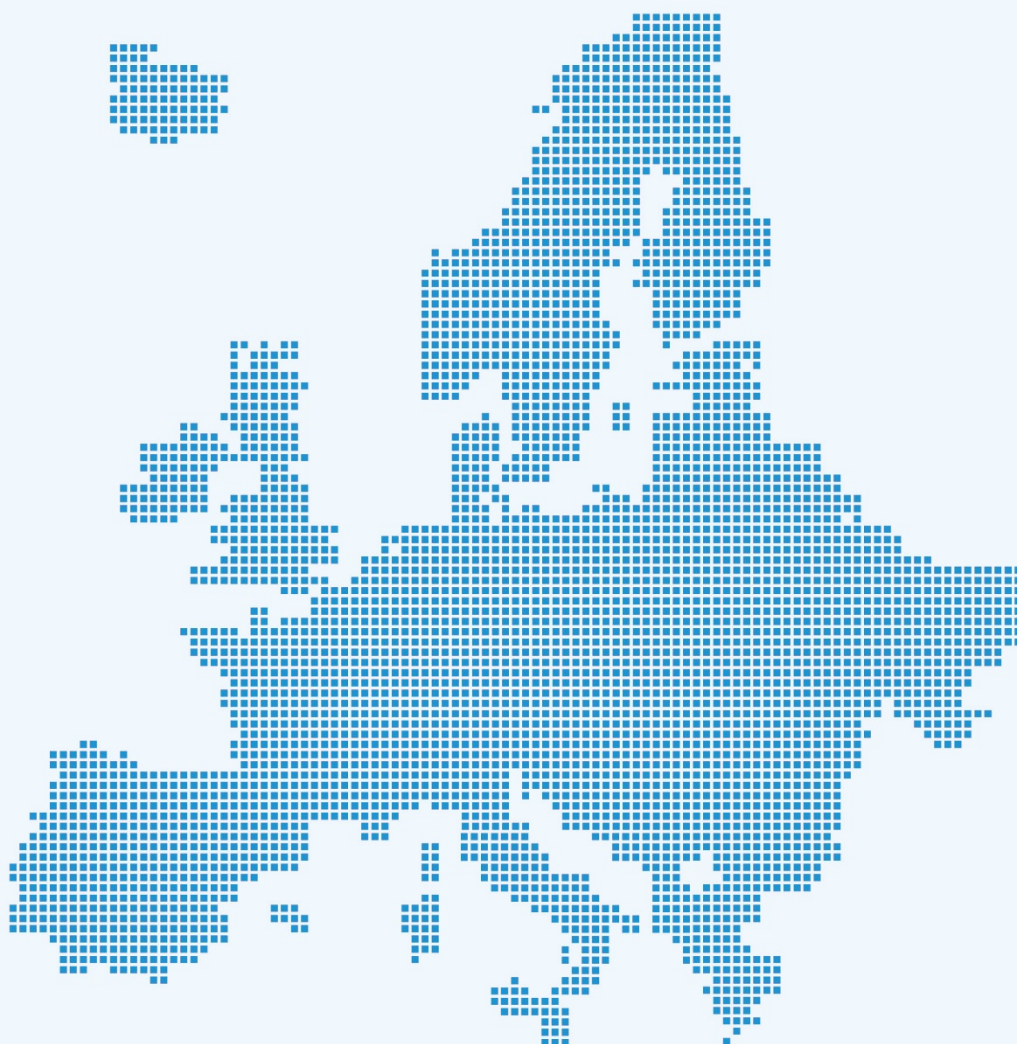


GUIDELINES FOR TRANSPOSITION OF THE STRASBOURG CONVENTION ON THE LIMITATION OF LIABILITY IN INLAND NAVIGATION (CLNI 2012) INTO NATIONAL LAW

**IVR**

Vasteland 78

3011 BN Rotterdam

T: +31 (0)10 411 60 70

F: +31 (0)10 412 90 91

E-mail: info@ivr.nl

www.ivr.nl



INDEX

1. INTRODUCTION
2. DR. MARTIN FISCHER: “TRANSPOSITION OF THE CLNI INTO THE NATIONAL LAW OF THE
FEDERAL REPUBLIC OF GERMANY”
3. MR. TIM ROOS: “THE REGULATION OF THE LIMITATION OF LIABILITY IN THE NETHERLANDS”
4. DR. THOMAS BURCKHARDT: “TRANSPOSING THE CLNI 1988 TO SWISS LAW”
5. ABOUT THE AUTHORS

1. INTRODUCTION

The Final Act accepting the Strasbourg Convention 2012 on the Limitation of Liability in Inland Navigation (CLNI 2012) was signed on 27 September 2012. The Diplomatic Conference on the acceptance of the Convention was attended by the representatives of 13 states and various recognised international associations, including the IVR.

The amended Convention came into being after several years of deliberation and extends the scope of application of the CLNI Convention then in force, which had previously been confined to the Rhine and Moselle. Moreover, in the new Convention, both the general maximum liability amounts as well as the maximum liability amounts for passenger claims have been increased and separate maximum liability amounts for claims in respect of losses arising from the carriage of dangerous goods have been introduced in a new article. The Convention will come into force once it had been ratified by 4 States and the existing Strasbourg Convention has been extinguished.

Guidelines for transposition into national law

One of the responsibilities of the IVR and of its Legal Commission is legal harmonisation. In the interests of its members it advocates inter alia the conclusion and ratification of international agreements. In this regard, the Legal Commission has set itself the objective of promoting the entry into force of the new CLNI Convention and, to this end, of drawing up guidelines for its national transposition. The intention is to offer support to States which have no previous experience with the limitation of liability instrument and with the setting up of funds.

Under the terms of Article 1 of the Convention, ship owners and salvagers or rescuers, as construed by the definitions in this article, can limit their liability for the claims specified in Article 2. However, the right to limitation under this Convention is reserved to the commercial shipping industry.

The Convention differentiates between general maximum amounts (Article 6), maximum amounts for claims in respect of losses arising from the carriage of dangerous goods (Article 7) and maximum amounts for passenger claims (Article 8), for which different limitations of liability may be asserted in each case.

The limitation of liability under CLNI 2012 may be asserted both without setting up a limitation fund (Article 11) and by setting up a limitation fund (Article 12). Whether and when an assertion occurs with or without a limitation fund having been set up shall be determined by the relevant State, which is a party to the CNLI.

To illustrate the assertion of a limitation of liability with and without a limitation fund having been set up, this brochure describes how the CLNI Convention 1988 was transposed into German, Swiss and Dutch law. Whereas the Netherlands and Switzerland opted for a system in accordance with Article 12, involving the setting up of a limitation fund when transposing the Convention into their national law, a limitation of liability in Germany can be asserted in accordance with Article 11 of this Convention without the setting up of a limitation fund.

The following contributions contain descriptions by three members of the Legal Commission of how the Convention was transposed into the three national legal systems in question, which might serve as guidelines for the transposition of the CLNI 2012 into national law.

Contributions

Dr. Martin Fischer: “Transposition of the CLNI into the national law of the Federal Republic of Germany”

Mr. Tim Roos: “The regulation of the limitation of liability in the Netherlands”

Dr. Thomas Burckhardt: “Transposing the CLNI 1988 to Swiss law”



2. DR. MARTIN FISCHER: “TRANSPOSITION OF THE CLNI INTO THE NATIONAL LAW OF THE FEDERAL REPUBLIC OF GERMANY”

Following the signing and ratification of the Strasbourg Convention on the Limitation of Liability in Inland Navigation (CLNI) of 4 November 1988, the provisions of the CLNI have been transformed into the law of the Federal Republic of Germany at two different levels:

The substantive law, namely the regulations that determine who is able to limit their liability under general civil rules, for which claims and for what amounts, has been incorporated into the Inland Waterways Act.

The formal regulations, namely the regulations governing the form in which, at which court and on which terms and conditions the limitation of liability can be achieved by the setting up of a fund, were incorporated in 1998 in the maritime law already existing at that time, namely in the Shipping Distribution Statute.

I.

