Application of Article 7 of the Rome II Regulation in the case of Begum v. Maran

Aplicación del artículo 7 del Reglamento Roma II en el asunto Begum contra Maran

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Abstract: The subject of this article is an analysis of the English court's consideration of the applicable law in *Begum v. Maran*. It concerned a claim against a multinational corporation for compensation for the death of a shipyard worker in Bangladesh. The court in that case addressed the appropriateness of using Article 7 of the Rome II Regulation, a special conflict of laws rule that determines the law applicable to environmental damage. The purpose of the paper is to show that the construction adopted in Article 7 Rome II is favourable to persons injured by environmental pollution, however, the scope and interpretation of this provision is narrowly applied. The paper will present the position of litigants and the court, as well as the views presented in other decisions of English and EU courts and representatives of the doctrine of private international law.

Key words: Environmental damage, Rome II Regulation, Article 7, human rights.

Resumen: Este artículo constituye un análisis de el asunto del tribunal inglés en *Begum v. Maran* sobre la ley aplicable. Se trataba de una demanda contra una multinacional para obtener una indemnización por la muerte de un trabajador de un trabajador de astillero en Bangladesh. En ese caso, el tribunal abordó la conveniencia de utilizar el artículo 7 del Reglamento Roma II, una norma especial de conflicto de leyes que determina la ley aplicable a los daños medioambientales. El objetivo de este trabajo es demostrar que la interpretación adoptada del artículo 7 del Reglamento Roma II es favorable a las personas perjudicadas por la contaminación medioambiental, aunque el alcance y la interpretación de esta disposición se aplican de forma restrictiva. La contribución presentará la posición de los litigantes y del tribunal, así como las opiniones presentadas en otras decisiones de tribunales ingleses y de la UE y de representantes de la doctrina del Derecho internacional privado.

Palabras clave: Daños medioambientales, Reglamento Roma II, artículo 7, derechos humanos.

I. Introduction

1. Private international law plays an important role in various areas of private law. Conflict of laws is not indifferent to the challenges of the modern world, such as new technologies (including AI), migration crises, armed conflicts and climate change. These challenges also include human rights violations and environmental damage.

2. The subject of the article is a case heard by English courts in two instances, i.e. England and Wales High Court (Queen's Bench Division) and England and Wales Court of Appeal (Civil Division). The dispute concerned the claims of the widow of a deceased shipyard worker against an English company regarding the fatal accident of her husband, who was working scrapping a ship at a shipbreaking yard in Chittagong, Bangladesh. This case has been noticed in the legal community, where attention has been paid primarily to the issue of liability of international groups of commercial companies for torts committed in other countries[1]. Importantly, it was also arranged in the legal literature. It is worth mentioning here the views presented by G. van Calster[2] , F. Farrington and M. Poesen[3]. The latter authors presented an interesting analysis of the case of Begum v. Maran paying particular attention to the issues of liability of international corporations for cross-border human rights violations. The aim of this paper is to critically analyse the views presented by English courts on the interpretation of Article 7 of the Rome II Regulation.

II. Article 7 of the Rome II Regulation

3. The Rome II Regulation, which is a twin to the Rome I Regulation on conflicts of laws, is the main source of European private international law in the field of tort law. Among the provisions of this act, one concerns the law applicable to environmental damage. Article 7 of the Rome II Regulation provides that the law applicable to a non-contractual obligation arising from environmental damage or from damage to a person or property resulting from such damage is the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and regardless of the country or countries in which the indirect effects of that event occur, unless the person claiming compensation chooses to submit his claim to the law of the country where the event giving rise to the damage occurred[4].

4. The Rome II Regulation also provides a definition of environmental damage in paragraph 24. According to that paragraph, environmental damage may be understood as adverse changes in natural resources such as water, soil or air, or a reduction in the functions rendered by those resources to other natural resources or society, or a reduction in the diversity of living organisms. It is also worth noting paragraph 25 according to which, with regard to environmental damage, Article 174 of the Treaty, which requires a high level of protection, based on the precautionary principle and the principle of preventive action, the principle of remedying damage at source as a priority and the 'polluter pays' principle, fully justifies the application of the principle of 'favouring the victim'. The question of when the person claiming compensation may choose the applicable law must be determined in accordance with the law of the Member State to which the case is sought.

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[1] See: https://cms-lawnow.com/en/ealerts/2021/03/the-law-of-tort-does-not-stand-still-begum-v-maran-uk-limited; https://www.linklaters.com/pl-pl/knowledge/publications/alerts-newsletters-and-guides/2021/june/02/begum-v-maran-uk-ltd-2021-ewca-civ-326; https://ropewalk.co.uk/blog/mission-creep-begum-v-maran-uk-ltd-and-the-duty-of-care/.

[2] G. van Calster, "*Begum v Maran*. A hopeful Court of Appeal finding on duty of care; however open issues on its engagement with Rome II's environmental heading", available at: https://gavclaw.com/tag/begum-v-maran/.

