

# Race to update Belgium's 'obsolete' maritime law

The Belgian fleet has recovered remarkably in the last few years. Now its maritime law is playing catch-up, writes **Helen Hill**

THE Belgian shipowning community has basically gone from nought to 60 like a Ferrari.

Just a few years ago, the fleet was totally flagged out and maritime student numbers were falling.

Then came an about-turn as the register rose from the ashes — and since then there has been no looking back.

According to the latest statistics by the United Nations Conference on Trade and Development, Belgium has climbed four places in the world shipowning league and is now ranked in 17th position, above countries such as rival neighbour the Netherlands and France.

Belgium's fleet now represents 11.5m dwt, while the Netherlands has 8.8m dwt.

Owners have returned and now Belgium is in the premier league of shipowning countries.

But despite the miraculous turnaround, one thing was left behind — Belgium's maritime law.

Captain Marc Nuytemans, managing director of the Royal Belgian Shipowners Association (KBRV), the architect behind the rebirth of the flag, is now a key driving force behind a move to update the whole maritime legal system.

KBRV has managed to persuade the Belgian government to put forward a substantial amount for the initial revamp of maritime commercial law, to which

the owners contribute 25%. But the total cost of the maritime law overhaul will amount up to €1.5m-€2m (\$2m-\$2.6m).

And an esteemed group of professors have been brought together to tackle the rather onerous task.

Led by Dr Eric van Hooydonk, a lawyer and professor of law at the university of Antwerp, the six professors also include Leo Baron Delwaide, who just stepped down as the president of the Port of Antwerp, after many years — he was also a lawyer.

In an interview, Capt Nuytemans did not mince his words.

"Belgium maritime law is totally obsolete, some of it was written centuries ago and even relates to practices that don't exist any more," he said.

Prof van Hooydonk points out that many developing countries have a more modern legal system than Belgium, such as Vietnam and China, and even Cambodia is developing a new legal code.

He is proud that effectively the group will be writing history.

They won't be reinventing the wheel, he stresses, but the group will look into the legal regimes of other maritime countries and seeing which laws will improve Belgium's outdated legal framework.

Professor van Hooydonk says that the outdated legal

system has to be seen in the historical context.

It was a pity that Belgium, which was such a leader in the maritime law field, was now operating under such an outdated system, he commented.

"In fact one of the first international maritime organisations ever created was from Belgium and this inspired countries such as the UK, France and Germany to create national maritime law associations."

He pointed to the Comité Maritime International formed in 1897.

If looking at the first treaties, conventions, liens, arrests ... many came from the CMI.

The CMI has effectively been replaced by the International Maritime Organization, although it still co-operates with the CMI.

"Belgium was always a leading nation in maritime law but now the law is totally obsolete," Professor van Hooydonk said.

If considering the broader maritime cluster, it is not possible to function properly unless there is an adequate legal sector, both Professor van Hooydonk and Capt Nuytemans stressed.

The men point to vivid examples of just how behind the law is.

The recent ongoing case of the grounded *MSC Napoli* shedding some of its containers, which subsequently washed up on the English



coast, provides a graphic example.

Capt Nuytemans said: "The law is really from the dark ages when applying to such cases."

Until recently, Belgian law applied would actually have been the Wreck Act enacted by Emperor Charles V in 1547, Capt Nuytemans said.

The law applied here dates back from the 15th century, from the Consulate of the Sea.

A thriving maritime cluster cannot reach its full potential with such a legal regime, he added.

The decline in the Belgian maritime legal sector is evidenced in the falling number of cases, which is reaching a "critical" situation.

Professor van Hooydonk accepts there are fewer cases

and that permission has not been granted, they cannot limit their liability.

Of course, the idea that someone chooses where their container goes on a 9,000 teu ship is laughable, Capt Nuytemans said.

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Professor van Hooydonk accepts there are fewer cases

because of the fact that there are fewer collisions, less damage from containerisation and that more cases are settled out of court.

But he adds it is also because of "a totally deficient and obsolete law".

In the year 2017, there will be no maritime cases at all in Belgium if the trend continues.

Prof van Hooydonk cannot help but laugh when he points to the interventions made at the 1989 International Salvage Convention organised by the IMO.

France made 77 interventions, the UK, 62, The Netherlands 23 and Belgium just one.

And it was as follows:



**Obsolete: Until very recently, Belgium still followed the Wreck Act enacted by Emperor Charles V, left, in 1547. Professor van Hooydonk, top, and Capt Nuytemans are leading a group of professors bringing the country's outdated maritime laws into the 21st century.**  
Sage Bibliothèque Nationale de France

"Thank you chairman. You know that we do not take the floor very often and if we do, it is for very short statements."

This for the pair epitomises the very problem. Belgium cannot reveal itself to have a strong fleet but an inadequate maritime law, the men emphasise, and admit that perhaps Belgium is not as forthright as it could be.

