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THE "FAULT OF THE VESSEL"

IN THE INTERNATIONAL COLLISION CONVENTIONS OF BRUSSELS (1910) AND GENEVA (1960)

FROM THE POINT OF VIEW OF GERMAN LAW

– HOW TO MAINTAIN OR ACHIEVE UNIFICATION?

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A. STATUS QUO

B. QUESTIONS ARISING IN CASE OF AUTONOMOUS VESSELS

C. WHAT CAN BE DONE?

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A. STATUS QUO

I. THE CONCEPT OF „FAULT“ IN THE CONVENTIONS

II. THE TRANSPOSITION INTO GERMAN LAW

I. THE CONCEPT OF “FAULT” IN THE TWO CONVENTIONS

Convention relating to the Unification of Certain Rules concerning Collisions in Inland Navigation

Geneva, 15 March 1960

Article 1

1. This Convention shall govern compensation for **damage caused by a collision** between vessels of inland navigation (…) either to the vessels or to persons or objects on board.

2. This Convention shall also govern compensation for any **damage caused** by a vessel of inland navigation (…), either to other vessels of inland navigation or to persons or objects on board such other vessels, **through the carrying out of or failure to carry out a manoeuvre**, or **through failure to comply with regulations**, even if no collision has taken place.

Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels

Brussels, 23 September 1910

Article 1

Where a collision occurs between sea-going vessels or between sea-going vessels and vessels of inland navigation, the compensation due for damages caused to the vessels, or to any things or persons on board thereof, shall be settled in accordance with the following provisions (…).

Article 13

This Convention extends to the making good of **damages** which a vessel has **caused** to another vessel, or to goods or persons on board either vessel, either **by the execution or non-execution of a manoeuvre** or **by the non-observance of the regulations**, even if no collision had actually taken place.

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I. THE CONCEPT OF “FAULT” IN THE TWO CONVENTIONS

Geneva, 15 March 1960

Article 2

1. The duty to compensate for damage shall arise **only if the damage is due to a fault**.

2. There shall be **no legal presumption of fault**.

3. If the damage is **accidental**, if it is due to ***force majeure***, or if its **causes cannot be determined**, it shall be borne by the persons suffering it.

Brussels, 23 September 1910

“only” in case of fault???

Article 6

(…) **All legal presumptions of fault** in regard to liability for collision are **abolished**.

Article 2

If the collision is **accidental**, if it is caused by ***force majeure***, or if the **cause of the collision is left in doubt**, the damages are borne by those who have suffered them.

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I. THE CONCEPT OF “FAULT” IN THE TWO CONVENTIONS

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There is a dispute in German legal doctrine as to whether the 1910 Maritime Collision Convention (like the 1960 Geneva Convention) prohibits its member states to enact “strict” liability.

- The convention only says that if there is fault, there is liability; it does not say that if there is no fault, there is no liability.

- The convention regulates liability in case of collision – and allows it only in case of fault.

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I. THE CONCEPT OF “FAULT” IN THE TWO CONVENTIONS

The first theory implies that there is a **gap**

between, on the one hand, “collisions caused by fault”,

and, on the other hand, collisions that are accidental or caused by force majeure, or where the cause of the collision is “left in doubt”.

That does seem conceivable.

However, the *travaux préparatoires* of the CMI start with the following resolution:

> “*In case of an inevitable accident, each ship should bear its own loss. (…)*
>
> *The case of inscrutable accident should be treated like that of inevitable accident.*
>
> *Inscrutable accident means that fault causing the collision is not established against either party.*”

I. THE CONCEPT OF “FAULT” IN THE TWO CONVENTIONS

Geneva, 15 March 1960

Article 3

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

Brussels, 23 September 1910

Article 3

If the collision is caused by the **fault of one of the vessels**, liability to make good the damages attaches to the one which has committed the fault.

