

RESPONSE BY THE NEDERLANDSE VERENIGING VOOR ZEE- EN VERVOERSRECHT (NVZV) (DUTCH MARITIME AND TRANSPORT LAW ASSOCIATION) TO THE CMI QUESTIONNAIRE DATED 19 JULY 2013 WITH REGARD TO OFFSHORE ACTIVITIES – POLLUTION LIABILITY AND RELATED ISSUES

1) Is your country a party to any of the instruments listed under 1 to 3 above or, in the case of OPOL, are the offshore operators in your country parties to that agreement? If so please advise whether issues of liability and compensation are adequately addressed by the instrument itself or by any subsidiary national legislation.

The Netherlands: The Netherlands is party to the 1992 OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic: [Ospar Contracting Parties](#). The Netherlands ratified the OSPAR Convention on 7 January 1994 and the OPSPAR Convention entered into force for the Netherlands on 25 March 1998 (Dutch Treaty Series *Tractatenblad* 1998, 169). The OSPAR Convention only applies to the European part of the Kingdom of the Netherlands. It does therefore not apply to the Dutch Caribbean (Aruba, Curaçao, St. Maarten and Bonaire, St. Eustatius, Saba). We are not aware of an instrument similar to the OSPAR Convention being available in the Caribbean region.

The 1977 Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources ('CLEE') (Dutch Treaty Series *Tractatenblad* 1978, 9) was signed by the Netherlands, but never ratified.

The questionnaire rightly points out that the 1992 OSPAR Convention does not deal with issues of liability and compensation. These issues are covered by national legislation.

Someone who has suffered loss or damage may claim damages on the basis of the general provision of Dutch tort law:

Article 6:162 Dutch Civil Code

1. A person who commits a tort against another which is attributable to him, must repair the damage suffered by the other in consequence thereof.
2. Except where there are grounds for justification, the following are deemed tortious: the violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.
3. A tortfeasor is responsible for the commission of a tort if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles.

The claimant will need to provide evidence as to the existence of a tort, the identity of the tortfeasor, fault or accountability of the tortfeasor, loss or damage, and causation between the act or omission and the loss or damage (*condicio sine qua non* suffices). This may be complicated in practice.

Certain offshore installations may be considered to be a ship under Dutch law, in which case

liability may also be based on the provisions of Dutch law dealing with collision. Dutch law has a rather liberal definition of ship ('all objects, not being aircraft, which as appears from their construction are destined to float, and which float or have floated') which would certainly include fpso's and semi-submersible units like the Deepwater Horizon and floating offshore installations which have been placed on the sea-bed on a non-permanent basis, like jack-up rigs. The Netherlands is a party to the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, Brussels 23 September 1910 and the Convention for the Unification of Certain Rules of Law concerning Collisions in Inland Navigation. Whereas Dutch national law is an amalgamation of the provisions of both conventions, their application has been extended beyond collisions to also include 'any damage caused by a ship without a collision'. This would include a blow-out. Following a judgment of the Hoge Raad of 30 November 2001 (Casuele/De Toekomst) the claimant would need to provide evidence of a 'fault of the ship' (i.e. fault of an employee or independent contractor of the shipowner, fault of (another) person that performs duties for the ship or cargo, or the materialization of a special danger for persons or things if the ship does not meet the standards which, in the given circumstances, needed to be met), loss or damage, and causation between the (quasi-)collision and the loss or damage (condicio sine qua non suffices). Again, this may be complicated in practice, but perhaps slightly less than under the general provision of tort law.

