De positie van het zeeschip in het internationaal privaatrecht

Velde, Welmoed van der

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2006

Link to publication in University of Groningen/UMCG research database

Citation for published version (APA):

Copyright
Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

Take-down policy
If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): http://www.rug.nl/research/portal. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.
THE POSITION OF THE SEAGOING SHIP IN PRIVATE INTERNATIONAL LAW

The main goal of private international law is to provide effective and just regulation for international situations. Conflict of law rules refer to the applicable law on an international situation. In order to provide effective and just regulation for international situations, conflict of laws rules should refer to the national law that has the closest connection with the international situation at stake by taking into account all interests involved in a balanced way. With regard to ships a complicating factor is that many different interest are involved. Apart from this difficulty, a seagoing ship has some special characteristics that may have the effect that conflict of laws rules that are well used in situations on land may not refer to the applicable law in an effective and just way in situations in which a seagoing ship is involved. The special characteristics of a seagoing ship can be listed as:
- commercial;
- mobile;
- international;
- being registered; and
- presenting a micro-society.

The main question presented in this research is whether the special characteristics of the seagoing ships require conflict of laws rules that are tailor-made for situations in which seagoing ships are involved. In order to answer this main question, the present Dutch conflict of laws rules for property law, tort law and global limitation have been examined. Regularly will be referred to the Dutch 1993 Act on the applicable law on seagoing ships, ships for internal waters and aircraft which contains a number of special conflict of laws rules for these objects.

Summary of Part I

The primary goal of Part I is to set out the relation between international uniform rules and conflict of laws rules with regard to property rights, mortgages and liens on seagoing ships and, if necessary, to make a proposal for the improvement of the current conflict of laws rules.

Part I starts with setting out some aspects of Dutch law on the registration of seagoing ships. In Article 311 of the Dutch Commercial Code the requirements for
obtaining the Dutch nationality of a ship are set out. The European Court of Justice has ruled that these requirements are in conflict with European law. The Dutch legislator has therefore proposed amendments to Article 311 which have the effect that the nationality of the management of the shipping company has become irrelevant. To comply with European law the proposed amendments to Article 311 should take effect as soon as possible. After presenting the Dutch rules on ownership and other rights in rem on a seagoing ships, Part I continues with an analysis of the conflict of laws rules in this field.

To apply the ordinary conflict of laws rule for property rights that refers to the lex rei sitae on a ship would lead to a change of the applicable law every time the ship crosses a national border and would lead to problems when the ship sails on the high sea. To overcome these problems the conflict of laws rules in Article 2 of the 1993 Act on the applicable law on seagoing ships, ships for internal waters and aircraft (1993 Act) refers to the law of the port of registration. For non-registered ships the lex rei sitae applies. Although the applicability of the lex registrationis is well founded, some questions may arise. In the first place an answer should be given to the question what happens in case the registration of a ship changes. In those cases the registration at the moment the right was constituted, is decisive. Rights in rem created under the law of the former port of registration continue to exist under the new law of registration, unless they are incompatible with the new law. If new rights in rem are created under the new law of the port of registration, they will take precedence over the rights in rem that were constituted under the law of the former port of registration. Secondly, the question can be raised which registration is decisive in case of bareboat registration.

I am of the opinion that the registration of the ownership should be decisive because Article 2 of the 1993 Act focuses on questions regarding the ownership of the ship. The third question relates to the scope of Article 2 with regard to the transfer of ownership of a ship. The law of the port of registration sets out the requirements for the transfer of ownership, including the way in which the ship should be delivered.

