

Anders als die CMR steht das europäische Verfahrensrecht jedoch nicht in Verbindung zu einem bestimmten materiellrechtlichen Regime⁴⁸. Die Gerichtsstände der EuGVVO dienen allein der Abgrenzung der mitgliedstaatlichen Zuständigkeiten unter Berücksichtigung des Zusammenhangs zwischen Gerichts-ort und Streitgegenstand. Wer materiell-rechtlich Anspruchsteller und wer Anspruchsgegner ist, ist für die Anwendung der europäischen Zuständigkeitsregeln ohne Belang. Dieser Unterschied dürfte in der Tat eine von der Haltung des EuGH abweichende Beurteilung für Art. 31 Abs. 2 CMR rechtfertigen, so dass der Sichtweise des BGH zuzustimmen ist⁴⁹.

4. Konsequenzen

Kehrseite dieser Sichtweise ist freilich, dass einander widersprechende Entscheidungen nur dann zu vermeiden wären, wenn die Gerichte der übrigen CMR-Mitgliedstaaten dem BGH folgten. Dies kann aber nicht unbedingt erwartet werden, umso mehr, nachdem der EuGH für das europäische Verfahrensrecht gegenteilig entschieden hat⁵⁰. Entscheidungen des EuGH dürfte international höheres Gewicht zukommen, und sie haben zudem den „Anschein nationaler Neutralität“ für sich. In diesem Zusammenhang ist es auch problematisch, dass der BGH in seinen Urteilen keinerlei Bezug auf ausländische Rechtsprechung⁵¹ oder Literatur⁵² zur CMR nimmt. Ohne eine übergreifende Instanz zur Auslegung kann eine einigermaßen einheitliche Anwendung internationaler Übereinkommen nur gelingen, wenn die mitgliedstaatlichen Gerichte über den Tellerand der eigenen Jurisdiktion hinausblicken⁵³.

Um bei einem Vorrang der Leistungsklage widersprechende Entscheidungen zu verhindern, müsste im Übrigen auch noch dafür gesorgt sein, dass eine später erhobene Leistungsklage bereits im Verfahren über die negative Feststellungsklage beachtet und dieses Verfahren beendet oder zumindest ausgesetzt wird. Die prozessualen Möglichkeiten hierzu mögen jedoch nicht in jeder Rechtsordnung vorhanden sein. Notfalls müsste die Unzulässigkeit der Fortführung eines Verfahrens über eine negative Feststellungsklage wohl als ungeschriebene Rechtsfolge aus Art. 31 Abs. 2 i. V. mit Abs. 1 CMR hergeleitet werden. Ob ausländische Gerichte dazu bereit wären, ist mehr als zweifelhaft.

Kommt es dazu, dass zunächst in einem ausländischen Verfahren festgestellt wird, dass ein bestimmter Anspruch nicht besteht, dann aber im Inland einer Leistungsklage zwischen denselben Parteien über eben diesen Anspruch stattgegeben wird⁵⁴, so hat dies auch Konsequenzen für die Vollstreckbarkeit⁵⁵: Das inländische Leistungsurteil wäre allein im Inland vollstreckbar. Einer Anerkennung und Vollstreckung im Staat, in dem über die negative Feststellungsklage entschieden wurde, stünde Art. 34 Nr. 3 EuGVVO bzw. die entsprechende Vorschrift des nationalen Verfahrensrechts entgegen⁵⁶. Auch in allen übrigen Mitgliedstaaten der Europäischen Union würde gemäß Art. 34 Nr. 4

EuGVVO nur das zeitlich frühere Urteil über die Feststellungsklage und nicht das Leistungsurteil anerkannt werden. Dies sollte stets vor Augen stehen, wenn darüber nachgedacht wird, einer im Ausland erhobenen negativen Feststellungsklage durch eine konkurrierende Leistungsklage im Inland zu begegnen.

IV. Zusammenfassung

Gerichte in der Europäischen Union müssen ihre internationale Zuständigkeit auch dann – und zwar von Amts wegen – nach den anwendbaren Vorschriften eines Spezialübereinkommens wie der CMR prüfen, wenn sich der Beklagte auf das Verfahren nicht einlässt. Art. 26 EuGVVO verweist insoweit auf die Gerichtsstände des Spezialübereinkommens und nicht auf diejenigen in Kapitel II der EuGVVO. Das steht nach den Entscheidungen des BGH und des EuGH endgültig fest.

