



THE NOTION OF A SHIP IN THE NEW BELGIAN SHIPPING CODE

Lectio magistralis
University of Bologna, 30 June 2016

Prof Dr Eric Van Hooydonk
Professor, University of Ghent
Advocate, Eric Van Hooydonk Lawyers, Antwerp



The reform
of Belgian shipping law

4 basic objectives

- Updating a central part of Belgian commercial maritime law
- Reinforcing the competitive position of the Belgian maritime cluster
- Encouraging legal services
- Reinforcing the appeal of Belgium as a maritime country

Updating Belgian commercial law (1)

- The current Maritime Code is obsolete
 - Enacted in 1879
 - Based on Code of Commerce of 1807
 - The latter was based on the *Ordonnance de la Marine* of Louis XIV from 1681



Updating Belgian commercial law (2)

- The Maritime Code was amended several times (inter alia in 1908 and 1989)
- Some CMI Conventions were incorporated into the Maritime Code
- The Maritime Code is superseded by the present-day reality of maritime activities
 - 141 out of 254 (55 %) provisions are obsolete and irrelevant
 - Nothing on containers, hazardous goods, EDI, ...

Updating Belgian commercial law (3)

- The Maritime Code is superseded by codifications elsewhere
 - Netherlands, Germany, Luxemburg, UK, Scandinavia, Croatia, Slovenia, Panama, Spain, Poland, Viet Nam, China, ...
- The Maritime Code is inconsistent and obscure
 - E.g. implementation of conventions
 - E.g. types of vessel
- The Maritime Code cannot be rescued
- The Code of Commerce as a whole is outmoded
- The non-shipping provisions of the Code of Commerce are being integrated into a new Code of Economic Law



Reinforcing the maritime cluster (1)

- The Belgian maritime cluster is world class
 - Antwerp is the second port of the EU (Trieste 13th, Genova 15th)
 - Zeebrugge, Ghent, Ostend, Brussels and Liège are top rank EU ports as well
 - 238 m tonnes of maritime cargo (Italy: 443 mt)
 - 4th in the EU for containers (Italy: 5th)
 - 13th in the world for containers (Italy: 14th)
 - The Belgian merchant fleet is 19th in the world (Italy: 16th)

30 June 2016

Lectio magistralis, University of Bologna

7



Reinforcing the maritime cluster (2)

- Belgium is the world's 9th largest transport insurance market
- International renown in hydraulics, nautical sciences, transport economy and maritime law
- Membership of IMO Council

30 June 2016

Lectio magistralis, University of Bologna

8

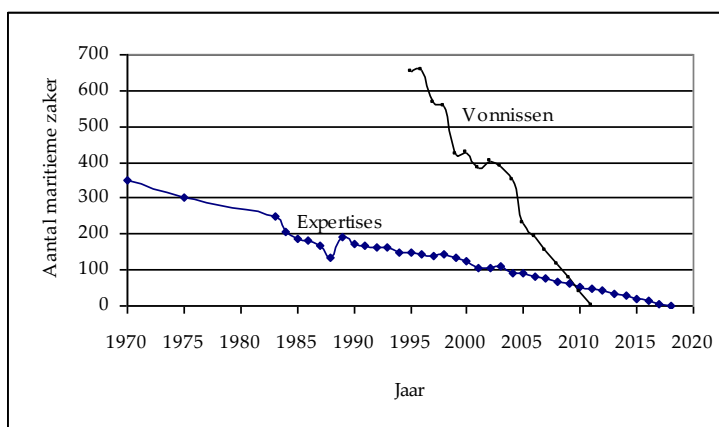
Reinforcing the maritime cluster (3)

- The maritime cluster needs an attractive legislative framework
 - Legal certainty
 - Accessibility and transparency of legislation
 - Connection to international trends
 - Appropriate equipment of competent authorities
 - Facilitating function of maritime legislation
- All branches of the maritime cluster have an interest in the reform process

Revitalising maritime legal services (1)

