) on the 19th of April 2016. Not all (maritime) States have ratified the Convention. For example, Greece, Italy, Japan, Norway, Russia, Spain and the United States are not (yet) parties to the Wreck Removal Convention.

The objectives and general principles of the Convention are stated in Article 2 WRC. A State Party may take proportionate measures in accordance with the Convention in relation to the removal of a wreck which poses a hazard in the Convention area. The definition of a wreck does not only cover sunken or stranded ships. It also means, following a maritime casualty, cargo lost at sea from a ship and that is stranded, sunken or adrift at sea.[7]

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3 *Kamerstukken II* [Parliamentary Papers II] 2018-2019, 35 061.

4 The recognition and enforcement of foreign judgements fall outside the scope of this paper. Reference is made to the ECJ judgment of 14 October 2004, C-39/02, ECLI:EU:C:2004:615 (*Maersk/De Haan*) and the judgment of the Dutch Supreme Court of 29 September 2006, *NIPR* 2006, 290, *NJ* 2007, 393, *S&S* 2007, 1 (*Seawheel Rhine*). See also: *NIPR* 2004, 357, *Rev. Crit. d.i.p.* 2005, p. 118, *IPRax* 2006, p. 262 and H. Boonk, 'HR 29 september 2006, *RvdW* 2006, 897, C05/147HR (*Seawheel Rhine*): Beperking van aansprakelijkheid van een zeeschip en EEX-Verordening', *TVR* 2006/6, pp. 191-196.

5 J.E. de Boer, 'Het perspectief van Nairobi', *TVR* 2008/2, pp. 53-56; T.C. Wiersma, 'Het Nairobi Wrakopruimingsverdrag 2007 in het licht van de praktijk', *TVR* 2008/2, pp. 57-64; L. Howlett, 'Nairobi International Convention on the Removal of Wrecks 2007', in: *CMI Yearbook* 2007-2008, 2009, pp. 341-345; R. Shaw, 'The Nairobi Wreck Removal Convention', in: *CMI Yearbook* 2009, pp. 402-416; E.H.P. Brans and H.J.S.M. Langbroek, 'Het Wrakkenverdrag en de Wet bestrijding maritieme ongevallen: van opruimplicht tot kostenverhaal. Een analyse', *TVR* 2016/3.

6 See www.imo.org; https://verdragenbank.overheid.nl. China has declared that the WRC shall not apply to the Hong Kong Special Administrative Region and the Macao Special Administrative Region of China until otherwise notified by the Government of China.

7 Art. 1(4) WRC.

The WRC applies to wrecks in the Convention area.[8] The 'Convention area' means the exclusive economic zone of a State Party. This exclusive economic zone (EEZ) is defined in the United Nations Convention on the Law of the Sea (UNCLOS). The EEZ is an area beyond and adjacent to the territorial sea of that State extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured. According to Article 3(2) WRC State Parties can declare the Convention applicable to their territorial waters as well. The Netherlands has done so.[9] Germany, on the other hand, has not made such a declaration.

2.2 Removal of the wreck

The WRC contains rules on the reporting, locating and marking of wrecks and measures to facilitate the removal of wrecks.[10] According to Article 9 WRC the registered owner is primarily responsible for the removal of a wreck determined to constitute a hazard.[11] If the registered owner does not remove the wreck within the deadline set, the affected State may remove the wreck by the most practical and expeditious means available, consistent with considerations of safety and the protection of the marine environment.[12]

2.3 Liability for wreck and cargo removal claims

The WRC creates a system of strict liability, limitation of liability, compulsory insurance and direct action against the insurer. This liability and compensation system has similarities with other IMO liability conventions such as the International Convention on Civil Liability for Oil Pollution Damage 1969, as amended (CLC) and the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Bunkers Convention). The strict liability of the registered owner for the costs of locating, marking and removing the wreck is laid down in Article 10 WRC.

The registered owner is liable for the costs of locating, marking and removing the wreck. The 'registered owner' means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship at the time of the maritime casualty.[13] No liability exists *inter alia* if the registered owner proves that the maritime casualty that caused the wreck resulted from a natural phenomenon of an exceptional, inevitable and irresistible character. No claim for the costs of locating, marking and removing the wreck may be made against the registered owner outside the Convention.[14] Article 10 WRC does not prejudice any right of recourse against third parties.[15]

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8 Art. 3(1) WRC.