I. THE CONCEPT OF “FAULT” IN THE TWO CONVENTIONS

Geneva, 15 March 1960

Article 4

1. Where damage is due to **faults committed by two or more vessels**, these vessels shall be liable jointly and severally (solidairement) for the damage caused to persons and to the vessels which committed no fault and to objects on board such vessels, but severally for damage caused to other vessels and to objects on board such vessels.
2. Where there is no joint and several liability, each vessel which by its fault contributed to the damage shall be liable to the injured party or parties **in proportion to the seriousness of the fault committed** by it;

   but if in the circumstances the proportion **cannot be determined** or if the fault appear to be equally serious, then the liability shall be apportioned equally.

Brussels, 23 September 1910

Article 4

If **two or more vessels are in fault** the liability of each vessel is **in proportion to the degree of the faults respectively committed**.

Provided that if, having regard to the circumstances, it is **not possible to establish the degree** of the respective faults, or if it appears that the faults are equal, the liability is apportioned equally.

The damages caused, either to the vessels or to their cargoes or to the effects or other property of the crews, passengers, or other persons on board, are borne by the vessels in fault in the above proportions, and even to third parties a vessel is not liable for more than such proportion of such damages.

In respect of damages caused by death or personal injuries, the vessels in fault are jointly as well as severally liable to third parties.

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I. THE CONCEPT OF “FAULT” IN THE TWO CONVENTIONS

Both conventions clearly say that there is liability if there is “fault”

– but neither of them defines “fault”.

Both conventions are based on the concept of “fault of a vessel”,

– but neither of them specifies what that may mean, and particularly does not specify any individuals whose fault might be meant. Only one exception:

Geneva, 15 March 1960

Article 5

The liability imposed by the preceding articles shall attach notwithstanding that the damage is caused by the **fault of a pilot**, even if pilotage is compulsory.

Brussels, 23 September 1910

Article 5

The liability imposed by the preceding Articles attaches in cases where the collision is caused by the **fault of a pilot**, even when the pilot is carried by compulsion of law.

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II. THE TRANSPOSITION INTO GERMAN LAW

Binnenschifffahrtsgesetz (BinSchG)

§ 92

(1) Liability for damages in the event of a **collision** between inland navigation vessels shall be determined in accordance with the provisions of §§ 92a to 92f.

(2) If a ship, by **executing or failing to execute a manoeuvre** or by **failing to observe a regulation**, causes damage to another ship or to the persons or property on board the ships without a collision taking place, the provisions of §§ 92a to 92f shall apply by analogy.

Handelsgesetzbuch (HGB)

§ 570 Liability for damages

In the event of a **collision** of seagoing ships, …

§ 572 Remote damage

If a ship, by **executing or omitting a manoeuvre** or by **failing to observe a navigation rule**, causes damage to another ship or to the persons or property on board the ships without a collision taking place, sections 570 and 571 shall apply by analogy.

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II. THE TRANSPOSITION INTO GERMAN LAW

BinSchG

§ 92b

If the damage is caused by the **fault of the crew (“*Besatzung*”) of one of the ships**, the owner of that ship shall be liable to compensate the damage.

§ 92c

(1) If the damage is caused by the joint fault of the crews (“*Besatzungen*”) of the ships involved, the owners of these ships shall be liable to compensate …

§ 92d

In the application of §§ 92b, 92c, the fault of a **pilot** working on board is equivalent to the fault of a member of the ship's crew.

HGB

§ 570 Liability for damages

In the event of a collision of seagoing ships, the owner of the **ship which caused the collision** is liable for (…). However, the obligation to pay compensation only applies **if the owner of that ship or a person referred to in section 480 is at fault**.

§ 571 Contributory negligence

If the shipowners of several ships involved in the collision are liable to pay compensation, the extent of the compensation to be paid by a shipowner shall be determined in proportion to the gravity of his fault to that of the other shipowners. (…)

§ 480 Responsibility of the shipowner for ship's crew and pilots

If a member of the **ship's crew (“Schiffsbesatzung”)** or a **pilot** working on board has caused damage to a third party in the course of his duties, the shipowner shall also be liable for the damage. (…)

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II. THE TRANSPOSITION INTO GERMAN LAW

BinSchG

§ 3

1. The shipowner shall be liable for any damage caused to a third party by the fault of a member of the ship's crew (“**Schiffsbesatzung**”) or of a pilot working on board in the course of his duties.
2. The ship's crew (“Schiffsbesatzung”) includes the **skipper**, the “**Schiffsmannschaft**” (§ 21) and **all other persons employed on the ship**.