- Belgian maritime legal services are crumbling away
 - General international tendencies (technological improvements and containerisation)
 - Belgium is still an important forum for litigation
 - The decline of litigation is worrying

Revitalising maritime legal services (2)



30 June 2016

Lectio magistralis, University of Bologna

11

International appeal of Belgium

- Severe criticism of London
 - Is the Brexit an opportunity ?
- Maritime arbitration centres
- Absence of Belgium and Antwerp as alternative maritime business and law centres
- Good maritime legislation as a sales promotion tool

30 June 2016

Lectio magistralis, University of Bologna

12

Reform procedure (1)

- 2006: Study and conference on maritime law and policy, governmental support, expert team
- 2007: Green paper, Royal Commission, websites, public consultation
- 2007-2010: Research and drafting
- 2011-2014: Publication of 9 Blue Books and second public consultation

Reform procedure (2)

- 2015: Publication and consultation in the French language (10th Blue Book)
- 2016: 11th Blue Book on public law, consultation, finalization of Code
- 2017: Adoption by Government and Parliament

Formal characteristics

- Codification
- Extraction from Code of Commerce
- Implementation of international conventions
- Comparative approach
- Continuous updating
- **Broad scope**
- Integration of maritime and inland navigation
- Autonomy of shipping law
- Non-mandatory as a rule
- Importance of auto-regulation and general principles (Lex Maritima)

Structure of Draft Shipping Code (1)

- **PART 1 – GENERAL PROVISIONS**
 - Chapter 1 – Definitions
 - Chapter 2 – Sources of law
- **PART 2 – PUBLIC LAW**
 - **BOOK 1 - SHIPS**
 - Title 1 – The Belgian Ship Registry
 - Title 2 – Registration of seagoing ships
 - Title 3 – Registration of inland navigation vessels
 - Title 4 – Tonnage measurement of ships
 - Title 5 – Safety of ships
 - Chapter 1 – General provisions
 - Chapter 2 – Safety requirements for seagoing ships
 - Chapter 3 – Certificates for seagoing ships
 - Chapter 4 – Safety requirements for pleasure craft

Structure of Draft Shipping Code (2)

- **BOOK 2 – SHIP OWNERS**
- Title 1 – Maritime navigation
- Chapter 1 – Compulsory insurance
- Subchapter 1 – Maritime claims
- Subchapter 2 – Pollution
- Subchapter 3 – Carriage of passengers
- Chapter 2 – Taxation of shipping companies
- Chapter 3 – Protection of the Belgian merchant marine
- Title 2 – Inland navigation
- Chapter 1 – Permit to operate
- Chapter 2 – Chartering and pricing
- **BOOK 3 – PERSONS ON BOARD**
- Title 1 – Employment in maritime navigation
- Title 2 – License for operating pleasure craft
- Title 3 – Maritime offences
- Chapter 1 – General provisions
- Chapter 2 – Prohibitions
- Title 4 – Stowaways

Structure of Draft Shipping Code (3)

- **BOOK 4 – SHIPPING TRAFFIC**
- Title 1 – General provisions
- Title 2 – Police regulations and navigation rules
- Title 3 – Places of refuge for ships in need of assistance
- Title 4 – Removal of wrecks
- Chapter 1 – Territorial sea
- Chapter 2 – Exclusive economic zone
- Title 5 – Investigation of shipping accidents

Structure of Draft Shipping Code (4)

- **BOOK 5 – SECURITY**
- Title 1 – Maritime security
- Chapter 1 – General provisions
- Chapter 2 – Authorities
- Subchapter 1 – National authority for maritime security
- Subchapter 2 – Local committees for maritime security
- Subchapter 3 – Maritime security officials
- Chapter 3 – Port security structure
- Subchapter 1 – Security levels
- Subchapter 2 – Security Assessment
- Subchapter 3 – Port security plans
- Chapter 4 – Recognised security organisations
- Chapter 5 – Communication of information and data
- Title 2 – Piracy
- Title 3 – Use of maritime security organisations

