Shipping 2020

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LEXOLOGY®
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the twelfth edition of *Shipping*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Egypt.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Kevin Cooper, of MFB Solicitors, for his continued assistance with this volume.

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Getting The Deal Through

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Netherlands

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NEWBUILDING CONTRACTS

Transfer of title

1 When does title in the ship pass from the shipbuilder to the shipowner? Can the parties agree to change when title will pass?

A shipbuilder constructing a vessel out of raw materials, components and equipment will acquire title to the vessel under construction, provided it owned the raw materials, components and equipment. However, if the shipbuilder does not already own all the chattels it uses to build the vessel, it nevertheless becomes the owner of the vessel constructed by it, unless the costs of the value added by it are so modest as not to justify this result. If the shipowner owns the raw materials, components and equipment with which the shipbuilder is constructing a vessel, then the shipowner will become the owner of the vessel built. In practice, the parties to a shipbuilding contract will contemplate what time suits them best to let title pass. The parties are free to contract that title will pass from the builder to the buyer during construction. The earliest moment during construction that this passing of title can be recorded in the ships register is the laying of the keel of the vessel or reaching a similar milestone in construction. Title will pass immediately to the buyer. Title will not pass gradually. By registering the vessel as a vessel under construction it will be possible, but not compulsory, to record a vessel's mortgage. Upon its completion, the vessel can be deleted from the Dutch Ship Register to register it abroad provided the mortgagee, if any, consents to this.

Refund guarantee

2 What formalities need to be complied with for the refund guarantee to be valid?

If the contract price is payable by the buyer in pre-delivery instalments according to certain milestones, a refund guarantee from the builder will usually be in the form of an undertaking from his or her bank to refund the relevant instalment upon the buyer's first written demand. The parties are at liberty to draft the wording of a refund guarantee, which may vary from an irrevocable first-written-demand type of guarantee to a guarantee whereby the beneficiary will have to submit an enforceable judgment or arbitration award before being allowed to claim under the guarantee. A refund guarantee issued by financial institutions and banks will usually have to be signed by two persons authorised to do so. Proof of authority to bind the guarantor for the maximum amount of the refund guarantee can be requested by the Society for Worldwide Interbank Financial Telecommunication. This request should be made to the issuing bank by the beneficiary's bank. If refund guarantees are issued by, for example, parent companies, the beneficiary should ensure that the company's articles (or memorandum) of association allow the issuance of guarantees and that the parent company is creditworthy. Issuance of a guarantee may be considered to be ultra vires, if the articles (or memorandum) of association do not allow it or the transaction is not ratified by all shareholders. In such a case, the issuance of the refund guarantee will be voidable.

Court-ordered delivery

3 Are there any remedies available in local courts to compel delivery of the vessel when the yard refuses to do so?

Under article 35 of Council Regulation (EC) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the (recast) Brussels I Regulation), application may be made to the Dutch court of competent jurisdiction (where the vessel under construction is located) for provisional measures to be taken, including a court order for the release of a vessel over which a yard exercises a lien (also referred to as a right of retention). This also applies if, under this regulation, the court of another member state or arbitrators have jurisdiction as to the substance of the matter. Shipbuilders are granted a statutory right of retention (articles 3:290 and 6:52 of the Dutch Civil Code). The right of retention is the power a creditor has to suspend the performance of an obligation to surrender goods to the debtor until payment of the outstanding debt is made. If the shipowner requests delivery of the vessel, and the yard relies on its right of retention, the local court will have to test whether under the circumstances of the case the shipyard is justified to do so. The test applied here will be the reasonableness and fairness of the yard's standpoint taking into account all circumstances.

Defects

4 Where the vessel is defective and damage results, would a claim lie in contract or under product liability against the shipbuilder at the suit of the shipowner; a purchaser from the original shipowner; or a third party that has sustained damage?

Where the vessel is defective and damage results, a claim by the shipowner will be delimited by the warranty provisions of the shipbuilding contract. The warranty provisions to which only the parties to the contract will be bound, customarily exclude liability of the shipbuilder for all indirect and consequential losses. Although section 3, title 3 of the sixth book of the Dutch Civil Code implements the provisions of the Council Directive (EC) No. 85/374/EEC of 25 July 1985 (OJEC No. L210) on the approximation of the laws, regulations and administrative provisions of the member states concerning liability for defective products, this section 3 is supplemental to the first section of title 3, containing general provisions in respect of tort. Claims made by a purchaser from the original shipowner can only be made if the original shipowner has transferred any residual rights for warranty it may have had under the building contract to the purchaser. Without such a transfer of rights

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a purchaser can only claim in tort, provided the defect in the vessel was of such a serious nature that a court would consider it to be a tort to the general public at the time the product was put into circulation. Product liability is limited to 'damage', namely damage caused by death or personal injury and damage to an item of property intended for private use or consumption, with a lower threshold of €500. The Dutch Act to implement the European Directive on Product Liability entered into force on 1 November 1990 and the relevant provisions can be found in articles 6:185 to 193 of the Dutch Civil Code. In cases of pure economic loss and of damage to commercial goods caused by a product, the rule of law developed by the Dutch Supreme Court is that it is unlawful to put into circulation a product that causes damage during its normal operation in accordance with its purpose. The differences between the liability regime of the directive as also contained in Dutch law and the liability regime of the Dutch general tort law is that the latter regime requires that the unlawful act can be attributed to the manufacturer of the goods (fault).

SHIP REGISTRATION AND MORTGAGES

Eligibility for registration

5 | What vessels are eligible for registration under the flag of your country? Is it possible to register vessels under construction under the flag of your country?

The law on the registration of vessels is mainly contained in the Dutch Civil Code, whereas the nationality of seagoing vessels is dealt with in accordance with the provisions of the Dutch Commercial Code. The regulatory provisions are found in the Act on the Public Registers and the Royal Decree on Registered Vessels 1992. Vessels eligible for registration under the Dutch flag are seagoing vessels and inland barges (inland waterway vessels).

A 'vessel' is defined as any object, with the exclusion of an aircraft, constructed to float in or on water, either actually floating or having been afloat. As a consequence, the definition includes all floating equipment, such as dry docks, pontoons, cranes, tunnel caissons, drilling rigs and elevators. However, if a tunnel caisson or a drilling rig becomes permanently anchored to the seabed it loses the status of 'vessel'.

'Seagoing vessels' are those vessels registered as such and, if not registered, the vessels that by their construction are intended to float or sail exclusively or mainly in or on the sea (article 8:2(i) of the Dutch Civil Code). Seagoing vessels must comply with article 8:194 of the Dutch Civil Code in order to be included in the Ship Register.

'Inland barges' are vessels registered as such, or, if not registered, vessels that by their construction are neither exclusively nor mainly intended to float in or on the sea (article 8:3(i) of the Dutch Civil Code). Owners of inland barges are obliged to register their vessel within three months after the vessel in question complies with the provisions of article 8:784 of the Dutch Civil Code. There is no statutory registration for inland barges with a carrying capacity of less than 20 tons and for other inland barges if they are under 10 cubic metres dead weight.

The Netherlands is a party to the Convention on Registration of Inland Navigation Vessels with protocols (Geneva, 25 January 1965). An inland barge is eligible for registration under the following conditions:

(i) the barge is operated from the Netherlands, irrespective of the nationality of its owner;
(ii) the barge is owned by a Dutch individual or the individual has domicile in the Netherlands; or
(iii) the barge is owned by a legal entity or a company that has its corporate seat or principal place of business in the Netherlands.

If joint owners own a barge, the majority of these owners have to comply with either (ii) or (iii).

Further to the definition of a vessel, a vessel under construction is constructed to float on water, but neither floats nor has been afloat. In order to enable registration of a mortgage on a vessel under construction or reservation of title of machinery and vessel ancillaries, the Dutch legislator decided that a vessel under construction should be considered a 'vessel' as well. Hence, registration of a vessel under construction in the Dutch Ship Register is possible. However, registration of a vessel under construction in the Dutch Ship Register does require the vessel to be constructed in the Netherlands. The Dutch Supreme Court has decided that it is not possible to register a barge hull built abroad that has already floated abroad in the Dutch Ship Register as a vessel, in the event this hull still needs completion by a yard either abroad or in the Netherlands and ruled that a registration to that effect is null and void (Dutch Supreme Court, 28 February 2014).

6 | Who may apply to register a ship in your jurisdiction?

The owner of a seagoing vessel, or its representative, may apply for registration in the Dutch Ship Register. However, such request will only be granted if the vessel qualifies as a Dutch vessel. This is the case if:

- the vessel is owned by one or more nationals of a member state of the European Union, or of a member state of the European Economic Area (EEA), Switzerland or persons who are equated with EU citizens, or the vessel is owned by one or more partnerships or legal entities established in accordance with the law of a member state of the European Union, one of the countries, islands or areas referred to in article 299, paragraphs 2 to 5 and 6c of the Treaty establishing the European Community, a member state of the EEA or Switzerland, or the vessel is owned by other individuals, companies or legal entities, who can invoke the freedom of establishment rules by virtue of an agreement between the EU and a third state; and
- the owner or ship manager has a head or branch office established in the Netherlands under Dutch law.

If it concerns an inland barge, registration may be applied for by the owner if one of the following requirements are met:

- the barge is operated from the Netherlands, irrespective of the nationality of its owner;
- the barge is owned by a Dutch individual or the individual has domicile in the Netherlands; or
- the barge is owned by a legal entity or a company that has its corporate seat or principal place of business in the Netherlands.

If it concerns a seagoing vessel or inland barge under construction, the owner must show that the vessel or barge is indeed under construction in the Netherlands. This can be demonstrated by submitting a letter from the shipyard confirming the construction on behalf of the applicant.

In all cases, the owner of the vessel applying for registration must choose domicile in the Netherlands, for example, at the office of a Dutch lawyer.

Documentary requirements

7 | What are the documentary requirements for registration?

Before applying for registration of the vessel in the Dutch Ship Register, the following documents are required in order to obtain the necessary certificate of nationality and the provisional certificate of registry from the Dutch Human Environment and Transport Inspectorate (an agency of the Ministry of Infrastructure and Water Management):

- power of attorney, if the owner does not apply for the registration itself;

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- if the owner is a company or legal entity, a copy of the extract from the trade register and a copy of the articles of association;
- if the owner is a private person, a copy of his or her passport;
- if a ship manager is appointed and this is a company or legal entity, a copy of the extract from the trade register and a copy of the articles of association;
- if the vessel is already registered abroad, a copy of the foreign registration;
- copy of the certificate of tonnage;
- copy of the bill of sale or other proof of ownership;
- copy of the class certificate; and
- copy of a certificate that includes details on the motor of the vessel (ie, a machinery certificate or an air pollution prevention certificate).

After obtaining the certificate of nationality and the provisional certificate of registry, the Dutch Ship Register requires the following documents:

- original bill of sale or other original proof of ownership;
- certificate of nationality;
- provisional certificate of registry (to be replaced by a definite certificate of registry in due course); and
- if the vessel was previously registered abroad, the original certificate of deletion (to be submitted within 30 days after the provisional registration in the Dutch Ship Register).

Dual registration

8 | Is dual registration and flagging out possible and what is the procedure?