Not all aspects of rights in rem on a seagoing ship are covered by the conflict of laws rule in Article 2 of the 1993 Act. For example, the applicable law on the proprietary aspects of a reservation of title clause and on the right of retention is determined by general conflict of laws rules that apply on other objects than ships as well. In Article 92a of Book 3 of the Dutch Civil Code, a conflict of laws rule for the proprietary aspects of a reservation of title clause has been created. According to this conflict of laws rule, the law of the State in which the goods are situated is applicable to the proprietary aspects of a reservation of title clause. However, because of the mobile character of the sea-going ship this book recommends application of the lex registrationis instead of the lex rei sitae for the proprietary aspects of a reservation of title clause. The application of the lex registrationis has the positive effect that it would lead to the application of the same law to the linked questions (a.) whether an object has become part of a ship (where a reservation of title clause has no effect) and (b.) regarding the effects of a reservation of title clause. It is recommended that the following provision will be added to the 1993 Act:
The proprietary aspects of a reservation of title clause with regard to goods which are on board a ship otherwise than under a contract of carriage, are governed by the law of the State in which the ship is registered at the moment the goods are delivered. The contractual aspects of a reservation of title clause are governed by the law applicable to the sale agreement.

The Kingdom of the Netherlands is not a State party to one of the treaties regarding ship mortgages and maritime liens. The applicable law to, inter alia, possessory liens is therefore to be decided by conflict of laws rules. In Article 4 of the Dutch draft Act on the applicable property law the lex causae and the lex rei sitae are applied to the right of retention. When applied to seagoing ships, these conflict of laws rules do not recognise the commercial character of the seagoing ship in situations where a choice has been made for a national law other than the law of the State in which the ship is situated. The need to examine two different systems of law is not in line with the ship’s commercial background because this examination is time- and money-consuming. It is therefore recommended that the right of retention should be ruled by the lex rei sitae alone. The 1993 Act should therefore be amended by adding the following provision:

‘The questions whether a right of retention on a registered ship exists, what the meaning is of such a right and whether this right can be made actionable are governed by the law of the State in which the ship is situated.’

The Dutch regulation on liens and mortgages on seagoing ships is based on the Geneva Convention of 1965 on the registration of ships for internal waters. The Kingdom of the Netherlands is not (yet) a party to the Geneva Convention of 1993 on maritime liens and mortgages. This Convention offers an attractive regulation of the right of retention and the protection of claimants in case of change of registration of a ship. A possible reason for the Netherlands for not ratifying the 1993 Convention may be the fact that claims for personal damage take order above claims secured by a mortgage. However, due to the existence of obligatory insurance and limitation of liability the question is whether the mortgagee should really worry about this.

Article 3 of the 1993 Act contains conflict of laws rules that refer to the applicable law on questions regarding priority rights and ranking. This Article still has an important meaning next to the European Insolvency Regulation because the scope of the European Insolvency Regulation is restricted to insolvency proceedings where the centre of the debtor’s main interests is located in an EU Member State other than Denmark. Article 3 sections 2 and 3 refer to application of the lex registrationis and the lex causae to the question whether a certain claim offers a priority right. The application of the lex registrationis is effective and just because it recognises the need for certainty about the applicable law. However, there seems to be no good reason to apply the lex causae as well. The lex causae does not offer an additional safeguard for the ship-owner, and it is an unnecessary burden for claimants to have their claim satisfied. It is therefore suggested that the questions whether a claim offers a priority right should be decided only by the law of the port of registration.
The legislator’s choice to refer in Article 3 section 2 of the 1993 Act to the law of the port of registration to be decisive for the ranking of claims is to be supported. Opposed to the application of the lex executionis, the application of the law of the port of registration to the ranking leads to certainty because it decreases the importance of forum shopping. Section 2 of Article 3 of the 1993 Act states that no claim will have a ranking above a mortgage if this higher rank would not be offered by Dutch law. This rule is not in line with the endeavour to create international uniformity. However, the corrective rule is understandable with regard to the purpose of protecting mortgage banks.

