Erasmus School of Law

17. Mannheim Conference on Inland Navigation Law – Strasbourg

The evolution of Dutch collision law

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9 October 2025

Evolution of Dutch collision law

Outline

- Introduction

- Legislative milestones
- Scope of application
- Liable person
- Basis of liability
- Fault of the vessel
- Legal and factual presumptions
- Time bars and concurrent claims

Evolution of Dutch collision law

Introduction

- Netherlands:
  - Long tradition as a sea and inland waters navigating nation.
    - Through the years many cases before Dutch courts
    - Extensive legal literature on collision law
    - Almost 500 years of successive maritime codifications.
  - Aligned with international uniform law on collision law
    - *1910 Brussels Collision Convention*
    - *1960 Geneva Inland Collision Convention*
    - *1972 Colregs*
    - *1996 LLMC*
    - *2012 CLNI*

Evolution of Dutch collision law

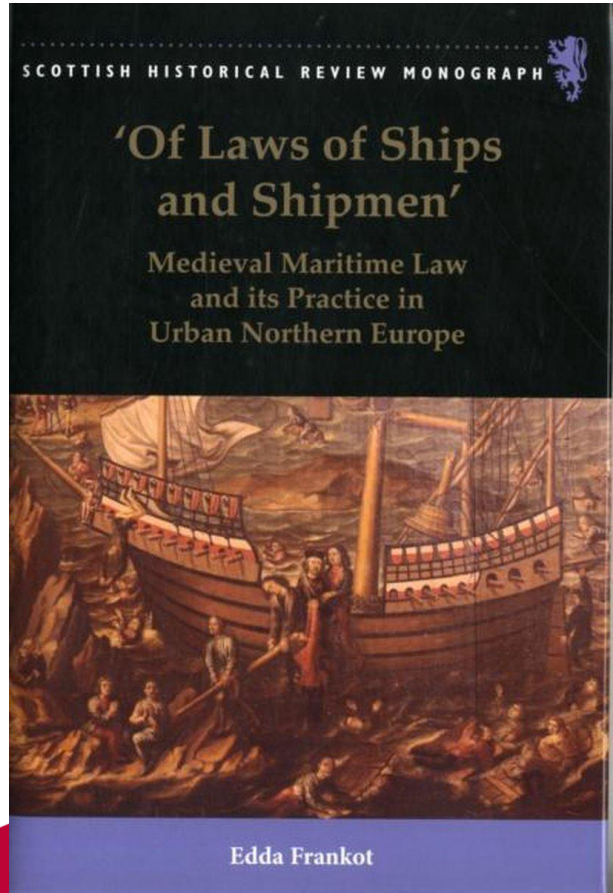
Introduction

- Netherlands:
  - Nevertheless, occasional signs of a Dutch "Sonderweg" with regard to key issues of the law of Collision.
  - *What are these differences and what explains them?*
  - Historical evolution:
    - Changes in the shipping industry
    - Interaction between legislation, case law and legal literature.
    - *Theme by theme approach*
  - N.B. International Working Group (IWG) works on draft Revision of Brussels 1910 Convention.

Evolution of Dutch collision law

Legislative Milestones

- Roman law as Ius Commune
- Late medieval compilations of customary laws
  - Rôles d'Oléron
  - Consolat del Mar
  - Waterrecht van Damme
  - Laws of Wisbuy
  - Town laws of Hanseatic and other cities.



Evolution of Dutch collision law

Legislative Milestones

- Early modern time: attempts at centralisation through national legislation
  - 1551 Maritime Law Ordonnance – Emperor Charles V
  - 1563 Maritime Law Ordonnance – King Philip II
  - N.B. For Netherlands this resulted in a mixture of Roman law and local Dutch law, known as: Roman-Dutch law.
  - N.B. 1681 *Ordonnance de la Marine* in France

Evolution of Dutch collision law

Legislative Milestones

- Napoleonic period
  - 1809 Draft Wetboek van Koophandel (Code of Commerce) for Kingdom of Holland
  - 1811 Netherlands absorbed by French Empire
    Dutch translation of French *Code de Commerce* in force
  - 1813 End of French rule and foung of Kingom of the Netherlands.
  - 1838 Revised ‘Dutch’ Wetboek van Koophandel in force.

