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# Collective redress mechanisms in EU: jurisdiction issues in mass harm events


Members of the team:

Alfonso Peralta Gutiérrez

Pablo Aguirre Allende

Roberto Sierra Gabarda

Roberto Sierra Gabarda
Alfonso Peralta Gutiérrez
Pablo Aguirre Allende

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## Abstract

In our current societies there is a pressing need for an adequate judicial response to so called "mass harm" events which frequently involve different Member States of the European Union ("**EU**") and, therefore, constitute a prime subject for a truly European legal framework. This study focuses primarily on the problem of determining which jurisdiction would be the appropriate one in order to consolidate all of the judicial actions resulting from that kind of events. In light of the inadequacy of the Regulation 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter ("**BIR (Recast)**"), a solution is proposed for the practical case employed as the starting point: recognizing the jurisdiction of the domestic court in the better position to adjudicate. This solution could also be used as the stepping stone for a future and comprehensive judicial or legal answer to the raised issues.

For this purposes, in the first part of this paper, a hypothetical case involving mass harm will be presented. Following this presentation, the next part will consist of a brief theoretical approach to the so called collective redress mechanisms in the light of the case presented. Then, the paper will focus on the jurisdiction issues coming out from this kind of events. The next part of the paper will analyze the case and try to give an answer to the jurisdictional problem according to the current legislation and case law. Finally, a new regulation will be proposed.

## I. - Presentation of the case

On 13 November 2002, an oil tanker registered as "*Mayflower*" (the **"Ship**") was sailing in Spanish waters close to the northwestern coast of Spain. The Ship was

owned by a Greek company called "Mediterranean Builders Ltd" (the "**Owner**") and insured by an English company designated as "Newcastle Insurance Association" (the "**Insurer**"). The Ship, which had been operating for a non-stop period of 26 years since its construction in Denmark back in 1976, sailed under the flag of the Netherlands.

Around 15:00 pm, a big crack caused by a multiple failure damaged it making the water to come into the oil tanker and pouring tons of oil into the sea. The break-up and subsequent sinking released an estimated 80,000 tons of the cargo carried by the ship: mainly fuel-oil and other hydrocarbon products.

As a consequence, the northwest coast of Spain was heavily polluted and oil eventually moved to the west coast of France. Traces of oil were also detected in the United Kingdom in places so far away as the Channel Islands, the Isle of Wight and the southern Kentish coast.

The certified claims of the Spanish Government totalled 500M€. On the other hand, the French State calculates its costs and damages on the sum of 60M€. Moreover, fishing and seafood industry was forced to suspend its activities in the region until May, 17th 2003.

Once the case was solved from the perspective of criminal law, it is necessary to adjudicate the civil liability of the ship owner, a Greek company. Therefore, the claimants (i) Spanish State ("**Spain**"); (ii) French State ("**France**"); (iii) Environmental NGO "Rainbow Association" ("**NGO**"); and a (iv) Fishermen cooperative association ("**Fishermen Association**") face the difficult question of determining which jurisdiction would enable them to get a comprehensive and enforceable adjudication against the defendant of their choice: in this case, the Ship Owner. The *a priori* possibilities would be the next ones: (i) where the harmful event occurred (Spain); (ii) where the damages were caused (France or Spain); and (iii) the defendant´s domicile (Greece).

## II.-Theoretical approach

Collective redress is actually a new term to designate the legal or case law

recourses allowing a collectivity of people to seek the consolidation of their similar claims in only one proceeding sharing the costs that it entails and providing other benefits such as the reduction of the risk of irreconcilable judgments on the same factual or legal issue, procedural economy and/or efficiency of enforcement[1]. Thusly, the idea behind their existence is that some claims are better adjudicated on a collective rather than on an individual lawsuit, particularly in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim[2] but without excluding other potential scenarios such as mass-harm events.

The 2011 consultation of the EU Commission on collective redress describes it as a mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation of harm caused by such practices[3] in a number of fields including[4], the area of environmental protection[5] [6].

