

**NEDERLANDSE VERENIGING VOOR ZEE- EN VERVOERSRECHT (NVZV)
(DUTCH MARITIME AND TRANSPORT LAW ASSOCIATION)**

**REPLY TO THE CMI QUESTIONNAIRE OF 10 AUGUST 2010 ON THE IMPLEMENTATION IN NATIONAL
LAW OF MANDATORY INSURANCE PROVISIONS IN INTERNATIONAL CONVENTIONS**

Introduction

It is briefly noted here that the Netherlands is party to the CLC 1992 Convention, but not (yet) party to the HNS 1996/2010, Wreck Removal 2007 and Athens 1974/2002 Conventions. The Netherlands will become party to the Bunkers Convention on 1 January 2011. So the current legislation with respect to the implementation of the CLC 1992 Convention, the *Wet aansprakelijkheid olietankschepen* (acronym: Waot) (Oiltankers Liability Act), as well as the implementation of the Bunkers Convention in Book 8 Civil Code is the true basis of our reply to the questionnaire. The Waot contains the most literal translation possible of the relevant substantial provisions CLC 1992 Convention.

However, ratification and implementation of the HNS, Wreck Removal and Athens Conventions are expected to follow soon. The draft legislation relating to these conventions contains provisions on the issues subject of this questionnaire which are similar to those currently in force with respect to the CLC 1992 Convention.

We were not entirely sure how to read the questionnaire. On the basis of the first paragraph of the preamble to the questionnaire we take it to be an investigation into the question whether or not the mandatory insurance provisions of the relevant Conventions have been properly implemented into Dutch national law. Many questions, however, go much further than that. These questions seem to look for answers to intricate problems posed by the interpretation of international conventions in general and of the wording of the relevant Conventions in particular. E.g., it is a question of interpretation of the relevant Convention whether the text of that Convention leaves room for general provisions of national law to supplement the provisions of the Convention (as specifically enacted in the national law) on certain issues.

1. Licensing

Does an insurer wanting to insure the risks under the Convention referred to above need a license?

The Netherlands: The implementing legislation itself does not contain direct provisions on the need to have a licence. The implementing legislation requires the owner of a ship that is registered in the Netherlands or the owner of a ship that is registered in a non-Convention state or flies the flag of a non-Convention state to have insurance cover or other financial security from an insurer, a bank or other financial institution within the meaning of Article 1:1 of the *Wet of het financieel toezicht* (Wft) (Financial Supervision Act), or other person of whom the minister of Transport after consultation of the minister of Finance considers the financial capacity to be adequate to cover the liability under the relevant Convention. Under the general requirements of the Wft, however, a licence is indeed necessary to carry on business as an insurer, a bank or other financial institution in the Netherlands if that insurer, bank or financial institution is domiciled in the Netherlands, if it is domiciled in a non-EU country, or if it is domiciled in a EU country but not operating under a licence from the financial supervisory authority from that other EU country. Where the insurer,

bank or financial institution is domiciled in another EU country and operating under a licence from the financial supervisory authority from that other EU country no further Dutch licence as such is required. See for the latest English translation of the Wft.: http://www.minfin.nl/english/Subjects/Financial_markets/Financial_supervision/Publications.

If so,

- 1.1 *must it be a national license, or do your respective authorities accept licenses issued by foreign bodies?*

The Netherlands: See the reply under 1.

- 1.2 *What are the consequences if an insurer issues a policy without the respective license?*

The Netherlands: The insurer will be subject to sanctions under administrative or criminal law. The insurance contract itself will, however, remain valid.

- 1.3 *Is there an obligation of a licensed insurer to conclude insurance contracts?*

The Netherlands: No.

2. Certification

- 2.1 *Will a certificate issued by a convention state*

- 2.1.1 *be recognized in your state without any preconditions?*

The Netherlands: Yes

- 2.1.2 *be subject to investigation whether insurance satisfying the convention requirements actually exist?*

The Netherlands: No

- 2.1.3 *be rejected if there is evidence that there [is] no valid insurance at all or that the insurance is not satisfying the convention requirements?*

The Netherlands: No, however such evidence may be reason to contact the issuing Convention State.

- 2.2 *Does the authority in your state in charge of issuing the certificate*

- 2.2.1 *require a license of your state or is it sufficient that the insurer is licensed in another state?*

The Netherlands: No, the certificate is issued by the minister of Transport (see also the reply to Question 1)

- 2.2.2 *investigate the insurance conditions before issuing a certificate?*

The Netherlands: Yes

- 2.2.3 *investigate the financial standing of the insurer?*

The Netherlands: In case of another person than an insurer, a bank or other financial institution within the meaning of Article 1:1 of the *Wet of het financieel toezicht* (Wft) (Financial Supervision Act), the minister of Transport after consultation of the minister of Finance considers whether the financial capacity is adequate to cover the liability under the relevant Convention.

