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Ship registration and choice of law in relation to contracts of employment

Comments on the Supreme Court's decision in the *Eimskip* case – HR-2016-1251-A[2]

1. Introduction

In 2016, the Norwegian Supreme Court decided that the law applicable to a seaman's employment contract is the law of the flag of the vessel on which he served – HR-2016-1251-A.

At this stage it is sufficient to state the basic facts of the case: a Norwegian citizen was engaged by a Norwegian company – Eimskip – as a second mate, and he served on a vessel registered in Antigua.[3] The vessel was on bare boat charter party to a Faroe Islands[4] company and rechartered to Eimskip on time charter terms. The mate was discharged for breach of contract, and the correctness of this action by the employer should – according to the Supreme Court – be decided on the basis of Antiguan law. Further details of the case will be presented later on.

2. The traditional position

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[2] This article is based upon a presentation given in Panama City in October 2017, during a seminar arranged by Tulane Law School as a link in the ongoing cooperation between Tulane Law School and the maritime institutes in Southampton and Oslo.

[3] Antigua and Barbuda is an island state in the Caribbean, with an area of approx.. 280 km^2 and a little more than 80.000 inhabitants.

[4] The Faroe Islands are a semi-independent part of Denmark.

When deciding choice of law questions in shipping-related matters, the country in which the vessel is registered has – undoubtedly – played an important role. This is particularly true in relation to public law/administrative law questions, such as safety, pollution, access to harbours, seizure, applicability of criminal law, neutrality in times of war, etc. However, the law of the flag has also been applied in the private law sector, and the Supreme Court decision is a confirmation of its continuing importance today.

Before discussing the *Eimskip* case, it is necessary to give an outline of Norway's historical development as regards registration and the seaman's employment contract – a development which is not dramatically different from what has happened in other countries.

In the latter part of the 19th century Norwegian shipping was expanding: Vessels were being built right along the Norwegian coast. They were to a great extent owned locally, and manned by people from the same district as where the owner or owners were domiciled. Boys went to sea when they were 14-15 years old, and the parents knew that their young boy would meet a crew recruited from their neighborhood, perhaps even relatives. Non-Norwegian crew members were exceptions.

Putting this in other words: the vessel was tightly connected to Norway. The non-Norwegian element was carriage from or to non-Norwegian harbours, often with non-Norwegian goods. There was no particular interest from abroad in investing in Norwegian shipping; consequently, on the ownerside side too, shipping was Norwegian. Therefore, the expression that the vessel was a floating part of Norway was not an overstatement. Since the vessel was undoubtedly

Norwegian, the vessel should of course fly the Norwegian flag and be registered in the Norwegian ship register.

With the First World War, the picture changed: Norway was a neutral country during those tragic years, with unrestricted submarine warfare and the capture of vessels carrying contraband cargo. In order to protect Norwegian shipping, it was deemed necessary to have strict rules on nationality: the right to fly the Norwegian flag and to be registered in the Norwegian register, required – broadly speaking –at least 60 percent of the equity capital to be owned by Norwegian persons or companies, and that the operation of the vessel should be handled from Norway. Basically, flying the Norwegian flag was a privilege.

The difficult period after the First World War and the Second World War, followed by the cold war, gave no reason to loosen the reins: On the contrary, the rules were made stricter – no exceptions should be allowed.

The post war period, however, brought in other factors of importance. Currency and taxation considerations led to the consequence that a vessel fulfilling the Norwegian registration requirements had to stay in the Norwegian register. An additional consideration was preparedness for war or warlike situations, where urgent transport requirements might necessitate requisitioning of the national fleet. Further, the employment situation for seamen became an issue. The international trends, for "flags of convenience" or open registers, threatened the traditional Norwegian flag and Norwegian crew. The seamen's unions were an important political pressure group in those days, trying to protect the Norwegian seaman.

The former privileges became obligations on the industry!

However, in the 1980's, the pressure from other directions became too strong. The obligation to register in Norway disappeared, and we even introduced an international ship register, in addition to the traditional one reserved for Norwegian owned tonnage.[5]

The important finding – in our context – is that the solid connection between registration and the registry state disappeared in Norway in the latter part of the 20th century, and we will find the same development – earlier, simultaneously or later – in other countries. In short: in matters of ship registration, Norway is today in line with the majority of shipping countries. Regarding private law, this means that we often have the situation where the vessel – apart from its registration – has all its connections to another country, or to a number of other countries.

