International Max Planck Research School for Maritime Affairs
at the University of Hamburg

Jürgen Basedow
Ulrich Magnus
Rüdiger Wolfrum
Editors

The Hamburg Lectures on Maritime Affairs 2007 & 2008

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Edited by

Jürgen Basedow • Ulrich Magnus
Rüdiger Wolfrum
(Editors)

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Editors
Professor Dr. Jürgen Basedow
Max Planck Institute for Comparative
and International Private Law
Mittelweg 187
20148 Hamburg
basedow@mpipriv.de

Professor Dr. Ulrich Magnus
University of Hamburg
Law Faculty
Schlüterstraße 28
20146 Hamburg
u-magnus@jura.uni-hamburg.de

Professor Dr. Rüdiger Wolfrum
Max Planck Institute for Comparative
Public Law and International Law
Im Neuenheimer Feld 535
69120 Heidelberg
wolfrum@mpil.de

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Preface

In April 2002 the International Max Planck Research School for Maritime Affairs at the University of Hamburg was established as a joint venture of the University of Hamburg and three Max Planck Institutes, in particular the Max Planck Institute for Comparative and International Private Law (Hamburg), the Max Planck Institute for Comparative Public Law and International Law (Heidelberg) and the Max Planck Institute for Meteorology (Hamburg). The Research School has set up a unique interdisciplinary PhD programme. The researchers and their respective topics cover the legal, economic, ecological and geophysical aspects of the use, protection and organisation of the oceans. From the very beginning, the school has been in close contact with the International Tribunal for the Law of the Sea (ITLOS).

A close cooperation of the two institutions has been established in several fields. One of them is the organisation of the Hamburg Lectures on Maritime Affairs which started in 2007. These lectures are meant to contribute to the top level education of the scholars of the Research School and of the trainees that take part in an internship program offered by the International Tribunal for the Law of the Sea and funded by the Nippon Foundation. While the latter group is mainly composed of junior government officials, the scholars of the Research School are young academics. Both groups are recruited from all over the world and represent the global spirit of maritime policy.

This volume publishes seven papers which were presented as Hamburg Lectures in the years 2007 and 2008. All of them deal with legal aspects of maritime affairs, focusing on issues of transport law, on the pollution of the marine environment, and on dispute settlement. While some of the topics relate to private law, others form part of public international law. These collected papers are published in the book series Hamburg Studies on Maritime Affairs edited by the Directors of the above mentioned Research School.

The editors of this volume gratefully acknowledge the editorial assistance of Dr. Anatol Dutta and of Ingeborg Stahl in preparing this volume and the language editing of the papers by Michael Friedman.

Hamburg, May 2009

Jürgen Basedow
Ulrich Magnus
Rüdiger Wolfrum

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Contributors

Jürgen Basedow

Dr. iur., Dr. h.c., LL.M. (Harvard), is Professor at the Law Faculty of the University of Hamburg and since 1997 director of the Max Planck Institute for Comparative and International Private Law in Hamburg. He is a member of various governmental advisory committees in the field of transport, insurance and competition law and speaker of the International Max Planck Research School for Maritime Affairs at the University of Hamburg. His key research areas are international economic law, the law of transport, shipping and insurance, private international law and comparative law.

Carlos Esplugues Mota

Dr. iur. (Univ. Valencia), LL.M. (Harvard), MSc (Edinburgh), is Professor of Private International Law at the School of Law of the University of Valencia (Spain). He has been Visiting Professor at different universities in Europe and Latin America. He is member to the Editorial Board of several national and international Law Journals and an arbitrator in various Arbitration Institutions of the world. He has coordinated several international research projects in the field of Private International Law and International Business Transactions. His key research areas are international trade law, international bankruptcy law, international commercial arbitration, international family law and international private law. He has published and edited, among others: *La quiebra internacional* (Barcelona, 1993), *Contratación internacional* (Valencia, 1999), *Derecho del comercio internacional: Mercosur-UE* (Montevideo/Madrid, 2005); *Derecho del comercio internacional* (Valencia, 2006), *Arbitraje marítimo internacional* (Pamplona, 2007), *Derecho de los contratos internacionales: Latinoamérica, Portugal y España* (Montevideo/Madrid, 2008) and *Derecho internacional privado* (Valencia, 2008).

