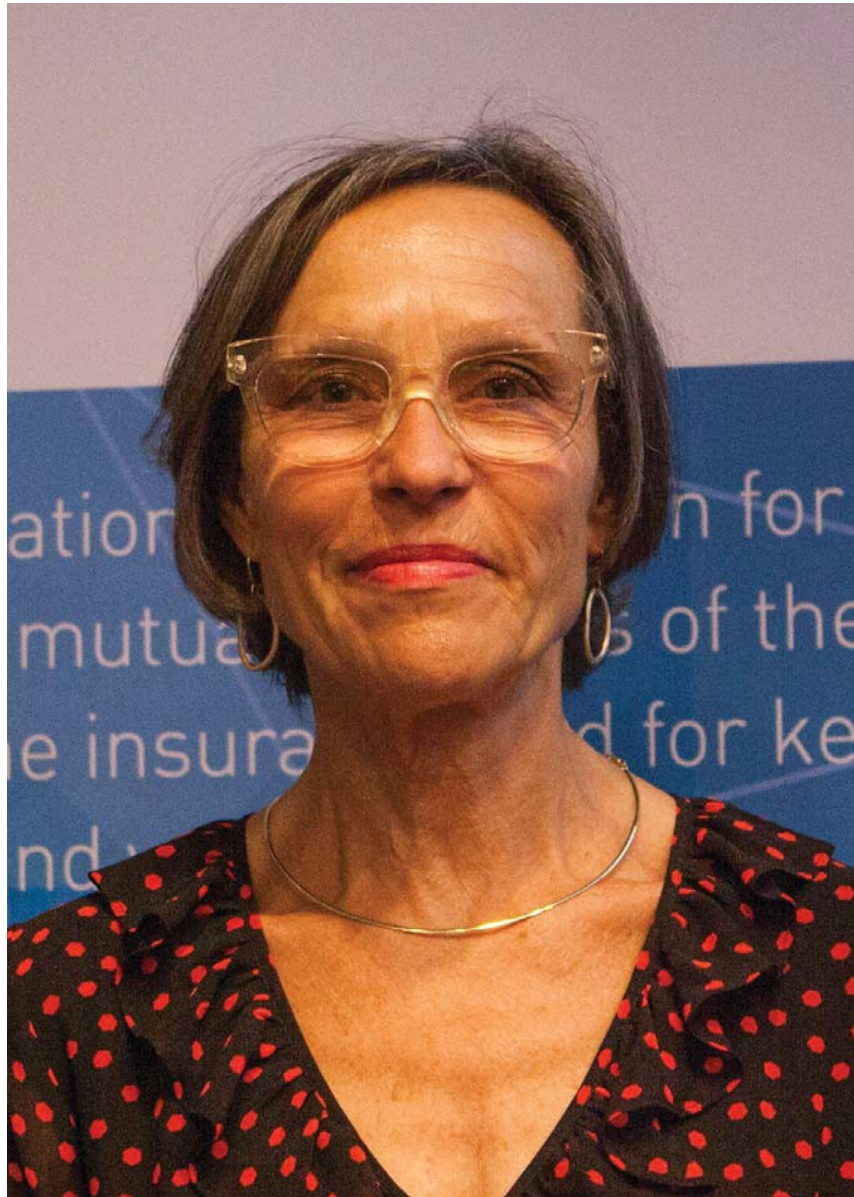


Festschrift Resi Hacksteiner

A Voyage Through the Law of Inland Shipping

**F rank Smeele, Kr ijn Haak, Mar t i n F isher, Wi llem Spr enger and F rank
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Liability for incidents with dangerous goods originating from inland vessels

Frank Smeele*

1 Introduction

In her long and distinguished career at the helm of the IVR¹ and the EBU,² Rési Hacksteiner has devoted much of her time and energy to the process of unifying inland navigation law.³ At least in Europe, the successful adoption and implementation of multiple uniform law instruments both in public and private law matters, is a characteristic feature of inland navigation law.

It all started with the Mannheim Act on the Navigation of the Rhine of 17 October 1868, an early example of an international convention aiming to create a level playing field for inland vessels operating on this international river and its tributaries. The Mannheim Act established the Central Commission for the Navigation of the Rhine (CCR) in Strasbourg, a supranational governing and judiciary body for Rhine Navigation. It further confirmed and protected the freedom of navigation on the Rhine and established the principle of non-discrimination.

In the 150 years that followed, many more uniform law instruments were created with regard to inland navigation.⁴ In the area of private law there are a number of conventions that have relevance for the subject matter of this contribution such as the Geneva Collisions

* Professor of Commercial Law, Erasmus School of Law, Rotterdam. The author thanks Prof. Dr. Ingo Maurer and Dr. Julia Hörnig, for their assistance with regard to certain aspects of German law. Needless to say, any remaining mistakes are for the sole account of the author.

1 International Association for the representation of the mutual interests of the inland shipping and the insurance and for keeping the register of inland vessels in Europe (IVR), see: www.ivr-eu.com/.

2 European Barge Union, see: www.ebu-uenf.org/.

3 This is also evident in her work as editor of the *Travaux préparatoires des Budapesters Übereinkommens über den Vertrag über die Güterbeförderung in der Binnenschifffahrt (CMNI)*, Zutphen, 2014.

4 For an overview: www.ccr-zkr.org/13020300-nl.html and: www.ivr-eu.com/expertises/juridisch and De Boer (ed.), *International Transport Treaties* (looseleaf).

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Convention of 1960,⁵ the Strasbourg Limitation Conventions (CLNI) of 1988⁶ and of 2012⁷ and Budapest Convention (CMNI) of 2001.⁸

However, not all adopted conventions managed to obtain (sufficient) approval from contracting states to enter into force. Notably in the area of non-contractual, civil or other liability for damage caused by dangerous goods during transport, no international convention has entered into force so far.⁹ This is not for want of trying since already in 1989 CRTD¹⁰ was adopted for carriage of dangerous goods by road, rail and inland waters, whereas for sea carriage in 1996 HNS¹¹ was adopted and relaunched in amended version in 2010,¹² but so far all to no avail. CRTD 1989, HNS 1996 or HNS 2010 have not or not yet entered into force.

2 Scope of this contribution

The aim of this contribution is to explore the likely legal implications for the various parties involved if a serious incident with an inland vessel carrying a dangerous cargo were to

5 Convention relating to the unification of certain rules concerning collisions in inland navigation, Geneva, 15 March 1960, entry into force 13 September 1966.

6 Convention on the limitation of liability of owners of inland navigation vessels (CLNI 1988), Strasbourg 4 November 1988, entry into force 1 September 1997.

7 Convention on the Limitation of Liability in Inland Navigation (CLNI 2012), Strasbourg, 27 September 2012, entry into force 1 July 2019.

8 Convention on the contract for the carriage of goods by inland waterway (CMNI), Budapest 22 June 2001, entry into force 1 April 2005.

9 Cf. Anne Kaiser, *Zur außervertraglicher Haftung für Gefahrguttransporte zu Lande, zu Wasser und mit Luftfahrzeugen*, diss. Göttingen, Universitätsverlag Göttingen, 2010, p. 173.

10 Convention on Civil Liability for damage caused during carriage of dangerous goods by road, rail and inland navigation vessels (CRTD 1989), Geneva, 10 October 1989. CRTD 1989 with only two signatory parties and only one state (Liberia) that has accepted it, has not entered into force.

11 International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS 1996), London, 3 May 1996. HNS 1996 has had 14 ratifications, representing 14,19% of the world's tonnage.

12 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS 2010), London 30 April 2010. HNS 2010 has five ratifications representing only 3,56% of the world's tonnage and has not (yet) entered into force.

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occur, e.g. an explosion¹³ of the dangerous substance or a spillage¹⁴ thereof from an inland vessel somewhere on the river Rhine, perhaps in Germany or the Netherlands or near the border between these countries. However, regulatory aspects of transport of dangerous goods by inland waterways¹⁵ and the classification of dangerous goods¹⁶ falls outside the scope of this contribution.

The incident may have been caused by a collision with another inland vessel or the inland vessel unilaterally colliding with a bridge pillar or the doors of a lock. Furthermore it is presumed that the chemical substance is of a very toxic, explosive and flammable nature and thus very dangerous to human and animal life even in smaller doses as well as a threat to the environment if spilled from an inland vessel. The incident causes death and serious injuries to persons both on board the vessels and in the immediate vicinity of the incident, as well as environmental damage and substantial clean-up costs. Finally, both the local authorities and the manufacturer of the dangerous are obliged to order extensive preventive measures to be taken in order to contain the polluted surface waters and to prevent the pollutant from flowing downriver and from spreading all over the Rhinedelta.¹⁷

13 Some of the most notorious shipping accidents involved the transportation of dangerous cargoes. Two examples must suffice here. The disaster known as the ‘Leidsche Kruitschip’ occurred on 12 January 1807 when the inland vessel ‘Delfs Welvaaren’ (Sic.) carrying 37 tons of gunpowder exploded at the Steenschuur Canal in Leyden. The disaster caused devastation in the Leyden city centre as well as the death of 155 people and injured 2,000 more.

The Halifax explosion of 6 December 1917 resulted from a collision between the French merchant vessel ‘Mont Blanc’ carrying high explosives and the Norwegian steamship ‘Imo’. The explosion that followed devastated the Richmond district in Halifax, Canada and killed 2,000 people and injured 9,000 more.

14 An example is offered by the capsizing on 13 January 2011 of the TMS Waldhof on the Central Rhine (553.75 km mark) which resulted in the loss of life of two crew members (a boatsman and a barge master) and personal injuries of two more crew members, as well as the spillage of a quantity of between 343 and 523.9 tonnes of sulphuric acid into the Rhine. Until the salvage of capsized Waldhof was completed on 14 February 2011, the river Rhine was wholly or partially blocked for shipping. For further details see: Wasser- und Schifffahrtsverwaltung des Bundes, Bericht über den Ablauf und die Ursachen der Havarie des Tankmotorschiffes ‘Waldhof’ am 13. Januar 2011 auf dem Mittelrhein (Rhein-km 553,75), dated 8 January 2013, S-312.4/016. Accessible (also with a Summary in English) at: www.elwis.de/DE/Service/TMS-Waldhof/TMS-Waldhof-node.html, accessed on 14 October 2019. See also: Appeal Chamber of the Central Commission for Navigation on the Rhine 18 March 2013, Case No. 473 Z – 1/13, *Schip & Schade* (S&S) 2013/71, [Waldhof].

15 See about this: Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods and the European Agreement concerning the International Carriage of Dangerous Goods by Inland Waterways (ADN).

16 Volume II of ADN deals with the classification of dangerous goods.

17 This imaginary scenario is loosely inspired by the facts of a railway incident which gave rise to Court of Appeal The Hague 30 April 2019, S&S 2019/89, ECLI:NL:GHDHA:2019:1021. On Saturday 4 May 2013 at about 01:58 hours a freight train derailed between Schellebelle and Wetteren near Ghent in Belgium. The freight train, with destination Hoek-Terneuzen (Netherlands), consisted of an assembly of eighteen wagons headed by two locomotives of DB Schenker NL. The five tank wagons up front contained Acrylonitril as produced by DSM, a flammable, toxic substance. Each wagon contained about 64 mt. During the derailling

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Obviously the above incident can give rise to a multitude of liability claims for a variety of heads of damage against various possibly liable parties. One of the first questions to arise is which court(s) have jurisdiction to hear these claims (§ 3) and whether it is possible in the interest of a swift and sound administration of justice to concentrate or consolidate these proceedings before a single court. The next issue that needs to be resolved is to determine the applicable law(s) to the various liability claims (§ 4).

After this, the alternative grounds upon which civil and other liability for the dangerous goods incident may be based are looked into (§ 5). This is followed by a brief discussion of the possibility of limitation of liability in case of an incident with dangerous goods originating from an inland vessel (§ 6). This contribution concludes with some final observations (in § 7).

As will become evident below, the above dangerous substances incident gives rise to a range of legal questions which are governed by a variety of international legal instruments as well as national laws. In the latter case, the author chooses to limit the discussion to comparisons between German and Dutch law.