The conclusion is clear: the real and good grounds for emphasis on the registration country, when deciding on choice of law issues in the private law sector, have eroded. However, applying the law of the flag gives a plain, unambiguous, foreseeable rule.

3. The Eimskip decision –the facts

It is now time for a more detailed description of the *Eimskip* case:

A contract for employment as a mate, between a Norwegian citizen and a Norwegian shipping company, Eimskip, was concluded in 2010 and renewed in 2012. The

[5] See Act 12th June 1987 no. 48 on Norwegian International Shipsregister (NIS).

2010 contract was on a standard form prepared by the Norwegian Maritime Directorate; at the top of the document was inserted: "According to Seamen's act of 30 May 1975 §3 with regulations." From the renewed contract of 2012, which was not on a standard form, I mention the first clause, which related to the mate's duty to serve on the ship designated by Eimskip. Further, I quote (my translation):

> "2. LEGAL REGULATION
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> With the limitations which are explicitly stated in this agreement the employment is subject to the wage agreement between the Small Vessel Owners' Association and the respective unions, the Norwegian Marine Officers' Association for NOR [NOR = The Norwegian Ordinary Ship Register], the Norwegian Seamen's Union and the Norwegian Engineers' Union to the extent appropriate.
>
> 10. CHOICE OF LAW AND JURISDICTION
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> Disputes in connection with this agreement or otherwise in the employment relationship shall be brought before a Norwegian Court. The accepted venue is Vesteraalen District Court."

The mate served on two vessels, both Antiguan registered. At the time of dismissal he worked on board MS Svartfoss (gross tonnage 2.990, built in Norway in 2004-2005).

The vessel was, as already mentioned, bare boat chartered to a company on the Faroe Islands, and this company was required to crew and run the ship. These tasks were – as regards manning and technical operations – outsourced to an Icelandic company. As part of fulfilling such tasks, the Icelandic company hired the services of the mate from Eimskip. In this way, the mate came to work on board MS Svartfoss, which traded in Norwegian waters, with some voyages to England and the Netherlands while he was on board.

This set-up was basically Islandic: The Faroe Islands company, as well as the Norwegian company, were owned by the Icelandic company.[6]

When the mate did not accept his dismissal and instigated court proceedings before a Norwegian District Court, in conformity with the quoted jurisdiction clause, the question arose: which country's law should govern? In an intermediate decision, the District Court held that it was the law of the flag.[7] The Court of Appeal agreed and also rejected an assertion that Norwegian law had been agreed.[8] The Supreme Court was solely asked to decide on the choice of law question, and it came – as already indicated – to the same conclusion as the lower courts.

4. De lege ferenda – or a common sense discussion

Before investigating the reasons given by the Supreme Court, it is – in my view – useful to mention some of the arguments that would have required consideration, if the law had been open. In short: what does common sense indicate?

At the outset, it is important to mention that it is possible to agree on choice of law in a contract for a mate's services. There are, however, certain safety mechanisms, protecting the mate against preposterous results (briefly considered below in 5.5).

Let us start with the basics: we have a Norwegian citizen engaged by a Norwegian company to serve as a mate on a ship to be designated by the Norwegian shipping company.

[6] In "Technical and Crew Management Agreement between the Faroe company and Eimskipafelag Islands, article 4 says: "Since both Faroe Ship and Eimskip are owned fully by Eimskipafelag Islands hf. no agent fee is payable under this Agreement". I add that the names Svartfoss and Eimskip clearly have an Icelandic "flavour".
[7] TVTRA-2016-808.
[8] LH-2015-95334.

Of course, there is no slave-master relationship here, but clearly the mate is the weaker of the two parties, even where the shipping company is a minor one. It would appear reasonable that the shipping company should make it clear for the person to be employed that his rights and obligations are not necessarily dependent upon Norwegian law. In our case, the shipping company made Antiguan law applicable by choosing the vessel on which the mate should serve. If the company had chartered a vessel from, say, India or Madagascar, the mate would, if necessary, have had to make himself conversant with one of those countries' laws.

I say nothing detrimental to Antiguan and Indian law or the law of Madagscar. They are illustrations of unpredictability for our mate. In all fairness, the company should have made it clear for the mate that he could not expect that his home law – Norwegian law – would necessarily apply.