Innerhalb des Anwendungsbereichs der CMR hat eine Leistungsklage Vorrang vor einer negativen Feststellungsklage, die denselben Anspruch und dieselben Parteien betrifft, auch wenn die negative Feststellungsklage früher erhoben wurde. Ob diese Auffassung auch außerhalb Deutschlands geteilt werden wird und deshalb zu einheitlichen Ergebnissen führt, ist allerdings zweifelhaft.

48 Mankowski, in Rauscher, Europäisches Zivilprozessrecht (2004), Art. 71 Brüssel I-VO Rn. 16; Rauscher, LMK 2004, 75 (76).

49 Ebenso Joost, EWiR 2004, 225 (226); Rauscher, LMK 2004, 75 (76); Mankowski, in Rauscher, Europäisches Zivilprozessrecht (2004), Art. 71 Brüssel I-VO Rn. 16; Hüfstege, in Thomas/Putzo, ZPO (27. Aufl. 2005), Art. 71 EuGVVO Rn. 4; bereits zuvor OLG Köln, 8. 3. 2002, TranspR 2002, 239 (241); HansOLG Hamburg, 7. 11. 2002, TranspR 2003, 25; Heuer, TranspR 2002, 221; Herber, TranspR 2002, 19 (20 f.); Herber/Piper, CMR (1996), Art. 31 Rn. 26; dagegen Otte, TranspR 2004, 347 (348 f.); Barnert, ZZP 118 (2005) 81 (91 ff.); bereits zuvor OLG Düsseldorf, 17. 6. 1999, TranspR 2002, 237; OLG Nürnberg, 6. 3. 2002, TranspR 2002, 402; Basedou, in MünchKommHGB (1997), Art. 31 CMR Rn. 30; Helm, in GroßkommHGB (4. Aufl. 2002), Anh. VI § 452, Art. 31 CMR Rn. 49; de Meij, Samenloop van CMR-Verdrag en EEX-Verordening (2003), S. 199.

50 Vgl. de Meij, Samenloop van CMR-Verdrag en EEX-Verordening (2003), S. 194 ff.

51 Insbesondere *Andrea Merzario Ltd. v. Internationale Spedition Leitner GmbH*, [2001] 1 Lloyd's Rep. 490; *Frans Maas Logistics (UK) Ltd. v. CDR Trucking BV*, [1999] 2 Lloyd's Rep. 179.

52 Etwa *Cerina*, Riv. dir. int. priv. proc. 1991, 953 de Meij, Samenloop van CMR-Verdrag en EEX-Verordening (2003), S. 191 ff.

53 Insoweit vorbildlich *Andrea Merzario Ltd. v. Internationale Spedition Leitner GmbH*, [2001] 1 Lloyd's Rep. 490.

54 Etwa dann, wenn beide Verfahren durch Versäumnisurteil entschieden werden.

55 Rauscher, LMK 2004, 75 (76).

56 Art. 31 Abs. 3 und 4 CMR regeln lediglich den Grundsatz der wechselseitigen Anerkennung von Urteilen im Anwendungsbereich der CMR unter Ausschluss einer „révision au fonds“. Die „Formerfordernisse“ der Anerkennung und Vollstreckbarerklärung und damit auch das Anerkennungshindernis der res iudicata bestimmen sich dagegen im Anwendungsbereich des europäischen Verfahrensrechts nach dessen Regeln: Basedou, in MünchKommHGB (1997), Art. 31 CMR Rn. 37 f.

Recognition of foreign limitation proceedings under the European Jurisdiction and Judgments Convention

(zu EuGH, 14. 10. 2004 – Rs. C-39/02 – Mærsk Olie & Gas A/S / M. de Haan and W. de Boer, unten S. 262, Nr. 17)

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I. Introduction

Not for the first time¹, questions have been addressed to the European Court of Justice (ECJ) about the rather complex relation between the European Jurisdiction and Judgments Conven-

1 Other examples of ECJ-decisions about the relation between the EJC and conventions on particular matters involve: – the Brussels Arrest Convention: ECJ 6. 12. 1994, C-406/92, IPRax 1996, 108, 80, Comm. Schack; [1995] 1 Lloyd's Rep. 302, *The Tätry/The Maciej Rataj*, critical comments by Briggs; [1995] Lloyd's MCLQ 161; and – the CMR: ECJ 28. 10. 2004, C-148/03, IPRax 2006, 256, 224 (in diesem Heft), Comm. Haubold, Nürnberger v. Portbridge.

tion (EJJC)² and the various international "conventions on particular matters".³ In *Mærsk Olie & Gas*, these questions concerned the legal consequences under the EJJC to Danish court proceedings of a decision by the Dutch Court of Groningen ordering the creation of a limitation fund under the Brussels Limitation Convention 1957.⁴ Although the factual background of the case dates back to May 1985 and said conventions have already been replaced almost everywhere⁵ in Europe by the European Jurisdiction and Judgments Regulation (EC) 44/2001 (EJRR 44/2001)⁶ and the 1976 London Limitation Convention⁷ respectively, the decision is of wide application and contains important clues about how the ECJ sees the co-existence and co-operation between the EJRR 44/2001 and the various maritime conventions on limitation of liability.