9 See https://verdragenbank.overheid.nl.

10 Arts. 5, 7, 8 and 9 WRC.

11 *Kamerstukken II* [Parliamentary Papers II] 2014–2015, 34 057, no. 3, pp. 3 and 8.

12 Art. 9 WRC.

13 Art. 1(8) WRC.

14 Art. 10(3) WRC. This is without prejudice to the rights and obligations of a State Party that has made a notification under Art. 3, para. 2, in relation to wrecks located in its territory, including the territorial sea, other than locating, marking and removing in accordance with this Convention.

15 Art. 10(4) WRC.

The WRC refers to the limitation of liability but the Convention does not constitute such a right itself. The Convention merely states that it shall not affect the right of the registered owner to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims 1976, as amended (LLMC).[16] The rules on the limitation of liability will be discussed in more detail in section 3.

Article 11 WRC clarifies the relation between the WRC and other liability conventions. The registered owner shall not be liable under the WRC for the costs of locating, marking and removing a wreck if, and to the extent that, liability for such costs would be in conflict with CLC, the Bunkers Convention, the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996, as amended (HNS Convention) or a convention on liability for nuclear damage, provided that the relevant convention is applicable and in force. The HNS Convention has not yet entered into force. To the extent that measures under the WRC are considered to be salvage, for example under the International Convention on Salvage, such convention shall apply to questions of the remuneration or compensation payable to salvors to the exclusion of the rules of the WRC.[17]

A ship can be constructed as a single ship company. Once such a ship has become a wreck, hardly any assets would be left for claimants to recover their costs. The WRC solves this problem by requiring the registered shipowner to maintain insurance to cover liability under the WRC and offering claimants the right to bring their claims under the WRC directly against the insurer.[18]

Should the registered owner become bankrupt after his ship has become a wreck, this would not be to the detriment of the claimants. They have a direct action against the insurer. The obligation to take out insurance is limited. The registered owner is required to maintain insurance to cover liability under the WRC in an amount equal to the limits of liability under the applicable national or international limitation regime, but in all cases not exceeding an amount calculated in accordance with Article 6(1)(b) LLMC 1976, as amended.[19]

3 Limitation of liability

3.1 Conventions on the global limitation of liability

States have adopted international rules on the global limitation of liability for maritime claims.[20] Global limitation should be distinguished from package limitation. Global limitation is the right to limit liability for all recognized claims under the Convention arising from the same incident. The limitation amounts depend on the ship's tonnage.[21] Different limitation regimes exist among States. A State can for example choose to be a party to the Protocol of

16 Art. 10(2) WRC.

17 Art. 11(2) WRC.

18 Art. 12 WRC.

19 Art. 12(1) WRC.

20 W. van der Velde, *De positie van het zeeschip in het internationaal privaatrecht* (diss.), Recht en Praktijk 146, Deventer: Kluwer 2006, Chapter III.

21 Art. 6 LLMC.

1996 to amend the Convention on Limitation of Liability for Maritime Claims 1976 (including the 2012 amendments) (LLMC 1996), the Convention on limitation of liability for maritime claims 1976 (LLMC 1976) or the Brussels International Convention relating to the limitation of the liability of owners of sea-going ships 1957. The Kingdom of the Netherlands is a party to LLMC 1996, as is Germany. Switzerland is a party to LLMC 1976. China acceded to LLMC 1996 but only for the Hong Kong Special Administrative Region. In other cases China applies its national law.[22]

3.2 Right to limit liability

Under the LLMC regime shipowners (including the owner, charterer, manager and operator of a seagoing ship) and salvors may limit their liability for claims laid down in Article 2 LLMC.[23] An insurer of liability for claims subject to limitation under LLMC shall be entitled to the benefits of LLMC to the same extent as the assured himself.[24]

One of the reasons for discrepancies between the liability laws of different States lies in the interpretation of convention rules. An example of a rule that is interpreted in different ways is the rule on conduct barring limitation. According to Article 4 LLMC a person who is liable is not entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. The Dutch Supreme Court has given a rather strict interpretation of 'recklessly and with knowledge that such loss would probably result' which deviates from the interpretation given by courts in other countries such as Germany.[25] Differences in the interpretation of the Convention highlight the importance of jurisdiction rules. These will be discussed in section 4.