3 Jurisdiction

Under Brussels-Ibis¹⁸ the claimant has a range of options for bringing civil liability claims before the court of a Member State. These include firstly the courts of the place where the defendant is domiciled¹⁹ or where a co-defendant is domiciled.²⁰ Next, the courts of the *place where the harmful event occurred or may occur* have jurisdiction,²¹ which notion

three of the wagons started to leak, causing the release of toxic gas clouds and acrylonitrile to pour out of the wagons and on to the ground and in the canal along the rail track. Also there was fire, explosions and the danger thereof. Havoc on and around the rail track with substantial damage resulted. Due to the high concentrations of acrylonitrile about two thousand people in the wider area were evacuated. Many reported to hospital. One person died after inhaling toxic fumes.

18 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).

19 In relation to a company or other legal person this may be the place where it has its (a) statutory seat; (b) central administration; or (c) principal place of business (Article 63 Brussels-Ibis). If the defendant is not domiciled in an EU member state, the Brussels-Ibis Regulation is not applicable (and the jurisdiction of courts in EU member states is determined by reference to their national laws (Article 4 (2) Brussels-Ibis).

20 Article 8 (1) Brussels-Ibis.

21 Article 7 (2) Brussels-Ibis.

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covers both where the harmful event that caused the damage took place, as where the damage occurred.²²

Furthermore, liability claims under a contract of carriage may be brought also in another EU Member State in the courts for the place of performance of the obligation in question.²³ Further still, the parties (or some of them) may agree or have agreed to confer exclusive jurisdiction with regard to their dispute upon a court in a member state.²⁴ Finally, in many jurisdictions the law of civil procedure allows the liable party to commence negative declaratory proceedings against a party who suffered a loss e.g. before the courts in the place of domicile of that injured party.

The above overview of jurisdiction rules under Brussels-Ibis implies that multiple courts (may) have jurisdiction in relation to claims arising from the above dangerous goods incident. The main defendant is likely to be the owner of the inland vessel, a limited company with a statutory seat in Luxembourg, but with central administration and principal place of business in France. Dependent upon what caused the dangerous goods incident other parties may face civil liability claims as well, such as the managers, the operators or the charterers of the inland vessel, individual crew members, a ship yard where maintenance and repairs of the inland vessel were recently effected, the classification society, salvors, each with their own place of domicile, which may provide courts with grounds to accept jurisdiction.

Furthermore, a spillage event on the river Rhine (the harmful event) may have taken place in Germany and yet the resulting damage may have occurred on the Dutch side of the border. Finally, the various who suffered damage all have their individual place of domicile, where possibly negative declaratory proceedings may be brought.

It is regrettable that the Brussels-Ibis Regulation does not provide for a procedural mechanism that allows for jurisdiction with regard to all claims originating from a major

22 This follows from a long standing case law of the European Court of Justice (ECJ) since its decision in *Handelskwekerij G.J. Bier BV v. Mines de Potasse d'Alsace SA*, (Case 21/76), [1976] ECR 1735, NJ 1977/494. For further case references see: Magnus/Mankowski/Mankowski, *European Commentaries on Private International Law ECPIL*, Vol. I, *Brussels Ibis Regulation*, 2016, p. 276, footnote 1364.

23 Article 7 (1) (a) Brussels-Ibis. In Article 7 (1)(b) it is clarified that in case of provision of services (such as transport of goods) the place of performance of the obligation in question means the place in a Member State where, under the contract the services were provided or should have been provided. It follows from the ECJ's decision in: *Peter Rehder v. Baltic Air Corporation* (Case C-204/08) [2009] ECR I-6073, that in case of a contract of carriage both the place of departure and the place of delivery provide an alternative jurisdiction at the discretion of the claimant. See more extensively: Magnus/Mankowski/Mankowski, *ECPIL*, Vol. I, *Brussels Ibis Regulation*, 2016, p. 240 ff., Nos. 186 ff.

24 Article 25 Brussels-Ibis.

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casualty to be concentrated before a single court with exclusive jurisdiction. Neither is there a mechanism under Brussels-Ibis to consolidate pending proceedings regarding claims from a major casualty before a single court.

This is a major shortcoming since it lies in the nature of accidents involving dangerous substances that these may result in numerous court proceedings against multiple parties being instituted before multiple courts in various jurisdictions. It seems self-evident that in such a case concentration of jurisdiction or consolidation of court proceedings before a single court is needed to ensure sound and expeditious administration of justice, in particular the fair and equal treatment of both claimants and defendants and the need to complete court proceedings and provide compensation to victims within a reasonable time period.

An interesting (maritime) example²⁵ is offered by the massive litigation which followed the blow-out on 20 April 2010 of the (off-shore oil rig) 'Deepwater Horizon' in the Gulf of Mexico, which resulted in the largest oil spill in United States **Waters**. Reportedly over 100,000 individual writs of summons were issued against multiple defendant parties before multiple courts spread out over several federal and state jurisdictions. Reportedly consolidation of court proceedings before the U.S. District Court for the Eastern District of Louisiana was achieved to a certain extent with the help of U.S. Federal Admiralty law.

It may be observed further that the maritime pollution conventions CLC 1992, Bunkers 2001,²⁶ and HNS 2010²⁷ as well as the failed inland convention CRTD 1989 Convention do provide for an exclusive jurisdiction ground in relation to liability claims for the compensation of qualifying damage.²⁸ The said maritime conventions essentially provide the

²⁵ Based upon details found in a Wikipedia entry: en.wikipedia.org/wiki/Deepwater_Horizon_litigation.

²⁶ Convention on Civil Liability for Oil Pollution Damage, London 27 November 1992 (CLC 1992) and Convention on Civil Liability for Bunker Oil Pollution Damage, London 23 March 2001 (Bunkers 2001).

²⁷ International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS 2010), London 30 April 2010.

²⁸ CLC 1992 and Bunkers 2001 use the term 'pollution damage' (as defined in Article I (6) and (7) CLC, respectively Article 1 (9) and (7) Bunkers 2001) to qualify the liability claims to which it applies. HNS 2010 uses the terms 'hazardous and noxious substances' (Article 1 (5) HNS 2010) and 'damage' (Article 1 (6) and (7) HNS 2010) for this purpose. CRTD 1989 uses the terms 'dangerous goods' (Article 1 (9) CRTD 1989) and 'damage' (Article 1 (10) and (11) CRTD 1989).

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same jurisdiction rule,²⁹ i.e. the exclusive jurisdiction of the court of the contracting state of the place where the damage occurred:³⁰

‘Where an incident has caused pollution damage in the territory, including the territorial sea or an area referred to in Article II, of one or more Contracting States or preventive measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea or area, actions for compensation may only be brought in the Courts of any such Contracting State or States. Reasonable notice of any such action shall be given to the defendant.’

Since a maritime pollution incident may easily result in qualifying damage occurring in more than one contracting state simultaneously, the said jurisdiction rule does not achieve the desired exclusive jurisdiction of a single court in all cases. Nevertheless the said rule is much to be preferred over that of Article 19 (1) CRTD 1989 which, rather than concentrating exclusive jurisdiction with a single court, provides four alternative jurisdiction grounds³¹ upon which courts in contracting states could base their jurisdiction. Furthermore, the said jurisdiction rule in the maritime pollution conventions is insufficient to achieve the consolidation of pending court proceedings before a single court.

Reference can finally be made to the nuclear conventions, i.e. the Paris Convention 1982,³² the Vienna Convention 1997³³ and the failed Nuclear Ships Convention 1962,³⁴ which also provide (diverging) exclusive jurisdiction grounds, for the place in a contracting where the nuclear incident occurred,³⁵ the courts of the contracting state where the nuclear

29 Article IX (1) CLC 1992, Article 9 Bunkers 2001, Article 38 HNS 2010. These provisions are all based upon the model of Article IX (1) CLC 1969.

30 See more elaborate: Sarah Gahlen, *Civil liability for Accidents at Sea*, diss. Hamburg, Springer, 2015, p. 71 ff., p. 174 ff.

31 The grounds listed in Article 19 (1) CRTD 1989 are: (a) the place where the damage resulting from the incident was sustained, (b) where the incident occurred, (c) where preventive measures were taken and (d) where the carrier has his habitual residence. Article 19 (2) CRTD 1989 further clarifies that ‘If the road vehicle or ship involved in the incident is subject to registration, the State of registration of the road vehicle or ship shall be deemed to be that of the habitual residence of the carrier.’

32 Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960, as amended by the Additional Protocol of 28th January 1964 and by the Protocol of 16th November 1982.

33 Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 as amended by the protocol of 12 September 1997.

34 Convention on the liability of operators of Nuclear ships, Brussels, 25 May 1962.

35 This is the primary jurisdiction ground under Article 13 Paris Convention 1982 and Article 11 (1) Vienna Convention 1997. The same applies if the nuclear incident occurred in the exclusive economic zone of a contracting state, Article 11 (1bis) Vienna Convention 1997.

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installation of the operator is situated,³⁶ the courts of the licencing state of the nuclear vessel,³⁷ or the courts of the contracting state(s) in whose territory nuclear damage has been sustained.³⁸

By focusing on the place where the harmful event occurred as primary jurisdiction ground and by offering a subsidiary ground if the place of the harmful event is not situated in a contracting state, the Paris and Vienna Conventions provide a workable model for the concentration of exclusive jurisdiction with a single court. This cannot be said of the failed Nuclear Ships Convention 1962 which provides two alternative jurisdiction grounds which may easily result in several courts in different contracting states having jurisdiction if within their territory qualifying damage was sustained.³⁹

It is suggested here that the jurisdictional system of the Brussels-Ibis Regulation could be improved, if an exclusive jurisdiction ground for incidents involving dangerous goods was created for which the above jurisdictional rule in art. IX CLC 1992 may serve as a model. Alternatively, it seems desirable if – perhaps in addition to the *lis pendens* and related actions provisions in Chapter 1, Section 9 Brussels-Ibis – a mechanism was introduced by which pending court proceedings in EU member states relating to liability claims originating from a single catastrophic event could be consolidated before a single court. The usefulness of such a consolidation mechanism in Brussels-Ibis would not be restricted to maritime and inland incidents involving dangerous goods, but could also be made to extend to mass torts in general.

4 Applicable law

In the absence of any uniform law conventions being in force specifically with regard to civil liability for damage resulting from incidents with dangerous goods originating from inland vessels, it may be that such damage falls under the scope of application of the Geneva

³⁶ Article 13 Paris Convention 1982, Article XI (2) Vienna Convention. This jurisdiction ground applies only if the nuclear incident did not occur in a contracting state or where the place of the incident cannot be determined with certainty.

³⁷ Article X (1) of the Nuclear Ships Convention 1962.

³⁸ Article X (1) of the Nuclear Ships Convention 1962.

³⁹ Article X (1) of the Nuclear Ships Convention 1962.

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Collision Convention 1960.⁴⁰ This could be the case where the dangerous goods incident results from a collision between inland vessels in a contracting state.⁴¹

If the incident results from a collision between an inland vessel and a sea-going vessel, it is the Brussels Collision Convention 1910⁴² which will apply ‘in whatever waters the collision takes place’.⁴³ The collision conventions apply further where a vessel – through carrying out of or failure to carry out a manoeuvre, or by not complying with regulations – causes damage to (an) other vessel(s) or to persons or objects on board of such (a) vessel(s), even if no collision has taken place.⁴⁴

The Collision Conventions do not apply however to all damage caused by a collision. As is expressed in their scope provisions,⁴⁵ these conventions govern compensation for damage caused by a collision either to the vessels or to persons or objects on board thereof. This implies that the applicable national law(s) govern damage caused by a vessel – whether in collision with another vessel or unilaterally – to persons or property not on board of the vessels involved in the collision or to the environment in general e.g. as a result of an explosion or the spillage of dangerous goods from the inland vessel.

This in turn raises the question by which (national) law, non-contractual claims arising from such a dangerous goods incident are governed. Before courts in member states of the European Union such conflict of laws questions are governed by the EU Regulation Rome II.⁴⁶

Under Article 14 (1) Rome II, in principle the parties to a civil liability claim have the freedom to submit non-contractual obligations to the law of their choice.⁴⁷ Failing a choice

40 Convention relating to the unification of certain rules concerning collisions in inland navigation, Geneva, 15 March 1960. The Geneva Collision Convention 1960 has thirteen contracting states, i.e. Austria, Belarus, France, Germany, Hungary, Kazakhstan, Montenegro, Netherlands, Poland, Romania, Russia, Serbia and Switzerland.