The Dutch Supreme Court (Hoge Raad) has ruled in 1997 that the conflict of laws rules in sections 2 and 3 of Article 3 of the 1993 Act apply as well to the question whether a claim offers an actio in rem against the ship. As well as it is stated with regard to the applicable law on the question whether a claim offers a priority right, the application of the lex registrationis on the question whether a claim be made against the ship is effective and just because it recognises the need for certainty as to the applicable law. However, there seems to be no good reason to apply the lex causae as well. It is therefore suggested that the question whether a claim can be made against the ship should be decided only by the law of the port of registration.

Article 461 of Book 8 of the Dutch Civil Code gives a rather broad enumeration of persons regarded as carriers under a bill of lading. In Article 217 of Book 8 of the Dutch Civil Code the persons mentioned in Article 461 are offered the right to make their claim against the ship. As a result of this even claims arising out of an incident in which the owner of a ship was in no way involved, can be made against the ship. Because of the applicability of the law of the port of registration on the question whether a claim can be made against the ship, this situation only applies to ships registered in the Netherlands. This unfair situation should be resolved by amending article 217 of Book 8 of the Dutch Civil Code as follows:

‘as well as claims arising out of transport under a bill of lading that can be made against the owner or bareboat charterer who signed the bill of lading or for whom the captain signed the bill of lading.’

Summary of Part II

The liability for damage arising out of a collision between ships, oil pollution or incidents involving hazardous and noxious substances is largely covered by international uniform rules laid down in convention as the Brussels International Convention of 1910 for the unification of certain rules of law with respect to collision between vessels, the International Convention of 1992 on Civil Liability for Oil Pollution Damage (CLC) and the International Convention of 1996 on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention), of which the latter has not yet entered into force. However, those international uniform rules do not cover all aspects of the liability for torts and
delicts in which seagoing ships can be involved. For example, liability for pollution damage on the high sea or in the territorial sea of a State which is not party to the CLC has to be decided by national law. Which national law applies has to be decided by using conflict of laws rules. The conflict of laws rules in Article 7 of the 1993 Act apply to collisions between ships. The conflict of laws rules in Article 7 of the 1993 Act refer to the lex loci delicti for collisions in territorial waters and to the lex fori for collisions on the high seas. These conflict of laws rules take into account the special characteristics of the sea-going ship.

The Dutch Act of 2001 on the applicable law on torts applies to torts other than collisions between ships. This Act of 2001 therefore applies, inter alia, to external torts such as allision with an other ship, collision with an object different than a ship, pollution damage, wreck removal costs as well as to internal torts, such as cargo damage and accidents on board. The Act of 2001 refers to the lex loci delicti for torts in territorial waters and to the lex registrationis for torts on the high seas. The application of conflict of law rules in the Act of 2001 on the applicable law on torts is not effective and just where a seagoing ship is involved. The existing conflict of law rules do not take into account the mobile character of the ship and neither do they recognise the fact that the ship itself is a micro-society which often has little link with the place where she is sailing at the moment a tort takes place. This book recommends that a distinction be made between external and internal torts where a seagoing ship is involved. As is the case with collisions between ships, the lex loci delicti and the lex fori should apply to all external torts. For internal torts it is advisable to recognise the fact that a ship is a micro-society. With regard to internal torts the ship functions as the place, the locus, where the tort takes place. The place of registration of the ship functions as the locus of the tort and for that reason the lex registrationis should be applied to all internal torts regardless where the ship sails. In Brussels an EU Regulation on the applicable law on non-contractual obligations (Rome II) is being prepared. The Commission’s proposal contains a similar solution for torts and delicts on the high sea as in the Dutch law. However, the European Parliament deleted this provision and as a result of that no proper solution is being given in Rome II for torts and delicts on the high sea. It is therefore recommended to add to Rome II a new conflict of laws rule that reads as follows:

'1. Questions regarding liability for a tort or delict committed by a ship causing damage in the internal or the territorial waters of a State are governed by the law of that State. Questions regarding liability for damage on the high seas are governed by the law of the forum where the action is pending.