Substantive provisions

The substantive provisions of the CLNI have been integrated into national, German law as follows:

1. CLNI and Inland Navigation Act

The CLNI contains substantive provisions in Chapter I and Chapter II. Chapter I principally governs which individual can limit liability for which claims and how this liability can be breached. Chapter II governs the level of maximum liability amounts for certain types of ships, how different claims that have been made relate to one another and how a limitation of liability can be effected even without setting up a limitation fund.

The Federal Republic of Germany has not enacted any new independent national law on the limitation of liability for this limitation of liability, but has integrated the CLNI's regulations into the already existing Inland Navigation Act¹.

2. Inland Navigation Act

The German Inland Navigation Act was first promulgated on 15 June 1895 and has since undergone regular reforms.

Even before the incorporation of the CLNI's rules on liability, this Act contained detailed rules on circumstances under private law that may result from the use of an inland waterway vessel for inland navigation on inland waterways.

Among the matters that was, and is, regulated is who is liable for losses arising in the event of a ship being used for inland navigation. The Act contains regulations governing duties of care and a skipper's liability, and to what extent the skipper has authority when working for the owner or operator. There

¹ Act pertaining to inland navigation matters under private law (Inland Navigation Act – BinSchG) of 15 June 1895, Reichsgesetzblatt (National Gazette), page 369, last amended by reform of the Maritime Law of 20 April 2013, Bundesgesetzblatt (Federal Gazette)) I, page 831

are regulations governing the claims of the crew arising from their work on board, about general average and detailed regulations on salvage and assistance and disasters. Also governed is the issue of the limitation period and ultimately, what guarantees are created for the injured party should a ship cause damage (shipping liens -*Schiffsgläubigerrecht*).

Until the Transport Law Reform Act was enacted in 1998² inland navigation freight law was also regulated within the Inland Navigation Act; nowadays this is incorporated into common commercial law³ (HGB - Commercial Code)⁴ and has been split out of the Inland Navigation Act. Nowadays, all that is to be found there is a referral⁵.

3. Old law (pre-1998)

Even prior to the incorporation of the CLNI liability regulations, there was an Article 4 of the Inland Navigation Act, old version⁶ a regulation on the limitation of liability for the shipowner. At that time the ship owner or operator⁷ was able to reduce his personal liability to the value of the ship and the freight (*adjektivische Haftung*)⁸.

In place of Articles 4 - 5 of the BinSchG (Inland Navigation Act) old version⁹ the German legislator has inserted new paragraphs¹⁰ in the Inland Navigation Act, which transpose the provisions of the CLNI into German national law in their own independent form. The German legislator therefore has not simply adopted the CLNI's regulations into German law but has formulated its own provisions and integrated them into the existing Inland Navigation Act as Articles 4 -6 BinSchG.

4. Transposition of the CLNI into national regulations

The German legislator has opted for the following system in its transposition of the CLNI.

Article 4 BinSchG (Inland Navigation Act) starts by describing the sort of claims for which liability as construed by Article 2 CLNI may be limited; in Article 5 BinSchG certain claims are excluded.

Article 5a of the BinSchG is the legislator's transposition of the ability to offset counterclaims under Article 5 CLNI.

Article 5b BinSchG governs the breaching of the limitation of liability pursuant to Article 4 CLNI in the case of conscious recklessness by the liable party.

² Act updating the law on freight, forwarding and storage (Transport Law Reform Act – TRG) of 25 June 1998 Bundesgesetzblatt 1(Federal Law Gazette) 998, I, page 1588 et seq.

³ Handelsgesetzbuch (Commercial Code) of 10 May 1897, Reichsgesetzblatt (National Gazette), page 219, last amended by the law amending the Commercial Code of 4 October 2013, Federal Law Gazette I, page 3476

⁴ HGB, section 4, Articles 407 et seq.

⁵ Article 26 Inland Navigation Act

⁶ Vortisch/Bemm, BinSchR (Inland Navigation Act), commentary, 4. Edition, 1991, page 71 et seq.

⁷ Pursuant to Article 2 I BinSchG this is the individual who uses, namely "*operates*" a third-party vessel himself for inland navigation

⁸ Vortisch/Bemm, BinSchR (Inland Navigation Act), 4. Edition, 1991, page 4 recital 16

⁹ Vortisch/Bemm, page 71, 80 and following page and 84 and following page.

¹⁰ Articles 4; 5 - 5m and 6 Inland Navigation Act

Article 5c BinSchG spells out the regulation in Article 1 (1), (2) lit. a and (5) CLNI; this regulation contains a precise definition of the circle of those individuals¹¹ who are able to exercise the right to limitation of liability.

Article 5d III BinSchG lays down that under Article 10 CLNI liability can be limited by entering a plea, namely without setting up a limitation fund, as envisaged by Article 11 CLNI.

Articles 5e to 5g BinSchG reflect the maximum liability amounts provided for in Article 6 CLNI and govern the so-called “Swift”¹², in accordance with Article 6 (1) c CLNI.

Article 5k BinSchG governs the level of the personal injury fund in accordance with Article 7 CLNI.

Article 5l BinSchG determines the level and timing of the calculation of the maximum liability amount in units of account, as provided for in Article 8 CLNI.

Finally, Article 15 CLNI is implemented in Article 5m BinSchG. It states that Articles 4 to 5l BinSchG apply in any event if the incident for which liability is limited takes place in Germany.

Finally, Article 6 BinSchG clarifies that in addition to the general ruling on responsibility in Article 3 BinSchVG¹³, irrespective of the possibility of limitation of liability, the competent court¹⁴ is also in all cases the court of the ship's home location¹⁵.

5. National reservations in German law

The German legislator has availed itself of a number of CLNI reservations:

In Article 5 BinSchG the German legislator has availed itself of the reservation in Article 18 CLNI and (in addition to the original exceptions in Article 3 CLNI) excluded claims in respect of losses arising from water pollution from the overall limitation of liability according to the CLNI. In terms of the legal mechanics, this has been implemented by a reference to Article 89 of the Wasserhaushaltsgesetz (WHG - Water Resources Management Act)¹⁶ in Article 5 (4) BinSchG. The term water pollution

¹¹ It is remarkable that the German legislator, without further linguistic substantiation or explanation, has carried the term of “charterer” from Article 1 (2) lit. a CLNI over into German law. Up until this juncture the term “charterer” was unknown in German law and could not therefore be deemed a legal *terminus technicus*. The German legislator leaves it to the courts to interpret this term and thus exercise considerable influence over the extent to which liability can be limited. See also Binnenschifffahrt (Inland navigation) magazine, ZfB, 2011 volume, page 2114 (incorrectly identified as 2014) et seq. with introductory remarks by Fischer and ZfB 2011 volume, page 2139 et seq.

¹² That is the partial use of the material damage fund for claims for personal injury.

¹³ Law on the statutory proceedings in inland navigation matters of 27 September 1952 (Federal Law Gazette I, page 641, as amended most recently by the Maritime Law reform act of 20 April 2013, Federal Law Gazette 2013 I, page 831 et seq.

¹⁴ Typically this is the inland navigation court responsible for the disaster scene.

¹⁵ Articles 5m and 6 BinSchG govern the scope of the law and place of jurisdiction for lawsuits, and are therefore, strictly speaking, not substantive rules but rules of procedure. However, they are co-governed in the context of the substantive rules of the Inland Navigation Act.

¹⁶ Article 89 WHG, which replaces the old Article 22 WHG, enacts a liability to pay compensation on the part of whoever introduces water-polluting substances into waterways. Law governing water resources management

pursuant to Article 18 (1) lit. a CLNI is therefore not defined in the Inland Navigation Act itself but is specified in the form of a reference to the Water Resources Management Act.¹⁷

Article 5h BinSchG codifies a particular limitation fund for the transport of dangerous goods. Germany has thus used the reservation in Article 18 (1) lit. b and made these specific material damages subject to a separate limitation fund.

The German legislator has also availed itself of the facility under Article 18 (1) lit. c CLNI and provided for national regulations for the limitation of the salvager's or pilot's liability and regulators in Article 5i BinSchG.

