**BELGISCHE VERENIGING VOOR ZEERECHT – L'ASSOCIATION BELGE DE DROIT MARITIME**

# CMI Revision of the 1910 Collision Convention

**Considerations and suggestions in respect of the CMI query 20th February 2023**

## General preliminary remarks

The 1910 Collision ( further on referred to as 10CC ( not to mix with the magic pop group artists in the mid '70 )has been and still is in force for a considerable time of age. The arguments for a change towards a modern and adequate instrument for Sea Law the introductory remarks of Lars Lange, IUMI Secretary General, in his comments dated March 2023, are nothing else but a very good analysis of the current situation in respect of this instrument of International Marine Law. It is too outdated to give clear responses towards actual situations of collisions.

In as far as this general introduction is concerned I feel one should also add the increase of Marine Traffic, the evolution towards modern IT equipment iro navigation tools and not to forget the immense proclaiming evolution of communication tools not only between vessels but also towards worldwide players overall in direct times. But for telephone and morse no other communication tools were at stake at the beginnig of the 20th Century. The 10CC had been adopted in 1910, unchanged since thus having a respectable age of 113 years.

It should also be stressed that the overall mentality in respect of commercial seagoing traffic has developed from a maritime adventure, with the need to protect the ones who are willing to offer themselves towards it, into a modern business model that should no longer have consideration towards the "adventures" of the sea but should be based on economic and commercial considerations whereby all partners involved should be considered on an equal level.

In respect of Lars Lange's numbered considerations, I do agree with the numbers 1 to 8 and 13 to 16 but I have some comments on the numbers 9 towards 12 and finally iro the last one , nr 17.

I will first emphise on Lars Lange's remarks and afterwards treat the questionnaire.

**Lars nr 9**

I agree towards the none interference of the public authorities when H&M underwriters see no need in doing so. I would however have the impression that Hull underwriters are somewhat done with the running down clause in their policies, and prefer a strict distinction between liability insurance and property damage insurance.

**Lars nr 10**

In my opinion cargo insurers would love to see mandatory liability insurance of the vessels and a direct action against the insurers including the PandI clubs.

**Lars nr 11**

To the contrary, market doesn't function well, otherwise arresting would not be a topic !

**Lars nr 12**

Agreed, but for the referring of the running down clause in H&M policies ( see above )

**Lars nr 17**

As said the first tier should not be with the H&M insurers since there should and is already going on a change towards overruling the running down clause in the H&M covers.

The number of insurers that should be taken into the action to start proceedings is a false argument.

Modern and advanced IT practice is a practical tool to make this an "easy" task. Even when not, a limited effort would do if a major commitment is at stake.

Finally, a change of policy wording and insurance practice, should allow to tackle the L/U only, clausing clearly that the others are to follow, thus making a fair extension of the existing L/U clauses in the policies.

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**Answering the CMI questionnaire**

**1.1 Vessel**

Vessel should definitely be defined.

Such definition should include all floating means of transport ( inland, unmanned, pleasure crafts,…) but should not extend to floating but vast structures ( Oils exploitation platforms, Windmill parks,…)

**1.2 Ocean/inland navigation vessels**

Yes, all should be falling under the application definition.

Aiming to unify the sea law, this should indeed apply to all.

**1.3 Collision**

A modern codification should include definitions on all issues treated, thus an overall definition is needed.

Manoevering without physical contact should be excluded. The discussions in this respect should not be cleared under a unification convention. There will always be a major discussion whether and to what extent one could regard a manoeuvre as a touching.

Towing is considered a unique transport mean and it should thus fall within the application of the convention( See also under 1.1.).

Collision between same owners should apply since beneficial owners could differ. One should also consider position of a bare boat charterer.

**2.1 Reference to the Flag**

Yes, the revision of the 10CC should embarrass all possibilities, giving the same a broad scope of application.

**2.2 REIO clause**

No, including the EU as a contracting party seems to me a bridge too far. Vessels do carry national Flags but there is no EU Carrying Flag regulation.

**3.1 Fault based liability**

Yes, fault based principle should be maintained. If one would maintain irrespective of any fault, major part of the contracting countries will abide from ratifying.

**3.2 Fault of the vessel**

In my opinion the convention should maintain the reference towards the vessel only, such as is the case under the 10CC. Including other parties goes too far. The practical solution could obviously be inserting a broad definition of the vessel under 1.1. including managers, crew, agents…. I prefer though keeping it "vessel".

**3.3 Title to sue**

All parties having undergone a damage that is evidenced in respect of liability on the vessel, should be in a position to sue. Therefore a short definition should be inserted under 3.3 referring to fault based liability towards damages whatever creating a right to sue against the liable party or parties in case of multiply parties being involved and considered having a degree of liability.

**3.4 Crew, Pilot etc. Channelling of Negligence**

Liabilities should be on the liable vessel only, but for the allowance of fault if more are at stake.

Therefore separate actions should be possible but always in respect of the degree of liability.