41 Article 1 (1) Geneva Collision Convention 1960. Article 1 (2) extends this application also to situations where an inland vessel causes damage to another vessel or to persons or to objects on board thereof, ‘through the carrying out of or the failure to carry out a manoeuvre, or through failure to comply with regulations, even if no collision has taken place.’

42 Convention for the Unification of certain rules of law with respect to collisions between vessels, Brussels 23 September 1910.

43 Article 1 (1) and 13 Brussels Collision Convention 1910.

44 Article 13 Brussels collision Convention 1910, Article 1 (2) Geneva Collision Convention 1960.

45 Article 1 Brussels collision Convention, Article 1 (1) Geneva Collision Convention 1960.

46 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).

47 They may do so either after the occurrence of the event that gave to the damage or in advance, provided that all the parties to the claim are pursuing a commercial activity. See Article 14 (1) (a) and (b) Rome II.

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of law, under Article 4 (1) Rome II the general conflict rule is that of ‘lex loci damni’ or the law of the place in which the damage occurs, irrespective of where the event giving rise to the damage occurred or where the indirect consequences of that event occur. If however, the claimant⁴⁸ and the defendant⁴⁹ are domiciled in the same country when the damage occurs, the said general rule is displaced by the rule of Article 4 (2) and the law of the country of their mutual habitual residence applies.

Finally, Article 4 (3) Rome II opens the possibility that in case that a claim is manifestly more closely connected with another country than follows from Article 4 (1) or 4 (2) Rome II, the law of that other country is applicable. In case of environmental damage⁵⁰ or of personal injury or damage to property as a result of environmental damage, Art. 7 (1) Rome II offers the party seeking compensation for damage the option to base his/her claim on the law of the country in which the damage occurs or alternatively where the event giving rise to the damage occurred.

It may be observed that even if all court proceedings resulting from a dangerous goods incident with an inland vessel were concentrated or consolidated before a single court in an EU member state, it would not necessarily follow that all civil liability claims would be judged by the same standards. First, there is or may be a difference between the liability regimes under the Brussels and Geneva Collisions on the one hand and the applicable national law on the other.

Second, also the civil liability regimes under the domestic law of EU member states, diverge. This is important, third, because the application of the conflict rules of both Rome I and Rome II is influenced by factors personal to the parties to a claim such as the states in which their places of domicile are situated etc. As these personal factors may vary as between parties, it follows that the same dangerous goods incident may give rise to different national laws being applicable to individual claims for damages.

Furthermore, it follows also from the alternative conflict rules in Article 7 (1) Rome II that different national laws could apply to compensation claims for pollution damage as a result of spillage of dangerous goods from an inland vessel if the claimant opts for the one or the other conflict rule or if the pollution damage occurs simultaneously in different states. In

⁴⁸ The ‘person sustaining damage’, see Article 4 (2) Rome II.

⁴⁹ The ‘person claimed to be liable’, see Article 4 Rome II.

⁵⁰ Understood in Recital 24 Rome II as meaning: ‘adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.

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this way, equal treatment of victims from dangerous goods incidents cannot be guaranteed, only uniform law could try to do that.

5 Grounds for liability claims

5.1 Fault-based liability under collision law

5.1.1 Introduction

As discussed above, a dangerous goods incident with an inland vessel may well be the result of a prior collision⁵¹ between that inland vessel and another vessel, whether an inland vessel or a sea-going vessel. In that case the civil liability for damage caused by the dangerous goods incident to the vessels and to persons and property on board thereof is in principle governed by collision law, i.e. the Collision Conventions of Brussels 1910 and of Geneva 1960, possibly supplemented by national law.⁵² Under collision law, the civil liability for the dangerous goods incident is based on fault and the burden of proof rests upon the party suffering the damage. Both collision conventions stress that a collision may be accidental or due to force majeure and that no legal presumptions of fault are permitted. This rule is expressed very clearly in Article 2 Geneva Collision Convention 1960.⁵³

Article 2

1. The duty to compensate for damage shall arise only if the damage is due to a fault. There shall be no legal presumption of fault.
2. If the damage is accidental, if it is due to force majeure, or if its causes cannot be determined, it shall be borne by the persons suffering it. ...

Collision law distinguishes between cases where the collision is caused by the fault of one of the vessels only, and where two or more of the vessels involved in the collision are at fault. In the former case, liability rests solely with the vessel at fault.⁵⁴ In the latter case, each of the ‘both to blame’ vessels is joint and severally liable for damage caused by loss

⁵¹ The term ‘collision’ is not defined in the Brussels and the Geneva Collision conventions. Dutch law in Article 8:540 DCC describes collision as the (forceful) ‘aanraking’ (*touching*) of two or more vessels with each other.

⁵² Provisions from the Brussels Collision Convention 1910 and the Geneva Collision Convention 1960 have been incorporated into German law in the § 570 ff. Handelsgesetzbuch (HGB or German Commercial Code), and § 92b Binnenschiffahrtsgesetz (BinSchG or Inland Shipping Act)) as well as into Dutch law, see Articles 8:540 ff. and 8:1000 ff. Dutch Civil Code (DCC).

⁵³ Compare also: Articles 2, 3 and 6 Brussels Collision Convention 1910.

⁵⁴ Article 3 Brussels Collision Convention 1910 and Article 3 Geneva Collision Convention 1960. See: § 570 HGB and § 92b BinSchG and Articles 8:544 and 8:1005 DCC.

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of life or personal injuries.⁵⁵ However in respect of ‘damage caused to the vessels, their cargoes or to the effects or other property of the crews, passengers, or other persons on board’ each vessel is severally liable only in proportion to the degree of the faults respectively committed.⁵⁶

Unfortunately, the collision conventions do not clarify what is to be understood by ‘fault’ or ‘liability’ of a vessel or who can be held liable in case of such fault. Both Collision Conventions personify the vessel as if it were a natural or legal person who/which through its conduct can commit a fault and who is civilly liable for damage resulting from such fault. See e.g. Article 3 Geneva Collision Convention 1960:⁵⁷

Article 3

If the damage is caused by the fault of one vessel only, liability to compensate for the damage shall attach to that vessel.

Obviously, this approach is at odds with many legal systems which deny physical objects such as vessels legal personality, although under the common law ‘in rem’ proceedings against a vessel are possible. In essence, the uniform law notion ‘fault of the vessel’ must be considered a legal metaphor used as a catalyst to determine whether the ‘fault’ of certain natural or legal persons can be attributed to the vessel so as to create the legal basis for collision liability.

An example of the attribution mechanism is the express rule in the Collision Convention that a collision caused by the fault of the pilot constitutes fault of the vessel even if pilotage was compulsory.⁵⁸ The above implies that national law must assist in filling the gaps left open by the Collision Conventions and determine who is liable in collision if a certain vessel is at fault and what constitutes ‘fault of the vessel’ exactly. Although German law and Dutch law have incorporated the provisions of the Collision Conventions into their national laws on collision liability,⁵⁹ the result is far from uniform.

⁵⁵ Article 4 (3) Brussels Collision Convention 1910, Article 4 (1) Geneva Collision Convention 1960. See: § 570 (II) HGB, § 92c (II) BinSchG, Article 8:545 (1) and Article 8:1006 (1) DCC.

⁵⁶ Article 4 (2) Brussels Collision Convention 1910 and Article 4 (2) Geneva Collision Convention 1960.

⁵⁷ See also Article 4 (1) and (2) Geneva Collision Convention 1960. Compare: Articles 3 and 4 Brussels Collision Convention 1910.

⁵⁸ Article 5 Geneva Collision Convention 1960 and Article 5 Brussels collision Convention 1910.

⁵⁹ For Germany see: § 570 ff. HGB, § 92 ff. BinSchG. For the Netherlands, Articles 8: 540 ff and 8:1000 ff. DCC.

5.1.2 Liable person in collision

Both German law and Dutch law provide that the ship-owner of the vessel at fault is the liable person.⁶⁰ However, the meaning given to the notion ‘ship-owner’ is not the same under German and Dutch law. Under German law the statutory definition⁶¹ of ‘Schiffseigner’ requires that he not only owns the inland vessel, but also uses it for this purpose.

If an inland vessel is not operated by the owner but by a different person, then the latter person, i.e. the ‘Ausrüster’ (Operator) is considered ship-owner towards third parties.⁶² It follows therefore that despite the chosen terminology under German law not the ownership but rather the use that is made of the inland vessel is decisive to determine the liable person in collision in case of fault of the vessel.

In contrast under Dutch law ownership of the vessel *is* decisive to determine who is liable for fault of the vessel in collision. With the recodification in 1992, the legislator has adopted a liability system in which the (registered) owner is the central debtor,⁶³ rather than the person who uses or operates the vessel, e.g. a bareboat charterer.⁶⁴ The main reason for this legislative choice was to make it easier for ship creditors to determine against whom they should direct their claims.

5.1.3 Fault of the vessel

With regard to the interpretation of ‘fault of the vessel’ German law has opted to transform this concept into a statutory vicarious liability of the ship-owner for fault on the part of

60 § 92b BinSchG, § 570 HGB, Articles 8:1005, 8:544 DCC. See: Klaus Ramming, *Hamburger Handbuch zum Binnenschiffverkehrsrecht*, München: Beck, 2009, p. 162, Nr. 600 ff.

61 § 1 BinSchG: ‘Schiffseigner im Sinne dieses Gesetzes ist der Eigentümer eines zur Schifffahrt auf Flüssen oder sonstigen Binnengewässern bestimmten und hierzu von ihm verwendeten Schiffes.’ (*Ship-owner in the meaning of this Act is the owner of a ship destined for shipping on rivers and other inland waters and used for this purpose.*)

62 § 2 (1) BinSchG: ‘Wer ein ihm nicht gehöriges Schiff zur Binnenschifffahrt verwendet und es entweder selbst führt oder die Führung einem Schiffer anvertraut, wird Dritten gegenüber als Schiffseigner im Sinne dieses Gesetzes angesehen.’ (*Whoever uses a vessel not owned by him for inland navigation, will be considered ship-owner in the sense of this Act with regard to third-parties.*). Similarly, in relation to sea-going vessels the notions of ‘Reeder’ in § 476 Handelsgesetzbuch (HGB or German Commercial Code) and ‘Ausrüster’ in § 477 HGB.

63 The ship-owner is the liable person in relation to claims based upon: – collision (Article 8:544; 8:1005 DCC); – dangerous goods (Article 8:623, 8:1033(1) DCC); – salvage (Article 8:1010 jo 8:563(3) DCC); – contribution in general average (Article 8:612, 8:1021 DCC); – oil pollution (Article 3 Act on the liability of oil tankers) and – wreck removal (Article 8:656 DCC).

64 For the motives of the Dutch legislator, see: M.H. Claringbould (ed.), *Parlementaire Geschiedenis Boek 8 BW*, Kluwer: Deventer, 1992, p. 326ff.

the crew⁶⁵ or the pilot⁶⁶ of the inland vessel in the performance of their duties.⁶⁷ The standard for determining what constitutes ‘fault’ is ‘Widerrechtlichkeit’ (unlawfulness), i.e. the same that applies to torts in general.⁶⁸ In older German case law regarding sea-going vessels, it was held that the ship-owner is liable for the faults of certain independent contractors⁶⁹ in the same way as for fault of the ship’s crew. This approach was based upon the idea that it should not make a difference for the ship-owner’s liability whether he lets certain tasks in the ship’s operation be performed by the crew or by other persons.⁷⁰

However, with the 2013 Maritime Law Reform, the German legislator has expressly rejected this approach of the German courts and has restricted the ship-owner’s liability to faults committed by the crew and the pilot.⁷¹ In the light of this development it must be presumed that also the owner of an inland vessel is liable only for faults of the crew and the pilot. Apart from the ship-owner also the relevant crew member(s) or the pilot can personally be held liable for the damage caused by their own fault.⁷²

Furthermore it must be presumed that the ship-owner is also liable in collision for his own fault.⁷³ If however a collision was caused by a hidden defect in a vessel, but in the absence of fault on the part of any person for whom the ship-owner is liable, this is insufficient under German law to make the ship-owner liable in collision. The prevailing understanding is that collision liability is fault-based and that legal presumptions of fault are forbidden.⁷⁴

65 § 92b BinSchG: ‘Ist der Schaden durch Verschulden der Besatzung eines der Schiffe herbeigeführt, so ist der Eigner dieses Schiffes zum Ersatz des Schadens verpflichtet.’ (If the damage is caused by fault of the crew of one of the vessels, then the owner of this vessel is obliged to compensate the damage.). See also § 92c BinSchG. To the crew belong the master, the people employed to serve the ship in particular the helmsmen, sailors, engine operators etc., see § 21 BinSchG.

