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Adoption of the CLNI 2012 – What has changed compared with CLNI 1988?

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Introduction

The Strasbourg Convention on the limitation of liability in inland navigation (CLNI 1988) was signed in Strasbourg on 4 November 1988 by the six States of the Rhine/Moselle basin (Switzerland, France, Germany, Luxembourg, Belgium, the Netherlands) and entered into force on 1 September 1997. Four States are party to the Convention – Luxembourg (since 5 July 1993), the Netherlands (since 16 April 1997), Switzerland (since 21 May 1997) and Germany (since 9 March 1999).

Purpose of the Convention

The Convention is modelled on the Convention on Limitation of Liability for Maritime Claims (LLMC)[1]; it enables vessel owners and their salvors[2] (referred to subsequently as »owners«) to limit their liability by constituting a fund containing an amount determined in accordance with the provisions of the CLNI. The amount deposited in the fund corresponds to the ceiling of the compensation that may be claimed from the owner for all the prejudice suffered in the event of a navigational incident occurring, on condition that the damage at issue was not caused by personal fault on the part of the owner. The amount deposited in the fund is high, and only limits the amount of compensation payable by the owner in the event of large-scale damage. The limits are certainly meant to constitute a protection for the owner; yet they also protect the victims by providing a better guarantee of adequate, effective and expeditious compensation. By making the extent of the liability more predictable, they help the insurance companies to offer products that are tailored to suit the risks of inland navigation without such cover constituting an excessive burden for inland navigation companies[3]. The companies are then more inclined to take out insurance in keeping with the risks they face, thereby substantially reducing the number of cases of navigational accidents bereft of effective compensation because of the insolvency of the company or the inadequacy of its insurance cover. Ultimately, and if they are established correctly, these limits should almost never come into play (as the amount of damage caused should hardly ever exceed the limits laid down in the text)[4], but ought

* The views expressed in this article are those of the author and do not necessarily reflect those of the CCNR.

1 Convention signed on 19 November 1976 and amended by an Additional Protocol in 1996. The concept of a global limit on liability is a tradition in maritime law that is not found elsewhere.

2 A vessel owner is defined in the CLNI 1988 as »the owner, hirer or charterer, manager and operator of a vessel as well as the manager and operator of a vessel« (Article 1.2 [a]). This definition was amended in the CLNI 2012, to streamline the various language versions and more clearly indicate that the person responsible for the commercial use of the vessel (usually defined as the operator in inland navigation), including the bareboat charterer, is covered under the definition. Hence the vessel owner is defined in the CLNI 2012, as the »owner, hirer or charterer entrusted with the use of the vessel, as well as the operator of a vessel«. The definition of the salvor has remained unchanged in the CLNI 2012 and reads as follows: »any person rendering services in direct connection with salvage or assistance operations« (Article 1.2[c]). Given the broad definition, several persons can often qualify as the owner and constitute a fund in this capacity. This can lead to procedural difficulties, each ›owner‹ waiting for the other to take the initiative.

3 Insurers are in favour of these limits being laid down; this would make their work easier by making evaluation of the risk more predictable.

4 If the amount is considered insufficient, a claimant could always allege personal fault on the part of the owner, which would then exclude limitation of liability if recognised. However, personal fault, if proven, would also exclude insurance coverage. The owner would have to compensate the damages out of his/her own assets, which are necessarily limited in fact. The end result may not be to the advantage of the claimant.

to increase the protection afforded to both owners and the victims of damage.

Contrary to most international conventions on civil liability, the CLNI harmonises only the overall amount of compensation that may be claimed from a vessel's owner. It does not harmonise either the scheme of liability (in the case of fault, absence of fault, or presumed fault), or the possibility of making insurance compulsory, or the possibility of claiming directly from the insurer, which all remain governed by the national law of each State.

Thus the level of harmonisation achieved by the CLNI remains modest, but it appears to be well suited to the current needs of inland navigation. Inland navigation on an international scale constitutes a more or less significant sector of the economy in just 18 European States[5], located around four main waterway systems: the north European network, comprising the Rhine and its tributaries, the Danube, the east-west corridor linking Germany, Poland and the Czech Republic, mainly via the Elbe and the Oder, as far as the port of Hamburg, and the north-south corridor linking the Netherlands to France via Belgium. For many decades, the Rhine and its tributaries were the only waterways with intense international traffic, justifying their specific, unified legal regime. The situation has recently changed, by virtue of two main factors. First, the four basins are now geographically better connected, through the Rhine-Main canal between the Rhine and the Danube in the first place, and soon possibly through the construction of a large canal linking the Seine in France to the Belgian and the Dutch network. Second, most European States where there is inland navigation are now members of the European Union and hence bound by the same rules of freedom of movement. As a result, any European company may decide to operate in a regional market located in another EU Member State: Romanian vessels may carry out transport operations on the Rhine, while Dutch vessels are entitled to navigate on the Danube. Thus, some river companies are already present on most of the international waterways (particularly river cruise operators). These evolutions have significantly changed the features of European inland water transport (IWT): the Rhine, from being a rather self-contained market, is now the backbone of an integrated European inland water network. The need for Europe-wide harmonised rules, including on liability, has consequently grown higher. Now, the level of harmonisation to be reached should be tailored to the actual economic needs in order to be accepted by the states concerned. In this regard, it is important to note that IWT will continue to mainly operate along regional corridors linking a maritime port to its hinterland, even if inter-basin traffic is now facilitated, and that the 18 states concerned presently remain relatively varied in terms of economic development and legal traditions, so that harmonisation would inevitably require significant changes of the national law in some of the states concerned.