Dutch law, however, also provides for specific rules for liability of an operator of mining works:

Article 6:177 Dutch Civil Code

1. The operator of mining works referred to in Article 1(n) of the *Mijnbouwwet* (Mining Act) shall be liable for a loss arising from:
 - a. the outflow of minerals referred to in Article 1(a) of the *Mijnbouwwet* due to failure to control the underground natural forces activated by the installation or operation of the works;
 - b. soil movement caused by the installation or operation of the works.
2. In this article 'operator of mining works' means:
 - a. the holder of a concession as referred to in Article 6 or 25 of the *Mijnbouwwet* who installs or procures the installation of mining works or who operates them;
 - b. any person who, otherwise than as a subordinate, installs or procures the installation of mining works or who operates them other than as holder of a concession referred to in subparagraph a, unless he acts upon the direction of another person holding a concession referred to above, or if he was not or ought not to have been aware that such other person is not such a holder.
3. If, after the event causing the outflow, another person becomes operator of the drilling hole, the liability for all damage, arising from the outflow as a result of that event, remains with the person who was operator at the time of that event. If the event causing the outflow takes place after the drilling hole has been abandoned, the liability falls upon the person who was the last operator of the drilling hole, unless, at the time of that event, more than five years have elapsed since the abandonment of the drilling hole, in accordance with the public regulations in force.
4. A person shall be liable for loss caused by movement of the soil if he is the operator at the time the loss became known. If, after this became known another becomes the operator, liability falls upon the person who was operator at the time it became known. If such loss became known after termination of the mining works, liability falls on the person who was the last operator.
5. If liability for an event causing the outflow or movement of the soil may also be

based on Article 173, 174 or 175, such liability falls, where the loss caused by such outflow or movement of soil is concerned, on the same person who is liable for the mining works.

Article 6:178 Dutch Civil Code

There shall be no liability pursuant to Articles 175, 176 or 177, if:

- a. the damage has been caused by armed conflict, civil war, insurrection, domestic turmoils, riot or mutiny;
- b. the damage has been caused by an event of nature of an exceptional, unavoidable and irresistible character, except for the underground natural forces referred to in Article 177, paragraph 1, in the case of that article;
- c. the damage has been caused exclusively by compliance with an order or compulsory regulation of a public authority;
- d. the damage has been caused by use of a substance referred to in Article 175, in the prejudiced person's own interest, whereby it was reasonable to expose him to the danger of damage;
- e. the damage has been caused exclusively by an act or omission of a third person with the intent to cause damage, and without prejudice to the provisions of Articles 170 and 171;
- f. as regards nuisance, pollution or other consequences for which no liability would have arisen on the basis of the preceding Section, had the person responsible knowingly caused them.

Article 6:182 Dutch Civil Code

If, in the cases of Articles 176 and 177, two or more operators act simultaneously, whether or not together, they shall be jointly and severally liable.

Article 6:184 Dutch Civil Code

1. Damage for which there is liability on the basis of Articles 173-182 also includes:
 - a. the costs of each reasonable measure to prevent or limit damage, taken by whomsoever, after a serious and immediate threat has arisen that damage will be caused which qualifies for reparation pursuant to those articles;
 - b. damage and loss caused by such measures.
2. If the measures referred to in the preceding paragraph are taken by a person other than the one who would have suffered the damage in respect of which the serious and immediate threat has arisen, such other person can only claim compensation for the costs, damages and losses referred to in the preceding paragraph to the extent that they could have been claimed by the person who would have suffered the imminent damage and the person sued can use the same defence against that other person as he would have had against this person.

Article 3:310 Dutch Civil Code

1. A right of action to compensate for damage or to pay a stipulated penalty is prescribed on the expiry of five years from the beginning of the day following the one on which the prejudiced person becomes aware of both the damage or that the penalty becomes exigible and the identity of the person responsible therefor, and, in any event, on the expiry of twenty years following the event which caused the damage or made the penalty exigible.
2. In derogation of the provisions at the end of paragraph 1, if the loss results from

air, water or soil pollution, or from the realization of a danger referred to in Article 175 of Book 6 or from the movement of soil as referred to in Article 177, paragraph 1, subparagraph b of Book 6, the right of action to compensate for the loss shall in any event be prescribed on the expiry of thirty years from the occurrence of the event which caused the loss.

3. (...)

