Netherlands

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Newbuilding contracts

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 of 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. From the keel laying of the vessel, a vessel under construction qualifies to be registered in the Dutch Ship Register as a vessel under construction in the name of the owner or the shipbuilder, as the case may be. 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.

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

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 SWIFT. 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 memorandum of association does 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.

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, 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 (article 6:52 of the Dutch Civil Code and article 3:290 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.

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. L 210) 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 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 6:185–193 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

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 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).

'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 10m³ 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 recently 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:

(i) 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, 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 European Economic Area, 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
(ii) 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:

(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 principle 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.

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 Netherlands Shipping Inspectorate (an agency of the Ministry of Infrastructure and the Environment):

- power of attorney, if the owner does not apply for the registration itself;
- 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 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 class certificate; and
- copy of a certificate which 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).

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 the Environment 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:
  (a) individuals who have the nationality of a member state of the EU, European Economic Area (EEA) or Switzerland or who are equated with EU citizens;
  (b) companies that are incorporated in accordance with the law of an EU or EEA member state or Switzerland; or
  (c) individuals, companies or legal entities, other than those mentioned under (a) who can invoke the freedom of establishment rules by virtue of an agreement between the EU 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.

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 Registry 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 thus: 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

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 (London Convention) with the following reservations:

- exclusion of articles 2(i)(d) and (e), which apply to the London Convention 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 60,000 units of account multiplied by the number of passengers the vessel is authorised to carry – but in no case will it be less than 720,000 units of account. Maximum limits of liability are also stated as 3 million units of account for a vessel with a maximum capacity of 100 passengers, 6 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 SDR. The 1996 Protocol, which entered into force on 13 May 2004, has been accepted.

The London Convention shall apply in cases described in article 15 of the London Convention. 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.

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 the CLNI 2012. To date Belgium, France, Germany, Luxembourg and Serbia have also signed the CLNI 2012. The CLNI 2012 will, in time, replace the current CLNI, but has not yet entered into force. 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.

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 district court of competent jurisdiction requesting limitation of liability. This petition 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 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 London Convention (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:
  - 2,001–30,000 tons, 800 SDR;
  - 30,001–70,000 tons, 600 SDR; and
  - 70,000 tons upwards, 400 SDR.

In respect of all other claims:

- 1 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 million SDR will be increased as follows:
  - 2,001–30,000 tons, 400 SDR;
  - 30,001–70,000 tons, 300 SDR; and
  - 70,000 tons upwards, 200 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.

12 In what circumstances can the limit be broken?

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*).

13 What limitation regime applies in your jurisdiction in respect of passenger and luggage claims? Is it the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea or some other limitation regime?

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 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 lowest. For other risks and categories of damage, the regular limits of the Athens Convention 2002 apply. The abovementioned 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 London Convention offers possibilities to limit the liability for a particular incident.

Port state control

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 State Control (the Paris MoU). One of the agencies of the Ministry of Infrastructure and the Environment, the Netherlands Shipping Inspectorate, 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 ISPS 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 last 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.

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*.

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 Netherlands Shipping Inspectorate. 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 Netherlands Shipping Inspectorate, 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

17 Which are the approved classification societies?

The Dutch Ministry of Infrastructure and the Environment has authorised a number of classification societies (recognised organisations) to act on behalf of the Netherlands Shipping 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 Solas, 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 seven authorised organisations are:

- the 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, Rotterdam;
- Nippon Kaiji Kyokai represented by Nippon Kaiji Kyokai, Rotterdam; and
- Registro Italiano Navale represented by Registro Italiano Navale, Rotterdam.

Register Holland, a foundation with its office in Enkhuizen, the Netherlands, is a national classification society recognised by the Netherlands Shipping 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 Netherlands Shipping 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 motorvessels with a power greater than or equal to 750 kW 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);
- 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);
- Nederlands Keuringsinstituut voor Pleziervaartuigen (Leeuwarden); and
- Stichting Register Holland (Enkhuizen).

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 the ECHR and European 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 which 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 worthwhile 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 a 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

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.

20 Which international conventions or protocols are in force in relation to collision, 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 will enter into force on 14 April 2015, since ten states have ratified the convention. The Dutch government indicated that it will seek ratification by Parliament in 2014.

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 OSPAR Convention, 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
- the International Convention for the Prevention of Pollution from Ships (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.

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

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.

23 In respect of what claims can a vessel be arrested? In what circumstances may associated ships be arrested?

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 has 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 which 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 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.

24 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.