In my view there is also another objection to Antiguan law – once again, I am not suggesting in any way that Antiguan law is substandard. When the employer – the shipping company – pleads that the dismissal is acceptable under Antiguan law, a heavy burden is placed on the mate contesting the dismissal. It is much easier for the shipping company, than for a Norwegian sailor, to obtain relevant information in such a form that it will be accepted by the Norwegian Court. Without the financial support of a union, it will be virtually impossible for the mate to contest the dismissal. To put it very strongly: when the company pleads Antiguan law, it might be said that this is tantamount to a denial of justice. The company may know that this man has neither the guts nor the money to put up a fight for his possible rights. I do not say that Eimskip subjectively acted in this way.

My point is that there is such a possibility and that the effect may be as indicated.

The most serious objection is, as indicated, the uncertainty: one month on an Antiguan vessel, the next month on a vessel flying another flag. The application of the flag state principle presents further problems if the dismissal is based upon a succession of events while serving on differently flagged vessels. The conclusion is that the predictability, seen from the mate's point of view, is zero, if he has not been informed beforehand of his employer's chartering plans!

The underlying difficulty is that the rule of the flag state law was developed at a time when the seaman was engaged for service *on a named, identified vessel*, with no right for the employer to demand his services on another vessel and, on the other hand, if the vessel was sold or lost, the employment was ended. In Norway this rule was changed in 1985 – primarily for the protection of the seaman.

In any case, the indicated demands of fairness, together with the wording in the contracts, in particular the last one (quoted in section 3 above) would, in my world, be sufficient to find that there was at least a presumption for Norwegian law. Arguments along these lines were rejected by the District Court and the Court of Appeal – essentially because the courts found that the flag law has such a solid standing that the arguments were not sufficient for the application of Norwegian law. This construction issue was not argued before the Supreme Court.

5. Why the Supreme Court reached its decision on the applicability of Antiguan law

5.1. Introduction

After these considerations – if I may use the phrase, of a natural justice character – it is time to explain the reasons given by the Supreme Court for its conclusion.

The opening remark of the Court is that when law, custom or other established rules do not apply, the task is to find the law of the state to which the dispute, according to a total evaluation, has its closest connection (para. 27).[9] However, if the choice of law question is not solved by Norwegian legislation, "there is reason to take into account the EU's choice of law rules in the two Rome regulations" (para. 27).

The possible arguments in respect of our problem may be divided into three groups:

(i) Contractual regulation
(ii) National regulation
(iii) International regulations, i.e. conventions to which Norway is a party and rules in other countries, in particular in EU.

5.2. Contractual regulation

As mentioned above, it was not argued on the part of the mate that Norwegian law was expressly or implicitly agreed. Nevertheless, the Court states that it may be agreed that the main rule, viz. that the employment legislation is governed by the law of the flag state, is not applicable (para. 31). It is then a little surprising that the Court shortly thereafter subscribes to a statement from the Department of Justice "that it is doubtful to what extent international law allows Norwegian legislation

[9] The Court refers to the so-called "Irma-Mignon-formula", deriving its name from a Supreme Court decision in Rt. 1923.II s. 58 regarding a collision between the vessels Irma and Mignon. This formula has since been applied in a number of private law issues.

to be applied on foreign vessels which are used by a Norwegian shipping company on other terms than bare boat terms" (para. 33). The basis for this reservation is apparently that the application of Norwegian law might be considered an infringement of the rights vested in the state of Antigua. However, if this restriction is accepted, the application of Norwegian law should not be problematic, as the link to Antigua was broken by the bare boat charter to the Faroe company.

5.3. National regulation

The Maritime Employment Act of 2013 Section 1-2 says that the act is applicable for employment on board a "Norwegian vessel", and whether a ship is, in this sense, Norwegian, depends upon the requirements of the Maritime Code – which basically means that the vessel needs to be owned by Norwegians and operated from Norway.

Section 1-2 is, the Court says, a choice of law rule (para. 29 and 30), and this is supported by a detailed examination of the preparatory works (*travaux préparatoires*), both to the act and to earlier legislation on maritime employment. The conclusion is that the national factors support the view that Section 1-2 is intended to be in conformity with the flag state principle of international law.

5.4. International regulation

Regarding the international situation, the Court states that UNCLOS (the United Nations Convention on the Law of the Sea of 1982) codifies the flag state principle, and that both Norway and Antigua have ratified the Convention. And I quote:

> "The flag state principle is codified in UNCLOS of 1982 – with entry into force in 1994. The flag state has according to Article 92 exclusive jurisdiction on the high sea, while the coastal state's jurisdiction on its own sea territory is limited by Articles 17 et seq. on the right to innocent passage. The Convention is in other words built upon an interplay between jurisdiction based upon personnel connection – flag state jurisdiction – and territorial connection – coastal state jurisdiction" (para. 36, my translation)".

