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Nederlandse Vereniging voor Vervoerrecht

REPLY BY THE NEDERLANDSE VERENIGING VOOR VERVOERRECHT (NVV) (DUTCH TRANSPORT LAW ASSOCIATION) TO THE CMI QUESTIONNAIRE ON THE COLLISION CONVENTIONS AS DISTRIBUTED BY LETTER DATED 20 FEBRUARY 2023

1. Definitions

1.1 Vessel

The 1910 Collision Convention applies to the collision of vessels (Art. 1) but does not feature a definition of a vessel.

Should the revised Convention define "vessel"?

Netherlands:
It is believed that the absence of a definition of "vessel" in the 1910 Convention has not given rise to any problems in relation to collisions within the Dutch jurisdiction. In view of the absence of a generally accepted definition of "vessel" in international maritime law conventions and the wide divergence of domestic laws, it may not be so easy to achieve international consensus in this regard.

On the other hand, it could benefit the uniformity of collision law and certainty of law if a uniform definition of "vessel" were given. In that case, alignment with the definition of "vessel" under ColRegs 1972[1] seems desirable, although there is concern from the perspective of Dutch law that the qualification "used or capable of being used as a means of transportation on water" in Rule 3 (a) ColRegs 1972 may lead to interpretations[2] which narrow the scope of the definition of "vessel" considerably, which is considered undesirable.

If so, should the definition include all floating structures?

Netherlands:

1 Rule 3 (a) of the ColRegs 1972 reads as follows: "The word "vessel" includes every description of watercraft, including non-displacement craft and sea-planes, used or capable of being used as a means of transportation on water."

2 Reference is made to the decision of the U.S. Supreme Court in *Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013) in which it was held that a houseboat did not constitute a vessel under the (almost identical) definition of 1 U.S.C. § 3 "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

If a definition were to be included in a revised Convention, it would be preferable from the perspective of Dutch law that it would include all floating structures. The prevailing view under Dutch law is that a narrow definition of vessel is undesirable as it would leave a residual category of floating objects excluded from the scope of application of collision law and hence subject to different legal regimes (whether under general tort law or otherwise) under national laws.

Under Dutch law the definition of "vessel" is rather broad. The relevant Article 8: 1 (1) Dutch Civil Code (DCC) reads as follows in unofficial English translation:

> *1. In this Code 'vessels' are all things, other than aircraft, which, according to their construction, are destined to float and which float or have float.*

The express aim of the Dutch legislator[3] was to adopt a description which would give rise to less doubt. The description should be such that it would create few borderline cases; furthermore, it was deemed undesirable that a particular object should fall within the definition sometimes during its existence and sometimes not.]

1.2 *Ocean/Inland Navigation Vessels*

The 1910 Convention applies to collisions between sea-going vessels and between seagoing vessels and vessels of inland navigation (Art. 1), and thus not to collisions between vessels of inland navigation.

Should the revised Convention apply to any collision between vessels?

Netherlands:
In principle, it seems preferable if all collisions between vessels – whether sea-going, used for inland navigation or both – were subject to the same legal regime. This would simplify the law and benefit uniformity of law and legal certainty. Further, there is no compelling reason why the rules applicable to collisions should be dependent upon the involvement of a sea-going vessel in the collision.

Nevertheless, it is believed that to extend the scope of a revised Convention also to collisions between inland vessels may give rise to practical complications in Europe in view of the 1960 Geneva Inland Collisions Convention[4], which entered into force on 13 September 1966 and to which currently 14 states[5] are a party.

[3] M.H. Claringbould (ed.), *Parlementaire Geschiedenis Boek 8 BW*, Kluwer: Deventer 1992, p. 27 ff.

[4] Convention relating to the unification of certain rules concerning collisions in inland navigation, Geneva, 15 March 1960.

[5] Austria, Belarus, Germany, France, Hungary, Kazachstan, Montenegro, Netherlands, Poland, Romania, Russia, Serbia, Switzerland.

1.3 *Collision*

The 1910 Convention applies to collisions between vessels but does not say what a collision is.

Should the revised Convention define "collision"?

Netherlands:
Yes, a revised Convention should define "collision" because this will help to demarcate the material scope of the convention, i.e. the casualty event from which the legal relations originate to which the collision liability rules of the revised Convention apply.

Dutch law defines collision as *the touching of vessels with each other*.[6] However, the Dutch legislator has declared the rules regarding collision liability of equal application when damage has been caused (unilaterally) by a ship without there being a collision[7], e.g. where a vessel collides with the doors of a lock, damages the quayside, spreads smoke, explodes, sets the port on fire or pollutes the beaches.[8] Excluded from this extension of the collision liability regime under Dutch domestic law are civil liability claims with regard to oil pollution[9], hazardous substances[10] and wreck removal[11] which are subjected to special liability regimes.

If so, should it include cases where damage is caused to one vessel by the manoeuvre of another even though there was no physical contact between the two?