[3] F. Farrington/M. Poesen, "Applicable Law In Claims For Damage Arising Out Of Unsafe Working Conditions: The Case Of *Begum V Maran*", *University of Edinburgh School of Law | LSGL Research Project Papers,* 2024, pp. 1-21.

[4] M. Świerczyński, "Szkody w środowisku naturalnym", *Studia Prawa Prywatnego* 2014, p. 87; M. Bogdan, "Some reflections regarding environmental damage and the Rome II Regulation", in G. Venturini/S. Bariatti (a cura di), *Nuovi Strumenti del diritto internazionale privato: Liber Fausto Pocar*, Milano, Giuffré, 2009, pp. 96-98.

5. It is worth noting the specific construction of Article 7 of Rome II. This provision allows the injured person to choose between the law of the country where the effects of the damage occur and the law of the country in which the event causing the damage occurred. This special right on the part of the injured person, referred to as the "right of option", is aimed at protecting a special good, which is the natural environment. This provision implements the European Union's environmental policy[5]. Of course, regardless of the solution under Article 7 Rome II, the parties may make a choice of law under Article 14 Rome II[6].

III. The Facts

6. The plaintiff was married to a worker who died in March 2018 while working on the dismantling of a destroyed tanker at the Zuma Enterprise Shipyard in Chittagong (now Chattogram), Bangladesh[7]. The Defendant is a company registered in the United Kingdom which entered into an agency agreement on 1 August 2013 with Maran Tankers Management, a company registered in Lebanon but established in Greece, under which it was to provide agency and brokerage services to MTM in respect of 29 vessels. MTM was to operate and manage the MARAN CENTAURUS vessel under an operating agreement with Maran Tankers Shipholdings Ltd (registered in the Cayman Islands), the parent company of Centaurus Special Maritime Enterprise ("CSME") (registered in Liberia). This vessel was registered in the years 2004-2017 to the CSME company. In 2017, the ship lost its ability to operate efficiently and a decision was made to dismantle it. The fatal accident of the plaintiff's husband occurred when he fell from a height and suffered many injuries. The deceased husband of the plaintiff had been working in ship scrapping since 2009 (an average of 70 hours per week). It is worth noting that the conditions in which the deceased worked were very dangerous. The method of ship scrapping used in Bangladesh and other countries in the region was considered harmful to workers and the environment[8].

7. In the lawsuit, the plaintiff raised several claims related primarily to the breach of the duty of due diligence. Importantly, the plaintiff sued Maran (UK) Ltd., and not the company operating the shipyard, as it claimed that it was both factually and legally responsible for the ship ending up in Bangladesh, where the working conditions were known to be highly hazardous. On the other hand, the defendant argued that foreseeability alone is not sufficient to justify the duty of care, that English law generally does not impose liability for omissions[9].

8. The defendant filed a motion to dismiss the claim and/or for summary judgment, mainly on the grounds that the defendant could not have had a duty of care to the deceased to take all reasonable steps to ensure that the negotiation and sale of the vessel would not endanger human health and/or the environment[10].

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[5] A. Wowerka, "Prawo właściwe dla odpowiedzialności za szkody w środowisku naturalnym w świetle rozporządzenia Rzym II", *Gdańskie Studia Prawnicze*, no 4, 2023, p. 317; A. Junker, "Rome II Regulation before Art. 1" in H.J. Sonnenberger et al. (eds.), *Private International Law. Rome I Regulation. Rome II Regulation. Introductory Act to the Civil Code (art. 1–24)*, t. 10, Munich, Beck, 2010; M. Bogdan/M. Hellner, "Art. 7", in U. Magnus/P. Mankowski (eds.) *European Commentaries on Private International Law. ECPIL. Commentary, t. 3: Rome II Regulation*, Munich-Köln, Sellier, 2019.

[6] T. Kadner Graziano, "The Law Applicable to Cross-Border Damage to the Environment", *Yearbook of private international law*, 2008, p. 72.

[7] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) (13 July 2020), pt 1.

[8] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) (13 July 2020) pt 7-19. As indicated in the judgment: "According to the International Labour Organisation (ILO), shipbreaking is one of the most dangerous jobs in the world. When conducted on tidal beaches, without proper infrastructure to allow for rapid emergency response and safe use of heavy lifting cranes, the danger workers are exposed to, of course, increases. Carried out in large part by the informal sector, shipbreaking in South Asia is rarely subject to occupational health and safety controls or inspections. Unskilled migrant workers are deployed by the thousands to break down the vessels manually. Without protective gear, they cut wires, pipes and blast through ship hulls with blowtorches. The muddy sand and shifting grounds of tidal flats cannot support heavy lifting equipment or emergency access, and accidents kill or injure numerous workers each year".

[9] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) (13 July 2020), pt 29-35.

[10] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) (13 July 2020), pt 3.

9. The court of first instance dismissed the defendant's motion to dismiss the claim and/or to issue a summary judgment. In justifying its position, the Supreme Court found that the defendant had a general duty of care towards the deceased[11]. The court cited that the defendant had a duty of care to the deceased on the grounds that (i) he had negligently caused or allowed a "source of danger" to arise (i.e. that the ship was inherently dangerous) and in respect of which it was reasonably foreseeable that neither the Buyer, nor the Shipyard nor the deceased's employer would intervene in such a way as to break the causal chain and (iii) thereby cause harm to the deceased[12].

