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Norwegian Supreme Court – HR-2016-1251-A

Court	Norwegian Supreme Court – Judgment
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Keywords	Labour law. Dismissal. Foreign registered ship. Choice of law.

Summary	A Norwegian seaman, whose employment was terminated, had worked on a ship that was registered in Antigua, and which was hired by a Norwegian company under a time charterparty. The Norwegian Supreme Court found that the seaman's working conditions were not regulated by the Norwegian Ship Labour Act. The ship was not Norwegian, cf. Section 1, first paragraph of the Norwegian Maritime Code, and the seaman's working conditions were thus not subject to the Norwegian Ship Labour Act, cf. Section 1-2, first paragraph, first sentence. This provision must be understood as a choice of law rule, and it is dependent on a conscious choice on the part of the legislator. The general rule that the flag state's labour legislation applies had not been set aside by agreement either. (Norwegian Supreme Court Report (Rt) summary)

Proceedings	Vesterålen District Court TVTRA-2015-808 – Hålogaland Court of Appeal LH-2015-95334 – Norwegian Supreme Court HR-2016-1251-A, (case no. 2015/2368), civil case, appeal of a judgment.
Parties	A (Attorney Gaute Gjelsten – under examination) versus Eimskip Norway AS (Attorney Jan Vablum – under examination).
Author	Judges Arntzen, Indreberg, Webster, Acting Judge Sæbø, Judge Skoghøy.

(1) Judge **Arntzen:** The case concerns the question of the choice of law in a dispute concerning the termination of a Norwegian seaman on a foreign-registered ship. The question is whether it is the labour legislation of Norway or of the flag state Antigua and Barbuda (hereinafter referred to as Antigua) that regulates the employment relationship.

(2) A was employed as a mate by Eimskip-CTG AS on 21 July 2010. The company subsequently changed its name to Eimskip Norway AS (hereinafter referred to as Eimskip). The original employment contract was executed on the Norwegian Maritime Directorate's standard form. In accordance with the employer's wishes, the parties executed a new employment contract on 12 September 2012; this time on a form that had been prepared by Eimskip's lawyer. The employment contract contained a provision that disputes were to be settled in Vesterålen District Court, but no express regulation of the choice of law. During the term of his contract A worked on board two ships, both of which were registered in Antigua.

(3) After prior discussions between the parties, Eimskip terminated A's employment in a letter of 24 October 2014, and he was to leave on 10 November of the same year. At the time of the termination, he worked on board the MS Svartfoss, which was owned by an Antiguan company. The ship was hired under a bareboat charterparty to a Faroese company, which rehired it to Eimskip under a time

charterparty. The Faroese company also had a crewing and technical management agreement with an Icelandic company, which leased A, among others, from Eimskip. The MS Svartfoss has primarily sailed along the Norwegian coast, including in Norwegian territorial waters.

(4) A contested the validity of the termination and filed a legal action with Vesterålen District Court on 30 December 2014 claiming that the termination be ruled invalid, and that he be awarded damages. A preliminary injunction entitling him to resume his employment was requested at the same time. Eimskip opposed this and claimed a decision in their favour, both in the principal case and in the case concerning the preliminary injunction. Vesterålen District Court dismissed the request to resume employment in a ruling of 24 February 2015. The ruling is legally enforceable.

(5) During preparation for the case before the District Court, the question arose whether Norwegian or Antiguan substantive law would apply in this case. The District Court considered the choice of law question separately and on the basis of a written hearing, cf. Section 16-1, second paragraph (b) and Section 9-9 second paragraph of the Norwegian Dispute Act.

(6) On 10 April 2015, Vesterålen District Court rendered judgment [TVTRA-2015-808] with the following conclusion:

> "The Norwegian Ship Labour Act does not regulate the employment relationship between the plaintiff and defendant."

(7) A appealed the District Court's judgment to the Hålogaland Court of Appeal. The Court of Appeal also decided on the case on the basis of a written hearing, cf. Section 29-16, fifth paragraph of the Norwegian Dispute Act. On 30 September 2015, the Court of Appeal rendered judgment [LH-2015-95334] with the following conclusion:

"1. The appeal shall be dismissed.

2. Costs before the Court of Appeal shall not be awarded."

(8) A's principal argument in the District Court and Court of Appeal was that Norwegian law was the agreed choice of law in accordance with the employment contract.

(9) A has appealed the judgment of the Court of Appeal to the Norwegian Supreme Court. The appeal concerns the assessment of evidence and application of the law. The argument of the agreed choice of law has not been maintained.

(10) The appellant, **A**, has in brief argued:

(11) The choice of law shall be determined in accordance with Norwegian international private law. Section 1-2 of the Norwegian Ship Labour Act is not a choice of law rule, and the Act applies if Norwegian law is to be used.