In view of these characteristics, overall limits on liability seem to represent a good level of progress towards harmonisation, via which it is hoped that compensation will be made more effective and the gap between both legal and commercial practices in inland navigation companies in Europe lessened. The day may perhaps come when this stage could – and should – be exceeded, and the limits laid down by the CLNI, having had their virtuous effect, may be replaced by more comprehensive harmonised mechanisms, but inland navigation in Europe has not reached that stage yet.

Adoption of CLNI 2012

In 2007, the States signatory to the CLNI decided to embark on the process of revising the Convention, with the two-fold purpose of opening up access to any interested State and updating the amounts of the limitations on liability agreed more than twenty years ago.

Negotiations resulted in the conclusion of the Strasbourg Convention of 2012 (»CLNI 2012«) on 27 September 2012, at the end of a three-day diplomatic conference chaired by *Dr Beate Czerwenka* (Germany). Thirteen States took part in the conference: the Czech Republic and Hungary (as observers), Poland, Bulgaria, Slovakia, Serbia, Austria, and all the Rhine and Moselle States. A number of international non-governmental organisations representing the interests of inland navigation from the point of view of the social partners (ETF, EBU), the insurance companies (IVR), and trade (UECC) also took part. Eleven States signed the Final Document at the end of the diplomatic conference.

Three States (France, Belgium and Luxembourg) signed the Convention immediately at the end of the diplomatic conference, and two other States have signed it since (the Netherlands[6] and the Republic of Serbia[7]). CLNI 2012 remains open for signature by any State until 26 September 2014[8].

Article 17 of CLNI 2012 provides that it will enter into force »on the first day of the month following the expiry of a period of one year as from the date on which four States have deposited their instruments of ratification, acceptance, approval or accession, or on the date on which the 1988 Strasbourg Convention [...] ceases to be in force, whichever date is the later«. The government delegates included this provision in order to organise the migration from the first CLNI convention to the second. They wanted to avoid any coexistence of the two Conventions and ensure that there would not be any interim period during which neither convention would apply. For this reason, Article 17 links the entry into force of CLNI 2012 to the termination of CLNI 1988.

At the same time, the four States currently party to the CLNI adopted a declaration conjointly with the Final Document, according to which the Strasbourg Convention on the limitation of liability in inland navigation of 4 November 1988 (CLNI 1988) would cease to be in force on the date on which the denunciation of the Convention by three of the aforementioned States took effect.

Thus CLNI 2012 will enter into force as soon as at least three of the four States currently party to CLNI 1988 have denounced it, which will most probably occur when they ratify the new version, and at least four States have ratified CLNI 2012. In fact, it is hoped that the States currently party to CLNI 1988 (or at least three of them) will be among the first to ratify CLNI 2012 so that its entry into force will not be blocked.

There is every hope that this will be achieved, since two of the four States party to CLNI 1988 have already signed the new convention and embarked on the procedure for ratifica-

5 The Rhine/Moselle States (Netherlands, Germany, Belgium, France, Switzerland, Luxembourg), the Danube States (Germany, Austria, Slovakia, Hungary, Croatia, Serbia, Romania, Bulgaria, Ukraine, Russia, Moldavia), plus the Czech Republic (on the Elbe) and Poland (mainly on the Oder and the Vistula).

6 29 November 2012.

7 18 January 2013.

8 Article 16.1.

tion, and Germany, who instigated the entire process of revising CLNI, should sign it shortly.

I Greater harmonisation by extending the scope of application of the convention

CLNI 2012 offers a higher level of harmonisation than CLNI 1988, in terms of both its geographical scope of application and the amounts of liability, which have been significantly increased.

A. Wider geographical scope of application

CLNI 1988 applies essentially to the Rhine and the Moselle[9]. The four Party States have deliberately extended its scope of application to their waterways of significance for inland navigation[10]; as a result, it also applies to all inland waterways in Germany and the Netherlands, on the Swiss section of the Rhine between Basle and Rheinfelden, and on the navigable sections of the Sûre in the Grand Duchy of Luxembourg. In fact, the entire north European network except Belgium is currently covered by CLNI 1988. Belgium for its part decided to extend the scope of application of the LLMC to its inland waterways, adapting the amounts to inland navigation. Thus it also applies a system of overall limitation of liability, but with amounts that are not the same as those applied over the rest of the north European network.