66 § 92d BinSchG.

67 § 3 BinSchG.

68 § 276 BGB.

69 E.g. fault of the crew of the tug boat if the master of the towed vessels retained the nautical control or fault of stevedores engaged in the stowage of the vessel. More elaborately: Rabe/Bahnsen/Bahnsen, *Seehandelsrecht*, 5. Auflage, München: C.H. Beck, 2018, § 480, No. 28 ff.

70 More elaborately: Rabe/Bahnsen/Bahnsen, *Seehandelsrecht*, 5. Auflage, München: C.H. Beck, 2018, § 480, No. 28 ff. and Schaps-Abraham, *Das Seerecht in der Bundesrepublik Deutschland, Seehandelsrecht*, Erster Teil, Berlin/New York: Walter de Gruyter, 1978, § 481 Nos. 10 ff.

71 Regierungsbegründung (Explanatory Note), Drucksache 17/10309, d.d. 12.07.2012, p. 64 ff.

72 § 92f BinSchG. See: Rammig, *Hamburger Handbuch zum Binnenschiffahrtsfrachtrecht*, 2009, p. 163, Nr. 607.

73 Although the Binnenschiffahrtsgesetz does not provide this expressly, it follows from § 823 (1) Bürgerliches Gesetzbuch (BGB). As follows from § 480 HGB, the ship-owner cannot disculpate himself from this liability. The said omission of the legislator has already been corrected with regard to maritime collisions in § 570 HGB as amended by the Maritime Law Reform Act of 2013. See: Rolf Herber, *Seehandelsrecht, Systematisch dargestellt*, 2. Auflage, Berlin: De Gruyter, 2016, p. 390. Cf. BGH 14.7.1980, VersR 1980, 968.

74 See in particular Article 2 (1) Geneva Collision Convention 1960: ‘1. The duty to compensate for damage shall arise only if the damage is due to a fault. There shall be no legal presumption of fault.’

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As a contracting state to the collision conventions, Germany is precluded ('untersagt') from imposing a strict liability based upon the creation of a hazard ('Gefährdungshaftung') in case of collisions.⁷⁵

How different is the approach under Dutch law! The Dutch legislator has not transformed,⁷⁶ but merely translated the autonomous term 'fault of the vessel' into Dutch: ('schuld van het schip') and has incorporated this concept into the collision provisions in Book 8 DCC.⁷⁷ The interpretation of this concept was left to the courts. In the landmark decision *Casus-ele/De Toekomst*,⁷⁸ which concerned inland vessels, the Hoge Raad has held that there is fault of the vessel (in translation):

if the damage is the result of: (a) a fault of a person for whom the ship-owner is vicariously liable pursuant to the Articles 6:169-6:171 DCC; (b) a fault of a person or persons who for the benefit of the ship or the cargo have done work within the scope of their employment; (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.

The Dutch Supreme Court in its interpretation of 'fault of the vessel' mentions three alternative cases that may be recognised as such, yet seems to have overlooked that also fault on the part of the ship-owner (and of persons who may be equated with him⁷⁹) may qualify as 'fault of the vessel', e.g. a fatal decision by the head office of the ship-owner to postpone necessary maintenance/repairs of the ship in order to save costs or not to miss a fixture.

Alternative (a) refers to persons for whose fault the ship-owner is liable includes the vicarious liabilities of parents for fault of their underage children,⁸⁰ of employers for faults of their subordinates,⁸¹ and of a principal for the fault of independent ancillaries performing activities in his business.⁸² Alternative (b) focuses on the functional aspect that certain

⁷⁵ To this effect: Herber, *Seehandelsrecht*, 2. Aufl., 2016, p. 390.

⁷⁶ This was considered wrong in view of the uniform law nature of the notion of 'fault of the vessel'. See: M.H. Claringbould, *Parlementaire Geschiedenis Boek BW*, Deventer: Kluwer, 1992, p. 573 resp. p. 957.

⁷⁷ See the Articles 8:544 and 8:545 DCC for collisions between sea-going vessels and between a sea-going vessel and an inland vessel and Articles 8:1004 and 8:1005 DCC for collisions between inland vessels.

⁷⁸ Hoge Raad 30 November 2001, *Nederlandse Jurisprudentie (NJ)* 2002, 143 *Schip & Schade (S&S)* 2002/35; ECLI:NL:HR: 2001:AD3922.

⁷⁹ E.g. the ship's managers to whom the commercial, technical and/or crewing management has been delegated by the ship-owning company.

⁸⁰ Article 6:169 DCC.

⁸¹ Article 6:170 DCC.

⁸² Article 6:171 DCC.

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persons in their work for the benefit of the vessel or cargo may cause damage due to their fault.

Although in many cases alternatives (a) and (b) will overlap, the significance of alternative (b) is that it extends also to subordinates⁸³ and independent contractors⁸⁴ of others than the ship-owner, e.g. charterers of the ship and shippers or receivers of cargo, for whose fault within the scope of their employment the ship-owner is nevertheless responsible.

Particularly alternative c) is remarkable as it implies that in the interpretation of the Hoge Raad even a collision caused by a hidden defect of the vessel, but in the absence of fault of any person for whom the ship-owner is liable pursuant to alternatives (a) and (b), can satisfy the requirement of ‘fault of the vessel’. In its reasoning, the Hoge Raad takes as its starting point that there exist no legal presumptions of fault⁸⁵ and deducts from this that no general risk liability rests upon the ship-owner with regard to damage caused by or with the ship to persons or property.⁸⁶

Nevertheless, the Hoge Raad continued that according to Article 6:173 (1) DCC the possessor of a movable thing is liable if a special danger for persons or things materializes that was caused by the thing not meeting the standards which, in the given circumstances must be set. Although – as Article 6:173 (3) DCC stipulates and the Hoge Raad acknowledges – this rule does not apply to vessels, a corresponding rule must be assumed for the liability of the ship-owner pursuant to Articles 8: 544-545 and 8:1004-1005 DCC (fault of the vessel).

This result is in line (although based upon different reasoning) with a 1940 landmark decision of the Hoge Raad also concerning inland vessels, *Synthese/Rubens*.⁸⁷ In that case the rudder stock of inland vessel ‘Rubens’, which very recently had been renewed at a shipyard, fractured during a passing manoeuvre at the Terneuzen Channel, causing the ‘Rubens’ to collide with the ‘Synthese’. The Hoge Raad concluded that there was fault on the part of the ‘Rubens’.

83 E.g. in the situation where the shipper or receiver of the cargo has its own loading and discharge facilities and his employees may be involved in stowage and other activities on board the inland vessel as is common in inland navigation.

84 E.g. independent stevedores.

85 The Hoge Raad refers to Articles 8:1004 (1) and 8:546 DCC which are based upon Article 2 (1) Geneva Collision Conventions 1960, resp. Article 6 Brussels Collision Convention 1910.

86 The Hoge Raad expressly refers to: Appeal Chamber of the Central Commission for Rhine Navigation 13 October 1976, *S&S* 1977, 49, ECLI:NL:XX:1976:AJ1235 [*Annabel/Boreas*].

87 Hoge Raad 5 January 1940, *NJ* 1940, p. 340.

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Based upon *Synthese/Rubens*,⁸⁸ it has been assumed under Dutch law for a long time already that the Hoge Raad favours the ‘*risicoleer*’⁸⁹ (*risk doctrine*) as opposed to the ‘*schuldleer*’⁹⁰ (*fault doctrine*) with regard to the interpretation of ‘*fault of the vessel*’. The risk doctrine implies that if a vessel navigates wrongly due to a cause located on board of the vessel, there is fault of the vessel, regardless of whether anybody in particular acted wrongfully. The fault doctrine on the other hand requires for fault of the vessel that the collision results from the fault of a person for whom the ship-owner or operator is liable.

In 20th Century Dutch legal literature this matter has proved highly controversial,⁹¹ however the Hoge Raad has long persisted in its approach. In *Jelle, EWT 28 and EWT 31*,⁹² it held in a case where the breaking of the connecting wire between a push boat and barge unit caused damage to the fence of a channel, that the fixed connection between the vessels has the legal consequence, that when due to fault of one of the vessels a collision occurs, the fault of this vessel must be considered fault of the other vessels as well. In *Olau Britannia/Pieniny II*⁹³ the Hoge Raad held that in view of the wrongful navigation of the ‘*Olau Britannia*’, fault of the this vessel’ must be presumed as long as it is not established, that the possibility can be excluded that causes on board this vessel have contributed to the causation of the collision.

Be that as it may, it is clear that the approach of the Hoge Raad in *Casuele/De Toekomst*⁹⁴ can hardly be considered an *autonomous* interpretation of the uniform law notion of ‘*fault of the vessel*’ in the collision conventions.⁹⁵ It is telling that in this decision the Hoge Raad did not employ its usual tools for the autonomous interpretation of uniform law conventions,⁹⁶ but instead adopted a rather domestic law perspective. This approach can be seen

88 Hoge Raad 5 January 1940, *NJ* 1940, p. 340.

89 As proposed inter alia by: W.L.P.A. Molengraaff, *Kort begrip van het Nieuwe Nederlandsche Zeerecht*, Haarlem: De Erven F. Bohn, 1928, p. 282 ff. and R.P. Cleveringa Jzn., *Zeerecht*, 4th ed., 1961, p. 764 ff.

90 As proposed by: A. van Oven, *De uniforme werking van het Brussels Aanvaringstractaat*, diss. Leiden, Zwolle: W.E.J. Tjeenk Willink, 1938, p. 43 ff., p. 76 ff.

91 See e.g. B. Wachter, ‘Schuld van het schip’, in: I.J. Dutilh et al. (red.), *Met Eerbiedigende werking, Liber Amicorum L.J. Hijmans van den Bergh*, Deventer: Kluwer, 1971, p. 309 ff.; S.J.A. Mulder/E.J.R. van der Smit, ‘Schuld van het schip’ naar aanleiding van het Geneefs Aanvaringstractaat van 1960’, in: P. Tuit et al. (red.), *Gratia Commercij, Liber Amicorum A. van Oven*, Zwolle: W.E.J. Tjeenk Willink, 1981, p. 179 ff.

92 Hoge Raad 23 November 1979, *S&S* 1980/14, *NJ* 1980/214, *ECLI:NL:HR:1979:AC6731* [*Jelle, EWT 28, EWT 31*].

93 Hoge Raad 20 July 1987, *S&S* 1988/2, *NJ* 1988/74 [*Olau Britannia/Pieniny II*].

94 Hoge Raad 30 November 2001, *NJ* 2002, 143; *S&S* 2002/35; *ECLI:NL:HR: 2001:AD3922*.

95 In the same sense, K.F. Haak in his annotation to the Hoge Raad decision of 30 November 2001, *NJ* 2002/143.

96 See e.g. Hoge Raad 1 February 2008, *S&S* 2008/46; *NJ* 2008/505 [*NDS Provider*], Nos. 4.2 ff.

in other jurisdictions as well, where the approach of the courts⁹⁷ or the legislator⁹⁸ evidences a desire to conform with its general tort law rather than to aim for an autonomous interpretation of the notion of ‘fault of the vessel’.

Neither can it be reconciled with the decision of the Appeal Chamber of the CCR in *Annabel/Boreas*⁹⁹. In this case, the collision on the Rhine¹⁰⁰ between the descending inland vessel ‘Annabel’ and the ascending ‘Boreas’ apparently resulted from a defect in the certified electrical steering system of the inland vessel Boreas, which could become overburdened if the steering handle was moved back and forth frequently. The Appeal Chamber considered however that if the ‘Boreas’ has made many rudder movements due to the course of the river, it cannot be said that the steering gear was wrongly operated. If the steering gear could not endure such operation, than this would not be attributable to wrongful operation, but rather to a hidden defect. Because the Geneva Collision Convention recognizes no ‘Gefährdungshaftung’ (strict liability for exposing others to special dangers) the mere factual localisation of the cause of the collision on board of the ‘Boreas’ did not result in the liability of its owner.