25 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. Consequently, the vessel cannot be arrested for a claim for bunker supplies against the charterer, since it is no claim against the owner and the vessel is no asset of the charterer.

26 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).

27 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?

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 the court has granted permission to make the arrest or attachments in the arrest order (the principal amount claimed by the arresting party + 10 – 30 per cent relating to interest and costs). 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).

28 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.

29 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.

30 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 (for example: 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.

31 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 is questionable whether under Dutch law attachment to preserve evidence is allowed except for evidence in intellectual property law cases. Dutch case law and literature are still not consistent with regard to whether the Dutch Code of Civil Procedure provides for a sufficient legal basis to grant leave for attachment of assets in order to preserve evidence in non-intellectual property law-cases. Recently, the Court of Amsterdam raised a prejudicial question to this end to the Dutch Supreme Court, and it is expected the answer will bring more clarity.

32 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 (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).

Judicial sale of vessels

33 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 money judgment from a court in the Netherlands;
- a notarial deed from a notary public holding offices in the Netherlands (including the Dutch Antilles);
- a money 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 (New York Convention 1958); and
- a 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).

34 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?

In order 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 to offer 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 to €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.

35 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).

36 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.

37 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 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.

38 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

39 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 UNCITRAL 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 24 countries and ratified by three countries; by Spain on 19 January 2011, by Togo on 17 July 2012 and by the Republic of the Congo on 28 January 2014. The Netherlands has signed the Rotterdam Rules.

40 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 '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 Nation Convention on International Multimodal Transport of Goods (Geneva, 1980) has explicitly been rejected by the Dutch administration. 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.

41 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.

42 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.

43 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.

44 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 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 which 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.

45 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.

46 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.

47 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.

48 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.

Shipping emissions

49 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.

50 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?

Until 2010, annex VI to MARPOL 73/78 limited the sulphur content of marine fuel oil to 1.5 per cent m/m and applied in designated SOx Emission Control Areas (SECA). A new provision for the further reduction of sulphur content of marine fuels specifies a maximum sulphur content of 1 per cent by 2010 and 0.1 per cent by 2015. In line with the International

Conventions, the Dutch Authorities prescribe that the sulphur concentration of the fuel may not exceed 3.5 per cent and that the sulphur concentration of fuel for use in an ECA may not exceed 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 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 1 per cent.

According to Directive 2005/33/EC of the European Parliament and the council, ships at berth in all ports of the European Community 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 securely moored or anchored in a port. The requirement does not apply to ships manoeuvring or on their way to enter or leave the port.

Following the European 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 which shows that they comply with the requirements from the SOLAS convention, when the ships are at sea and to ships which shut down all engines and use land-based power supply while they are in a port at their berths.

Non-compliance with the new provisions might result in a fine against the shipmaster.

Jurisdiction and dispute resolution

51 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. The 19 district courts are the general courts of first instance, whereas there are 62 sub-district courts dealing with petty offences and cases with a monetary value not exceeding €25,000, agency disputes, leasehold cases and employment matters. On 12 July 2012, the Dutch government adopted the Act for the Revision of the Judicial Map. Pursuant to this Act, as of 1 January 2013 the territory of the Netherlands is divided into 11 districts.

There are no specialised district courts exercising jurisdiction over maritime disputes, but on a more informal basis the Rotterdam District Court and the Court of Appeal at The Hague each have a specialised chamber dealing with maritime and insurance cases.

52 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 the EC Council Regulation on the Service in the Member States of Judicial and Extrajudicial documents in Civil or Commercial Matters (the EC 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 EC 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 EC 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 EC 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.

53 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 TAMARA Institute (Transport and Maritime Arbitration Rotterdam-Amsterdam) has offered a platform for conducting professional arbitration in the areas of shipping, shipbuilding, transport, storage, logistics and international trade. The TAMARA Institute is organised in the form of a foundation with the major Dutch shipping firms as founding members.

54 What rules govern recognition and enforcement of foreign judgments and 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 EC instrument. The most important enforcement and recognition 'treaties' are the EC Regulation and the Lugano Convention. On the basis of these Community instruments, judgments delivered in the member states of the European Union and in Norway, Switzerland and Iceland 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 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 which are exhaustively enumerated in the Arbitration Act.

55 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.

56 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

57 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.

58 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

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

The Netherlands has 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 Netherlands Shipping Inspectorate has mandated the issuing of these certificates in the Netherlands to accredited classification societies.

60 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. Having said that, 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 which 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 basis of unforeseen circumstances of such nature that the contractual counter party 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 which presumptions the parties based the contract on. 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.

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

No.

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