On the other hand, it is difficult for States that do not border the Rhine or the Moselle to accede to CLNI 1988. They may only do so if they have a direct navigable link with the Rhine or the Moselle (which excludes all the Danube States), and only by invitation from the Party States, which must approve the accession unanimously[11].

CLNI 2012, for its part, adopts from the outset a very open scope for application in geographical terms. Any State (including a non-European State) may become party to it. Indeed its arrangements provide that it is to apply not to a specific waterway but to all the national waterways of the Party States, although the latter retain the possibility of issuing a reservation excluding certain minor waterways of no significance for navigation. This possibility is strictly limited, however, since the major navigable waterways of international importance, as listed in Annex I to the European Agreement on Main Inland Waterways of International Importance (AGN), may not be excluded.

Whereas CLNI 1988 provided for limited geographical scope, open to limited extension, CLNI 2012 has adopted the opposite principle, providing for very broad geographical scope with possible but limited restrictions. The target is of course that the limits laid down by CLNI 2012 should apply to the entire network of European waterways of international importance: waterways such as the Rhône, the Seine, the Oder, the Elbe, most of the German, Belgian and Dutch navigable network, the Dnieper, and the Volga should fall within the scope of application of the CLNI if the territorial States concerned are bound by the Convention.

B. Upgraded and more harmonised limits

Upgrading the amounts of limitation, more particularly with a view to taking account of inflation and price increases in maritime circles, was one of the main features of the negotiations. It could also cause the failure of CLNI 2012 as, while it is in the interests of all concerned to lay down common limits, difficulties arise as soon as the amounts of these limits need to be discussed. The navigation companies and their insurers would like to keep the limits as low as possible, whereas the States are anxious to ensure full compensation for victims[12], and this would not necessarily be assessed in the same way in, say, Germany and Bulgaria. The interests of the stakeholders therefore diverge, as do the levels of compensation usually awarded in the various States.

The effect on the sector of the increase in these amounts also depends on the scope of their application. If as a result of reservations the agreed amounts are not actually applied everywhere, the predictability the insurance companies need to be able to assess the risk suffers. From this point of view, CLNI 2012 constitutes progress compared with CLNI 1988. The possible divergences between States are rather less numerous under CLNI 2012 than they were under CLNI 1988, as there is less scope for applying reservations. This in turn should make the increase of the limits more acceptable for the insurance market.

After recalling the outlines of the material scope of application of the CLNI, we shall look first at the evolution CLNI 2012 represents compared with CLNI 1988 in terms of amounts of liability and reservations, and then the change in the simplified procedure for revising the amounts.

1) Material scope of application of CLNI 2012

As its title indicates, the overall limit of liability should theoretically constitute the upper limit for the total compensation payable by the owner in respect of all the damage caused by any one navigational incident.

A certain number of claims are nevertheless excluded from the principle of the limitation of liability laid down in the CLNI. These include claims resulting from assistance and salvage (Article 3[a]) or nuclear damage (Article 3[b] and [c]), and claims made by the owner's agents[13] (Article 3[d]). These exclusions are to be found in both CLNI 1988 and CLNI 2012.

CLNI 2012 also limits more clearly the scope of application of the Convention to vessels used for commercial purposes (Article 3[e]); this is new compared with CLNI 1988, which theoretically covered pleasure craft but allowed the Party States to exclude them by means of a reservation. In practice, three of the four States party to CLNI 1988 have issued such a reservation[14]; as a result, CLNI 1988 has not achieved any harmonisation in this area. Under CLNI 2012, this matter is now settled exclusively by the national law of each State: each State is free to decide whether or not to make provision for limited liability in favour of the owners of pleasure craft.

9 CLNI 1988 was designed as a closed instrument, accessible only to States party to the Revised Convention relating to the Navigation of the Rhine of 17 October 1868 and the Grand Duchy of Luxembourg (CLNI 1988, Article 15.1 [a]).

10 By a declaration made by virtue of Article 15.2.

11 CLNI, Article 16.3.

12 National courts are in fact more likely to find circumstances excluding limitation of liability if the limits laid down under the law are found unfairly low for the victims.

13 In the event of an accident in the workplace, for example.

14 Germany, Switzerland and the Grand Duchy of Luxembourg.

The Party States also have the possibility of issuing reservations aimed at excluding certain claims from the scope of the Convention. A full list of these reservations is given; they may be issued by any Party State at the time of signature or at the time of depositing the instrument of ratification, approval or accession, or at any subsequent time[15].