Lucius Caflisch

Licence en droit, doctorate in law (Geneva); MA (Columbia), Dr. h.c. Professor of International Law (em.), The Graduate Institute of International and Development Studies, Geneva; former judge, European Court of Human Rights, Strasbourg; former legal advisor, Swiss Federal Department of Foreign Affairs, Berne. Lecturer at the University of Fribourg. Member of the International Law Commission of the United Nations.

Sergio M. Carbone

Prof. Avv., is Professor at the Law Faculty and Director of the Institute of International and Maritime Law at the University of Genoa since 1979. He has been lecturer at the Hague Academy of International Law in 1990 and 2009. Since 1977 he is admitted to plead before the Supreme Court of Cassation (Italian Supreme Court). He is a member of the Governing Council of Unidroit. His key research areas are international trade, public and private international law, European Union law, international shipping and ocean carriage law.

Krijn Haak

Krijn Haak has been a professor of Private and Commercial Law at the Erasmus University Rotterdam since 1991. Following his law study at the University of Utrecht (1969−1973), Krijn Haak received his doctorate in 1984. In addition to his academic work he is also a judge in the District Court of Rotterdam and in the Court of Appeal in Arnhem. Krijn Haak is a member of the editorial boards of several legal journals, including "Nederlands Tijdschrift voor Burgerlijk Recht" (NTBR), "Schip en Schade" and "Nederlands Juristenblad" (NJB). He heads the Scientific Working Party on Lex Mercatoria (Commerce and Transport) of the Erasmus University Rotterdam. His list of publications reflects his expertise in the area of carrier liability, freightforwarding and logistics, Transport and Maritime Law and Commercial Law in general.

Ulrich Magnus

Dr. iur., is Professor at the Faculty of Law at the University of Hamburg; Chair for civil law, private international law and comparative law; Judge (part-time) at the Court of Appeal of Hamburg; Executive Vice-director of the European Centre for Tort and Insurance Law in Vienna; Germany's National Correspondent at UNCITRAL; Co-speaker of the International Max Planck Research School for Maritime Affairs at the University of Hamburg; Member of the German Council for Private International Law, of the European Group on Tort Law and of the European Acquis Group.

Thomas A. Mensah

Judge of the International Tribunal for the Law of the Sea, from 1996 to 2005, the first President of the Tribunal from 1996 to 1999. Prior to his election to the Tribunal, Lecturer of Law University of Ghana and Dean of the Faculty of Law, Associate Legal Officer at the International Atomic Energy Agency, Vienna and Assistant Secretary-General and Director of Legal Affairs and External Relations at the International Maritime Organization (IMO); Cleveringa Professor of Law at Leiden University and Professor of Law and Director, Law of the Sea Institute at the University of Hawaii; from 1995 to 1996 High Commissioner (Ambassador) of Ghana to the Republic of South Africa and Chairman of the F4 (Environmental Claims) Panel, United Nations Compensation Commission (UNCC), Geneva from 2000 to 2005. Since 1989 a Member of the "Institut de Droit International",

Titular Member of the "Comité Maritime International" (CMI) and Member of the Advisory Council of the British Institute of International and Comparative Law.

Erik Røsæg

Dr. jur., Professor of Commercial Law, University of Oslo, Scandinavian Institute of Maritime Law. He has been advising the Norwegian Government in the IMO Legal Committee when the Athens Convention was negotiated, and was the coordinator of the IMO intersessional correspondence groups on the matter. Main areas of interest include maritime law as well as third party relations in private law (bankruptcy, mortgages etc).

Lorenzo Schiano di Pepe

Dottore in giurisprudenza (Genoa 1997), LL.M. in International Business Law (London 1999) and in International Legal Studies (Georgetown 2000), dottore di ricerca in diritto internazionale (Milan 2004), he is a researcher at the Faculty of Law of the University of Genoa, where he teaches European Union Law. His fields of expertise include international and European transport law, international and European environmental law and international law of the sea. Among his recent publications are a monograph on ship-source pollution and coastal States' powers and an essay on the law applicable to environmental damage according to the so-called "Rome II" regulation.

Frank Smeele

Was born in 1966, has a Master in Law and a Master in Arts (European Studies) both from University of Amsterdam (1991), and a PhD from Erasmus University Rotterdam School of law (1998). Also in 1998 he was admitted as an attorney-at-law to the Rotterdam Bar and joined Van Traa Advocaten at Rotterdam , where he made partner in 2004. In 2005, he was appointed part-time Professor of Maritime Law at Erasmus University and in 2007 he was appointed full-time Professor of Commercial Law. His key research areas are: shipping, transport and maritime law, private international law and comparative law.