Netherlands:
Yes. As follows from the above, a revised convention should apply to cases where the manoeuvre of vessel A without physical contact:
- causes damage to vessel B;
- causes a collision between vessels B and C;
- causes vessel B to cause damage to other objects, e.g. a bridge.]

Should it include vessels engaged in a towing situation?

Netherlands:
In principle yes. It is believed to be undesirable as a matter of principle but also for practical reasons to create various carve-outs from the scope of application of a revised Convention. If the tug and/or the tow collide(s) with a third vessel the

6 Article 8:540 DCC: "de aanraking van schepen met elkaar".
7 Article 8:541 DCC: "
8 M.H. Claringbould, Parlementaire Geschiedenis Boek 8 BW, Kluwer: Deventer 1992, p. 569 ff.
9 Civil liability for oil pollution originating from an oil tanker is governed by the Wet Aansprakelijkheid Olie-Tankschepen (Liability of oil tankers Act) which is based upon CLC 1992. Oil pollution originating from the bunker tanks of a non-oil tanker is governed by Book 8, Title 6, Section 5, Articles 8:639-8:653 DCC, which is based upon the Bunkers Convention 2001.
10 Civil liability for damage caused by hazardous substances is governed by Book 8, Title 6, Section 4, Articles 8:621-8:627 DCC which is based upon the CRTD Convention of 1989.
11 Wreck and cargo removal is governed by Book 8, Title 6, Section 6, Articles 8:655-658 DCC which is based upon the Nairobi Wreck Removal Convention 2007.

rules governing collision liability should be applicable in any case. If a collision occurs between vessels involved in a towage situation, the towage contract (or possibly the salvage contract) between the tug and tow is likely to apply to the collision as well and may very well prevail over non-mandatory rules on collision liability under a revised Convention.

Should it include collisions where both vessels are owned by the same beneficial owner?

Netherlands:
Yes. There seems to be no need to make a carve-out for this particular case. Furthermore, the notion of "beneficial owner" may not be so easy to define. It is doubtful whether it is relevant in the context of collision liability since collision liability is likely to be vested either in the registered shipowner (often a single ship company) or in the party operating/in possession of the vessel such as a bareboat charterer.

Further, collisions often affect the interests of multiple other parties such as charterers, the crew, governments, other third parties etc as well. The mere fact that the ultimate beneficial owner of two vessels involved in a collision is the same is therefore insufficient reason to exclude this case from the scope of a revised convention.

Finally, reference is made to Article 12 (3) London Salvage Convention 1989 which provides that Chapter III on the Rights of Salvors shall applies "notwithstanding that the salved vessel and the vessel undertaking the salvage operations belong to the same owner."

2. Scope of Application

2.1 Reference to the Flag

The 1910 Convention applies if all vessels involved fly the flag of Contracting States (Art. 12), in whatever waters the collision occurs (Art. 1).

Should the scope of application of the revised Convention be expanded (i) to the effect that the revised Convention applies, irrespective of the involved vessels' flags, if the collision occurred within a Contracting State's internal waters, coastal sea and/or exclusive economic zone and (ii) to the effect that the revised Convention applies to any collision in any other waters if one or more of the colliding vessels flies the flag of a Contracting State?

Netherlands:
In general, an expansion of the scope of a revised Convention is believed to be desirable. The current flag-requirement in Article 12 of the 1910 Brussels Collision

Convention is unnecessarily restricted and leaves the determination of the applicable law too much to the conflict law of the court seized of the case, which – especially in case of collisions on the High Sea between vessels of different flags – often results in the application of the law of the court seized (lex fori) failing a closer connection with any other national law.

An expansion of the scope of application for example to collisions occurring on the high seas, is believed to benefit uniformity and certainty of law. However, arguably it may infringe upon the freedom of the High Seas[12] and upon the sovereignty of flag states.

An alternative way in which the scope of application of a revised convention could be expanded is to follow the examples of the London Limitation of Maritime Claims Convention (LLMC) 1976/1996 and the London Salvage Convention (LSC) 1989 which apply to limitation of liability, resp. to salvage matters whenever limitation of liability is invoked or salvage related matters arise before the court of a state party.[13]

2.2 REIO-Clause

Should the revised Convention include a REIO-Clause (Regional Economic Integration Organisation) which would in particular allow the EU to become a contracting party? This may in particular be relevant if the revised Convention features provisions on international private law (point 5 below), jurisdiction and recognition/ enforcement (points 6 and 7 below).

Netherlands:
It is believed to be desirable that the European Union can become a party to a revised Convention and therefore it is desirable that a REIO-Clause is included. If the EU does not become a party, yet EU member states such as the Netherlands do, this may give rise to the problem that as a matter of EU law, EU Regulations on Jurisdiction, Recognition and Enforcement[14] and on the applicable law in relation to non-contractual obligations[15] take precedence over the revised convention despite its worldwide scope and uniform law nature.