CLNI 2012 hence enables the Party States to exclude from the Convention's scope of application small craft used exclusively for domestic transport, for an eight-year transitional period[16]. »Small craft« are defined in accordance with the Police Regulations for the Navigation of the Rhine[17]; they are vessels less than 20 metres in length that are neither small ferries, nor pushed barges, nor vessels that may be coupled, nor vessels capable of carrying more than twelve passengers. In practice, this exclusion is directed mainly at the »taxi boats« that operate in a number of cities on the Danube. Some of the companies concerned do not yet have the benefit of appropriate insurance cover. The purpose of the transitional period provided for in CLNI 2012 is to allow insurers and owners enough time to adapt to the new legal framework.

The other reservations permitted by the Convention include the possibility of excluding claims in connection with operations to raise or dispose of sunken vessels (Article 18 1) c)). A number of Party States have therefore made provision for the constitution of an additional fund for compensation for this type of damage. Germany is one such State; it provides for the constitution of a specific fund containing twice the amount of the general limits provided for in CLNI 1988[18]. This practice will no doubt continue under CLNI 2012, and will probably even extend to other Party States.

The States may also issue a reservation excluding application of the Convention to lighters used exclusively for transhipments in ports[19].

These last two types of claims are mostly dealt with by the State. Through these reservations, claims in respect of the cost incurred by the State, i.e. paid for ultimately by the taxpayer, may have the benefit of more advantageous conditions for compensation than other claims. In the same line of thought, mention may also be made of Article 6.2, which allows States to stipulate in their national legislation that the compensation of claims in respect of damage caused to infrastructures[20] is to take priority over other claims. Here again, the provision gives the State an advantage over other claimants.

2) *The three funds provided for by virtue of CLNI 2012*

The mechanism of the overall limitation of the owner's liability should theoretically take the form of the constitution of a single fund containing an amount sufficient to cover all the damage involved, whatever its nature. This situation has evolved with the passage of time, and CLNI 1988 refers to two funds, whereas CLNI 2012 henceforth refers to three, according to the nature of the prejudice at issue.

1. The first fund is the »general« fund. The amount to be deposited is calculated according to the vessel's tonnage and power (Article 6 [1]). CLNI 2012 has doubled the limits laid down for this fund compared with those in CLNI 1988; they may not be less than SDR 400000[21] for claims resulting from death or physical injury and SDR 200000 for claims related to all other damages[22].

2. The second fund covers claims resulting from death or physical injury caused to the vessel's passengers (contractual liability): the amount to be deposited in this fund is calculated on the basis of the vessel's transport capacity (Article 8). CLNI 2012 increases this amount from SDR 60000 to SDR 100000 multiplied by the number of passengers the vessel is authorised to carry or, if this number is not prescribed, the number of passengers actually being carried at the time of the incident. This amount may not at any event be less than SDR 2 million. CLNI 2012 also removes the ceilings for compensation provided for in CLNI 1988 for large-capacity passenger vessels. Apart from the agreed increase, CLNI 2012 thus achieves a higher degree of harmonisation than CLNI 1988 since it no longer prescribes the possibility of issuing a reservation in respect of this provision. The limits prescribed in Article 8 are to apply uniformly in all the States party to CLNI 2012.

3. Lastly, CLNI 2012 creates a third fund, solely for compensating damage arising from the carriage of dangerous goods (Article 7). The limit on this fund is twice the amount of the general limits, with a minimum amount of SDR 10 million, for claims for death and personal injury as well as for other claims. This arrangement differs from that of CLNI 1988, where damage caused by the transport of dangerous goods was treated like any other damage and the States had the possibility of issuing a reservation if they wanted to lay down higher limits or exclude the possibility of limiting liability altogether for this type of damage. In practice, two Party States (Germany and the Netherlands) issued such a reservation[23], in order to double (Netherlands)[24] or triple (Germany)[25] the limits laid down in the CLNI. It is on the basis of this practice that the States decided to change the provisions of the CLNI in this area. The Party States nevertheless retain the right to issue a reservation in respect of this provision if they wish to lay down higher limits or exclude the possibility of limiting liability altogether for this type of damage. CLNI 2012 thus constitutes progress in terms of harmonisation in this field, compared with CLNI 1988, by laying down a common minimum amount. The progress remains modest, however, as the Party States have full powers to go beyond this amount.

