

## **Introduction**

### **Overview Inland Navigation Agreements**

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The timing and location of this conference cannot be better chosen, as it coincides with the entry into force of CLNI 2012 on July 1<sup>st</sup>, 2019, and locally takes into account the fact that Serbia is the first country and also the first Danube riparian state to ratify CLNI 2012.

Legal certainty is an essential factor for the favourable development of an economic sector, especially in cross-border activities: legal harmonisation makes a very important contribution to legal certainty. And the strengthening of economic cooperation across national borders ultimately also promotes peaceful coexistence, and this is particularly true for cross-border traffic as a prerequisite for cross-border trade. It is therefore not surprising that the Helsinki Final Act of the 1975 Conference on Safety and Cooperation in Europe strongly recommended harmonisation of legislation in the interest of promoting transport.

And if you consider the numerous and interwoven European waterways, across many nations and different legal regimes, you can imagine the importance of the unification of law on inland navigation:

The IVR, as well as the CCNR and the Danube Commission, have therefore always been and continue to be very keen to contribute to the harmonisation of legislation in the field of inland navigation law. And of course, also this conference serves this purpose.

Before we go into more detail at this conference on various aspects of the international conventions essential for transport on European waterways, I would like to give an overview on the current status of inland navigation conventions, at least as far as they are the subject of further discussions at our colloquium and as far as liability issues are concerned.

Inland navigation - especially in comparison to road transport - is undoubtedly a safe mode of transport: nevertheless, averages and damages can naturally occur here as well, such as the recent tragic collision of a tourist ship with a passenger vessel near Budapest.

Accordingly, by their very nature, liability issues play an essential role in international conventions.

## 1. CLNI 2012:

The purpose of the CLNI is to establish uniform liability limits for damages that may occur in inland navigation.

The model for the CLNI is the LLMC (Convention of Limitation of Liability for Maritime Claims): both conventions allow the vessel owner to limit his liability to certain maximum amounts. Bearing in mind that the potential compensation obligations of a vessel owner are incalculable, the CLNI shall ensure that, on the one hand, the vessel owner is able to acquire liability-insurance cover for economically justifiable premiums without, on the other hand, unduly limiting the compensation claims of persons suffering damages by vessels and, and to give them - due to the availability of insurance cover - a high probability that they will actually be able to enforce their claims against the vessel owner.

The CLNI itself regulates and harmonises only the right of the vessel owners and salvors to limit their liability by setting up liability funds and the maximum amounts of liability which are thereby applicable (except in cases of serious fault<sup>1</sup>) as well as the legal consequences of the establishment of liability funds; however, CLNI 2012 does not change the basis of liability as provided for in the individual Member States: Whether, therefore, in a concrete case the vessel owner is only liable for fault or if a strict liability is applicable, is not regulated in the CLNI as is the question whether there is also a direct claim of the injured party against the liability insurer / P. & I.-Club: all these issues continue to be assessed in accordance with the applicable national law which has to be determined under the applicable laws on the collision of laws.

The CLNI 2012 has made some essential enhancements compared to the CLNI 1988, which I would like to point out only as a general introduction:

- **Extension of the geographical scope of application**

While the CLNI 1988 was in principle only accessible for states with Rhine and Moselle waterways and was only ratified by four states (Switzerland, Germany, Luxembourg and the Netherlands), CLNI 2012 is also open for ratification / accession by other states, especially for the Danube, Elbe, Or states: it is all the more pleasing that some Danube states, such as Serbia and Hungary, have already made use of

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<sup>1</sup>) i.e. if the damage resulted from an act or omission committed with the intent to cause such damage, or recklessly and with the knowledge that such damage would probably result.

this opportunity and have signed and ratified CLNI 2012: this shows the great need for such regulations also in Danube states.

- **a significant increase in the maximum liability amounts and the creation of a new fund<sup>2)</sup>**

Doubling of the general liability fund for property damage, pecuniary loss and personal damage who are not on board the vessel (Art. 6 CLNI), whereby this "**general fund**" cannot be less than 400,000.00 SDR for personal injury and 200,000.00 SDR for all other damage;

- Increase by 2/3 to 100,000.00 SDR of the **Fund** for Life and Body Damage to **Ship Passengers** (Art 8 CLNI), multiplied by the maximum number of passengers allowed, but at least 2 million SDRs, and by the abolition of the previous limit for ships with high passenger capacity;
- Creation of a new **fund** for liability for damage resulting from the carriage of **dangerous goods** (Art. 7 CLNI) equal to the double general liability fund, but not less than SDR 10 million.

A further improvement results from the newly created regulation on the periodic adjustment of maximum liability amounts to the inflation in the CLNI 2012, as we already know it from the Montreal Convention for air traffic.