The German legislator has used Article 5h III BinSchG to avail itself of its right under CLNI Article 6 (2) and accorded the compensation claims referred to therein absolute priority over other material damages. Typically this favours the public authorities who are very frequently the owners of the facilities mentioned in Article 6 (2) CLNI / Article 5h III BinSchG.

The German legislator has provided for a dedicated fund for wreck removal costs in Article 5j BinSchG and thus availed itself of the reservation in Article 18 (1) lit. c.

6. Résumé

The German legislator has not taken the opportunity, which also fundamentally exists, of simply transforming the CLNI into national law by means of an appropriate incorporation law using the original CLNI wording but has taken the course of specifically incorporating the CLNI's provisions on liability into German substantive law by means of its own formulations and additions to the CLNI.

To that end – dogmatically and systematically correctly – it has used the already existing Inland Navigation Act that has governed inland navigation affairs in Germany under private law from as long ago as 1895. As this law contains, inter-alia, the critical regulations on liability in shipping tort law, this Act is the right place in which to regulate the limitation of liability as well. As the CLNI has replaced the liability with ship and freight also previously regulated in the Inland Navigation Act, this approach is also historically and legally consistent.

The German legislator has made very extensive use of the CLNI's reservations: Favouring claims for water pollution and losses incurred by port and waterway facilities in the event of damage typically favours public authorities relative to aggrieved parties under private law. The same applies to the setting up of a separate fund for wreck removal costs.

(Water Resources Management Act – WHG) of 31 July 2009, as amended most recently by the law of 7 August 2013 (Federal Law Gazette I, page 3154).

¹⁷ There has been a controversial decision on this subject that has attracted much attention and generated considerable discussion, namely on the question whether costs incurred by the fire brigade come under the reservation of Article 5 (4) BinSchG, ZfB, 2012 volume page 2168 et seq. with comments by Fischer and Schmidt, ZfB 2012 volume, page 2181f

The setting up of a separate dangerous goods fund serves the general public's need for protection, especially in the case of major loss events and catastrophes, which are conceivable when it comes to the carriage of dangerous goods.

II.

Distribution procedure

The formal CLNI rules, namely the rules governing where and how a fund for limiting liability is to be set up, have been recast and regulated by the German legislator in the context of the 1998 Shipping Distribution Statute already existing for maritime law¹⁸.

1. Initial situation 1957 and 1976

The Shipping Distribution Statute initially regulated the requirements as to the limitation of liability under the 1957 Brussels Convention on shipowners' liability and then the 1976 London Convention.

The provisions of the 1957 Brussels Convention on shipowners' liability were implemented in law in 1973 by means of a revised version of Articles 486 to 487 of the German Commercial Code (HGB) applicable in Germany at the time. The London Convention of 1976 on the other hand was not transformed into substantive law but was incorporated in full into German liability law in 1986¹⁹ by a simple reference in Article 486 I HGB (German Commercial Code)²⁰.

The German legislator of the day therefore refrained from implementing the rules of the London Convention by formulating its own independent rules and incorporating these rules into an existing or new national law. The text of the London Convention became an integral part of German law via the referral provision itself. From a substantive law standpoint, the London Convention in its original wording is thus deemed to be German national law.

In 1957, the German legislator dealt with the procedural treatment of this substantive law by enacting a new law, namely the Shipping Distribution Statute, which it then later brought into line with the provisions of the 1976 London Convention.

2. Shipping Distribution Statute

Converting the 1957 Brussels Convention on Shipowners' liability into German law necessitated a procedural law stipulating how the rules of the Convention on Shipowners' liability were to be implemented from a legal and procedural perspective.

To this end, the Shipping Distribution Statute was first enacted on 21 June 1953²¹. The introduction of the new Article 486 I HGB (German Commercial Code) by means of the maritime law amending law of

¹⁸ Law on the procedure for the depositing and distribution of the liability amount for limiting ship operators' liability (Shipping Distribution Statute), Federal Law Gazette, 1972 I, page 953 et seq.

¹⁹ Entry into force on 1 September 1987.

²⁰ Detailed commentary by Sabine Rittmeister in *Das seerechtliche Haftungsbeschränkungsverfahren nach deutschem Recht*, (The limitation of liability procedure in maritime law according to German law), 1995, page 3 et seq, 9.

²¹ Law on the procedure for the depositing and distribution of the liability amount for limiting ship operators' liability (inland navigation and maritime law distribution statute), Federal Law Gazette, 72 I, 51.

25 July 1986²² also necessitated an amendment of the Shipping Distribution Statute, which was also brought into line with the rules of the London Convention on 25 July 1986²³.

3. Inland Navigation Distribution Statute

To implement the CLNI and the reform of the Inland Navigation Act that followed it, it was therefore possible to make use of an already existing procedural law.

A second part “*inland navigation distribution procedure*” was introduced into the distribution statute, with Article 34 II of the SVertO (Shipping Distribution Statute) essentially referring to the formal rules of the Shipping Distribution Statute.

This law²⁴, which since the reform is no longer referred to as the **Shipping Distribution Statute** but as the **Shipping** Distribution Statute is now divided into a first part, the maritime distribution procedure, a second part, **inland** navigation distribution procedure, and a third part governing what happens when a fund is set up, not in Germany, but in another CLNI Contracting State.

4. Shipping Distribution Statute

The Shipping Distribution Statute (SVertO) governs the requirements to be applied to an application under which the procedure is to be initiated. It governs the jurisdiction for the distribution procedure and the way in which the court determines the sum to be paid when setting up the fund. It also governs how and where the money can be deposited.

Article 9 of the SVertO determines that there will be an administrator who is comparable to the insolvency administrator as construed by the Insolvency Regulation. The administrator is there to ensure that the procedure is correctly implemented and is not therefore engaged in the interest of the parties but as a sort of supervisory authority. He is paid for out of the liability amount.

The Shipping Distribution Statute also governs in what form, where and by whom the claims need to be lodged (Articles 13 to 16 SVertO) and how these claims are to be verified.

Articles 31 to 33 SVertO govern the costs to be borne by the applicant and what happens if the amount of the costs potentially arising in the course of the distribution procedure is not yet determined (Article 33 SVertO).²⁵

²² Law amending the German Commercial Code and other laws of 25 July 1986, Federal Law Gazette 1986, II, 786

²³ Law on the procedure for the setting up and distribution of the fund for the limitation of liability for maritime claims (Shipping Distribution Statute) of 25 July 1986, Federal Law Gazette, 1986, I, 1130.

²⁴ Law on the procedure for the setting up and distribution of a fund for the limitation of liability in maritime and inland navigation (Shipping Distribution Statute - SVertO) of 25 June 1986 (Federal Law Gazette I, page 1130 et seq., last amended by the Maritime Law reform act of 20 April 2013, Federal Law Gazette 2013 I, page 831 et seq.

²⁵ In this eventuality the distribution court shall be permitted to hold back part of the ability fund until the amount of the costs has been definitively determined.

Articles 35 to 49 SVertO contain derogations from the Shipping Distribution Statute, arising from the fact that there are some differences between the CLNI and the terms of the London Convention.

5. International law

The third part of the Shipping Distribution Statute applies equally to the maritime and inland navigation distribution procedure.

This governs what happens if a lawsuit is instituted for which a fund has been set up abroad in another Contracting State. In this case, execution is limited in the same way²⁶ as if the fund had been set up in Germany. There is a unanimous opinion that the fact that a fund was established not in Germany but in a Contracting State other than the Federal Republic of Germany must not in itself result in a title being handed down which finds that there is personal liability without the possibility of a limitation of liability.

6. Setting up of a fund and unlimited personal liability

There is however no provision for what happens with a lawsuit in which an aggrieved party claims that there are grounds which might result in the liable party not being able to limit his liability vis-a-vis the specific aggrieved party; for example because there is conscious recklessness. There have already been a number of fundamental rulings in Germany on this subject in terms of the practical application of the Shipping Distribution Statute²⁷.