The Contracting States also retain the possibility of excluding from the scope of application of the Convention claims in respect of damage caused by changes in the physical, chemical or biological quality of the water[26], which may also be caused by pollution arising from the carriage of dangerous

15 Article 18.1.
16 Article 15.3.
17 Article 1.01 (m) of the Police Regulations for the Navigation of the Rhine.
18 Legislation on relations governed by private law in inland waterways transport (BinSchG), § 5j.
19 Article 18.1 (d).
20 Structural work in ports and pools and on navigable waterways, sluices, dams, bridges and navigational aids.
21 The Special Drawing Right (SDR) is a unit of account defined by the International Monetary Fund; its day-to-day value in euros may be found on the IMF's Internet site at http://www.imf.org.
22 If the first fund is not sufficient to meet claims in respect of the death and bodily injury to third parties, the CLNI allows for the possibility of half the amount in the second fund to be taken (Art. 6 [1] c)).
23 By virtue of Article 18.1 (c) of CLNI 1988.
24 Article 1[1] b) of the Decision of 29 November 1996 regarding the implementation of Article 8:1065 of the Dutch Civil Code (Burgerlijk Wetboek, published in »Staatsblad 587«).
25 Binnenschifffahrtsgesetz vom 15. Juni 1895, § 5h.
26 Article 18.1 (a).

goods. There is obviously no way of knowing whether the Party States will make use of this possibility for CLNI 2012; it may nevertheless be noted that all the States party to CLNI 1988 have taken up the possibility of making such a reservation.

In practice, a number of funds may be constituted in connection with any one incident[27]. If, for example, a navigational incident concerning a passenger vessel causes material damage to both infrastructures and another vessel and death or injury to a number of passengers, two or three funds may have to be constituted: one under Article 6 for the material damage caused to third parties, one under Article 8 for the damage caused to passengers, and possibly a third to pay compensation for wreck removal operations. The limit of the compensation the owner will be required to pay is then the sum of the amounts to be deposited in the various funds.

3) Periodic updating of the amounts of limitation

The CLNI makes provision for a simplified procedure for revising the amounts of limitation so that they can be updated regularly to keep in line with inflation. CLNI 2012 simplifies further the simplified procedure provided for in CLNI 1988, taking as its inspiration the procedure adopted in the Montreal Convention on international carriage by air[28]. Under CLNI 1988, revision of the amounts required the convening of a conference of all the contracting States and the adoption of the new values by a two-thirds majority of those States present and voting. According to Article 20 of CLNI 2012, this revision may be effected without convening the contracting States, by means of an ordinary written procedure that may be triggered in one of two ways:

– on the initiative of the depositary, every five years, starting on 31 December 2017 and if inflation exceeds the level of 10 %;

– on the initiative of one-third of the Party States, at any time and if inflation exceeds the level of 5 % compared with the most recent update.

Those Party States opposed to an agreed update always have the possibility of denouncing the Convention.

II. Greater effectiveness of the overall limits through the combination of CLNI 2012 and Community law

As we saw in the introduction, the amount of the damage caused at the time of a navigational incident should only in exceptional cases exceed the overall limit laid down in the Convention, such that owners should rarely need to claim the limitation of their liability. In this sense, the main value of the overall limits laid down by the CLNI lies in helping insurers determine the maximum amount of the risk they insure and facilitating the out-of-court settlement of claims for compensation.

For this logic to function, however, the overall limits laid down in the CLNI need to be adhered to on those cases where the amount of the damage exceeds the overall limit. Otherwise, the insurers would not be able to rely on the figures laid down.

It is therefore important to assess the effectiveness of the overall limits laid down by the CLNI and the methods for implementing them, particularly in the hypothetical case of only a small number of States ratifying the Convention. This issue will probably be just as important to the States as the issue of increasing the amounts in their deciding whether or not to ratify the Convention. Here again, CLNI 2012 constitutes progress compared with CLNI 1988.

A. Greater effectiveness as a result of the changes brought about by CLNI 2012

1) Outlines of the procedure for constituting a fund

Where the amount of the damage exceeds the overall limit, the owner must instigate the procedure for constituting a limitation fund[29] in order to invoke the limitation of his liability.

The procedure for constituting a fund is specific to each State, but in all cases is similar to the procedure for court-ordered liquidation. We may set out the outlines that are common to all the States.

Firstly, the owner lodges an application requesting the constitution of a fund. The application is not brought against any other party, but it must list the potential claimants, together with the justification and amount of their claims, as well as the ceiling for the fund to be constituted.

On the basis of this application, the court orders the opening of proceedings, laying down the deadlines for constituting the fund(s), designating the claimants whose claims, according to the application, should be included in the proceedings, and appoints a commissioner with the task of distributing the fund(s) among the claimants.

As part of the proceedings, an appeal is issued by public notification to any unknown claimants on the owner's assets. Deadlines are laid down for claimants to be able to contest the amount or the fund or the amount of their claims.

Invoking the limitation of liability under these proceedings does not necessarily result in its automatic application. The fund is indeed constituted in accordance with the amounts laid down in the CLNI, but the claimants still have the possibility of contesting the very principle of the limitation of the owner's liability, either as part of the proceedings (the case in the Netherlands) or at the same time (the case in Germany), by invoking personal fault on the part of the owner[30]. Similarly, the owner may contest his liability even though he instigates proceedings to constitute a fund[31]. Logically, it is only at the end of the proceedings that the owner's liability is established definitively and the limit of his liability possibly recognised.

