



VAN STEENDEREN MAINPORTLAWYERS

FORUM CLAUSES AND FORUM SHOPPING: A Dutch Perspective

- The Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (“Regulation”):
 - / is for the Netherlands the most important source of international rules of jurisdiction
 - / came into force for the Netherlands on 1 March 2002

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- The Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (“Brussels Convention”):
 - / has been used as a model for the international rules of jurisdiction as outlined in internal Dutch law
 - / has been converted to the Regulation pursuant to article 65 of the Treaty establishing the European Community

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- The Regulation provides for:
 - / a unified system of rules
 - / which rules have almost completely set aside the internal Dutch rules of jurisdiction (those rules have been outlined in a special division of the Dutch Code of Civil Procedure (“DCCP”, Book 1))
 - / the internal Dutch rules are only applicable in case a matter of international jurisdiction falls outside the scope of the Regulation

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- The main rule under both the Regulation and internal Dutch law is:
 - / a Dutch Court is competent to hear a claim if the defendant is domiciled in the Netherlands (article 2 of the Regulation, article 2 DCCP)
 - / “*forum rei*” is the most common jurisdiction from international perspective

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- Next to this main rule, both the Regulation and internal Dutch law provide for a number of additional grounds for international jurisdiction of a (Dutch) Court, amongst which a jurisdiction clause (choice of forum, article 23 of the Regulation, article 6 DCCP)

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- Within the scope of this presentation the focus will be on the special jurisdiction in actions relating to liability from the use and operation of a ship and limitation thereof
- Relevant is article 7 of the Regulation, which generally attributes jurisdiction in actions for limitation of such liability to the Court which also has jurisdiction over claims relating to the liability itself

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- Article 7 of the Regulation:
 - / is closely connected to the London Convention on the Limitation of Liability of 19 November 1976, as amended by Protocol, dated 2 May 1996 (“London Convention”)
 - / the equivalent in internal Dutch rules of jurisdiction is article 642a DCCP

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- / provides for such rules of jurisdiction since the London Convention does not provide for explicit rules of international jurisdiction for limitation actions.

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- However, article 7 of the Regulation has its basis in article 6 *bis* of the Brussels Convention. This article 6 *bis* only applies to a request for limitation which does not lead to the establishment and division of a fund

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- Establishment of a fund is, however, mandatory under Dutch law (article 8:750 subsection 1 Dutch Civil Code (“DCC”) jo. article 642c DCCP)

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- As a consequence:
 - / jurisdiction of a Dutch Court cannot be founded on article 7 of the Regulation (or article 6 *bis* of the Brussels Convention prior to its conversion into the Regulation)

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/ if such a maritime claim falls within the formal scope of rules of jurisdiction of the Regulation, a Dutch Court only has jurisdiction over a claim for limitation on the grounds of the following articles of the Regulation:

- article 2 (defendant is domiciled in the Netherlands),
- article 5 (tortuous act committed in the Netherlands), or
- article 6 (breach of a contract that had to be executed in the Netherlands)

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- Court of Appeal Leeuwarden, 4 June 2003, S&S 2003, 110 (*IJsseldelta* / JB 6189)
 - / a Dutch shipowner filed a request for limitation with a Dutch Court on the ground of article 642a DCCP; not as a defence since the German domiciled creditor had not commenced an action for liability yet

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- / the District Court Groningen held that it lacks jurisdiction since, pursuant to article 11 of the London Convention, a limitation fund can only be established in a Member State where an action for liability has been commenced in relation to a claim capable of limitation

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- / the meaning of this stipulation is, in the opinion of this Dutch Court and as confirmed by the Court of Appeal, that a shipowner who expects to be held liable for such a claim is not entitled to establish a fund in the Member State of his choice, but has to await the initiative of the creditor, in order to prevent forum shopping

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- / since article 642a DCCP not only governs a request for limitation, but is also related to the establishment and division of a fund, it was held that, in order to prevent forum shopping, a Dutch Court has to take the meaning of article 11 of the London Convention into consideration
- / the additional request of the shipowner to bind the German Court to any limitation amount to be established by the Dutch Court and to set up a fund in Germany was denied for the same reason

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- / this case is an example of forum shopping: the limitation amount to be established by a Dutch Court was expected to be much lower than any limitation amount to be established by the German Court

Risk: due to lack of jurisdiction in the Netherlands, this shipowner was unable to timely file a request for limitation in Germany and, as a consequence, was held liable for the total amount of damages

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- Prior to 1 January 2002, Dutch law was much more in favour of those who wish to shop around for better law:
 - / a Dutch Court deemed to have jurisdiction in an action for limitation ex article 320a DCCP (old) unless the Dutch Court had to be considered as a *forum non-conveniens* due to insufficient connection with the Dutch legal atmosphere