State of ratification CLNI 2012: in force since July 1, 2019; with effect at this date, the Netherlands, Germany and Luxembourg also notified the termination of CLNI 1988: thereby, the denunciation of CLNI 1988 took effect at the same date, as was declared by the 4 Member States at the signing of CLNI 2012.

### **Serbia, Luxembourg, Hungary, the Netherlands and Germany**

Ratification process initiated:

### **Switzerland, Belgium and France**

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<sup>2)</sup> Nothing has changed in the flexible system for calculating maximum liability amounts, based on load capacity and engine power.



The CLNI 2012 leaves it up to the member states whether they ratify the CLNI 2012 and declare it as a whole to be directly applicable or whether they incorporate the CLNI 2012 regulations into their national law, a path that Germany, for example, has taken. It will be interesting to discuss at today's colloquium, if the different transformation procedures do have effect on the interpretation and application of the CLMNI rules in the member states – and in fact as we will see later this morning, the judgments of the courts in the various member states differ as can be easily seen in the collection of CMNI and CLNI judgments published by IVR.

Moreover, the possibilities of the member states to make reservations regarding individual regulations of the CLNI, which are still contained in the CLNI 2012, are obstructive to the unification of the law.

Nevertheless, the CLNI 2012 continues to allow a reservation by the member states regarding the limitation of liability for damage to the physical, chemical or biological quality of water, in particular damage caused by dangerous goods. The Netherlands and Germany, for example, have already made use of this reservation: liability for water pollution damage under § 5 of the German Inland Navigation Act is assessed in accordance with the German Water Resources Act.

Germany, but not for instance the Netherlands, has also made use of the reservation under Art. 18 lit. b) CLNI 2012 regarding the possibility of excluding the limitation of liability for damage arising from the transport of dangerous goods: in § 5 lit.) h of the Inland Navigation Act, Germany has subjected such damage to a separate, additional liability fund and has thus, by way of this national regulation, at least granted the vessel owners to limit liability for such damages.

Furthermore, Germany has made use of the possibility of the reservation according to Art. 18 lit. d) CLNI 2012 (unlike, for example, the Netherlands and the other current member states regarding the limitation of liability for lighters exclusively used in ports for transshipments..

Finally, Germany, in contrast to the Netherlands, has also declared a reservation pursuant to Article 18 c) of CLNI 2012 concerning the costs of wreck removal, but has created its own liability fund for this in § 5j of the German Inland Navigation Act.

#### **Overview reservations CLNI 2012**

<b>Article CLNI 2012</b>	<b>Description of the</b>	<b>country</b>
Art. 6 (2)	Preference for port facilities, bridges, etc.	GER
Art. 15 (2)	Excluded national waterway	
Art. 15 (3)	Exclusion of small vehicles in national transport (limited to 8 years)	
Art. 18 (1) lit. a)	damage caused by changes in the physical, chemical or biological properties of the water	NL, GER, Serbia (CH)
Art. 18 (1) lit. b)	Damage resulting from the carriage of dangerous goods	
Art. 18 (1) lit.c), 1st case (Art 2 (1) lit. d))	wreck removal	GER, Serbia (CH)
Art. 18 (1) lit. c), 2nd case (Art 2 (1) lit. e)	Disposal, destruction, etc. cargo	GER, Serbia (CH)
Art. 18 (1) lit. d)	Lighter for transshipment in ports	GER

## 2. CMNI (Budapest Convention)

The CMNI is already a success story today: Completed in 2000, it has since been ratified or transformed into national law by nearly all states bordering the most important European waterways, with the exception of Austria, Poland and Portugal, whereby at least Austria and Poland declared their willingness to ratify CMNI in the foreseeable future and the European Commission has also given its approval to do so in the meantime.

The CMNI regulates the liability arising from the contract of carriage of goods by inland waterways, provided that the place of acceptance and the place of delivery are located in two different countries, and at least one of which has ratified the CMNI. The CMNI regulates the liability of the carrier for loss of or damage to the goods as well as for exceeding the delivery period - similar to the CMR, which recognisably was the model for the CMNI. The CMNI provides for a liability for the loss/damage caused between acceptance and delivery of the goods, for which the carrier is liable for fault with a reversed of the burden of proof: accordingly, the carrier is liable in principle for the loss/ damage occurring during the period in which the carrier has the goods in his custody, unless he is able to prove one of the reasons for exemption from liability under Art. 16, 18 CMNI, in particular the "unavoidable event".<sup>3)</sup>

This far reaching **liability of the carrier** is, however, **limited to 666.67 SDR/package** or unit of cargo or **2 SDR/kg of** the goods carried in the case of damage to goods (**loss, damage**), whichever is the higher, or **1,500 SDR** for the (empty) container and an additional **25,000 SDR** for the **goods loaded** therein in the case of **container transport** (art 20 (1), (2) CMNI).

Liability for **damage caused by delay** is limited to the **freight charges agreed** for the transport (art 20 (3) CMNI).