If, on concluding the proceedings for the constitution and distribution of the contents of a fund, the competent court finds that the owner's liability is unlimited, the fund is liquidated and each claimant, according to procedures applied

27 Article 12 of CLNI 2012.

28 Convention for the unification of certain rules relating to international carriage by air, 28 May 1999, Article 24.

29 CLNI 2012, Article 12. The CLNI provides that limitation may be invoked even if a fund has not been constituted. German legislation does authorise this option (»Gesetz über das Verfahren bei der Errichtung und Verteilung eines Fonds zur Beschränkung der Haftung in der See- und Binnenschifffahrt« (Schifffahrtsrechtliche Verteilungsordnung – SvertO), § 5 d). Dutch law (Article 642 a of the Dutch Code of Civil Procedure) and Swiss law (Section VI of the Swiss Act on maritime navigation of 20 November 1956 [as at 1 September 2007]) conversely require a fund to have been actually constituted.

30 CLNI (1988 and 2012), Article 4. See however remark under footnote 4.

31 CLNI (1988 and 2012), Article 1.6: »The act of invoking limitation of liability shall not constitute an admission of liability.«

by each State, may invoke the totality of his claim, possibly guaranteeing it by means of protective or enforcement measures[32].

2) The value of constituting a fund

The CLNI provides that the fund may be constituted »with the competent court (...) in any State Party in which legal proceedings are instituted in respect of a claim subject to limitation or, if no legal proceedings are instituted, (...) in any State Party in which legal proceedings *may be* instituted for a claim subject to limitation«[33].

The owner may therefore wait until proceedings are instigated against him before invoking the limitation of his liability. In this case, he must constitute the fund with the competent court of the State(s) in which proceedings have been instigated against him.

The value for the CLNI, however, lies in the much more interesting possibility of constituting a fund **as a preventive measure**, i.e. even before any proceedings are instigated.

1. Constituting a fund first enables the owner to ward off any measure to seize his assets, as it has the immediate and automatic effect of preventing attachment of the owner's property, and more particularly of his vessel[34].

2. By constituting a fund as a preventive measure, the owner further channels all the claims into the fund(s) and prevents claimants who are able to obtain compensation from the fund(s) from obtaining awards of compensation in other quarters. The owner thus saves the legal fees connected with a string of individual applications made to a number of different courts, sometimes in a number of different States.

In this respect, the wording of CLNI 2012 is much clearer than CLNI 1988, and significantly reinforces the effectiveness of the system by directing all the claims much more clearly towards the fund(s).

Indeed, contrary to Article 13 of CLNI 1988[35], Article 14 of CLNI 2012 clearly obliges claimants to invoke their claims as part of the fund proceedings[36]. CLNI 1988 only prevents claimants from participating in both proceedings for the distribution of the contents of the fund and proceedings for the award of compensation. Under CLNI 1988, a claimant notified of proceedings to constitute a fund may elect to not be involved in the proceedings but to lodge an individual claim for the award of compensation. In this case, it is perfectly clear that the amount of the fund ceases to constitute the upper limit of the total compensation that may be claimed from the owner, since any compensation awarded to the claimant on the basis of an individual application is not deducted from the fund[37].

CLNI 2012 makes good this anomaly. Its Article 14.1 provides that »where a fund has been constituted in accordance with Article 12, any person *entitled* to make a claim against the fund shall be barred from exercising any right in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted«. As soon as they have been notified of proceedings to constitute a fund, claimants therefore cease to be able to choose between participating in the proceedings to constitute the fund and lodging an individual application to claim compensation for which liability may be limited; they are only able to participate in the proceedings to constitute the fund. It ceases to be possible to lodge an individual application for the award of compensation to which limited liability applies in any of the States party to CLNI 2012 as soon as the owner has constituted a CLNI fund with the competent court of a Party State and the claimant(s) concerned have been notified of the fact.

It is true that these guarantees are only valid before the courts of a State that is party to the CLNI, and it is legitimate to ask how effective the system would be if only a small number of States were to ratify CLNI 2012.

B. Effectiveness amplified by Community law

Most of the 18 States concerned with inland navigation of international significance are bound by Regulation 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (the »Brussels I« Regulation), either because they are Members of the EU or because they have signed an association agreement with the EU[38].

The Brussels I Regulation lays down rules for the recognition and enforcement of judgment delivered by the courts of Member or Associate States bound by the Regulation. These rules apply to court judgments on the distribution of a fund as well as to those delivered on the basis of the CLNI[39].

32 *Frank Smeele*, »Recognition of Foreign Limitation Proceedings under the European Jurisdiction and Judgments Convention«, IPRax 2006, vol. 3, pp. 229–233.