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- / even the fact that an arrest seeking security was made in the Netherlands was considered to create jurisdiction for a Dutch Court (*forum arresti*, Supreme Court 28 February 1992, S&S 1992, 61 (*Sylt-case*))
- / however, from the same case law it can be concluded that parties are not entitled to make a choice of forum in order to create jurisdiction in an action for limitation

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- Internal Dutch law as valid since 1 January 2002:
 - / from article 10 jo. 642a DCCP it can be derived that in principle a Dutch Court has jurisdiction in an action for limitation
 - / the *forum non-conveniens* exception no longer exists
 - / but, since establishment of a fund is mandatory under Dutch law, a request for limitation shall only lead to realisation of the right to limitation in case an action for liability has been initiated against the shipowner

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- Potentially the action for limitation can be initiated before a Court in another Member State than the Member State where the action for liability has been filed:
 - / *lis pendens* article 21 of the Regulation ?
 - / negative: European Court of Justice 14 October 2004 C-39/02 (*Maersk Olie en Gas A/S / Firma M. de Haan en W. de Boer, Cornelis Simon-case*)

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- / consequently, both Courts involved have jurisdiction in the respective actions and the last requested Court is not obliged to declare lack of jurisdiction
- / under Dutch internal law, article 12 DCCP, a Dutch Court is only obliged to declare lack of jurisdiction if a foreign judgment can be acknowledged and executed in the Netherlands

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- Why would it be favourable or unfavourable to establish a fund in the Netherlands?

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- On basis of article 18 (1) London Convention, the Netherlands reserved the right to exclude the application of article 2 (1) (d) and (e) London Convention:
 - / (d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which has sunk, wrecked, stranded or abandoned, including that is or has been on board such ship
 - / (e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship

FORUM CLAUSES AND FORUM SHOPPING: A Dutch Perspective

- 3 examples

EXAMPLE 1

- The Netherlands:

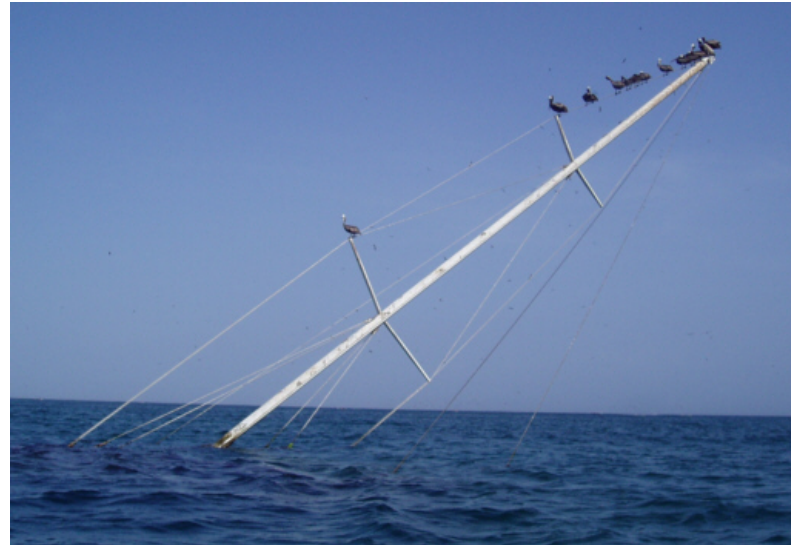
- / wreck fund

Article 8:755(1)(c) DCC

- England:

- / no wreck fund

- / property fund: can be limited with regard to property damage, which includes wreck salvaging costs



EXAMPLE 1

- Vessel with tonnage 2,000 ton gross

/ limitation in the Netherlands:

- Property fund:

$$\text{SDR } 167,000 + (1,500 \times \text{SDR } 167) = \text{SDR } 417,500$$

- Wreck fund:

$$\text{SDR } 262,000 + (1,500 \times \text{SDR } 333) = \underline{\text{SDR } 761,500}$$

$$\text{Total} \quad \text{SDR } 1,179,000$$

/ limitation in England:

- Property fund (fixed amount <2,000 ton) SDR 1,000,000

EXAMPLE 2

- Vessel with tonnage 100,000 ton gross

/ limitation in the Netherlands:

- Property fund:
 $\text{SDR } 167,000 + (\text{SDR } 167 \times 29,500) +$
 $(\text{SDR } 125 \times 40,000) + \text{SDR } (83 \times 30,000) = \text{SDR } 12,583,500$
 - Wreck fund:
 $\text{SDR } 262,000 + (\text{SDR } 333 \times 5,500) +$
 $(\text{SDR } 125 \times 64,000) + (\text{SDR } 83 \times 30,000) = \text{SDR } 12,583,500$
- Total SDR 25,167,000