Those understandings of collective redress mechanisms include the so called (1) *representative* actions, (2) *group* or *collective* litigation, (3) *class actions*, (4) *follow-on actions* and (5) *model* or *test case* litigation[7]. In fact, the most probable outcome of a massive oil spill such as the one posed by the case at hand, particularly given the

[1] C. González Beilfuss / B. Añoveros Terradas, *Cross- border Class Actions. The European Way*, edited by Arnaud Nuyts and Nikitas E. Hatzimihail, pp. 242, 243 (2014).

[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: "*Towards a European Horizontal Framework for Collective Redress*". Strasbourg, 2013.

[3] http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html

[4] Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013).

[5] Principle of "*polluter pays*" as stated by the White Book on environmental liability.

[6] Nevertheless, we find very useful in order to throw light on the matter, one of the foremost definitions of this legal concept. We are referring ourselves to the one stated by Rule 23 of the Federal Rules of Civil Procedure of the United States of America: "*One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joining of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.*"

[7] Notes of the presentation made at the Conference in Brussels on 27 April 2012 by Arnaud Nuyts.

diversity of the damaged parties, would be the appearance of at least some of the aforementioned judicial actions if not all.[8] [9]:

(i) Representative action: When an organization, authorized or representative body brings actions on behalf of a group of individuals, who are not themselves parties to the proceedings. In our case, the best candidate for the use of such an action would be the different Member States affected by the spill as well as the environmental NGO. Since the protection of the environment is a public interest, the State (including other parts of the polity) has the first responsibility to act if the environment or other public goods are damaged or threatened. However, there are limits to the availability of public resources for this, and there is a growing acknowledgement that the public at large should feel responsible for the environment and should, under certain circumstances, be able to act on its behalf[10]. In fact, the Commission has been recognizing for some time the need for such an enhanced access to justice[11]. As a result of this concern the EU promulgated two distinct instruments: the Directives 2003/4/EC and 2003/35/EC[12].

[8] However, we suggest a cautious approach to the definitions employed immediately after as studies may be found that provide different interpretations of the terms involved.

[9] Zheng Sophia Tang, Consumer Collective Redress in European Private International Law, Journal of Private International Law, Newcastle University, Vol. 7 No. 1, pp. 101-141 (2011).

[10] Article 18 of The Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous for the Environment established in 1993 ("**Lugano Convention 1993**") is especially interesting as it recognizes active standing to requests by *"associations or foundations which according to its statutes aim at the protection of the environment and which complies with any further conditions of internal law of the Party where the request is submitted".* Moreover, the right of access to justice pursues two objectives: protect the environmental interests and apply the environmental legislation. These two purposes are included in the Arhus Convention on access to information, public participation in decision-making and access to justice in environmental matters ("**Arhus Convention**"). Consequently, according to the Arhus Convention or the Lugano Convention 1993, a non-governmental organization such as "Rainbow association" enjoys the necessary legal standing in order to bring forth proceedings on the matter of environmental liability.

[11] Communication to the Council and Parliament on Implementing Community Environmental Law 96/500 par. 12. We consider also relevant that according to the White Book public interest groups promoting environmental protection (and meeting relevant requirements under national law) shall be deemed to have an interest in environmental decision-making. In general, public interest groups should get the right to act on a subsidiary basis, i.e. only if the State does not act at all or does not act properly (second tier).

[12] White Paper on Environmental Liability COM (2000) 66 final, 9 February 2000 on its 5.1 Section states the following: "*Comparing the regime of the Lugano Convention with the environmental liability regimes of the Member States, a general impression is that the Convention goes further than most Member States in some respects (namely in that it explicitly covers environmental damage as such). Its open scope of dangerous activities also goes further than several Member States which have regimes with a closed and more limited scope. These Member States, and most of industry, feel that the scope of the*

(ii) Group or collective action: It is an action where a number of identified claimants bring actions in one procedure to enforce their claims together and each group litigant is a party in the litigation. The Fishermen Association would most probably endeavor to employ this action in order to reduce their litigation costs. This mechanism allows these small entrepreneurs whose businesses have been affected by the spill to seek compensation for the harm suffered and/or the loss of future potential profit simultaneously, that is, in the same judicial proceeding, when those claims are based on the same legal and factual issues[13].