Flagging in of seagoing vessels in the Bareboat Register kept by the Dutch Ministry of Infrastructure and Water Management is possible, provided the seagoing vessel in question remains registered in another country. The Act on the Nationality of Seagoing Vessels in Bareboat Charter (Act of 8 October 1992, as amended) sets out the requirements. According to article 3 of this Act, a seagoing vessel registered abroad can be bareboat registered in the Netherlands if:

(i) the vessel has been let under a bareboat charter to one or more:
  - individuals who have the nationality of a member state of the EU, EEA or Switzerland or who are equated with EU citizens;
  - companies that are incorporated in accordance with the law of an EU or EEA member state or Switzerland; or
  - individuals, companies or legal entities, other than those mentioned under the top sub-bullet who can invoke the freedom of establishment rules by virtue of an agreement between the European Union and a third state;

(ii) the bareboat charterer has its main office or branch office in the Netherlands;

(iii) one or more individuals who have their management office in the Netherlands are responsible on behalf of the bareboat charterer for the vessel, the master, the other crew members, as well as for all related matters, and who, either alone or together, have the power of decision and the power to represent;

(iv) one or more individuals as mentioned under (iii) or, in the case of absence, if a deputy is permanently available and has the powers to act without delay if so required;

(v) the owner and the bareboat charterer, if another person or entity than the owner, approves in writing of the acquiring of the status of a Dutch vessel;

(vi) the bareboat charterer accepts the responsibility for the vessel and those on board, which arises from status of a Dutch flag vessel; and

(vii) pursuant to the laws of the state in which the vessel has been registered, there are no impediments to acquiring the status of a Dutch vessel in connection with entering into the bareboat charter agreement with a bareboat charterer located in the Netherlands.

By registration in the Bareboat Register the bareboat charterer qualifies for the tonnage tax system. Upon registration, a bareboat chartered vessel loses Dutch nationality and flagging out is therefore only possible if the vessel is removed from the Dutch Ship Register. In that event there is no residual right to fly the Dutch flag, the president of the district court of the place of registration of the vessel will have to authorise the deletion of such vessel from the Dutch Ship Register. After having received such authorisation from the court, the Dutch Ship Register will complete the deletion.

It is not possible to register a seagoing vessel that is already registered in public registers, either as a seagoing vessel or as an inland waterway vessel, or in any similar foreign register.

Mortgage register

9 | Who maintains the register of mortgages and what information does it contain?

The register of mortgage entries concerning the judicial status of a registered property are made in public registers kept for that purpose at the Dutch Land Register Office. The law provides which public registers will be kept, the manner and place of making an entry, the kind and contents of the documents to be filed with the registrar, the organisation of the registers, the manner of registration and the consultation procedure. Registers are maintained in Rotterdam, Amsterdam and Groningen, but the Dutch Ship Register in Rotterdam also operates as a central register in which all other registries are duplicated ex officio. The following particulars in respect of a mortgage will be recorded:

- the name and address of the mortgagee;
- the original principle sum or the maximum sum secured; and
- the date of the mortgage deed and the date and time the mortgage deed was recorded against the vessel.

The rank of entries pertaining to the same registered property is determined by the order in which they have been registered, unless a different order results from the law. Where two entries are made at the same time, and where they would lead to mutually incompatible rights of different persons to the same property, the precedence shall be determined accordingly: in the event that the deeds presented for registration have been executed on different days, in order of the day the deeds were presented; and in the event that both deeds, being notarial deeds and including notarial declarations, have been executed on the same day, in order of the time of execution of those deeds or declarations (article 3:21 of the Dutch Civil Code).

LIMITATION OF LIABILITY

Regime

10 | What limitation regime applies? What claims can be limited? Which parties can limit their liability?

The Convention on Limitation of Liability for Maritime Claims 1976 (LLMC) applies with the following reservations:

- exclusion of articles 2(i)(d) and (e), which apply to the LLMC to claims in respect of raising, removal, destruction or rendering harmless of vessel or cargo that is sunk, wrecked, stranded or abandoned;
- application of national law of limitation to vessels intended for navigation on internal waterways, including provision that the limitation of liability for claims for loss of life or personal injury (other than those claims in respect of passengers of a vessel) on any distinct occasion shall in no case be less than 200,000 units of account;
- the limitation of liability for claims in respect of loss of life or personal injury on inland navigation vessels will (in general) be

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60,000 units of account multiplied by the number of passengers the vessel is authorised to carry; but in any case, it will be less than 720,000 units of account. Maximum limits of liability are also stated as three million units of account for a vessel with a maximum capacity of 100 passengers, six million units for 180 passengers, and 12 million units for vessels carrying more than 180 passengers; and
- the limit for passenger vessels under 300 tons for other than claims for loss of life or personal injury is 100,000 special drawing rights (SDR). The 1996 Protocol, which entered into force on 13 May 2004, has been accepted.

The LLMC shall apply in cases described in article 15 of the LLMC. Claims subject to limitation are:
- loss of life or personal injury, or loss or damage to property (including damage to harbour works, basins and waterways and aids to navigation) occurring on board or in direct connection with the operation of the vessel or with salvage operations, and consequential loss resulting therefrom;
- claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
- claims in respect of other loss, resulting from infringement of rights, other than contractual rights, occurring in direct connection with the operation of the vessel or salvage operations;
- claims in respect of the raising, removal, destruction or the rendering harmless of a seagoing vessel or an inland navigation vessel that is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such vessel;
- claims in respect of the removal, destruction or the rendering harmless of the cargo of the vessel; and
- claims of a person in respect of measures taken in order to avert or minimise loss for which the person liable may limit his or her liability in accordance with title 7, book 8 of the Dutch Civil Code, and further loss caused by such measures, but with exception of such claims of the person liable.

The Netherlands denunciated the LLMC 1976, but is a Contracting State to the LLMC Protocol 1996. Amendments to increase the limits of liability in the LLMC Protocol 1996 to amend the LLMC Convention entered into force on 8 June 2015. The new limits are also applicable in the Netherlands. The limit of liability for claims for loss of life or personal injury on ships not exceeding 2,000 gross tonnage (GT) is 3.02 million SDR (up from 2 million SDR) and the limit of liability for property claims for ships not exceeding 2,000 GT is 1.51 million SDR (up from 1 million SDR). In both cases additional amounts are claimable on larger ships.

For inland navigation, the Strasbourg Convention on Limitation of Liability in Inland Navigation (CLNI) shall apply. The Netherlands has incorporated the provisions of CLNI in the Dutch Civil Code in articles 8:1060 to 1066. In November 2012, the Netherlands signed CLNI 2012. To date Belgium, France, Germany, Luxembourg, Poland and Serbia have also signed CLNI 2012, with Luxembourg and Serbia ratifying it. The CLNI 2012 will supersede the CLNI 1988 on 1 July 2019. Liability may be limited for claims set out before, even if brought by way of recourse or for indemnity under a contract or otherwise. Persons entitled to limit liability by constituting one or more limitation funds are the shipowner (including the charterer, the hirer, or any other user of the vessel including the operator and the salvor). Under the CLNI persons entitled to limit liability are also the vessel owner, including the hirer, charterer, manager and operator, and salvors.

Procedure

11 | What is the procedure for establishing limitation?

Provided legal proceedings are instituted in the Netherlands, the person entitled to limit liability can file a petition with the Dutch district court of competent jurisdiction requesting limitation of liability. Legal proceedings therefore must already have been instituted, although the concept of 'legal proceedings' is to be interpreted broadly. In its judgment dated 20 December 1996 (*Sherbro*), the Dutch Supreme Court has declared that legal proceedings do not only include the normal proceedings on the merits initiated by a writ of summons, but also requests for conservatory measures, applications to appoint an expert and applications to conduct pretrial witness hearings.

Over the years, the Dutch courts have demonstrated a willingness to adopt a clear and singular approach to the global limitation of liability issues arising from maritime casualties. The Court of Appeal in The Hague rendered a judgment on 20 December 2016, adding to the body of rulings in this respect. The dispute had its origins in a 2010 collision in Turkish waters between two containerships, the *Odessa Star* and the *CMA CGM Verlaine*. Neither the parties to the dispute nor the ships involved in the collision had any direct connection to the Netherlands, but the owners of both vessels had signed a jurisdiction agreement to have the liability dispute heard in the Rotterdam court. At the time of the collision, the Netherlands, in direct contrast to many other countries, applied the lower limitation of liability levels applicable under LLMC 1976, as opposed to the increased levels adopted under LLMC Protocol 1996. The Rotterdam District Court held that the agreement to have the dispute over liability heard in the Netherlands was a lawful procedure allowing the *Odessa Star*'s owners to establish a limitation fund in Rotterdam. The Court of Appeal in The Hague upheld this ruling following a strict application of article 11's wording.

To invoke limitation, a fund must be established as per articles 642(a) to 642(z) of the Dutch Code of Civil Procedure. The petition requesting limitation of liability shall be heard in a session of the court and it will result in a court order ordering the petitioners to constitute one or more limitation funds by either making a cash deposit, or submitting a letter of undertaking in favour of all creditors from a guarantor reasonably acceptable, such as a reputable bank or protection and indemnity (P&I) club. By the same court order a delegated judge and a fund liquidator will be appointed to deal with the limitation proceedings. There is no separate right to plead limitation without setting up a fund. The limits of liability for other claims than those mentioned in article 7 of the LLMC (carriage of passengers) must be calculated as follows.

In respect of claims for loss of life or personal injury:
- 2 million SDR for a vessel with a tonnage not exceeding 2,000 tons;
- for a vessel with a tonnage exceeding 2,000 tons the number of SDR to be added to the basic 2 million SDR:
  - 2,001 to 30,000 tons: 1,208 SDR;
  - 30,001 to 70,000 tons: 906 SDR; and
  - 70,000 tons upwards: 604 SDR.

In respect of all other claims:
- 1.51 million SDR for a vessel with a tonnage not exceeding 2,000 tons;
- for a vessel with a tonnage exceeding 2,000 tons the amount of 1.51 million SDR will be increased as follows:
  - 2,001 to 30,000 tons: 604 SDR;
  - 30,001 to 70,000 tons: 453 SDR; and
  - 70,000 tons upwards: 302 SDR.

Property damage that arises in connection with wreck removal or salvage of cargo and other chattel will not be compensated from the property fund but from the wreck removal fund. On 2 February 2018, the

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Dutch Supreme Court ruled on how to determine which claims under the LLMC 1976 (as amended by its protocol of 1996) are paid out of the property fund and which are paid out of the wreck fund if a party has chosen to constitute both funds (ECLI:NL:HR:2018:140). The dispute had its origins in an October 2008 collision between Dutch inland waterways vessel the *Riad* and Dutch seagoing vessel the *Wisdom* on the Oude Maas, which resulted in the *Riad*'s sinking. The owner of the *Wisdom* had limited liability by establishing both a property and a wreck fund. The Dutch state initially ordered the wreck's removal. Cargo interests of the *Riad* provided security of €600,000 for the costs that might be incurred in the wreck and cargo removal operation. The Dutch state eventually took matters into its own hands and paid for the wreck and cargo removal operation, following which it obtained payment under the guarantee of €560,790.72, which the cargo interests of the *Riad* sought to recover from the wreck fund. The owner of the *Wisdom* argued that the claim of the cargo interests should be paid out of the property fund. It maintained that the claim of the cargo interests was a recourse claim and therefore not a claim for the raising, removal, destruction or rendering harmless of a ship that had been wrecked or whose cargo had been lost. The Dutch Supreme Court ruled that the subject of each claim, and not its legal basis, is the decisive factor in determining which fund is made available for its payment. Thus limitation of liability for wreck and cargo removal claims can be achieved only by constituting a separate wreck fund, including by way of a recourse claim. The Dutch Supreme Court considered that the wording and context of article 2 of the LLMC should be interpreted in accordance with articles 31 to 33 of the Vienna Convention on the Law of Treaties, even though the wreck fund as such is a rule of Dutch law. Article 2 of the LLMC refers to the specific subjects of claims and includes the text 'whatever the basis of liability may be' and 'even if brought by way of recourse or for indemnity under a contract or otherwise'.