II. Global limitation of liability

It is a peculiarity of both maritime and inland navigation law, that the owner of a ship involved in a nautical accident which causes extensive harm to other parties, is entitled to limit his overall liability for the resulting claims for compensation – whether for death or injury to persons, for damage to property or for purely financial losses – by creating one or more funds for the benefit of his joint creditors.⁸

Originally the shipowner's right to global limitation of liability was granted to him in domestic legislation of maritime nations that engaged in overseas trade.⁹ However, during the 20th Century several attempts were made to unify this area of the law internationally. Although these efforts failed to create a truly worldwide unification of limitation law¹⁰, they did result in the proliferation of many international instruments on limitation of liability, some of which are of general application¹¹, whereas others cover only restricted areas of the law.¹²

A common feature of the international conventions on global limitation of liability is that in return for establishing a limitation fund with a competent court for all claims arising out of a casualty, the shipowner is granted protection from his creditors.¹³ Both the creation of the limitation fund and the resulting immunity from conservatory and enforcement measures are typically provisional measures. Because invoking the right to limitation or establishing a fund are not to be deemed admissions of liability¹⁴, it may be that at the end of the limitation proceedings, the fund is to be returned to the shipowner who constituted it, if it is ultimately decided that he is not liable. Similarly, if it appears not only that the shipowner is liable, but also that his conduct is such that it bars him from limiting his liability¹⁵, then the shipowner will forfeit the fund and his assets will once again be vulnerable to conservatory and enforcement measures from his creditors.

It is obvious that this aim of granting (at least) temporary protection to the shipowner can only be achieved if foreign courts recognize the legal effects of the limitation fund also. Otherwise any creditor may easily circumvent the limitation of liability by arresting the ship in a more favourable jurisdiction and then enforcing his claim without limitation upon the ship or any alternative security given. However it is equally clear that only courts in states party to a limitation convention will in principle be bound to recognize the legal effects of a limitation fund