7. Substantive law

In addition to the details concerning the distribution of the fund that has been set up, the Shipping Distribution Statute also contains, in Article 24 SVertO, a substantive law provision determining that a creditor who accepts a payment from the fund thereby forfeits his personal claim if he fails to sue for personal liability within one month of the finding against the debtor.

Legally, the Shipping Distribution Statute becomes an effective part of substantive law by means of Article 5d II of the Inland Navigation Act (BinSchG), which states that the limitation of liability under the Inland Navigation Act can be triggered by the maximum liability amounts contained in the CLNI “by setting up a fund in accordance with the Shipping Distribution Statute”. The procedural law, the Shipping Distribution Statute, thereby becomes an integral part of the substantive provision on the limitation of liability.

8. Résumé

The need arising from the CLNI, namely that the liability amount be distributed to different claimants according to a set procedure is governed in Germany by a specific law, namely the Shipping Distribution Statute.

²⁶ See Art. 52 SVertO

²⁷ The German courts are of the opinion that a lawsuit in which it is being considered whether the liable party is personally liable, for example because of deliberate recklessness, not be discontinued because a fund has been set up and a distribution procedure is being conducted. The liable party can therefore – if the prerequisites for unlimited personal liability have been met – be sentenced to unlimited personal liability in the course of the distribution procedure, ZfB 2010 volume, page 2099 et seq.; ZfB 2012 volume page 2201 et seq.; fundamentally on ZfB 2014, volume page 2263 et seq.

This law features numerous elements of the Insolvency Statute, namely the distribution of the insolvency proceedings among different insolvency creditors. At the same time however it is so specific that it made absolute legal sense in implementing the CLNI (and the same also for the maritime regulations) to regulate the shipping distribution procedure in a law of its own.

The CLNI guidelines regarding the formal provisions are very brief such that the national legislator enjoys considerable discretion, which the German legislator has taken advantage of.

Notwithstanding the differences between the limitation of liability under maritime and inland navigation law, there are numerous parallels which certainly warrant both distribution procedures being regulated uniformly within one law with a reference procedure.

In the process the German legislator has also borne in mind that clear regulations need to be created in the event of the limitation of liability by setting up a fund in another CLNI Contracting State also achieving its full effect in respect of claims under substantive law being pursued in German courts.

3. MR. TIM ROOS: “THE REGULATION OF THE LIMITATION OF LIABILITY IN THE NETHERLANDS”

The CLNI 1988 and 2012 contain numerous material provisions regarding the right of liable ship owners and salvagers or rescuers to limitation of liability. However, the CLNI (1988 and 2012) contains no procedural regulations but leaves it to the Contracting States as to how limitation of liability can be achieved in practice. Each Contracting State must therefore determine its own procedural regulations. In the Netherlands, the procedural regulations are incorporated in the Code of Civil Procedure (Rv) (Article 642a et seq, hereafter: the limitation proceedings; Annex: English translation of Article 642a Rv un). Once the modernised CLNI 2012 has been ratified and come into force some of the provisions in Dutch law will have to be amended. The CLNI 1988 is directly applicable in the Netherlands. This means that the judge can directly apply the material provisions in the CLNI and is required to interpret them autonomously. Although the material provisions have also been incorporated into the Dutch Civil Code, this in no way affects the judge's duty directly to apply the provisions of the agreement and to interpret them independently.

This contribution explains how the limitation proceedings are currently regulated in the Netherlands.

1. The right to limitation of liability?

As already mentioned, the CLNI 1988 applies directly in the Netherlands. Once it has come into force, the CLNI 2012 will also apply directly. That means that the CLNI itself – namely without any consideration to national legislation – provides grounds for judging whether the various parties are able to limit their liability.

Article 1 section 1 CLNI (both 1988 and 2012) entitles a ship owner to limit his liability. Article 1 paragraph 2 (a) CLNI 1988 defines as being a ship owner not only the owner but also the charterer, freighter and operator of a vessel. These individuals belong to the so-called circle of those entitled to limitation.

2: How can the right to limitation of liability be invoked?

What must the individual classified as a ship owner as construed by Art. 1 CLNI do in order to limit his liability?

The CLNI (Art. 10 CLNI 1988; Art. 11 CLNI 2012) provides two options for limiting liability:

- (1) by invoking the limitation of liability without the constitution of a limitation fund,
- (2) by constitution of one or a number of funds by or for the liable party.

The Contracting States may however provide in their national legislation that is only possible to invoke the right to limit liability by constituting one or more funds. The Netherlands have availed themselves of this a possibility in their national legislation (Art. 8:1060 para 1 BW and Art. 642a Rv).

The owner of a ship will therefore have to constitute one or a number of limitation funds. How that is to be achieved in practice is not described in the CLNI but left to the Contracting States.

3: How many funds are required?

The following question is which (categories of) funds need to be constituted in order to be entitled to limit liability for the various claims.

The CLNI 1988 (Articles 6 and 7) differentiates between three categories of maximum liability amounts:

- a. for claims in respect of death or personal injury (personal fund): SDR 700 per kW of engine power (+) SDR 200 per tonne of carrying capacity,
- b. for other claims (asset fund): half of the personal fund,
- c. for claims by travellers aboard passenger vessels (passenger fund): SDR 60,000 per passenger with a minimum amount of SDR 720,000 and maximum amounts of SDR 3, 6 or 12 million, depending on the permitted number of passengers.

In the new CLNI 2012 the maximum liability amounts are doubled for personal injury and material damage (personal and asset funds). The maximum liability amount for claims by Travellers (passenger fund) was increased to 100,000 (instead of 60,000) SDRs per passenger with a minimum amount of SDR 2 million and with no maximum amount (Art. 8 CLNI 2012).

Wreck removal

The CLNI 1988 offers states the option of not applying the agreement's provisions to claims relating to the removal of sunken ships and cargoes (Art. 18 para 1 (c)). The Netherlands have not however availed themselves of this option. This means that under Dutch law, as it currently stands, the ship owner can limit his liability for such demands by creating a property fund. To do so he does not need to create a separate wreck removal fund. A property fund is sufficient.

It remains to be seen whether the Netherlands will avail themselves of the opportunity to ratify the new CLNI by excluding the option of a limitation of liability for wreck and cargo removal costs after all.

Water pollution

The CLNI 1988 also affords the option provided by Art. 18 para 1 (a) of not applying the provisions of the agreement to claims in respect of water pollution. The Netherlands have availed themselves of this option. Under Dutch national legislation (Article 1 para 1 (b) KB, 29 November 1996, Stb . 587) a separate water pollution fund of an amount equal to the personal fund must be set up in order to limit the liability for costs and damages caused by water pollution. It is not known whether this will change under the new CLNI 2012.

Dangerous goods

The current CLNI 1988 makes no distinctions as to the maximum liability amounts for claims for damage caused as a result of the carriage of dangerous goods. However, the CLNI 1988 offers the Member States the option of not applying the provisions of the agreement to such claims (Article 18 para 1 (b)). The Netherlands have availed themselves of this option as well. Pursuant to Dutch national legislation the maximum liability amounts for personal injury and material damage, namely personal and asset funds, are doubled in the event of damage caused by the carriage of dangerous

goods. This is referred to as the “dangerous goods fund” although in fact what we are talking about is an increase in the personal and property fund.

In the new CLNI 2012, however, – in addition to the maximum liability amounts for personal injury and material damage – there are separate (new) maximum liability amounts for ships carrying *dangerous goods*, but then only as regards claims arising directly or indirectly from the hazardous nature of these goods. Both for personal injury and material damage, these maximum liability amounts are double the normal maximum liability amounts, but a minimum of 10 million SDRs. Should the new CLNI 2012 be ratified, Dutch legislation will have to be brought into line with the modernised CLNI as regards the maximum liability amounts for damage *caused by* dangerous goods. The consequence of this will be that where damage is caused by dangerous goods separate “dangerous goods funds” will have to be constituted in addition to the normal personal and asset funds.

4: Which court has jurisdiction? (Art. 642a Rv)

By virtue of Article 7 of the EEX Regulation (Brussels I) a court which has jurisdiction under the provisions of the Regulation on jurisdiction in actions relating to liability from the use or operation of a vessel shall also have jurisdiction in actions pertaining to the limitation of liability. By virtue of Article 5 paragraph 3 Brussels I, the court of the scene of the accident shall have jurisdiction as regards compensation claims arising from an unlawful act (collision).