Break of limitation

12 | In what circumstances can the limit be broken? Has limitation been broken in your jurisdiction?

No one shall be entitled to limit his or her liability if it is proven that the loss resulted from the personal act or omission of said person, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. It is clear from the words 'intent to cause such loss' that in order to deprive the person liable of the right to limit, it must be proved that the person liable has the subjective intent (mens rea) to cause the loss. Therefore, it is not sufficient if the parties suffering the loss prove that a reasonably competent person could not have failed to conclude that his or her act or omission would cause the loss. The test to be applied to understand the consequences of the words 'or recklessly and with knowledge that such loss would probably result' was the subject of two cases of the Dutch Supreme Court on 5 January 2001. In these cases, the Dutch Supreme Court ruled that conduct is to be regarded as reckless and with knowledge that the loss would probably result therefrom, if the person conducting him or herself in this way knew the risks connected to that conduct and was conscious of the fact that the probability that the risk would materialise was considerably greater than that it would not, but all this did not restrain said person from behaving the way he or she actually did. This very strict test has meanwhile been applied by lower courts in cases in respect of limitation of liability of shipowners (Court of Appeal of The Hague, 22 February 2002, the *Pioner Onegi* and Amsterdam District Court 12 May 2004, the *Arcturis*). In both cases the Dutch courts have decided that the limitation could be broken since the conduct was reckless and with knowledge that such loss would probably result. The test developed by the Supreme Court in 2001 has been confirmed by the Supreme Court in 2002 (*CGM* case and *CTV/K-Line* case).The fund will remain at the disposal of the creditors that have filed a claim. The shipowner will of course be liable to reimburse these creditors for any claims that transcend the amount of the fund.

Passenger and luggage claims

13 | What limitation regime applies in your jurisdiction in respect of passenger and luggage claims?

Regulation (EC) 392/2009 implements the provisions of the Athens Convention and entered into force on 31 December 2012. The provisions of the regulation are nearly identical to the convention, but some provisions do offer more protection to passengers. Article 6 of the regulation provides for an advance payment to passengers, without constituting liability, within 15 days after the shipping incident causing death or personal injury. In the event of death, the minimum advance payment is €21,000. Additionally, article 7 stipulates that carriers shall ensure that passengers are provided with appropriate and comprehensible information regarding their rights under this regulation. Not surprisingly, some articles related to jurisdiction, recognition and enforcement are excluded, as other European instruments already exist in this field.

The 2002 Protocol amending the Athens Convention was ratified by the Dutch legislator on 26 September 2012 and entered into force on 23 April 2014. The Athens Convention 2002 is subsequently implemented in articles 8:500 to 8:529k of the Dutch Civil Code. The Netherlands reserved the right to limit the liability in respect of death and personal injury caused by any of the risks (eg, war, terrorism and expropriation) mentioned in section 2.2 of the International Maritime Organization (IMO) Guidelines for implementation to 250,000 SDR in respect of each passenger or 340 million units of account overall per ship on each distinct occasion, whichever amount is the lower. For other risks and categories of damage, the regular limits of the Athens Convention 2002 apply. The above-mentioned means that, even when the Athens Convention is not applicable (eg, for national carriage of passengers), similar or identical provisions to those of the Athens Convention will apply, provided that Dutch law or the regulation is applicable to the claim.

The Athens Convention 2002 system entails a two-tier liability system:

- strict liability in respect of claims for loss of life or personal injury up to 250,000 SDR, unless the incident was intentionally caused by a third party, or resulted from an act of war, hostilities, civil war, insurrection or force majeure; and
- in respect of claims above this limit, there is a further limit of 400,000 SDR, unless the incident occurred without the fault or neglect of the carrier.

With regard to luggage the following limits apply:

- cabin luggage claims are limited to 2,250 SDR per passenger;
- vehicle claims including all luggage carried in or on the vehicle are limited to 12,700 SDR per vehicle; and
- other luggage claims are limited to 3,375 SDR per passenger.

Thus the Athens Convention 2002 limits the liability with regard to individual claims, whereas the LLMC offers possibilities to limit the liability for a particular incident.

PORT STATE CONTROL

Authorities

14 | Which body is the port state control agency? Under what authority does it operate?

Vessels flying a foreign flag and calling at a Dutch port are regulated on the basis of the Paris Memorandum of Understanding on Port

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State Control (the Paris MoU). One of the agencies of the Ministry of Infrastructure and Water Management , the Human Environment and Transport Inspectorate in Rotterdam, performs inspections on vessels focusing on safety, construction, environmental items and quality and number of crew. Moreover, the living and working conditions on board are inspected. These inspections take place unannounced. They aim to inspect a quarter of all foreign vessels visiting a Dutch port. Compliance with the International Ship and Port Facility Security Code is also verified by this body. As of 1 January 2011, vessels flying the flag of states participating in the Paris MoU are required to issue the following notifications:

- notification 72 hours before arrival at the port or anchorage if vessels are eligible for an expanded inspection;
- notification 24 hours before arrival at port; and
- notification of hazardous materials on board.

The vessels eligible for an expanded inspection are:

- vessels that have a high-risk profile and have not been inspected in the last five months;
- oil, gas and chemical tankers, bulk carriers or passenger vessels more than 12 years old with a standard-risk profile that have not been inspected in the last 10 months; and
- oil, gas and chemical tankers, bulk carriers or passenger vessels more than 12 years old with a low-risk profile that have not been inspected in the past 24 months.

The master or the vessel's agent must report that the vessel is eligible for a mandatory expanded inspection. The information to be provided is listed in Directive 2009/16/EC. The vessel's risk profile is calculated according to article 10 of Directive 2009/16/EC and an online calculator is available on the website of the Paris MoU.

Sanctions

15 | What sanctions may the port state control inspector impose?

The sanctions that may be imposed for substandard vessels are:

- to order rectification of deficiencies without detention;
- to detain the vessel: the violation should be rectified before the vessel is allowed to leave; or
- to ban the vessel: after multiple detentions, the vessel will not be allowed to enter into ports of states that have adopted the Paris MoU.

Notorious examples of vessels, berthed in Dutch ports, that were posing an unreasonable risk to the environment (asbestos) and were therefore detained before being scrapped, are the *Otapan* and the *Sandrien*.

Appeal

16 | What is the appeal process against detention orders or fines?

In the case of detention on account of the Port State Control Act or the Pollution Prevention by Ships Act, an appeal can be made by any party interested to the Minister of Infrastructure and the Environment. The appeal shall be made within six weeks after the date of notification of the detention and shall be sent to the inspector-general of the Human Environment and Transport Inspectorate in Rotterdam. Appeals have to be duly signed and at least comprise the following information:

- name, address and interest of appellant;
- date of appeal;
- date of detention and details of the case against which the appeal is directed; and
- the reason for lodging the appeal against the decision.

It is possible to draft the appeal in English and if the appeal is sent by fax a signature may be omitted. An appeal shall not cause the detention to be suspended. The detention shall not be lifted until, according to the professional judgement of an officer of the Human Environment and Transport Inspectorate in Rotterdam, all deficiencies notified in the detention order have been rectified and until full payment has been made or an authorised payment guarantee has been given for the reimbursement of the costs (if applicable).

CLASSIFICATION SOCIETIES

Approved classification societies

17 | Which are the approved classification societies?

The Dutch Ministry of Infrastructure and Water Management has authorised a number of classification societies (recognised organisations) to act on behalf of the Human Environment and Transport Inspectorate, who has a delegated public task as laid down by law of performing statutory surveys, verifications and certification as required in the international conventions (such as the International Convention for the Safety of Life at Sea 1974 (SOLAS), the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL) and EU Directive No. 96/98/EC). Seven authorised, recognised organisations carry out surveys of vessels applying to transfer to the Dutch Ship Register and issue the certificates required. The six authorised organisations are:

- American Bureau of Shipping represented by ABS Europe Ltd, Rotterdam;
- Bureau Veritas represented by Bureau Veritas, Rotterdam;
- DNV GL, Barendrecht;
- Lloyd's Register represented by Lloyd's Register Group, Rotterdam;
- Nippon Kaiji Kyokai represented by Nippon Kaiji Kyokai (Netherlands) BV, Barendrecht; and
- Registro Italiano Navale represented by RINA Netherlands BV, Rotterdam.

Register Holland, a foundation with its office in Enkhuizen, the Netherlands, is a national classification society recognised by the Human Environment and Transport Inspectorate. Register Holland was founded in 1984 as an independent and highly specialised organisation, mainly focused on surveying sailing passenger vessels. As of April 2011, Register Holland also received a designation by the Human Environment and Transport Inspectorate allowing it to classify all kinds of inland vessels, such as tugs, barges and passenger vessels for non-convention and non-European legislation. Its knowledge of both traditional and modern rigging is quite unique and surveys for Dutch certificates are conducted by Register Holland in accordance with their own classification rules. There are special rules for:

- seagoing sailing vessels with up to 36 passengers and a maximum of 500 GT and seagoing motor vessels with a power greater than or equal to 750kW and a maximum of 12 passengers (the White Rules);
- inland navigation sailing vessels with more than 12 passengers (the Yellow Rules);
- inland navigation sailing vessels with up to 12 passengers (the Red Rules);
- non-commercial seagoing sailing vessels (the Green Rules); and
- seagoing sailing vessels taken into service prior to 1996 (the Blue Rules).

In respect of inland cargo vessels, the respective surveyors are:

- EFM Onderlinge Schepenverzekering UA and EFM Expertise BV (Meppel);
- VOF Expertise- en Taxatiebureau A Middelkoop (Nieuwendijk);

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- Stichting Nederlands Bureau Keuringen Binnenvaart (Rotterdam); and
- Noord Nederland Maritiem Expertisebureau Heerenveen BV (Heerenveen).

In respect of sailing vessels, the surveyors are:
- EFM Onderlinge Schepenverzekering UA and EFM Expertise BV (Meppel);
- Dutch Certification Institute (Joure); and
- Stichting Register Holland (Enkhuizen).

Liability

18 | In what circumstances can a classification society be held liable, if at all?