Structure of Draft Shipping Code (5)

- **BOOK 6 – MARINE ENVIRONMENT**
- **BOOK 7 – ENFORCEMENT**
- Title 1 – Sanctions
- Chapter 1 – General provisions
- Subchapter 1 – Measures of sanctions
- Subchapter 2 – Penal sanctioning
- Subchapter 3 – Administrative sanctioning
- Chapter 2 – Sanctioning of violations
- Subchapter 1 – Implementation of international treaties and instruments
- Subchapter 2 – Ships
- Subchapter 3 – Ship owners
- Subchapter 4 – Persons on board
- Subchapter 5 – Shipping traffic
- Subchapter 6 – Security
- Subchapter 7 – Marine environment
- Subchapter 8 – Enforcement

Structure of Draft Shipping Code (6)

- Title 2 – Detection of violations
- Chapter 1 – Shipping Control
- Subchapter 1 – Organisation and general powers
- Subchapter 2 – Reports of proceedings
- Section 1 – Hearings
- Section 2 – Detection of violations
- Subchapter 3 – Special powers
- Section 1 – Ships
- Section 2 – Ship owners
- Section 3 – Marine environment
- Chapter 2 – Shipping police
- Chapter 3 – Masters
- Chapter 4 – Other authorities

30 June 2016

Lectio magistralis, University of Bologna

21

Structure of Draft Shipping Code (7)

- Title 3 – Prosecution of violations
- Chapter 1 – Decision to prosecute
- Chapter 2 – Administrative prosecution
- Chapter 3 – Special provisions
- Subchapter 1 – Maritime offences
- Subchapter 2 – Piracy
- Subchapter 3 – Marine environment
- Title 4 – The Board of Marine Inquiry
- Chapter 1 – Institution and powers
- Chapter 2 – Organisation
- Chapter 3 – Proceedings
- Title 5 – The Enforcement Body for carriage of passengers
- Title 6 – The Prize Court

30 June 2016

Lectio magistralis, University of Bologna

22

Structure of Draft Shipping Code (8)

- **PART 3 – PRIVATE LAW**
- **BOOK 1 – GENERAL PROVISIONS**
- Title 1 - Definitions
- Title 2 – Sources of law
- Title 3 – Construction
- **BOOK 2 - SHIPS**
- Title 1 – Regime under property law
- Title 2 – Security rights in ships
- Chapter 1 – General provisions
- Chapter 2 – Priority rights in ships
- Chapter 3 – Non-possessory liens on ships
- Chapter 4 – Possessory liens on ships
- Chapter 5 – Mortgages on ships

Structure of Draft Shipping Code (9)

- Title 3 – Attachment of ships
- Chapter 1 – Arrest of ships
- Subchapter 1 – Arrest of seagoing ships
- Subchapter 2 – Arrest of inland navigation vessels
- Subchapter 3 – Conservatory attachment of goods on board
- Chapter 2 – Executory attachment of ships
- Title 4 – Publicity
- Chapter 1 – General provisions
- Chapter 2 – Publicity of ship mortgages
- Title 5 – Public ships
- Chapter 1 – Belgian public ships
- Chapter 2 – Foreign public ships

Structure of Draft Shipping Code (10)

- **BOOK 3 – SHIP OWNERS**
- Title 1 – Co-ownership
- Title 2 – Liability
- Chapter 1 – Liability of registered owners and operators of ships
- Chapter 2 – General limitation
- Subchapter 1 – Seagoing ships
- Section 1 – General provisions
- Section 2 – The right to limitation
- Section 3 – Limits of liability
- Section 4 – Limitation proceedings without establishment of a fund
- Section 5 – Limitation proceedings with establishment of a fund

30 June 2016

Lectio magistralis, University of Bologna

25

Structure of Draft Shipping Code (11)