2.2.4 *investigate the license of the insurer?*

The Netherlands: No (see also answer to Question 1).

3. Statutory Law

3.1 *Does your national law contain any provisions specifically designed to transform the above mentioned provisions in international conventions into your national law?*

The Netherlands: Yes, by means of the *Wet aansprakelijkheid olietankschepen* (Waot) (Oiltankers Liability Act). The Waot contains an almost verbal translation of the relevant substantial provisions CLC 1992 Convention.

If so, could you

3.1.1 *summarize the main characteristics of those provisions?*

The Netherlands: These provisions follow the main characteristics of the substantial provisions of the relevant Conventions.

3.1.2 *provide the IWG with an English translation of those provisions?*

The Netherlands: There is no English translation readily available. In view of the short time until the Buenos Aires Colloquium it was thought best not to wait with submitting our reply until a translation was prepared. The Waot contains an almost verbal translation of the relevant substantial provisions CLC 1992 Convention.

3.2 *If your national law does not contain any provisions specifically designed to transform the above mentioned provisions in international conventions into your national law, does your national law then contain general provisions on mandatory insurance, which also apply to the mentioned provisions in the international conventions?*

If so, could you

3.2.1 *summarize the main characteristics of those provisions?*

The Netherlands: Not applicable.

3.2.2 *provide the IWG with an English translation of those provisions?*

The Netherlands: Not applicable.

3.3 *What does your private international law provide for as the applicable law,*

The Netherlands: Not applicable.

3.3.1 *if the claimants are national persons or companies, but if the insurer is a foreign company?*

The Netherlands: Not applicable.

3.3.2 *if the claimants are foreign persons and companies, but if the insurer is a national company?*

The Netherlands: Not applicable.

3.3.3 *if the claimants and the insurer are foreign companies?*

The Netherlands: Not applicable.

4. Jurisdiction/Proceedings

4.1 *Does your national law contain provisions on jurisdiction of courts for direct claims against Insurers?*

The Netherlands: Yes (District Court of Rotterdam).

If so, does your national law

4.1.1 *allow foreign claimants to directly sue national insurers in your national courts?*

The Netherlands: Yes.

4.1.2 *allow foreign and national claimants to directly sue foreign insurers in your national courts?*

The Netherlands: Yes.

4.2 *Does your national law allow that the direct claims against an insurer are subject to an arbitration clause?*

The Netherlands: No.

4.3 *Does a judgement against the liable party bind the courts of your country in a direct action against an insurer as regards the merits and quantum?*

The Netherlands: No.

If so,

4.3.1 *does this also apply to judgements in default?*

The Netherlands: Not applicable.

4.3.2 *can the insurer invoke that the court having decided on the claim against the party liable has not had jurisdiction?*

The Netherlands: Not applicable.

4.3.3 *can the insurer invoke that the party liable has not been properly served with proceedings and no opportunity to defend itself?*

The Netherlands: Not applicable.

4.3.4 *can the party liable invoke that the party liable has not defended itself properly?*

The Netherlands: Not applicable.

- 4.5 *Can the claimant under your national law sue the person liable and the insurer in the same proceedings?*

The Netherlands: Yes.

If so,

- 4.5.1 *are there any requirements as to the domicile of the party liable or the insurer?*

The Netherlands: No.

- 4.5.2 *Does your national law contain provisions on what has to happen if the insurer requires that the party liable is joined as a further defendant?*

The Netherlands: Yes, the insurer has the right to require the owner to be joined in the proceedings. Article 118 of the Dutch Code of Civil Procedure (DCCP) requires a third party to be summoned in a similar way as a defendant.

5. Particulars of direct action

- 5.1 *Does your national law contain provisions according to which a direct claimant has to fulfil requirements for commencing a direct action against an insurer?*

The Netherlands: No

- 5.2 *Does your national law contain provisions on burden and measure of proof which distinguish between a claim against the party liable under the respective convention and a direct claim against the insurer of such party?*

The Netherlands: No

- 5.3 *What defences does your national law allow an insurer against a direct claim?*

The Netherlands: The same defences as the owner under the relevant Convention. The insurer may, even if the owner is not entitled to limit his liability according to the relevant Convention, avail himself of the limits of liability prescribed therein. He may further avail himself of the defences (other than the bankruptcy or winding up of the owner) which the owner would have been entitled to invoke. Furthermore, the defendant may avail himself of the defence that the damage resulted from the wilful misconduct of the owner himself, but the defendant shall not avail himself of any other defence which he might have been entitled to invoke in proceedings brought by the owner against him. The defendant shall in any event have the right to require the owner to be joined in the proceedings.