- 4 Brussels Convention relating to the limitation of the liability of owners of sea-going ships, 24 October 1957, T. van der Valk (ed.), *International Transport Treaties (ITT)*, Kluwer, p. I-76 ff.
- 5 With the notable exception of Denmark, see Article 1–3 EJRR 44/2001.
- 6 The Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L-012/1.
- 7 London Convention on limitation of liability for maritime claims, 19. 11. 1976, ITT, p. I-247 ff.
- 8 By contrast, owners of other kinds of transport means, such as automobiles, trains, trucks, air- and spacecraft, do not have similar protection. For a critical discussion of the public policy considerations for the privileged position of the shipowner: *Lord Mustill*, "Ships are different – or are they?", [1993], *Lloyd's MCLQ* 490 ff., and *D. Steel*, "Ships are different: the case for Limitation of Liability", [1995] *Lloyd's MCLQ* 77.
- 9 A famous example is the French *Ordonnance de la Marine* of 1681, which granted the shipowner the right to abandon the ship and the earned freight in return for a release of all his liabilities. For an historical overview, see: *James J. Donovan*, "The origins and development of limitation of shipowners' liability", *Tulane Law Review*, vol. 53, 1979, p. 999–1045.
- 10 This is illustrated by the fact that the United States is party to none of the international conventions listed below. Other great powers such as China and Russia are only party to the conventions on oil pollution.
- 11 In the area of maritime law the oldest effort was the 1924 Brussels Convention for the unification of certain rules relating to the limitation of the liability of owners of sea-going vessels, ITT, p. I-23 ff. This was followed by the 1957 Brussels Convention relating to the limitation of the liability of owners of sea-going ships, ITT, p. I-76 ff., and its Protocol of 1979, ITT, p. I-309 ff., the 1976 London Convention on limitation of liability for maritime claims, ITT, p. I-247 ff., and the Protocol of 1996 to amend the 1976 London Convention on limitation of liability for maritime claims, ITT, p. I-561 ff. All these international instruments are still in force for at least some of the member states of the European Union. For an overview of ratifications and denunciations of said international conventions, see: ITT, *Survey of conventions*, p. 1 ff. In the field of inland navigation, both the 1973 Geneva Convention relating to the limitation of the liability of owners of inland navigation vessels (CLN), ITT, p. II-45 ff., and its 1978 Geneva Protocol, ITT, p. II-75 ff., have failed to gather sufficient support to enter into force. However, the 1988 Strasbourg Convention on the limitation of liability in inland navigation (CLNI), ITT, p. II-87 (French text), has been more successful and has entered into force in 1997.
- 12 Most important for practical purposes are the conventions regarding oil pollution damage, see the 1969 Brussels Convention on civil liability for oil pollution damage (CLC), ITT, p. I-167 ff., and the 1971 Brussels Convention on the establishment of an international Fund for compensation of oil pollution damage (IFC), ITT, p. I-185 ff., and the subsequent London protocols to the CLC and IFC of: – 1976, ITT, p. I-264 ff., p. I-268 ff. (not in force); – 1984, ITT, p. I-318 ff., p. I-333 (not in force); – 1992, ITT, p. I-459 ff., p. I-476 ff. (not in force); – 1996, ITT, p. I-561 ff. Other conventions for specific subjects include: – NUCLEAR DAMAGE: the 1960 Paris Convention on third-party liability in the field of nuclear energy, ITT, p. VI-1 ff.; the 1963 Brussels Convention supplementary to the Paris Convention on third-party liability in the field of nuclear energy, ITT, p. VI-23 ff., the Paris Protocols of 1964, ITT, p. VI-54, and 1982, ITT, p. VI-179 and p. VI-185; the 1962 Brussels Convention on the liability of operators of nuclear ships, ITT, p. I-100 ff. (not in force); the 1963 Vienna Convention on civil liability for nuclear damage, ITT, p. VI-37, the 1997 Vienna Protocol, ITT, p. VI-225 ff., the 1988 Vienna Joint Protocol relating to the application of the Vienna Convention and the Paris Convention, ITT, p. VI-193 ff., and the 1997 Vienna Convention on the supplementary compensation for nuclear damage, ITT, p. VI-261 ff. – DANGEROUS GOODS: see the 1989 Geneva Convention on civil liability for damage caused during carriage of dangerous goods by road, rail and inland navigation vessels (CRTD), ITT, p. IV-81 ff. (not in force), and the 1996 London Convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances at sea (HNS), ITT, p. I-573 ff. (not in force).
- 13 Articles 2–4 and 5 Brussels Limitation Convention 1957; Article 13 London Limitation Convention 1976.
- 14 Article 1–7 Brussels Limitation Convention 1957; Article 1–7 London Limitation Convention 1976.
- 15 Pursuant to Article 1–1 of the 1957 Brussels Limitation Convention the owner can not limit his liability if "the occurrence giving rise to the claim resulted from the actual fault or privity of the owner." Under Article 4 of the 1976 London Limitation Convention a person otherwise entitled to limitation loses that right 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 occur.

2 The 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, [1978] OJ L304/36. In this case the 1968 Brussels Convention as amended by the 1978 Accession Convention was applicable.

3 See Article 57 EJJC (= Article 71 EJRR 44/2001).

constituted with a court in another member state. Although courts in non-member states may use discretionary powers in ship's arrest situations to give cross-border effect to a limitation fund created abroad, they are not under any obligation to do so.

In *Mærsk Olie & Gas* essentially the question arose whether the EJJC can be used to expand the legal effect and binding force of a limitation fund beyond the states party to the limitation convention to include the courts of all EU member states, whether these are party to that particular limitation convention or not.

III. Facts¹⁶

In June 1985, the Dutch fishing trawler "Cornelis Simon" allegedly caused damage to some of Mærsk's newly laid oil and gas pipelines in the North Sea. In April 1987, the Dutch shipowners commenced limitation proceedings before the Dutch Court of Groningen, the place of registry of the trawler. In a decision of 23 May 1987 the Court provisionally set the amount of the limitation fund at NLG 52,417.40 (= € 23,785.80), and subsequently the shipowners deposited this fund with the court. Mærsk, who was notified only afterwards on 5 June 1987, unsuccessfully challenged the jurisdiction of the Groningen Court in appeal before the Leeuwarden Court of Appeal and raised no further appeal in cassation in the Netherlands. Despite formal notification in February 1988 of the Court of Groningen's decision of 23 May 1987 and although being invited in April 1988 to submit its claim to the fund, Mærsk declined to participate in the Dutch limitation proceedings any further and pursued its recovery claims of US \$ 1,700,019 and GBP 51,961.58 instead before the Danish Courts. Failing any submitted claims, the fund was returned to the shipowners in December 1988.