As the above comparison between German and Dutch law illustrates, the international uniformity achieved by the collision conventions is not complete.¹⁰¹ Already in the coming years this may prove problematic when the international community must address the question of what constitutes a suitable civil liability system with regard to highly automated vessels.¹⁰² The current civil liability system of the collision conventions is based upon fault and thus rooted in an assumed freedom of the individual which is reined in by legal responsibility for one’s acts and omissions. It does not answer the question who is the liable person or whose faults can be attributed to that person as fault of the vessel.

97 E.g. English law, see: Gault et al. (eds.), *Marsden and Gault on Collisions at Sea*, 14th ed., London: Sweet & Maxwell, 2016, No. 4.01.

98 E.g. the above transformation under German law of the uniform law concept of ‘fault of the vessel’ to that of ‘Verschulden der Schiffsbesatzung und Lotsen’ (fault of the crew and the pilot) pursuant to § 92b BinSchG and § 570 HGB.

99 Appeal Chamber Central Commission for Rhine Navigation 13 October 1976, S&S 1977, 49, ECLI:NL:XX:1976:AJ1235 [*Annabel/Boreas*].

100 At km mark 348.5.

101 A conclusion already drawn by A van Oven in: *De uniforme werking van het Brussels Aanvaringstrac-taat* (The unifying effect of the Brussels Collision Treaty), diss. Leiden, 1938, p. 442 ff.

102 The author proposes this term as generic ‘catch all’ term for all vessels (both sea-going and inland vessels) which, through the extensive use of systems of automation and information technology have the capability to operate with no human crew or with a substantially reduced crew on board (unmanned vessels) or which can be operated whilst being remotely controlled from the shore or from another vessel.

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Arguably, it places the risk of hidden defects as well as the burden of proof upon the injured party. It is hard to see how this liability system can function in an era when vessels increasingly operate and navigate autonomously and unmanned with the aid of advanced information and automation technology.¹⁰³ It will have to be considered whether a reversal of the burden of proof (through a legal presumption of fault) is sufficient or whether also a strict liability analogous to the various pollution conventions¹⁰⁴ should be imposed. In either case, the Brussels and the Geneva Collision Convention would have to be revoked or amended.

5.1.4 Damage caused by an inland vessel not governed by collision conventions

As discussed above, the scope of the collision conventions does not extend to all damage caused by a vessel in a collision. If a vessel causes the death of or personal injuries to persons not on board of a vessel involved in the collision, e.g. through an explosion or the spillage of dangerous goods from its cargo tanks, the collision conventions are not applicable.

The same applies if a ship causes damage to property, whether through an allision¹⁰⁵ with navigational infrastructure such as the gate of a lock, the quayside or a mooring pole, or through the pollution of surface waters, the river bed and soil as a result of the spillage of dangerous goods or bunkers. Finally, if a vessel sinks or capsizes on a river this may cause a serious obstruction to inland navigation due to which many other vessel owners and cargo interested parties suffer damage due to idleness of the vessel or delay in the delivery of the cargo.¹⁰⁶ This raises the question what civil liability regime(s) is/are applicable in such a case where the vessel causes such ‘other damage’.

Under German law, the ship-owner is in the same way liable for other damage caused by an inland vessel without there being a collision, as he is for collision damage. If damage is caused by ‘Verschulden’ (fault) on the part of a member of the ship’s crew or of a pilot in the performance of services, the ship-owner is liable.¹⁰⁷ As in case of collision damage, the

¹⁰³ Take the example of an autonomous vessel fitted with a state of the art systems of computers and sensors which causes a collision due to a bug in the software. This is a hidden defect, yet all computer software has bugs and this software was state of the art. Can there even be negligence in such a case?

¹⁰⁴ CRTD 1989, CLC 1992, Bunkers 2001, HNS 2010, Nuclear Ships Convention 1962, Brussels Paris Convention 1982, Vienna Convention 1997, See above No. 7.

¹⁰⁵ Under English law an allision is the (forceful) touching of a vessel with a non-vessel.

¹⁰⁶ In Appeal Chamber of the Central Commission for Navigation on the Rhine 18 March 2013, Case No. 473 Z – 1/13, S&S 2013/71, [*Valdhof*], it was held pursuant to German law that there was no liability under general tort Law (§ 823 BGB or German Civil Code) of the ship-owner whose damaged vessel had caused an obstruction of river navigation towards another ship-owner whose vessel was unable to continue its voyage to the place of destination.

¹⁰⁷ § 3 (1) BinSchG.

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standard for determining what constitutes ‘fault’ is the same, i.e. ‘Widerrechtlichkeit’ (unlawfulness), which applies to torts in general.¹⁰⁸ However, the prescription period which applies is shorter, i.e. one year starting from the end of the year when the claim arose¹⁰⁹ instead of the two year prescription period in relation to collision claims.¹¹⁰

Under Dutch law, the legislator has chosen to extend the scope of application of statutory collision law in two ways compared to the collision conventions. Firstly, Dutch collision law applies also to cases where the vessel causes damage without there being a collision,¹¹¹ hereafter: non-collision damage caused by a ship. This implies that when an inland vessel forcefully hits another object not being a vessel, nevertheless the rules about collision liability will be applicable.

Secondly, the Dutch collision liability regime applies to *all* damage caused by a vessel¹¹² including damage due to loss of life and personal injury of persons not on board of a vessel, damage to property not on board the vessel and damage due to pollution of the environment. This sometimes leads to surprising results in legal practice, when unilateral damage events that take place on board¹¹³ or are caused in direct connection with the operation of the vessel¹¹⁴ are governed by the collision liability regime and especially by the short two year prescription period for collision claims.¹¹⁵

It follows that what is stated above about Dutch collision law, in principle also applies here. However, due to the fact that the Netherlands is not bound under international law by any treaty obligations with regard to non-collision damage caused by a ship or with regard to

108 § 823 BGB.

109 § 117 (1) No. 6 and (2) BinSchG.

110 § 118 (1) BinSchG.

111 Articles 8:1002 and 8:541 DCC. In Dutch legal terminology this extended concept of collision is known as ‘aanvaring in ruime zin’ or ‘schadevaring’.

112 See Articles 8:1005 (1) and 8:545 (1) DCC.

113 An example is HR 8 November 1996, *S&S 1997/61 [Zilverstad]* where a stevedore assisting with loading operations in the ship’s holds was hit on the head by a falling ‘merkel’ and was seriously injured.

114 In the case of HR 15 June 2007 *S&S 2007/95 [Zwartemeer]* a gas pipe was hit during dredging works taking place from an inland vessel at the river IJssel near Kampen. In: HR 21 November 2014 *S&S 2015/74 [Lian-der/KWS]* an electric cable was hit during the placing of timbering poles from an inland barge at the river Vecht.

115 The three Hoge Raad decisions mentioned in footnotes 114 and 115 basically concern the question whether the two year prescription period for collision claims in Article 8: 1790 DCC applies exclusively to all claims that can be brought within the concept of a claim for non-collision damage caused by a vessel or whether the claimant may also opt to invoke other civil liability grounds to which a longer prescription period applies. In each of these cases it seems that the advocate handling the case for the claimant initially failed to protect the shorter two year prescription period, which could have been renewed by the issuance of a simple claim letter by registered mail.

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‘other damage’ not covered by the collision conventions, the Dutch legislator has taken the liberty to adopt at least three rules that depart from the liability regime of the collision conventions.

First, Art. 8:1004 (1) DCC provides for a legal presumption of fault in case a vessel which runs into another thing not being a vessel which, if need be, is properly lit, fixed or attached at the appropriate place. Second, in Art. 8:1005 (1) DCC it is provided that in case of a both-to-blame collision the owners of the colliding vessels are joint and severally liable for all other damage than damage to the vessels or to property on board of these vessels. The third exception made by Dutch law is discussed below in § 5.2.

5.2 *Strict liability for damage due to a dangerous goods incident with an inland vessel*

It is a special feature of Dutch law that Book 8 DCC in Title 11 contains a special section No. 4 dealing with *Dangerous substances on board of an inland vessel*.¹¹⁶ This Section, introduced in 1995, was inspired by CRTD 1989, but in certain aspects departs from it.¹¹⁷ Similar sections were adopted in relation to carriage of dangerous substances by other modes of transport.¹¹⁸

In the event of damage caused by a dangerous goods incident with an inland vessel, all liability is channelled¹¹⁹ to the ship-owner.¹²⁰ This liability is of a strict nature as it arises

¹¹⁶ Act of 30 November 1994, *Staatsblad* 846. It is noteworthy that the Dutch legislator has adopted similar sections in relation carriage of dangerous goods by sea (Art. 8:620 ff. DCC), by road (Art. 8:1210 ff. DCC) and by rail (Art. 8:1670 DCC).

¹¹⁷ E.g. in CRTD 1989 liability is imposed upon the carrier, whereas in Book 8 DCC it is the ship-owner who is the liable person.

¹¹⁸ I.e. by sea (Art. 8:620 ff. DCC), by road (Art. 8:1210 ff. DCC) and by rail (Art. 8:1670 ff. DCC).

¹¹⁹ The channeling of civil liability upon the ship-owner implies that other persons involved in the operation of the vessel as defined in art. 8:1033 (5) DCC (= Art. 5 (7) CRTD 1989), such as crew members, pilots, salvors are immune from all liability. This immunity from liability can only be lifted in case the damage was caused by the relevant person with the intent to cause such damage or recklessly and with knowledge that such damage would probably result. In that case also the ship-owner can take recourse against the relevant person pursuant to art. 8:1033 (6) DCC (= Art. 5 (7) and (9) CRTD 1989).

¹²⁰ Art. 8:1033 (1) DCC. In CRTD 1989 the strict liability is imposed upon the carrier, see Art. 5 (1) CRTD 1989. ‘Carrier’ is defined in Art. 1 (8) CRTD as ‘(a) with respect to carriage ... by inland navigation vessel: the person who at the time of the incident controls the use of the vehicle on board which the dangerous goods are carried. The registered owner (and failing that the owner) of the inland vessel is presumed to control the use of the inland vessel ‘unless he proves that another person controls the use of the vehicle and he discloses the identity of that person or, if he is unable to disclose the identity of such person, he proves that such other person has taken control of the vehicle without his consent and in such circumstances that he could not reasonably have prevented such use.’

on the occurrence of a defined ‘incident’¹²¹ which gives rise to a defined ‘damage’,¹²² without it being necessary to prove that the incident or the damage was caused by fault of the ship-owner or of persons for whose fault he is vicariously liable. In other words, the liability of the ship-owner is presumed.

It does not follow however, that ‘fault’ or the absence of fault is completely irrelevant to the ship-owner’s liability. The statutory regime in Book 8 DCC allows the ship-owner a limited range of defences, which have in common that in the absence of fault attributable to the ship-owner, he may exempt himself from liability by invoking certain force majeure grounds.¹²³ In one instance the ship-owner can even partially be exempted from liability despite his contributory negligence, i.e. when the own fault of the injured person contributed to the causation of the damage.¹²⁴ In all cases, the burden of proof with regard to exemption grounds rests upon the ship-owner.

The strict liability of the ship-owner applies to the entire period that the dangerous substance is on board the inland vessel and lasts from the beginning of loading until the end of discharge from the vessel¹²⁵ unless the ship-owner proves that loading or discharge operations took place under the sole responsibility of a person other than the ship-owner, his agents or servant, such as the shipper or the consignee.¹²⁶ Furthermore, the strict liability

121 ‘Incident’ means here ‘any occurrence ... which causes damage or creates a grave and imminent threat of causing damage’. See: Art. 8:1030 (e) DCC. Compare: Art. 1 (12) CRTD 1989.