- Subchapter 2 – Inland navigation vessels
- Section 1 – General provisions
- Section 2 – The right to limitation
- Section 3 – Limits of liability
- Section 4 – Limitation fund
- Chapter 3 – Pollution
- Subchapter 1 – Pollution by oil-carrying ships
- Subchapter 2 – Pollution by bunker oil
- Subchapter 3 – Nuclear damage
- Title 3 – Ship agents

30 June 2016

Lectio magistralis, University of Bologna

26



Structure of Draft Shipping Code (12)

- **BOOK 4 – CREW**
- Title 1 – Employment
- Title 2 – Masters
- Title 3 – Liability

30 June 2016

Lectio magistralis, University of Bologna

27



The notion of a ship in the current Maritime Code

30 June 2016

Lectio magistralis, University of Bologna

28

MC, Art 1

- *For the purposes of the present Act all craft of at least 25 tons, designed or usually utilized for the transportation of persons or goods, fishing, towing or any other profit-making activity at sea shall be considered seagoing ships.*

MC, Art 271

- *For the purposes of the present Act craft usually employed or destined for navigation in inland waters of at least 25 tons, designed or usually employed for the purpose of the transportation of persons or goods, fishing, towing, dredging or any other profit-making activity shall be considered inland ships.*
- *For the purposes of the present Act, all craft of less than 25 tons which are usually utilized at sea for similar activities shall be assimilated to inland ships.*

‘Internal’ criticism (1)

- Too laconic
 - State-of-the-art legislation needs clear definitions
 - It is “sad” that neither international, nor national maritime law has a uniform definition of the ship (Antwerp Court of Appeal)
 - No definition of ship, only of subcategories
 - No definition of other key notions such as shipowner, chartering, transportation

‘Internal’ criticism (2)

- The profit-seeking criterion is outdated (1)
 - General criterion for the purposes of the Code of Commerce
 - As such, it is fundamentally outdated (cf concept of an ‘undertaking’)
 - It is irrelevant in international maritime conventions
 - It is unclear: ‘profit-seeking’ or ‘profit-making’ ?

‘Internal’ criticism (3)

- The profit-seeking criterion is outmoded (2)
 - Vessels owned or operated by public authorities
 - Tugs, floating cranes and derricks
 - Pleasure boating and commercial yachting
 - Heritage ships
 - An issue of anti-constitutional discrimination ?

‘Internal’ criticism (4)

- The need for combined reading with provisions elsewhere
 - Extension of the scope
 - LLMC and limitation of liability in inland shipping
 - State-owned ships
 - Status of ships (liens and mortgages, publicity of rights in rem)
 - Opacity of the law
 - The legislator confirms that the MC is too narrow

‘Internal’ criticism (5)

- Different notions and definitions in other laws and regulations
 - Ship Registration Act, Marine Environment Protection Act etc
- No definitions in other laws and regulations
 - Ship arrest, wreck removal etc – so scope is wider

‘Internal’ criticism (6)

- Substantive anomalies
 - The definitions do not say that they determine the scope of the MC
 - Dredges are always inland ships (contrary to reality and to Maritime Labour Act)
 - The tonnage criterion is unclear (GT is meant) and arbitrary (1888: 20 tons), it deviates from int’l legislative practice, and it is irrelevant

‘Internal’ criticism (7)

- The original intention was to consider ships operated in the TS inland ships
- The terminology is inconsistent: ‘bateaux’, ‘bateaux d’intérieur’, ‘bateaux de navigation intérieure’
- A ship does not need to have its own modes of propulsion (cf sea lighters)
- A passenger boat used as a hut at a construction site is no ship
- Pushing barges are not mentioned
- Overall there is considerable legal uncertainty

‘Internal’ criticism (8)

- There is no definition of ship components and ship appurtenances

‘Int’l and EU’ criticism (1)

- Narrow Belgian definitions result in frictions with international conventions
- Many conventions do not have a definition
 - Collision Convention, Salvage Convention 1910, Ship Arrest Convention 1952, LLMC Convention
- Other conventions have a wider definition
 - Hague Rules, CLC, Inland Ships Convention 1965
- Offshore craft (CMI 1977, 1994)

