



# caluwaerts uytterhoeven

Let's get  
things clear.

# **Belgian government liability for navigable waterways: revisited?**

**10th IVR COLLOQUIUM VIENNA 2023**



# I. INTRODUCTION



- Belgian Waterways
- Custody by Belgian Governments
  - The Flemish Waterway
  - Service public de Wallonie (Mobilité et Infrastructures)
  - Port of Brussels
  - Port of Antwerp (docks)



## II. PRINCIPLES BEFORE 1st JUNE 2022



- ↙ Civil liability for waterway operators / custodians / administrators / managers
- ↙ Article 1384 (old) Belgian Civil Code:
  - ↙ **One is liable** not only **for the damage** caused by one's own act, but also for **that caused** by ... **things in one's custody**.
  - ↙ The person who uses, enjoys or maintains the property on his own account, with the right of supervision, direction and control. Whether or not ownership is relevant.
- ↙ Nature of liability
  - ↙ Strict (faultless) liability.

## II. PRINCIPLES BEFORE 1st JUNE 2022



### Public / Government liability:

- When the government opens a waterway to shipping / navigation traffic, it is responsible for the safe and smooth navigation of the waterway. A navigable waterway should be **free of any obstacle or element - not even inherent in the waterway itself - that hinders normal navigation**, even when the waterway has other socio-economic functions. **The operator of the waterway will be liable if damage occurs as a result of a defect** (Article 1384, §1 of the Civil Code).
- Equally irrelevant: the government's argument that it would **not be** liable for floating objects as this would mean it would have an **increased duty of surveillance** (Dendermonde 10 May 2021, AR/19/2125).

## II. PRINCIPLES BEFORE 1st JUNE 2022



### ↳ “Defect”:

- ↳ The exhibiting of an **abnormal characteristic** which makes that thing liable to cause damage in certain circumstances. One must consider whether the characteristic of the thing, which the claimant alleges is a defect that has caused him damage is an abnormal or normal condition at the time of the facts. **The cause of the defect is irrelevant.** Also not required is that the defect is an intrinsic defect or a permanent element.
- ↳ Thus, a waterway is defective when a foreign object appears in it, even though this object is not an intrinsic feature of this matter.
- ↳ Examples:
  - ↳ **Yes:** driftwood, fishing nets, nylon mooring lines, planks, tree trunks, dolphin, container, car wreck, stone blocks, metal cables, ...
  - ↳ **No:** the hit with bank or bed of the stream, steering errors, errors of a third party, force majeure, ...

## II. PRINCIPLES BEFORE 1st JUNE 2022



### ↳ Burden of proof:

- ↳ If **positive proof** of the precise cause of the damage to the vessel cannot be provided, the claimants may, pursuant to Article 1384, §1, of the Civil Code, satisfy their burden of proof in respect of the waterway manager by providing **negative proof**, namely by demonstrating, at least plausibly, that the damage, as it occurred in concreto, could not have been caused by any cause other than as a result of a defect in the waterway (the injured party's own fault and force majeure equally excluded).
- ↳ Only the skipper's own statements are insufficient (Antwerp 30 January 20217, 2014/AR/2651).
- ↳ Exclusion of any possible cause of damage other than a defect in the waterway (the claimant's own fault and force majeure)