3.3 Limitation of liability for wreck and cargo removal claims

Article 2 LLMC lists the claims that are subject to limitation under LLMC. Apart from claims in respect of the loss of life or personal injury and the loss of or damage to property, specific reference is made to wreck and cargo removal claims in Article 2(1) under d and e.

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22 See Chapter XI 'Limitation of Liability for Maritime Claims' of the Maritime Code of the People's Republic of China. See for an unofficial translation: http://www.colindelarue.com/wp-content/uploads/2018/09/PRC-Maritime-Code.pdf. Art. 207 of the Chinese Maritime Code does not list wreck and cargo removal claims as claims that are subject to limitation.

23 Art. 1 LLMC.

24 Art. 1(6) LLMC.

25 The Dutch Supreme Court decided in 2001 that: '*[…] van gedrag, dat moet worden aangemerkt als roekeloos en met de wetenschap dat de schade er waarschijnlijk uit zou voortvloeien, sprake is, wanneer degene die zich aldus gedraagt het aan de gedraging verbonden gevaar kent en zich ervan bewust is dat de kans dat het gevaar zich zal verwezenlijken aanzienlijk groter is dan de kans dat dit niet zal gebeuren, maar zich door dit een en ander niet van dit gedrag laat weerhouden.*' Dutch Supreme Court 5 January 2001, *NIPR* 2001, 106, *NJ* 2001/391 (*Overbeek/Cigna*) and Dutch Supreme Court 5 January 2001, *NJ* 2001, 392 (*Van der Graaf/Philip Morris*). See also the decisions of the Dutch Supreme Court of 11 October 2002, *NJ* 2002/598 (*CTV/K-Line*); 29 May 2009, *NJ* 2009/245 (*Van der Graaf/AIG*); 10 August 2012, *NJ* 2012/652 (*Maat/Traxys*) and 22 June 2018, ECLI: NL:HR:2018:981 (*Arcturus*).

'Article 2 LLMC
1 Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:
[…]
(d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;
(e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;
[…]'

It is important to draw attention to a reservation clause in LLMC. This Convention offers State Parties the possibility to exclude *inter alia* wreck and cargo removal claims from the scope of the Convention.[26] If a State Party has excluded wreck and cargo removal claims it can opt for unlimited liability or adopt national liability limits that deviate from the Convention limits. The Kingdom of the Netherlands has reserved the right to exclude wreck and cargo removal claims from LLMC. At present Dutch national law contains special provisions on the limitation of liability for wreck and cargo removal claims. The person held liable should constitute a separate limitation fund for wreck and cargo removal claims (*wrakkenfonds*).[27]

In October 2018 a legislative proposal was sent to the Dutch Parliament with the aim of striking out the right to limit liability for wreck and cargo removal claims.[28] The Asser Institute Centre for International & European Law drafted a report on this matter.[29] The Dutch Government refers to this report and states that unlimited liability for wreck removal claims would enhance the possibilities to recover the costs. It is however also recalled that the chances of obtaining full recovery depend on other factors as well, including the applicable law and jurisdiction.[30] The Dutch government recognises that its legislative proposal for unlimited liability will not change the practice of forum shopping.[31]

Germany and Belgium have a similar system to the Netherlands (at this point in time) while other States like France and the United Kingdom have opted for unlimited liability for wreck and cargo removal claims.[32] The possibility to deviate from the limitation conventions is one of the reasons why private international law rules remain important despite the existence of international conventions.

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26 Art. 18(1) LLMC.

27 Arts. 752(1)(d), 752(1)(e) and 755(1)(b) Book 8 Dutch Civil Code (*wrakkenfonds*). The Dutch Supreme Court has clarified the relation between Art. 2(1) para. a LLMC and Art. 2(1) paras. d and e LLMC 1996. Dutch Supreme Court 2 February 2018, *NJ* 2018/374 (*Eitzen Chemical/E.O.C. Onderlinge Schepenverzekering & co.*) and Dutch Supreme Court 2 February 2018, *NJ* 2018/375 (*MS Amasus/ELG Haniel Trading & co.*).

28 Voorstel van wet tot wijziging van Boek 8 van het Burgerlijk Wetboek, Boek 8 van het Burgerlijk Wetboek BES en de Wet bestrijding maritieme ongevallen in verband met de schrapping van de beperking van aansprakelijkheid voor vorderingen inzake wrakopruiming, Parliamentary Papers II 2018-2019, 35 061, nos. 1 and 2.

