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JURISDICTION AND ILLEGAL STRIKE ACTION BY SHIPPING TRADE UNION

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In this case *DFDS Torline A/S v SEKO Sjöfolk Facket för Service och Kommunikation* the ECJ had occasion to deal with the relevance of the flag state where the claimant shipowner purports to bring an action within the scope of Article 5(3) of the Brussels Convention. The *Tor Caledonia* was registered in the Danish international ship register and was subject to Danish law. She was owned by DFDS Torline A/S and served the route between Göteborg (Sweden) and Harwich (United Kingdom). DFDS had employed a crew of Polish nationality. The crew was employed on the basis of individual contracts, containing terms consistent with a framework agreement between a number of Danish unions on the one hand, and three Danish associations of shipping companies on the other. Those contracts were expressed as being governed by Danish law.

The Polish crew was represented by a Swedish trade union, Sjöfolk Facket för Service och Kommunikation (SEKO). SEKO made a demand on DFDS for a collective agreement which DFDS rejected. SEKO then served a notice of industrial action by fax instructing its Swedish members not to accept employment on the *Tor Caledonia*. The fax also stated that SEKO was calling for sympathy action. The Svenska Transportarbetareförbundet (Swedish Transport Workers Union)(STAF) gave notice, upon receipt of the fax, of sympathy action and made plain that they would refuse to engage in any work whatsoever relating to the *Tor Caledonia*. That meant the ship was very likely to be prevented from being loaded or unloaded in Swedish ports.

DFDS brought an action before the Danish Arbejdsret (Labour Court) for an order that the industrial action and the sympathy action were unlawful. Very soon after the hearing but *before a decision was made*, SEKO and STAF decided to terminate industrial action. However, in the meantime, DFDS had had to remove the *Tor Caledonia* from serving the Harwich-Göteborg route and to use a leased vessel instead. DFDS thus brought action against SEKO before another Danish court claiming that the defendant was liable in tort for giving notice of unlawful industrial action and inciting another Swedish union to give notice of sympathy action, which was also unlawful. The damages sought were for the loss allegedly suffered by DFDS as a result of immobilising the *Tor Caledonia* and leasing a replacement ship.

There were a number of very significant private international law questions that had to be answered before that claim could be dealt with. They were so important that representations were made not only by the parties, but also Sweden, Denmark, the United Kingdom and the Commission. The position under Danish law was that the Arbejdsret had no jurisdiction to order compensation.

SEKO's argument was thus that DFDS could not rely on Article 5(3) of the Brussels Convention¹ to bring its claim in Denmark. Article 5(3), it might be recalled, states that in matters relating to a tort, delict or quasi-delict, the defendant may be sued in the courts for the place where the harmful event occurred. On the other hand, if Article 5(3) did not apply, DFDS would be required to sue SEKO in Sweden, the place where SEKO was domiciled. SEKO's argument was supported by the Swedish Government, whilst Denmark and the United Kingdom took the opposing view. The Arbejdsret thus referred the matter to the ECJ for a preliminary ruling.²

The ECJ held that the fact that Denmark had a system whereby a ruling on the legality of industrial action may be made by a court not competent to hear claims for consequential damage was not a bar to the application of Article 5(3). The ECJ saw the argument by SEKO as one which operated against the principles of sound administration of justice and practicality.³ If SEKO's argument was correct, it would mean that if the claimant wished to obtain compensation for damage *occurring in Denmark*, the claimant would have had first to sue SEKO in Sweden for a ruling that the action was illegal and then subsequently, bring an action for damages before a Danish court. The court relied on the recent case of *Italian Leather*⁴ in reiterating that the object of the Brussels Convention was not to unify the procedural rules of the Contracting States, but to determine which court has jurisdiction in disputes concerning civil and commercial matters in intra-Community relations. It would be quite contrary to the principle of legal certainty where the plaintiff is inconvenienced by a restrictive reading of Article 5(3). It should also be noted that the intention in Article 5(3) was clearly to offer the plaintiff a convenient forum to claim damages at the place where the harm or loss occurred. Artificially separating the two limbs of the action, the legality and the right to compensation, would not serve this purpose at all.