2. Otherwise than as provided in section 1, questions regarding liability for a tort or delict that occurs on board a registered ship only affecting persons or goods on board that ship, are governed by the law of the port of registry of the ship. If the ship has not been registered, the national law of the ship-owner applies.'
Summary of Part III

Global limitation is defined as the right offered by treaty or statute to limit one’s liability for all claims mentioned in that treaty or statute which arise from the same incident. The London Limitation Convention 1996 (LLMC 1996) applies to a wide range of claims. Other conventions, like the CLC or HNS Convention only apply to specific claims such as claims arising from oil pollution damage or from damage by other hazardous and noxious substances. The prerequisites for the right to limitation and the limits of liability established in these conventions vary substantially.

The Kingdom of the Netherlands is party to the London Convention of 1976 on the Limitation of Liability for Maritime Claims (LLMC 1976) and will in the near future become party to the 1996 protocol to this Convention as well. The Kingdom of the Netherlands is as well party to the CLC and will be party to the HNS Convention in the near future.

In part III an overview has been made of all possible relations between the various limitation regimes. From this overview it becomes clear that very complex situation arise when a State becomes party to a new convention without denouncing a former convention. Apart from this, it becomes clear that for two reasons not all aspects of global limitation are covered by international rules. In the first place gaps exist between the various conventions. If a State is party to the LLMC and the CLC no right to limit exist with regard to the liability for oil pollution damage that occurs on the high sea or in the territorial waters of a State not party to the CLC. Similar gaps exist between the LLMC 1996 and the HNS Convention if a State makes use of the reservation mentioned in sentence 1 sub d of Article 18 LLMC 1996. The gap for oil pollution damage has been filled by Dutch national rules by offering the right to limit the liability for oil pollution damage that is not covered by the CLC according to the rules laid down in the LLMC. A similar gap-filling measure will have to be made with regard to HNS damage outside the geographical scope of the HNS Convention.

In the second place situations may not be covered by international uniform law when States make use of reservation clauses in international conventions. The Kingdom of the Netherlands has for example made use of the possibility to make a reservation with regard to the limitation of liability for wreck- and cargo removal costs and with regard to requiring the establishment of a fund. In most cases it will be a State that orders the removal of a wreck or the removal of lost cargo. These orders will often be preventive measures. Those measures should not be destimulated by the risk of not being able to have the costs recovered as a result of having to share the established limitation fund with other claimants. The establishment of a separate fund for costs of wreck- and cargo removal is in the interest of the other claimants as well as it will enhance their chances to have their losses recovered.

In the LLMC the shipowner is offered the right to constitute a limitation fund. A fund can only be constituted in a State in which legal proceedings are instituted in respect of claims subject to limitation. The LLMC does not set the establishment of a fund as a prerequisite for obtaining a right to limit liability. However, the Kingdom of the Netherlands has made use of the possibility to require in its national law
the establishment of a fund. The reason for this is that the establishment of a fund protects the claimant for possible insolvency of the liable person. For this same reason the establishment of a fund is required in the CLC and the HNS Convention. If the total amount of damages arising out of oil pollution or an HNS incident is higher than the amount of the limited liability of the ship-owner, the claimant can get an additional compensation from the IOPC Fund or the HNS Fund.

The LLMC does not contain a provision regarding jurisdiction. If the plaintiff has his habitual residence in an EU Member State the Brussels I regulation applies. According to this Regulation the Dutch judge has jurisdiction to hear a case on limitation of liability if the plaintiff has his habitual residence in the Netherlands or if the damage for which limitation of liability is sought was caused in the Netherlands. The Dutch judge will not be able to base its jurisdiction on article 7 of the Brussels I Regulation because this provision does not apply to the Dutch limitation procedure in which the establishment of a fund is obligatory. It is suggested that Article 7 of the Brussels I regulation be amended in the sense that it will state that the judge of the State in which a limitation fund can be constituted has jurisdiction to hear the case regarding the limitation of liability.