33 CLNI 2012, Article 12: »Any person alleged to be liable may constitute one or more funds with the competent court or other competent authority in any State Party in which legal proceedings are instituted in respect of a claim subject to limitation or, if no legal proceedings are instituted, (...) in which legal proceedings *may be* instituted for a claim subject to limitation.« [Our italics.] This provision takes up almost word for word Article 11 of CLNI 1988. Under Article 11 (Article 10 of CLNI 1988), the Party States may also make provision for the possibility of involving limited liability without a fund being constituted.

34 Article 14.2 of CLNI 2012 (which takes up Article 13.2 of CLNI 1988) provides that »any vessel or other property [...] which has been attached within the jurisdiction of a State Party for a claim which may be raised against the fund, or any security given, shall be released by order of the court« as soon as a fund has been constituted in accordance with the provisions of the CLNI.

35 Article 13 of CLNI 1988: »Where a limitation fund has been constituted in accordance with Article 11, any person *having made a claim* against the fund shall be barred from exercising any right in respect of such a claim against any other assets of a person by or on behalf of whom the fund has been constituted.«

36 Article 14 of CLNI 2012: »Where a fund has been constituted in accordance with Article 12, any person *entitled to make a claim* against the fund shall be barred from exercising any right in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted.«

37 Except for considerations connected with the enforcement of the judgment that the fund procedure may make more difficult.

38 This Regulation also applies in Serbia. Switzerland is also bound by its provisions, by virtue of the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 30 October 2007.

39 Community jurisprudence has confirmed that a judgment ordering the constitution of a fund for the limitation of liability constitutes a »judgment« within the meaning of Article 32 of the Brussels I Regulation, on condition that potential claimants have been notified (Brussels I Regulation, Art. 34[2]). As such, it should be recognised in all the States bound by the Regulation without any special procedure being required (Brussels I Regulation, Art. 33). See CJEU, 14 October 2004, C-39/02, Maersk Olie & Gas A/S v. Firma de Haan and W. de Boer. For a commentary on this judgment, see more particularly Pierre Bonassies, »La coordination des compétences entre le ›juge du fonds‹ et le ›juge du fond‹ lorsque ces juges ressortissent d'Etats différents«, DMF 2005, no. 655.

1) More concentrated channelling

As we have already seen, CLNI 2012 prohibits the lodging of an individual application before the courts of any State party to CLNI 2012 once proceedings for distributing the contents of a fund have been instigated: the State where the fund had been constituted by virtue of CLNI 2012 would systematically bar claimants from instigating legal proceedings outside the fund, and this ban would be valid in all the States party to CLNI 2012.

The Brussels I Regulation extends this ban to all the States bound by the Regulation, whether or not they are party to the CLNI. Indeed according to *F. Smeele*[40] and *S. Rittmeister*[41], who reason by analogy with the Community rules on insolvency proceedings[42], the decision to constitute a fund ought to produce the same effects in all the States bound by the Brussels I Regulation as in the State of origin. In the case considered here, any State bound by the Brussels I Regulation will be required to recognise the ban on lodging an individual application once a CLNI 2012 fund has been constituted in another State bound by the Regulation and the claimant concerned has been notified of the fact. All these States must also recognise decisions on the distribution of the contents of funds and ensure their enforcement.

Let us consider the hypothetical case, for example, of Bulgaria but not Romania having ratified CLNI 2012. A large-scale accident occurs on the section of the Danube that forms the border between the two countries. As a preventive measure, the owner of the vessel which caused the accident constitutes a fund with the competent Bulgarian jurisdiction. Even though Romania is not bound by CLNI 2012, the Romanian jurisdictions would be bound, under the Brussels I Regulation, to reject any individual application for compensation for the damage caused and refer applicants to the Bulgarian court responsible for distribution of the fund. Once a decision is made on distribution of the fund, the Romanian courts would be obliged to recognise the decision and ensure its enforcement if necessary.

Thus Community law amplifies the effectiveness of the CLNI[43]: as a result of the Brussels I Regulation, the recognition of the decision to distribute the contents of the fund is no longer limited to the States that are party to the CLNI but becomes an obligation for all the States bound by the Brussels I Regulation. The Regulation reinforces the channelling effect of the fund and further reduces any gain to be achieved by claimants taking action outside the fund. Thanks to this Regulation, and regardless of the number of ratifications obtained for CLNI 2012, the effective application of the overall limits on liability laid down by the Convention is thus assured satisfactorily and ensures good predictability for insurers.