Supervisors can only be held liable if they have caused damage by an imputable, unlawful act. In this connection courts will take as a starting point that a supervisor is exercising a public task and thus enjoys a certain amount of policy freedom. The policy freedom is limited by the fact that supervisors have to comply with general principles of good governance and with obligations arising from European Court of Human Rights and EU law. Despite this certain amount of policy freedom, supervisors run the risk of being held liable both by supervisees and by third parties who have incurred damage as a result of inadequate enforcement supervision. If a supervisor fails in the performance of a general supervisory task, for example, the failure to recognise dangerous situations, it will largely be a matter of the policy freedom of the supervisor. However, if a supervisor fails to recognise and address a particular dangerous situation, it will be easier for a court to establish a causal link between the failure of the supervisor and the damage that has occurred.

The responsibility and liability for statutory certification as a public task was addressed by the Dutch Supreme Court in the *Duwbak Linda* case (Dutch Supreme Court 7 May 2004, NJ 2006/281, RvdW 2004/67). Although none of the well-known classification societies were involved, the considerations and grounds for this judgment are illustrative of the reluctance of the Dutch legislature to hold supervising authorities' inspection or certification institutes liable for the (non-)performance of a delegated public task. In this leading case the Dutch Supreme Court expressed its opinion that, under Dutch law, an owner of a vessel is not entitled to rely on a statutory certificate as a guarantee to the owner that the vessel has been soundly constructed and, moreover, that it is not the purpose of the certificate to guarantee safety, but merely to provide a vessel's certificate (in order to comply with port entry requirements, obtain insurance coverage or liability covers, or comply with carriage of goods by sea. Under charters, sales, shipbuilding contracts or towing contracts, it is a warranty or even a condition that the subject vessel is a classed and class maintained vessel or meets a standard classification standard).

Moreover, the Dutch Supreme Court decided that, although the Dutch government has chosen to take care of safety within its territorial waters and has introduced a certification system for that purpose supervised by classification societies, neither the government's intention for introducing a liability for damages of these supervisors towards third parties can be derived from that choice, nor is such a liability caused by operation of law. Although in the *Duwbak Linda* case, the supervisor had acted in an imputable unlawful manner, it did not automatically mean that this supervisor was liable for the damage. In the first place, the legal norm infringed by the supervisor must be intended to protect against the damage as suffered by the injured party. This is the relativity requirement, and in *Duwbak Linda,* the Dutch Supreme Court suggested that this requirement can serve as a barrier to extensive liability on the part of the supervisor. The Court of Appeal Den Bosch followed the Dutch Supreme Court in a more recent decision (20 March 2012) in respect of the sudden sinking of the brand new inland barge *No Limit*.

The above does not mean that classification societies cannot be held liable on the basis of a private contract, instead of a delegated public task (to which in most situations general conditions of the classification societies, excluding liability clauses, shall apply) or in tort by third parties when not performing a public task (the *Blue Danube* case, Rotterdam District Court, 11 July 2002, S&S 2003/18). It is worth mentioning that, in the Netherlands, other private entities with a delegated public task, have been held liable for failing supervision when using their own developed rules and standards exceeding a statutory minimum for supervision. These stronger requirements will then have to be fulfilled. Therefore, assuming for the sake of argument that classification societies make use of their own developed rules and standards, liability of classification societies may be at stake when they do not meet their own standards. Third parties can rely on legitimate expectations that requirements and standards have been met. This may be suitable for analogous application, but for now there is still no case law on the liability of classification societies to be reported. However, the most important and unanswered question still remains whether the Dutch courts will follow the recent French decision in the *Erika* case (judgment of January 2008 as upheld in appeal on 30 March 2010) in such a way that classification societies do not have a blanket immunity from a public law perspective, nor can they be qualified as 'any person' as stipulated in article III, subsection 4 under (b), Civil Liability Convention, from a private law perspective. The *Erika* verdict is, from a public law perspective, diametrically opposed to the decision of the Dutch Supreme Court in *Duwbak Linda*.

The conclusion of the above seems to be that a supervisor who acts reasonably in performing a public delegated task does not run any real risk of becoming liable. The injured party will have to overcome a considerable number of hurdles in order to be able to establish an imputable unlawful act on the part of the supervisor with regard to supervision and enforcement. Even in cases where such an imputable unlawful act has been established, a lack of relativity and causality can ultimately result in denial of a claim for damages.

COLLISION, SALVAGE, WRECK REMOVAL AND POLLUTION

Wreck removal orders

19 | Can the state or local authority order wreck removal?

Yes, pursuant to article 1 of the Dutch Wrecks Act 1934, the Dutch state and the operator of waterways are entitled to remove or have removed any vessel or its remains wrecked or beached in public national and territorial waters, without being liable to the parties with interest in such vessels for the damage caused by such removal. It has been held by the Dutch Supreme Court that even for international waters the Dutch state shall have the power to have vessels, cargo or their remains removed at the expense of the party liable, provided the wreck's location is in the approach to one of the main Dutch ports.

International conventions

20 | Which international conventions or protocols are in force in relation to collision, wreck removal, salvage and pollution?

In the Netherlands, the International Convention on Salvage 1989 is in force in relation to salvage. The convention has been incorporated into national statute, by means of provisions in book 8 of the Dutch Civil Code.

In 2008, the Netherlands signed the Nairobi International Convention on the Removal of Wrecks 2007. This convention entered into force on 14 April 2015. The Nairobi Convention entered into force in the Netherlands on 19 April 2016 and has been transposed into Dutch

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law by the Maritime Accident Response Act. In accordance with paragraph 2 of article 3 of the Nairobi Convention, the Netherlands declares, for the European part of the Netherlands, that it will apply this convention to wrecks located within its territory, including the territorial sea. The Maritime Accident Response Act applies to wrecked seagoing vessels (and lost cargo) located in the Dutch exclusive economic zone and inland waters. On the basis of this domestic act, the state may dispose of wrecks and may seek recourse against the owners of the vessel liable for sinking the other vessel or cargo.

The Netherlands is party to two conventions on vessel collisions. The first, the 1910 Brussels Convention (the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, 23 September 1910) applies to collisions between seagoing vessels or between seagoing vessels and inland navigation vessels. The second, the 1960 Geneva Convention, applies to collisions between inland navigation vessels only. The 1910 and 1960 conventions have force of law in the Netherlands and may therefore apply in their own right. Nevertheless, the conventions have also been incorporated into national statutory law, by means of provisions in book 8 of the Dutch Civil Code. However, the legislature has taken the liberty of extending the application of the conventions to all events where 'damage is caused by a ship'.

In the area of pollution many international, multilateral and bilateral conventions apply, such as, inter alia, the Agreement for Cooperation in dealing with pollution on the North Sea by oil and other harmful substances (Bonn, 13 September 1983); the Convention for the Protection of the Marine Environment of the North-East Atlantic, which was adopted by the Netherlands on 22 September 1992 and entered into force in the Netherlands on 25 March 1998; the International Convention for the Prevention of Pollution from Ships 1973, as modified by the protocol of 1978; and the International Convention on Oil Pollution Preparedness, Response and Cooperation (30 November 1990) ratified on 13 May 1995, but not yet in force. Also included are:

- the International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969) (Trb 1970, 196), as ratified by the Netherlands in the Act of 11 June 1975 and again adopted by a Protocol of 27 November 1992 (Trb 1994, 228-229) (which came into force in the Netherlands on 18 September 1996);
- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 18 December 1971) (Trb 1973, 101) (CLC), as ratified by the Netherlands and again adopted by the Protocol of 29 November 1992 (Trb 1994, 228-229). This convention, also known as the International Fund Convention, came into force on 18 September 1996;
- the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea (London, 3 May 1996. The Netherlands has signed the convention, but it is subject to ratification and has not entered into force yet. If this convention comes into force, Dutch law will have to be amended accordingly;
- the Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (Geneva 10 October 1989), which closely resembles the CLC;
- EU Directive No. 2005/35/EC on vessel source pollution and on the introduction of penalties for related infringements is implemented in the Dutch Act on the Prevention of Pollution by Vessels; and
- MARPOL, supplement 1, IMO, 2 November 1973), as ratified by the Netherlands, adopted on 2 November 1973, and which came into force in the Netherlands on 2 October 1983.

Salvage

21 Is there a mandatory local form of salvage agreement or is Lloyd's standard form of salvage agreement acceptable? Who may carry out salvage operations?

There is no mandatory Dutch form of salvage agreement and Dutch law does not require that a salvage agreement is concluded in writing. In practice, Lloyd's Standard Form of Salvage Agreement (LOF 2000 or LOF 2011) is frequently agreed upon in the Netherlands. In case parties do not agree upon salvage under applicability of LOF 2000 or LOF 2011, salvors often carry out salvage operations under the Salvage Conditions 1958. Operators of floating sheerlegs use the general terms and conditions of the Sheerlegs Conditions 1976.

SHIP ARREST

International conventions

22 Which international convention regarding the arrest of ships is in force in your jurisdiction?

The International Convention relating to the Arrest of Seagoing Ships (Brussels, 10 May 1952) (the Brussels Convention) is in force in the Netherlands.

Claims

23 In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested? Can a bareboat (demise) chartered vessel be arrested for a claim against the bareboat charterer? Can a time-chartered vessel be arrested for a claim against a time-charterer?

The Brussels Convention only applies to vessels flying the flag of a state party to this convention. If an arrest is made in the Netherlands in respect of a vessel flying the flag of a non-member state, the convention does not apply and consequently Dutch law applies, which means that an arrest can be made for any claim against the shipowner, or non-maritime claims within the meaning of the Brussels Convention. This exception also applies if the vessel flying the Dutch flag is arrested in the Netherlands by a Dutch arresting party. Article 1 of the Brussels Convention provides for a definition of the concept of 'maritime claim' and in article 1 of the Brussels Convention, 17 different types of maritime claims are mentioned. Claims for which an arrest is not possible under the Brussels Convention include outstanding insurance premiums, including calls of P&I clubs, claims in respect of a sale and purchase agreement regarding a vessel, oil pollution claims, broker's commission and probably also claims of stevedores. In the *River Jimini* case the Rotterdam District Court decided (29 June 1984) that the claim for payment of container hire due by the shipowner falls within the scope of 'goods or materials wherever supplied to a vessel for her operation or maintenance'. The Rotterdam District Court also decided (as upheld by the Court of Appeal in The Hague) in the *IBN Badis* case that advance payments to the Algerian company CNAN to cover disbursements also fall within the scope of article 1 of the Brussels Convention. The Brussels Convention does not apply to an attachment of bunkers (the *Gabion* case, Rotterdam District Court, 24 February 2010).

Article 3 of the Brussels Convention provides for the possibility to arrest a sister vessel and such vessels shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons. It has been held that this does not allow the possibility to pierce the corporate veil since article 3(ii) of the Brussels Convention refers to shares in the vessel, not shares in the company that owns the vessel.

In another judgment, the Dutch Supreme Court (9 December 2011) ruled that article 3 of the Brussels Convention does not prevent the

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arrest of a vessel of a debtor, not being the owner of the vessel to which the maritime claim is related. This would mean, for instance, that an arrest of vessels owned by a time-charterer based on a claim of charter hire is possible, provided the Brussels Convention is applicable and other legal requirements for an arrest can be met.

Under the applicable Brussels Convention an arrest may be made on a vessel in respect of which the maritime claim arose, when the owner is liable for the claim or when, under the applicable law, recovery against the vessel following that arrest is possible. Under Dutch (international) private law, a claim is recoverable against a vessel when that is the case:

(i) under the law which applies to the claim; and
(ii) under the law of the flag of the vessel.