In this connection it might also be noted that Article 5(3) has in the past been given an expansive reading by the ECJ. In *Mines de Potasse d'Alsace*⁵ one of the first ECJ decisions on Article 5(3), the court stated that by its comprehensive form of words, Article 5(3) of the Convention covers 'a wide diversity of kinds of liability'. Similarly in *Kalfelis*⁶ the court asserted that the concept of matters relating to tort, delict and quasi-delict 'covers all actions which seek to establish the liability of a defendant and which are not related to a contract within the meaning of Article 5(1)'. SEKO, however, emphasised that the Arbejdsret had no jurisdiction to order compensation for harm done, whatever the nature of the harm. Although there is some force in that argument, the general tenor from ECJ case law is that the specificity of competence of the national court in question is not material when applying the jurisdictional rules of the Convention. Moreover, it has been recently established that even where no financial compensation is claimed as remedy, Article 5(3) can apply (*Henkel*,⁷ a judgment delivered after the present reference was made). There, the court had allowed the consumer protection organisation seeking an injunction to prevent a trader from using unfair consumer contract terms to rely on Article 5(3).

SEKO stressed that there was no absurdity in its contention because it was possible that following a ruling by the Arbejdsret that the industrial action was unlawful, it, SEKO, could withdraw the unlawful action thereby causing no damage to DFDS. That reasoning was not acceptable. As far as the ECJ was concerned, 'it was not possible to accept an interpretation of Article 5(3) of the Brussels

¹ The Brussels Convention has now been replaced by Regulation 44/2001 with effect from 1 March 2002. As the Danish court, the Arbejdsret, made its application for a preliminary ruling on 29 January 2002, this case pre-dates the new Regulation. That said, Denmark has exercised an opt-out of the new Regulation and is thus still governed by the Convention.

² An earlier preliminary issue was whether the Arbejdsret had the competence even to make a reference to the ECJ. That objection was overruled by the ECJ which stated that although the Arbejdsret was not mentioned in the 1971 Protocol's list of Danish courts empowered to make such an application, it was clear that the Arbejdsret had exclusive jurisdiction over certain disputes in employment law and as such, was a court of first and last instance.

³ See also Case C-269/95 *Benincasa* [1997] ECR I-3767, paragraph 26.

⁴ Case C-80/00 [2002] ECR I-4995.

⁵ Case 21/76 [1976] ECR I735.

⁶ Case 189/87 [1988] ECR 5565.

⁷ Case C-167/00 [2002] ECR I-8111.

Convention according to which application of that provision is conditional on the actual occurrence of damage.⁸ Furthermore, the ECJ has also held that the finding that the courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence, is equally relevant whether the dispute concerns compensation for damage which has already occurred or relates to an action seeking to prevent the occurrence of damage.⁹

A second question of some interest was that of causation. The Arbejdsret sought clarification as to whether if it was necessary for the application of Article 5(3) in the present context that 'the harm caused must be a certain or probable consequence of the industrial action itself or whether it was sufficient that that industrial action was a necessary condition of sympathy action which may result in harm'.¹⁰ The question was important as it was established in *Mines de Potasse d'Alsace* that liability in tort, delict or quasi-delict can only arise when there is a causal connection between the damage and the event from which the damage originates. It is clear from the facts that as DFDS had only employed Polish sailors on the ship in question, the SEKO industrial action in calling its Swedish members not to accept jobs on the ship in question, on its own, would not have caused harm to DFDS. Be that as it may, without that industrial action there would not have been any sympathy action by dock and port workers which in turn led to the cancellation of that route and the leasing of a substitute vessel. The chain of causation had thus not been broken.