§ 21

With the exception of the skipper, the “Schiffsmannschaft” includes the persons employed on the ship for navigational service, in particular the helmsmen, boatswains, sailors, ship's servants, ship's boys, machinists and stokers.

HGB

§ 480 Responsibility of the shipowner for ship's crew and pilots

If a member of the **ship's crew (“Schiffsbesatzung”)** or a pilot working on board has caused damage to a third party in the course of his duties, the shipowner shall also be liable for the damage. (…)

§ 478 Ship's crew („Schiffsbesatzung“)

The ship's crew (“Schiffsbesatzung”) shall consist of the **master**, the ship's officers, the ship's crew (“**Schiffsmannschaft**”) and **all other persons employed** by the shipowner or the Ausrüster or entrusted to the shipowner or the Ausrüster by a third party **to perform work in connection with the operation of the ship and who are subject to the orders of the master**.

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INTERIM RESULT:

1. Both conventions allow damages claims (only) in case of „fault of a vessel“.
2. The definition of fault remains unclear.
3. German law applies ist concept of „fault = dolus or negligence“ and in respect of the relevant individuals transposes as follows:

BinSchG

1. the ship owner? (cf. BGH 14.7.1980, II ZR 138/79 re.**HGB**!)
2. the crew (“*Besatzung*”)
   a. the skipper
   b. the “Schiffsmannschaft”:
      - the persons employed on the ship for navigational service (with exception of the skipper),
      - in particular the helmsmen, boatswains, sailors, ship's servants, ship's boys, machinists and stokers
   c. all other persons employed on the ship.
3. the pilot working on board

HGB

1. the ship owner
2. the ship’s crew (“*Schiffsbesatzung*”)
   a. the master
   b. the ship's officers
   c. the “Schiffsmannschaft”
   d. all other persons employed by the shipowner or the Ausrüster or entrusted to the shipowner or the Ausrüster by a third party to perform work in connection with the operation of the ship and who are subject to the orders of the master.
3. the pilot working on board

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B. QUESTIONS ARISING IN CASE OF AUTONOMOUS VESSELS

I. WHAT IS „FAULT“ ?

II. WHOSE BEHAVIOUR COUNTS ?

„AUTONOMOUS VESSELS“

- „Autonomous vessels“ here without precise definition.
- The aim is to see which questions arise

  - (1) if there is no master nor crew on board and/or („remote controlled vessels“)

  - (2) and/or if the decisions regarding navigation of the vessel are not even taken by any human beings anymore („fully autonomous vessels“).