5.5. The exceptions of ordre public, fraus legis and international mandatory rules

There are a few exceptions regarding the application of foreign law; the catchwords are *ordre public*, *fraus legis* and international mandatory rules.

In the *Eimskip* case it was argued that the special rules in the Maritime Employment Act on protection of employment – i.e. rules on dismissal etc. – were of such a nature that Antiguan law could not be applied.

As for international mandatory rules, the Court stated that one aspect of this doctrine is that:

> "a Norwegian rule of law can be so fundamental that it has to be applied irrespective of which law is applicable in other respects" (para. 39, my translation).

The condition is, however, the Court continued, that the Norwegian rule is applicable in the present instance, and here there are no grounds for holding that the rules on job protection should have a wider application than the other rules of the Maritime Employment Act – and the Act, according to the Court's findings, is not applicable to employment on a non-Norwegian vessel.

The remaining possible exception is *ordre public*: when application of foreign law gives a *result* contrary to "fundamental principles" in the state where judgment is given,

foreign law will not be applied. However, whether the application of Antiguan law will give such a result is not a question of choice of law: it is a substantive question to be decided in the principal case (para. 40).

6. Some concluding remarks on Norwegian law

It is time to sum up:

We have a long tradition of applying the principle that the contract of employment is subject to the law of the flag state – unless there is an agreement that the law of another country shall apply. The basis for this principle is –as I see it – twofold:

(i) There was a strong connection between vessel and the flag state: The vessel was owned and operated from the flag state by nationals – individual persons or legal entities domiciled in the flag state. And the seaman was a national of the flag state.

(ii) The employment contract was strictly bound to a specific vessel – when the vessel was sold or lost, the contract came to an end.

Both of these two premises have slowly eroded. Open registers are not a rare exception today, and even with the traditional registers, the vessels therein have, in most cases, strong financial and operative connections with other countries.

The most striking feature in the *Eimskip* case is – as I see it – that the choice of law depends upon the decision of the employer: The employee is not informed beforehand and is

not required to consent when the employer has made his decision.[10]

7. Modern principles – Rome 1

The Supreme Court's reference to the EU rules of law (see 5.1 above) requires some remarks. Our question is what result the rules promulgated in Rome I (Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008) would lead to if applied in the *Eimskip* case.

The rules apply to "contractual obligations", with general rules and special rules for i.a. "individual employment contracts" (Art. 8).

Art. 3 on freedom of choice says, in sub. 1, that a choice "shall be made expressly" or shall be "clearly demonstrated by the terms of the contract or the circumstances of the case". In the *Eimskip* case there was no express choice, and in the circumstances – as presented in the descriptions given by the courts – it is doubtful whether the criteria "clearly demonstrated" is met. Accordingly, we have to turn to Art. 8 on individual employment contracts, with its three layers of rules.

The first rule of Art. 8 is in sub. 2, referring to "the law of the country in which or from which the employee "habitually carries out his work in performance of the contract". Since the vessel did not fly the Norwegian flag, the greater part of the work was, technically speaking, not performed in Norway, even though the vessel, for the better part of the relevant period, was in Norwegian waters.

[10] If the employee were to protest when informed that he is to serve on a vessel registered outside Norway, I suggest that the issue of whether his objections are sound would need to be decided in accordance with Norwegian law.

Then we come to the second layer in sub. 3, referring to the law of the country "where the place of business through which the employee was engaged is situated". This means Norwegian law for our mate.

The last resort is that failing a decision according to sub. 2 or sub. 3, sub. 4 states that the applicable law is that of the country "that the contract is more closely connected with", than one of the countries indicated in sub. 2 or sub. 3. In the present case, this country is obviously Norway: We have a Norwegian mate, engaged by a Norwegian company, signing the contract in Norway, working on board a vessel that only occasionally trades outside Norwegian waters, and when outside the Norwegian area sailed to England and the Netherlands, i.e. countries that clearly are of no significance when deciding upon the choice of law question.

The indicated rules are, however, subject to "overriding mandatory provisions", as spelled out in Art. 9. But this reservation is of no interest in the present context.

One possible objection may be based on Art. 25, which says that the Rome 1 rules "shall not prejudice the application of international conventions to which one or more Member States are parties". Assuming that Norway is a Member State, it may be questioned whether UNCLOS' principle in Art. 92, on the exclusive jurisdiction of the flag state, prevents the Norwegian court from applying the employment laws of another state than Antigua. As I see it, the answer is clearly no.