The judge who by virtue of Art. 5 paragraph 3 would have jurisdiction in the matter of compensation claims arising from a collision shall therefore also have jurisdiction when ruling on an application to limit liability.

Under the Dutch national code of civil procedure (Article 642a Rv), the person who wants to invoke the limitation of liability must apply for it to the District Court of Rotterdam. In this application, the applicant requests the court to determine the amount of the limitation fund and order the institution of proceedings for the purpose of distributing the fund to be constituted. Such an application does not constitute an admission of liability. In the application, the applicant must state, *inter alia*, the total amount of the funds to be constituted as well as the names and addresses of possible creditors and how he intends to constitute the funds (depositing the fund amounts into an account or issuance of a guarantee).

Based on these provisions therefore, a person who qualifies as a ship owner as construed in Art. 1 CLNI, may apply to the District Court of Rotterdam for a limitation of his liability. He does not have to wait until legal proceedings are instituted against him in this or another Dutch court. Under Art. 11 CLNI 1988 (Art./ 12 CLNI 2012) it suffices that proceedings could be instituted against him in a Dutch court.

5: Judicial handling of the application

Once the applications for a limitation of liability have been submitted, the court will set a date for the oral proceedings and take care of summoning potential creditors. The purpose of these oral proceedings is to define the amount(s) of the funds to be constituted and to determine how the funds are to be constituted (payment into an account or issuance of a guarantee).

Under Art. 4 CLNI (1988 and 2012) a liable party shall not be entitled to limit his liability if he has deliberately or recklessly caused the damage, conscious of the fact that his conduct will probably result in the damage.

The oral proceedings may not however yet judge whether the prerequisites of Article 4 for prohibiting the applicant from invoking the limitation of liability have been fulfilled. The aggrieved parties shall not be entitled to raise such an objection (Art. 642c paragraph 1 Rv).

An application to constitute one or a number of funds for the purpose of limiting liability is almost always granted by the District Court in Rotterdam. In its ruling, the court defines the amount of the funds and commands the applicant to constitute the funds, either by payment into a court account or in the form of a guarantee (guarantee; Art. 642c paragraph): see also Art. 11 paragraph) CLNI 1988 and Art. 12 paragraph) CLNI 2012).

In its ruling, the court will also appoint both a judge (Rechter-Commissaris - supervisory judge) and a liquidator who will take care of the rest of the distribution procedure of the funds (Art. 642c paragraph 3 Rv).

Once the applicant has then constituted the fund or funds, he shall be required to request the court to make a written declaration to that effect (Art. 642c paragraph 6 Rv). This declaration testifies that the fund or funds have been constituted.

Note:

If in the course of the procedure the guarantee put in place (and accepted by the court) should prove worthless – for example in the case of an insurance or bank guarantee as a result of the bankruptcy of the insurance company or bank – then this will not alter the fact that the fund has already been constituted and that the liability has already been limited to the amount of that fund. The insolvency of the fund is then the risk borne by the creditors as a whole. Is that odd? No, because the same would apply if the bank at which the account to which the amount of the fund has been remitted were to become bankrupt.

Pursuant to Art. 11 para 3 CLNI 1988 (Art. 12 para 3 CLNI 2012; see also Art. 642d Rv. and Art. 8:1066 BW) a fund that has been constituted by a shipowner, as construed by Art. 2 para 2 (a) CLNI, or by its insurer, shall be deemed to have been set up by all the individuals belonging to the circle of those entitled to limitation of liability. This means in principle that the funds constituted by a shipowner also limit the liability of the other individuals belonging to the circle of those entitled to limitation of liability.

Pursuant to the last sentence of Art. 11 para 1 CLNI 1988 (Art. 12 CLNI 2012) a limitation fund shall be available only for payment of claims in respect of which limitation of liability can be invoked. The creditors of the persons belonging to the circle of those entitled to limitation must therefore be able to submit their claims to the fund. But the funds only afford protection to the circle of persons entitled to limitation against their creditors' claims if the creditors can actually assert their claims against the funds before the court administering the funds.

The question is how this would have to be dealt with procedurally. Do the other individuals entitled to limitation have to take further procedural steps in order to be able to invoke the funds and refer their creditors to the funds? This is not regulated by the CLNI but is left to national legislators. This is not regulated in the Dutch Code of Civil Procedure but in a decisions rendered on 30 October 2010 (S&S 2003,26; Mighty Servant) the District Court in Rotterdam ruled that a liable party, who is entitled

to limit his liability to a fund already constituted by another debtor, must submit an independent application to the court in order to do so.

Because of this procedural rule introduced by the Court in Rotterdam, such an individual must therefore submit an application in which he requests the court to determine that his liability has been limited to the fund already set up by another individual qualified as a ship owner. The court will grant this application. Independent limitation actions will then commence based on the same funds. The charterers' creditors will then be able to submit their claims to the administrator of these funds as well.

Next steps

Under Article 13 CLNI 1988/Article 14 CLNI 2012, creditors capable of making claims effective against the fund shall be barred from exercising any right in respect of such claims against any other assets of a person by or on behalf of whom the fund has been constituted (paragraph 1). After a fund has been constituted, any vessel or other asset of the person on behalf of whom the fund has been constituted which has been arrested, or any security given, must be released by order of the court. These of the CLNI's provisions are to be applied directly by the Dutch court, as already mentioned, but despite that the national law (art. 642e Rv) – to cap it all – determines that the court shall, at the request of the party entitled to limitation of liability, order the release of arrests and the return of guarantees that have been made.

Release of the ships:

The court issues a declaration that the monies have been paid into the funds (Art. 642c para 6 Rv.) .

Note: According to Art. 642e paragraph 1 and 4 Rv, the court shall not be obliged to order the release of arrests if one or more creditors has contested that the debtor is entitled to a limitation of liability and there has not yet been an irrevocable negative ruling in this regard. This provision however contradicts both Art. 13 para 2 CLNI 1988 and Art. 14 para 2 CLNI 2012, which provision takes precedence and also is of direct effect. Consequently the court must order the annulment of the seizure and release of the vessel.

The distribution of the funds

Under Art. 12 CLNI 1988/Art. 13 CLNI 2012, the funds are required to be distributed between the creditors in proportion to their established claims against the funds. The agreement does not regulate the way in which this is to take place but leaves the establishment of the distribution procedure to the Contracting States. The Netherlands have settled this in Articles 642 f to z Rv inclusive.

(Art. 642g Rv) Once the court has issued the declaration that payment has been made into the funds, the judge determines in a written decision:

- the date on which the claims against the limitation of liability debtor as well as objections to the latter's invoking of limitation of liability must be submitted to the liquidator;
- a so-called meeting of creditors (“verificatievergadering”), namely a meeting (oral proceedings) at which the creditors' claims and their objections to the limitation of liability are dealt with.

(Art. 642i Rv) The liquidator subsequently reports to the debtor (the liable party) and known creditors. The creditors can then submit their claims to the liquidator and possibly contest the liable party's entitlement to limitation (642l Rv). The creditor wishing to object to the application for limitation of liability (for example because he is of the view that the debtor should not be permitted to restrict his liability in view of the category of the claim) must nevertheless lodge his claim for review (Art. 642k Rv). Creditors who are requested to act reasonably will do so, if they actually do submit their claims to the administrator, because their claims against the debtor expire after distribution of the fund or funds (Art. 642w Rv). On the other hand, the liable party will act reasonably if he ensures that all the creditors known to him are actually invited by the administrator to register their claim because otherwise he incurs the risk of remaining liable without limitation for these claims if the latter are not submitted by the creditors. The submission of the claims to the liquidator is tantamount to the institution of a lawsuit, thus inhibiting a limitation period (Art. 642l paragraph 3 Rv).

The liquidator draws up schedules of the claim submissions (642l paragraph 5 Rv) and lodges them with the court (Art. 642l paragraph 6 Rv). Typically, the liquidator also sends copies of these schedules to the debtors, urging them at the same time once again to take part in the distribution procedure that has already been set in train (Part. 642m Rv).