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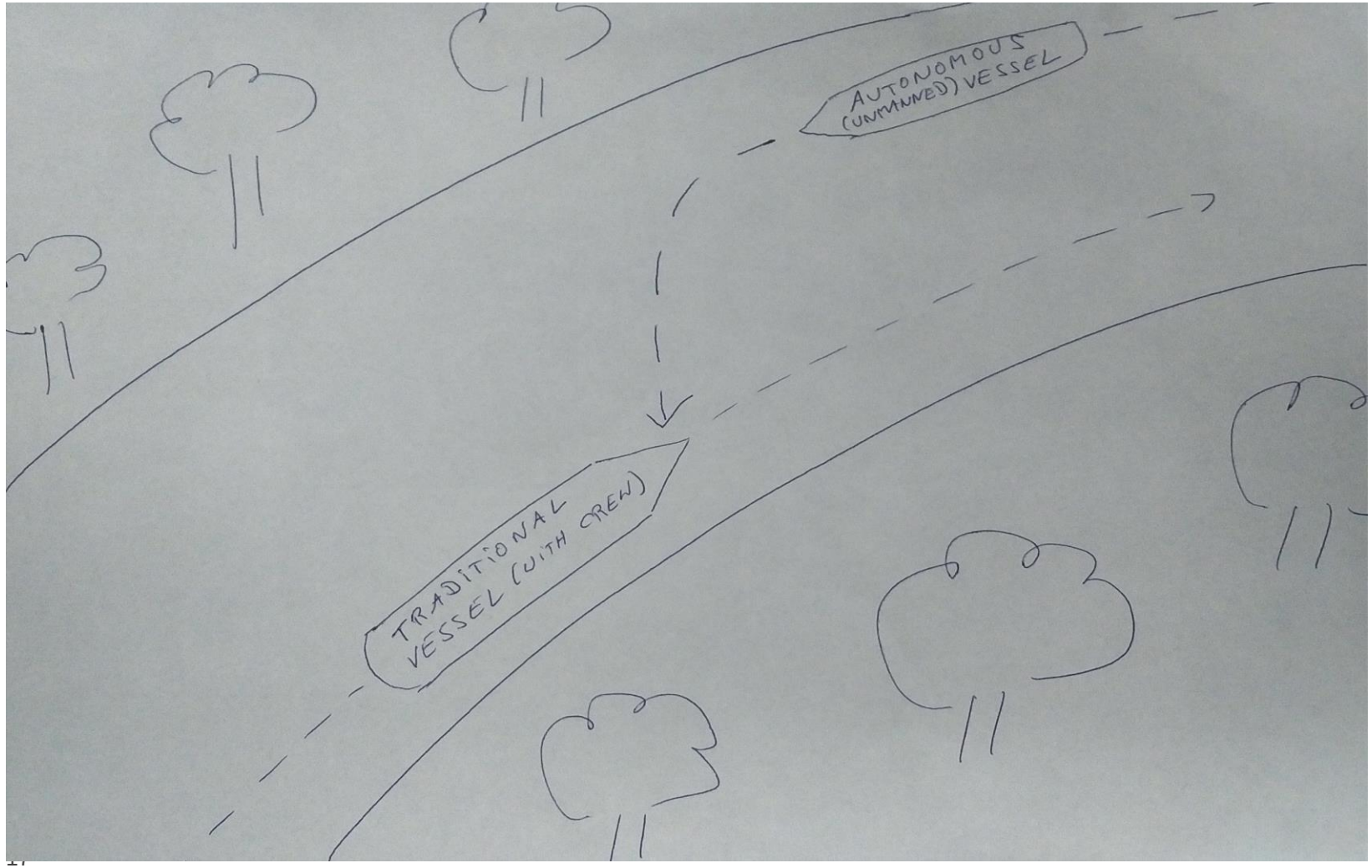
I. WHAT IS „FAULT (OF A VESSEL)“?



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I. WHAT IS „FAULT (OF A VESSEL)“?

- Is it a “fault of a vessel” if land navigators commit a fault?

- Is it a “fault of a vessel” if the computer takes the wrong decision?

- Is it a “fault of a vessel” if the network connection breaks down?

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I. WHAT IS „FAULT (OF A VESSEL)“?

Case law comparison (outside the conventions):

Hoge Raad 30 November 2001 (Casuele/De Tekoemst):

A yacht caught fire which spread to another yacht lying next to it.

→ Application of the extended collision law ; a vessel could be considered to be “at fault”, if it does not meet the expected requirements (“hidden defects of the vessel”).

BGH 4 April 2006 (VI ZR 151/05):

A yacht caught fire which spread to another yacht lying next to it.

→ Application of general tort law and VSP (safety obligations); but in result no “fault” of a *person*; prima facie principle applied, but it remained possible that despite a possible “defect” there had not been fault.

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I. WHAT IS „FAULT (OF A VESSEL)“?