In view of the limited exonerations possible under Article 6:178 Dutch Civil Code, these provisions may be considered to provide for a strict liability of the operator of mining works. The claimant will, however, still need to provide evidence as to the loss or damage, and causation between the outflow of minerals (blow-out) 'due to failure to control the underground natural forces activated by the installation or operation of the works' (blow-out) or 'soil movement' on the one hand and the loss or damage on the other (*condicio sine qua non* suffices). This may still be complicated in practice.

Where the outflow of minerals claimant cannot (easily) be attributed to the underground natural forces (activated by the installation or operation of the works), but may be blamed on a defect in the pipes used or a defect in the mining works, the claimant may rely on other provisions dealing with liability for defective moveables or unmoveables:

Article 6:173 Dutch Civil Code

1. A possessor of a movable thing which is known to constitute a special danger for persons or things if it does not meet the standards which, in the given circumstances, may be set for such thing, is liable if this danger materializes, unless, pursuant to the preceding Section, there would have been no liability if the possessor would have known of the danger at the time it arose.
2. If the thing does not meet the standards referred to in the preceding paragraph because of a defect as referred to in Section 3 of Title 3, there shall be no liability on the basis of the preceding paragraph for damage referred to in that Section, unless
 - a. taking all the circumstances into consideration, it is likely that the defect did not exist when the product was put into circulation, or that the defect arose at a later date; or
 - b. in respect of damage to things and pursuant to Section 3 of Title 3, there is no right to damages because of the excess or deductible provided for in that Section.
3. The preceding paragraphs do not apply to animals, ships and aircraft.

Article 6:174 Dutch Civil Code

1. A possessor of a building or structure which does not meet the standards which, in the given circumstances, may be set for it and thereby constitutes a danger for persons or things, is liable if this danger materializes, unless, pursuant to the preceding Section, there would have been no liability if the possessor would have known of the danger at the time it arose.
2. In the case of leasehold, the liability falls upon the possessor of the right to the leasehold. In the case of public roads, it falls upon the public authority in charge of the proper maintenance of the roads; in the case of cables and conduits, it rests upon the person managing the cables and conduits, except to the extent that the cable or conduit is located in a building or works and serves to supply or drain that building or works.
3. Liability for any mining works falls upon the person who, at the time the loss becomes known, operates the works in the conduct of his business. Where,

after a loss has become known, another becomes the operator, liability falls on the person who was operator at the time it became known. If such a loss became known after termination of the mining works, liability falls on the person who was the last operator.

4. In this article, 'building' or 'structure' means buildings and works permanently attached to land, either directly or through incorporation with other buildings or works.
5. A person who is entered in the public registers as owner of the building or structure or the land is presumed to be the possessor thereof.
6. For the purposes of this article, a public road includes the foundation and surface of the road, and their fixtures.

The legislative history of the provisions suggests that when 'the underground natural forces activated by the installation or operation of the works' cannot be controlled due to damage to the mining works as a result of a collision with a ship Article 6:177 et sequi may still be applied.

Perhaps it is relevant to add that there is a new Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC. The new directive, which entered into force on 15 July 2013, applies to offshore activities in the territorial sea, the Exclusive Economic Zone or the continental shelf of a Member State within the meaning of the United Nations Convention on the Law of the Sea. The directive contains the following article:

Article 7 Directive 2013/30/EU

Without prejudice to the existing scope of liability relating to the prevention and remediation of environmental damage pursuant to Directive 2004/35/EC, Member States shall ensure that the licensee is financially liable for the prevention and remediation of environmental damage as defined in that Directive, caused by offshore oil and gas operations carried out by, or on behalf of, the licensee or the operator.

We are unable to confirm at this stage whether the current liability regime applicable in the Netherlands does not already satisfy the requirements of the new directive. (The directive requires EU member states to have their legislation compliant with the directive by 19 July 2015.)