The carrier shall not be entitled to avail himself of such limits of liability if it is proved that the carrier himself caused the damage by an act or omission, either with the intent to cause such damage or recklessly and with knowledge that such damage would probably result (art 21 CMNI).

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<sup>3)</sup> The damage was caused by circumstances which a diligent carrier could not have prevented and the consequences of which he could not have averted.

These liability regulations are supplemented by the recipient's obligation to make a complaint, the breach of which is linked to a (however rebuttable) presumption of proper delivery, as well as a short, **1-year limitation period** from delivery or the agreed delivery date.

The provisions of the CMNI are **mandatory** and are accessible to deviating party agreements to a very limited extent, only: the maximum liability amounts cannot be reduced and can only be increased by an explicit agreement, therefore not merely by means of General Terms and Conditions; the CMNI rules on the burden of proof regarding liability are mandatory and the limitation period can only be extended, but not shortened (Art 25 (1) CMNI).

However, due to Art. 25 (2) CMNI, the liability for nautical fault, fire or explosion on board the vessel unless resulting from a fault of the carrier, and for defects of the vessel existing prior to the voyage which could not have been detected prior to the start of the voyage, can be excluded by contractual agreement: the IVTB has made use of these possibility.

In addition, there is a certain interaction between CMNI and CLNI: Since the CLNI maximum liability limits generally contain liability limits also for damage on board the ship, it may well be possible - albeit only in exceptional cases - that it may be worthwhile for shipowners to consider setting up a liability fund. However, this will only be possible in exceptional cases because, as a rule of thumb, the liability limits of the general liability fund under CLNI are higher than the maximum liability under CMNI. However, in the event of a collision, i.e. when tort and contractual damages occur together, it is quite possible that the establishment of a fund under the CLNI will result in the proportionate satisfaction of all material damages leading to a payment of damages below the liability limits of the CMNI.<sup>4)</sup>

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4) See *Fischer*, TranspR 2013, 372 ff.



Also the CMNI provide for certain reservations and declarations for states ratifying or acceding to CMNI:

Examples of declarations/reservations to CMNI (not exhaustive).

Article CMNI	Description of the reservation/declaration	Country
Art 30 (1)	Excluding certain inland waterways	CH
Art. 31 lit. a))	Applicable also to (certain) inland transports.	H, CH, NL (if agreed by the parties), Serbia
Art 31 lit. b)	Applicable also to carriages free of charges	NL
Art 32	Nautical faults (acts or omissions by the crew during navigation); regional transports	



### 3. 1960 Convention on the Unification of Certain Rules on collision of inland navigation vessels

Member States:

**Austria, Belarus, Belgium, France, Germany, Hungary, Kazakhstan, Montenegro, Netherlands, Poland, Romania, Russian Federation, Serbia, Switzerland.**

This agreement has been in force for quite a long time and covers damage inflicted on ships, persons or property on board, in the waters of one of the Contracting Parties caused by (Art 1)

- collisions between inland waterway vessels, or
- execution or omission of a manoeuvre, or
- non-compliance with regulations

However, the subject of regulation is small: it only provides for

- principle of a **liability for fault**;
- **allocation of liability**: if a damage was caused by the fault of several ships,
  - o they are **jointly and severally liable for** personal injury and for damage to property caused to other ships which suffered those damage without own fault and to the property on board of such vessel;
  - o for damage to property suffered by the ships responsible for the damage, there is only a **pro rata** liability provided for, the proportion of liability being determined by reference to the seriousness of fault in question, if the latter cannot be determined, there is a liability in equal shares (Art. 2, 3). If there is fault on the part of several ships, those are **jointly and severally liable for** personal injury and for damage to property caused to other ships without fault and to the property on board of them (Art. 2, 3), if there is no possibility of determining the proportion of liability on the basis of the seriousness of the fault in question, there is a liability in equal shares (Art. 4).
- The fault of a pilot, including that of a forced pilot, is attributed (Art. 5).
- a **limitation period of 2 years** is provided for claims for damages, for recourse claims one year from payment or legally binding decision in the preliminary process.

The **amount of liability is not regulated** in this Agreement: it is assessed according to the applicable national law or international convention on limitation of liability (Art 8): this Convention therefore does not change the fact that under Austrian law, for example, the liability of the shipowner is limited to the ship or, as another example, under German law, the liability can be limited according to the implemented CLNI 2012 regulations.



#### 4. Goal of the Colloquium

At the colloquium, we will first discuss CMNI and CLNI in more detail; the aim of these agreements, legal unification, which is also a major concern of IVR, will therefore also be given priority in questions of interpretation of the agreement and implementation in the individual Member States.

In the afternoon we will look at other inland waterway conventions and try to clarify where there are still gaps and what agreements are still needed.

We hope for exciting lectures and stimulating discussions, to which all of you are cordially invited.