12 Article 87 UNCLOS.

13 See Article 2 LSC 1989: "Article 2 – Application of the Convention This Convention shall apply whenever judicial or arbitral proceedings relating to matters dealt with in this Convention are brought in a State Party." See also Article 15 (1) LLMC 1976/1996: "Chapter IV: Scope of Application Article 15 1. This Convention shall apply whenever any person referred to in Article 1 seeks to limit his liability before the Court of a State Party or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of any such State. …"

14 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels Ibis").

15 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II").

3. Liability

3.1 Fault-Based Liability

The principal underlying decision of the 1910 Convention is that the vessels' liability arising from a collision is fault-based (Art. 2(1), Art. 3 and Art. 4(1)) and that there is no strict liability.

Should fault-based liability be maintained? If not, can you provide your reasoning for abandoning fault-based liability?

Netherlands:
It is believed that "fault" as the basis for collision liability should be maintained. However, from the perspective of Dutch law, this starting point does not preclude that certain risk elements attributable to the vessel itself may be relevant as well when determining whether a collision was caused by "fault *of the vessel*". See further below under 3.2.

3.2 Fault of the Vessel

The 1910 Convention's liability concept is based on the fault of the vessel. However, the Convention does not identify the persons who must act negligently, but merely refers to "the vessel" being in fault.

Should this concept be maintained in the revised Convention, or should the revised Convention identify who needs to be at fault?

Netherlands:
It is believed that the concept of "fault of the vessel" should be maintained. There is strong support in The Netherlands for the modern interpretation given to this concept by the Hoge Raad in the *Casuele/De Toekomst*-decision.[16] According to the Hoge Raad there is fault of the vessel, if the collision damage was caused by:

(a) a fault of a person for whom the shipowner is vicariously liable pursuant to Articles 6:169-171 DCC;
(b) a fault committed within the scope of his employment by a person who has done work for the benefit of ship or cargo;
(c) the realisation of a special danger for persons or things originating from the ship not meeting the requirements that under the given circumstances may be demanded.

[16] Hoge Raad 30 November 2001, Nederlandse Jurisprudentie (NJ) 2002/143; Schip & Schade (S&S) 2002/35, [*Casuele/De Toekomst*].

Category (a) relates to persons for whose faults the shipowner under general Dutch liability law may be vicariously liable such as his employees (e.g. the master, officers and crew) and his independent subcontractors (e.g. pilots, stevedores and workers at a ship yard).

Category (b) relates to persons for whose faults the shipowner is not vicariously liable, but who have committed a fault within the scope of their employment while doing work for the benefit of ship or cargo. Such faults may also be attributed to the liable person as "fault of the vessel". Examples are where the master, officers and crew are employed by the bareboat-charterer or where the stevedores are instructed by the time charterer to load and stow the cargo on board of the ship.

Category (c) relates to defects in the vessel, whether known or unknown and whether discoverable through the exercise of due diligence to make the vessel in all respects seaworthy or not. In the case of the *Synthese/Rubens*[17] the sudden breaking of a rudder stock in its steering gear caused the vessel Rubens to collide with the Synthese on the Terneuzen canal. Although the steering gear had been repaired quite recently at a reputable ship yard when also the rudder stock was replaced at a reputable ship yard, it was held that a vessel may be considered "guilty" of a collision, when the improper action that led to the collision is caused by a defect of the vessel, regardless of whether someone could have or should have prevented the coming into being or the continued existence of this defect.

Furthermore, it is believed by some that (although not mentioned by the Hoge Raad in the *Casuele/De Toekomst*-decision[18]) a fourth category (d) of instances of fault of the vessel exists, i.e. fault of the shipowner himself, e.g. where a decision of the shipowner not to effect timely maintenance or repairs of the vessel has contributed to the causation of a collision.

3.3 Title to Sue

The 1910 Convention is silent as to who is entitled to bring an action against the liable "vessel".

Should the revised Convention identify which parties (registered shipowners, bareboat charterers, etc.) may bring suit against the liable vessel?

Netherlands:
It is believed that this is not necessary. Under Dutch law this question has so far not given rise to any difficulties. Pursuant to a general rule of Dutch private law, no party has a right of action without sufficient interest.[19]

[17] Hoge Raad 5 January 1940, NJ 1940/340 [Synthese/Rubens].
[18] Hoge Raad 30 November 2001, NJ 2002/143; S&S 2002/35, [*Casuele/De Toekomst*].
[19] Article 3:303 DCC.

3.4 Crew, Pilot etc. channelling of Negligence

The 1910 Convention does not preclude entities other than the shipowners being liable for collision damage.

Should this concept to be maintained in the revised Convention or should liability be channelled solely to the owner of the liable vessel?