(Art. 642p) In the course of the meeting of creditors, the judge takes stock of:

- to what extent the claim submissions are contested or acknowledged (the examination of the claims);
- whether the entitlement to the limitation of liability is contested.

If and insofar as the appeals against the claims or entitlement to limitation of liability are handled, the judge refers the parties to the court to conduct a claims validation procedure (renvooi procedure). These validation proceedings then deliver a final decision on whether the claims are justified and/or the liable party is entitled to limited liability.

The right to limitation of liability per se is seldom if ever contested in Dutch limitation actions so that hardly any validation procedures with respect to the question whether or not the debtor is entitled to invoke the limitation of its liability are ever conducted.

Note:

Under Article 4 CLNI, a liable party is not permitted to limit his liability if it can be demonstrated that the damage is attributable to an unlawful act, or failure to act, committed by himself (namely by him personally) with the intention of causing such damage, or recklessly, and with knowledge that such damage is likely to occur.

Dutch case law however imposes such stringent requirements on the creditors successfully invoking Article 4 (namely invoking the breaching of the maximum liability amounts, such that the debtor is liable without limitation) that the latter are virtually impossible to comply with in practice.

On the other hand the claims submitted by the creditors are typically contested by all the interested parties, not just by the liable party himself, but also and above all between the creditors themselves. This is because the fund is distributed between the creditors in proportion to the amount of their established claims, such that each creditor has an interest in his own claim award being as high as possible, whereas the estimate of the other claims is non-existent or as low as possible.

(Art. 642q Rv) Frequently one or a number of validation proceedings will be required in order to determine the amount of the various creditor' claims against the parties who are entitled to limitation of liability.

With collisions it is frequently the case that one fund is constituted for both vessels. If both vessels are at fault then they will also have mutual claims which they wish to submit to the mutual funds. In such cases, under the terms of Article 5 CLNI 1988/2012, the mutual claims must be netted off against one another such that only the residual claim may then be submitted to one of the mutual funds.

In practice, not all points in dispute are dealt with in validation proceedings; instead between one and three “test cases” are selected in which the fundamental issues (distribution of blame, liability) have to be resolved. Once all the claims have been established by the court or by the parties themselves, a definitive distribution this can be drawn up (Art. 642s to 642u inclusive RV), on the basis of which:

1. the claims of creditors who have not registered their claims, despite having been called upon to do so in the correct manner, expire:
2. the relevant fund can be distributed between the acknowledged creditors.

4. DR. THOMAS BURCKHARDT: “TRANSPOSING THE CLNI 1988 TO SWISS LAW”

I. General

1. Ratification of the CLNI

The Strasbourg Convention on the Limitation of Liability in Inland Navigation (CLNI) of 4 November 1988 signed by Switzerland first had to be approved by the Federal Parliament with a federal decree of 22 March 1996 in accordance with the applicable provisions of the Federal Constitution before the Federal Government was able to ratify the agreement. Once the Swiss ratification instrument was deposited on 21 May 1997, the Convention came into force for Switzerland on 1 September 1997.

2. Revision of the Maritime Navigation Act

To implement the Convention, then published in the Swiss Collection of laws under point 0.747.206, the Federal Parliament decided on 22 March 1996 - concurrently with the Federal Government's authorisation to ratify the Convention - to revise the Federal Act on Maritime Navigation under the Swiss Flag of 23 September 1953 (“Maritime Navigation Act” or “SSchG” published in the Collection of laws under point SR 747.30), which was to ensure implementation of the Convention in terms of substantive law. Section seven of this Act entitled ‘The application of maritime provisions in inland navigation’ contains in Articles 125 - 127 the most important rules under private law on the navigation by inland waterway vessels of the Rhine, its tributaries and side channels as well as of other navigable waters connecting Switzerland with the sea.

3. Amendments of the Maritime Navigation Ordinance

On 22 December 1988, even before the Convention came into force, and before the revision of the Maritime Navigation Act, the Federal Government inserted in the so-called Maritime Navigation Statute of 20 November 1956 (i.e. the implementing decree for the Maritime Navigation Act (“SSchV”), in its Section Six entitled “Procedural provisions”, an initial subsection “Limitations of liability by the constitution of a limitation fund” and further provisions, the intention of which was to implement the CLNI from a procedural point of view.

The issuing of the procedural implementation provisions on the CLNI came at a time when the general legislative responsibility for civil procedure law in Switzerland still resided with the cantons. Although legislative sovereignty has since been transferred to the Confederation with the new Article 122 paragraph 1 of the Federal Constitution of 18 April 1999, the procedural provisions were not transferred from the Maritime Navigation Ordinance into the new Swiss Code of Civil Procedure of 19 December 2008 (SR 272), which superseded the previous cantonal regulations with effect from 1 January 2011.

II.

Transposition of the CLNI in terms of substantive law**1. Principles**

According to Article 126 paragraph 2, 1st sentence of the revised Maritime Navigation Act, under Article 48 paragraphs 1 and 2, the inland navigation shipowner shall be liable for the damage caused by a crew member, pilot or other person aboard the seagoing vessel engaged in the performance of their duties should he fail to prove that this ship personnel was not in any way at fault. Concerning the limitation of the inland navigation shipowner's liability, the 2nd sentence of the aforementioned provision declares the provisions of the CLNI to be applicable.

In addition, Article 126 paragraph 3 SSchG specifies that if a pusher was rigidly connected with lighters to form a pushed convoy at the time the damage was caused, the total amount of the liability shall be calculated on the basis of the pusher's engine power and the ship's carrying capacity.

The blanket reference in the Maritime Navigation Act to the provisions of the CLNI made the provisions of the Strasbourg Convention of 1988 integral parts of applicable Swiss national law without the provisions of the CLNI having to be incorporated in detail into national law. As such, they are directly applicable, inasmuch as they are sufficiently specific and clear, to be the basis of a ruling by an authority with responsibility for applying the law in a specific case. That applies in particular to determining maximum liability amounts, which, for Switzerland, before the CLNI came into force under international law, were stipulated in Article 44 a SSchV, enacted on 22 December 1988 and repealed on 3 September 1997 – together with the provision on liability for pushed barges, which subsequently became Article 126, paragraph 3 SSchG – and thus in the meantime would have permitted a limitation of liability outside the CLNI, but based purely on Swiss national law.

2. Scope

In accordance with Article 15 paragraph 2 CLNI, the Federal Government declared in ratifying the Convention that Switzerland will also apply the provisions of the Convention to the stretch of the Rhine between Basel and Rheinfelden. Switzerland also excluded the application of Convention in matters covered by Articles 18 paragraph 1 (a), 18 paragraph 1 (d) and 18 paragraph 2. In Switzerland, the provisions of the CLNI are thus not applicable to claims for damages caused by water pollution and are also not applicable to sports and leisure craft, nor to vessels not being used for commercial purposes. By the same token the maximum liability amounts envisaged in Article 7 paragraph 1 (a) and (b) for passenger claims are also not applicable in Switzerland.

Claims for damage to docks, dock installations, waterways, etc. or arising from the lifting, removal, demolition or making safe of a wreck and its cargo, which the institution 'Port of Switzerland' ("Schweizerische Rheinhäfen" or "SRH") in its function as the governmental agency responsible for the entire navigable length of the Rhine in Switzerland or another subject under public law can bring against an inland navigation shipowner, are also and especially subject to the limitation according to Article 2 CLNI. This also applies especially to claims brought under Article 6 of the Federal Act on Inland Navigation of 3 October 1975 ("BSchG", SR 747.201) for the removal of stranded, sunken or non-operational vessels and other objects that are obstructing or jeopardising navigation, because Switzerland has not availed itself of the opportunity afforded in Article 18 (1) (c) CLNI, not to apply the provisions of the Convention to claims for the removal of sunken ships or cargoes as construed by Article 2 (1) (d) and (e). There is also no reservation by Switzerland regarding claims in respect of

damage to docks, dock installations, waterways, locks, bridges and navigational aids as construed by Article 6 (2) CLNI, which the State, as the repository of sovereignty over the Rhine waterway and the owner of public waters and other public property, is capable of bringing.