2) Owner's election of competent jurisdiction

The CLNI provides that the owner shall constitute the fund with the competent court of the State »in which proceedings may be instigated«[44]. The CLNI does not itself indicate where proceedings may be instigated; this is a matter not only for the national law of each Party State but also for the Brussels I Regulation, which lays down common rules on legal competence in civil cases and thus designates the State »in which proceedings may be instigated«. Article 2 to 7 of the Regulation then provide the ground for national jurisdiction. First, Article 7 provides that the court having jurisdiction in actions relating to liability from the use or operation of a ship shall also have jurisdiction over claims for limitation of such liability, thereby confirming the channeling effect of the CLNI. Then, Article 2, in particular, provides that proceedings are in principle instigated with the court of the place of domicile of the defendant party. The owner of the vessel is indeed the potential defendant party in proceedings for the awarding of compensation for damage caused by a navigational incident. Although the owner takes the initiative in the proceedings and constitutes a fund as a preventive measure, he is still the defendant party. He may therefore invoke the limitation of his liability before the competent court of the State in which he is domiciled[45]. In a way, this rule overturns the rule designating the defendant party's place of domicile as the competent jurisdiction since here it is the jurisdiction of the place of domicile of the party instigating proceedings which is competent.

This possibility, which will often prove to be to the owner's advantage, is not the only one, however. The owner has other options, in application of Articles 2 to 7 of the Brussels I Regulation. Thus under contract law proceedings may be instigated before the court of the place where the obligation serving as the basis for the application has been or should be performed, which normally corresponds to the place where the goods are delivered[46]. In the same way, if the incident may give rise to proceedings for compensation on the grounds of quasi-delict, the owner may choose to constitute the fund »in the courts for the place where the harmful event occurred or may occur«[47]. Thus a Dutch company suffering an accident in Germany would be able to opt for the constitution of the fund in Germany rather than in the Netherlands.

Among these choices, the owner will naturally adopt the place most favourable to him, which will generally be the competent court of the State which applies the lowest amounts for limited liability. If, through reservations issued in respect of the CLNI, these amounts are for example lower in the State of delivery, the owner may prefer to focus proceedings in that State. It is only by limiting the allowance of reservations in respect of the CLNI that this practice of »forum shopping« may be reduced. If the amounts are the same in all the States party to the CLNI, the owner will probably elect to constitute the fund with the competent court of his place of domicile.

It should be borne in mind that the owner does not have this choice if proceedings for compensation are instigated against him before he has embarked on constituting a fund. In this case he may only invoke the limitation of his liability

40 *Frank Smeele*, »Recognition of Foreign Limitation Proceedings under the European Jurisdiction and Judgments Convention«, IPRax 2006, vol. 3, p. 232.

41 *S. Rittmeister*, »Die internationale Wirkung der Fondserrichtung«, in Das Recht der Haftungsbeschränkung, Schriften des deutschen Vereins für internationales Seerecht, Heft 1005, (ed. *Dr Ramming*), p. 82.

42 Particularly Article 17 of Regulation 1346/2000 on insolvency proceedings.

43 See *S. Rittmeister*, »Die internationale Wirkung der Fondserrichtung«, in: Das Recht der Haftungsbeschränkung, Schriften des deutschen Vereins für internationales Seerecht, Heft 1005, (ed. *Dr Ramming*), pp. 73–83.

44 CLNI 2012, article 12.1; CLNI 1988, article 11.1.

45 It is also before this court that the enforcement of judgments may be most easily claimed, since it is a priori within the territory of this State that most of the owner's property will be located.

46 Regulation 44/2001, Article 5.1.

47 Regulation 44/2001, Article 5.3.

before the competent court of the State in which the proceedings to obtain compensation have been instigated.

Furthermore, this protection may only be temporary. If the judge concludes that the owner is not responsible, the amount of the fund should be returned to the owner. If, on the contrary, the judge holds the owner fully liable of all damages, each claimant recuperates his/her right to claim full compensation through the regular channels[48].

Conclusion

We believe CLNI 2012 constitutes real progress in comparison with CLNI 1988. It extends the rules to the whole of the river network in Europe and strengthens the degree of harmonisation by reducing the possibility of issuing reservations compared with CLNI 1988. At the same time, harmonisation only refers to the overall limits of liability, leaving the States full latitude to preserve their traditions in terms of liability schemes and the procedure for constituting a fund. In this sense, it represents valuable progress in the harmonisation of the rules of private law governing inland navigation, while remaining within the limits of what the inland navigation States are prepared to accept, given the current state of development of the sector.

CLNI 2012 also increases the effectiveness of the system set up in 1988 by channelling all claims more clearly towards the fund. The effect of the clarification of these rules is further amplified by the application of the Brussels I Regulation, which confers a European dimension on them, regardless of the number of ratifications obtained by CLNI 2012.

This effectiveness improves protection for the owner and hence risk predictability for insurers, who in turn should be able to cover higher levels of compensation, affording better protection for victims. It should be borne in mind in this respect that the purpose of the overall limits is nowadays just as much to protect the viability of the inland navigation companies as to ensure appropriate and expeditious compensation for victims.

In this context, it is hoped that the increase in the amounts agreed in CLNI 2012 will be considered an acceptable compromise for the sector in all States, so that CLNI 2012 will be widely ratified.

48 See comment under footnote 4.