Rüdiger Wolfrum

Dr. iur., is Professor for national public and international public law at the Law Faculty of the Ruprecht-Karls-University of Heidelberg and since 1993 director and scientific member of the Max Planck Institute for Comparative Public Law and International Law, former President of the International Tribunal for the Law of the Sea (2005-2008), "Honorarprofessor" of the University of Hamburg, former President of the German Society for International Law (Deutsche Gesellschaft für Völkerrecht, 2005-2009), Director of the Rhodes Academy Ocean Law and Policy. He has published widely in various fields of international public law, thereby focusing on the law of the sea, the law concerning Antarctica, environmental law as well as on human rights and United Nations issues.

Part I:

The Hamburg Lectures 2007

Civil Liability and Compensation for Environmental Damage in the 1982 Convention on the Law of the Sea

Thomas A. Mensah

I. State Responsibility under the 1982 Convention

The provisions of the United Nations Convention on the Law of the Sea on the protection and preservation of the marine environment, as contained in Part XII of the Convention, are in the main addressed to States. The articles set out the obligations and rights of States, particularly with respect to legislative and other measures that States are permitted or required to take in areas within their jurisdiction to prevent, reduce and control pollution of the marine environment from the various sources of pollution, as enumerated in paragraph 3 of article 194 of the Convention, namely, pollution from land-based sources, pollution from or through the atmosphere, pollution from dumping, pollution from vessels, pollution from installations and devices used in exploration and exploitation of natural resources of the sea-bed and subsoil, and pollution from other installations and devices operating in the marine environment.

The Convention also spells out the nature and extent of the obligations of States to other States in this field, and it affirms that failure by a State to discharge its obligations may entail liability to other States who suffer damage as a result of the failure. As stated in article 235, paragraph 1, of the Convention,

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> "States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law"

Indeed, failure by a State to discharge its obligations in this field could lead to a claim that may be brought before one or other of the dispute settlement procedures specified in Part XV of the Convention. Article 297, paragraph 1(c), of the Convention states that a case may be brought against a State Party to the Convention (before one of the courts and tribunals specified in article 287) if it is alleged that the State has failed to comply with "international rules and standards for the protection and preservation of the marine environment".

Similarly, a State may incur liability to other States or persons if it acts in excess of the powers or rights granted to it under the Convention and if such action causes damage to the States or persons concerned. Thus article 232 of the Convention declares: "States shall be liable for damage or loss attributable to them arising from measures taken pursuant to section 6 (dealing with enforcement of laws for the protection and preservation of the marine environment) when such measures are unlawful or exceed those reasonably required in the light of available information".

II. Liability beyond State Responsibility

But the provisions of the Convention on liability for damage to the marine environment are not restricted to cases involving the responsibility of States. In addition to liability for damage that arises from the wrongful acts or omissions of States, the Convention also deals with damage resulting from acts which are not attributable to a State or which may not constitute violation of the Convention or any rules of international law. In other words, the Convention deals also with liability for damage or loss from pollution of the marine environment even if the act that caused the damage was not wrongful. Article 229 of the Convention states that

> "Nothing in this Convention affects the institution of civil proceedings in respect of any claims for loss or damage from pollution of the marine environment"

And, with a view to facilitating such civil proceedings, paragraph 2 of article 235 provides that States shall "ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused to the marine environment by *natural or juridical persons* within their jurisdiction" (emphasis supplied).

Article 235 also calls for the development and improvement of mechanisms to ensure the availability of compensation for damage to the marine environment. In particular, paragraph 3 of the article states:

> "To assure prompt and adequate compensation in respect of all damage caused to the marine environment, states shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability, for the assessment of and compensation for damage, and the settlement of

related issues as well as, where appropriate, development of criteria and procedures for payment of adequate compensation such as compulsory insurance and compensation funds".