On the other hand Switzerland did not avail itself in the revised Maritime Navigation Act of the opportunity afforded by Article 10 paragraph 1, 2nd sentence CLNI, of determining in its domestic law, in the event of a legal action being brought before its courts to enforce one of the claims subject to the limitation, that a liable party may only assert the right to limit liability if a limitation fund is set up. Moreover, in this connection, Article 60, paragraph 2 SSchV expressly provides that a shipowner may also invoke the statutory limitation of liability against a claim by a creditor outside a procedure aiming to set up a fund, but that in such a situation he will not share in the particular benefits associated with the constitution of a limitation fund.

III.

Procedural transposition of the CLNI

1. Limitation of liability by setting up a limitation fund

Pursuant to Article 45 paragraph 1 SSchV, an inland navigation shipowner wishing to limit his liability under the provisions of the CLNI may apply to the competent civil court to initiate proceedings by designating the amount of the limitation fund to be set up and the creditors in respect of whom he wishes to invoke the limitation of liability as well as the basis and amount of the claims to which the application for a limitation of liability applies.

Pursuant to Article 45 paragraph 2 SSchV, and provided that plausible grounds for limited liability have been established, the judge then promptly initiates proceedings, sets the deadline for the limitation fund to be set up, identifies the creditors concerned by the application proceedings and appoints an administrator. Under Article 45 paragraph 4 SSchV, the shipowner applicant bears the costs of the legal proceedings including the administrator's costs.

Anyone wishing to set up a limitation fund shall be required to create the fund on an interest-bearing basis with the cantonal deposit institute in accordance with Article 50 paragraph 1 SSchV. The court can however make provision for an irrevocable guarantee by a Swiss bank or insurance company in favour of the court; in this case however the liability amount to be secured will increase by the interest rate that would have been achieved in the event of the deposit.

From the date on which the shipowner makes the application to the date the proceedings are concluded or terminated, a recovery cannot be commenced or continued in respect of claims covered by the proceedings; civil proceedings that are pending or recovery procedures are suspended for the duration. The running of the limitation and expiry periods is stayed until the proceedings are terminated. Once the limitation fund has been set up and after the advance on costs has been paid, seizures and garnishments in respect of claims covered by the proceedings are to be revoked ex officio, provided no realization of the fund's assets has yet occurred.

2. Jurisdiction

The local jurisdiction of the Swiss courts to deal with an application in respect of the limitation of liability arises from the provisions of Articles 11 CLNI and Article 45 SSchV in conjunction with the provisions of Article 129 of the Federal law of 18 December 1987 on Private International Law (“IPRG”, SR 291), which envisage a place of jurisdiction at the place where the harm occurred or place where the harm arose for actions for compensation as a result of an unlawful act (which might include lawsuits by the injured parties against an inland navigation shipowner in accordance with Articles 48 and 126 SSchG). In each case, this place where the harm occurred or place where the harm arose is the scene of the disaster that resulted in the application for a limitation of liability.

Applying the provisions of Article 5 (3) and (4) of the Revised Lugano Convention (“Revised Lugano Convention”) of 30 October 2007 (SR 0.275.12) on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters leads to the same result. According to Article 5(3), a person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued, “in matters relating to tort, delict or quasi-delict” in the courts of the place where the harmful event occurred or may occur. As regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, the result is identical according to Article 5 (4), as a suit may be brought in the court seized with these proceedings, to the extent that the Court has jurisdiction under its own law to entertain civil proceedings. Moreover, Article 7 clarifies in this context that if a court has jurisdiction for ruling on cases to do with liability arising from the use of the ship, this court at the place of the shipowner or another court appointed in its place according to the law of this State shall also be competent to rule on actions for limitation of this liability.

In the Canton of Basel-Stadt (in whose territory is to be found the stretch of the Rhine between the Swiss border and the mouth of the Birs close to Birsfelden lock) there are no relevant implementation provisions dealing with the law on the limitation of liability pursuant to CLNI/SSchG/SSchV. In particular, the law on courts for the navigation of the Rhine of 8 February 1968 (Systematic Collection of laws 955.200) is not applicable to this matter. The competent court in Basel for limitation of liability cases is therefore the Civil Court of Basel-Stadt, with which resides the subsidiary jurisdiction for judging civil matters for which there is no particular jurisdiction.²⁸

The request can be granted based on a unilateral application by the shipowner applicant and without the holding of a hearing of the other persons involved, who have not previously made any concrete claims nor established themselves in the proceedings as civil parties, if the prerequisites for limited liability have been plausibly established (Article 45 paragraph 2 SSchV). The Maritime Navigation Ordinance envisages no judicial remedies or means of legal redress against an *ex parte* ruling by the competent court relating to the limitation of liability.

²⁸ Having regard to Section 9 paragraph 2 (1) (c) of the Basel-Stadt Introductory Act on the Swiss Code of Civil Procedure of 13 October 2010 (Systematic Collection of Laws 221.100), applications in respect of limitation of liability may be dealt with by the so-called single judge sitting in summary proceedings.

3. Administrator

The tasks of the administrator are described in Article 47 paragraph 1 SSchV and essentially entail validating the claims of the eligible creditors in a schedule of claims and the distribution of the limitation fund to the authorised creditors, if and when this schedule of claims has become final. A complaint against its decisions may be lodged (Article 47 paragraph 2 SSchV) with the supervisory authority in accordance with Articles 17 et seq. of the Swiss Federal Law on Debt Collection and Bankruptcy of 11 April 1889 (“SchKG”) within ten days of them becoming known to the creditor. The right to challenge the schedule of claims in the form of a written complaint mentioned in Article 55 SSchV remains reserved (cf. *infra* section III.5).

In accordance with the provisions of Article 46 SSchV, the initiative for all further measures, as in the event of filing for bankruptcy or debt-restructuring moratorium, passes to the administrator to be appointed by the courts. In particular, the administrator shall notify all creditors concerned by the proceedings of the decision to initiate the procedure and state the date of his decision in accordance with Article 48 paragraph 1 SSchV. The notification or public announcement by the administrator shall contain the information contained in Article 48 paragraph 2 SSchV. At the shipowner's request, the administrator shall be required in a public announcement to summon other creditors not known to the shipowner or not identified by him to register their claims to be settled from a limitation fund, within the specified period and upon submission of the evidence.

4. Determination of the limitation fund

In the absence of any personal notification and within 60 days of the administrator mailing notification of the initiation of proceedings or public notification in the Swiss Commercial Gazette, the creditor whose claim is covered by the proceedings may bring an action before the judge for a larger limitation fund than that set up by the shipowner, failing which the latter fund shall be deemed to have been accepted.

Should the suing creditor win, the increased amount of the limitation fund shall accrue to him up to the amount of his claim, including his legal costs. Any excess amount shall accrue to the remaining creditors. In the event of a number of creditors having brought a joint action then, subject to evidence to the contrary, the proceeds of the litigation shall be distributed in proportion to the registered claims. Should the judge determine a higher limitation fund, he shall at the same time determine the nature of the payment and date by which it is to be made.

5. Validation and establishment of the schedule of claims

Each creditor whose claim against the shipowner is subject to the procedure shall be required to declare to the administrator within the 60 day deadline stipulated by Article 49 SSchV whether he is asserting a higher claim or withdrawing all or part of the claim registered by the shipowner (Article 52 paragraph 1 SSchV). If no written declaration by the creditor is forthcoming within this period, the claim shall be subject to the procedure for the amount stated by the shipowner (Article 52 paragraph 2 SSchV). The claims registered by creditors under Article 48 paragraph 3 are subjected to the same procedure as the claims being indicated by the shipowner if the shipowner is not notified of an objection by the administrator within 30 days. (Article 52 paragraph 3 SSchV). A creditor whose claim is subjected to the proceedings has not thereby waived the assertion of unlimited liability if the shipowner is at fault. (Article 52 paragraph 4 SSchV).