10. The Court of Appeal, in its judgment of 10 March 2021, upheld Judge Jay's finding that it could be argued that Maran (UK) Ltd had a duty of care to the deceased employee and that it would be an error to dismiss the claim for negligence at this stage. The court held that claims based on duty of care, in circumstances where the damage was caused by a third party, are now at the forefront of the development of the law on negligence, and the implied duty in this case can certainly be considered to be on the verge of that development[13]. In addition, the court noted that the defendant could have acted differently: "it is at least arguable that the [Maran (UK) Ltd] could have acted differently and that, if they had done, it might have made a real difference to the outcome"[14].

IV. Conflict-of-law issues (article 7 Rome II)

11. In this case, the issue of determining the applicable law played an important role. In its deliberations, the court of first instance referred to the general rule of Article 4 of the Rome II Regulation, according to which the law applicable to a non-contractual obligation resulting from a tort is the law of the country in which the damage occurs, regardless of the country in which the event giving rise to the damage occurred and regardless of the country or countries in which the indirect effects of that event[15] occur. In this situation, it would be Bangladeshi law, as it was in Bangladesh that the fatal accident took place. Moreover, under Article 4(2) and (3) of the Rome II Regulation, if, however, the person to whom liability is imputed and the person who suffered the damage are habitually resident in the same State at the time the damage occurred, the law of that State is to apply. If, on the other hand, it is clear from all the circumstances of the case that the tort is manifestly more closely related to a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply[16]. An obvious closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely related to the tort in question. In this context, Bangladeshi law should be the applicable law, as the deceased performed work there and suffered damage[17].

12. The plaintiff argued that the tort consisting of a material breach of duty was committed by the defendant operating in that jurisdiction. The conclusion of the 2017 vessel sale agreement was approved by the Board of Directors in the UK and all contracts relating to this transaction were governed

[11] The court appealed to the old British judgment *Donoghue v Stevenson* [1932] AC 562. That decision determined what to do in order to avoid reasonably foreseeable acts or omissions that could harm the deceased, on the basis that the deceased was closely or directly affected by the defendant's action that the defendant should have taken into account. R. F. V. Heuston, "Donoghue v. Stevenson in Retrospect", *Modern Law Review*, no. 1, 1957, pp. 1–24.

[12] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) (13 July 2020), pt 36-65.

[13] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 124: "The Defendant was responsible for sending the ship to Chattogram, knowing that this would expose workers such as the Claimant's husband to the risk of death or serious injury as a result of the negligence of the shipbreaker which employed him. It was not a case where there was merely a risk that the shipbreaker would fail to take reasonable care for the safety of its workers. On the contrary, this was a certainty, as the Defendant knew".

[14] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 70.

[15] X. E. Kramer, "The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: The European private international law tradition continued Introductory observations, scope, system, and general rules", *Nederlands Internationaal Privaatrecht*, no. 4, 2008, pp. 12-13.

[16] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) (13 July 2020), pt 76-78.

[17] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) (13 July 2020), pt 78-79.

by English law. The plaintiff argued that they should apply the conflict-of-law rule under Article 7 of Rome II, because the circumstances of the case suggest that the so-called environmental damage occurred[18]. According to this provision, the law established in accordance with Article 4(1) is applicable to a non-contractual obligation arising from environmental damage or damage suffered to persons or property as a result of such damage, unless the person claiming compensation for the damage chooses to base his claim on the law of the country in which the event giving rise to the damage occurred. The defendant replied that the tort obligation invoked by the plaintiff did not "arise out of environmental damage or damage sustained by persons or property as a result of such damage". She stated that it happened because the deceased had fallen from a height[19].

13. The court took an intermediate position. In its view: "The proximate cause of the accident was the deceased's fall from a height, but on a broader, purposive approach the accident resulted from a chain of events which led to the vessel being grounded at Chattogram, in consequence of which damage was no doubt caused at very least to the beach and tidal waters. Assuming (as I have found) that the claimant has a sustainable argument that the defendant committed a relevant tort, it is far from obvious that the present case is not caught by the spirit of Article 7. Moreover, the event giving rise to the damage was for these purposes the tortious event which occurred in this jurisdiction"[20]. In doing so, the court acknowledged that it did not at this stage take this view on the basis of what was presented to it by the parties, but did not rule out that there was a body of knowledge which, if presented to it, could have influenced the outcome. In the court's view, the claimant has a realistic chance of success on this issue[21].