As for (i), under Dutch substantive law, recovery of a bunker claim for which the owner is not liable is not possible. When the claim is against the bareboat charterer, it should be instituted against the bareboat charterer and against the registered owner, claiming that the latter allows the claims to be enforced against the vessel. When a vessel is time-chartered and the time-charterer orders the bunkers, it is the time-charterer who is liable, and not the owner. The *Celine* (Rotterdam District Court, 24 February 2012) dealt with a ship arrest for a claim for bunkers supplied under Turkish law to a Turkish-flag vessel. Under Turkish law, a claim for bunkers against a time-charterer was recoverable against the vessel when the invoices were sent to the owner ('master and owners') and where there was an involvement of the owner (such as the signing of the bunker receipt by the master or chief engineer), and when the claim concerned 'necessities'. Under these circumstances, the vessel arrest was allowed in the Netherlands.

Maritime liens

24 | Does your country recognise the concept of maritime liens and, if so, what claims give rise to maritime liens?

The Netherlands is not a party to any of the international conventions on maritime liens. Furthermore, Dutch law does not recognise the concept of maritime liens and therefore provides no mechanism by which such a lien can be enforced. Foreign liens are recognised in the Netherlands if they are created in accordance with the Dutch conflict rules. Pursuant to article 10:136 of the Dutch Civil Code, it should be determined to what extent the rights of lien – which may exist under the foreign law applicable to the contract – fit into the Dutch legal system. A maritime lien can, for example, be transformed into a right of retention (ie, a right to withhold goods). Such right cannot be registered.

Wrongful arrest

25 | What is the test for wrongful arrest?

The test to be met by the alleged debtor to prove an arrest was wrongful is the test of proving an unlawful act under article 6:162 of the Dutch Civil Code. If the claim for which the arrest was made ultimately fails in the court or arbitral proceedings on the merits, the arrest was wrongful and the arresting party can be held liable for any and all damages and losses. In its decision of 5 December 2003, NJ 2004,150 the Dutch Supreme Court has formulated the following rule about liability for wrongful arrest: a creditor is strictly liable for the consequences of an arrest if the claim for which the arrest was made is found to be completely unfounded (ie, the court deciding on the merits of the case has found no basis for the claim at all). However, if the claim for which the arrest was made is partially awarded, this does not mean that the arrest was wrongful.

In cases where it is established that the arrest made was with hindsight for a too high amount, or where the arrest was unnecessarily prolonged, courts will apply an abuse of right test to verify if the creditor acted vexatious and therefor wrongful.

Bunker suppliers

26 | Can a bunker supplier arrest a vessel in connection with a claim for the price of bunkers supplied to that vessel pursuant to a contract with the charterer, rather than with the owner, of that vessel?

In general, a claim can only be recovered from the assets of the debtor, unless that claim has droit de suite. Dutch law does not provide for droit de suite in respect of a bunker claim. Such claim is therefore not considered a bunker claim against the vessel that received the bunkers. When the bunker claim is against the bareboat charterer, it should be instituted against the bareboat charterer and against the registered owner, claiming that the latter allows the claims to be enforced against the vessel. When a vessel is time-chartered and the time-charterer orders the bunkers, it is the time-charterer who is liable, and not the owner. The *Celine* (Rotterdam District Court, 24 February 2012) dealt with a ship arrest for a claim for bunkers supplied under Turkish law to a Turkish-flag vessel. Under Turkish law, a claim for bunkers against a time-charterer was recoverable against the vessel when the invoices were sent to the owner ('master and owners') and where there was an involvement of the owner (such as the signing of the bunker receipt by the master or chief engineer), and when the claim concerned 'necessities'. Under these circumstances, the vessel arrest was allowed in the Netherlands.

The bunker supplier may as an alternative wish to proceed to attach the bunkers on board of the vessel, provided these bunkers are still (partially) owned by the charterer who was the original debtor for the price of the bunkers supplied. The effect of an attachment of bunkers is similar to a ship arrest: the vessel is not allowed to sail since the attached bunkers would have to be used, which would violate the attachment and is considered to be a crime. Debunkering is not always allowed since bunkers may be considered as waste under the European Waste Regulation (1013/2006).

Security

27 | Will the arresting party have to provide security and in what form and amount?

The president of the district court granting permission for arrest has discretionary power to order the arresting party to provide counter-security to secure any claims for wrongful arrest. In practice, this discretionary power is hardly ever exercised. The amount of security is also discretionary and to be determined by the president in the arrest order. The form of the security shall be agreed upon between the seizer and the debtor, failing which the president shall decide. The Rotterdam guarantee form is a wording for a bank guarantee regularly used and accepted in the Netherlands (in case both the arresting party and the debtor are of Dutch nationality, the NVB form is a wording for a bank guarantee to be issued).

28 | How is the amount of security the court will order the arrested party to provide calculated and can this amount be reviewed subsequently? In what form must the security be provided? Can the amount of security exceed the value of the ship?

If the arrested party makes an offer to the arresting party to put up sufficient security, the arresting party is obliged to lift the arrest, attachments, or both. In general, the amount of security that needs to be provided by the arrested party will be equal to the amount for which

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the court has granted permission to make the arrest or attachments in the arrest order (the principal amount claimed by the arresting party).

In the arrest order courts use the following schedule for including interest and costs in the amount of security:

- for principal amounts up to €300,000: 30 per cent;
- if the principal amount is between €300,000 and €1 million: 30 per cent of the first €300,000 plus 20 per cent of the balance of the principal amount up to €1 million;
- for claims between €1 million to €5 million: 30 per cent of the first €300,000 plus 20 per cent of the balance of the principal amount until €1 million plus 15 per cent of the balance of the principal amount up to €5 million; and
- for principal amounts exceeding €5 million: 30 per cent of the first €300,000 plus 20 per cent of the balance of the principal amount until €1 million plus 15 per cent of the balance of the principal amount until €5 million plus 10 per cent of the balance of the principal amount over €5 million.

Depending on the amount for which the court has granted permission to make the arrest or attachments in the arrest order, the amount of security to be provided could exceed the value of the ship. The form of the security shall be agreed upon between the arresting party and the debtor, failing which the president of the court shall decide.

The Rotterdam guarantee form is a wording for a bank guarantee regularly used and accepted in the Netherlands (where both the arresting party and the debtor are of Dutch nationality, the NVB form is a wording for a bank guarantee to be issued).

Formalities

29 What formalities are required for the appointment of a lawyer to make the arrest application? Must a power of attorney or other documents be provided to the court? If so, what formalities must be followed with regard to these documents?

Dutch law requires no formalities for the appointment of a lawyer to make the arrest application, other than that the application must be filed by a Dutch lawyer admitted to the Dutch Bar Association. A power of attorney is not required. None of the documents accompanying the arrest application need to be notarised, legalised and authenticated.

Ship maintenance

30 Who is responsible for the maintenance of the vessel while under arrest?

The shipowner remains responsible for the maintenance of the arrested vessel. However, if an arrest is made in enforcement of a vessel's mortgage, the mortgagees, although not under the obligation to do so, will normally ensure the vessel is safe and properly maintained during the time of arrest. Any amounts spent in that connection will usually be recoverable under the mortgage, ranking above other claims.

Proceedings on the merits

31 Must the arresting party pursue the claim on its merits in the courts of your country or is it possible to arrest simply to obtain security and then pursue proceedings on the merits elsewhere?

The arresting creditor does not have to pursue the claim on its merits in the Dutch Court. An arrest to obtain security for a claim will be allowed, provided this creditor initiates proceedings on the merits before the court of competent jurisdiction or the arbitration panel within the number of weeks or months set by the president of the district court granting permission for the arrest. Authoritative writers have also argued that even initiation of a third-party ruling (binding advice) meets the requirement to initiate the claim on the merits.

Injunctions and other forms of attachment

32 Apart from ship arrest, are there other forms of attachment order or injunctions available to obtain security?

A creditor is allowed to seek recourse against all assets of its debtor. Consequently, other forms of attachment, for instance, a third-party attachment of bank accounts, claims of the debtor on third parties but also attachment of chattels (eg, bunkers or real estate owned by the debtor) are possible. Next to that, security for a claim can be asked for in summary injunction proceedings provided that the president of the district court applied to is competent and that there is an urgent interest. From a time and costs perspective, however, attachment may be a more attractive option, provided that there are assets.

Delivery up and preservation orders

33 Are orders for delivery up or preservation of evidence or property available?

In general, the Dutch Code of Civil Procedure provides for the possibility of a pre-judgment attachment for the purpose of delivery or surrender of assets and evidence. However, it has been debated in case law and literature whether under Dutch law attachment to preserve evidence is allowed except for evidence in intellectual property law cases. Dutch law contains a specific regime for the seizure of evidence in intellectual property law cases. However, until September 2013 it was uncertain whether seizure in other civil proceedings was possible. The Dutch Supreme Court decided in September 2013 that under specific conditions it is possible to seize evidence in all civil cases. The Dutch Supreme Court clarified this issue by considering that seizure of evidence is also possible in non-IP cases, provided that such seizure occurs only after the court has given permission not to inspect the evidence.

Bunker arrest and attachment

34 Is it possible to arrest bunkers in your jurisdiction or to obtain an attachment order or injunction in respect of bunkers?

It is possible to attach bunkers within the Dutch territory provided that the arresting party has a claim against the owner of the bunkers. In most cases, this will be the time-charterer. The effect of an attachment of bunkers is similar to a ship arrest: the vessel is not allowed to sail since the attached bunkers would have to be used, which violates the attachment and is considered to be a crime. Debunkering is not always allowed since bunkers may be considered as waste under the European Waste Regulation (EC) No. 1013/2006 and a permit may be required. However, recently the European Court of Justice (ECJ) ruled that contaminated fuel does not have to be classified as waste (*Shell/Netherlands*, joint cases C-241/12 and C-242/12). The ECJ recalled the fact that, in accordance with settled case law, the concept of 'waste' must not be understood as excluding substances and objects that have commercial value and that are capable of economic reutilisation (*Palin Granit Oy/Vehmassalon*, C-9/00). Having regard to the requirement to interpret the concept of 'waste' widely, the reasoning should be confined to situations in which the reuse of the goods or substance in question is not a mere possibility but a certainty (eg, when the holder of the consignment intends to place the consignment back on the market).

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JUDICIAL SALE OF VESSELS

Eligible applicants

35 | Who can apply for judicial sale of an arrested vessel?

A creditor who has an enforceable legal title (enforcement order) against the owner of the vessel as debtor is entitled to apply for a judicial sale of an arrested vessel. Such legal titles are:

- a monetary judgment from a court in the Netherlands;
- a notarial deed from a notary public holding offices in the Netherlands (including the Dutch Antilles);
- a monetary judgment by a foreign court, if enforceable in the Netherlands;
- a notarial deed by a foreign notary, if enforceable in the Netherlands;
- an arbitral award from a Dutch domestic arbitral tribunal;
- a foreign arbitral award, if enforceable in the Netherlands (eg, the New York Convention 1958); and
- a EU European Enforcement Order (pursuant to EU Regulation (EC) No. 805/2004 of 21 April 2004).

One of the above-mentioned legal titles enables the creditor to apply for a judicial sale of a vessel under arrest (even though this creditor is not the arresting party).