Netherlands:
From the perspective of Dutch law, it is considered desirable that *collision liability* is channelled towards the registered shipowner of the vessel at fault.[20] This is beneficial to claimants who can easily establish the identity of this shipowner by reference to the ship's register whereas it may be more difficult for such claimants to establish quickly and with certainty whether the ship is operated by the registered shipowner or by another party and in the latter case also to establish the identity of the party (e.g. a bareboat charterer) who operates the vessel. For these reasons, under Dutch law collision liability is channelled to the registered owner in Article 8:544 DCC.

However, from the perspective of Dutch law such channelling of collision liability does not preclude the possibility that a claimant directs a liability claim based in "onrechtmatige daad"[21] (unlawful act), also or alternatively against the party (e.g. a crew member, a stevedore, a ship yard) who committed the fault that caused or contributed to the causation of the collision or against a party who is vicariously liable for the particular fault.

3.5 Pro Rata versus Joint Liability

The 1910 Convention liability system provides for joint liability of the involved vessels in relation to third parties' personal injury claims (Art. 4 (3)). A vessel that settles the full amount of the claim may recover from the other vessel in proportion to its share of liability (Art. 4 (3)).

The 1910 Convention does not apply to damage caused to the property of third parties not on board one of the vessels involved. For example, a collision leading to damage to a bridge. It is to be presumed that national law would apply to any claim for such damage.

However, in respect of claims to property damage on board one of the colliding vessels, the 1910 Convention provides for a pro-rata liability in proportion to the degree of fault of the vessels involved (Art. 4 (1) and (2)). This becomes relevant in cases where two or more than two vessels are involved in the collision and one

20 Article 8:544 DCC.
21 Article 6:162 DCC.

vessel seeks to recover from one or more of the other vessels, or where there is damage to property, in particular cargo, and the property owner claims from the two (or more) vessels involved.

Should the joint liability for personal injury claims of all involved vessels found to be at fault be explicitly extended to liability for third-party property damage in the revised convention? Even if not on board one of the colliding vessels? If so, what justifies your reasoning?

Netherlands:
It is believed that the existing rule of pro rata liability in proportion to the degree of fault of the vessels involved in a both-to-blame collision should be retained with regard to loss of or damage to the cargo on board of these vessels. The same applies in relation to luggage and other property of the crew, passengers and other persons on board the vessel.

However, with regard to damage caused by a collision of vessels to property of third parties that is not onboard of these vessels (e.g. a manoeuvre of vessel A causes vessel B to collide with the pillar of a bridge owned by the state) it is believed desirable to submit such other property damage to the rule of joint and several liability.

Under current Dutch domestic law, a rule to this effect already exists in Article 8:545 (1) DCC, which in translation reads as follows: "If two or more vessels have jointly caused a collision by their fault, the owners thereof shall be liable, without joint and several liability, for the damage caused to other vessels at fault and to goods on board thereof, *and they shall be jointly and severally liable for all other damage*."[22] (with added stress). This latter rule accords also with Dutch general tort law, which imposes upon joint tortfeasors a joint and several liability for damage caused to a third party.[23]]

3.6 Defects in the Vessel

Under the 1910 Convention, the vessel owner will not be liable if the collision was caused by some defect in the vessel which the owner, by applying due diligence in all respects, was unable to detect.

Should there be an exception to the effect that the vessel should be strictly liable for such defects irrespective of fault?

If so, should the revised Convention then define "defects", for which no fault is required to lead to liability?

[22] Article 8:545 (1) DCC.
[23] See Article 6:101 DCC.

Netherlands:
It is believed that the shipowner should be strictly liable if the collision was caused by defects in the vessel irrespective of fault. It is believed helpful if a revised convention would define against which standard it must be assessed whether the vessel has a defect.

It is long settled case law[24] in the Netherlands, that the concept of "fault of the vessel", a legal metaphor, is wide enough to allow defects in the vessel to be considered a "fault" of that vessel even if the exercise of due diligence in making the vessel in all respects seaworthy would not have brought the defect to the light. In its most recent formulation the Hoge Raad has defined defects which may give rise to fault of the vessel and hence collision liability (in translation) as follows: *The realisation of a special danger for persons or property created by the fact that the ship did not meet the requirements that could be expected of it in the given circumstances*.[25]

3.7 Legal Presumptions

Art. 6 (2) of the 1910 Convention provides that legal presumptions relating to fault are not applicable when it comes to determining liability under the Convention.

Should the revised Convention expressly adopt some internationally recognised presumptions, and if so, what type of presumption?

Netherlands:
It is believed that the 1910 Convention has not led to a uniform practice among the contracting states with regard to the question how in court proceedings "fault of the vessel" can be established as a matter of evidence. Although Article 6 (2) abolishes "all legal presumptions of fault in regard to liability for collision", the 1910 Convention provides no further rules of evidence that can provide guidance to the courts in contracting states.