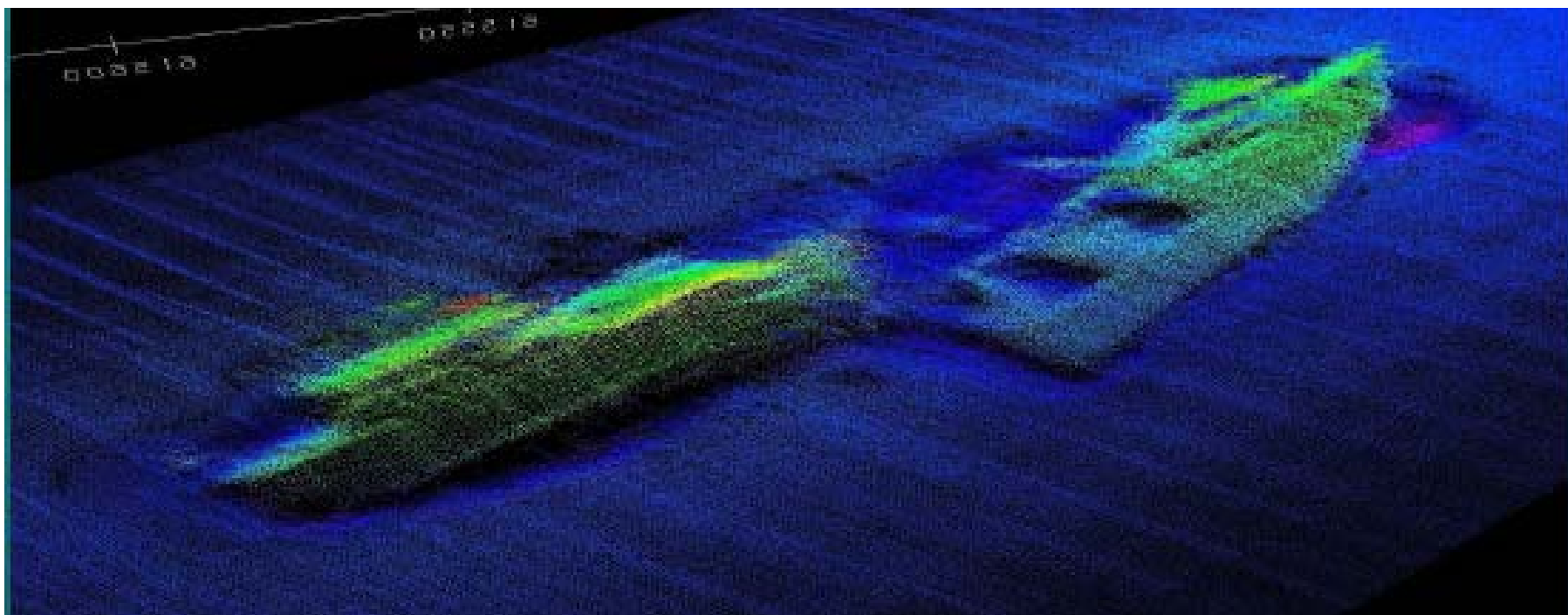
/ limitation in England:

- Property fund:
 $\text{SDR } 1,000,000 + (\text{SDR } 400 \times 28,000) +$
 $(\text{SDR } 300 \times 40,000) + (\text{SDR } 200 \times 30,000) = \text{SDR } 30,200,000$

EXAMPLE 3

- Court of Appeal The Hague, 15 March 2005, S&S 2005/60
 - / collision between “*Seawheel Rhine*” and “*Assi Eurolink*” in the North Sea (Friesland Junction)
 - / the “*Assi Eurolink*” sank and became a wreck