Evolution of Dutch collision law

Legislative Milestones

- Dutch law
  - 1910 Brussels Collisions Convention
  - 1927 Fundamental reform of maritime law in WvK in force led by Prof. Molengraaff.
  - 1960 Geneva Inland Collision Convention
  - 1991 Fundamental reform and recodification of maritime and transport law in Book 8 Dutch Civil Code led by Prof. Schadee.

Evolution of Dutch collision law

Scope of application

- Gradual expansion:
  - Wide Definition of ship:
    - Ships are all watercraft, whatever they are named and whatever their nature. (Art. 309 (1) WvK 1927: “Schip”:
    - In this Code “vessels” are all things, other than aircraft, which according to their construction, are destined to float and which float or have floated. (Art. 8:1 DCC)
    - N.B. “Anything that floats”.

Evolution of Dutch collision law

Scope of application

- Gradual expansion
  - Material scope: which legal relations are affected?
    - Collision liability for whole damage caused to the ship and goods on board. (Art. 534 WvK 1838).
  - Brussels Collision Convention 1910 adds:
    - “damage caused to persons on board of the colliding vessels”. (Art. 1)
    - “the making good of damage caused which a vessel has caused to another vessel, or to goods or persons on board either vessel, either by execution or non-execution of a manoeuvre or by the non-observance of the regulations, even if no collision had actually taken place.” (Art. 13)

Evolution of Dutch collision law

Scope of application

- Gradual expansion
  - "Aanvaring" (collision) the colliding or touching of vessels with eachother.
    - (Art. 534 WvK 1927)
  - Addition: collision law also applies where ship collides or touches other moveable or immovable objects. (Allision)
    - Art. 544a WvK 1927
    - N.B. Addition not wide enough: HR 26 March 1965, NJ 1965/386 [*IJssel; Fendel, Kolomna*].

Evolution of Dutch collision law

Scope of application

Gradual expansion

- Art. 8: 541 and 8: 1002 DCC:
  - Further extension: Schadevaring (extended concept of collision) applies to all damage caused by a vessel except for damage to which a special liability conventions applies, i.e. oil pollution (CLC), bunker oil pollution, wreck removal, dangerous goods).

  - Examples from case law are abundant and include:
    - Fire spreading from one yacht to another in a marina
    - Personal accidents on board involving seafarers and stevedores.
    - One-sided incidents causing damage to bridges, locks, a dam and light tower, jetties, quaysides, buoys, cables, pipelines,
    - gas explosions.

Evolution of Dutch collision law

Liable person

- Central figure in maritime law?
  - Channelling of liability, including collision liability
  - Until the end of the 19th Century
    - (Directly) the "schipper" (master), Article 534 WvK 1838
    - (Indirectly) the shipowner or co-owners of the vessel, subject to their right of abandon, Article 321 WvK 1838.

Evolution of Dutch collision law

Liable person

- Central figure in maritime law:
  - Channelling of liability, including collision liability
  - WvK 1927
    - "Reeder", he who uses a ship for navigation at sea and either sails it himself or has it sailed by a master in his service, Art. 320 WvK 1927.
    - Reeder is not necessarily the shipowner.
    - Alignment with general principles of liability: responsibility for own acts/omissions and those of servants/agents, Art. 321 (2) WvK 1927.
    - Collision liability, Art. 536 WvK 1927.
    - Lien on vessel for collision claims, Art. 318c (4) and 318q WvK 1927

Evolution of Dutch collision law

Liable person

- Central figure in maritime law?
  - Book 8 DCC 1991
    - Shipowner,
    - Collision liability: Art. 8:544; 8:1005 DCC.
    - Ratio: protection of creditor:
      - Easy to find in ship register
      - Solvable debtor
      - Creditor does not know contractual relations regarding the operation of the ship.
    - N.B. Downside: shipowner not always appoints the master and crew. This opens the prospect of two parallel liabilities in case of collision, one against the shipowner in collision, the other against the bareboat charterer in tort/vicarious liability.