In the Netherlands, the Dutch Supreme Court has held repeatedly that fault of the vessel is deemed to exist if the vessel navigates wrongly due to a cause located on board of that vessel. A vessel navigates wrongly if it navigates in a manner different from what was required under the circumstances in view of the applicable regulations and the requirements of good seamanship.[26]

[24] Hoge Raad 28 June 1935, *NJ* 1936/7 [*Drechtstroom/Errato*]; Hoge Raad 5 January 1940, *NJ* 1940/340 [*Synthese/Rubens*]; Hoge Raad 30 November 2001, NJ 2002/143; S&S 2002/35, [*Casuele/De Toekomst*].

[25] Hoge Raad 30 November 2001, NJ 2002/143; S&S 2002/35, [*Casuele/De Toekomst*], No. 3.3.2.

[26] Hoge Raad 28 June 1935, *NJ* 1936/7 [*Drechtstroom/Errato*]: "dat het schip anders heeft gevaren dan onder de gegeven omstandigheden, gelet op de geldende reglementen en de eischen van goede zeemanschap, was geboden." See also: HR 9 November 1962, NJ 1962/311 [*Antje/Nieuwe Zorg*]; Hoge Raad 26 June 1987, S&S 1988/2; NJ 1988/74 [*Olau Brittania/Pieniny II*], No. 3.3.2.

Furthermore, it is noteworthy that the Dutch legislator has adopted in a case falling outside of the scope of the 1910 Convention a presumption of fault akin to the "Oregon Rule[27]". The relevant Article 8:546 DCC provides in translation as follows: *There are no legal presumptions of fault with respect to the liability for collision; the vessel which runs into another thing, not being a vessel, if necessary adequately lit, fixed or fastened at the appropriate place, shall be liable for the damage unless the collision proves not to have been caused by the fault of the vessel.*

3.8 Recoverable Damages

The 1910 Convention does not address what damages are recoverable. The Lisbon Rules 1987, issued by CMI, (https://comitemaritime.org/work/collision/), include detailed principles as to the recoverable damages and their assessment in typical collision cases.

Should the revised Convention define recoverable damages?

If so, should the Lisbon Rules 1987 on recoverable damages in collision cases be made part of the revised Convention?

Netherlands:
From the perspective of Dutch law, the question of what damages are recoverable in case of a collision has not given rise to problems in collision practice. Under Dutch law, the general law of obligations[28] distinguishes between the *founding* of the liability and the *extent* of the liability. For the former, in principle a causal connection (*conditio sine qua non*) is required as a minimum, whereas for the latter it must be determined which consequences of the event that caused the damage can be attributed to the liable person. This is a question of law, to be determined based on objective factors such as the nature of the liability, the nature of the damage and the degree of objective foreseeability etc.

In view of the above, it is believed that the necessity or desirability to define recoverable damages in a revised convention or to incorporate the Lisbon Rules 1987 has not sufficiently been established.

[27] *The Oregon*, 158 U.S. 186 (1895).

[28] See Article 6:98 DCC which in office translation reads as follows: Article 6:98 *Causal relation and attribution Only damage that is connected in such a way to the event that made the debtor liable, that it, in regard of the nature of his liability and of the damage caused, can be attributed to him as a consequence of this event, is eligible for compensation.*

4. Mandatory Insurance

A number of international liability conventions, including oil pollution conventions, provide that the vessel owner must maintain insurance which covers claims under the respective conventions. These conventions often have a public policy aim and may not be an appropriate model for the 1910 Convention. In Europe, EU-Directive 2009/20 provides that the vessel owner must maintain insurance that covers claims up to the limitation amounts of the 1996 LLMC relevant for the vessel. The Directive does not provide for direct action against the vessel's liability insurers.

Should the revised Convention provide for mandatory insurance? If so, what justifies this change in your view?

Netherlands:
From the perspective of Dutch law, it is believed that there is no compelling reason to include a mandatory liability insurance requirement in a revised convention. Some fear also that this would lead to an unnecessary increase in insurance premiums.

As an EU member State, the Netherlands has given effect to EU Directive 2009/20/EC by adopting the "Wet Verzekering Zeeschepen" (*Act on the Insurance of Sea-going vessels*) of 27 October 2011.

Furthermore, the Netherlands is a contracting state to the special maritime liability conventions, CLC 1992, Bunkers 2001 and Wreck Removal Convention 2007 which impose a mandatory insurance obligation upon shipowners. The relevant provisions have also been incorporated into Dutch legislation in Article 11 "Wet Aansprakelijkheid Olie-Tankschepen" (WAOT or *Act on the liability of oil tankers*) of 11 June 1975 (oil pollution); Article 8:645 DCC (Bunkers) and Article 26 (1) "Wet Bestrijding Maritieme Ongevallen" (*Act on combatting Maritime Accidents) of 14 October 2015 (Wreck removal).* [29]

4.1 Direct Actions and Defences

If mandatory collision insurance is to be introduced, should the revised Convention provide for direct actions by the damaged parties against the liability insurers of the liable vessel? If so, what justifies this change in your view?