This obviously does not include nor harms the right of cargo owners to address their claim for damages against the carrying vessel. There claim is a contractual right against a contracting party, not able to perform. It doesn't consider a liability claim against a third party. Cargo owners could however be in a position to sue a claim against other parties on a fault liability base, either for the part of their cargo claim if the same cannot be honored in full through the contracting carrying vessel ( eg. Act of God iro collision applies as a tool for the carrying vessel to escape from liability to carried cargo ).

The 10CC doesn't coincide with the H/V rules and the new CC should not do as well.

**3.5 Pro rata versus joint liability**

Yes, since the same is in line with my remarks under 3.2. It is but maintaining the view of the 10CC.

**3.6 Defects in the vessel**

One should depart from the unseaworthiness of the vessel when defaults are being observed. It is vessels' duty to make sure the vessel was seaworthy upon departure. Introducing the liability on the vessel for defects irrespective of fault, is a way or a bridge too far. Any extension of this principle could be achieved in defining not only those defects that would lead to no fault liability, but also a definition compromising all defects to which the convention would apply, at fault or not.

**3.7 Legal presumptions**

Adopting internationally recognised presumptions ( eg. damages to cargo presumed liability on carrier, recognised by H/V rules) would be improper since it would be time consuming in finding out all of them and compromise the local differences applied. Therefore there should not be an adopting of these presumptions in the new Convention.

**3.8 Recoverable damages**

It would be a practical tool to summing up the same but under the expressed condition that any difference between and in respect of the Lisbon Rules, the latter will prevail.

**4 Mandatory insurance**

There is a major increase of traffic resulting into more parties playing a role in this increased traffic. Though most of the vessels have a decent P&I insurance with a decent Club, there are still lots of vessels sailing without any insurance and without any respect of the seaworthiness requirements.

We are left with a considerable part of vessels being registered in doubtful regimes.

Same results into an increase of so-called P&I clubs or direct insurers, unknown by the International group of P&I clubs and having but a registration in doubtful regimes.

Therefore a mandatory insurance at a first class P&I Club and having a reliable Class register would be an advantage towards collision avoiding measures and resulting into fair replies towards damages in respect of a collision event. This allows insurers but also other interests to look but for reliable vessels. The publication of the mandatory insurance should be enforced as well.

## 4.1 Direct actions and Defences

Direct action has to be inserted in the revision of the 10CC. It is an advanced and also well known tool which is common in non-marine insurances in respect of liability.

The sharing of liability between H&M and liability insurers under the running down clause has to disappear ( see above ). Hull underwriters are no longer called to take part in a liability insurance in case of collision or whatever case of damage. There exists no longer any argument to continuing this practice.

The practice of the ”pay to be paid” principle must be abandoned.; In case a vessel has a decent insurance but the claimany gets no express insurers’ guarantee either from the vessels’ own or from a counter party insurer confirming direct paying, he is left alone in the desert in case of bankruptcy or disappearance whatever, wherever of the vessel called for payment of the damages she is liable for.

Exceptions which insurers would have had against their insured are not applicable any longer unless they are mandatory exceptions, touching the common public interest, rendering the coverage nul and void ( eg. fraud, willfull misconduct, deliberate destructive actions,…).

## 5. International Private Law

This tool is an essential way towards unification of legal decisions on the same or comparable issues. It is of utmost importance that interpretation rules are made applicable on the Convention that will be drafted. The CMI 1977 Rio Draft Convention is a good tool to refer to  if it had in the meantime resulted into an applicable  Convention, ratified by enough contracting member States. Since this is not the case, I would assume that taking over the principles laid down in the said draft convention is preferable towards a mere referring to a draft. One should obviously limit the taking over to those clauses that could be relevant in respect of collision issues.

**6 Jurisdiction**

In respect of jurisdiction choice, the referring to the 1977 Rio Draft on interpretation would be the best choice, since in respect of I.P.L. issues the same draft should be referred to ( see above ).

**7 Recognition and Enforcement**

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With reference to recognition and enforcement of judgments the CMI 1977 draft has drafted a provision to the extent that judgments under the law of a contracting State can be enforced in another contracting State. Uniformity in respect of both choice of jurisdiction and enforcement of decision should be handled in a common way and therefore the referring to ( or the taking over as suggested above ) is the best choice to implement.

**8 Autonomous and Unmanned Ships**

The evolution of marine traffic will no doubt be directed towards Autonomous/Unmanned vessels in as far as the local circumstances in respect of safe navigation , capacity of the vessels and distance of the voyage is under control as from the quay side. One should have in mind that some unmanned vessels, be it smaller ones and on a limited distance are in use for quite some years. Ocean crossings are being foreseen in a not to long period of years as from now. Therefore the answer should be yes in all issues regulated in the draft convention.

**9 Conclusions**

In as far as I am concerned amending the 10CC is being supported in full taking into consideration the remarks made above in the present paper.

Keeping the 10CC is deciding to let things run further and be judged on a Convention that is no longer fit for the actual ocean going trade.

The revision of the old convention, standing for over 113 years, is evidence of the excellency of the same but also an incentive to go ahead with a modern convention fit for  the actual needs of the parties aiming to satisfy their demands and going to a reform of a longstanding convention that has proven its necessity but that needs quite some young blood to further survive and keeping it a usable tool in case of need.

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