29 Report entitled 'Schrappen mogelijkheid tot limiteren aansprakelijkheid wrakopruiming', Asser Institute Centre for International & European Law, 5 April 2016.

30 Parliamentary Papers II 2018-2019, 35 061, no. 3, p. 1.

31 Parliamentary Papers II 2018-2019, 35 061, no. 3, p. 7

32 Parliamentary Papers II 2018-2019, 35 061, no. 3, p. 7.

4 Jurisdiction

4.1 Applicable regime

According to Article 1 the Brussels Ibis Regulation is applicable in 'civil and commercial matters'.[33] The European Court of Justice has ruled on this concept in the *Rüffer* case.[34] This case concerned a claim for redress brought by the State of the Netherlands against the owner of a German river motor vessel, the Otrate which collided with the Dutch motor vessel Vechtborg in the Bight of Watum and as a result of that collision sank. The Netherlands had the wreck removed in accordance with the Ems-Dollard Treaty and on the basis of the Dutch Law on Wrecks of 19 June 1934 ('*Wrakkenwet*'). According to the Ems-Dollard Treaty the Kingdom of the Netherlands shall be responsible for river police functions including the removal of wrecks in the Bight of Watum. Pursuant to Article 6 of the *Wrakkenwet* the remains of the ship and its cargo were sold by public auction in order that the State might recover the wreck removal costs. The European Court of Justice ruled that the concept of 'civil and commercial matters' within the meaning of Article 1 of the Brussels Convention does not include actions brought by the agent responsible for administering public waterways against a person having liability in law in order to recover the costs incurred in the removal of a wreck carried out by or at the instigation of the administering agent in the exercise of its public authority. The ECJ referred to a number of factors in view of which that case must be regarded as being outside the ambit of 'civil and commercial matters'. Relevant factors were the fact that the wreck was situated in a public waterway, the fact that the State had an obligation to remove the wreck under an international treaty (the Ems-Dollard Treaty) and the fact that on the basis of national law the State was invested with public authority to administer public waterways.

In my view the situation is different under the WRC regime. A wreck removal claim based on the strict liability provisions of Article 10 WRC (implemented in Article 656 of Book 8 of the Dutch Civil Code) is a civil matter.[35] Consequently such a claim falls within the scope of the Brussels Ibis Regulation. The Brussels Ibis Regulation determines the jurisdiction of the courts of a Member State if the defendant is domiciled in a Member State. Given the global nature of shipping the defendant in the case of a wreck or cargo removal claim may very well be domiciled outside the Member States. In that case the Brussels Ibis Regulation does not apply. If the person held liable is domiciled in Denmark, Iceland, Norway or Switzerland the jurisdiction rules of the 2007 Lugano Convention apply.[36] In other cases the national jurisdiction rules of the court are applicable.

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33 EU Regulation No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *OJ* 2012, L 351/1.

34 ECJ 16 December 1980, C-814/79, ECLI:EU:C:1980:291 (*Netherlands State/Reinhold Rüffer*).

35 Parliamentary Papers II 2014-2015, 34 069, no. 3, p. 9 and Parliamentary Papers II 2014-2015, 34 069, no. 6, p. 5. See also: Brans and Langbroek 2016, pp. 71-72 (see note 5).

36 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* 2007, L 339/3 (2007 Lugano Convention).

4.2 Place where the harmful event occurred

According to the general jurisdiction rule in the Brussels Ibis Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.[37] This general jurisdiction rule can in principle be applied in maritime cases (if the person held liable is domiciled in a Member State). The same holds true for the similar general jurisdiction rules in the 2007 Lugano Convention and the Dutch Code of Civil Procedure.[38]

In matters relating to tort, delict or quasi-delict a person domiciled in a Member State may be sued in the courts for *the place where the harmful event occurred*.[39] This jurisdiction rule for tort claims can be problematic in maritime cases. Which court has jurisdiction if the harmful event occurred on the high seas? It is useful to make a distinction between so-called internal and external torts. Internal torts mainly produce damage on board a single vessel. External torts (also) produce damage outside the ship. For internal torts the flag of the ship will in principle be the factor to determine the place where the harmful event occurred. Basedow is of the opinion that this presumption may be rebutted in respect of ships flying a flag of convenience or being registered in an open registry.[40] For external torts the situation is more complicated. If a ship becomes a wreck or cargo is lost and sinks on the high seas, the reference to the place where the harmful event occurred does not refer to a competent court. The same problem arises under Article 5(3) of the 2007 Lugano Convention and the Dutch jurisdiction rule on tort claims as these provisions have similar wording as Article 7(2) Brussels Ibis Regulation.[41]