14. In addition, the Court referred to the plaintiff's position on the issue of public policy. The plaintiff's counsel stated that Article 26 of the Rome II Regulation applies to the one-year non-extended limitation period in Bangladesh[22]. In addition, it pointed out that the plaintiff had not previously had access to justice against the defendant, and that the nature of the defendant's breach of duty was significant. The court did not agree with this argument. It found that the claims that the plaintiff did not have access to justice was incorrect, as evidenced by the pre-trial correspondence between the parties to the dispute written before 30 March 2019. Moreover, as he stated: "In my view, the focus must be principally on whether it would be offensive in English law to countenance the application of so short a limitation period, and the submissions on this aspect were light indeed. Aside from taking a pleading point, Mr Bright did not advance a substantive rebuttal. Thus, I am asked to resolve this issue on a basis that is far from satisfactory. My conclusion is that it would not be right to determine the issue at this stage, and certainly not in the defendant's favour. If the overriding objective and reasons of proportionality support the definitive resolution of the Article 26 issue in advance of the trial, the Court may come back to it"[23].

15. The Court of Appeals devoted more attention to conflict of law issues[24]. It did not share the position of the plaintiff on the application of Article 7 of Rome II. The claimant demonstrated that the beaching of the vessel on Chattogram beach constituted an adverse change in the natural resource, as defined by the definition of 'environmental damage' in the recitals. He said the term "resulting from" was deliberately broader and looser than "caused by" so that it could be argued that the death of the deceased occurred as a result of this environmental harm[25]. He said that because the accident was the result of a chain of events that began with a beaching, with all the environmental hazards that this entailed, the death of the deceased was covered by Article 7. The court completely disagreed with this argumenta-

[18] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) (13 July 2020), pt 81-83.
[19] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) (13 July 2020), pt 82.
[20] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) (13 July 2020), pt 83.
[21] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) (13 July 2020), pt 84.
[22] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) (13 July 2020), pt 85.
[23] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) (13 July 2020), pt 85.
[24] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 74-115.
[25] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 81-83.

tion[26]. In its view, Article 7 Rome II concerns the law applicable to a non-contractual obligation: in other words, the duty of care. It is precisely this obligation that must 'result' from environmental damage in order for Article 7 to apply at all. This duty related to care under customary law and required the defendant to take all reasonable steps to ensure that the negotiated and agreed end-of-life sale and subsequent disposal of the ship for dismantling would not endanger human health, harm the environment and/or violate international regulations for the protection of human health and the environment. According to the court, this is an obligation to take all reasonable steps to ensure that the sale of the ship for dismantling does not endanger human life or health. That obligation did not result from environmental damage and had nothing to do with it. It resulted from a complete lack of safety in the workplace[27].

16. Notwithstanding this argument, according to the court, if the relevant obligation in this case resulted from environmental damage or an adverse change in natural resources (damage caused by a ship falling ashore in Chattogram, which would allow oil and other pollutants to spill into the sea and onto land, and possibly the exposure of workers to toxic materials such as asbestos), then the respondent would not be able to benefit from such an obligation, to bring this claim[28]. Such an obligation would not be imposed as a result of the deceased falling from the top of the ship. There would be no actionable breach of duty in relation to environmental damage on which a fatal accident claim could be based. If the references to 'environmental damage' were removed, this would not affect the validity of the claim and its necessary link between the obligation and the damage suffered. However, references to the risk or protection of human health were removed from the alleged obligation, so that only the obligation to take reasonable steps not to harm the environment would remain, the obligation would have no relation to the damage suffered, and the claim would be rejected[29].

17. The Court of Appeal also addressed the issue of the accident as a potential consequence of the environmental damage. As the court stated: "Even if Mr Hermer was right and, as a matter of construction of Article 7, the court had to consider whether the death (rather than the duty) arose out of environmental damage, the result would be the same, and for the same reasons. Even assuming for this purpose that the beaching of the vessel itself constituted environmental damage, the deceased's death did not arise out of that environmental damage or result from such damage. Instead, the death arose out of the absence of safe working practices and, in particular, the absence of a safety harness. The deceased could have been working in the most environmentally-friendly shipbreakers in the world, but sadly the absence of a safety harness would still have killed him"[30]. The court, in its analysis, referred to the doctrinal position noting that the injury damage must be "direct" and must be caused by environmental damage[31].

18. In analysing the interpretation of Article 7, Rome II also referred to the functional (purposive) interpretation of this provision. He stated: "Some countries will have more lax standards as to environmental risks than others. If, say, a state or a person suffers environmental damage in country A, because of a petrol-chemical plant in a less environmentally-aware country B, five miles over the border, Article 7 is designed to give country A or its citizens the choice to use its courts to bring the claim against the plant in country B"[32].

19. In the opinion of the Court of Appeal, the position of the plaintiff would lead to the conclusion that Article 7 would apply to any claim for compensation for damage caused to persons and property, provided that there was some kind of connection (as it put it) with other environmental damages, even

[26] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 81.
[27] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 135-137.
[28] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 83-84.
[29] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 84.
[30] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 86.
[31] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 84.
[32] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 88.

if those environmental damages were incidental, because they would not be the subject of the[33] claim. He suggested that Article 7 would not apply if the ship was in dry dock, but if its broad interpretation is correct, it would be inevitable that some (albeit limited) environmental damage would be caused by, say, cutting open a steel hull, even if the workplace was generally safe. As the Court of Appeals pointed out: "So Article 7 would still apply. That would be an astonishing interpretation, giving Article 7 a scope and an impact which cannot be discerned from its words, or the commentaries upon it. The absence of any caselaw to that effect is also an indication that it cannot have such a broad application"[34].