If so, how would this be achieved given the usual sharing of liability cover between the vessel's hull and machinery and P&I insurers?

[29] Currently, a legislative proposal to approve and implement the HNS Convention 1996, as amended by the protocols of 2010 has been submitted to the Dutch Parliament. Article 12 (1) of the HNS 1996/2010 imposes a compulsory insurance obligation upon the shipowner.

If it were to be achieved, should the insurers benefit from any defence they might have had vis-à-vis their insured related to their policy? Would this include the bankruptcy or winding up of the vessel owner and pay-to-be-paid clauses?

Netherlands:
From the perspective of Dutch law, it is believed that there is no compelling reason to include a direct action in a revised convention. Some fear that this would also lead to an unnecessary increase in insurance premiums. Furthermore, it is believed that in most cases at least the first tier of collision liability cover will be provided by H&M insurers. As H&M insurance is commonly provided on a subscription market that operates internationally, it is believed to be impractical if a direct action in relation to collision liability claims had to be started against a huge number of co-insurers.
The Netherlands is a contracting state to the special maritime liability conventions, CLC 1992, Bunkers 2001 and Wreck Removal Convention 2007 which provide for a direct action against the liability insurers of the shipowners. The relevant provisions have also been incorporated into Dutch legislation in Article 7 "Wet Aansprakelijkheid Olie-Tankschepen" (WAOT or Act on the liability of oil tankers) of 11 June 1975 (Oil pollution); Article 8:644 DCC (Bunkers) and Article 8:658 DCC (wreck removal).[30]

5. Private International Law

The 1910 Convention provides for a unified liability regime covering claims arising from the collision. Any further issues, e.g., the recoverable damages, the identity of the liable parties, title to sue etc., are left to the law otherwise applicable, determined by international private law principles. These principles normally consider each claim separately, to the effect that a claim by a first vessel against a second may be decided on different rules of law than those applicable in the claim by the second vessel against the first, even though both claims concern the same collision.

Should a revised Convention include international private law rules on the law otherwise applicable to all claims, seeking to identify one law that is relevant?

Netherlands:
To the extent that the said further issues are not dealt with uniformly in a revised Convention, it is believed that a supplementary conflict rule may indeed be useful. However, the courts of EU member states such as the Netherlands are bound to apply the conflict rules of the Rome II Regulation[31] to aspects of a collision claim

[30] Currently, a legislative proposal to approve and implement the HNS Convention 1996, as amended by the protocols of 2010 has been submitted to the Dutch Parliament. Article 12 (8) of the HNS 1996/2010 grants the injured party a direct action.

[31] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law

which fall outside the scope of application of the 1910 Brussels Convention. The relevant conflict rules in the Rome II Regulation are the articles 4 and 14, respectively 15 of the Rome II Regulation, which for easy reference read as follows:

"CHAPTER II – TORTS/DELICTS
Article 4 – General rule
1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be 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 irrespective of the country or countries in which the indirect consequences of that event occur.
2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.
[…]

"CHAPTER IV – FREEDOM OF CHOICE
Article 14 – Freedom of choice
1. The parties may agree to submit non-contractual obligations to the law of their choice:
   (a) by an agreement entered into after the event giving rise to the damage occurred; or
   (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.
2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.
3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

CHAPTER V – COMMON RULES
Article 15 – Scope of the law applicable
The law applicable to non-contractual obligations under this Regulation shall govern in particular:
(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
(b) the grounds for exemption from liability, any limitation of liability and any

applicable to non-contractual obligations (Rome II).

division of liability;

(c) the existence, the nature and the assessment of damage or the remedy claimed;

(d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;

(e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;

(f) persons entitled to compensation for damage sustained personally;

(g) liability for the acts of another person;

(h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation."

Netherlands:

Unfortunately, the conflict rules of the Rome II Regulation do not always result in an applicable law to a collision. More specifically, if the collision occurs on the high seas, and therefore the place of occurrence of the damage is not located within the territorial waters of a country, the general rule of Article 4 (1) Rome II cannot be applied.

If in that case the party that caused the damage and the injured party do not have their normal residence in the same country, the conflict rule of Article 4 (2) Rome II cannot be applied either. In such a case it might also not be possible to establish a manifestly closer connection with a particular country so that the conflict rule of Article 4 (3) Rome II cannot be applied.

Finally, if in such a case the parties cannot agree on a choice of law[32], the system of conflict rules in Rome II does not result in an applicable law. For this particular situation, the Dutch legislator has adopted a supplementary conflict rule in Article 10:164 DCC[33] which refers to the law of the court seized of the case (*lex fori*). An example from case law in which the above approach is applied by the Court of Rotterdam offers the *Loïc-Lucas/Ambassadeur*-decision.[34]

If so, should the revised Convention adopt the choice of law provisions of articles 4 and 5 of CMI's 1977 Draft International Convention for the Unification of certain rules concerning civil jurisdiction, choice of law, and recognition and enforcement of judgements in matters of collision (the "CMI 1977 Rio Draft Convention"), published in the CMI Yearbook 1977 Part I, p. 22, https://comitemaritime.org/publications-documents/cmi-yearbook/?