122 Essentially this concerns damage caused by a dangerous substance, see Art. 8:1030 DCC: c. ‘damage’ (1) damage caused by death of, or bodily injury to a person, caused by a dangerous substance; (2) other damage outside the vessel on which the dangerous substance is present caused by that dangerous substance, with the exception of loss of, or damage to other vessels or sea-going vessels and things on board, if those vessels or sea-going vessels form part of a tow of which such vessel forms part, or if those vessels are closely joined with such vessel in a unit; (3) the costs of preventive measures and loss or damage caused by such measures; (d) ‘preventive measure’ means every reasonable measure to prevent or minimize damage, taken by whomsoever, with the exception of the person liable in accordance with this Section, after an event has occurred;

123 The alternative exemption grounds listed in Art. 8:1033 (2) DCC are identical to those in Art. 5 (4) CRTD. They require that: (a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or (b) the damage was wholly caused by an act or omission with the intent to cause damage by a third party; or (c) the consignor or any other person failed to meet his obligation to inform him of the dangerous nature of the goods, and that neither he nor his servants or agents knew or ought to have known of their nature. See finally Art. 8:1033 (3) DCC (= Art. 5 (5) CRTD 1989) which allows the ship-owner to be exempted wholly or partially from liability if se the own fault of the injured person caused or contributed to the causation of the damage.

124 Art. 8:1033 (3) DCC (= Art. 5 (5) CRTD 1989).

125 Art. 8:1031 (2) DCC. Compare Art. 3 (1) and (3) CRTD 1989.

126 Art. 8:1034 (1) DCC. Compare Art. 6 (1) CRTD 1989. The strict liability provisions do not apply either if the inland vessel was solely used in a place not accessible to the public, see Art. 8:1031 (3) DCC and Art. 4 (a) CRTD 1989.

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of the ship-owner is not applicable in the contractual and quasi-contractual relations¹²⁷ between the ship-owner and other persons who are either party to an operational contract¹²⁸ with regard to the inland vessel at the time of the incident or against whom such an operational contract may be invoked although they are not a party.¹²⁹

To the extent that the ‘incident’ occurs in a collision context and results in damage caused by the spilled dangerous substance to the other vessel or to persons or things on board thereof, there is overlap and possibly conflict between the collision conventions and book 8 Title 11, Section 4 DCC. Based upon Dutch constitutional law,¹³⁰ domestic legislation (such as here the strict liability rule of Art. 8:1033 DCC) which contradicts provisions of treaties that are in force and binding on all persons by virtue of their contents,¹³¹ must be denied application. It follows therefore that in case of concurrence between the fault-based liability system under the Collision Conventions and the strict liability system under Dutch law in relation to damage caused by dangerous goods, the former prevails.

5.3 *Liability pursuant to EU Directives on Environmental Liability and Waste*

Spillage of dangerous substances from an inland vessel may further give rise to civil liability under domestic legislation implementing the EU Environmental Liability Directive 2004/35/EC¹³² (hereafter: ELD) and the EU Waste Directive 2008/98/EC¹³³ (hereafter: Waste Directive) Since the provisions of the ELD and Waste Directive are addressed to

¹²⁷ Art. 8:1031 (1) DCC.

¹²⁸ In Art. 8:361 (1) DCC the concept of ‘Exploitatie-overeenkomsten’ (Operational contracts) is defined as the chartering of the vessel and the contracts of carriage of goods or persons by the vessel. In relation to each vessel a chain of operational contracts may exist at the same time, see Art. 8:361 (2) DCC.

¹²⁹ In the Art. 8:362 ff. DCC the Dutch legislator has created an elaborate system to allow parties involved in the operation of the ship to invoke contractual defences against non-contractual claims brought by other such parties. Art. 8:364 DCC allows also contractual defences to be raised against non-contractual claims for death or personal injury or damage to property from outsiders, i.e. persons who are not party to any operational contract with regard to the vessel. Art. 8:880 DCC provides that the rules of Art. 8:361-366 DCC are of equal application to inland vessels.

¹³⁰ Art. 93 and 94 Grondwet (Basic Law) provide (in translation) as follows: *Article 93 – Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published. Article 94 – Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or resolutions by international institutions that are binding on all persons.*

¹³¹ E.g. Art. 2 (1) Geneva Collision Convention 1960: ‘The duty to compensate for damage shall arise only if the damage is due to a fault. There shall be no legal presumption of fault.’

¹³² Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

¹³³ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives.

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the EU member states,¹³⁴ private persons cannot derive rights and obligations from these directives directly, but only based upon national legislation of the EU member states in which provisions of these Directives are implemented.¹³⁵

It falls outside the scope of this contribution to discuss the national implementations of the ELD and the Waste Directives in any detail.¹³⁶ However, as EU member states are obliged to ensure that their domestic legislation is in compliance with these directives since the European Court of Justice has competence to interpret these directives autonomously, indirectly the Directives do have great significance. For this reason, the liabilities to which the ELD and the Waste Directive may give rise in the event of a spillage of dangerous substances from an inland vessel will be analysed below.

5.3.1 Environmental Liability Directive 2004/35/CE

The ELD is applicable¹³⁷ if environmental damage is caused by certain occupational activities, including transport by inland waterways,¹³⁸ and to any imminent threat of such damage occurring by reason of any of those activities. ‘Environmental damage’ as defined in Art. 2 (1) ELD includes:

- a. damage to protected species and natural habitats ...;
- b. water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/ EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies;
- c. land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms;

¹³⁴ Art. 21 ELD; Art. 43 Waste Directive 2006/12/EC.

¹³⁵ This is expressly stated in Art. 3 (3) Environmental Damage Directive 2004/35/CE.

¹³⁶ In Germany and The Netherlands the legislators have followed a two-tier approach in the transposition of the Directive into national law, pursuant to which stand-alone Acts were enacted, in combination with amendments to existing legislation. For more a more detailed overview see for the ELD: BIO Intelligence Service and Stevens & Bolton LLP, *Implementation challenges and obstacles of the Environmental Liability Directive, Annex – Part A: Legal analysis of the national transposing legislation*, published by European Commission, DG Environment, dated 16 May 2013, p. 113 ff. (Germany) and p. 215 ff. (Netherlands) and for the Waste Directive: Eunomia et al., *Final Implementation Report for Directive 2008/98/EC on Waste: 2013-2015*, published by European Commission, DG Environment, dated 8 June 2018.

¹³⁷ Art. 3 (1) (a) ELD.

¹³⁸ Art. 3 (1)(a) ELD refers to the occupational activities listed in its Annex III, which includes inter alia: 8. ‘Transport by road, rail, inland waterways, sea or air of dangerous goods or polluting goods ... as defined in Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods ...

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2. ‘damage’ means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly.

It goes without saying that an explosion or a spillage of a dangerous substance from an inland vessel is quite likely to result in environmental damage, both in terms of water and land damage and possibly also in damage to protected species and natural habitats. In the absence of any international conventions (or amendments thereof), being in force with regard to civil liability for damage caused by dangerous goods,¹³⁹ the Directive does apply without reservation also to such damage.¹⁴⁰ This was different in the case that led to the *Commune de Mesguer*¹⁴¹ decision of the European Court of Justice (ECJ), as in that case the ELD was not applicable pursuant to the exclusion in Art. 4 (2) ELD, because the oil pollution damage was subject to CLC 1992, i.e. one of the international conventions listed in Annex IV to the Directive. Finally, environmental liability pursuant to ELD is expressly without prejudice to the right to limitation of liability pursuant to the limitation conventions.¹⁴²

In the event that environmental damage occurs as a result of incident with dangerous substances originating from an inland vessel, such as an explosion or a spillage, the operator of that inland vessel is the liable person who must bear the costs of all the preventive and remedial actions taken pursuant to the ELD.¹⁴³ As follows from its definition¹⁴⁴ the notion of ‘operator’ in relation to (the occupational activity of) transport by waterway refers to the person who operates or controls the inland vessel. This is usually the ship-owner, but

139 Art. 4 (2) ELD refers to the international conventions listed in Annex IV of the Directive, which are: CLC 1992 (in force), International Fund Convention 1992 (in force), Bunkers 2001 (in force), HNS 1996 (not in force) and CRTD 1989 (not in force). In addition also HNS 2010 (not in force could be added to the list in Annex IV).

140 The exception of Art. 4 (2) ELD requires that the conventions listed in Annex IV are in force in the member state concerned, but HNS 1996, HNS 2010 and CRTD 1989 are not in force at all.

141 *Commune de Mesguer v. Total France*, ECJ 24 June 2008 (Case C-188/07), ECR 2008 I-04501; S&S 2009/37 [Erika].

142 See Art. 4 (3) ELD which names the Convention on Limitation of Liability for Maritime Claims (LLMC), 1976 and the Strasbourg Convention on Limitation of Liability in Inland Navigation (CLNI), 1988 and refers to any future amendments of these conventions, i.e. LLMC 1996 and CLNI 2012. All the said conventions are in force.

143 Article 8 (1) ELD. For a more extensive discussion see: L. Bergkamp & A. van Bergeijk, Ch. 3 Scope of the ELD Regime, in: L. Bergkamp/B.J. Goldsmith (Eds.), *The EU Environmental Liability Directive, A Commentary*, Oxford, 2013, Nos. 3.04 ff.

144 See Article 2 (6) ELD: ‘6. ‘operator means any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity.’

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this may be different in cases where the inland vessel is being operated by another person e.g. under a bareboat charter.

In case of environmental damage the operator of the inland vessel is obliged to take the necessary preventive measures without delay,¹⁴⁵ to inform the competent authorities¹⁴⁶ and to take the necessary remedial measures.¹⁴⁷ The costs of preventive and remedial actions taken pursuant to the ELD, whether by the operator itself or (ordered) by the competent authority,¹⁴⁸ are for the account of the operator of the inland vessel.¹⁴⁹ The liability of the operator under ELD is not a civil liability, but is rather of a public or administrative law nature, as it can only be enforced by public authorities and not by private parties.¹⁵⁰

The liability of the operator under ELD is a strict liability, as there is no need to prove fault on the part of the operator of the inland vessel or his servants and agents for it to arise. However, the operator can escape this liability by invoking one of two defined cases of force majeure.¹⁵¹ If the operator proves that (the threat of) environmental damage was caused (a) by a third party although appropriate safety measures were in place or alternatively (b) resulted from compliance with a compulsory order/instruction from a competent authority prior to the incident which caused the (threat of) environmental damage, then the operator shall *not* be required to bear the costs of preventive and remedial measures.

This exception to the strict liability of the operator of an inland vessel may be relevant in case the dangerous goods incident resulted from a collision of the inland vessel with another

¹⁴⁵ Art. 5 (1) ELD. 'Preventive measures' are defined in Art. 2 (10) ELD as: 'any measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimising that damage.'

¹⁴⁶ See Art. 5 (2) and Art. 6 (1) ELD.

¹⁴⁷ See Art. 6 (2) and Art. 7 (1) ELD. 'Remedial measures' are defined in Art. 2 (11) ELD as: 'any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services as foreseen in Annex II.'

¹⁴⁸ Pursuant to Art. 5 (3) and Art. 6 (2) ELD the competent authority has extensive powers to deal with (the threat of) environmental damage, including the power to require the operator of the inland vessel to take preventive or remedial measures, to give instructions to the operator, as well as to take such measures itself.

¹⁴⁹ Art. 8 (1) ELD.

¹⁵⁰ See: E. Brans, Ch. 2 Fundamentals of liability for environmental harm under ELD, in: Bergkamp/Goldsmith (Eds.), *The EU Environmental Liability Directive, A Commentary*, Oxford, 2013, Nos. 2.25 ff.

¹⁵¹ Art. 8 (3) ELD. There are two other defences potentially open to an operator under ELD, pursuant to Art. 8 (4) (a) and (b) ELD, which are not relevant in case of an explosion or an accidental spillage from an inland vessel. For a more extensive discussion, see: L. Bergkamp & A. van Bergeijk, Ch. 4 Exceptions and defences, in: Bergkamp/Goldsmith (Eds.), *The EU Environmental Liability Directive, A Commentary*, Oxford, 2013, No. 4.23 ff.

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vessel for which that other vessel is solely liable. Unfortunately the wording of Art. 8 (3)(a) ELD leaves unclear whether mere third-party causation suffices for the operator to escape environmental liability or whether it is required for this that the environmental damage was caused by the fault (act or omission) of the third party.