Accordingly, in light of the previous considerations it is self-evident that most, if not all, of the characters of the commonly recognized definition of the scope of collective redress are present, at least potentially, in the case at hand: a typical mass harm event caused by the sinking of an ocean going vessel and the subsequent, catastrophic and uncontainable spill of its dangerous cargo. Those characters are the following:

(i) The injured parties are likely to number in the millions encompassing both public and private bodies without forgetting common citizens affected by the sinking of the Ship;

(ii) Each and every one of the claims for damages arising from the oil spill, and the courts seised of them, will need to deal with same basic legal and factual

*Lugano Convention is too wide and gives too little legal certainty and that its definitions, especially in the field of environmental damage, are too vague. The Convention does cover such damage, but in a rather unspecific way. For instance, it does not require restoration nor does it give criteria for restoration or economic valuation of such damage. Thus, if accession to the Convention was envisaged, an EC act would be needed to supplement the Lugano regime in order to bring more clarity and precision to this new area where liability is concerned."*

[13] We must not lose sight of the fact that other categories of potentially relevant collective redress actions could be brought forward in such a context. The most obvious examples would be the following: (i)"pure" class action, that is, when a plaintiff acts on behalf of a group of individuals who will be bound by the outcome of the procedure, either if they have "opted in" or they haven't "opted out"; (ii) follow-on action which follow a final decision taken by the relevant public authority which concludes finding that there has been a violation of EU law; and (iii) test case procedure, also called leading case, which implies that a leading decision is given in one specific case, deciding the common factual and legal issues of a massive number of similar and individual actions serving as an example for the courts to follow. For instance, the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law makes a brief reference on this subject matter.

issues and details;

(iii) The existence of a common or class interest means that it is conceivable that a domestic court would eventually accept the legal standing, and therefore the judicial action, of at least some of the claimants of the case at hand[14]; and

(iv) It is our starting hypothesis that the collective redress mechanisms envisioned by the academia or applied in some countries, both within the EU and outside it, would be, at least some form of them, the most convenient way of dealing with consequences emanating from the described maritime catastrophe.[15]

In light of the above, how many of the aggrieved parties could be recognized as legitimate claimants? How could they ever get that kind of recognition? Which court or courts would hold jurisdiction to entertain that kind of claims? What kind of jurisdiction would that be? How could the claimants ensure the timely and full enforcement of an eventual and favorable judgment? We consider these questions only the first ones of a long list that needs to be answered if we are to attain the shared goal of a truly integrated liberty, security and justice area within the EU. But, alas, the sheer volume of that undertaking surpasses the necessarily narrow remit of this work and is, therefore, unattainable. That is the reason behind our decision to focus our efforts on one of the most complex and yet unsolved issues arising from the development of collective redress mechanisms in a European context: rules on jurisdiction of the courts in light of the BIR (Recast).

## III. - Analysis of the jurisdiction

[14] Provided that the specific domestic jurisdiction allows those possibilities, which is not a given in every and each of the Member States of the European Union but yes in most of them. In fact, it is the consolidated policy of the EU institutions the advancement of, at least, some of the forms of collective redress actions in order to attend to the legitimate and otherwise ignored or inadequately treated harmful events and/or situations.

[15] Moreover, depending on the type of claim, collective redress can take two forms: *injuctive* relief or *compensatory* relief. The form of *injunctive* relief is on which cessation of the unlawful practice is sought as claimants seek to stop the continuation of an illegal and specific behavior. On *compensatory* relief the claimants aim is the reparation and compensation of the suffered damages. In spite of the fact that both actions are conceivable in a mass harm context such as the one that we are analyzing we are nevertheless making the assumption that the claimants only seek compensation.

## A. The different heads of jurisdiction under the BIR (Recast) applicable to the case.

First of all, we have to point out that none of the jurisdiction rules provided for in the BIR (Recast) is specifically designed for the taking of legal actions such as the ones which we envision on the case at hand[16]. This legal instrument has not explicitly taken into account collective redress mechanisms in terms of jurisdiction. This absence of a specific legal provision is complicated by the fact that there are various ways of consolidating collective claims before the court of one single Member State under the BIR (Recast). It is commonly known that the main forum of that basic European text is the defendant's domicile (Art. 4), as it is the case in most domestic legal systems of Europe. But, besides this general rule, this regulation also provides specific provisions on jurisdiction for different types of judicial disputes.