Evolution of Dutch collision law

Legal basis

- Inculpable collisions
  - Equal shares approach (50%-rule)
  - Each party bears his own loss.
- Culpable collisions
  - Fault of the vessel
  - Both to blame collisions

Evolution of Dutch collision law

Legal basis

- Inculpable collisions:
  - Masters of vessels involved in accidental collision are in equal shares liable for the total damage to ship (and cargo).
    - Articles 48 and 71 Laws of Wisbuy (Early 16th Century)
    - Article 46 Maritime Law Ordonnance 1551 – Charles V
    - Article 4 Title *Van Schepen die malkanderen beschadigen (of ships which damage each other) Maritime Law Ordinance 1563 – Philip II*
    - *N.B. Hoge Raad (1629) Jansdochter/Blaeu.*
    - *N.B. Solidarity mechanism allows the loss-spreading of collision damage over greater number of parties.*
    - *N.B. Proposal in WvK 1809 to extend rule to collisions caused by mere negligence and to apply general average principles to bear this loss.*

Evolution of Dutch collision law

Legal basis

- Inculpable collisions:
  - Masters of vessels involved in accidental collision are in equal shares liable for the total damage to ship (and cargo).
  - The scope of application of this rule is reduced to where the cause of the collision remains in doubt, in:
    - Art. 218 3rd WvK 1811 (= Art. 407 French Code de Commerce 1807) and
    - Art. 536-538 WvK 1838.
  - Later the rule was even entirely abolished in:
    - 1910 Brussels Convention;
    - WvK 1927
    - 1960 Geneva Convention
    - Book 8 DCC.

Evolution of Dutch collision law

Legal basis

- Inculpable collisions:
  - If however, it was established that collision was due to “toeval” (chance, a fortuity) then each party must bear its own loss.
    - Art. 218 1st Sentence WvK 1811.
    - Art. 536 WvK 1838.
    - Art. 2 Brussels Convention: 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. (= Art. 2 (2) Geneva Convention.
    - Art. 535 WvK 1927
    - Art. 8:543 and 8:1003 DCC.

Evolution of Dutch collision law

Legal basis

- Culpable collisions:
  - If collision is caused by fault the "guilty" party must pay the damage.
    - Article 4 *Maritime Law Ordinance 1563 – Philip II* "maer gheschiedet met wille, of by schulde van den eenen, die sal de schade alleene gelden" (*but if it occurred through the intent or fault of the one, he will pay the damage alone*).
    - Art. 421 WvK 1809: "moedwil of merkelijke achteloosheid" (*intent or gross negligence*)
    - Art. 218 WvK 1811: "schuld van één der schippers" (*fault of one of the masters*).
    - Art. 534 WvK 1838: schuld van de schipper of het scheepsvolk" (*fault of the master or the ship's crew*).

Evolution of Dutch collision law

Legal basis – culpable collisions

- Schuld van het schip (= fault of the vessel)
  - Art. 3 1910 Brussels Collisions Convention.
    - Travaux Préparatoires, p. 54: No definition given. Interpretation is left to domestic law.

    - Explanatory Note Molengraaff: The term “fault of the ship” is intentionally used, not “fault of the master or his crew", or "fault of the master or crew", which terms are too restrictive. “Fault of the ship” is always present when it navigates wrongly, due to a cause on board the ship, regardless of which one. The cause may be a defect of the ship due to poor construction, inadequate maintenance or improper handling, an incorrect order from the captain, an incorrect execution of a correct order by a crew member or generally by one of the crew members, an incorrect order from the pilot taken on board by the captain, etc.

Evolution of Dutch collision law

Legal basis – culpable collisions

- Schuld van het schip (= fault of the vessel)
  - Art. 3 1910 Brussels Collisions Convention.
    - Travaux Préparatoires, p. 54: No definition given. Interpretation is left to domestic law.