20. An interesting statement was made by the Court of Appeal: "Although my views as to environmental damage make it unnecessary to reach a concluded view as to whether or not "the event giving rise to the [environmental] damage" could be said in this case to be England, I think there is a fundamental difficulty with the Respondent's argument on that aspect of the construction too. The Respondent has to say that the event which gave rise to the damage was the sale of the vessel, an event which, of itself, was a mere paper transaction with no direct effect on the environment at all. The same paragraph in *Dicey, Morris & Collins* noted in the previous paragraph suggests that the event giving rise to the damage should be identified with «the human activity which is the principal or substantial cause of the environmental damage». In this case, that must be the demolition of the vessel in Chattogram"[35].

21. Contrary to the assertions of the claimant's attorney, the Court of Appeal held that this was a common sense interpretation of the words 'events causing damage...'. The court referred to the decision of the Swedish authority, that was also against it. As it noted: "There the damage caused by the wet sludge took place in Chile, but the Swedish court accepted jurisdiction. That was not (as Mr Hermer suggested) because the first event in the chain happened to be in Sweden, but because the defendant was a Swedish company, and numerous relevant and significant events happened in Sweden, including meetings with the Swedish Environmental Protection Agency and other key decisions about who would take over responsibility for the wet sludge. In this way, the *Arica* case is simply an example of the equivalent English law as to jurisdiction in tort claims, where the claiming party who wishes to litigate in England needs to show that "the damage has resulted from substantial and efficacious acts committed within the jurisdiction"[36]. *Arica* is not authority for any proposition or principle, much less the suggestion that you simply take the first event in a chain of events as being "the event giving rise to the damage"[37].

22. Summing up this issue, the court found that Article 7 of Rome II was not applicable in this case. As a result, the plaintiff could not effectively pursue claims related to the limitation period.

V. Conflict-of-law issues (article 26 Rome II)

23. The second important conflict-of-law issue was the application of the institution of public policy referred to in Article 26 of Rome II. The court of first instance rejected the argument that the correspondence preceding the initiation of the proceedings was unjustified, but stated that any broader arguments as to whether a one-year limitation period would be offensive under English law should be resolved by way of [38] a preliminary issue. The applicant argued that Article 26 Rome II cannot be resol-

[33] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 89.

[34] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 89.

[35] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 90. See: A. Biggas/A. Dickson/J. Harris et al*, Dicey, Morris & Collins: The Conflict of Laws*, London, Sweet and Maxwell, 2012.

[36] *Metall und Rohstoff v Donaldson* [1990] 1 QB 391 at 437 E-G.

[37] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 91 and 92. About case *Metall und Rohstoff v Donaldson* see: P. Rogerons, "Choice of Law in Tort: A Missed Opportunity?", *The International and Comparative Law Quarterly,* no. 3, 1995, p. 650.

[38] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 98 and 99.

ved without evidence, in particular evidence as to whether the respondent will suffer undue hardship and whether access to justice will be denied[39].

24. The Court of Appeals held that while the plaintiff may be right that the legal resources were available to the respondent, the nature of her communication with her lawyers and the manner and timing in which they were facilitated, may be directly relevant to any consideration of undue hardship and access to justice[40]. However, according to the court, this situation can only occur in "ordinary cases". However, in this case, the Court of Appeal did not see such premises, because the law firm (Leigh Day) sent a 13-page letter with a claim to the Appellant. Among other things, the letter explicitly acknowledged, as part of an alternative case, that Bangladeshi law would apply to the claim. Therefore, regardless of the difficulties that may have arisen prior to January 2019 in terms of access to justice, it was quite obvious that all the material required to bring a claim had been obtained on behalf of the Respondent two months before the expiry of the limitation period[41].

25. The plaintiff argued the need to apply English law in the context of the limitation period on the basis of public policy considerations. The primary argument was that there might be further evidence of disclosure of information relevant to public policy issues. In particular, it said that disclosure could be relevant if the documents showed that one of the reasons the sale of the vessel took place in the first place was that the complainant knew that the short statute of limitations in Bangladesh made it unlikely that he would have to pay any final legal price for the decision to sell the vessel. The court found such a view "fantastic" and "irrelevant".[42] He explained that public policy should be invoked in order to waive the application of the foreign limitation period only in exceptional circumstances. In doing so, he referred to the ruling in *Wilkie J in the KXL case*[43] and the position of the defendant, who drew attention to the content of Article 26 of Rome II, which says that "it shall apply only"if the foreign limitation period is "manifestly incompatible" with public policy[44]. Moreover, according to the court, the argument that the limitation period under foreign law (Bangladesh), which is clearly less generous than the English limitation period, does not make sense. The court cited the Durham *v T & N PLC*[45] ruling, which the court pointed out would be a mistake to treat a foreign limitation period as contrary to English public policy simply because it is less generous than a comparable English provision[46]. Consequently, according to the court: "new evidence about the incorrect date of the accident justifies a short preliminary issue hearing on the 'undue hardship' test, I do not consider that the same is necessary or appropriate in respect of the policy issue. On the contrary, in the present case, there is no basis, other than possibly undue hardship, for the one-year limitation period to be disapplied"[47].