32 As permitted under Article 14 Rome II.

33 In office translation, Article 10:164 DCC reads as follows: *Liability for collision (and damage caused by a seagoing ship) To the extent that the liability for a collision at high sea is not covered by the Rome II Regulation, it shall be governed by the law of the State where the relevant legal claim (right of action) is filed in court. The first sentence applies also if the damage is caused by a seagoing ship without any collision taking place.*

34 Loïc-Lucas/Ambassadeur – Court of Rotterdam 22 April 2020, ECLI:NL:RBROT:2020:3746, Schip & Schade (S&S) 2022/90 of which an office translation is attached.

Netherlands:
With the adoption of the Rome II Regulation, as a matter of EU law, the power to negotiate and adopt conflict law rules for non-contractual obligations (such as claims in collision) has been transferred from individual member states to the European Union as a whole.

From the perspective of Dutch law, it is believed that the conflict rules in Articles 4 and 5 of the CMI 1977 Rio Draft Convention provide useful inspiration for possible conflict rules in a revised convention. However, their current formulation is considered inappropriate primarily because Article 4 of the CMI 1977 Rio Draft Convention does not recognize the principle of party autonomy or the freedom of the parties to choose the applicable law to the collision claim. This is contrary to the fundamental principle underlying article 14 Rome II, as well as recital 31 of the preamble to Rome II[35] and is considered undesirable.

On the other hand, Article 4 of the CMI 1977 Rio Draft Convention does provide a desirable residual solution – i.e. application of the law of the court seized of the case (*lex fori*) – to the abovementioned problem that the Rome II may not provide a conflict rule in certain cases where a collision occurs on the high seas. For easy reference the conflict rules in articles 4 and 5 of the CMI 1977 Rio Draft Convention are reproduced below.

Articles 4 and 5 CMI 1977 Rio Draft Convention
"**TITLE II CHOICE OF LAW**
Article 4
When a collision occurs in the internal waters or territorial sea of a State the law of that State shall apply, and when a collision occurs on the high seas the law of the Court seized of the case shall apply, except that when all of the vessels involved are registered or otherwise documented in, or, if not registered or otherwise documented, owned in the same State, the law of that State shall apply, whether the collision occurs in the internal waters or territorial sea of a State or on the high seas.
Provided, however, that in cases involving vessels registered or otherwise documented in, or, if not registered or otherwise documented, owned in different States, the Court seized of the case shall give effect to any Convention which has been adopted by all of such States.
Article 5
The law referred to in Article 4 shall be the law governing :
(1) the basis of liability;
(2) the grounds for exemption from liability and any division of liability;
(3) the kinds of damage for which compensation may be due;
(4) the quantum of damages;
(5) the persons who may claim damages in their own right;
(6) the liability of a principal for the acts or omissions of his agent, or of an employer for the acts or omissions of his employee, or of a vessel or her

[35] Recital 31 to the Rome II Regulation reads as follows: "(31) To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation.
This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice.

owner or operator for the acts or omissions of a pilot;
(7) the question whether a right to damages may be assigned or inherited;
(8) the burden of proof and presumptions. […]"

6. Jurisdiction

The 1910 Convention does not include any provisions as to jurisdiction.
Should a revised Convention provide for jurisdiction?

Netherlands:
From the perspective of Dutch law, the absence of a jurisdiction provision in the 1910 Convention has not given rise to any problems. The Netherlands is a member state of the European Union and thus bound to the Brussels Ibis Regulation[36]. Furthermore, the Netherlands is a party to the 2005 Revised Lugano Convention[37], the 1952 Arrest Convention[38] and has supplementary statutory provisions on civil jurisdiction in its Code of Civil Procedure.

If provisions concerning jurisdiction are to be included in a revised Convention, as a matter of EU law the power to negotiate such provisions is vested in the European Union as a whole, not in the individual EU member states. (See above under 5).

If so, should the jurisdiction be based on the International Convention on certain rules concerning civil jurisdiction in matters of collision, 1952 or on the CMI 1977 Rio Draft Convention?

The CMI 1977 Rio Draft Convention allowed for jurisdiction:
a) where the defendant has his habitual residence or domicile, or principal place of business;
b) in the internal waters or territorial sea of which the collision occurred;
c) where a vessel involved in the collision (other than the plaintiff's own vessel) or a vessel under the same ownership lawfully subject to arrest, has been arrested or security has been provided to avoid arrest on account of the collision;
d) where the defendant has property subject to attachment under the law of that State and such property has been attached or security has been provided to avoid attachment on account of the collision; or
e) where a limitation fund has been properly constituted by the defendant in accordance with the law of that State on account of the collision.