Furthermore Art. 8 (3)(a) ELD does not clarify whether the operator may invoke this defence only in case of a collision ‘wholly’ caused by the other vessel or also in case of a both-to-blame collision. It is here tentatively suggested that the former interpretation is the correct one in view of the requirement in Art. 8 (3)(a) ELD that ‘appropriate safety measures were in place’ and of the consideration that to these safety measures must surely belong the observance of navigational regulations to prevent collisions.

5.3.2 Waste Directive 2008/98/EC

The aim of the Waste Directive is to protect the environment and human health against harmful effects caused by the collection, transport, treatment, storage and tipping of waste¹⁵² by laying down measures preventing or reducing the adverse impacts of the generation and management of waste.¹⁵³

In the Waste Directive ‘waste’ is defined broadly as ‘any substance or object which the holder discards or intends or is required to discard’.¹⁵⁴ The Waste Directive distinguishes further between specific kinds of waste, such as ‘hazardous waste’,¹⁵⁵ ‘waste oils’¹⁵⁶ and ‘bio waste’,¹⁵⁷ to which different waste management regulations apply.¹⁵⁸

In ECJ case law it has been clarified that also (industrial) products with an economic value, such as hydrocarbons, become ‘waste’ under the Waste Directive when the producer or holder thereof ‘discards’ them, e.g. through an explosion or an accidental spillage which causes pollution of the environment. Obviously the same will apply in principle to a dangerous substance spilled from an inland vessel.

¹⁵² Joint Cases C-481/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, Nos. 36 ff. under reference to Recital 3 to Directive 75/442.

¹⁵³ Art. 1 Waste Directive.

¹⁵⁴ Art. 3 (1) Waste Directive 2008/98/EC.

¹⁵⁵ Art. 3 (2) Waste Directive: ‘2. “hazardous waste” means waste which displays one or more of the hazardous properties listed in Annex III; e.g. ‘H1 explosive’, ‘H3 Highly flammable’, ‘H4 Irritant’, ‘H5 Harmful’, ‘H6 Toxic’, etc.

¹⁵⁶ Art. 3 (3) Waste Directive.

¹⁵⁷ Art. 3 (4) Waste Directive.

¹⁵⁸ In the Waste Directive, Art. 17-20 apply specifically to hazardous waste; Art. 21 to waste oils and Art. 22 to bio-waste.

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*Van der Walle*¹⁵⁹ concerned a leak from the storage facilities of a Texaco service station in Brussels. It was held that the holder of hydrocarbons which are accidentally spilled and which contaminate soil and groundwater ‘discards’ those substances, which as a result must be classified as waste.¹⁶⁰ *Commune de Mesguer*¹⁶¹ related to oil pollution damage on French beaches following the sinking of the oil tanker Erika on 13 December 1999. The ECJ held *inter alia*:

1. A substance such as that at issue in the main proceedings, namely heavy fuel oil sold as a combustible fuel, does not constitute waste within the meaning of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Commission Decision 96/350/EC of 24 May 1996, where it is exploited or marketed on economically advantageous terms and is capable of actually being used as a fuel without requiring prior processing.
2. Hydrocarbons accidentally spilled at sea following a shipwreck, mixed with water and sediment and drifting along the coast of a Member State until being washed up on that coast, constitute waste within the meaning of Article 1(a) of Directive 75/442, as amended by Decision 96/350, where they are no longer capable of being exploited or marketed without prior processing.

The above qualification of the spilled dangerous substance as waste is significant, because it implies for ‘any original waste producer or holder’ responsibility to carry out waste treatment procedures in accordance with the Waste Directive¹⁶² and liability for the costs of waste management in line with the ‘polluter-pays’-principle.¹⁶³ However in the given case, the term ‘waste holder’ cannot usefully be applied because its definition¹⁶⁴ presumes possession of the waste, whereas the dangerous substance only becomes waste when it is spilled.

¹⁵⁹ ECJ 7 September 2004 (Case C-1/03), ECR 2004 I-07613.

¹⁶⁰ *Van der Walle*, ECJ 7 September 2004 (Case C-1/03), ECR 2004 I-07613, No. 50. In the judgment, the ECJ referred to the concept of waste in Directive 75/442, but the same applies under the Waste Directive 2008/98/EC.

¹⁶¹ *Commune de Mesguer v. Total France*, ECJ 24 June 2008 (Case C-188/07), ECR 2008 I-04501; S&S 2009/37 [*Erika*].

¹⁶² Art. 15 (1) Waste Directive.

¹⁶³ Art. 14 Waste Directive.

¹⁶⁴ Art. 3 (6) Waste Directive.

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‘Waste producer’ under the Waste Directive¹⁶⁵ is ‘anyone whose activities produce waste’. This implies that there can be more than one waste producer at the same time, and in the case of a dangerous goods incident with an inland vessel, such as an explosion or a spillage, it is safe to assume that the owner or operator of the inland vessel can be considered waste producer as the waste was ‘produced’ when the incident occurred.

Other parties than the ship-owner may also qualify as ‘waste producer’, but only if they contributed to the risk that **the** waste would be caused. Therefore the manufacturer of the product (the dangerous substance) which as a result of the incident became waste is not necessarily ‘waste producer’ in the meaning of the Waste Directive. This is illustrated by the reasoning of the ECJ in *Commune de Mesguier*,¹⁶⁶ where the ECJ held that Total France, the seller of the heavy fuel oil and charterer of the vessel ‘Erika’, may be regarded as a producer of the waste if it

‘contributed to the risk that the pollution caused by the shipwreck would occur, in particular if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship;’

Nevertheless, pursuant to the Waste Directive,¹⁶⁷ EU member states may provide in their national legislation that the manufacturer ‘of the product from which the waste came’ (i.e. the dangerous goods) must bear the costs of waste management partly or wholly and that the distributors of that product must share in these costs as well.

Admittedly, the ECJ’s reasoning in *Commune de Mesguier* related to an earlier version of the Waste Directive¹⁶⁸ and not the current Waste Directive 2008/98/EC. Nevertheless, it seems to follow *mutatis mutandis* from this reasoning that – if the cost of disposing of the waste produced by an accidental spillage were to exceed the applicable limit of liability for that accident and if the national law of a member state with limitations and exemptions of liability were to prevent that cost from being borne by the ship-owner and/ or the

165 Art. 3 (5) Waste Directive reads: ‘5. “waste producer” means anyone whose activities produce waste (original waste producer) or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste.’

166 *Commune de Mesguier v. Total France*, ECJ 24 June 2008 (Case C-188/07), ECR 2008 I-04501; S&S 2009/37 [*Erika*].

167 See Art. 14 (2) Waste Directive which provides: Article 14 – Costs ... ‘2. Member States may decide that the costs of waste management are to be borne partly or wholly by the producer of the product from which the waste came and that the distributors of such product may share these costs.’ See further Art. 15 (3) Waste Directive.

168 I.e. Council Directive 15 July 1975 on Waste (75/442/EEC) as amended by Council Directives 91/156/EEC of 18 March 1991 and 91/692/EEC of 23 December 1991.

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charterer even though they are to be regarded as ‘waste producers’¹⁶⁹ – the applicable national law must make provision for that cost to be borne by the producer of the product from which the waste thus spread came. In accordance with the ‘polluter pays’-principle, however, such a producer cannot be liable to bear that cost unless he has contributed by his conduct to the risk that the pollution caused by the shipwreck will occur.¹⁷⁰

The liabilities of the waste producer under the Waste Directive (and that of the manufacturer or the distributor of the product from which the waste came under national law) are of a strict nature as there is no need to prove fault on his/their part or on that of his servants and agents for it to arise. All that is required pursuant to Art. 14 Waste Directive is that through the activities of this waste producer waste was produced. Contrary to the ELD, no exemptions from liability are granted under the Waste Directive.

6 Limitation of Liability under CLNI 2012

In case of a dangerous goods incident with an inland vessel, the extent of the resulting damage and liabilities may be so huge that the owner or the operator of this inland vessel will wish to seek limitation of liability. Under the 2012 Strasbourg Convention on the Limitation of Liability in Inland Navigation (CLNI 2012),¹⁷¹ which came into force on 1 July 2019,¹⁷² this is in principle possible if four requirements are met. First, the inland vessel involved must have been used for commercial navigational purposes, which is likely to be the case with an inland vessel carrying dangerous goods as a cargo.¹⁷³ Second, the person seeking limitation of liability should not be guilty of conduct that bars him from limiting liability.¹⁷⁴

169 In *Commune de Mesguer*, ECJ 24 June 2008 (Case C-188/07), ECR 2008 I-04501; S&S 2009/37 [*Erika*], Nos. 81 ff. reference is made to the ‘holder’ and ‘previous holder’ of the waste which is in line with the terminology used in Council Directive 15 July 1975 on Waste (75/442/EEC) as amended, see footnote 169.

170 *Commune de Mesguer*, ECJ 24 June 2008 (Case C-188/07), ECR 2008 I-04501; S&S 2009/37 [*Erika*], Nos. 81 ff.

171 See in general: M. De Decker, *Europees Internationaal Rivierenrecht*, Antwerpen/Apeldoorn: Maklu, 2015, p. 1233 ff.

172 CLNI 2012 has been ratified by Germany, Hungary, Luxembourg, The Netherlands and Serbia. Belgium and France have expressed their intention to soon follow suit.

173 Art. 1 (2) (a) CLNI 2012.

174 Art. 4 CLNI 2012 reads as follows: ‘A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.’

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Third, the dangerous goods incident with the inland vessel must have occurred on a waterway located on the territory of a State Party.¹⁷⁵ States Party may exclude certain¹⁷⁶ inland waterways within their territory from the scope of application of CLNI 2012. Whereas in maritime law it is in principle possible to invoke limitation of liability before a court of a state party regardless of the place where the incident occurred,¹⁷⁷ CLNI 2012 requires as a precondition to the right to limitation of liability that the incident did occur on a not-excluded waterway in a contracting state of CLNI 2012.¹⁷⁸

Fourth, the State Party within whose territory the incident occurred must not validly have excluded the application of CLNI 2012 to claims for damage arising from the carriage of dangerous goods prior to the incident. The relevant Art. 18 (1) and (2) CLNI provides as follows:

Article 18 Reservations

1. Any State may, at the time of signature, ratification, acceptance, approval or accession and at any subsequent time, reserve the right to exclude the application of the rules of this Convention in their entirety or in part in respect of:
 - a. claims for damage due to a change in the physical, chemical or biological quality of the water;
 - b. claims mentioned in Article 7, in so far as they are governed by an international convention or domestic regulations excluding the limitation of liability or setting limits of liability higher than provided for in this Convention;
 - c. claims mentioned in Article 2, paragraph 1 (d) and (e) of this Convention;
 - d. (...)

¹⁷⁵ Art. 15 (1) CLNI 2012 provides as follows: '1. This Convention shall apply to the limitation of liability of the vessel owner or a salvor at the time of the incident giving rise to the claims where: (a) the vessel was being operated on a waterway located on the territory of a State Party, (b) salvage or assistance services had been rendered along one of the said waterways to a vessel in danger or to the cargo of such a vessel, or (c) a vessel sunk, wrecked, stranded or abandoned along one of the said waterways or the cargo of such a vessel had been raised, removed, destroyed or rendered harmless ...'

¹⁷⁶ Art. 15 (2) CLNI 2012 allows this if the inland waterways are not listed in Annex I of the European Agreement on Main Inland Waterways of International Importance (AGN).

¹⁷⁷ Art. 15 (1) LLMC 1996 provides as follows: '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 ...'

¹⁷⁸ A similar provision existed already in Art. 15 (1) CLNI 1988.

2. A State that avails itself of the option provided for in paragraph 1(b) shall notify the Depositary of the applicable limits of liability or of the fact that no such limits exist.