The final question for the ECJ is one of particular interest to maritime lawyers. It was whether Article 5(3) must be interpreted as meaning that the damage resulting from industrial action taken by a trade union in a Contracting State to which a vessel registered in another Contracting State sails can be regarded as having occurred in the flag state, the result being that the shipowner can bring an action for damages against that trade union in the flag state. In short, the Arbejdsret wanted to know from the ECJ whether the damage could be regarded as having occurred in Denmark so that proceedings might be brought there when it was clear that the notification of industrial action emanated in Sweden, not Denmark.

There are three possible solutions: DFDS and the Danish Government submitted that the question should be answered in the affirmative; SEKO and the Commission took the contrary view. The United Kingdom considered that the question must be answered on the basis of the applicable national law determined in accordance with Danish rules of private international law. DFDS *in part* based its conclusion that the place where the damage occurred was Denmark on the ground that the object of the proposed industrial action was to change the conditions of employment on board the *Tor Caledonia*, which was registered in Denmark and was hence to be regarded as Danish territory. The Danish Government also considered it relevant that the event giving rise to the damage was intended to produce its effects and influence the other party's conduct where the ship affected by the action is registered and where the important decisions concerning the conditions of employment were taken, namely on board the ship. The United Kingdom and the Commission, in contrast, did not regard the nationality of the ship as relevant to determining the place where the damage occurred within the meaning of Article 5(3) of the Convention. SEKO and the Commission argued, however, on the basis of *Marinari*,¹¹ that the phrase 'place where the harmful event occurred' should not include the place where the victim claimed to have suffered financial damage following initial damage arising and suffered by him in another state. Those parties conclude that in the circumstances of the present

⁸ Paragraphs 46, 48 of *Henkel (ibid.)*.

⁹ *Ibid.*

¹⁰ See paragraph 29 of the judgment.

¹¹ In Case C-364/93 *Marinari* [1995] ECR I-2719, the claimant claimed damages against the defendant bank alleging that the negligence of the bank's employees in one country had resulted in his imprisonment in that country and also financial loss in another. The court ruled that the term 'place where the harmful event occurred' could not be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere; consequently, the term could not include the place where the victim claimed to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State.

case the place where the harmful event occurred could not therefore be Denmark but Sweden.

In dealing with the somewhat complicated issue, the ECJ first reiterated the time-honoured rule that the place where the harmful event occurred in Article 5(3) includes both the place where the damage occurred and the place of the event giving rise to it. The claimant thus has a choice as to where the defendant should be sued where these two places are different (*Shevill and others*¹²). It then went on to find that the natural forum was Sweden where the industrial action notice was given and publicised and where SEKO had its head office. However, it did not rule out the possibility that harm could have been sustained in Denmark. It held that the damage was financial loss arising from the withdrawal of the *Tor Caledonia* from its normal route and the hire of another ship to serve the same route. As far as the court was concerned, it was for the national court to inquire whether such financial loss could be regarded as having arisen at the place where DFDS was established. The issue of the flag state was less relevant. However, unlike the somewhat entrenched view taken by the United Kingdom and the Commission, the ECJ considered that in the course of that assessment, it was permissible and indeed, appropriate, for the national court to take the flag state (or nationality of the vessel) into account. That factor however is only one of many factors the national court should accommodate in ascertaining the place where the harmful event took place. It should of course be noted that the ECJ does not make findings of fact when giving a preliminary ruling; it will be for the Arbejdsret to decide whether the harm was suffered in Denmark where DFDS has its registered office.

It should however be observed that the nationality of the ship is highly relevant where the damage or harm suffered is alleged to have been sustained on board. In the present case, it would follow that if the union had been able to mobilise the Polish crew into taking industrial action on board the *Tor Caledonia*, the flag state should be able to assume civil and commercial jurisdiction. Although the court was careful not to make too much of the relevance of the ship's nationality, this is an interesting development in that nationality is generally irrelevant in the application of the jurisdictional rules of the Brussels regime, but here the court has ruled that, in the case of ships, nationality may be taken into account when determining where the harm was sustained for the purposes of civil action.

¹² Case C-68/93 [1995] ECR I-415; in that case the court held that the victim of a defamatory statement originating in one country but circulated in another can choose to sue the defendant publisher in either of those countries.