26. To summarize this part of the analysis, the appellate court would make sure that there was any relevant material concerning the application of Article 7 or Article 26 Rome II that was not available to the court.

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[39] *Begum v Maran* (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) (13 July 2020), pt 85.

[40] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 104.

[41] In the opinion of the court of second instance: „On the face of it, therefore, the case was entirely within the category of case identified in the *Arab Monetary Fund* case, cited by Wilkie J in *KXL*. That was clearly the judge's view, because he found that the pre-action correspondence (namely the detailed letter of claim) demonstrated that the complaint about access to justice was inapplicable" (*Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 105).

[42] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 112: „It is fanciful because, as I have already explained, the Appellant always knew that there would be no ultimate legal price to pay, because of the tooth lessness of clause 22. And it is irrelevant because such documents, even if they existed, would be of no relevance to the Section 2(1) / public policy test. Section 2(1) is concerned with wider principles, not the particular facts of any given case. It is impossible to see how in principle, even if the short limitation period in Bangladesh had been a factor in the sale, that could give rise to any sort of public policy argument".

[43] *KXL & Ors v Murphy & Anor* [2016] EWHC 3102 (QB) (02 December 2016).

[44] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 113.

[45] *Durham v T&N plc* 1996 Court of Appeal (unreported).

[46] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 114.

[47] *Begum v Maran* (UK) Ltd (Rev1) [2021] EWCA Civ 326 (10 March 2021), pt 115.

VI. Analysis

27. The fundamental problem from the point of view of private international law and the application of Article 7 Rome II in the Begrum v Megan case is the interpretation of the concept of environmental damage. It is from the interpretation of the concept of environmental damage that it is possible to determine the scope of application of Article 7 Rome II, including the limits of application of this provision. Consequently, the decisive factor in determining whether Article 7 of Rome II should be applied in Begrum v Megan is whether, in the light of the facts of the case, there are grounds for concluding that environmental damage has occurred.

28. As indicated above, the concept of environmental damage is included in the Rome II Regulation in point 24. This is a concise and quite broad definition[48]. It is worth comparing the definition of environmental damage in the Rome II Regulation with the concept of damage in Directive 2004/35/EC[49], which states in Article 2 that damage means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly [50]. On the other hand, "damage caused to the natural environment" means three categories of damage, i.e. damage caused to the aquatic environment subject to Community water management laws[51], damage caused to protected species and natural habitats,[52] and damage to soil[53]. The definition of damage contained in the directive has been implemented into national legal systems[54]. It is assumed in the doctrine[55] that environmental damage under Article 7 of Rome II also includes the so-called ecological damage (if it is the result of human activity) and damage to property and person.

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[48] 'Environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms. See. G. van Calster, "Lex ecologia. On applicable law for environmental pollution, a pinnacle of business and human rights as well as climate change litigation", *IPrax*, no. 5, 2022, pp. 445–446.

[49] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

[50] A. Wowerka, *op. cit.*, pp. 314-315; M. Bogdan/M. Hellner, " Art. 7" cit., pp. 290-291.

[51] Water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies.

[52] Damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I; Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Directive 92/43/EEC or Article 9 of Directive 79/409/EEC or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation.

[53] Land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms.

[54] For example, on its basis, in accordance with Article 6(11) of the Polish Act of 13 April 2007 on the prevention of environmental damage and repair (Dz.U. 2007 nr 75 poz. 493) by: "environmental damage – it is understood as a negative, measurable change in the condition or function of natural elements, assessed in relation to the initial state, which was caused directly or indirectly by the activity carried out by an entity using the environment: a) in protected species or protected natural habitats, having a significant negative impact on achieving or maintaining a favourable conservation status of these species or natural habitats, provided that the damage to protected species or protected natural habitats does not include previously identified negative impacts resulting from the activity of an entity using the environment in accordance with the permit to deviate from the prohibitions in force in Natura 2000 areas, permits for the collection of plants or fungi and the acquisition of animals under species protection, an approved forest management plan, for which a strategic environmental impact assessment has been carried out, referred to in Article 46 of the Act of 3 October 2008 on the provision of information on the environment and its protection, public participation in environmental protection and on environmental impact assessments, decision on environmental conditions referred to in Article 71(1) of the Act of 3 October 2008 on the provision of information on the environment and its protection, public participation in environmental protection and on environmental impact assessments, or the provisions referred to in Article 90(1) and Article 98(1) of the Act of 3 October 2008 on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessments; b) in waters, having a significant negative impact on the ecological potential, ecological, chemical or quantitative status of waters or the environmental status of waters (...); c) in the surface of the earth, which is understood as contamination of soil or land, including in particular pollution that may pose a threat to human health".

[55] M. Świerczyński, *op. cit.*, pp. 94-95.