Thus, the question still stands: to what extent can various individual claims be consolidated before the court of one single Member State? In other words, in which forum can pan-European *group actions, representative actions or class actions* be brought? In order to answer it we will briefly comment on the general provisions and special rules on jurisdiction that could be, and even sometimes have been, applied to collective redress mechanisms as a whole. After that we will highlight the most appropriate solution for the case at hand.

### A.1.-Domicile of the defendant

As we were anticipating the general jurisdiction forum of the BIR (Recast) is the domicile of the defendant (Articles 4 to 6). The defendant in a collective redress case usually is a legal person. In accordance with Article 63 *"a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business".*

[16] Beatriz Añoveros Terradas, *Jurisdiction rules. Consumer Collective Redress under the Brussels I Regulation Recast in the Light of the Commission's Common Principles*, Journal of Private International Law (2015).

In the case of several defendants, such as an international cartel involving companies domiciled in different Member States, under the art 8(1) BIR (Recast) proceedings could be brought before the court of the Member State where one of the defendants is domiciled if the conditions listed on that provision are met.

In fact, it has been sometimes suggested that the domicile of the defendant, or of one of them in case that there is a plurality of them, should be the only rule of jurisdiction for collective redress mechanisms such as the class actions, at least for the ones covered by the BIR (Recast). The single most important factor in order to reach that conclusion would be the following: any other court than the one where the defendant is located would require a choice amongst, potentially at least, several others forum. Were this choice be allowed, say the proponents of this opinion, it would give rise a number of issues all which would badly affect the principle of mutual confidence[17].

Nevertheless, this option would not be wholly satisfactory to the interests of the aggrieved parties. The European Court of Justice ("**ECJ**") case law would most probably allow the consolidation of all claims emanating from the Ship at the courts of the defendant, that is, the Greek Owner but, would that choice of forum adequately serve the interests of the liberty, security and justice space? In light of the arguments that will follow at our conclusions we are of the opinion that it would not.

A.2.-Contract disputes

In *matters relating to a contract*, Article 7(1) of BIR (Recast)[18] sets up jurisdiction in the courts for the place of performance of the obligation. This head of jurisdiction is narrow in its scope and its application to the case at hand would pose

[17] Risk of "forum-shopping" as the defendants probably would try to bring proceedings before a court in the Member State with the procedures or laws most advantageous to their claim.

[18] "*A person domiciled in a Member State may be sued in another Member State: (1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question; (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be: in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered, in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided…"*

insurmountable problems. The main one would be the very meaning of the expression *"matters relating to a contract".* Under the ECJ case law, this necessarily implies that *"an obligation freely assumed by one party towards another"*[19] exists.

Accordingly a thorough analysis of this head of jurisdiction is not necessary at all because of the absence of any contractual relationship whatsoever connecting the injured parties to the stakeholders of the Ship[20].

A.3.-Matters relating to tort, delict or quasidelict (art. 7 (2) BIR (Recast)).

The BIR (Recast) does not define what is to be considered a "*tort, delict or quasi-delict*" matter but we can say that tort encompasses actions which were not born under a contract and pursue a compensation for the damages suffered. As belonging to this category we can mention traffic accidents, plane crashes, maritime accidents, environmental damages, liability for defective products, anticompetitive practices, and damages caused by misleading advertising and others similar ones.

If we leave aside article 7(3) BIR (Recast), article 7(2) offers us two prospective fora: the place of the causal event and the place where the harmful event occurred.

Under *Shevill* jurisprudence proceedings can be brought at the place where the

[19] Case C-26/91 Handte v. Traitments [1992] ECR I-3967, para 15.

