Autonomous Interpretation of ‘Civil and Commercial Matters’: Do Public Authorities’ Claims for Clean-up Costs for Pure Environmental Harm Qualify?

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ABSTRACT

Recovery of public authorities’ costs for pure environmental harm, ie harm that does not entail an economic loss on part of the authorities, is unlikely to be considered a ‘civil matter’ under Rome II – or the Judgments Regulation/Lugano Convention. The greater problem is probably recognition and enforcement, not choice of law.

Key words
Article 7, Rome II, pure environmental damage, choice of law, recognition and enforcement

Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) contains a special provision in Article 7 on environmental damage. According to Article 7, the law shall be determined in accordance with Article 4(1), which as a main rule points to the law of the country in which the damage occurred, unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

Pursuant to Article 1, the Regulation only applies to ‘civil and commercial matters’. Due to their technical complexity, or sheer scale, clean-up operations after environmental damage are often carried out by public bodies under environmental protection legislation that in most countries would probably be considered as ‘public law’, not legislation concerned with ‘civil and commercial matters’.

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For instance, the Norwegian Pollution Act is mainly concerned with the obligation not to pollute and, should pollution occur, the duty incumbent on the person responsible to take preventive and/or remedial action. This duty exists irrespective of anyone’s economic interests having been negatively affected by the pollution. The Act also establishes a system under which State or local environmental agencies can engage in, or take command of, clean-up operations beyond the capacity of the person responsible. The State or local government concerned may then claim recovery of their expenses, or damages to cover future remedial action, irrespective of any negligence on part of the person concerned. Private persons who have assisted in the operation with their own equipment or workforce because they were legally obliged to do so may also claim recovery of their costs.

In addition, any person whose economic interests have been negatively affected may claim compensation. The Act establishes strict liability, irrespective of whether this would be the case under the general law of torts.

The question then arises to which extent such claim for recovery or damages may qualify as ‘civil’ or ‘commercial’ matters. This question is relevant not only with regard to choice of law, but also with regard to jurisdiction. Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments – the Judgments Regulation – as well as its sibling the Lugano Convention, only applies to ‘civil and commercial matters’ – as indeed follows already from the title.

Recital 7 of the preamble to the Rome II Regulation states that the substantive scope of the Regulation should be consistent with that of the Judgments Regulation. Consequently, as the CJEU has not yet had the occasion to pronounce itself on the concept of ‘civil and commercial matters’ as used in Rome II, it would seem natural to base oneself on the Court’s rulings concerning the same concept in the Judgments Regulation, including its predecessors Regulation (EC) No 44/2001 and the Brussels Convention.

The CJEU concluded already in its judgment in Case 29/76 Eurocontrol concerning the Brussels Convention that that concept of ‘civil and commercial matters’ must be interpreted autonomously and by reference to the objectives and scheme of the Convention. Also under Rome II, the concept of ‘civil and commercial matters’ must be interpreted autonomously.

In that judgment, the Court also stated that when a public authority acts in the exercise of its powers, the matter is not ‘civil’ or ‘commercial’. This was followed up in Case 814/79 Rüffer. Here, a claim for redress for costs incurred in removing a shipwrecked boat from a river was not considered to fall under the Brussels Convention. The reason was that the State had made the removal in fulfilment of public law obligations concerning waterways.

2. Chapters 2 to 6 of the Act (n 1).
3. Chapter 6 of the Act (n 1).
4. Chapter 8 of the Act (n 1).
5. Section 47 of the Act (n 1).
6. Sections 55 and 57 litra a of the Act (n 1). Persons who, through the delivery of goods and services or by carrying out control functions, have contributed to the damage only indirectly, are only liable based on negligence.
On the other hand, claims pursued by public authorities may also qualify as a ‘civil’ or ‘commercial’ matter, if based on rules that apply equally to public and private creditors.9 Case C-49/12 *Sunico* is illustrative. The CJEU concluded that a claim relating to VAT fraud pursued by the tax authorities fell under Regulation 44/2001 since it was based on the law of torts.10 Also, in Case C-271/00 *Baten*, the Court found that a claim for recovery of social assistance fell under the Brussels Convention since the municipality seeking recovery based its claim on non-paid maintenance claims to the person who, as a consequence of not having received the maintenance money, had had to seek social security assistance.11 Maintenance claims fell under the Brussels Convention.

From this it would seem reasonable to conclude the following with regard to claims for environmental harm: To the extent that the clean-up costs were necessary – also – to safeguard or restore the economic value of affected land owned by the State or local government, the claim will be considered as a ‘civil’ matter as long as it is pursued under the law of torts. This would be so even if – as would be the case under Norwegian law – environmental legislation lays down strict liability for this particular kind of compensation for economic loss. The decisive argument would be that the same rule on strict liability would apply if the claim were pursued by a private landowner who had suffered injury to his economic interests due to pollution of his property (or business). Nor can it matter that it would also be possible for the State to pursue the same claim under rules of environmental law that establish its right to redress regardless of whether the pollution has caused an economic loss.

As mentioned earlier, it could be that private parties have an obligation under public environmental law to contribute with equipment or workers in clean-up operations, or to clean up their own property beyond what is necessary to neutralise any economic loss. The claim for recovery of such costs would be possible to pursue against the polluter as tort-feasor under the law of torts, and consequently as a ‘civil’ or ‘commercial’ claim, regardless of whether it would also be possible to pursue the claim under special environmental rules pertaining to the right to redress for clean-up costs from the polluter.

However, as the claims discussed so far are in essence claims for compensation for economic loss, these are not really claims for ‘pure’ environmental harm. Here, the answer based on case law concerning the Judgments Regulation would seem to be in the negative: this may not be considered as a claim pertaining to a ‘civil’ or ‘commercial’ matter under the Judgments Regulation, and consequently not under Rome II, either. It would not matter, I think, that private environmental organisations may have legal standing, as they have under Norwegian law,12 to pursue such claims in court as long as any damage awarded would go not to the organisation but to public environmental agencies responsible for the clean-up – as is also the case under Norwegian law.

The question is, however, whether this really matters. If claims related to ‘pure’ environmental harm fall outside the Rome II Regulation, the States are free to formulate their

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12. Section 58, third paragraph, of the Pollution Act (n 1).
own choice of law rule. Those rules would probably end up reading a lot like Article 7 of Rome II.

The more serious problem may turn out to be enforcement abroad of judgments awarding damages for pure environmental harm. Since this falls outside the scope of application of the Judgments Regulation and the Lugano Convention, States would be free to refuse enforcement unless other treaties compel them to do so. Many countries have exequatur procedures whereby foreign judgments may be declared enforceable even in the absence of any treaty obligation to do so. This is not so under Norwegian law, where foreign judgments are only enforceable if there is a treaty obligation or special legislation to this effect. The exception is foreign judgments based on an agreement between the parties conferring jurisdiction on the court in question.\textsuperscript{13} It is unlikely, I think, that Norway would enact a general and unconditional rule on the enforcement of foreign judgments awarding damages for pure environmental harm – not least because such claims could be astronomical, and Norway has an important international shipping industry.

\textsuperscript{13} Act of 26 June 1992 No. 86 (Enforcement Act) Section 4-1 second paragraph litras f and g read together with Act of 17 June 2005 No. 90 (Civil Procedure Act) Section 19-16.