

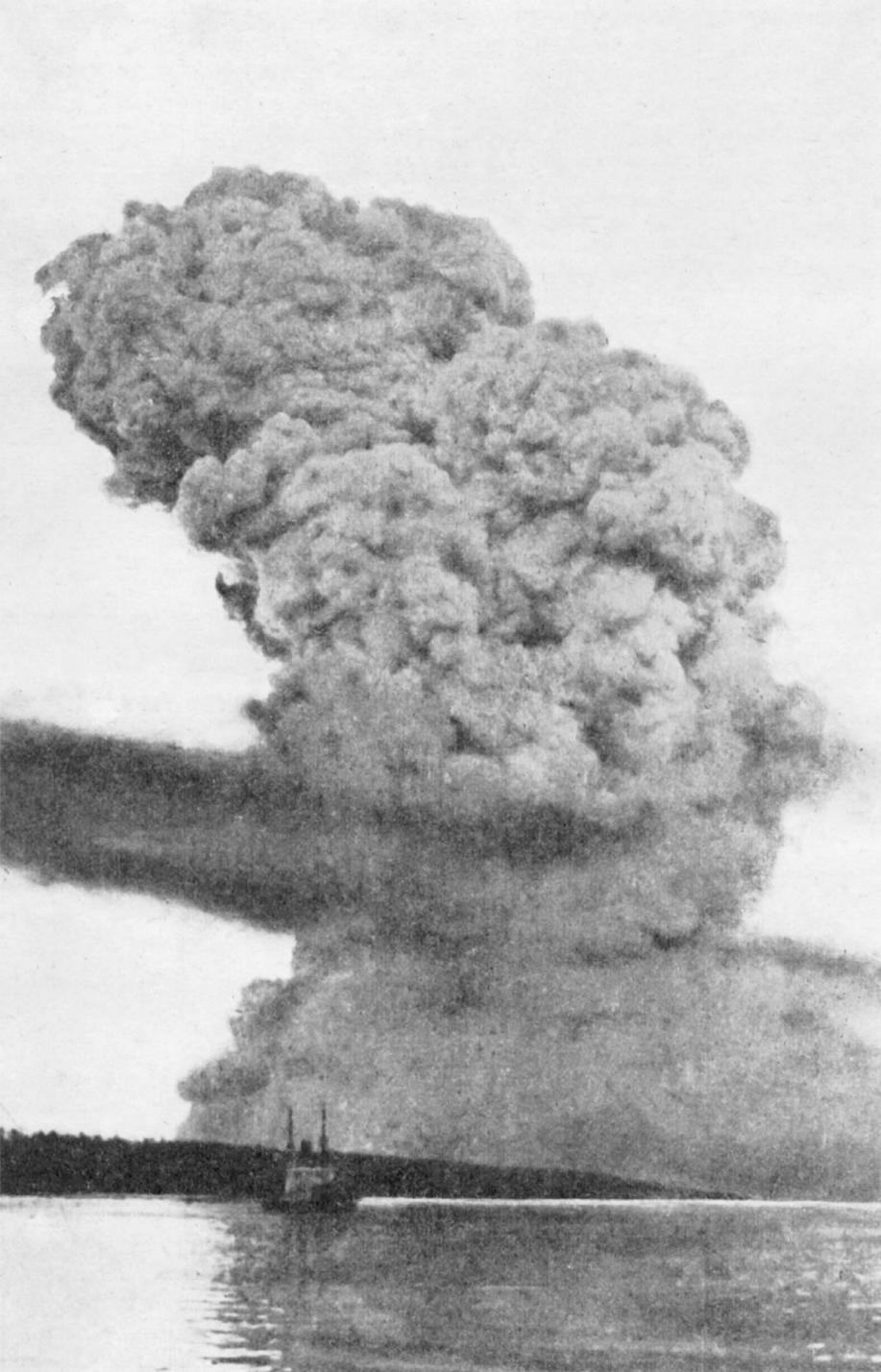
Inland Shipping Law Conference Rotterdam 3 and 4 November 2022

Liability for incidents with dangerous goods
originating from inland vessels

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Explosion of gunpowder barge
“Delft’s Welvaren” in Leyden 1807





Halifax, Canada 1917 collision between vessels "Imo" and "Mont Blanc", the latter laden with high explosives, resulted in a massive explosion killing 2,000 people.



Beirut Explosion 2020 concerned the explosion of a cargo of ammonium nitrate stored in port, causing 218 deaths





So far, container vessels on fire due to explosions/fires starting in the cargo is primarily a maritime phenomenon.

Dangerous goods

Introduction

- What if a major accident involving dangerous goods originating from an inland barge would occur on the Rhine?
 - Dangerous: toxic, explosive, inflammable.
 - Gunpowder,
 - ammonium nitrate,
 - fertilizer, (Toulouse 2001)
 - chemical substances, e.g. chlorides for cleaning of swimming pools.
 - What if this happens when an inland barge navigates a river or canal in an urbanized area?