[20] Under this provision jurisdiction is provided at the place of performance of the contract - defined as the place of delivery of goods or provision of services, or alternatively, the place of performance of the obligation by the ECJ-, at least *a priori*, when there are two contracts, it is doubtful that the ECJ would allow that proceedings be brought at the place of performance of a given contract for a claim that also relates to another, or a plurality of other contractual relationships, even if the legal and factual issues are identical. This does not mean at all that the contract jurisdiction cannot be employed in collective redress. Notwithstanding clear legislative or jurisprudential action taking a different course that only means that jurisdiction is likely to be limited to the claims related to the contract locally performed.

See Case C-167/00 *VereinfürKonsumenteninformation v Karl Heinz Henkel* [2002] ECR I-8111 and Case C-265/02 *Frahuil SA v AssitaliaSpA* [2004] ECR I-1543 for the difficulties of representative actions pursuant to the ECJ interpretation of "parties to a contract".

For jurisdiction over contractual relationships with multiple places of performance see: Case C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I-3699; Case C-204/08 Rehder *v Air Baltic Co* [2009] ILPr 44; and Case C-19/09 *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA* [2010] 1 WLR 1900.

damage is suffered but in that case the court will only have limited jurisdiction, that is, it can not only entertain claims concerning the entirety of the damage inflicted.

If the jurisdiction belongs to the courts where the harm event occurred or may occur, we have to determine the place of the "harmful event". The location event according to the EJC includes both the place where the damage is suffered and the place of the event giving rise to the damage[21]. The jurisdiction consolidated at this place is wider than the jurisdiction accorded to the place where the damage is suffered in cross-border tort action. In matters relating to tort in collective redress we can typically speak about damages occurred extending over different locations. These two different options imply that the collective redress claimants can choose between the aforementioned two fora.

### B. Brief reference to international treaties on environmental protection

First of all, it is necessary to remark that there are a growing number of international conventions and protocols dealing with (environmental) liability in several fields. All of these conventions are based on a strict but limited liability, and the concept of a second tier of compensation. Therefore, we have to classify the international instruments relating to environmental liability according to the international system of legal sources, before employing them as a support in order to analyze the jurisdiction issue later on.

#### B.1.-International Maritime Organization ("**IMO**") treaties

Compensation for damages relief by oil spills are ruled by an international system created by IMO: (i) Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 ("**CLC PROT 1992**"), and (ii) Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 ("**FUND PROT 1992**")[22].

[21] Case C-68/93, *Fiona Shevill, Ixona Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance* [1995] ECR I-415.

[22] Other relevant instruments, among others: (i) International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990, as amended (OPRC 1990); (ii) Protocol on Preparedness, Response

In any case only the first one contains rules of jurisdiction. As for the applicability of that the CLC PROT 1992 to the case at hand we must take into account that the Kingdom of Spain is a Member State of IMO since 1962 and is also a Party to that specific treaty since the 6th of July of 1995.

B.2.- Other international treaties potentially relevant to the case.

(i) UN/ECCE Convention on Access to Information, Public Participation on Decision-Making and Access to Justice on Environmental Matters has been adopted and signed by the EU at the Fourth Ministerial Conference in Arhus (Denmark), 23-25 June 1998.

Based on that international instrument the European legislator has enacted two distinct directives: Directive 2003/4/EC on public access to environmental information and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programs relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

In any event, this treaty and subsequent European directives that followed it are not relevant to this case as none of them contain any clause of jurisdiction whatsoever.

(ii) The Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous for the Environment established in 1993 ("**Lugano Convention 1993**"). This treaty is the other international instrument that establishes rules on jurisdiction applicable to cases like the one that we are examining. However, this treaty has not been signed nor ratified by the EU as a whole. Therefore, it is only fully applicable in those Member States that have ratified it and Spain among them. Consequently, we will only make use of it as a supporting reference.

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and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000 (OPRC-HNS 2000); (iii) Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC 1976); (iv) International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS 1996).

## IV.-Characterization of the claim

### A. Analysis of the case

Therefore, at this point determining a common head of jurisdiction in order to file the claim happens to be the critical issue that arises from the case.

The subject matter of the case has to do with torts, more precisely with non-contractual obligations, an issue clearly included under the scope of the BIR (Recast) according to the Article 1 ("*civil and commercial matters*").