Procedure

36 | What is the procedure for initiating and conducting judicial sale of a vessel? How long on average does it take for the judicial sale to be concluded following an application for sale? What are the court costs associated with the judicial sale? How are these costs calculated?

To initiate and effect a judicial sale of a vessel, the debtor should be served an order to comply with a judicial order for payment within 24 hours. If the debtor fails to do so, a public civil notary (or alternatively a Dutch court in the case of a vessel flying a foreign flag) should be instructed to conduct the judicial sale. A judicial sale by auction can only take place 14 days after proper announcement and publication in a local daily newspaper is made of the same. If the creditor decides to organise a judicial sale before a Dutch court regarding a vessel flying a foreign flag, the court will determine in which newspaper of the state of the vessel's flag the judicial sale should be announced and also which period has to be taken into account before the judicial sale actually takes place. The creditor enforcing its title has to give notice of the sale to the owners, to any creditors registered in the Dutch Ship Register and to creditors that have arrested the vessel. The auction will be conducted in the Dutch language. Prospective buyers are invited by the public civil notary or the court to verbally tender higher bids. The amount of the higher bid can be determined by the party tendering the bid. If no higher bids are made, the identity of the highest bidder and his or her bid will be recorded. After a short break, the second part will be commenced with the intention of offering the vessel for sale at diminishing prices. The intervals between prices are announced. The first person to shout 'It is mine!' will be awarded the vessel.

If a foreign legal title is already available and enforceable in the Netherlands, the estimated time frame for a judicial sale is six to eight weeks. The court registration fee amounts to approximately €350. The executing parties' costs will be assessed by the court on the basis of a draft invoice. The costs are calculated on a time-spent basis and in addition the disbursements for costs of the bailiff, publications, etc, will be added.

Claim priority

37 | What is the order of priority of claims against the proceeds of sale?

The order of priority of claims on vessels according to Dutch law is the following, from highest priority to lowest:

- costs of execution and wreck removal, costs of preservation made after the arrest of the vessel, claims in respect of labour agreements, claims in respect of salvage and contribution of the vessel in general average;
- claims secured by mortgage or pledge;
- claims relating to the operation of the vessel and claims against the carrier under a bill of lading;
- collision claims;
- claims in respect of which the shipowner may limit his or her liability (overall limitation) (these claims are equal in rank); and
- all other claims (no preference).

Legal effects

38 | What are the legal effects or consequences of judicial sale of a vessel?

The statutory effects of a judicial sale can be summarised as follows. First, all arrests of the vessel, whether conservatory or in enforcement of a title will cease to exist. The purchase price paid by the buyer in the public auction replaces the vessel. Second, the restricted rights that cannot be invoked against the purchaser will cease to exist, although article 578 of the Dutch Code of Civil Procedure, paragraph 1, intends to provide the buyer with a 'clean' vessel, that is, without any (restricted) rights or limitation thereon. Some rights amount to an action in rem and have droit de suite: they can also be invoked against the vessel after the ownership has transferred in title to a third party. Consequently, a judicial sale of vessel does not release the vessel from these specific claims. Moreover, a vessel might be encumbered with the right of retention, in which case a creditor that has possession of the vessel postpones delivery of the vessel until his or her claim is settled. A right of retention can be enforced, even if the vessel is to be judicially sold. The party entitled to exercise the right of retention against a vessel does not have a preferential claim that can be recovered from the sale proceeds or the vessel, but should recover his or her claim from the purchaser. As a consequence, the potential buyer shall have to redeem the right of retention before he or she can take possession of the vessel. The judicial sale will extinguish the previous ownership.

Foreign sales

39 | Will judicial sale of a vessel in a foreign jurisdiction be recognised?

The purchaser of a vessel through a judicial sale in our jurisdiction acquires a clean title over the vessel, which should be recognised throughout the world. However, recognition of a judicial sale is based on international convention or reciprocity. The EU Regulation on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (the recast) Brussels I Regulation), is applicable in the Netherlands and all other member states of the EU. However, a foreign registration within the EU is not automatically cancelled or deleted on the basis of a court order issued by the court of another member state and may sometimes only be obtained by commencing separate acknowledgement and enforcement proceedings. It may be difficult to have a court order from foreign jurisdictions outside the EU and member states of other conventions recognised and to cause (deletion of) registration.

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International conventions

40 | Is your country a signatory to the International Convention on Maritime Liens and Mortgages 1993?

The Netherlands is not a signatory to the International Convention on Maritime Liens and Mortgages 1993.

CARRIAGE OF GOODS BY SEA AND BILLS OF LADING

International conventions

41 | Are the Hague Rules, Hague-Visby Rules, Hamburg Rules or some variation in force and have they been ratified or implemented without ratification? Has your state ratified, accepted, approved or acceded to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea? When does carriage at sea begin and end for the purpose of application of such rules?

The Hague-Visby Rules are in direct force in the Netherlands. Pursuant to article 8:371, paragraph 3 of the Dutch Civil Code, articles 1 to 9 inclusive of the modified Convention of 25 August 1924 for the Unification of Certain Rules relating to Bills of Lading (Trb 1953, 109) apply to each bill of lading pertaining to the carriage of goods between ports in two different states, if the bill of lading has been issued in a contracting state, or the carriage takes place from a port in a contracting state, or the contract embodied in the bill of lading or if the bill of lading evidencing the contract provides that the contract is governed by the provisions of the modified convention or of any legislation that declares those treaty provisions to be in force, irrespective of the nationality of the vessel, the carrier, the consignor, the consignee or any other person involved. The Hague-Visby Rules apply to the period from the time the goods are loaded on to the time they discharged from the vessel. However, the exact moment may differ depending on the nature of the goods. In Dutch case law, it is generally decided that the rules apply from the time the goods are hooked to be loaded on board to the time they are actually discharged from the vessel (and released from the crane).

The Netherlands has made active contributions to the development of the Rotterdam Rules and Rotterdam was appointed by the United Nations Commission on International Trade Law to host the signing ceremony of the new convention. On 23 September 2009, 16 countries officially expressed their support for the new convention during the official signing ceremony. To date, the convention has been signed by 25 countries and ratified by four countries: Spain on 19 January 2011; Togo on 17 July 2012; the Republic of the Congo on 28 January 2014; and by Cameroon on 11 October 2017. The Netherlands has signed the Rotterdam Rules.

Multimodal carriage

42 | Are there Conventions or domestic laws in force in respect of road, rail or air transport that apply to stages of the transport other than by sea under a combined transport or multimodal bill of lading?

If the (combined) carrier and the consignor have agreed upon a contract of combined carriage, the Dutch Civil Code applies the 'chameleon system' or the 'network system', pursuant to which each part of the carriage is governed by the juridical rules applicable to that part. The uniform system as laid down in the United Nations Convention on International Multimodal Transport of Goods (Geneva, 1980) has been explicitly rejected by the Dutch government. In respect of international carriage by road, the Convention on Carriage by Road (Geneva, 1956) is mandatorily applicable. The Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 1999) is mandatorily applicable to international carriage by air. Regarding international carriage by rail, the Convention concerning International Carriage by Rail 1980, Berne, and its 1999 Protocol, are applicable.

Title to sue

43 | Who has title to sue on a bill of lading?

Pursuant to article 8:441 of the Dutch Civil Code excluding any other party, only the rightful and regular holder of a bill of lading has the right to demand delivery of the goods from the carrier under the bill of lading according to the obligations resting upon the carrier or to claim damages for loss of or damage to the goods, unless he or she has not become a holder lawfully.

Charter parties

44 | To what extent can the terms in a charter party be incorporated into the bill of lading? Is a jurisdiction or arbitration clause in a charter party, the terms of which are incorporated in the bill, binding on a third-party holder or endorsee of the bill?

Generally, the terms of a charter party, including a jurisdiction or arbitration clause, are allowed to be incorporated into a bill of lading. Such terms must be referred to in a sufficiently clear manner in the document itself before they can be validly invoked towards a third-party bill of lading holder. If a contract of carriage has been entered into and furthermore if a bill of lading has been issued, the judicial relationship between the original consignor and the carrier is governed by the stipulations of a contract of carriage, which prevail over those of the bill of lading.

Demise and identity of carrier clauses

45 | Is the 'demise' clause or identity of carrier clause recognised and binding?

Under Dutch law the carrier under a bill of lading is generally considered to be the person who has signed the bill of lading or on whose behalf it was signed, as well as the person whose form has been used. If a bill of lading is signed by the master, or on behalf of the master, the shipowner or the charterer last in the chain of contracts shall be bound as carrier, in addition to the persons mentioned in the first sentence. Much will depend on the actual wording of such clause, but it can be said that the basis to assess the validity of a demise or identity of carrier clause is laid down in article 8:461, paragraph 3 of the Dutch Civil Code. This article provides that only the last bareboat charterer or the shipowner is deemed to be the carrier under the bill of lading, if the bill explicitly designates the bareboat charterer as such or, as the case may be, the shipowner, and in addition, in the case of designation of the bareboat charterer, if his or her identity is clearly apparent from the bill of lading. If a demise or identity of carrier clause is not sufficiently clear, this cannot be held against the holder of the bill of lading.

Shipowner liability and defences

46 | Are shipowners liable for cargo damage where they are not the contractual carrier and what defences can they raise against such liability? In particular, can they rely on the terms of the bill of lading even though they are not contractual carriers?

If the shipowner is sued extra-contractually by his or her co-contracting party with respect to damage that has occurred in the operation of the vessel, the shipowner shall be liable towards the latter no further than he or she would be pursuant to the contract they have entered into (article 8:362 of the Dutch Civil Code). Article 8:363 of the Dutch Civil

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Code states that if the shipowner is sued extra-contractually in respect of damage that has occurred in the operation of the vessel by another party to such a contract, the shipowner shall be liable towards the latter no further than he or she would be, as if he or she were a co-contracting party to the contract of operation that has been entered into by the party that sues him and that, in the chain of contracts of operation, lies between him and the latter. According to article 8:364, paragraph 1 of the Dutch Civil Code, the shipowner, sued extra-contractually in respect of the death or bodily injury to a person, or in respect of damage to goods by a person who is not a party to a contract of operation, shall be liable no further than he or she would be pursuant to the contract.

Deviation from route

47 | What is the effect of deviation from a vessel's route on contractual defences?

Notwithstanding any specific provisions contained in the contract of carriage or bill of lading on the basis of which the carrier may be entitled indeed to limit or exclude its responsibility in this regard, pursuant to article 8:379 of the Dutch Civil Code, the carrier is under the obligation to conduct the transportation without delay. In the case of a non-permissible delay, the compensation owed must be calculated by taking into account what value the goods would have had at the time and place they should have been delivered, and the time and place they have actually been delivered.

Liens

48 | What liens can be exercised?