(12) The EU choice of law rules concerning individual employment contracts that are laid down in the Rome 1 Regulation [Regulation (EC) No. 593/2008] must apply analogously in Norwegian law. The rules have universal application for protection of the weak party in contractual relationships. Consideration of uniformity of the law indicates that the rules shall be used as a basis for Norwegian law. Article 8 of the Rome 1 Regulation is a continuation of Article 6 of the Rome Convention, and prior case law is still relevant. This case law indicates the law of the country to which the work has a significant association.

(13) As is evident from Article 8 (2) of the Rome Regulation, the general rule is that the substantive rules in the country where or from where the employee normally performs his work shall be used as the basis, unless otherwise agreed. If a country to which the employment relationship has a significant

association cannot be determined, Article 8 (3) stipulates an alternative provision that the employment relationship is subject to the law of the country in which the employer has his place of business. Another alternative choice of law provision has been laid down in Article 8 (4) concerning the choice of law following the law of the country to which the employment contract is most closely associated.

(14) A's employment contract falls under all of the association criteria of the Rome Regulation for the application of Norwegian law. A is a Norwegian citizen who resides in Norway and has place of work has primarily been Norwegian waters. The employer is also domiciled in Norway. The employment contract does not have any genuine association with the flag state Antigua.

(15) Under the assumption that the Rome Regulation is not applied analogously, it follows nonetheless from the Irma Mignon formula that the employment contract shall be regulated by Norwegian law. The employment contract was executed in Norway between parties domiciled in Norway, and Norway was chosen as the legal venue. The sailing took place primarily in Norwegian waters, and instructions on the sailing were given from a Norwegian place of business. The flag of the ship is only one factor in the assessment. This factor is weakened by the fact that the flag of Antigua is listed as a flag of convenience by the International Transport Workers' Federation.

(16) Ultimately, the Norwegian rules concerning protection against unfair dismissal and unlawful dismissal must be regarded as mandatory internationally. Any application of Antiguan law must therefore be supplemented by the Norwegian employment protection rules.

(17) The Law of the Sea Convention regulates the legal relationship between states, not civil law circumstances. Article 91 of the Convention, cf. Article 92, requires the states to exercise governmental jurisdiction in accordance with the flag state principle, but it does not stipulate any international private law rules concerning the choice of law.

(18) A has entered the following statement of claim:

"1. The case shall be heard and decided in accordance with Norwegian law.

2. Eimskip Norway AS shall be ordered to reimburse A's costs before the Court of Appeal and Norwegian Supreme Court."

(19) The appellant, **Eimskip Norway AS**, has in brief argued:

(20) When the choice of law has not been regulated contractually, it follows from both Norwegian and international law that it is the law of the flag state that regulates the working conditions on board.

(21) Section 1-2, first paragraph of the Norwegian Ship Labour Act states that the Act applies to employees working on board "Norwegian ships". The provision entails a deliberate delimitation against employees on foreign-registered ships, cf. Prop. 115 L (2012-2013), page 66 and NOU 2012:18, page 95. Such employees are subject to the law of the flag state. The flag state principle is laid down in Article 92 of the Law of the Sea Convention concerning jurisdiction, which both Norway and Antigua have ratified. The principle promotes the international legal order and is based on shipping policy reciprocity considerations. The obligations pursuant to the Maritime Labour Convention also lie with the flag state. The Norwegian Ship Labour Act and authorities to issue regulations are based on the jurisdiction rules of the Law of the Sea Convention.

(22) The Irma Mignon formula only applies of the choice of law question is not regulated by law, customer or other fixed rules, cf. Rt-2011-531. The formula therefore does not apply in this case. Even if the formula was used as a basis, decisive importance must be attached to the ship's domicile and registration. The rule is accordingly harmonised with our treaty law obligations related to international shipping.

(23) The Rome 1 Regulation [32008R0593] is not part of the EEA Agreement, and there are no grounds for applying EU law analogously at the expense of clear Norwegian law. The EU has also ratified the Law of the Sea Convention, and clarified the individual state's responsibility for complying with treaty obligations at the same time. There are no decisions from the European Court of Justice that support that the flag state principle does not apply in relation to third-party countries, even if both the employee and employer are domiciled in an EU country. The European Court of Justice's judgment of 15 December 2011 in case C-384/10 *Voogsgeerd* is not relevant because the flag state was an EU state and not a third-party state.

(24) Moreover, there are no Norwegian employment protection rules for employees on foreign ships that are mandatory internationally in the sense that they must be applied by Norwegian courts regardless of the choice of law. Norwegian employment protection rules are relatively speaking of a more recent date, and are not of fundamental importance to our legal order, cf. for example Section 5-6 third paragraph of the Norwegian Ship Labour Act. The fundamental view of the employees' employment protection is in any case safeguarded adequately by Antiguan law.