- 5.4 *Can the insurer take over the defence of the party liable, and has the insurer a statutory power of attorney to act for the party liable?*

The Netherlands: There are no specific provisions on these issues in the relevant Convention or the implementing legislation. It is a question of interpretation of the relevant Convention whether general provisions of Dutch national law may supplement the provisions of the relevant Convention on this issue. If Dutch national law would be allowed to apply we note that there is no statutory power of attorney under Dutch law for insurers to act for the party liable. The possibility to take over the

defence of the party liable would normally be subject to the relevant contract of insurance.

5.5 *Are there any time limits in your national law for a direct action against an insurer?*

The Netherlands: The same provisions as under the relevant Convention are enacted in a Dutch translation in the Waot (to be autonomously interpreted on the basis of the authentic texts of the relevant Convention). See 5.3.

If so,

5.5.1 *what protects such a time limit (e.g court proceedings; demand letters)?*

The Netherlands: The same provisions as under the relevant Convention are enacted in a Dutch translation in the Waot (to be autonomously interpreted on the basis of the authentic texts (“extinguished”/”s’êteignent” and “action brought”/”action en justice intentée” of the relevant Convention). It is a question of interpretation of the relevant Convention whether (all kinds of) court proceedings or demand letters are included in the notion “action brought”. In view of case law regarding similar wording (e.g. ‘suit is brought’/”action ... intentée’ of the Hague (Visby) Rules) we believe court proceedings will of course protect the time limit, but demand letters will not.

5.5.2 *can the time limit be extended by agreement? If so, is the agreement with the insurer sufficient or does the party liable have to agree to the extension as well?*

The Netherlands: The same provisions as under the relevant Convention are enacted in a Dutch translation in the Waot (to be autonomously interpreted on the basis of the authentic texts of the relevant Convention). We are not aware of the relevant Convention (or implementing legislation) providing/allowing for an extension of the time limit by agreement.

5.6 *Under your national law, are the party liable and the insurer jointly liable?*

The Netherlands: The same provisions as under the relevant Convention are enacted in a Dutch translation in the Waot (to be autonomously interpreted on the basis of the authentic texts of the relevant Convention). It is a question of interpretation of the relevant Convention and the implementing legislation whether the party liable and the insurer may be considered jointly liable or whether general provisions of Dutch national law on joint liability may even supplement the provisions of the relevant Convention on this issue.

If so,

5.6.1 *what legal consequences does your national law provide for such joint liability?*

The Netherlands: The same provisions as under the relevant Convention are enacted in a Dutch translation in the Waot (to be autonomously interpreted on the basis of the authentic texts of the relevant Convention). It is a question of interpretation of the relevant Convention and the implementing legislation whether general provisions of Dutch national law on joint liability may even supplement the provisions of the relevant Convention on this issue. If national law would be allowed to apply, one would presumably have to determine - under conflict of law rules - the law applicable to the issue of the consequences of joint liability. If Dutch law were to apply, the joint debtors are obliged to each other to contribute to toward the performance of the obligation of which they are joint debtors (Article 6:10 Dutch Civil Code (DCC)). In order to determine their contribution amongst themselves the loss shall be

apportioned between them in proportion to the degree in which the circumstances which can be attributed to each of them have contributed to the damage, provided that a different apportionment shall be made or the obligation to repair the damage shall be extinguished in its entirety or maintained if it is fair to do so on account of varying degrees of seriousness of the faults committed or any other circumstances of the case, and provided statute or contract does not provide for a different apportionment (Article 102 and 6:101 DCC).

5.6.2 *can the insurer file a cross action against his insured in the same proceedings?*

The Netherlands: The same provisions as under the relevant Convention are enacted in a Dutch translation in the Waot (to be autonomously interpreted on the basis of the authentic texts of the relevant Convention). We are not aware of the relevant Convention (or implementing legislation) providing for this issue. As a procedural issue it is presumably left to the *lex fori*. Under general rules of Dutch procedural law the insurer would be allowed to file a cross action against his insured in the same proceedings. It is believed, however, that recourse or cross actions may not be possible in the proceedings relating to the limitation of liability.

5.6.3 *do your courts in such a situation give effect to a jurisdiction or arbitration clause in the insurance policy?*

The Netherlands: The same provisions as under the relevant Convention are enacted in a Dutch translation in the Waot (to be autonomously interpreted on the basis of the authentic texts of the relevant Convention). We are not aware of the relevant Convention (or implementing legislation) providing for this issue. As a procedural issue it is presumably left to the *lex fori*. Under general rules of Dutch procedural law the insurer one would expect the courts would give effect to a jurisdiction or arbitration clause in the insurance policy in such a situation. It is believed, however, that recourse or cross actions may not be possible in the proceedings relating to the limitation of liability.