IV. Danish proceedings

On 20 June 1987, Mærsk brought an action for damages against the shipowners before the Western Regional Court (Vestre Landsret) in Denmark, but in a decision of 27 April 1998 (!) the Court declined jurisdiction in favour of the Dutch Courts. The Danish Court reasoned that the Dutch decisions of 23 May 1987 and 6 January 1988 had to be recognized as judgments in the sense of Article 25 EJJC because Mærsk had had the opportunity to defend its position in these proceedings. Further the Court found that the *lis pendens*-rule of Article 21 EJJC applied to the (earlier) Dutch and the (later) Danish proceedings because these proceedings were between the same parties, had the same subject matter and related to the same cause of action. Mærsk appealed to the Danish Supreme Court (Højesteret), who in a decision of 8 February 2002 stayed the proceedings and referred the matter to the European Court of Justice for a preliminary ruling on four questions.¹⁷

V. Same cause of action and same subject-matter pursuant to Article 21 EJJC?

The first question as rephrased by the European Court of Justice was, whether a shipowner's application to a court to have a limitation fund established in which the potential victim of damage is named and an action for damages brought before a court in another European country, constitute proceedings that have the same subject-matter, involve the same cause of action and are between the same parties, within the terms of Article 21 EJJC.

In accordance with its earlier decisions¹⁸ and the opinion of the Advocate-General Léger, the ECJ held that an action for damages and an application for limitation proceedings clearly do not have the same subject matter because each serves a different purpose. The former seeks to have the defendant declared liable, the latter is designed to ensure that if that person is declared liable, such liability will be limited.¹⁹ Also the "cause of action" was different here, because the action for damages is based on the law governing non-contractual liability, whereas the application for the establishment of a liability limitation fund is based on the 1957 Brussels Limitation Convention and on Dutch legislation giving effect to it.²⁰ Without even having to address the third cumulative requirement in Article 21 EJJC of "proceedings [...] between the same parties", the ECJ could already answer the first question in the negative.

From the perspective of Dutch limitation procedure law this decision of the ECJ seems well-founded. The mere application to a court to establish a limitation fund does not create a situation of *lis pendens* pursuant to Article 21 EJJC with a claim for damages brought before a court in another EU member state. However, it would be wrong to draw the inference from this that the ECJ has ruled that limitation proceedings generally cannot give rise to application of the *lis pendens*-rule pursuant to Article 21 EJJC. That definitely seems possible and will depend on how the limitation procedure is structured under the applicable national law of the court seised of the case.²¹ E.g. under English law a shipowner may invoke limitation of liability without first establishing a limitation fund, by bringing an action in which he seeks a declaration that he is not liable or not fully liable for the damage.²² As was implicitly acknowledged by the ECJ in *The Tetry/The Maciej Rataj*²³, such a declaratory action may very well involve the same subject-matter and cause of action and the same parties as the claim for damages pending before the court of another member state.

But even in legal systems such as the Netherlands, where a limitation fund must be established first before limitation of liability can be invoked²⁴, *lis pendens*-situations can arise. Pursuant to Dutch law, the limitation procedure consists of three stages. The first preliminary stage is directed at the establishment of the limitation fund. The second stage is dedicated to verification of claims and resolution of disputes, whereas in the third and final stage the fund is divided proportionally among the verified

16 Also based upon factual findings in: Court of Appeal Leeuwarden 6. 1. 1988, Schip & Schade 1988, 54; Nederlandse Jurisprudentie 1988, 766; Danish Supreme Court 8. 2. 2002, [2003] I.L.Pr. 12 and ECJ 14. 10. 2004, C-39/02, [2005] 1 Lloyd's Rep. 210, *Mærsk Olie & Gas A/S v. M. de Haan and W. de Boer*.

17 An English translation of the Danish referral decision of 8 February 2002 was published in [2003] I.L.Pr. 12.

18 ECJ 8.12.1987, Case C-144/86, IPRax 1989, 157, 139, Comm. Schack, [1987] ECR 4861, *Gubisch Maschinenfabrik*, No. 14; *The Tetry/The Maciej Rataj*, op. cit., No. 39.

19 *Mærsk Olie Gas*, op. cit., No. 35.

20 *Mærsk Olie Gas*, op. cit., No. 38.

21 Article 4 of the 1957 Brussels Limitation Convention and Article 14 of the 1976 London Limitation Convention leave all rules of procedure to the national law of the state in which the fund is constituted.