If a ship is arrested in the Netherlands, the question may arise whether the arrest must be lifted if a limitation fund has been established in the Netherlands or elsewhere. The question of recognition can also arise when the liability procedure runs in the Netherlands while a foreign judge has already decided that the liability of the plaintiff is limited. The first sentence of article 13 LLMC states that once a limitation fund has been established any person having made a claim against the fund shall be barred from exercising any right in respect of such a claim against any other assets of a person by or on behalf of whom the fund has been constituted. Article 13 furthermore states that after a limitation fund has been constituted, any ship or other property, belonging to a person on behalf of whom the fund has been constituted, which has been arrested or attached within the jurisdiction of a State Party for a claim which may be raised against the fund or any security given, may be released by order or other competent authority of such State. Such a release is compulsory if the limitation fund has been constituted in the State of the port where the occurrence giving rise to the damage, the disembarkation or the discharge took place or where the arrest was made. Article 13 does not give a rule on the recognition of foreign decisions on limitation of liability. If the Brussels I Regulation applies, Article 33 of this Regulation states that EU member States in principle will recognize decisions from other member states. The CLC and HNS Convention do contain a provision on recognition and enforcement of foreign judgments. From article 71 it follows that EU member States cannot refuse recognition of a decision by another EU Member State based on the CLC or HNS Convention even if they would not be obliged to recognize the decision according to the Brussels I Regulation. In order to enhance legal certainty, it would have been advisable to add a provision on recognition and enforcement in the LLMC as well.
Because of the fact that not all aspects of limitation of liability are covered by international uniform law, conflict of laws rules are necessary to refer to the applicable national law on questions with regard to the limitation of liability from oil pollution damage on the high sea, the limitation of liability for costs of wreck- and cargo removal and the need for the establishment of a fund. The LLMC does not contain a conflict of laws rule. The Dutch Act on the applicable law on non contractual obligations of 2001 (WCOD) refers to the lex loci delicti for damage in territorial waters and to the law of the port of registration for damage on the high sea. This conflict of laws rule leads to a result that is unjust as well as unpractical. No solution is given for situations where various claims are involved on each of which an other law applies. Furthermore it leads to an unjust result with regard to limitation of liability from damage on the high sea where claimants are faced with possible low limits from the law of the flag of the ship that caused their damage. It would therefore be advisable to apply the law of the State in which the request for limitation of liability is made. Application of the lex fori has the advantage that only one system of law, and therefore one global limit, applies to a variety of claims. Apart from that, the application of the lex fori has the effect that States can exercise the reservations they made to the convention they are party to. For example, by applying the lex fori, the Dutch judge is able to require the establishment of a fund under the LLMC before granting the right to limit and can require the establishment of a separate fund for wreck removal costs. The conclusion is therefore that global limitation should be governed by the lex fori. The application of the lex fori is a better solution than the application of the law of the State in which a fund is constituted because questions concerning global limitation may also arise before a fund has been constituted. For these reasons a new conflict of laws rule should be created stating that:

‘Questions regarding the limitation of liability for claims arising from the same incident are governed by the law of the State in which the request for limitation of liability is made.’

This conflict of laws rule should be added to Rome II. If this conflict of laws rule is not added to Rome II, the application of Rome II on global limitation should be excluded and the proposed conflict of law rule should be added to the national conflict of laws provisions.

Conclusion

The answer to the main question of this research can be summarised as follows: in order to serve the main goal of private international law the special characteristics of the seagoing ship require conflict of laws rules that differ from the existing conflict of laws rules. In order to provide an effective and just regulation, conflict of laws rules have to be created that take into account all various interests involved in shipping as well as the facts that a seagoing ship has a commercial interest, is mobile and international, forms a micro-society on board, and has a place of registry. This book
recommends on the one hand to exclude some general conflict of laws rules from application to the seagoing ship. On the other hand, it is recommended to create new conflict of laws rules especially for seagoing ships with regard to: the proprietary aspects of a reservation of title clause, the right of retention, liens, torts other than those involved with collisions between ships and global limitation.