It is important to remark that, although the BIR (Recast) is mainly designed for disputes between private parties, such regulation is still applicable when a public body (as it could be the Spain or France) files a claim based on private law with the only exception of the *acta iure imperii*[23].

Once it has been determined that the BIR (Recast) is the proper and applicable legal instrument in order to start the judicial proceedings over the case at hand, it is necessary to address the following issue: which head of jurisdiction would be the most adequate in light of the different options legally foreseen?[24]

The dispute derived from the case has to do with torts coming from a maritime accident. This means that the parties in dispute were not linked by a contractual relation in the terms of the RBI (Recast)[25] and, for this reason, the dispute should be solved in the field of non-contractual obligations (which covers torts, delict and quasi-delict

[23] Case C-167/00, *VereinfürKonsumentenininformation v. Karl Heinz Henkel* [October 2002], para. 26.

[24] As previously stated, all of the following arguments apply insofar the availability of the defendants' domicile, the general and therefore the safest of the jurisdictional rules contained in the BIR, is not questioned at all. Thusly, the claimants affected by the oil spill would in any case retain their ability to bring forth proceedings in Greece, that is, the Member State where the ship owner is located. However, it is our opinion that being the easiest to accept judicial forum does not imply at all that it is the most adequate one in light of the circumstances of the case at hand as we will explain in our final conclusions.

[25] There is not in the case at hand such a thing as *"an obligation freely assumed by one party towards another"* as it has been established, among others, in Case C-26/91 *Handte v Traitements* [1992] ECR I-3967, para 15.

events): actions which seek to establish the liability of a defendant and which are not related to a contract in the terms of the regulation[26].

Having stated that the dispute belongs to the group of non-contractual obligations, the logical conclusion is that the head of jurisdiction applicable to the case is the one regulated in article 7(2) RBI (Recast) that determines the "*place where the harmful event occurred o may occur*" as the one in which the claim should be filed when it comes to solve disputes arising from non-contractual obligations.

The plaintiffs, therefore, can file their claim in the place where the harmful event occurred. However, this forum has to be understood in a double basis. According to the settled case law doctrine established by the ECJ, this head of jurisdiction is influenced by the principle of ubiquity. For this reason, such place can be either (i) the place where the harmful event giving rise to the damage occurred or (ii) the place where the damage occurred[27]. The choice between these places is, with some exception, upon the plaintiff.

On the one hand, the place where the harmful event giving rise to the damage occurred is based on factual circumstances related to the tortfeasor's activity. In the current case, the main singularity has to do with the fact that the accident took place in the ocean but under Spanish jurisdiction. Thus, the sinking of the Ship, according to this forum, could be subject to the jurisdiction of the coastal State (Spain)[28].

On the other, the place where the damage occurred happens to be the place where the event giving rise to the damage, entailing tortuous, delictual o quasi-delictual liability, produced its harmful effects upon the victim[29].

Apparently, this option would be as eligible by the plaintiffs in the case as the

[26] Case C-189/87, *Anasatasios Kalfelis v. Bankhaus Schröder Münchmeyer HengstCie* [1998] p. 17, 27.

[27] Case C-21/76 *Handelskwekerij G.J. Bier v. Mines de Potassed'Alsace SA* [1976], para 15/19-24/25.

[28] For simplicity's sake we will omit analysing the no less complex issue of national sovereignty over the ocean which would merit a full ruling on its own. Therefore we will make the assumption that the Ship sank in a nautical position near the coast of Spain which according the United Nations Convention on the Law of the Sea (UNCLOS) was subject to the national jurisdiction of the concerned EU Member State.

[29] See Shevill case.

previous one. However, in order to avoid the already mentioned risk of forum-shopping, the ECJ has limited this last option by creating the so called "mosaic doctrine". According to this doctrine, when the damages have occurred in various States, the plaintiff can bring an action in a certain State only limited to the damages sustained in that State. Therefore, this doctrine leads to a fragmentation of the jurisdiction[30].