5.7 *Does your national law allow that the claimant assigns his direct claims to a third party?*

The Netherlands: The same provisions as under the relevant Convention are enacted in a Dutch translation in the Waot (to be autonomously interpreted on the basis of the authentic texts of the relevant Convention). The Convention only refers to subrogation (Article V (5) and (6) CLC 1992) and states (Article III (4) CLC 1992) that no claim for compensation for pollution damage shall be made against the owner other than in accordance with this Convention. It is therefore a question of interpretation of the relevant Convention whether assignment is covered by the notion of subrogation used in the Convention or, if not, whether it is intended that assignment is prohibited by the Convention, or that national law may supplement the provisions of the relevant Convention on that issue.

If so,

5.7.1 *are there any requirements for the validity of the assignment?*

The Netherlands: See sub 5.7 above. If the relevant Convention may be supplemented by provisions of national law the conflict of law provisions provided for in the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations) are thought to apply. If Dutch law were to be applicable, assignment requires both a written instrument and notice thereof by the assignor or assignee to the debtor.

5.8 *What qualifies under your national law as a wilful misconduct?*

The Netherlands: The same provisions as under the relevant Convention are enacted in a Dutch translation in the Waot (“opzettelijk wangedrag”, a phrase otherwise unknown under Dutch law) (to be autonomously interpreted on the basis of the authentic texts (“wilful misconduct”, “faute intentionnelle” etc.) of the relevant Convention). We are not aware of Dutch case law on this issue.

5.9 *Does the insurer acquire rights against his own insured (the party liable) if he has to indemnify the direct claimant in circumstances, under which he would have avoided cover if he had been sued by the party liable and not by the direct claimant?*

The Netherlands: The same provisions as under the relevant Convention are enacted in a Dutch translation (to be autonomously interpreted on the basis of the authentic texts of the relevant Convention). We are not aware of the relevant Convention (or implementing legislation) directly providing for this issue, but the provisions in the relevant Convention and implementing legislation allowing the insurer to require the owner to be joined in the proceedings indicate that this may be the case. If national law is allowed to supplement the provisions of the relevant Convention and the implementing legislation on this issue, the insurer will most probably have the right under the rules of joint liability (see 5.6.1. above) and the insurance contract.

5.10 *How is limitation of liability affected under your national law in cases of direct actions?*

The Netherlands: The same provisions apply as under the relevant Convention. See 5.3. above.

5.11 *Does your national law contain consequences, if the insurance contract contains provisions which are not consistent with the Conventions referred to above?*

The Netherlands: The same provisions apply as under the relevant Convention. We are not aware of the relevant Convention (or implementing legislation) directly providing for this issue.

If so,

5.11.1 *are such provisions invalid?*

The Netherlands: Not applicable.

5.11.2 *is the whole contract invalid?*

The Netherlands: Not applicable.

5.11.3 *does the contract including such conflicting conditions remain valid, so that the insurance does not fulfil the requirements of the Conventions? What effect does that have under your national law?*

The Netherlands: Not applicable.

6. State Liability

Does your national law provide for liability of the state where the appropriate authority issues a certificate under the Convention, if it turns out

6.1 *that there is no insurance contract at all?*

The Netherlands: The same provisions apply as under the relevant Convention. We are not aware of the relevant Convention (or implementing legislation) directly providing for this issue. If national law is allowed to supplement the provisions of the relevant Convention and the implementing legislation on this issue, which we expect, state liability is to be determined under general notions of Dutch tort law. In that respect to so-called rule of relativity of Article 6:163 DCC will be relevant: there is no obligation to repair the damage if the standard breached does not serve to protect against damage such as that suffered by the person suffering the loss. In the matter of the Linda the Dutch Hoge Raad (Court of Cassation) ruled that the state was not liable for issuing a safety certificate for a inland vessel (lighter) contrary to applicable safety rules. It ruled that the relevant safety rules served to enhance safety in general, and not the direct financial interest of third parties that suffered loss when the lighter capsized due to its poor condition. Where it concerns issuing a certificate under the relevant Convention and implementing legislation attesting that insurance or other financial security is in force it is arguable that the applicable rules do serve to protect the financial interest of third parties that suffered loss, entailing a greater likelihood of state liability.

6.2 *that the insurance contract is not consistent with the provisions of the Conventions?*

The Netherlands: See under 6.1.

6.3 *that the insurer is not financially stable and cannot satisfy all direct claims?*

The Netherlands: See under 6.1.

Rotterdam, 18 October 2010

Nederlandse Vereniging voor Zee- en Vervoersrecht
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