29. According to the Supreme Court and the Court of Appeal, the accident took place on the premises of a shipyard in Bangladesh and involved a shipyard worker falling from a height and suffering multiple fatal injuries. Due to this, the condition of the occurrence of negative effects on a person, violation of the rights of a natural person, has been met. However, it is problematic to consider that the accident in any way caused, or rather was caused, by a phenomenon that produced negative changes in natural resources. During the court proceedings, the plaintiff argued that the fatal accident of the plaintiff's husband was part of a larger chain of events that led to the ship's grounding in Chattogram, as a result of which there was undoubtedly damage caused at least to the beach and tidal waters. However, such a broad interpretation and analysis of the "event causing damage" is questionable. The fact that the ship, which was scrapped and caused environmental damage (water or beach pollution), is not the source of the accident of the plaintiff's husband. In other words, in the light of the facts established by the court, it is difficult to conclude that there is a causal relationship between the damage (human death) and the occurrence of negative phenomena in the natural environment. It is worth noting that the environmental damage can be caused by humans. It is about both man-made actions and omissions. Therefore, if a human being is not the perpetrator of changes in the natural environment that could have harmed both the natural environment and property or persons (natural or legal), it cannot be considered that we are dealing with environmental damage within the meaning of Article 7 of Rome II.

30. Similarly, it is difficult to accept the legitimacy of the claimant's position as to the need to apply Article 26 of Rome II. In its opinion, the shorter limitation period for a claim under Bangladesh law than under English law required the application of English law. This was to be supported by public policy considerations and excessive difficulties that the party had in pursuing its claims at the initial stage of the dispute. It should be emphasised that the public policy clause (Article 26 Rome II) is an essential instrument for the protection of the fundamental rights and interests of the State. However, due to the fact that this concept is vague, it is obvious that it can cause serious difficulties in interpretation. As Justice Burrough pointed out in *Richardson v. Mellish*: "Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you"[56]. As a consequence, the concept of public policy is constantly evolving, and thus changing in given times, along with the change of values that this legal institution is supposed to protect[57]. It is the public order clause that guards, for example, human rights[58]. Therefore, it is assumed that the application of the public policy clause should be carried out in a moderate and prudent manner. There is a wealth of doctrine and ideas on the restrained application of the public policy clause (*l'effet atténué*)[59]. Due to the same comparison, that English law is more favourable to the victim than Bangladeshi law is not very convincing. In the light of the findings of the court of appeal, the argument that Article 26 Rome II must be applied was not supported by evidence of a lack of access to justice. The defendant demonstrated that the injured party had already corresponded with the defendant in connection with the pursuit of claims.

31. The plaintiff's reference to Article 7 of Rome II is evidence of the attractiveness of this provision in the context of pursuing claims by injured parties. As already indicated, thanks to the connecting factors used, i.e. the place where the damage occurred and the place where the event causing the damage occurred, the injured party has a strengthened legal position in relation to the entity causing the damage.

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[56] Richardson v. Mellish (1824) 2 Bing 229.

[57] J. Blom, "Public Policy in Private International Law and its Evolution in Time", *Netherlands International Law Review*, no 3, 2003, p. 373.

[58] See A. Dickinson, *Rome II Regulation*, Oxford, Oxford University Press, 2008, pp. 628–629; T. L. Wearstad, "Harmonising Human Rights Law and Private International Law through the Ordre Public Reservation: The Example of the Norwegian Regulation of the Recognition of Foreign Divorces", *Oslo Law Review*, no 1, 2016, p. 51; S. Knowler, *The Public Policy Exception in Private International Law in the Context of Human Rights*, thesis, 2018, available at: efaidnbmnnnibpcajpcglclefindmkaj/https://www.otago.ac.nz/__data/assets/pdf_file/0022/332185/taming-the-unruly-horse-the-public-policy-exception-in-private-international-law-in-the-context-of-human-rights-711012.pdf.

[59] M. Zachariasiewicz, *Klauzula porządku publicznego jako instrument ochrony materialnoprawnych interesów i wartości fori*, Warsaw, Beck, pp. 241-244; P. Lagarde, "Public Policy", in K. Lipstein (ed.) *International Encyclopedia of Comparative Law, Vol. III, Private International Law*, Tubingen, JCB Mohr, 1994.

The injured party's right of option is an effective legal instrument to protect the rights of vulnerable parties, as well as to hold cross-border legal entities accountable for their activities in countries with less stringent environmental regulations. It is worth noting that Article 7 of Rome II, as well as all private international law, has an important regulatory function in the field of environmental protection[60]. The implementation of this function may be manifested in the legislator's supplementation by the legislator (national or European) of substantive (civil, administrative) law regulations by means of the use of norms of private international law[61]. The purpose of this may be the implementation of general assumptions of state policy, such as environmental protection[62].