The approach reflected in these provisions is commonly referred to as the "civil liability" approach. This is an alternative to an approach based on "state responsibility" under which responsibility for damage is placed primarily on the State under whose authority or within whose jurisdiction the activity causing the damage was undertaken. In general, state responsibility is based on the principle that a State has failed to discharge its legal duties in relation to activities that were undertaken under its control or within its jurisdiction. On the other hand, civil liability is intended to provide compensation to a person who suffers damage as a result of the activities of another person, even if the activities involved were not contrary to any law and the person undertaking the activity was not guilty of any fault or negligence. Furthermore, under a civil liability regime, the obligation to compensate does not lie on a State or governmental authority, as such. Rather, the obligation falls on the person or entity that was actually responsible for the activity that caused the damage. Such a person may be a State or a public body; but could also be a private person or corporate entity. However, civil liability does not seek to displace the responsibility of the State where this exists. Rather it may in fact be a supplement to the responsibility of the state in some cases. Its principal purpose is to provide a means for the victim of the damage to obtain compensation in the cases where it may not be possible or easy for that person to obtain redress by recourse to state responsibility.

III. The Rationale of the Civil Liability Approach

The civil liability approach recognizes that damage is not always the result of governmental action or inaction. For there are many cases where damage is caused as a result of the activities of persons and entities who have little or no connection at all with a State or a governmental agency. And it is also a fact that the direct victims of pollution damage may in fact be persons or entities other than the State, and the damage caused may affect purely personal or commercial interests of the persons or entities concerned, as opposed to the interests of the State, as such.

In the cases where the damage suffered is not attributable to a State or where the person or entity suffering the damage is a non-State entity, civil liability may have a number of advantages over an approach that relies solely or predominantly on state responsibility.

First, civil liability offers a more convenient and effective means for a victim of damage to obtain compensation in cases where the person suffering damage is a private individual or entity or where the damage does not arise from the acts or omissions of a State agent or from acts or omissions that may properly be attributed to a State. In such a situation, reliance on state responsibility may not offer a realistic possibility that compensation will be obtained. For one of the conditions for obtaining compensation from a State is the ability to prove that the act or omission that caused the damage may properly be attributed to the State, and it

may not always be possible or easy to prove this. Furthermore, where damage has been suffered by a non-state entity, a claim for compensation for the damage will almost invariably require intervention by the State of nationality of the person who suffered the damage. As is well known, State authorities may in some cases not be too keen to bring claims, or take related measures, against other States. This reluctance may be the result of political, diplomatic or economic considerations. But even when a state may be willing to bring a claim on behalf of a national who has suffered damage, the procedures of inter-state negotiation and litigation may make the claim process so protracted that the eventual outcome does not offer much practical benefit to the person who suffered the damage. Civil liability, on the other hand, permits the person who has suffered damage to seek compensation, without having to rely on decisions to be taken by governmental authorities or state officials.

Another advantage of civil liability is that it targets the person or entity that was actually responsible for the damage. For that reason, it may be said that civil liability facilitates the effective application of the "polluter pays principle", since it imposes the sanction on the person or entity whose acts or omissions were the direct cause of the damage, regardless of whether that party is a state, a corporate person or natural person.

It is also arguable that the civil liability approach provides a greater incentive to the potential polluter, whether a public body or a private entity, to make greater efforts to comply with applicable standards and procedures and to take more care to avoid damage and, thereby, reduce the risk of being called upon to pay compensation for damage resulting from the activity. In this regard, it is worth noting that reliance on state responsibility alone may not always be effective in ensuring that actors and operators will in fact comply with the required safety and environmental standards and procedures. This is particularly the case in developing countries where the administrative machinery for enforcing environmental standards may be either non-existent or not sufficiently effective.

But civil liability is not without its own disadvantages. A major drawback is the absence of a widely recognized judicial system to deal with conflicting claims from victims of different nationalities. Civil liability conventions generally reserve jurisdiction over disputes under the conventions to the national courts of the States Parties to the conventions. This means that important issues, such as the existence or otherwise of liability for damage and the level of compensation that is appropriate for the damage, are left for final determination by the courts of the country or countries in which the damage was caused or in the State in which the claimant chooses to bring the claim for compensation. As a general rule, decisions of the competent national courts on these issues are final and are not subject to appeal in any other forum. This can create problems in the application of the Convention.

First, a regime that gives exclusive jurisdiction to national courts to determine issues of liability (as well as the compensation payable) may result in unequal treatment of different claimants, especially in cases where damage from the same incident has occurred in different states and claims for compensation are brought before the courts of different countries. In this regard it is pertinent to note that the rulings of national courts may not always be sufficiently impartial, particularly