In the *travaux préparatoires* of the CMI for the 1910 Convention, it is stated:

- that the concept of „responsability“/„fault“ necessarily requires **life** and cannot stem from inanimate objects;
- that the definition of „fault“, as it is not agreed in the convention, is left to the respective **national legislators**.
- German legislator: “**Verschulden**” – generic term comprising purpose (“Vorsatz”) and negligence (“Fahrlässigkeit”).
- It requires a behaviour that is objectively contrary to someone’s duties (“objektiv pflichtwidrig”)
- and personally reproachable (“subjektiv vorwerfbar”).
- It also requires accountability (“Zurechnungsfähigkeit”) of the individual that committed the fault.

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I. WHAT IS „FAULT (OF A VESSEL)“?

This definition would, therefore, clearly **not** allow to include e.g.

- the mistakes of an artificial intelligence computer
- or the breakdown of the internet connection

in the concept of “Verschulden”.

In German legal doctrine, it has been discussed whether the rule by which the fault of a vicarious agent (e.g. subcontractor) is attributable to the principal can be applied to machines and computers by analogy, but based on an old decision of the Bundesgerichtshof the majority remains opposed.

It would likely not be in line with the concept of “fault” under the conventions.

II. „FAULT OF A VESSEL“ – WHOSE BEHAVIOUR COUNTS?

In the *travaux préparatoires* of the CMI for the 1910 Convention, it is stated:

- that „fault **of a vessel**“ is „only an expression“ („*une façon de dire*“);
- that the fault cannot be attributed to the vessel itself (which is only an object), but must be attributed „to the author of the damage and the persons who are accountable for them “;
- that the concept of „ship“ was used as a term for the concept of all interests in the ship, actively and passively, and that it designated the crew and all the different employees / staff for who the owner is accountable;
- but that it remained for the **national legislators** to establish more concretely who that might be; it would be too difficult to do that in the convention (and „not necessary“…).

INTERIM RESULT

- Fault : must be the fault of **a person**, no „fault of objects“
- Conventions: „fault of the vessel(s)“ – without clear definition, but „broad understanding“
- German law: dolus or **negligence** committed by…:

BinSchG

1. the ship owner
2. the crew (“*Besatzung*”) on the ship

→ **This would not allow to directly include the fault of an “on-shore master”, navigating by remote-control.**

→ maybe by analogy?

HGB

1. the ship owner
2. the ship’s crew (“*Schiffsbesatzung*”), including “all persons employed (…) to perform work in connection with the operation of the ship and who are subject to the orders of the master.”

→ **This would allow to include the fault of an “on-shore master”, navigating by remote-control.**

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C. WHAT CAN BE DONE?

I. ON THE LEVEL OF GERMAN LAW

II. ON THE CONVENTIONAL LEVEL

I. ON THE LEVEL OF GERMAN LAW

1. Introduction of a strict liability regime?

→In my opinion not possible for collisions involving maritime vessels (1910 Convention).

→Certainly not possible in inland navigation (1960 Convention).

2. Extension of the „fault“ concept to „technical defects“?

→In my opinion there needs to remain fault *of a person*,

→but (1) not necesarily identified, and

→(2) „secondary burden of proof“...

I. ON THE LEVEL OF GERMAN LAW

3. Attribution of fault of other persons to „the vessel“, not only ship owner and crew…?

→Certainly necessary in inland navigation law e.g. in respect „on-shore staff“; and clarification recommendable re. vessel owners.

→Clarifications possibly useful also in maritime law.

4. …maybe even further… producers of computer systems ? and network service providers? Where shall the line be drawn…?

II. ON THE CONVENTIONAL LEVEL

1. **Confirm a common understanding that „fault of the vessel“ includes fault of other persons than owner, master and crew on board? (who else?)**

2. **Political question: Introduction of a strict liability regime?**

→That would require amendments to the conventions.

Geneva, 15 March 1960 (Article 17):

Every member State may request the Secretary General of the U.N. to call for a conference of revision of the convention.

The S.G. will let all member states know – and will then call for such a conference if 25 % of the member States agree.

→ Currently that would need to be **four** of the 13 member states.

Brussels, 23 September 1910 (Article 14):

Every member State may call for a fresh conference with a view to possible amendments, it must notify its intention to the others through the Belgian Government

which will make arrangements for convening the conference within six months.

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Thank you !

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