22 Pursuant to Article 10-1 London Limitation Convention a shipowner may invoke limitation of liability without first establishing a limitation fund. E.g., see [2005] 2 Lloyd's Rep. 359, *The Western Regent* [C.A.], (2005) 11 JIML 263 ff., with comm. D. Rhidian Thomas. However, constitution of a fund is a prerequisite for protection against conservatory and enforcement measures under Article 13 London Limitation Convention.

23 *The Tetry/The Maciej Rataj*, op. cit.

24 This followed from Article 320a Code of Civil Procedure (CCP) (old). Now the same rule is contained in art. 642a CCP. See also: Art. 10-1 London Limitation Convention.

claims and distributed to each of the respective creditors. If it appears during the second stage that a claim for damages is disputed, the judge can define the dispute and refer it to so-called *renvooi*-proceedings. These are regular court proceedings with the only exception that they start – not with a writ of summons – but with the referral decision from the judge in limitation proceedings. The *renvooi*-proceedings lead to a final verdict that is subject to appeal. The appeal decision is subject to final appeal in cassation.

It follows from the above that according to Dutch procedural law an application to the court to establish a limitation fund is in itself insufficient to make (disputes about) individual claims for damages (even if these are subject to limitation under that fund) pending as well. For that to happen, the creditor must first file his claim for damages with the liquidator of the fund, his claim must then be disputed, and finally the judge in the limitation proceedings must refer the disputed claim for damages to *renvooi*-proceedings. Often this third step is not necessary, because it is agreed by all the parties to wait for the outcome of one exemplary dispute that is to be referred to *renvooi*-proceedings as a test case. Once the result of this test case is known, other disputes can usually be settled amicably by applying the same standards and rules as the court did.

There is, however, no reason why a referred dispute about a claim for damages could not have the same subject matter and cause of action as a claim for damages between the same parties pending before the courts of another EU member state. It seems therefore that the referral to *renvooi*-proceedings of a dispute about a claim for damages can indeed give rise to a situation of *lis pendens* pursuant to Article 21 EJJC.²⁵ Considering that, according to Dutch procedural law, normally a case is pending from the date of service of the writ of summons, it would seem that the *renvooi*-proceedings become pending on the day of the referral decision by the judge in limitation proceedings.

VI. Judgment pursuant to Article 25 EJJC?

The second question raised by the Højesteret asked whether a decision ordering the establishment of a liability limitation fund, such as that of the Court of Groningen in this case, is a judgment within the meaning of Article 25 EJJC. In accordance with the opinion of Advocate-General Léger and with reference to the Schlosser-Report²⁶, the ECJ held that Article 25 is not limited to decisions which terminate a dispute in whole or in part, but also applies to provisional or interlocutory decisions. Consequently, a decision such as the order made on 27 May 1987 by the Court of Groningen, which provisionally fixed the amount to which the liability of the shipowner would be limited, comes within the scope of Article 25 EJJC.²⁷

This finding was not altered by Mærsk's objection that the order was the result of non-contested proceedings. While upholding the settled case law based on *Denilauler*²⁸ that the EJJC is essentially concerned with judicial decisions which, before their recognition and enforcement are sought in another State, have been or have been capable of being the subject of an inquiry in contested proceedings in the country of origin, the ECJ extended its *Hengst Import* ruling²⁹ further: The Court stated clearly that even if the order was given at the conclusion of an initial phase of the proceedings in which both parties had not been heard, the order of the Dutch court could have been the subject of submissions by both parties, before the issue of its recognition or its enforcement pursuant to the Convention came to be addressed. The ECJ based this finding on the case file, from which it was evident that such an order of the Dutch court had no effect in law prior to being notified to claimants, who may

then assert their rights before the court which made the order and challenge the right of the debtor to the benefit of limitation, as well as the limitation amount and the jurisdiction of the court, as happened in this case.

In general, it is to be welcomed that in *Mærsk Olie & Gas* the ECJ has brought decisions by European courts about the constitution of a limitation fund under the application of Article 25 EJJC, because this implies that such decisions must in principle be recognized without further ado in other member states of the European Union pursuant to Article 26 EJJC (= Article 32 EJJR), as well as easily be enforced pursuant to Articles 31 EJJC and 38 EJJR. Although this is left open by both the EJJC and the EJJR and is still undecided by the ECJ, it is submitted here that the effects of recognition of a foreign decision under the EJJC and the EJJR are identical to those of a decision opening insolvency proceedings under Article 17 of the EU Insolvency Regulation No. 1346/2000³⁰, i.e. the decision shall, with no further formalities, produce the same effects in any other member state as under the law of the state of origin.³¹

This 'recognition without further ado' will lead to significant changes in maritime and legal practice under the limitation conventions. Below some illustrations of this will be given.