Netherlands:
From the perspective of Dutch law, the following jurisdiction grounds in the CMI 1977 Rio Draft Convention are in line with jurisdiction grounds currently available

36 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
37 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Lugano dated 21 December 2007.
38 International Convention relating to the arrest of sea-going ships, Brussels, May 10, 1952.

in case of collision claims:

- Ground (a) CMI 1977 Rio Draft Convention concords with Article 4 (1) Brussels Ibis and Article 2 Dutch Code of Civil Procedure.
- Ground (b) CMI 1977 Rio Draft Convention concords with Article 7 (2) Brussels Ibis and Article 6 (e) Dutch Code of Civil Procedure.
- Ground (c) CMI 1977 Rio Draft Convention concords with Article 7 (1) (d) 1952 Arrest Convention and to some extent with Article 767 Dutch Code of Civil Procedure.[39]

The jurisdiction ground (d) CMI 1977 Rio Draft Convention has no counterpart in the jurisdiction grounds currently available within the Netherlands. It is believed that ground (d) CMI 1977 Rio Draft Convention should be abolished.

It is unclear where jurisdiction ground (e) in the CMI Questionnaire originates from. It is in any case not included in Article 2 CMI 1977 Rio Draft Convention. However, it is believed that such an additional jurisdiction ground of the court where limitation proceedings are pending, is desirable.

Despite the words "Unless the parties otherwise agree" in Article 2 (1) CMI 1977 Rio Draft Convention, it is believed to be an omission in the CMI 1977 Rio Draft Convention that it does not state with greater emphasis and in more detail that parties may agree to submit the collision claim to the jurisdiction of a particular court of their choice or to arbitration. Such a jurisdiction ground would concord with Article 25 Brussels Ibis, Article 7 (3) 1952 Arrest Convention and Article 8 Dutch Code of Civil Procedure.

7. Recognition and Enforcement

Neither the 1910 nor the 1952 Convention include regulations on the recognition and enforcement of judgments in collision matters. The CMI 1977 Rio Draft Convention provided that State Parties would recognize judgments from other State Parties.

Should such provisions be adopted in the revised Convention, e.g., to the effect that judgments in collision matters rendered by the court of one Contracting State may be enforced in another Contracting State?

Netherlands:
On this issue, views are divided. It is believed by the majority that such provisions on recognition and enforcement of judgments in collision matters are useful. From the perspective of Dutch law, the Brussels Ibis Regulation, the 2007 Revised

[39] Yet, subject to the precondition that there exists no other way to obtain a title that is enforceable in the Netherlands.

Lugano Convention and the 2019 Hague Convention[40] already provide a framework for such recognition and enforcement, but it is believed that the inclusion of recognition and enforcement provisions will contribute to the finality of decisions and legal certainty and will favour the worldwide enforcement of collision judgments. The minority view on the other hand, is concerned about the dangers involved in automatic recognition and enforcement of judgments from courts in contracting states and worries that this may lead to instances of abuse of law. The minority view prefers to base recognition and enforcement on the principle of *comitas gentium* or *international comity*.

8. Autonomous and Unmanned Ships

Maritime Automated Surface Ships are coming. It is not yet clear whether this will require amendments to several conventions or the creation of a single MASS convention.

Should the revised Convention stipulate that it applies to any vessel whether manned or autonomous or is it too early to consider including autonomous vessels?

Netherlands:
It is unanimously believed that a revised Convention should apply to any vessel whether manned or autonomous.

If autonomous vessels should be included, should the revised Convention include specific rules for collisions involving autonomous ships?

Netherlands:
In the light of the technical developments leading to the introduction of autonomous vessels, it is believed that a civil liability system based solely upon the "fault" of certain persons that is attributed as "fault of the vessel" to the liable person in collision is not future-proof.

In particular, it needs to be explored if risk elements (in particular with regard to defects in the vessel that contribute to the causation of the collision) and a reversal of the burden of proof (in case of faulty navigation of the vessel) may be expressly introduced in a revised convention.

From the perspective of Dutch law, it is believed that such changes should apply to collisions in general and not just to collisions involving autonomous vessels, but clearly such rules would be particularly relevant in relation to autonomous vessels.

[40] Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

9. Conclusions

In light of the above questions, do the revisions to the 1910 Convention which your association supports justify the amendment of the Convention at all, or does the risk of creating a new convention which might not be as universally adopted as the 1910 Convention lead your association to the overall conclusion that the Convention should remain as it is at present?

Netherlands

From the perspective of Dutch law, the question whether the proposed revisions justify amendment of the 1910 Convention or whether the current level of uniformity achieved by the 1910 Convention should not be placed at risk, depends ultimately on the degree of consensus that can be achieved internationally about the main substantive issues. In other words, it still too early to tell. However, in the light of the developments towards autonomous shipping it is believed that the possible revision of the Collision Convention merits further study, discussion and review.

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