EXAMPLE 3

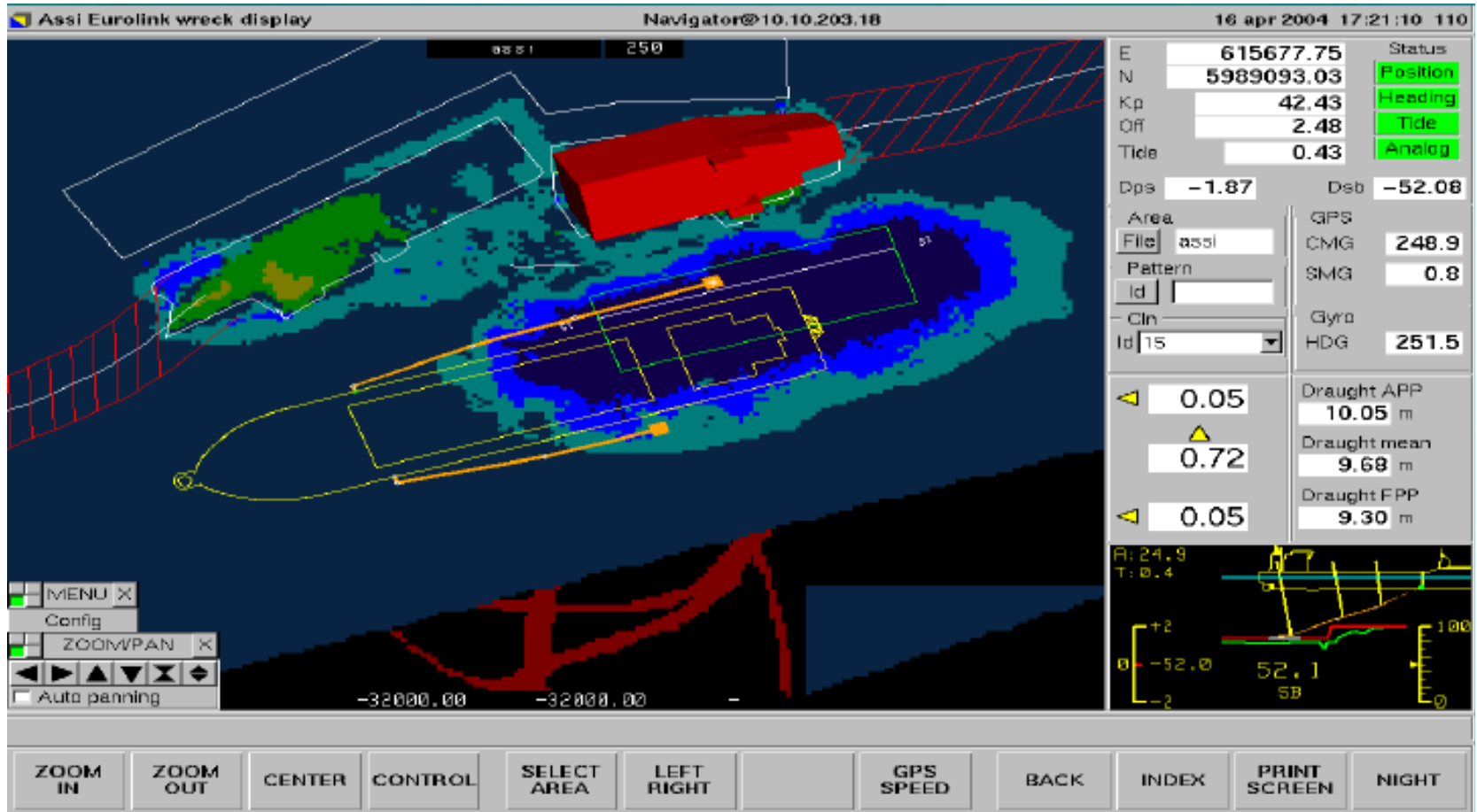


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EXAMPLE 3

- / on 7 February 2003 the State of the Netherlands commenced legal proceedings against Northsea (owner of “*Seawheel Rhine*”) and Westereems (shipowner of “*Assi Eurolink*”) before a Dutch Court with regard to marking and salvage costs in relation to the wreck of “*Assi Eurolink*”

EXAMPLE 3



EXAMPLE 3

- / on 19 February 2003 Northsea, (the owner of “*Seawheel Rhine*”), commenced arbitration proceedings in Sweden against B&N (bareboat charterer of “*Seawheel Rhine*”) in relation to all (possible) claims which could be initiated against Northsea
- / on 24 February 2003 B&N filed a request for limitation of liability in Sweden, which request has been approved

EXAMPLE 3

- What was the reason for B&N to do this?
- / limitation of liability in **Sweden**:
 - Property fund amounting to EUR 2,255,218.62 (SDR 1,800,093)
- / limitation of liability in **the Netherlands**:
 - Property fund plus wreck fund amounting to EUR 3,329,585.76 (SDR 2,628,375)
- / Sweden: was more favourable (lower limitation)

EXAMPLE 3

- / The Dutch Supreme Court ordered that since (arbitral) proceedings between Northsea and B&N had been commenced in Sweden, the stipulations as outlined in article 11 of the London Convention were met
- / Pursuant to the Regulation, the recognition of the decision to establish a fund to limit liability had to be assessed
- / Therefore, the decision of the Swedish court to approve limitation of liability by establishing a fund, although without “*révision au fond*”, had to be recognized by the Dutch court



THANK YOU
FOR YOUR ATTENTION