Firstly, Article 13-2 of the 1976 London Limitation Convention distinguishes between the legal effects of the constitution of a limitation fund in the country of origin and in other states party to this Convention: Whereas in the country where the fund is established, the courts may be compelled to lift ship's arrests and to order the return of security given, in other states party to the 1976 Convention, the courts have discretionary powers in this regard.³² Recognition under Article 26 EJJC or Article 32 EJJR will therefore mean that decisions relating to the establishment of a limitation fund will have the same compulsory effects in other member states of the European Union as in the country of origin.

Secondly, because recognition under Articles 26 EJJC and 32 EJJR means that the decision must produce the same results abroad as in the state of origin, the domestic law of the limitation court will determine the legal effects of the fund established. This is important because during the drafting process of the 1976 Convention a serious schism developed between the contracting states about the question whether or not claims for wreck and cargo removal should be subject to limitation under this Convention. In the end, it was decided to draft the 1976 Convention in such a way that said claims were subject to the fund "in respect of all other claims" as referred to in Article 6-1 b) of the 1976 Convention, although Article 18. of the 1976

25 In the Dutch case: *Rechtbank Rotterdam* 7.8.1997, *Schip & Schade* 2004, 3, *The Michlifien*, the Rotterdam Court stayed the *renvooi*-proceedings until the first seised Court of Genua had decided about its jurisdiction.

26 OJ 1979 C 59, p. 71, No. 184.

27 ECJ 14. 10. 2004, Case C-39/02, [2005] Lloyd's Rep. 210, *Mærsk Olie & Gas*, No. 46-47. To the same effect already with regard to the *Sherbro*-decision of the Dutch Supreme Court (Hoge Raad) of 20 December 1996, *Schip & Schade* 1997, 38, Advocate-General *Strikwerda* in his opinion, Nos. 12-20, and *M.H. Claringboud* in his comment in: *Nederlandse Jurisprudentie* (N.J.) 1998, 489.

28 ECJ 21. 5. 1980, Case 125/79, IPRax 1981, 95, 79, *Comm. Hausmann*, [1980] ECR 1553, *Denilauler*, No. 13.

29 ECJ 13. 7. 1995, Case C-474/93, IPRax 1996, 262, 245 *Comm. Gmuskij*; [1995] ECR I-2113, *Hengst Import*, No. 14.

30 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, OJ 2000, L-160, p. 1 ff.

31 To the same effect: *Jenard Report*, OJ 1979, C-59, p. 1 ff., commentary to Article 26 EJJC and the prevailing views about Articles 26 EJJC and 33 EJJR, see: *J. Kropholler*, *Europäisches Zivilprozeßrecht*, 2002, *Vor Art. 33*, RdNr. 9.

32 See Article 13 of the 1976 London Limitation Convention and also Article 5 of the 1957 Brussels Limitation Convention.

Convention allowed states upon ratification to reserve the right to exclude the claims of Article 2-1 sub d and e for compensation of the costs of wreck and cargo removal from the application of the 1976 Convention. Several European countries³³ have made the reservation of Article 18. However, it seems that not all these countries³⁴ have followed the example of Belgium³⁵ and the United Kingdom³⁶ to actually pass the corresponding domestic legislation excluding the claims of Article 2-1 sub d and e from the application of the 1976 Convention. In Germany and the Netherlands, which also made the reservation of Article 18, domestic legislation has been passed to the effect that limitation of liability for the costs of wreck and cargo removal is permitted after a separate limitation fund for these claims has been created.³⁷

Thirdly, recognition under Articles 26 EJJC and 32 EJJR implies that courts in EU member states must now also respect and recognize the legal effects of the establishment of a limitation fund before a court in another member state if the state of origin is party to a different (version of a) limitation convention than the state where recognition of the fund decision is asked. If for example a relatively small limitation fund is established in Portugal under the 1957 Convention, this must be recognized in other EU member states although they are party to the 1976 Convention, which generally requires a much higher limitation fund.³⁸ In fact, even a EU member state not party to any limitation convention must recognize the establishment of limitation funds in other EU member states.