In order to conclude, the plaintiffs in the case may opt for filing the claim in Spain, as is the place where the harmful event occurred, or they could file the claim in the place where the damage occurred. Obviously, this last choice of judicial venue would most probably entail, according to the already analyzed ECJ case law, that the local courts restrict the proceedings to the damages suffered in their own Member State[31]. Therefore, in order to ensure a judicial adjudication covering all the damages emanating from the Ship it would be necessary to bring proceedings before the courts of the State where the causal event occurred, that is, the sinking.

Moreover, it cannot be denied that the jurisdiction of the Member State in whose waters the ship sank and where most of the damages occurred it is predictable for the potential defendants in cases related to tanker accidents and the subsequent and potential oil spills. Neither can be argued to the contrary that Spain holds the closest connection to the maritime accident that originated the damages.

This solution is not only, in our opinion, the most adequate in the context of the BIR (Recast), but also a solution that finds support in some of the most important international treaties on environmental damages such as the ones previously mentioned. The CLC PROT 1992 includes a similar head of jurisdiction in its Art. 9. This article accords jurisdiction to the courts, among others, where the incident which caused the pollution took place, including the territorial sea. Furthermore, Art. 19 of the Lugano Convention 1993 also allows bringing actions to the courts of the place (…) where the dangerous activity was conducted in spite of the previously mentioned fact that it has not been ratified by the EU as a whole nor by Spain.

[30] Magnus Mankowski, *European Commentaries on Private International Law-Brussels I bis Regulation,* edited by Otto Schmidt KG, Köln, p. 278-279 (2016).

[31] See Shevill Case.

Finally, it could also be argued that in order to examine the conduct of both the Ship itself[32] and the Spanish authorities charged with preventing the disaster the Spanish courts are in the better position to adjudicate. All of these considerations would ensure the "*sound administration of justice*" particularly in light of the inherent drawbacks of the rest of the prospective fora[33] and, in particular, the forum of the defendant's domicile.

Taking into consideration both the aforementioned conclusions extracted from the case law of the European Court and the circumstances of the case at hand we believe that the full jurisdiction of the courts where the sinking took place, in the case at hand the Spanish courts, would be wholly defensible and compatible with the principles of the European cooperation in judicial matters as we will establish next. However, it is self clear that this solution does not conclusively solve the so called "forum shopping" risk, mainly because one or all of the claimants could choose suing before the Spanish or the Greek courts, or even the French ones, and nothing in the EU law would prevent that. Of course, it goes without saying that this is not an optimal solution from neither the "*sound administration of justice*" nor the legal certainty perspectives so relevant to the liberty, security and justice space.

## VI.-Conclusions

### A. General approach

#### A. 1.-Current situation: insufficient regulation

This paper highlights a general disappointment with the new European Union instruments.

[32] Including, but not excluded to, the conduct of the crew of the ship, the state of the tanker and the decisions taken by the stakeholders.

[33] It is obvious that the Spanish courts would be in the best position possible in order to access the evidentiary material. It is also self evident that this considerable advantage would not be available to the judicial authorities of other Member States, such as the Greek ones.

First, the BIR (Recast) has not explicitly taken into account collective redress in terms of jurisdiction. Furthermore, nothing has been done to adapt procedural mechanisms.

Secondly, the Commission's Recommendation on the common principles limits its scope in a way that will make consumer collective redress even less harmonised and more complex than it is now. The Commission seems more worried about blocking unproven illegal practices than about establishing a worthwhile European Union consumer collective redress system. The choice of a non-binding instrument is a clear symptom of the lack of consensus and corporate fear of the collective mechanisms seen in other jurisdictions. For the Commission, any measures for judicial redress need to be appropriate and effective and bring balanced solutions supporting European growth, while ensuring effective access to justice.

Consequently, and as we have already been stating, the current European system of international jurisdiction and choice of law rules is far from being able to provide satisfactory answers to the questions that we have also been mentioning from the very beginning of this work[34].

Specifically, there is no corresponding provision for the situation where several plaintiffs intend to file an action against the same defendant concerning a single event or a single cause mass tort like a mass accident or a series of incidents as in a product liability case. The present system of BIR (Recast), in spite of all the recent reforms and the ECJ case law, does not foresee the legal nor procedural complications that necessarily arise from a mass harm event such as the one that we are examining.