Dangerous goods

Introduction

- What if a major accident involving dangerous goods originating from an inland barge would occur on the Rhine?
 - No uniform law applicable
 - Inland navigation conventions
 - Mannheim Act on the Navigation of the Rhine 1868,
 - 1960 Geneva Collision Convention
 - 1988 and 2021 CLNI
 - 2012 CMNI
 - 2000 and 2020 AND (Regulatory)
 - No conventions in force regarding **liability** for dangerous goods incidents.
 - 1989 CRTD
 - 1996/2010 HNS

Dangerous goods

Outline

■ Consequences of lack of uniformity:

- Jurisdiction
- Applicable law
- Civil liability aspects
 - Fault based
 - Strict liability
 - Burden of proof
 - Polluter pays principle
- Limitation of liability

Dangerous goods

Jurisdiction

■ Brussels Ibis Regulation 1215/2012

- Multiple options to find competent courts:
 - Domicile of defendant.
 - Domicile co-defendant.
 - Domicile of claimant (in case of direct action against liability underwriter.
 - Place where harmful event occurred:
 - Place where harmful event occurred.
 - Place where damage occurred.
 - Place of performance of contractual obligation:
 - Place of departure passenger/place of taking over goods.
 - Place of destination passenger/place of delivery goods.
 - Choice of jurisdiction/arbitration.

- N.B. Negative declaratory actions.

Dangerous goods

Jurisdiction

■ Brussels Ibis Regulation 1215/2012

■ Multiple parties to direct claims against:

- Shipowner
 - Managers
 - Operator
 - Charterer
 - Non-Vessel Operating Carrier
 - Master and crew
 - Ship yard
 - Classification Society
 - Salvors
 - Liability insurers (if applicable law grants a direct action)
-
- N.B. Parties interested in other inland vessels involved in causation of dangerous goods incident.

Dangerous goods

Jurisdiction

■ Brussels Ibis Regulation 1215/2012

- Multiparty proceedings before numerous courts are problematic because of:
 - Difficulty of ensuring sound and expeditious administration of justice.
 - Fair and equal treatment to claimants and defendants
 - Completion of court proceedings within a reasonable time.
 - Compensation of victims within a reasonable time.



Deepwater Horizon Blow Out on 20 April 2010 (Gulf of Mexico) led to issuance of over **100,000** writs of summons

Dangerous goods

Jurisdiction

■ Brussels Ibis Regulation 1215/2012

■ Possible solutions:

- **Exclusive jurisdiction** in case of multiple claims arising from a single catastrophic event?
 - N.B. Almost by definition, incidents with inland vessels take place within the territory of a given state.
 - N.B. Other special liability conventions provide exclusive jurisdiction grounds: Art. IX CLC, art. 9 Bunkers 2001, art. 38 HNS 2010, art. 13 Paris Convention 1982 (Nuclear), art. 11 (1) Vienna Convention 1997 (Nuclear).

- Creation of a procedural mechanism allowing for **consolidation** of all pending proceedings before a single court.
 - Claims arising from **Deepwater Horizon** case were consolidated before Federal district court in New Orleans.
 - Possible improvement for **Brussels Ibis** Regulation?

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Applicable Law

■ Divergence of liability regimes:

■ Uniform law:

- 1960 Geneva (Inland) Collision Convention 1960 applies if dangerous goods event results from collision between two inland vessels.
 - N.B. If a sea-going vessels is involved in the collision, then the 1910 Brussels Convention may be applicable.

- Scope Collision Conventions is however limited to extracontractual claims for collision damage caused to :
 - (1) the vessels involved,
 - (2) property on board the vessels,
 - (3) persons on board the vessels and
 - (4) consequential losses resulting from (1), (2) and (3).

- CMNI 2001 applies to (extra-) contractual claims between cargo interested parties and inland carrier.

Dangerous goods

Applicable Law

- Divergence of liability regimes:
 - Conflict law determines lex causae of claims for compensation of other kinds of damage, e.g.
 - Loss of life or personal injury of people not on board the inland vessels involved in the collision.
 - Damage caused to property not on board of vessels, e.g. port and canal infrastructure, doors of locks etc.
 - Pollution damage to the environment.
 - Costs of preventive measures.

Dangerous goods

Applicable Law

■ Divergence of liability regimes:

■ Rome II Regulation No. 864/2007.

■ Option: Choice of law, Article 14 (1) Rome II.

■ Main rule: the law of the place where the damage occurred (*lex loci damni*) (art. 4 (1) Rome II).

■ Exception: if both claimant and defendant domiciled in same country (art. 4 (2) Rome II).