The ECJ ruled in *Weber* v. *Ogden* that work carried out in the mining business on the continental shelf is to be regarded as work carried out in the territory of the coastal State for the purposes of Article 5(1) of the Brussels Convention on the jurisdiction and enforcement of judgments in civil and commercial matters.[42] The Advocate General made clear in his opinion that the situation might be different in the case of a vessel flying the flag of another State and sailing on the high seas over the continental shelf in which case the ship would be subject to the jurisdiction of the flag State. In *DFDS* v. *Sjöfolk* the ECJ ruled that the flag State must be regarded as only one factor, among others, which assists in the identification of the place where the harmful event took place.[43] The ECJ added that 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 ship. In that case, the flag State must necessarily be regarded as the place where the harmful event caused damage.

The Dutch jurisdiction rules include a special provision concerning the Dutch continental shelf. For the application of the rules regarding the jurisdiction of the Dutch courts the Dutch

37 Art. 4 Brussels Ibis Regulation.

38 Art. 2 Dutch Code of Civil Procedure.

39 Art. 7(2) Brussels Ibis Regulation.

40 J. Basedow, 'Rome II at Sea – General Aspects of Maritime Torts', *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law*, January 2010, Vol. 74, issue 1, p. 137.

41 Art. 6(e) Dutch Code of Civil Procedure.

42 ECJ 27 February 2002, C-37/00, ECLI:EU:C:2002:122, *NIPR* 2002, 122 (*Herbert Weber/Universal Ogden Services Ltd.*).

43 ECJ 5 February 2004, C-18/02, ECLI:EU:C:2004:74, *NIPR* 204, 144 (*DFDS/Sjöfolk*), para. 44.

continental shelf is regarded as Dutch territory.[44] This provision on the continental shelf does not, however, offer a solution in the case of a harmful event involving a ship at the high seas because the water column above the seabed is not part of the continental shelf.[45]

4.3 Limitation of liability

According to Article 9 Brussels Ibis Regulation a court of a Member State which has jurisdiction in actions relating to liability from the use or operation of a ship shall also have jurisdiction over claims for the limitation of such liability. A similar rule can be found in Article 7 of the 2007 Lugano Convention and Article 6a of the Brussels Convention on jurisdiction and enforcement. Article 6a was added to the Brussels Convention by the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom to the Brussels Convention (the 1978 Accession Convention). The rationale for this rule is explained in the Schlosser Report on the 1978 Accession Convention.[46] According to Schlosser this provision enables the shipowner to concentrate all actions affecting the limitation of his liability in the courts of his domicile:

> 'If a shipowner anticipates a liability claim, it may be in his interest to take the initiative by asking for a declaration that he has only limited or potentially limited liability for the claim. In that case he can choose from one of the jurisdictions which are competent by virtue of Articles 2 to 6. According to these provisions, he cannot bring an action in the courts of his domicile. Since, however, he could be sued in those courts, it would be desirable also to allow him to have recourse to this jurisdiction. It is the purpose of Article 6a to provide for this. Moreover, apart from the Brussels Convention of 1952, this is the only jurisdiction where the shipowner could reasonably concentrate all actions affecting limitation of his liability.'[47]

Important to note is the fact that Article 6a of the Brussels Convention does not apply to an action by a claimant against the shipowner, fund administrator or other competing claimants, nor to the collective proceedings for creating and allocating the liability fund, but only to the independent action brought by a shipowner against a claimant.[48] According to Dutch law the constitution of a fund is a prerequisite for the right to limit liability.[49] For that reason the juris-

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44 Art. 14 Dutch Code of Civil Procedure.

45 Art. 76(1) United Nations Convention on the Law of the Sea (UNCLOS): 'The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.'

46 Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (Signed at Luxembourg, 9 October 1978) by Professor Dr Peter Schlosser, *OJ* 1979, C 59/71.