## II. CASELAW BEFORE 1st JUNE 2022



### Examples - caselaw (1):

- ✦ The counterparty has the Lys under its control and is therefore manager within the meaning of article 1384, §1, of the Civil Code. **The waterway is defective when the safety of navigation is disrupted by floating objects present in it, which can cause damage to ships.** The survey report conclusively shows that the propeller struck a floating object. No evidence shows that the skipper would not have kept the middle fairway. It can therefore be assumed that a hit with the bank would have resulted in a different damage pattern to the propeller. **Nor can it be retained that the skipper should have noticed the beam, since a beam floats largely under water and thus cannot be easily noticed** (Kh. Gent 6 February 1996, AR 2473/94).
- ✦ The presence of a **tree trunk** constitutes an abnormal feature of the waterway so that it is unsuitable for normal use and may cause harm to users (Antwerp 22 October 2019 (AR/17/1980)i).
- ✦ For example, if it has not been ruled out that the propeller strike and the damage caused by it may have been caused by the hit with the bank of the current at a place where the vessel was not allowed to navigate, **the proof by elimination does not succeed** and it has not been proved to the satisfaction of the law, at least plausibly, that the damage, as it occurred in concrete terms, could not have been brought about by any cause other than a defect in the waterway which compromised its navigability (Gent. 20 February 2017 201/AR/2310 - ms Sunrise).



## II. CASELAW BEFORE 1st JUNE 2022



### Examples - caselaw (2):

- Even if the damage was repaired, the court **still deduced from weighty, certain and consistent presumptions that the touching of the propeller with a hard, floating object was proven**: the groove formation of coupling plates, the teeth of the forward pawn showing that the propulsion coupling had suffered a blow in forward position, etc. In this way, it was held that the waterway in question at the place of the hit was affected by an intrinsic defect that prevented the normal use of the navigable waterway. The operator of the waterway was therefore liable (Court of Appeal Ghent 25 June 1998, 1996/AR/1635).
- The defect of the watercourse need not necessarily be an intrinsic feature of that watercourse. Thus, it is not required that it be a defect that affects the structure of the watercourse, would be permanently or inseparably connected to the watercourse or would be foreign to any third-party intervention. **Nor is it required that the obstruction must have been foreseeable to the skipper.** Given the average draught of the stern in lead condition (0.46 m) and the location of the propeller, the obstacle must have been at least 40 cm below the waterline. It is impossible for a skipper of a moving vessel to see and avoid such an underwater floating obstacle (Antwerp 4 June 2001 AR/98/1447).

## II. CASELAW BEFORE 1st JUNE 2022



### Examples – caselaw (3):

- ✦ A **bollard** around which hangs a rope floating several metres into the waterway exhibits an abnormal characteristic. The fact that due to the presence of that rope on that bollard, the waterway itself could also be considered defective does not exclude that the claim was caused by the defective bollard. The custodian of that mooring post can be sued for full damages. NV Waterwegen en Zeekanaal must be regarded as the custodian of the defective bollard, as it is established that, pursuant to a protocol, it is custodian of 'everything fixed' in the defined territory, including, inter alia, the bollards. (Antwerp 16 October 2017, 2015/AR/1965).
- ✦ **A regulatory legal relationship and not a contractual relationship arises between the operator of a waterway who designates a mooring place as part of a public service and the user. If the designated mooring place is defective, the liability of the provider of the public service should be retained** on the basis of Article 1384, §1, of the Civil Code (Antwerp 1 December 2008, 2007/AR/2647).

# III. PRINCIPLES AFTER 1st JUNE 2022



## ↳ Flemish Shipping Decree ("SD")

- ↳ Entry into force by 1 June 2022 on Flemish territory (!)
- ↳ Title 2, Chapter 2 "Civil liability of the waterway authorities (Articles 7 to 11)

## ↳ Flemish Ports Decree ("HD")

- ↳ Chapter 2, Section 3: "Liability of the port authority" (Article 23a to Article 23e)
- ↳ Introduced cf section 173 - 177 SD.

# III. PRINCIPLES AFTER 1st JUNE 2022



- ↙ Big shock:
  - ↙ Exclusion of certain cases previously considered a 'defect' within the meaning of Article 1384, §1, Civil Code.
  - ↙ Exoneration of liability for certain claims.
  - ↙ Limitation of liability for certain causes of damage.