For each limitation fund, the claims available from the fund are to be included in the schedule of claims in accordance with the procedure under Article 52 SSchV (Article 54 paragraph 1 SSchV). The schedule of the claims is compiled in accordance with the applicable provisions of the CLNI. The schedule of claims is lodged with the court for inspection for a period of 60 days. The administrator publishes the posting in the Swiss Commercial Gazette and sends a copy of the schedule of claims to each creditor with a reference to the posting date (Article 54 paragraph 2 SSchV).

If a creditor wishes to contest the claim or another creditor's eligibility, he shall be required to bring an action against the other creditor within 60 days. Should the plaintiff win, the amount by which the defendant's share of the limitation fund is reduced shall be used to satisfy the plaintiff until the latter's claim has been settled in full, including his legal costs. Any surplus shall accrue to the remaining creditors. If a number of creditors have brought a joint action, Article 49 paragraph 2 SSchV second sentence shall apply. Should the creditor bring an action seeking a declaration that the contested claim is not subject to the limitation of liability or is not assigned to the same limitation fund, the shipowner may intervene in the lawsuit (Article 49 paragraph 3 SSchV). The verdict operates for and against the shipowner and for and against all the creditors involved (Article 49 paragraph 4 SSchV).

If a creditor has withdrawn all or part of the claim registered by the shipowner, or acknowledged an action by another creditor as construed in the sense of Article 55 paragraph 3 SSchV without the shipowner's consent, Article 56 paragraph 1 SSchV first sentence permits the shipowner to object to any renewed assertion of the withdrawn amount, and to declare that the claim is subject to limitation of liability and should have been asserted in the previous procedure. Should the shipowner's objection prevail, the creditor's claim shall be foreclosed (Article 56 paragraph 1 second sentence SSchV). Claims that the shipowner has not included in the proceedings shall be subject to the limitation of liability only inasmuch as the claim can be attributed to another loss event for which a special procedure is possible (Article 56 paragraph 2 SSchV).

Article 57 SSchV deals exclusively with the question of the extent to which offsetting against the shipowner's claims is possible.

6. Conclusion of the proceedings

Once the limitation fund has been distributed, the administrator shall submit a final report to the court. Should the court find that the proceedings have been completed, he shall declare them to have been concluded. (Article 61 paragraph 2 SSchV). Should the shipowner fail to pay the limitation funds that have been applied for or determined by the court, the court shall terminate the proceedings. The administrator shall notify the creditors who have already been informed of the proceedings that these proceedings have been terminated. A limitation fund that has been partially put in place will revert to the shipowner after deduction of costs incurred (Article 60 paragraph 2 SSchV). However, the right to assert unlimited liability remains reserved under paragraph 2 of this provision, which can be important in cases in which, according to Article 4 CLNI, there is conduct excluding the limitation of liability.²⁹

²⁹ At this point, the statute refers to the international Conventions of 19 November 1976 on Limitation of Liability for Maritime Claims or 29 November 1969 on Civil Liability for Oil Pollution, mentioned in Article 49 SSchG. These conventions are not applicable to inland navigation (where in accordance with the Swiss reservation as to Article 18 paragraph 1 (b) CLNI limitation of liability does not in any event apply to losses arising from water pollution).

Furthermore, Article 60 paragraph 1 SSchV makes it clear that the creditor's claim is extinguished upon payment to the limitation fund of the share due to the creditor.

7. International law

Finally, Article 62 SSchV governs how to proceed if a shipowner involved in a lawsuit in Switzerland is being sued abroad in respect of claims which in Switzerland are subject to limitation of liability. It is stipulated that in such circumstances the judge shall be required to take measures and precautions giving effect to the limitation of liability and providing equal satisfaction to the creditors according to the shipowner's application. In particular the judge may reduce a limitation fund or assign a creditor's share in a limitation fund to the shipowner to the extent necessary to satisfy the foreign-based creditor's claim.

IV.

Appraisal

In the absence of any cases to date that have caused an inland navigation shipowner to invoke limitation of liability, the rules for transposing the CLNI described above have not yet been applied in practice, which is also why there are no decisions by Swiss court that can shed light on experience of applying the CLNI.

The limitation of liability regime, which is both self-contained and a source of interpretation, has therefore never yet proved itself in practical application. It therefore remains unresolved whether the – compared with foreign model regimes – missing institutions (such as the numerous adversarial lawsuits before the competent judge and the so-called “renvoi procedure” pursuant to the relevant Articles of the Dutch “Wetboek van Burgerlijke Rechtsvordering”) might result in practical difficulties. Such difficulties might also arise from the fact that in the intervening period, the Swiss Code of Civil Procedure has come into force, but the law on the limitation of liability procedure has not as yet been tailored to the new civil procedure rules and that this will probably if at all not happen until any Swiss ratification of the CLNI 2012 at the earliest.

5 ABOUT THE AUTHORS

Dr. iur. Martin Fischer

Martin Fischer was born in Frankfurt and studied Law at the Johann Wolfgang Goethe University in Frankfurt am Main, specialising in the history, theory and, in particular, the philosophy of law. There he completed his doctorate in 1992 under Professor Dr. Ernst Amadeus Wolff, with a thesis entitled “*Wille und Wirksamkeit*” [Intention and effectiveness], which covered matters of criminal law and the philosophy of law. He worked as assistant to the chairs of Professor Dr. Ernst Amadeus Wolff and Professor Dr. Winfried Hassemer.

Since 1991 he has been practising as an independent lawyer in Frankfurt am Main, focussing on international shipping and transport law, including insurance law. In addition to membership of various shipping organisations and transport law associations, he is a member of the Board of the *Gesellschaft zur Förderung des Binnenschiffahrtsrechts* [Association for the Promotion of Inland Navigation] at the University of Mannheim, as well as Chair of the Legal Commission of the IVR, the International Association for the representation of the mutual interests of inland shipping and insurance and for keeping the register of inland vessels in Europe.

In addition to numerous articles and monographs which have appeared in the IVR, in publications by the *Institut für Binnenschiffahrtsrecht* [Institute for Internal Navigation Law], in Mannheim jurisprudence reviews and in other professional journals, as legal editor of the *Zeitschrift für Binnenschiffahrt (ZfB)* [Journal of Internal Navigation Law] Martin Fischer also regularly writes and comments on shipping law judgments.

Mr. Tim Roos

Tim Roos, born in 1963, studied Law at the Erasmus University in Rotterdam.

Since 1986 he has been practising as an independent lawyer in Rotterdam, focussing on international internal shipping and transport law, including insurance law. In addition to membership of various shipping organisations and transport law associations, he is a member of the Board of the Dutch *Vereniging voor Vervoersrecht* [Association of Transport Law], and of the Legal Commission of the IVR, the International Association for the representation of the mutual interests of inland shipping and insurance and for keeping the register of inland vessels in Europe. He sat on various committees which advised the Dutch minister on the introduction of the CMNI and the CLNI.

Since 2014, Tim Roos has been a member of the editorial team of the Dutch Journal of Jurisprudence *Schip en Schade* [Ship and Damage], in which he comments on judgments related to shipping and liability law.

Dr. iur. Thomas Burckhardt LL. M.

Thomas Burckhardt was born in Basel and studied Law at the Universities of Basel and Munich, as well as at Harvard law School. His particular areas of interest were private law, commercial law and international law. He obtained his doctorate from the University of Basel, submitting his thesis in 1978 on a topic of private arbitral jurisdiction.

After working in a large internationally oriented law firm in Zurich, since 1984 Thomas Burckhardt has been practising as an independent lawyer in Basel, focussing on commercial and company law, including shipping and transport law and arbitration. In addition to membership of various legal associations he is Vice president of the *Schweizerischen Vereinigung für Seerecht* [Swiss Maritime Law Association], a full member of the Comité Maritime International and a member of the Legal Commission of the IVR. From 1996 to 2004 he was president of the *Schweizerische Vereinigung für Luft- und Raumrecht* [Swiss Association for Air and Space Law].

From 1988 to 2006, Thomas Burckhardt also served as an alternate judge at the Court of Appeal of the City of Basel.