47 Schlosser Report, no. 128.

48 Schlosser Report, no. 127.

49 Art. 642a Dutch Code of Civil Procedure.

diction of the Dutch courts in a limitation procedure cannot be based on Article 9 Brussels Ibis Regulation.[50] The jurisdiction rules in Articles 4-8 of the Brussels Ibis Regulation determine the jurisdiction of the Dutch courts in limitation proceedings (if the Brussels Ibis Regulation applies). If the jurisdiction rules of the Dutch Code of Civil Procedure are applicable, the jurisdiction of the Dutch courts in a limitation procedure is determined on the basis of Articles 10 and 642a of that Code.

5. Conflict of law rules

5.1 Contractual obligations

Under Rome I parties can to a large extent choose the applicable law on contractual obligations.[51] In the absence of a choice of law, a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence according to Rome I.[52] These conflict of law rules from the Rome I Regulation can be applied in maritime cases without great difficulty.

5.2 Non-contractual obligations

Liability rules for wreck removal in the EEZ have been harmonized by WRC to a great extent. Less uniformity exists for wreck removal in territorial waters. Gaps in international uniform law also still exist with regard to liability for damage caused by hazardous and noxious substances due to the fact that the HNS Convention has not yet entered into force. These maritime cases have to be determined by national law. First we will focus on the question whether the Rome II Regulation offers suitable conflict of law rules for liability for damage on the high seas.[53] In the next section we will turn to the conflict of law rules for global limitation.

In the absence of a choice of law based on Article 14 Rome II the general conflict of law rule for tort/delict determines the applicable law. According to the general rule in Article 4 Rome II the law of the country in which the damage occurs is applicable 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. If the damage occurs in the national territory or territorial waters, this general conflict of law rule refers to an applicable national law. When cargo is lost on the high seas and washes ashore, this rule can be applied as well. In both cases the law of the coastal State applies. However, in the case when damage occurs on the high seas this general provision does not prove to be workable.[54] The reference to the country in which the damage occurs does not work in the case of a *locus sine lege* such as the high seas. Only if the person claimed to be liable and the person sustaining damage both

50 Court of Appeal of Leeuwarden 4 June 2003, *NIPR* 2004, 44, *S&S* 2003, 9 (*IJsseldelta/JB6189*).

51 Art. 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), *OJ* 2008, L 177/6-16.

52 Art. 4(1)(b) Rome I Regulation.

53 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), *OJ* 2007, L 199/40-49.

54 Van der Velde 2006, pp. 317-319 (see note 20).

have their habitual residence in the same country at the time when the damage occurs can Article 4(2) Rome II lead to a national law which is applicable to damages on the high seas. The manifestly closer connection provision in Article 4(3) Rome II may at first sight offer a solution for damages on the high seas. The wording indicates, however, that this provision can only be used if paragraphs 1 and 2 do refer to a specific country which is not the case on the high seas.

Rome II contains a special rule in the case of environmental damage.[55] In the case of environmental damage the person seeking compensation can choose to base his or her claim on the law of the country in which the event giving rise to the damage occurred instead of the law of the country in which the damage occurs. This rule on environmental damage does not offer the person seeking compensation an extra option when the event giving rise to the damage has occurred on the high seas.

Basedow is of the opinion that torts, other than collisions caused by merchant vessels on the waters above the continental shelf or in the exclusive economic zone causing damage in those areas, are subject to the law of the coastal State.[56] His conclusion is based on an analogy to CLC (the liability convention for oil pollution damage). The CLC has extended the application of the law of the coastal State to oil pollution damage in the exclusive economic zone. According to Basedow the fact that all coastal Member States have ratified the CLC would allow for an analogy in the field of the choice of law. The application of the law of the coastal State to damage occurring outside territorial waters would in his opinion also be in line with the jurisdiction of the coastal State in the exclusive economic zone laid down in Article 56 UNCLOS.

Because Rome II leaves a gap with regard to damage that occurs on the high seas the Dutch Civil Code provides an additional conflict of law rule. This national conflict of law rule is only applicable in as far as Rome II does not apply. The Dutch conflict of law rule for damage caused by a seagoing vessel on the high seas refers to the *lex fori*.