32. The attractiveness of Article 7 is also confirmed by the use of this provision as a model for conflict-of-law rules on the law applicable to human rights violations. An example is the proposal to introduce Article 6a into the Rome II Regulation, proposed at an early stage of legislative work on the draft directive on corporate due diligence and corporate responsibility. The draft of that provision provided that victims of human rights violations could potentially choose between four different rights, namely: the law of the country where the damage occurred, i.e. the law of the place where the event giving rise to the damage occurred, i.e. the law of the place where the legal transaction occurred, the law of the country where the parent company is domiciled or, where the parent company is not domiciled in a Member State, and the law of the country in which the parent company is domiciled, and the law of the country in which the parent company is domiciled. in which the parent company operates. Clearly, this project was modeled on Article 7 of Rome II, and even further strengthened the position of the victims as the weaker party[63]. Ultimately, the proposal to add this provision to the Rome II Regulation was not taken into account at a later stage of legislative work.

33. The attractiveness of Article 7 Rome II and its links to human rights is closely connected to the *Begum v Maran* case. Although in this case the court did not find that this provision was applicable, given the general nature of this case, it is worth noting the potential qualification of this case as a dispute concerning a violation of human rights. During the court dispute, the plaintiff repeatedly drew attention to the dangerous working conditions in which the plaintiff's deceased husband performed work. In the ruling of the court of first instance, attention was drawn to the dangers associated with scrapping ships. Leaving aside the evidence collected in this case and the established facts, it can be assumed that performing this type of work without complying with standard occupational health and safety standards, such as appropriate protection against poisonous substances or adequate working time, may be considered a violation of human rights. Specifically, it is about the right to work or the right to health care.

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[60] U. Grusic, "Transboundary pollution at the intersection of private and public international law", *Journal of Private International Law*, no 3, 2023, pp. 574 ff.; G. Laganiere, *Liability for Transboundary Pollution at the Intersection of Public and Private International Law*, London, Bloomsbury, 2022, pp. 120 ff.; R. Wail, "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization", *Columbia Journal of Transnational Law*,no 2, 2002, p. 250; U. Grusic, "International Environmental Litigation in EU Courts: A Regulatory Perspective", *Yearbook of European Law*, 2016, p. 180.

[61] M. Lehmann, "Regulation, Global Governance and Private International Law: Squaring the Triangle", *Journal of Private International Law*, no 1, 2020, pp. 1-30.

[62] See: E. Alvarez-Armas, *Private international environmental litigation before EU courts : choice of law as a tool of environmental global governance*, thesis, 2017, available at https://dial.uclouvain.be/pr/boreal/object/boreal:187732.

[63] B. Brunk, "A step in the right direction, but nothing more – A critical note on the Draft Directive on mandatory Human Rights Due Diligence", available at: https://conflictoflaws.net/2020/a-step-in-the-right-direction-but-nothing-more-a-critical-note-on-the-draft-directive-on-mandatory-human-rights-due-diligence/; C. Thomale, "On the EP Draft Report on Corporate Due Diligence", available at: https://conflictoflaws.net/2020/chris-thomale-on-the-ep-draft-report-on-corporate-due-diligence/; G. van Calster, "First analysis of the European Parliament's draft proposal to amend Brussels Ia and Rome II with a view to corporate human rights due diligence", available at: https://gavclaw.com/2020/10/02/first-analysis-of-the-european-parliaments-draft-proposal-to-amend-brussels-ia-and-rome-ii-with-a-view-to-corporate-human-rights-due-diligence/; J. von Hein, "Back to the Future – (Re-)Introducing the Principle of Ubiquity for Business-related Human Rights Claims", available at: https://conflictoflaws.net/2020/back-to-the-future-re-introducing-the-principle-of-ubiquity-for-business-related-human-rights-claims/; E. Alvarez- Armas, "Potential human-rights-related amendments to the Rome II Regulation (II): The proposed Art. 6a; Art. 7 is dead, long live Article 7?", available at: https://conflictoflaws.net/2021/alvarez-armas-on-potential-human-rights-related-amendments-to-the-rome-ii-regulation-ii-the-proposed-art-6a-art-7-is-dead-long-live-article-7/.

VII. Final considerations

34. The *Begum v Maran* case is one of the few in which the court analysed Article 7 of the Rome II Regulation. Although the final result of the findings of the Court of Appeal was unfavourable to the injured party, because the court did not agree with the arguments in favour of the application of Article 7 of Rome II, the opinions presented by the English courts of both instances constitute an interesting subject of research for experts in private international law. The interpretation of this provision made by British judges will allow to determine the limits of the application of Article 7 Rome II in terms of the relationship between environmental protection (environmental damage) and infringement of personal rights as a result of harmful and dangerous working conditions.

35. The case has given rise to a discussion on the protection of human rights and the liability of international legal entities for their violations. The case itself illustrates well how difficult it is to pursue claims against such entities. Transnational corporations have the economic and legal means to minimize the legal risks associated with the redress of those injured by their actions in countries with less developed or less well-functioning legal and judicial systems[64].

36. As indicated in this article, the construction of Article 7 Rome II is attractive and beneficial to those affected. This is evidenced by the fact that it was the injured party who tried to prove that environmental damage had occurred in this case. The fact that the court did not agree with this argument is primarily due to the facts and evidentiary issues.

[64] F. Farrington/M. Poesen, *op. cit.*, pp. 16-17.