Art. 18 (1) and (2) CLNI 2012 provides States Party with several (overlapping) options to depart wholly or in part from the CLNI limitation regime in relation to claims arising from a dangerous goods incident involving an inland vessel. This is most obvious in option (b) which refers to the claims mentioned in Art. 7 CLNI, i.e. ‘claims arising in respect of damage resulting directly or indirectly from the dangerous nature of the goods’.¹⁷⁹ A State Party may exclude such claims from the application of CLNI if – in their domestic law or through ratification of an international convention (which must be in force¹⁸⁰) – it has either excluded limitation of liability for such claims altogether or has set higher limits for such claims.¹⁸¹

However, if a State Party has made use of option (a) which refers to (environmental) ‘damage due to a change in the physical, chemical or biological quality of the water’,¹⁸² or option (c) which refers to claims for wreck and cargo removal,¹⁸³ this may also be relevant in case of a dangerous goods incident with an inland vessel. Furthermore, this option may also be relevant to State Parties who as EU member states must bring their legislation (including international treaty obligations) in conformity with the requirements of the ELD and the Waste Directive¹⁸⁴ and the case law of the ECJ.¹⁸⁵

If CLNI 2012 is applicable to claims arising from a dangerous goods incident with an inland vessel on waterways of a Contracting State, then the owner and the operator of an inland vessel involved in a dangerous goods incident will undoubtedly be included in the circle of persons entitled to limitation.¹⁸⁶ Also other persons involved in the ship’s operation will be entitled to invoke limitation such as the ship’s managers, the hirers, charterers, operators or salvors of an inland vessel, as well as other persons for whose act, neglect or

¹⁷⁹ Art. 7 (a) CLNI applies expressly also to claims for loss of life or personal injury.

¹⁸⁰ This follows from the words: ‘in so far as they are governed by an international convention’ in Art. 18 (1)(b) CLNI 2012.

¹⁸¹ A State Party who makes use of option in Art. 18 (1)(b) CLNI 2012 must give notice to the Depositary of the applicable limit (if any) or of the fact that no limits exist, see Art. 18 (2) CLNI 2012.

¹⁸² Art. 18 (1)(a) CLNI 2012.

¹⁸³ Art. 2 (1)(d) and (e) CLNI 2012.

¹⁸⁴ See above in § 5.3.1 and § 5.3.2.

¹⁸⁵ See above in Nos. 39 ff. the discussion of the implications of *Commune de Mesguier*, ECJ 24 June 2008 (Case C-188/07), ECR 2008 I-04501; S&S 2009/37 [*Erika*].

¹⁸⁶ See Art. 1 (1) and (2) CLNI 2012.

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default the vessel owner or the salvor will be liable¹⁸⁷ and liability underwriters¹⁸⁸ are entitled to limit their liability.

The claims that are subject to limitation of liability are in principle defined in Art. 2 (1) CLNI. However certain claims that otherwise would be subject to limitation are expressly excluded from limitation in CLNI 2012¹⁸⁹ or can be excluded by member states pursuant to CLNI 2012.¹⁹⁰

Art. 2(1) CLNI 2012 categorizes liability claims on the basis of the nature of the damage¹⁹¹ and requires that the damage claimed has arisen ‘on board or in direct connection with the operation of the vessel or with salvage operations’.¹⁹² The words ‘whatever the basis of liability may be’ in Art. 2 (1) CLNI 2012 express that the liability ground for the damage claim is irrelevant as long as the nature of the damage falls in one of the given categories. This implies that also liability claims pursuant to (national implementation legislation of the) ELD or the Waste Directive may be subject to limitation under CLNI.¹⁹³

Expressly excluded from limitation are claims for remuneration under contracts with the person liable in relation to wreck and cargo removal and preventive measures.¹⁹⁴ In addition, also claims for a salvage reward or for special compensation¹⁹⁵ and claims for contributions in general average¹⁹⁶ are excluded from limitation of liability. The *ratio legis* for this rule is that it is widely accepted to be in the general interest to encourage salvage operations¹⁹⁷

187 Art. 1 (4) CLNI2012.

188 Art. 1(5) CLNI2012.

189 See: Art. 2 (2), Art. 3 CLNI.

190 See Art. 18 91) CLNI 2012.

191 The main categories listed in Art. 2 (1) CLNI 2012 are damage to persons (loss of life or personal injury), damage to property, consequential losses, damage due to delay, loss resulting from infringement of (non-contractual) rights, claims for wreck and cargo removal, claims for costs of preventive measures.

192 This is expressly stated in Art. 2 (1) (a), (c) and (d) CLNI 2012 and follows implicitly from Art. 2 (1)(b), (e) and (f) CLNI 2012.

193 A claim for the costs of preventive measures falls under Art. 2 (1)(f) CLNI 2012. A claim for the costs of disposing of waste/ pollution from spilled cargo falls under Art. 2 (1)(e) CLNI, whereas the costs of cleaning up bunker fuel falls under Art. 2 (1)(d) CLNI 2012.

194 Art. 2 (2) CLNI2012.

195 Art. 3 (a) CLNI2012.

196 Art. 3 (b) CLNI2012.

197 As expressed in the following recitals to the (maritime) London Salvage Convention 1989: ‘CONSCIOUS of the major contribution which efficient and timely salvage operations can make to the safety of vessels and other property in danger and to the protection of the environment, CONVINCED of the need to ensure that adequate incentives are available to persons who undertake salvage operations in respect of vessels and other property in danger’.

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and general average (hereafter general average)¹⁹⁸ to promote safety of navigation and to mitigate losses and that it would be contrary to this public policy to subject such claims to limitation of liability. In international case law with regard to the (maritime) LLMC,¹⁹⁹ it has repeatedly been held²⁰⁰ that a possible recourse claim in relation to a salvage reward paid or a general average contribution paid is not excluded from limitation because in that case the above ratio legis is not applicable. It must be presumed that the same applies under CLNI 2012.

Furthermore claims for nuclear damage are excluded from limitation under CLNI 2012,²⁰¹ since such liability claims are governed by special liability conventions.²⁰² Finally, claims from servants of the liable person or salvor if under the law governing the employment contract such claims are not subject to limitation or only for a higher amount.²⁰³ Again, a possible recourse claim in relation to such a claim may not be subject to limitation, because the public policy reasons for excluding a claim under an employment contract are not applicable to the recourse claim.²⁰⁴

Whereas previously under CLNI 1988 claims in relation to carriage of dangerous goods were subject to the general limitation regime under CLNI 2012, there now is a special regime for such claims with rather high limitation amounts. **On the hand, Art. 7 CLNI 2012 doubles the usual limitation amounts²⁰⁵ both for loss of life/personal injury claims²⁰⁶ and for all other claims,²⁰⁷ whereas on the other hand it imposes a minimum amount of not less than 10,000,000 SDR for both categories of claims.²⁰⁸**

198 General Average is defined in Art. I IVR Rules 2003 as: ‘Sacrifices and expenditure reasonably made and/or incurred, in extraordinary circumstances, for the purpose of saving a vessel and its cargo from a common peril are general average. Compare also Rule A York-Antwerp Rules 2016.

199 Which in Art. 3 (a) LLMC 1976 and LLMC 1996 has a similar exclusion provision as in Art. 3 (a) and (b) CLNI 2012.

200 E.g. *The Breydon Merchant* [1992] 1 Lloyd’s Rep. 373; *The Aegean Sea* [1998] 2 Lloyd’s Rep. 39; Cour de Cassation (Com) 9 July 2013, No. 12-18.504, *Droit Maritime Français (DMF)* 2014.795 [CMA CGM *Maghreb*]; Hoge Raad 2 February 2018, *S&S* 2018/62 [*Riad/Wisdom*].

201 Art. 3 (c) and (d) CLNI 2012.

202 See above § 3, Nos. 8ff.

203 Art. 3 (e) CLNI 2012. A similar provision is included in Art. 3 (e) LLMC 1996.

204 To this effect (pursuant to LLMC 1976): Cour d’Appel de Bordeaux 8 September 1987, *DMF* 1988.591 [*Terutoku-Maru*].

205 Which limits had already been doubled in Art. 6 (1) CLNI 2012 in comparison with those in Art. 6 (1) CLNI 1988.

206 Art. 6 (1)(a) CLNI 2012.

207 Art. 6 (1)(b) CLNI 2012.

208 In comparison, under Art. 6 (1)(d) CLNI 2012 the minimum limits are 400,000 SDR for loss of life/personal injury claims and 200,000 SDR for all other claims, which is double the amounts for these categories of claims under Art. 6 (1)(d) CLNI 1988.

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As a result, CLNI 2012 differentiates between no less than five limitation funds. Pursuant to Art. 6 (1) CLNI 2012 regular claims subject to limitation fall either under the fund for damage claims for loss of life/personal injury (hereafter: the Persons Fund)²⁰⁹ or under the fund for all other claims (hereafter: the General Claims Fund).²¹⁰ Pursuant to Art. 7 CLNI 2012 dangerous goods damage claims fall either under the Dangerous Goods Persons Fund (hereafter DG Persons Fund)²¹¹ or under the Dangerous Goods General Claims Fund (hereafter: DG General Claims Fund).²¹² Finally, pursuant to Art. 8 CLNI 2012 there may also be a Passenger's Fund.²¹³

As the limitation amounts of the Dangerous Goods Funds are significantly higher than those of the regular funds, the question arises when a damage claim belongs in one of the Dangerous Goods Funds. For this a two-prong test must be applied. Firstly, it must be established that a damage claim is subject to limitation under CLNI 2012.²¹⁴ Secondly, it must be established that this claim arose 'in respect of damage resulting directly or indirectly from the dangerous nature of the goods'.

An example may help to clarify this. Two inland vessels, the Alpha and the Bravo collide due to which the Bravo sustains hull damage and dangerous goods on board of vessel Alpha are spilled and cause personal injury to a crew member on board of the Bravo, as well as pollution of the environment. In this case the claim for hull damage to the Bravo does not result from the dangerous nature of the goods, and therefore should be directed against the General Claims Fund,²¹⁵ whereas the personal injury claim arises directly from the dangerous nature of the goods and falls within the DG Persons Fund.²¹⁶

Damage claims for the costs of preventive measures aimed to restrict the pollution damage to a limited area or for the costs of disposing of the spilled dangerous goods belong in the DG General Claims Fund. In view of the dangerous nature of the goods preventive measures to prevent the spill from spreading are necessary in the interests of safety, public health and protection of the environment. The same applies to efforts to dispose of the spilled dangerous goods. In both cases the costs involved with the preventive and disposal measures are damage that indirectly results from the dangerous nature of the goods.

²⁰⁹ Art. 6 (1)(a) CLNI 2012.

²¹⁰ Art. 6 (1) (b) CLNI 2012.

²¹¹ Art. 7 (a) CLNI 2012.

²¹² Art. 7 (b) CLNI 2012.

²¹³ This fund is calculated on the basis

²¹⁴ I.e. is included in one of the categories of Art. 2 (1) CLNI 2012 and is not excluded in Art. 2 (2) or Art. 3 CLNI 2012 or pursuant to Art. 18 (1) CLNI 2012.

²¹⁵ Art. 6 (1)(b) CLNI 2012.

²¹⁶ Art. 7 (1)(a) CLNI 2012.

7 Final Observations

As follows from the above, the law with regard to liability for incidents with dangerous goods originating from inland vessels is rather complex and anything but uniform. A single dangerous goods incident may give rise to court proceedings in multiple jurisdictions, conflict of law issues which may be answered differently from one claim to the next, diverging liability regimes (fault-based or strict) depending upon whether the damage claim falls within the scope of the Collision Conventions or of the European ELD and Waste Directives or is to be determined by reference to diverging national laws. Finally, the question whether a damage claim arising from a dangerous goods incident is subject to limitation of liability depends upon whether this claim can be brought within the scope of application of CLNI 2012. Needless to say the resulting court proceedings are likely to be time-consuming and may give rise to unpredictable outcomes and unequal treatment of claimants, especially if a dangerous goods incident causes damage on a massive scale to a multitude of interested parties.

Clearly this unfortunate state of affairs calls for a uniform law solution. However in inland navigation the prospects for the adoption of a dangerous goods convention seem dim, whereas in maritime law at least an attempt was made in 2010 to reform and relaunch the HNS Convention. Furthermore the general jurisdiction grounds of the Brussels-Ibis Regulation and the general conflict rules of the Rome I and Rome II Regulations [see](#) ill-adapted to cases such as these. Finally, the emerging ‘brave new world’ of highly automated vessels raises the question whether the liability regimes of the current Limitation Conventions of Brussels 1910 and Geneva 1960 are adequate to deal with damage caused by unmanned vessels. In other words, the law in general and the law of inland navigation in particular, needs to keep moving, adapting itself to changing circumstances not unlike an inland vessel moving upstream or downstream the river. This is how it always was and how it always will be.