For companies active on the Dutch continental shelf the *Nederlandse Olie en Gas Exploratie en Productie Associatie* (Netherlands Oil and Gas Exploration and Production Association) (NOGEP) offers a so-called 'mutual indemnity agreement'. The agreement contains a waiver by a signatory to the agreement of the right to take recourse against another signatory for damage to or loss of property, or death or personal injury of its personnel except in cases of gross negligence or willful misconduct. It amounts to a collective knock-for-knock agreement.

With regard to the Dutch Caribbean it should be noted that the Civil Codes of Aruba, Curaçao, St. Maarten and the Civil Code of the Caribbean Netherlands (Bonaire, St. Eustatius, Saba (or BES-islands)) contain a similar provision as Article 6:162 Dutch Civil Code, but do not contain the provisions 6:177, 6:178, or 6:182 Dutch Civil Code. These Civil Codes also contain a similar definition of 'ship' and have similar provisions dealing with quasi-collision.

So with regard to liability the Netherlands has a fairly comprehensive legal system in place, whereas in the Dutch Caribbean liability is to be based on the general tort law provision or on the law dealing with collision. The absence of the specific provisions regarding liability of an operator of mining works may, at least partly, be explained by the fact that exploration and

exploitation of oil and gas in the Dutch Caribbean is almost non-existent.

There are no provisions in Dutch law or Dutch Caribbean law which regulate the actual availability of funds on the side of the offshore operators to settle claims for which they may be liable. Some offshore operators active on the Dutch continental shelf are party to OPOL, but this is not required under Dutch law or, as we were informed, under the terms of the concessions normally granted by the Dutch authorities.

On the other hand, there are no provisions of Dutch law or Dutch Caribbean law which would grant the offshore operators some form of limitation of liability, unless the offshore installation itself could be considered to be a ship (see above). In those cases the shipowner may, under circumstances, be able to rely on the provisions of the Convention on Limitation of Liability for Maritime Claims 1976 as amended by the 1996 Protocol, or equivalent provisions incorporated in Dutch national law.

In the given time frame, it was difficult to get a comprehensive response from all parties with an interest in the issue, such as the industry, environmental organisations and the relevant government ministries. In view of that fact we are hesitant to give a view as to whether the issues of liability and compensation are in fact (as the questionnaire mentions) 'adequately' addressed. Looking at CLC/IFC or HNS type elements of strict liability of the owner/operator, limitation of liability, guaranteed availability of the (limited) compensation for claimants via compulsory insurance or additional industry-backed liability funds, it is clear that Dutch law satisfies the first two elements to a certain degree, whereas Dutch Caribbean law only employs a basic fault based tort law regime. (The latter may be explained by the virtual non-existence of offshore oil and gas exploration and exploitation operations in the area.)

2) If your country is not a party to any of the instruments listed under 1 to 3 above, is it party to any other form of regional or bilateral agreements which address the issues of liability and compensation? May we please have details of any such agreement.

The Netherlands: Not applicable in view of the answer to question one.

3) Please identify the national regulations which are applied to offshore oil and gas exploration and exploitation operations by the authorities in your country?

The Netherlands: The most relevant with regard to offshore oil and gas exploration and exploitation operations which are applied by the authorities in the Netherlands are laid down in the *Mijnbouwwet* (Mining Act) and appending subsidiary regulation: *Mijnbouwbesluit* (Mining Decree) and *Mijnbouwreglement* (Mining Regulations). To some specific issues (environment, special planning, labour relations) other legislation may also apply offshore.

As far as we have been able to determine offshore oil and gas exploration and exploitation in the Dutch Caribbean is still in its infancy. There is legislation in place regarding Aruba, the *Petroleumlandsverordening Zeegebied Aruba 1987* (National Ordinance On Petroleum Aruba 1987), and in Saba, the *Petroleumlandsverordening Saba Bank* (National Ordinance on Petroleum Saba Bank) of 13 December 1976. A similar *Petroleumlandsverordening zeegebied Curaçao* (National Ordinance On Petroleum Curaçao) is still to be submitted to the Curaçao parliament for consideration.