Maritime law and private international law

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'The law of the sea is the oldest law.'
Prof. H. Schadee[1]

As may be deduced from quoting Prof. Schadee above, this first issue of the Netherlands Private International Law Journal of 2019 will largely focus on international maritime law.

Maritime law has a long history of international uniform law. For centuries people have used the sea for trade. The Code of Hammurabi, dating from the 18th century BC, regulated the trade in oil, dates and copper between Mesopotamia, Bahrain and West India. The maritime laws of Rhodes provided the necessary legal certainty for Mediterranean trade from 900 BC onwards. The Consolato del Mare, the Rôles d'Oléron and the Laws of Wisby from 1000-1300 AD form the foundation of today's maritime law.[2] International agreements of this type were not drawn up 'on land' until much later.

From the outset, maritime law was based on uniform rules specifically written for international sea trade. The rise of States and nationalism disrupted this uniformity. Countries made their own rules. Since the end of the nineteenth century, attempts have been made to create uniform maritime law, such as the Nairobi Wreck Removal Convention.[3] In parallel with the International Maritime Organization (IMO), the European Union has created rules that result in uniform maritime law provisions among the EU Member States. Examples of EU maritime legislation include rules relating to the liability of carriers of passengers by sea in the event of accidents and rules relating to the insurance of shipowners.[4]

Despite these efforts and the many international treaties resulting therefrom, maritime law differs across the globe. This is due to the fact that not all States are signatories to every IMO convention, States can reserve their rights with regard to specific convention provisions and conventions can be given a different interpretation in different State Parties. As a result, private international law rules remain necessary to settle international maritime disputes and cases.

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1 Interview with Prof. H. Schadee, published in *Ars Aequi*, May 1993.

2 R.P. Anand, *Origin and Development of the Law of the Sea*, The Hague: Martinus Nijhoff 1983; D.R. Rothwell and A.G. Oude Elferink (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford: Oxford University Press 2015; D.R. Rothwell and T. Stephens, *The International Law of the Sea*, Portland: Hart Publishing 2016.

3 Nairobi International Convention on the removal of wrecks, 2007, *Trb.* 2008, 115.

4 Regulation (EC) No. 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents, *OJ* 2009, L 131/24; Directive 2009/20/EC of the European Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims, *OJ* 2009, L 131/128.

Within the European Union, a considerable part of private international law has now been harmonized in regulations such as the Brussels Ibis, Rome I and Rome II Regulations. However, these EU Regulations were not drawn up specifically for maritime situations.

For instance, as regards international employment matters in maritime situations, these rules do not take into account the fact that ships can sail on the high seas (*locus sine lege*) and the fact that moving from one jurisdiction to another is essentially the core business of the shipping industry. The fact that these EU private international law regulations are not suitable for maritime cases can be illustrated by taking a look at the following provisions from the said regulations.

Article 21 Brussel Ibis Regulation refers to 'the place where or from where the employee habitually carries out his work' and to 'the place where the business which engaged the employee is or was situated'. As for the law which is applicable to an individual employment contract, Article 8 Rome I Regulation stipulates that this would be 'the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract'. Article 7(2) Brussels Ibis Regulation on tort claims confers jurisdiction on the courts of 'the place where the harmful event occurred'. To determine the applicable law for tort claims, Article 4 Rome II Regulation refers to 'the country in which the damage occurs'.

In many cases, the seafarer does not carry out his work in or from the same place. Because of that the 'country in which the business that engaged the employee is (or was) situated' is usually the most important rule to determine the international jurisdiction and the (mandatory provisions of the) law that is applicable to the employment contract of the seafarer. In this issue, Van der Voet analyses in her contribution entitled 'International maritime employment law – About the special legal status of the most globalised of international workers: the seafarer' how this rule should be applied in the shipping industry.

Also, despite an international convention on wreck and cargo removal, differences remain among States regarding the (limitation of) liability for removal costs. Consequently, also in this field private international law rules are required. As for the EU, the Brussels Ibis and Rome II Regulations give rise to difficulties in the case of wreck and cargo removal outside territorial waters. This is due to the fact that the reference to the place where the harmful event occurred does not lead to an internationally competent court of an EU Member State 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. Van der Velde explores in her contribution 'Beachcombing for liability limits? Wreck and cargo removal claims in private international law' the possibilities to fill these gaps in EU private international law.

Another maritime matter that still requires private international law is the carriage of goods by sea. Despite the fact that this has been regulated by international law to a large extent, conventions like the Hague Visby Rules have a limited scope and do not cover all issues that may arise from a contract of carriage. The Rome I Regulation on the law applicable to contractual obligations excludes from its scope 'obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character'. This exclusion should also cover bills of lading to the extent that the obligations under the bill of lading arise out of its negotiable character. In his contribution 'Het cognossement op naam en IPR', Claringbould discusses the question whether a straight bill of lading falls within the scope of the Rome I Regulation.

With regard to the carriage of goods by sea another relevant question is whether forum selection clauses are allowed. The Hague Visby Rules are silent on this topic. Some courts have understood that they contravene Article 3(8) Hague Visby Rules, as they represent a *de facto* lowering of the carrier's liability. Others have taken the opposite approach. Salmeron analyses in his contribution 'Forum selection under the Hague (Visby) Rules' the reasons behind the expansive and restrictive interpretation of Article 3(8) Hague Visby Rules regarding forum selection clauses.

As will become evident after reading the various contributions in this issue, maritime private international law is not a paddling pool. On the contrary, the combination of international, EU and national rules can lead one into maelstroms. However, I hope that the contributions in this issue of the *NIPR* will also offer you the necessary beacons to safely navigate around them.