    - Parliamentary statement Molengraaff: That “faute de l'un des navires” in Article 3 of the Convention refers exclusively to "an error in the navigation of one of the vessels" is debatable. However, be that as it may, such a limited provision may not be included in the Dutch Commercial Code. Even when the collision results from an error on board other than an error in the vessel’s navigation, for example, a steering defect arising from an unknown cause, the damage should be borne by the at-fault vessel.

Evolution of Dutch collision law

Legal basis – culpable collisions

- Fault of the vessel (= schuld van het schip)
  - Doctrinal controversy: risico-leer (risk doctrine) vs. schuld-leer (fault doctrine)
    - Cleveringa: if a ship navigates wrongly due to a cause situated on board and this wrong navigation leads to a collision, the operator of that ship is obliged to compensate the resulting damage.
    - Van Oven: Only if the "verkeerd varen" (*improper navigation*) results from "laakbaar gedrag" (*reproachable conduct of persons on board of the ship*) can there be fault of the vessel.

Evolution of Dutch collision law

Legal basis – culpable collisions

- Fault of the vessel (= schuld van het schip)
  - Case law – Hoge Raad
    - Drechtstroom/Erato – Hoge Raad (1935): fault of the vessel means that the vessel navigated differently than was required under the given circumstances, given the applicable regulations and the requirements of good seamanship. This "verkeerd varen" (*improper navigation*) may equally be due to shortcomings of the master or other persons on board the vessel as to a defect in the vessel itself.

    - But the Hoge Raad rejected the argument that if the navigation of a vessel results in a collision, the "reeder" is liable unless it is proven that the manner of navigation resulted from a cause external to the vessel. (No reversal of burden of proof).

Evolution of Dutch collision law

Legal basis – culpable collisions

- Fault of the vessel (= schuld van het schip)
  - Case law Hoge Raad
    - Synthese/Rubens – Hoge Raad (1935) reasons as follows:
    - "all this leaves no doubt that Art. 536 WvK 1927 is intended to hold the operator liable in the event of a collision caused by a defect in his vessel, even if neither he nor anyone for whom he is responsible is to blame for that defect; ….
    - that, after all common usage fully permits, in the metaphor used in Article 536 K., to call a vessel "guilty" of a collision if the wrong move-ment leading to it is caused by a defect in the vessel, regardless of whether anyone could or should have prevented the occurrence or continuation of that defect.

    - N.B. *Annabel/Boreas*-decision of Chamber of Appeal CCNR (1976): No "Gefährdungshaftung" under 1960 Geneva Convention.

Evolution of Dutch collision law

Legal basis – culpable collisions

- Fault of the vessel (= schuld van het schip)
  - Case law Hoge Raad
    - Casuele de Toekomst (2001) : This leads to the conclusion that a ship is at fault if the damage is the result of:
    - (a) an error by a person for whom the ship owner is vicariously liable under Articles 6:169-6:171;
    - (b) an error by a person or persons engaged in work for the ship or cargo, committed in the course of their duties;
    - (c) the realisation of a particular danger to persons or property caused by the ship not meeting the requirements expected under the circumstances.

Evolution of Dutch collision law

Legal basis – culpable collisions

- Fault of the vessel (= schuld van het schip)
  - In summary
    - Hoge Raad does not support the risk doctrine as it requires an error (= “fout” = an unlawful act that is attributable to its perpetrator) to be established under (a) and (b).
    - However, with regard to defects in the vessel (c), the Hoge Raad raises the bar much higher than merely requiring due diligence. Is it in effect a risk liability or a “Gefährdungshaftung”.
    - N.B. In criterium (c) Hoge Raad goes *contra legum. See:* Art. 6:173 (4) DCC.

Evolution of Dutch collision law

Legal basis – culpable collisions

- Fault of the vessel (= schuld van het schip)
  - Fault of the pilot
    - In several decisions the Hoge Raad has held that in cases where the pilot was employed by the State or the Municipality of Rotterdam yet made a mistake resulting in damage to state-owned or munipality-owned infrastructure objects, the claim of the State municipality against the Reeder/shipowner failed.
      - Cunene (1943)
      - Tarpon Bay (1971)
      - Topaz (1977)
      - Good Leader (1988)

      - N.B. In 1988, the Dutch *Loodswezen* (pilotage association) was privatized by the Dutch government.