# III. PRINCIPLES AFTER 1st JUNE 2022



- ↙ Exclusion of certain claims as a 'defect':
  - ↙ Article 7 SD: "*the presence of objects and deviations from established or customary navigation in a waterway due to natural processes does not constitute a defect or abnormal feature of the waterway for the purposes of Article 1384(1) of the Civil Code*" (cf. Article 23a HD).
  - ↙ Explanatory memorandum
  - ↙ Issues:
    - ↙ Lack of definition of "natural process"
    - ↙ Lack of a definition or explanation of a "customary navigation"
    - ↙ ...

# III. PRINCIPLES AFTER 1st JUNE 2022



- ↙ Article 8 SD: "*the waterway authority shall not be liable under Article 1384(1) of the Civil Code for the presence, not resulting from a natural process, of objects and deviations from established or customary navigation in a waterway that are not visible to the naked eye from above the water surface.*"
- ↙ Explanatory memorandum
- ↙ Issues:
  - ↙ Lack of definition of "natural process".
  - ↙ Lack of definition or explanation of a "customary navigation".
  - ↙ What is meant by "visible to the naked eye from above the water level"? Refers to objects as well as deviations from navigation. What is observable or visible (radar, scanner, eye, ...)? Statement by the skipper is insufficient.
  - ↙ Unbearable reverse burden of proof on the claimant?

# III. PRINCIPLES AFTER 1st JUNE 2022



## Article 10 SD: Limitation of liability:

*"In the event of damage due to an error or omission on the part of the waterway manager or his appointees or caused by a defect in the property in the waterway manager's custody, the waterway manager's liability shall be limited to the amount determined in accordance with paragraph 2 if the damage results from any of the following causes:*

*1° a defect or deficiency in the traffic signs and devices serving to give information or instructions to vessels, such as beacons and buoys;*

*2° a defect or deficiency in the works of art, such as locks, bridges and embankments.*

*§ 2. The amount to which the waterway manager's liability per damaging event is limited depends on the class of waterway on which the damaging event occurs."*

# III. PRINCIPLES AFTER 1st JUNE 2022



- ↙ Article 10 SD: Limitation of liability:
- ↙ Explanatory memorandum
- ↙ Issues:
  - ↙ Not in case of intent or gross negligence of the waterway authority. But of the appointee?
  - ↙ Well lack of the listed elements, but what in case of a 'mistake'?
  - ↙ Limitation fund formation. Very atypical system (publicity in Belgian Official Journal) without clarity on disputed claims ea.



# IV. COMPARISON WITH FRANCE



- Voies navigables de France (VNF)
- Article L. 4311-1 of the transport code: *la responsabilité de VNF qui assure l'entretien et la maintenance du réseau fluvial. L'engagement de VNF: l'exploitation, l'entretien, la maintenance, l'amélioration, l'extension et la promotion des voies navigables ainsi que de leur dépendances ...*
- Article L. 2124-11 of the code general de la propriété des personnes publiques referring to L. 215-14 of the environment code: "*L'entretien régulier a pour objet de maintenir le cours d'eau dans son profil d'équilibre, de permettre l'écoulement naturel des eaux et de contribuer à son bon état écologique ou, le cas échéant, à son bon potentiel écologique, notamment par enlèvement des embâcles, débris et atterrissements, flottants ou non, par élagage ou recépage de la végétation des rives.*"

# IV. COMPARISON WITH FRANCE



- ✦ VNF for the account of the French State, to satisfy its duty for maintenance (entretien) of the rivers & waterways must remove all floating objects that would be a hindrance to the navigation (L4311-1). Does not deal with liability in case a floating object would damage a riverboat for example.
- ✦ The Cour de cassation held in this respect that the "*obligation d'entretien mise à la charge des VNF est sans conteste **une obligation de moyens et non de résultats***". (Cass. 2nd civ., 3 févr. 2011, n° 10-14,840).
- ✦ Given that VNF or any other person in charge of the maintenance of the river part (see case hereafter) has an "obligation de moyens", **the claimant has to prove that the obligation was not properly fulfilled.**
- ✦ In other words, you cannot simply argue that VNF are liable just because there was a contact between a riverboat and a floating object on a part of the river under their administration/maintenance. You have to prove that the contact was directly caused with improper maintenance i.e. failure to meet their obligation de moyens.