As a consequence of the aforementioned inadequacies, and depending on jurisdiction, parallel proceedings could be initiated against the same defendant in several courts and on behalf of different groups of tort victims. Moreover, there is not a single provision in order to prevent "*forum shopping*" over the same mass harm event.

[34] Astrid Stadler, *The Commission's Recommendation on common principles of collective redress and private international law issues*, Dutch Journal on International Private Law, vol. 4, p. 483.488 (2013).

Therefore, it is necessary to initiate a broad discussion on the private international law issues now, in order to come up with a solution as soon as possible.

A.2.-Desirable scenario

High predictability is a commonly desired trait of the legal rules of jurisdiction. In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action in order to facilitate the already mentioned principle of the sound administration of justice. In fact, it is our opinion as judges that the most convenient solution would be the establishment of a single forum able to adjudicate the multiple claims arising from a mass harm event overcoming the current alternative fora. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a Member State which he could not reasonably have foreseen[35]. Moreover, in order to protect the interests of the harmonious administration of justice, enhance the effectiveness of exclusive choice-of-court agreements and avoid abusive litigation tactics, it is necessary to minimize the possibility of concurrent proceedings. This would ensure that irreconcilable judgments will not be given in different Member State or even that the potential claimants do not select the forum most amenable to their specific interests.

## B. Concrete proposal

On the one hand, the most obvious solution would be that jurisdiction in those cases might be had in the defendant's domicile if the dispute has a sufficient connection with the Member State of the court seised. In fact this solution is the one most favoured by the academia as it guarantees a fair amount legal certainty. However, we believe that this forum does present, at least sometimes, some considerable drawbacks that could, in the most common scenarios, constitute an insurmountable obstacle.

On the other hand, another solution would imply the admissibility of collective relief to be sought in the Member State where a majority of the members of the

[35] Articles 16 and 21 BIR (Recast).

collective are domiciled and/or other connecting factors to the mass harm event are present[36].

Before offering a solution to this matter it is important to state that any European approach should: (i) be capable of effectively resolving a large number of individual claims for compensation of damage, thereby promoting procedural economy; (ii) be capable of delivering legally certain and fair outcomes within a reasonable timeframe, while respecting the rights of all parties involved; (iii) provide for robust safeguards against abusive litigation; (iv) avoid any economic incentives to bring speculative claims and (v) guarantee the adequate accessibility to the evidentiary material.

Consequently, and in light of the above the principle of the sound administration of justice underpinning the European judicial cooperation area requires the following:

(i) If possible, jurisdiction over mass harm situations with consequences spanning two or more Member States should be consolidated at a singular domestic court.

(ii) This domestic judicial authority should be fully capable to hear and decide over every damage caused by the mass harm event in question, regardless of where it occurred or the damages suffered, provided that it is under the jurisdiction of a Member State of the European Union.

(iii) The jurisdiction consolidated in the aforementioned way should be granted only to the domestic court in the "better position to adjudicate" according to rules and principles clearly set.

Therefore, the objective of this work is to provide a sound and workable basis on which future ECJ case law could be developed over one singular area: jurisdiction over collective claims and, more specifically, over maritime accidents such as the one described in the case at hand. In fact, it is our conclusion, that in the case at hand the

[36] S.I. Strong, *Cross-Border Collective Redress in the European Union: Constitutional Rights in the Face of the Brussels I Regulation*, 45 Arizona State Law Journal; Legal Studies Research Paper Series, Research Paper No. 2012-19. Page 44 (2013).

Spanish courts are in the "better position to adjudicate", namely because of the following twin arguments:

(i) Proximity, and consequent greater ease to examine, the legal and factual of the issues at hand by means of the available evidentiary material and;

(ii) Overwhelming damages caused to the Spanish coastline, public and private interests, particularly compared with relatively lesser incidence that the oil spill has had on other Member States.

Having said that, our proposal, from a judicial perspective, is for a future European case law or regulation in the field of mass harm situations that would grant, to the courts of the Member State where the harmful event occurred, full jurisdiction in order to adjudicate all of the claims resulting from the same legal and factual issues.