Evolution of Dutch collision law

Legal basis – culpable collisions

- Fault of the vessel (= schuld van het schip)
  - Fault of the pilot
    - Interestingly, the Hoge Raad in Tarpon Bay (1971) has suggested that Rule 5 Brussels Convention, which attributes the fault of a person (i.e. the pilot) not in his employment to the Reeder, is subordinate to the more fundamental rule of Dutch law that faults committed by a person in the course of his employment must be attributed to the employer (the State).

Evolution of Dutch collision law

Legal basis – culpable collisions

- Fault of the vessel (= schuld van het schip)
  - Pushbarge/Dumb barge units
    - Article 2 (3) Geneva Convention provides that where vessels are in tow, a vessel forming part of the train shall be liable only if it has committed a fault.
    - In Jelle/EWT (1980) a case concerning a pushbarge/dumb barge unit was a close-knit group of vessels" that participated and navigated as a single vesselin maritime traffic with the individual actions of one or more of the constituent parts being excluded.
    - N.B. The legal consequence was that if a collision occurs due to fault of one of the vessels, the fault of that vessel is also considered the fault of other vessels.

Evolution of Dutch collision law

Legal basis – culpable collisions

- Both to blame collisions
  - Each ship bears its own loss (Art. 535 WvK 1838)
  - Proportional liability rule
    - Art. 4 (1) Brussels Collision Convention; Art. 4 (1) Geneva Convention
    - "in proportion to the degree of the faullts respectively committed"
      - Dutch law: "in verhouding tot het gewicht van de door hen begane fouten" (in proportion to the weight of the fault committed) (Art. 8:545 (1) DCC).
      - What is the test: causality or gravity of the fault?
    - Scope: As between the ships and their cargo, including 3rd parties interested in ship and cargo.

Evolution of Dutch collision law

Legal basis – culpable collisions

- Both to blame collisions
  - Each ship bears its own loss (Art. 535 WvK 1838)
  - Proportional liability rule
    - …
  - Joint and several liability
    - In relation to:
      - Persons on board,
      - Vessels and cargo thereon that committed no fault (Art. 4 (1) Geneva Convention.
      - True third parties, e.g. the Dutch State, see Art. 8:545 (1); 8:1006 (1) DCC.

Evolution of Dutch collision law

Legal and factual presumptions

- Article 6 (2) 1910 Brussels Convention abolishes all legal presumptions of fault in regard to liability for collision.
  - In practice Dutch courts nevertheless work with factual presump-tions, subject to counter-evidence.
    - "Verkeerd varen" (improper navigation) of the vessel which leads to a collision may give rise to the factual presumption that errors in navigation have been made by persons on board of the vessel.
    - Distinction between causes on board and external causes.
    - Defendant can then try to show with counter evidence that causes external to the ship were the real cause of the way the vessel navigated. Etc.
    - Drechtstroom/Erato (1935)
    - Olau Brittannia-Pieniny II (1987)

    - N.B. Casuele/De Toekomst (2001): "fire is no cause".