(25) Eimskip Norway AS has entered the following statement of claim:

"1. The appeal shall be dismissed.

2. A shall be ordered to reimburse the costs of Eimskip Norway AS before the Norwegian Supreme Court."

(26) **I have concluded** that the appeal will not be successful.

(27) The point of departure for the choice of law is – when there is no law, custom or other more established rules regulating the question – is to find the state that the case has the strongest or closest association with (Irma Mignon formula). If the choice of law question is not solved by Norwegian law, there may also be grounds to attach importance to the EU choice of law rules laid down in the Rome Regulations. I make reference to Rt-2009-1537, paragraphs 32 and 34, and Rt-2011-531, paragraphs 29 and 46 concerning the Irma Mignon formula and the application of the Rome Regulations in Norwegian law. The question is whether there is a statutory choice of law rule that applies to the circumstances of our case.

(28) The Working Environment Act does not apply to shipping, cf. Section 1-2, second paragraph (a) of the Act. Maritime employment protection is regulated in the Norwegian Ship Labour Act of 2013, which is largely a continuation of the Norwegian Seamen's Act of 1975. The scope of the Act is stated in Section 1.2, first paragraph, first sentence:

> "The Act applies to employees who work on board Norwegian ships."

(29) A ship is considered Norwegian if the capital and management requirements in Sections 1 and 3 of the Norwegian Maritime Code have been satisfied. It is also a condition that the ship has not been entered in the ship register of a different country, cf. Section 1, first paragraph of the Norwegian Maritime Code. A worked on board a ship registered in Antigua, and his employment relationship is thus not encompassed by the Norwegian Ship Labour Act.

(30) The provision concerning the scope of the Norwegian Ship Labour Act must be understood as a choice of law rule, cf. Proposition No. 13 (1999-2000) to the Odelsting, page 15 concerning the corresponding provision in Section 1 of the Norwegian Seamen's Act. As is evident from Prop. 115 L (2012-2013), page 66, employees on foreign-registered ships will as a general rule "be subject to the seamen's legislation in the country in question". This so-called flag state principle is the result of ships being regarded as part of the flag state's territory with the associated jurisdiction. Section 9-5, first paragraph (c) of the Norwegian Ship Labour Act, which gives an employee the right to leave if the ship loses the right to bear the Norwegian flag, is a consequence of the flag state's

legislative jurisdiction. It shall not be possible to force an employment contract under another country's law on the employee.

(31) The general rule that the flag state's labour law legislation applies can be waived by agreement between the employer and employee. In the legislative background to Section 1 of the Norwegian Seamen's Act, it is pointed out that for agreements that the Norwegian Seamen's Act is to apply to employment relationships on foreign vessels "must... bear in mind that the authority for its application is the agreement entered into", cf. Proposition No. 43 (1973-1974) to the Odelsting, page 21. In our case, it is not alleged before the Norwegian Supreme Court that such an agreement exists.

(32) The fact that the choice of law rule in Section 1 of the Norwegian Seamen's Act and subsequently in Section 1-2 of the Norwegian Ship Labour Act depends on a conscious choice on the part of the legislator, is also underscored by the authorities to issue regulations associated with the provisions.

(33) Section 2 (b) (2) of the Norwegian Seamen's Act granted authority to give the Act full or partial application to anyone who worked on a "foreign ship that was managed by a Norwegian ship-owning company". The repeal of this authority to issue regulations was adopted by Act No. 123 of 19 December 2008, but the Amendment Act never entered into force. The authority to issue regulations has not been maintained in the Norwegian Ship Labour Act. In Prop. 115 L (2012-2013), pages 33 and 76, the Ministry makes reference to a statement from the Ministry of Justice's Legislation Department from 14 September 1977, where it is regarded as "doubtful to what extent international law will allow Norwegian legislation to be applied to foreign ships that are managed by a Norwegian ship-owning company in any way other than by a bareboat charterparty". The Ship Labour Law Committee also assumed that there is "limited authority in international law to regulate internal affairs on a foreign ship when it is located outside Norwegian territorial waters", cf. the Proposition, page 77.

(34) Instead of granting general authority to issue regulations concerning employees on foreign ships, the legislative amendment in 2008 adopted more limited access to stipulate supplementary regulations concerning employees working on board "a foreign ship as long as it was permitted by international law and the ship is located in Norwegian territorial waters, ...", cf. Section 1, sixth paragraph of the Norwegian Seamen's Act. This authority to issue regulations has been maintained in Section 1-2, third paragraph (d) of the Norwegian Ship Labour Act, but it has not yet been exercised. The provision was brought about by the need to keep track of compliance with ILO Convention No. 186 on maritime working and living conditions (Maritime Labour Convention 2006) with corresponding regulation in the Norwegian Seamen's Act. Proposition No. 70 (2007-2008) to the Odelsting, page 11, states that it is primarily the "provisions in Sections 3, 21, 22, 27 and 28 that will be relevant to enforce in relation to foreign ships". Employment protection, which was regulated in Section 19 of the former Norwegian Seamen's Act, was not included in the Ministry's list, nor was it laid down in the Convention.