Dutch law does not recognise a maritime lien as such. First one must determine any contractual rights of retention or liens and the extent thereof or limits or conditions thereto under the law applicable to such contract (of carriage), and then determine, under article 10:163 of the Dutch Civil Code, to what extent such rights fit into the Dutch legal system, and in particular the concept of the right of retention and the right to withhold the goods. Article 8:30, paragraph 1 of the Dutch Civil Code stipulates that the carrier is entitled to refuse to hand over the goods that he or she holds in connection with the contract of carriage, to any person who has a right to the delivery of those goods pursuant to a title other than the contract of carriage, unless the goods have been attached and the continuation of this attachment results in an obligation to hand over the goods to the attachor. In addition, article 8:30, paragraph 2 of the Dutch Civil Code stipulates that the carrier shall be entitled to exercise the right of retention on the goods that he or she holds in connection with the contract of carriage for what the recipient owes or will owe the carrier for the carriage of those goods. The carrier may also exercise this right for the charge due for those goods by way of cost on delivery.

Delivery without bill of lading

49 | What liability do carriers incur for delivery of cargo without production of the bill of lading and can they limit such liability?

Normally a carrier will be liable no further than he or she would be under the provisions of the contract of carriage or bill of lading. However, a carrier generally loses the right to rely on the contractual exclusions and limitations of liability in case of his or her gross negligence or wilful misconduct. Not necessarily, but should cargo be (intentionally) delivered without requesting the submittal of the original bill of lading involved, such act pertaining to gross negligence or wilful misconduct could give rise to unlimited liability of the carrier.

Shipper responsibilities and liabilities

50 | What are the responsibilities and liabilities of the shipper?

According to article 8:383, paragraph 3 of the Dutch Civil Code, in a contract of carriage under a bill of lading, the shipper shall not be liable for any loss or damage suffered by the carrier or the vessel and which result or arise from whatever cause, without there being an act, fault or omission on the part of the shipper, his or her agents or servants.

Pursuant to article 8:394 of the Dutch Civil Code, the shipper must promptly provide the carrier with all those indications regarding the goods, as well the handling thereof, that he or she is or ought to be able to provide, and of which he or she knows or ought to know are of importance to the carrier, unless he or she may assume that the carrier knows of these data. According to article 8:395 paragraph 1 of the Dutch Civil Code, the shipper must compensate the carrier for the loss the latter suffers because, for whatever reason, the documents and information that are required from the shipper for carriage, or for the fulfilment of customs and other formalities before the delivery of the goods, are not adequately available. Article 8:397, paragraph 1 of the Dutch Civil Code stipulates that the shipper must compensate the carrier for the loss the latter has suffered from equipment that the former has made available to the carrier or from goods that the carrier has received for carriage or from the handling thereof, except to the extent that this loss has been caused by a fact that a prudent shipper of the goods received for carriage has been unable to avoid and the consequences of which such a shipper has not been able to prevent.

Pursuant to article 8:398, paragraph 1 of the Dutch Civil Code, the carrier may at any time and at any place unload, destroy or otherwise render harmless goods received for carriage that a prudent carrier would not have wanted to receive for carriage, had he or she known that, after taking receipt thereof, they could constitute a risk. The same applies to goods received for carriage that the carrier knew to be dangerous, but only when they present an imminent risk. The carrier does not owe any damages in respect hereof and the shipper is liable for all costs and any damage that result for the carrier from the presentation for carriage, from the carriage or from the measures themselves.

Based on article 8:411 of the Dutch Civil Code, the shipper is deemed to warrant the carrier as to the accuracy, at the time of receipt, of the marks, number, quantity and weight that he or she has declared, and he or she shall indemnify the carrier for all losses, damage and costs resulting from inaccuracies in the declaration of these particulars. Article 8:423, paragraph 1 of the Dutch Civil Code stipulates that in a contract of carriage under a bill of lading, goods of an inflammable, explosive or dangerous nature that the carrier, captain or agent of the carrier would not have consented to be loaded had he or she known the nature or condition thereof, may be unloaded at any place, destroyed or rendered harmless at any time before unloading by the carrier and this without compensation, and the shipper of these goods shall be liable for all damage and costs that have directly or indirectly resulted or arisen from the loading thereof.

In addition to the general obligations to pay freight and other charges, or make a contribution in general average, only these last obligations for costs, etc, can be imputed to the third-party consignee as receiver of the cargo together with any other obligation that shows for the bill of lading document itself, which includes the obligation to take delivery against presentation of the bill of lading to the carrier and under full compliance with all conditions set thereto.

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SHIPPING EMISSIONS

Emission control areas

51 Is there an emission control area (ECA) in force in your domestic territorial waters?

Yes, two examples of ECAs in force in Dutch territorial waters are the North Sea Area and the adjacent Baltic Sea Area.

Sulphur cap

52 What is the cap on the sulphur content of fuel oil used in your domestic territorial waters? How do the authorities enforce the regulatory requirements relating to low-sulphur fuel? What sanctions are available for non-compliance?

Under the revised MARPOL 73/78 Annex VI, the global sulphur cap will be reduced to 0.5 per cent as from 1 January 20120 (from the current 3.5 per cent). Since 1 January 2015, the limits applicable in the ECAs for sulphur dioxide and particulate matter are 0.1 per cent.

In line with the international conventions, the Dutch authorities prescribe that the sulphur concentration of the fuel may not exceed 3.5 per cent (0.5 per cent as from 1 January 2020) and that the sulphur concentration of fuel for use in an ECA may not exceed 0.1 per cent. During inspections (port state and flag state control), samples of fuel may be taken to determine the sulphur content of the fuel in use. If the sample indicates a sulphur content exceeding 0.1 per cent, this is deemed a 'deficiency' and the vessel may be detained until fuel is on board with a sulphur percentage of less than 0.1 per cent.

According to Directive 2005/33/EC, ships at berth in all ports of the European Union shall not use marine fuels with a sulphur content exceeding 0.1 per cent m/m, beginning from 1 January 2010. Following the directive, ships at berth in Dutch ports are not allowed to use marine fuels with a sulphur content exceeding 0.1 per cent m/m. This fuel requirement only applies to ships at berth, meaning ships securely moored or anchored in port. The requirement does not apply to ships manoeuvring or on their way to enter or leave a port.

Following the EU directive, the Dutch Regulation on Prevention of Pollution from Ships has been amended to include the new provisions.

In short, the following rules apply for ships lying at berth in Dutch ports:

- when at berth, seagoing ships irrespective of flag (including non-EU ships) shall not use any marine fuel with a sulphur content exceeding 0.1 per cent m/m;
- in case fuel changeover is necessary this operation shall commence as soon as possible after berthing of the ship. The time of change-over shall be recorded on board the ship;
- if the required fuel is not on board, appropriate fuel shall be taken on by the ship immediately after berthing. The arrival of the ship shall be so planned and coordinated to ensure the immediate supply of the fuel;
- ships staying at a berth for less than two hours are exempted from above provisions; and
- the port state control authority is entitled to control on board the ship documents and the fuel delivery notes. Upon request of the port state control authority the ship's crew assist in taking a sample of the fuel actually used at berth.

The above rules do not apply to inland waterway vessels as referred to in article 2 of Directive 1999/32/EC, with a certificate that shows that they comply with the requirements of SOLAS, when the ships are at sea and to ships that shut down all engines and use land-based power supply while they are in a port at their berths.

If during an inspection performed by port state control, flag state control or special sulphur inspectors it is proven that the vessel was not in compliance with the sulphur directive the vessel may be detained, prosecuted or both. Non-compliance with the new provisions could result in a fine. The maximum penalty in the Netherlands at this time is €830,000.

SHIP RECYCLING

Regulation and facilities

53 What domestic or international ship recycling regulations apply in your jurisdiction? Are there any ship recycling facilities in your jurisdiction?

The Netherlands has several ship recycling facilities and is one of few EU countries with the capacity to recycle large ships. Nevertheless, only a small part of the available capacity is used. The Netherlands is often not a favourable location for ship recycling owing to high labour costs. In 2018, no specific ship recycling regulations apply other than the general waste disposal provisions from the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 and Regulation (EC) No. 1013/2006 on shipments of waste. As of 31 December 2018, Regulation (EU) No. 1257/2013 on ship recycling comes into force. This regulation is applicable to ships flying the flag of an EU country and to non-EU vessels calling at an EU port or anchorage. Ships of less than 500 GT do not fall under the new regulation. The Netherlands has signed the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009, and has accepted the Convention on 20 February 2019, though the Convention has not been ratified yet by the Dutch parliament and has not (yet) entered into force.

In a judgment of the Rotterdam District Court of 15 March 2018, Seatrade, a Dutch reefer shipping group, and two of its directors have been found guilty of violating Regulation (EU) No. 1013/2006 of 14 June 2006 on shipments of waste (EWSR). Seatrade has been imposed with fines ranging between €50,000 to €750,00. Furthermore, two of its executives have been banned from exercising the profession as director, commissioner, adviser or employee of a shipping company for one year. A third director has been acquitted. The prison sentence, previously sought by the prosecution, has been waived amid the company's lack of a previous criminal record that was accepted as a mitigating factor. Seatrade has appealed the judgment.

In 2012, Seatrade sold four reefer vessels for scrapping. The vessels sailed from the ports of Rotterdam and Hamburg to India, Bangladesh and Turkey, where they were beached and then scrapped. The Dutch public prosecutor charged the directors of Seatrade with violations of EWSR.

The Court examined the internal email exchanges, as well as exchanges between the accused and the shipbrokers prior to and during the last voyages of the ships, which established that it had been the intention from the very beginning to sell the vessels for scrap. The Court rejected the argument that an operational ship could not be regarded as waste and found that 'waste' is defined in the EU legislation as 'any substance or object which the holder discards or intends or is required to discard'. The Court further found that all the circumstances of the case must be taken into account when assessing whether the holder of an object actually intended to discard it (which, in this case, it did) and that the term 'discard' cannot be interpreted restrictively.

In the Court's view, at the time that the ships left the ports of Rotterdam and Hamburg, they were within the meaning of waste under the EWSR. The Court emphasised that the fact that three of the ships were still in commercial service and carried a cargo during part of the voyage to their final destination did not affect this conclusion.

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The judgment of the Rotterdam District Court potentially has wide-reaching implications for ship owners based in Europe and beyond who are considering scrapping their vessels. The judgment highlights the interaction between EWSR and the EU Regulation No. 1257/2013 on ship recycling (Recycling Regulation). The Recycling Regulation clarifies that transboundary movement for the purpose of recycling ships is regulated by the Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and their Disposal and the EWSR, except for ships falling under the scope of the Recycling Regulation as defined in article 2 of that Regulation.

In accordance with the Recycling Regulation, as of 31 December 2018 seagoing vessels flying the flag of an EU member state must be recycled at a recycling facility that meets the requirements set out in the Regulation. In December 2016, the EU adopted the list of approved ship recycling facilities, which was updated on 4 May 2018. As at September 2018, the list does not include any non-European yards. The EWSR will continue to apply to non-EU flagged vessels.

JURISDICTION AND DISPUTE RESOLUTION

Competent courts

54 | Which courts exercise jurisdiction over maritime disputes?

The Dutch judicial system can be divided into the general system and the administrative law system. For the past 200 years, the territory of the Netherlands was divided into 19 districts. As of 1 January 2013, the territory of the Netherlands is divided into 11 districts.

As a result of new legislation, which entered into force on 1 January 2017, the Rotterdam District Court has, within the boundaries of EU rules, exclusive jurisdiction in nearly all shipping cases within the Netherlands. The Maritime Chamber of the Rotterdam District Court deals with these maritime cases. However, the Rotterdam District Court has refused to accept jurisdiction in a case of an international choice of forum clause for the Amsterdam District Court and referred the matter to Amsterdam

Service of proceedings

55 | In brief, what rules govern service of court proceedings on a defendant located out of the jurisdiction?