Evolution of Dutch collision law

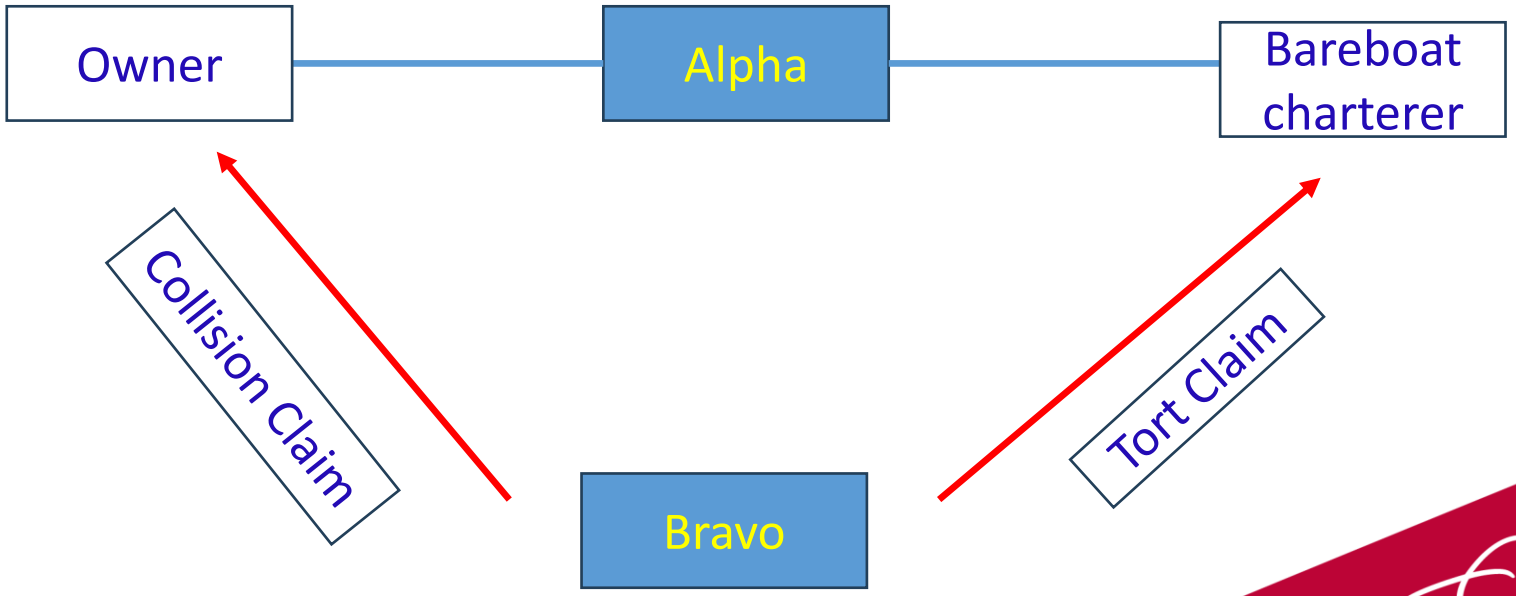
Time Bar and concurrent claims

- Complications
  - As we have seen the Dutch legislator has brewed a heavy cocktail by extending the notions of ship, collision and the heads of damage subject to collision law.
  - This can have unforeseen side-effects such as the unexpected application of the rather short two year-time bar for collisions to e.g. personal injury claims and claims for breaking underground cables and pipelines.
  - This provides an impetus to look for ways to save the time-barred collision claim by converting it into a not time-barred other liability ground.

Evolution of Dutch collision law

Time Bar and concurrent claims

- Complications
  - If a ship is operated under a bareboat charter and fault of the master or crew who are employed by the charterer caused the collision, the claimant can choose between:
    - A collision claim against the shipowner (Art. 8:544 DCC)
    - A claim in tort/vicarious liability against the charterer (Art. 6:162; 6:170-171 DCC).



Evolution of Dutch collision law

Time Bar and concurrent claims

- Complications
  - In the past decades, the Hoge Raad has had to deal with this repeatedly. The following lessons can be drawn from the case law:
    - Where the case is a classic example of damage done by a vessel in a way that only a vessel can, then Zwartemeer (2007) is the leading case in which the Hoge Raad stated that short time bar is meant to protect the liable shipowner, so that attempts to circumvent the short time bar by way of an action in tort against that shipowner can not be admitted. The specific law on collision liability then prevails over general tort law.

    - Where the involvement of a ship in the operations which caused the damage is coincidental and not necessary, then Liander/KWS (2015) suggests that it may be perfectly legitimate for the claimant to base the claim in tort instead of in collision.

Evolution of Dutch collision law

Time Bar and concurrent claims

- Complications
  - In the past decades, the Hoge Raad has had to deal with this repeatedly. The following lessons can be drawn from the case law:
    - Where two or more specific liability grounds each with their own time bar are available to the claimant the claimant has the choice, in other words: *lex specialis non derogate lex specialis*. This approach was followed in Zilverstad (1996) and Carola Smits (1997).

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Thank you for your attention.