‘Int’l and EU’ criticism (2)

- Public law conventions show a broader tendency as well
 - UN Convention on Conditions for Registration of Ships: ‘ship’ means ‘any self-propelled sea-going vessel used in international seaborne trade for the transport of goods, passengers, or both, with the exception of vessels of less than 500 gross registered tons’

‘Int’l and EU’ criticism (3)

- MARPOL: ‘ship’ means ‘a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms’
- Same approach in EU law:
 - Traffic Monitoring Directive 2002/59/EC: ‘ship’ means ‘any sea-going vessel or craft’

‘Comparative’ criticism

- Germany
- England
- France
- Luxemburg
- Netherlands
- Others
 - Chile, China

'Policy' criticism (1)

- First consultation
 - Clear and unanimous support for a new definition which omits the profit-seeking criterion and assimilates public vessels to other vessels
 - Support for registration and mortgaging of non-commercial inland ships
 - Support for broader definition in line with MARPOL and SOLAS
 - Positions on off-shore, estuarine vessels

'Policy' criticism (1)

- Closer examination
 - Urgent need for new definitions, more legal certainty, integration into the Code of all provisions, and equal treatment
 - Non-commercial ships should be treated in the same manner as other ships

Conclusion

- Current definitions are obsolete, too narrow and uncertain, and deviate from international practice
- New definitions are urgently needed, should be broader and non-discriminatory, and they find wide support

The notion of a ship in the Draft Belgian Shipping Code

The 'ship'

- A 'ship' means 'every craft, with or without its own propulsive power, with or without displacement, that floats or has floated and that is used or which is suitable for use as a means of traffic on the water, including air-cushion craft but to the exclusion of fixed devices, waterplanes and amphibious vehicles'

'traffic on water'

- 'every, even stationary, participation in traffic in, under or over public waters'

‘public waters’

- ‘all waters which are open for public traffic in accordance with applicable regulations, regardless of the marine area to which they belong’

‘air-cushion craft’

- ‘every ship which is used or suitable for use as means of traffic on the water with the assistance of an air cushion which is maintained between the apparatus and the surface of the water or the earth’

‘fixed devices’

- ‘every device which lost its suitability for use as a means of traffic on the water due to its permanent connection to the land or the bottom’

‘waterplanes’

- ‘every device which can be kept in the atmosphere as a result of forces exercised on it by the air and which is only used or suitable for use as a means of traffic on the water in connection with the take-off, landing, taxiing or parking, with the exception of air-cushion craft’

‘amphibious vehicles’

- ‘every device which is used or suitable for use as a means of traffic on the water and which also participates or is suitable for participation in road traffic’

The ‘seagoing ship’

- ‘every ship which has a certificate of registry, a safety certificate or any other official document which indicates that the ship is suitable for use in marine waters, as well as every ship which, as appears from its construction, is designed for use in marine waters or which at any moment relevant to the matter, is factually used in marine waters’

‘marine waters’

- ‘all waters at the sea side of the baseline from which the breadth of the territorial sea is measured’

The ‘inland ship’

- ‘every ship which is not a seagoing ship’

‘Ship components’

- ‘everything which is part of a ship, particularly:
 - a) the hull, the superstructure, the masts, the rudder and the other steering devices;
 - b) the accessories which are connected with a ship in such manner that they cannot be separated from it without causing substantial damage to them or to the ship;
 - c) propulsion engines, handling gear and facilities and other equipment which were built in definitively’

‘Ship appurtenances’

- ‘those consumption goods which are on board and necessary or useful for the normal operation of the ship, as well as those goods, with the exclusion of ship components, which were brought on board to serve the ship in a sustained manner, particularly where
 - a) their presence on board is mandatory by law;
 - b) they can be recognized as such due to their form;
 - c) they are necessary or useful for the normal operation of the ship’



Specific issues

- Ships under construction
- Derogations
 - In the Code
 - By Royal Decree