(35) The review so far shows that an attempt has been made to adapt the provisions concerning the scope of Section 1-2 of the Norwegian Ship Labour Act and the associated authorities to issue regulations to the flag state principle in international law.

(36) The flag state principle has been codified in the Law of the Sea Convention of 1982 – which entered into force in 1994. Both Norway and Antigua have ratified the Convention. In accordance with Article 92, the flag state has exclusive jurisdiction on the open sea, while the coastal state's jurisdiction in its own territorial waters is limited to Articles 17 ff. concerning the right to innocent passage. The

Convention builds in other words on the interaction between jurisdictions based on personnel affiliation – flag state jurisdiction – and on the territorial association – coastal state jurisdiction. The distribution of jurisdiction in maritime law also forms the basis for Norwegian shipping policy, as this is expressed in for example the legislative background to the Act relating to the general application of wage agreements etc. in Proposition No. 26 (1992-1993) to the Odelsting, page 18, and the consultation comments by the Ministry of Foreign Affairs on the Norwegian Ship Labour Act, which have been included in Prop. 115 L (2012-2013), page 79, which the Ministry "takes note of" on page 81.

(37) My conclusion so far is that A's employment relationship is not regulated by the Norwegian Ship Labour Act.

(38) A has argued alternatively that the Norwegian employment protection rules are mandatory internationally in the sense that they must be applied by Norwegian courts regardless of whether the employment relationship is otherwise subject to Antiguan law.

(39) Brought about by the parties' argumentation before the Norwegian Supreme Court, I find cause to mention that there are two sides to the theory of an international mandatory rule. Firstly, in a contractual relationship the parties should not be able to avoid mandatory Norwegian legislation by means of a choice of law agreement. In such cases, it is the actual choice of law agreement that is set aside, cf. for example the discussion in Hjort, 2009, "Internasjonalt preseptoriske regler i arbeidsretten - en rettskildemessig analyse". Secondly, a Norwegian rule of law could be of such fundamental importance to our legal order that it must apply regardless of what country's law otherwise applies. In such cases, it is the substantive provisions in foreign law that must yield. It is this aspect of a mandatory rule that is discussed in Rt-2009-1537, paragraph 37, as "internationally directly applicable" rules, which are pleaded in this case.

(40) The prerequisite for the principle of international direct applicability is that the Norwegian rule applies according to its content to the circumstances of the case at hand. There are no grounds supporting that the rules of the Norwegian Ship Labour Act concerning employment protection should have a broader scope than the rest of the Act. As is evident from my review of the scope of the Norwegian Ship Labour Act, it does *not* encompass employees on board foreign ships. It is the "ordre public" rule that must then be pleaded if the application of foreign law gives an outcome that is in violation of fundamental principles in the legal system of the country of the court. Whether the application of Antiguan law in our case will lead to an outcome that will bring about a correction of the outcome on such grounds must be determined in the principal case, since this is not a choice of law question.

(41) Accordingly, I have concluded that the appeal shall be dismissed.

(42) The respondent has won the case and his costs are in principle to be reimbursed in accordance with the general rule in Section 20-2, first paragraph of the Norwegian Dispute Act. The case has not raised unresolved legal issues, and the decision was not made under doubt either. I have therefore not found grounds to apply any of the exemption rules in the Act. The statement of costs, which is limited to covering the counsel's fees for the Supreme Court's hearing of the case, amounts to NOK 490,000. The appellant has not protested, and the amount will be relied on as necessary, cf. Section 20-5 of the Norwegian Dispute Act.

(43) I vote for this

judgment:

1. The appeal shall be dismissed.

2. A shall pay Eimskip Norway AS four hundred ninety thousand Norwegian kroner (NOK 490,000) in costs before the Supreme Court within two (2) weeks from service of this judgment.

(44) Judge **Indreberg:** I am essentially and as regards the outcome in agreement with the first voting judge.

(45) Judge **Webster:** Likewise.

(46) Acting Judge **Sæbø:** Likewise.

(47) Judge **Skoghøy:** Likewise.

(48) After voting, the Supreme Court handed down the following

judgment:

1. *The appeal shall be dismissed.*
2. *A shall pay Eimskip Norway AS four hundred ninety thousand Norwegian kroner (NOK 490,000) in costs before the Supreme Court within two (2) weeks from service of this judgment.*