If a defendant has no known domicile or residence in the Netherlands, but does have a known address abroad, a distinction must be made between a defendant who resides in:

- a state to which Council Regulation (EC) No. 1393/2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (the EU Service Regulation) applies;
- a state that is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965 (the Hague Service Convention) or the Hague Convention on Civil Procedure of 1954 (the 1954 Hague Convention); or
- another state.

While the EU Service Regulation contains mandatory and exclusive rules for service to be completed in EU member states, the Hague Service Convention and the 1954 Hague Convention contain rules that are additional to the service requirements for foreign defendants in the Dutch Code of Civil Procedure. Under the Dutch Code of Civil Procedure, service on defendants residing abroad is completed if a bailiff serves the writ at the office of the public prosecutor of the court that is competent to hear the case and at the same time mails a copy of the writ to the defendant's address outside the Netherlands.

Although neither the EU Service Regulation nor the Hague Service Convention prescribes a translation of the writ of summons, it is nevertheless advisable to provide one as, under the EU Service Regulation, a defendant may otherwise refuse to accept the writ and under the Hague Service Convention, the Central Authority has the power to require such a translation if it deems this necessary. For service under the 1954 Hague Convention, a translation is compulsory.

If the defendant has no known address in the Netherlands or abroad, the above-mentioned conventions and regulation do not apply and the writ must be served at the office of the public prosecutor. In addition, an abstract of the writ must be published in a Dutch national newspaper.

Arbitration

56 | Is there a domestic arbitral institution with a panel of maritime arbitrators specialising in maritime arbitration?

Since its establishment in 1988 by the major maritime law firms in the Netherlands, the Transport and Maritime Arbitration Rotterdam-Amsterdam (TAMARA) institute – which has recently been renamed and is now named Unum Transport Arbitration & Mediation – has offered a platform for conducting professional arbitration in the areas of shipping, shipbuilding, transport, storage, logistics and international trade. Unum Transport Arbitration & Mediation is organised in the form of a foundation with the major Dutch shipping firms as founding members. It has been offering arbitration services for years, but has now also incorporated a mediation service, for the maritime and trade industry. In 2018, more cases have been commenced at Unum than ever before.

Foreign judgments and arbitral awards

57 | What rules govern recognition and enforcement of foreign judgments and arbitral awards?

Although a distinction must be made between recognition and enforcement of a foreign judgment, recognition will generally lead to enforcement. In practice, foreign judgments will be recognised by a Dutch court if the following three conditions are met:

- the judgment is a result of proceedings compatible with Dutch concepts of due process;
- the judgment does not contravene public policy; and
- the non-domestic court must have found itself competent on grounds that are internationally accepted (for example, a forum chosen by the parties).

As regards enforcement, judgments delivered outside the Netherlands can only be directly enforced within the Netherlands on the basis of an enforcement treaty or EU instrument. The most important enforcement and recognition 'treaties' are the EU Service Regulation and the Lugano Convention. On the basis of these Community instruments, judgments delivered in the member states of the European Union and in Iceland, Norway and Switzerland are enforceable in the Netherlands once leave to do so has been obtained from the preliminary relief judge of the District Court. In addition to these treaties, the Netherlands has concluded bilateral treaties regarding enforcement with European countries as well as Suriname and the United States (the latter only as regards maintenance obligations).

Foreign judgments to which no treaty applies must, in principle, be enforced by commencing a new cause of action before the Dutch courts, but if the three above-mentioned criteria for recognition are met, no litigation on the merits will be required.

The Netherlands is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Arbitral awards made in countries that are a party to the New York Convention are enforceable in the Netherlands in accordance with the provisions of the New York Convention. Foreign arbitral awards made in countries that are not a party to the New York Convention can

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also be enforced in the Netherlands. Pursuant to article 1076 of the Dutch Code of Civil Procedure, the preliminary relief judge may only refuse to enforce an award on grounds that are exhaustively enumerated in the Arbitration Act.

Asymmetric agreements

58 | Are asymmetric jurisdiction and arbitration agreements valid and enforceable in your jurisdiction?

Generally speaking, asymmetric jurisdiction and arbitration agreements are valid and enforceable in the Netherlands. Although the Dutch Code of Civil Procedure and the EU Brussels I (recast) Regulation do not explicitly stipulate that such agreements are allowed, they are accepted on grounds of the principle of party autonomy. The Dutch Supreme Court has upheld an asymmetric jurisdiction and arbitration clause in a judgment of 21 March 1997, ECLI:NL:HR:1997:AG7212 (*Meijer/OTM*). On the other hand, lower courts have occasionally dismissed such clauses. This is considered possible in Dutch legal literature if the asymmetric jurisdiction and arbitration agreement is contrary to the principles of reasonableness and fairness.

Breach of jurisdiction clause

59 | What remedies are available if the claimants, in breach of a jurisdiction clause, issue proceedings elsewhere?

In the Netherlands, no remedies are available should the claimants commence proceedings elsewhere, in breach of a contractual jurisdiction clause stipulating that the Dutch courts or arbitral tribunals have exclusive jurisdiction. The defendants should file a motion to dismiss the proceedings for lack of jurisdiction in these proceedings abroad.

60 | What remedies are there for the defendant to stop domestic proceedings that breach a clause providing for a foreign court or arbitral tribunal to have jurisdiction?

If a court does not have international, absolute or relative jurisdiction over a dispute, a defendant may file a motion to dismiss for lack of jurisdiction, either prior to or in his or her statement of defence (articles 11, 110 and 1022 of the Dutch Code of Civil Procedure). Such a formal defence should first be dealt with by the Dutch court, before the case can continue on the merits.

LIMITATION PERIODS FOR LIABILITY

Time limits

61 | What time limits apply to claims? Is it possible to extend the time limit by agreement?

The time limits applying to claims are:

- for breach of contract: five years;
- for liability for an unlawful act: five years;
- for collision damage: two years;
- for cargo claims: one year; and
- for claims based on a forwarding contract: nine months.

It should be noted that claims for breach of contract and for liability for an unlawful act are also subject to a time limit of 20 years, which period starts running the day after the event giving rise to the damages. The shorter prescription period of five years starts running the day after the party suffering loss or damage became aware, not only of the loss or damage, but also of the identity of the person liable. It is possible to extend the time limit by agreement. However, such agreement should be concluded after the event giving rise to the claim.

Court-ordered extension

62 | May courts or arbitral tribunals extend the time limits?

Courts shall only apply a time limit if it is being relied upon by the defendant. In the event of a cargo claim where the defendant becomes in default, the court will verify whether the plaintiff has claimed that the 12-month time limit has been extended by mutual agreement or has been suspended by writing a notice to the defendant before the time ran out, reminding the defendant that he or she should still be prepared to answer a claim by the plaintiff.

MISCELLANEOUS

Maritime Labour Convention

63 | How does the Maritime Labour Convention apply in your jurisdiction and to vessels flying the flag of your jurisdiction?

The Netherlands ratified the Maritime Labour Convention (MLC) on 13 December 2011. The MLC entered into force on 20 August 2013 and has been designed to improve the labour conditions of seafarers worldwide. The most important effect on Dutch legislation was the modernisation and modification of legislation governing maritime shipping and employment in the Netherlands (including the Dutch Commercial Code, the Ships' Manning Act, book 7 of the Dutch Civil Code and the Occupational Safety and Health Act). The MLC is primarily a confirmation of existing maritime standards, with several new components. These include the certification of living and working conditions of seafarers on board, the Maritime Labour Certificate. This certificate is proof that a shipowner and his or her ship meet the requirements of the MLC. The Human Environment and Transport Inspectorate has mandated the issuing of these certificates in the Netherlands to accredited classification societies.

Relief from contractual obligations

64 | Is it possible to seek relief from the strict enforcement of the legal rights and liabilities of the parties to a shipping contract where economic conditions have made contractual obligations more onerous to perform?

As the parties to a shipping contract have the freedom of contract, the rights and liabilities provided for in that contract are in principle upheld, meaning that if the contractual provisions do not offer relief from the strict enforcement thereof, in principle no relief is possible. That said, article 6:248 of the Dutch Civil Code provides that the consequences of a contract between parties can be set aside if these consequences, in light of the circumstances of the case and the principle of reasonableness and fairness, would be deemed unacceptable. This abridging effect reasonableness and fairness must, however, be limitedly applied by the courts.

In addition, Dutch law contains a specific provision (article 6:258 of the Dutch Civil Code) for unforeseen circumstances that cause hardship in a given situation. The provision provides that the court may, at the request of one of the parties, amend the consequences of the contract, or even partly or wholly rescind the contract on the basis of unforeseen circumstances of such nature that the contractual counterparty may not reasonably expect the continuous and unaltered existence of the contract. The test is not whether the circumstances were foreseeable at the time the contract came into existence, but rather on which presumptions the parties based the contract. Again, this possibility must be limitedly applied.

Finally, article 6:94 of the Dutch Civil Code provides the possibility for the court to reduce contractual penalties, should the principle of fairness require such reduction.

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Other noteworthy points

65 Are there any other noteworthy points relating to shipping in your jurisdiction not covered by any of the above?

Jurisdiction clauses are recognised by the Dutch courts if they comply with article 25 of the recast EU Brussels I Regulations 1215/2012. Bill of lading holders, in principle, are bound by jurisdiction clauses referring to jurisdictions under the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (ie, EU member states, Iceland, Norway and Switzerland).

In the case of a jurisdiction clause for a court outside this jurisdiction, the Netherlands has a particular rule on jurisdiction in maritime matters. Article 629 of the Dutch Code of Civil Procedure states that in the case of a contract of carriage of goods by sea to the Netherlands between a carrier and a consignee that was not the shipper, the court at the final place of destination will be the competent court. This rule cannot be set aside contractually, unless the contract of carriage contains a jurisdiction clause which declares competent the court of a named place in the country where either the carrier or the receiver of the goods has its place of business or the contract contains a valid arbitration clause.

UPDATE & TRENDS

Emerging trends

66 Are there any emerging trends or hot topics that may affect shipping law and regulation in your jurisdiction in the foreseeable future?

On 19 March 2019, the Dutch Senate (upper house) approved a bill that will permit armed security guards aboard merchant vessels sailing under the Dutch flag. The shipping sector had been demanding the anti-piracy measure for more than 10 years. Dutch merchant ships will join those from other seafaring nations in carrying private armed security guards in waters where pirates abound, such as off the coast of the East African state of Somalia. Merchant marine vessels will also continue to be able to obtain assistance from Dutch naval ships stationed in the area.

The Netherlands and Russia have reached a settlement in the *Arctic Sunrise* case, in which Russian officials boarded a Greenpeace protest ship in international waters and arrested the crew in 2013. As part of the deal Greenpeace will get €2.7 million from Russia to pay for damage to the ship, additional costs and compensation for the 30-strong crew. The Arctic Sunrise, which sailed under the Dutch flag, was seized in September 2013 and its crew arrested on piracy charges following a protest at a Russian drilling rig in Arctic waters. The crew were released in December that year after Russia agreed to an amnesty. The ship was kept in Russia for 11 months.

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