It is obvious from the above that this 'recognition without further ado' will greatly extend the scope of application of the limitation conventions listed above in § 2 and will generally improve the legal position of shipowners. Also, it will undoubtedly open many new possibilities for forum shopping. Those are, however, insufficient grounds to deny a decision of a court of a member state ordering the establishment of a limitation fund recognition and enforcement as a decision under Articles 25 EJJC and 32 EJJR.

VII. Refusal of recognition pursuant to Article 27-2 EJJC?

The third and fourth question of the Højesteret as rephrased by the ECJ asked whether a decision establishing a liability limitation fund, in the absence of prior service on the claimant concerned, may be refused recognition pursuant to Article 27-2 EJJC, even in the case where the claimant has appealed against that decision in order to challenge the jurisdiction of the court

that delivered it. After taking into account the special features of the Dutch limitation proceedings, the ECJ held – again in conformity with the opinion of Advocate-General Léger – that a decision to establish a liability limitation fund, in the absence of prior service on the claimant concerned and even where the latter has appealed against that decision in order to challenge the jurisdiction of the court which delivered it, cannot be refused recognition in another EU member state pursuant to Article 27-2 EJJC, on condition that it was duly served on or notified to the defendant in good time.

Whether notification was effected in the due and proper form and in sufficient time to enable the defendant to arrange his defence effectively, was to be decided by the courts in Denmark, being the courts in which enforcement was sought, taking account of all the circumstances of the case. Yet the ECJ made it clear that it considered certain circumstances, which appeared from the case-file, very relevant. These circumstances were that Mærsk was informed of the order of 27 May 1987 by registered letter of 1 February 1988 from the administrator appointed by the Groningen Court and that such notification is due and proper according to Dutch law and the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters of 15 November 1965, which at the time of the accident was binding both on Denmark and the Netherlands.

After this clear direction from the European Court of Justice it is not surprising that the Danish Supreme Court (Højesteret), in its final decision dated 17 October 2005, has concluded that the order of 27 May 1987 of the Groningen Court to establish a limitation fund had to be recognized in the Danish proceedings.³⁹

33 I.e. Belgium, France, Germany, Ireland, Netherlands, United Kingdom. See: ITT, p. 193 ff.

34 For the disputed position under French law, see: *René Rodière/Emmanuel du Pontavice*, *Droit Maritime*, 12th edition, 1997, p. 130–131 with further references, and *Antoine Vialard*, *Droit maritime*, 1997, p. 136.

35 See article 47(1) of Book II, Title II of the *Wetboek van Koophandel* (Belgian Commercial Code). See also: CMI Yearbook 2000, p. 610.

36 See paragraph 3 of Part II of Schedule 7 to the Merchant Shipping Act 1995. See: *Patrick Griggs/Richard Williams*, *Limitation of liability for Maritime Claims*, 3rd edition, 1998, p. 18.

37 For Germany, see § 487 HGB (German Commercial Code), for the Netherlands, see: Article 8:755-1 c) BW (Dutch Civil Code).

38 This is illustrated by the fact that under the 1957 Convention, for a vessel of 25,000 m.t., the limitation fund for property claims amounts to SDR 1,666,750, whereas under the 1976 London Convention the fund equals SDR 4,258,500. Under the 1996 Protocol to the 1976 Convention the fund equals SDR 12,200,000.

39 Højesteret 17 October 2005, Sag 233/1998.

Das Schiedsvereinbarungsstatut in der Anerkennungsperspektive

(zu BGH, 21. 9. 2005 – III ZB 18/05, unten, S. 266, Nr. 18a,
und OGH, 24. 8. 2005 – 3 Ob 65/05p, unten S. 268, Nr. 18b)

von Notar Prof. Dr. *Reinhold Geimer*, München

I. Der richtige dogmatische Ausgangspunkt: Die Schiedsvereinbarung als Prozessvertrag und die daraus zu ziehenden kollisionsrechtlichen Konsequenzen

Die Schiedsvereinbarung blockiert den Zugang zu den staatlichen Gerichten; sie zielt auf einen Rechtsprechungsakt: der Schiedsspruch ist nämlich kein materiellrechtlicher Gestaltungs-

akt, sondern ein echtes Äquivalent zum Urteil des staatlichen Gerichts. Daher setzt sich immer mehr die Erkenntnis durch, dass die Schiedsvereinbarung ein *Prozessvertrag* ist.¹ Diese Einordnung hat erhebliche Konsequenzen in kollisionsrechtlicher Hinsicht. Da es sich nicht um einen schuldrechtlichen Vertrag

1 Nachweise bei *Hausmann* in *Reithmann/Martiny*, *Internationales Vertragsrecht*, 6. Aufl., 2004, Rz. 3218.