> Article 164 Book 10 Dutch Civil Code
> '*Voor zover de aansprakelijkheid ter zake van een aanvaring in volle zee niet wordt bestreken door de Verordening "Rome II", is daarop van toepassing het recht van de staat waar de vordering wordt ingesteld. De eerste zin is eveneens van toepassing indien schade door een zeeschip is veroorzaakt zonder dat een aanvaring plaats had.*'[57]

5.3 Global limitation

As mentioned before State Parties have the possibility to deviate from LLMC with regard to the limitation of liability for wreck and cargo removal costs. Conflict of law rules need to deter-

55 Art. 7 Rome II Regulation: '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.'

56 Basedow 2010, pp. 118-138 (see note 40).

57 'To the extent that the liability for a collision on the high seas is not covered by the Rome II Regulation, it shall be governed by the law of the State where the relevant legal claim is filed in court. The first sentence applies also if damage is caused by a seagoing vessel without any collision taking place' (unofficial translation).

mine the applicable law on the limitation of liability. According to Article 15 under b Rome II the law that is applicable to non-contractual obligations under Rome II shall govern *inter alia* any limitation of liability. Earlier I have advocated the application of the *lex fori* to global limitation due to the lack of a better alternative.[58] The *lex loci delicti* offers no solution on the high seas and the *lex registrationis* could be to the detriment of the coastal State. The application of the *lex fori* to global limitation can be constructed in two ways. One option is to adopt a conflict of law rule for global limitation that refers directly to the *lex fori*. The alternative is to clarify that both with regard to jurisdiction over and the applicable law on non-contractual obligations the continental shelf and the exclusive economic zone of a State should be regarded as the territory of that State. Consequently the courts of the coastal State would have jurisdiction over and would apply their own law to the limitation of liability for wreck removal costs. I however prefer a direct reference to the *lex fori* because the global limitation of liability can cover both non-contractual and contractual obligations arising from the same incident. The application of the *lex fori* to the limitation of liability for all claims appears to be more appropriate than applying a conflict of law rule for non-contractual claims to contractual claims as well.

6. Conclusion

Despite international uniform law laid down in conventions, differences remain between the national laws on the (limitation of) liability for wreck and cargo removal claims. Jurisdiction and conflict of law rules are needed to decide on the competent court and the applicable law. The Brussels Ibis Regulation and the Rome II Regulation do however give rise to difficulties in the case of wreck and cargo removal outside territorial waters.

A wreck removal claim based on WRC should in my view be regarded as a civil matter and as such be covered by the Brussels Ibis Regulation. This regulation may in practice have limited applicability in maritime cases. Given the global character of shipping the person held liable for wreck or cargo removal costs may very well be domiciled outside the Member States in which case the Brussels I Regulation does not apply. If the Brussels Ibis Regulation is applicable the rule referring to the place where the harmful event has occurred does not refer to a competent court if a ship becomes a wreck or loses its cargo on the high seas. A similar problem arises under the 2007 Lugano Convention and the Dutch jurisdiction rules in matters relating to tort.

The conflict of law rules for contractual obligations in Rome I can be applied without difficulty in maritime cases. The conflict of law rules for non-contractual obligations in Rome II can be applied in most maritime cases. In case the damage occurs in the territory or territorial waters, the Rome II Regulation refers to an applicable national law. When cargo is lost on the high seas and washes ashore, the general conflict of law rule in the Rome II Regulation can be applied as well. The law of the coastal State will be applicable in both cases. Only if the damage occurs outside territorial waters (and no international uniform law applies) is the general conflict of law rule insufficient as it does not refer to an applicable national law. The same holds true for the special rule in the case of environmental damage in the Rome II Regulation. This rule does not offer the person seeking compensation an extra option if the event giving rise to the damage has occurred on the high seas. Because of this gap in the Rome II Regulation the Dutch Civil Code provides an additional conflict of law rule that is applicable in as far as Rome

58 Van der Velde 2006, pp. 476-488 (see note 20).

II does not apply. The Dutch conflict of law rule for damage caused by a seagoing vessel on the high seas refers to the *lex fori*.

Given the gaps that exist in EU private international law for maritime cases, it would be advisable to create jurisdiction and conflict of law provisions for incidents outside territorial waters. A possibility could be to regard the continental shelf and the exclusive economic zone of a State as the territory of that State for the application of the jurisdiction and conflict of law rules relating to torts other than torts which solely cause damage on board a single vessel. In addition, it would be advisable to create a conflict of law rule for global limitation that refers to the *lex fori*.