■ Overall exception: manifestly closer connection to another law.

■ Special rule for environmental damage (Art. 7 (1) Rome II), alternatively

➤ Law of place of loss occurrence or

➤ Law of place where event giving rise to the damage occurred.

Dangerous goods

Applicable Law

■ Divergence of liability regimes:

■ Consequences:

- Even if all liability claims are consolidated before a single court based upon the nature of the damage and the liability claim, different standards will be applicable.
- Application of conflict rules of Rome II is influenced by factors personal to parties.
- Diverging national laws will lead to different outcomes even if nature of damage or liability claim is the same.
- In summary: equal treatment of claims and claimants, as well as sound and swift administration of justice can not be ensured.

Dangerous goods

Liability law

■ Fault based :

■ Collision Conventions:

- Injured party must prove **fault of the vessel**.
- No presumptions of fault.
- “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.” (Article 2 Geneva Collision Convention 1960).
- N.B. Problematic in the age of the autonomous vessel. Do we need at the very least a **reversal of the burden of proof** and possibly also a system of strict liability, compulsory insurance and direct action against the liability insurer?

Dangerous goods

Liability law

■ Fault based : Collision Conventions

■ Divergence between Dutch and German law

■ Liable person:

- Under **Dutch law** this is always the (registered) shipowner, even if the ship is operated by a bareboat charterer.
- Under **German law**, it is in principle the shipowner, but if the ship is operated by another person “Ausrüster”, the operator is deemed by law to be the shipowner towards third parties.

Dangerous goods

Liability law

■ Fault based : Collision Conventions

■ Divergence between Dutch and German law

■ Attribution of fault of other persons

- Under **German law**, since the Maritime Law reform, the shipowner/ operator is only liable for faults of the crew and the pilot and not for fault of other independent contractors.
- Under **Dutch law**, fault of the vessel extends to faults of all persons for whom the shipowner by law is vicariously liable (e.g. employees, independent contractors (incl. pilots), but also his agents). Further, the fault of a person not employed by the shipowner, but working for the benefit of ship and cargo can be attributed to the shipowner as fault of the vessel.

Dangerous goods

Liability law

■ Fault based :

■ Divergence between Dutch and German law

■ Hidden defect not discoverable by the exercise of due diligence

- Under **Dutch law**, if a special danger for persons or things materializes that is caused by a ship not meeting the standards which, in the given circumstances must be set, there is fault of the vessel.

- **Synthese/Rubens**, HR 5 January 1940
- **Casuele/De Toekomst**, HR 30 November 2001.

Dangerous goods

Liability law

■ Fault based :

■ Divergence between Dutch and German law

■ Hidden defect not discoverable by the exercise of due diligence

- Under **German law**, the prevailing opinion is that a hidden defect does not constitute “fault of the vessel” because the collision conventions preclude that based upon the creation of a hazard (“**Gefährdungshaftung**”) a strict liability is imposed.
- N.B. **Annabel/Boreas** – Appeal Chamber Central Commission for Rhine Navigation 13 October 1976.
- N.B. How future proof is this approach in the age of autonomous vessels?

Dangerous goods

Liability law

■ Claims not covered by collision conventions

■ Divergence between Dutch and German law

- German law applies general tort law.
- Dutch law extends the application of collision law under domestic law in principle to all damage caused by the vessel.

- N.B. Burden of proof rests upon the injured party.

- However, for damage resulting from the spilling of dangerous goods, Dutch law has created a strict liability regime (inspired by CRTD 1989). Implications:
 - Reversal of the burden of proof
 - Only limited exemption grounds for the shipowner.
 - Limitation of liability based upon the general CLNI 2012 limits.

Dangerous goods

Liability law

- Claims for environmental damage
 - Environmental Liability Directive 2004/35/CE
 - Strict liability.

 - Waste Directive 2008/98/EC
 - “The Polluter Pays” Principle.
 - Van der Walle – ECJ 7 September 2004
 - Commune de Mesguier – ECJ 24 June 2008
 - “Producer of Waste”

Dangerous goods

Liability law

■ Limitation of liability under CLNI 2012

- Contracting states may exclude dangerous goods claims from limitation (art. 18 jo art. 7 CLNI).
- If claims are subject to limitation, then five different limitation funds may be required to limit liability effectively.
 - Persons fund
 - General Claims Fund
 - DG Persons Fund
 - DG General Claims Fund
 - Passengers Fund

Dangerous goods

Conclusions

- Incidents with dangerous goods spilling from inland vessel
 - Lack of uniformity.
 - High complexity.
 - No guarantees for sound and swift administration of justice.
 - No guarantees for equal treatment of claimants.
 - No clear demarcation between civil liability and environmental liability law.
 - Limitation of liability shipowner uncertain.

Thank you for your attention.