# IV. COMPARISON WITH THE NETHERLANDS

## Waterway authority

- Waterway authority may be the State, province, water board or municipality:

## Classification of waterways

- main transport axes, including access channels to seaports: managed by Rijkswaterstaat
- main waterways: managed by Rijkswaterstaat and provinces
- other waterways: managed by Rijkswaterstaat, provinces, water boards and municipalities

- Liability: as operator of the waterway, to make reasonable efforts to provide the safest possible passage for shipping (tort liability).

# IV. COMPARISON WITH THE NETHERLANDS

- ✦ Article 6:162 BW: the State's duty of care to prevent dangerous situations.
- ✦ Article 6:174 BW: liability for defective premises (bridges, locks, ...). This is a strict liability. The risk rests with the owner (or manager) of the defective building.
- ✦ Article 8:546 (and Article 8:1004) BW: *There are no legal presumptions of fault with regard to liability for collision; the ship, which comes into contact with another, if necessary properly lighted, fixed or capable of being fixed in place, which is not a ship, is liable for the damage, unless it appears that the contact was not caused by fault of the vessel.*
- ✦ Report Nationale Ombudsdienst (2007) **Rijkswaterstaat**: *liable for damages only when it has failed in **its duty of care** with regard to the management and maintenance of the waterway. There may also be a defect in the waterway **if a dangerous condition is left unchanged**. This is the case when the Rijkswaterstaat as a waterway operator has failed in its duty of care, which includes removing movable objects that make the waterway unsafe and fulfilling its duty of warn.*

# CONCLUSION

- ⚡ Complete reverse in burden of proof. Risk of damage now falls largely on inland navigation companies;
- ⚡ Quid insurability of such damages? Cutting off insurer's right of recourse. Impact on insurance premiums?
- ⚡ Definitions challenged: interpretation by case law. No known case law yet.
- ⚡ What is expected of a skipper placed in the same conditions? An inland skipper is concerned with the safety and technicality of the vessel. Not directly concerned with the waterway. Is an inland skipper supposed to know the Flemish waterline conditions? Damage *heard*, yet dozens of kilometres of passage (Flanders → Wallonia). A skipper may be expected to notify the competent authority immediately when he has heard a "knock" in the propeller, possibly causing damage to his vessel, now that an immediate determination of damage is imminent (Antwerp 30 January 2017, 2014/AR/2651). Surely now triggered by the new regulations in Flanders?
- ⚡ No consultation with all stakeholders. Only criterion is government financial protection. Huge socio-economic impact.
- ⚡ Inconsistent and non-harmonised system (cfr Wallonia vs Flanders).

**THANK YOU FOR YOUR ATTENTION**

**QUESTIONS?**

**Ignace Kroos**

**[i.kroos@legaloffice.be](mailto:i.kroos@legaloffice.be)**

**+32/472.73.85.35.**

**IVR COLLOQUIUM VIENNA 2023**





caluwaerts  
uytterhoeven

Let's get  
things clear.

ANTWERP OFFICE  
Potvlietlaan 6  
2600 Antwerpen (Berchem) - België

BRUSSELS OFFICE  
Bd A. Reyerslaan 80  
1030 Brussel - België

Lid van 

Caluwaerts Uytterhoeven BV  
met zetel te 2600 Berchem, Potvlietlaan 6  
KBO-nummer 0766.553.584  
Derdenrekening BE43 6304 3921 0201

BVO Advocaten BV  
met zetel te 2600 Berchem, Potvlietlaan 6  
KBO-nummer 0682.540.302  
Derdenrekening BE45 7360 4382 7189

T: 0032 3 448 49 92  
info@legaloffice  
www.legaloffice.be

advocaten - avocats - lawyers