And it is not because of a lack of maritime lawyers. Capt Nuytemans said perhaps lawyers need to take a broader view of the sector and be more ambitious.

For instance, looking at arbitration, there is no reason that cases could not be held

in Antwerp — as many other port cities have a strong presence in arbitration such as Hamburg, New York and Vancouver.

The men point to London. The UK is recognised as a leading legal maritime nation and yet London port is not one of the majors.

A study a few years ago in London looked at many competing legal cities such as Hamburg, Rotterdam, Athens and Singapore.

Antwerp was not mentioned. "We have a terrible image problem," said Prof van Hooydonk.

As well as the revamp of the law, the men are also pressing for a secretary of state for maritime affairs.

And true to form, the Belgians are pressing ahead at rapid rates.

The 15th century law mentioned earlier is already for the chop.

Professor van Hooydonk and the team held a special maritime law day last May at the University of Antwerp when around 175 people attended.

The issues of concern were addressed and those legal points were some of the first to be grasped by the government for change. They are already before parliament.

Legal experts are working on a very tight schedule to get the revamp of commercial law carried out. They started in December and will finish in May.

After that a Royal Commission will be established and this will address the whole maritime law sector.

It is likely that the same group of professors with a few other experts will carry the process forward and they are hopeful that the whole legal system will be totally revamped by around 2009.

"It is quite ambitious — we are basically throwing the existing legal code away."

"But we need something that is more modern and functions better," said Capt Nuytemans.

"We have the lawyers and the expertise but we need to be ambitious and fight otherwise but there will be no cases at all in 10 years' time."

"We have to do our utmost, this is a unique opportunity. We have put it on the political agenda, everyone knows it has to be a success and that is our responsibility," added Prof van Hooydonk.

# Punished with a capital pee over drugs test

RANDOM drug tests on board ships are a fact of life these days, so unfortunately is the criminalisation of seafarers, writes **Sandra Speares**.

Just what happens when seafarers fall foul of an overly proscriptive approach to drug testing can be read in Captain Joseph Kinneary's account of what happened to him after he was unable, due to a medical condition, to comply with a random drug test immediately.

The reason he could not comply with the request for a urine sample when required was that Capt Kinneary suffers from "Shy Bladder Syndrome", a neurological illness by which the individual is unable to urinate under stressful conditions.

This meant the master was unable to provide the urine sample within the required three-hour time limit — his offer of a blood sample instead was refused.

This was to be the start of a bureaucratic nightmare. Although he received a note from a doctor diagnosing his condition and recommending

treatment, this failed to satisfy the City of New York — he was master of a municipal



**Capt Kinneary suffers from Shy Bladder Syndrome and cannot urinate under stress.**

sludge tanker — who charged him with misconduct for refusal to take a drugs test.

His argument that he had not refused the test but had simply been unable to give a

sample fell on deaf ears. Initially, sent on leave without pay, he was told the US Coast Guard was set to withdraw his license to operate, and his health benefits would also be withdrawn.

Capt Kinneary was obliged to go through an onerous round of alternative tests in an attempt to prove that, while he was unable to provide the necessary urine sample, he did not test positive for drugs.

The regulatory nightmare in which he became trapped led to him losing his licence and position as master.

The legal battle was to prove immensely costly as he battled against the accusation that he had refused to take a random drugs test.

This is a tale of bureaucracy gone mad and an indication of the inflexibility of the system as well as another example of how seafarers can become targets for minor infringements of regulations.

*The Good Lord Hates a Coward by Captain Joseph Kinneary. Published by JK Marine. Price \$24.95*



**Maritime partners: left to right, Peter Smith, Antoine West and Peter Leslie.**



## Trio bring wealth of experience to Holman Fenwick & Willan

**HOLMAN Fenwick & Willan have appointed three new partners.**

They are Peter Smith and Antoine West, who will be based in the commercial group in London, and Peter Leslie, who joins the shipping group in Melbourne.

Mr Smith was formerly

with Manches and his practice mainly focuses on dispute resolution in the water, power, oil and gas, commercial property and specialist engineering sectors.

Mr West was formerly with Charles Russell and specialises in international arbitration, particu-

larly within the insurance, oil and gas and construction and engineering industries.

Mr Leslie joins from Middletons in Melbourne and specialises in seafarers' personal injury claims, dust disease litigation and public liability litigation.

# Law lords send anti-suit case packing to Luxembourg court

Final judgement in long-running *Front Comor* case expected to take considerable amount of time, writes **Sandra Speares**

ANTI-suit injunctions return to the European Court of Justice in Luxembourg after the House of Lords referred the *Front Comor* case to the court for a judgment.

At issue in an appeal heard by the Law Lords was whether a court of a member state could grant an injunction against a person bound by an arbitration agreement to restrain him from starting legal action in breach of the agreement in a court of another member state which had jurisdiction under European Court Regulation 44/2001 to entertain proceedings.

The long-running *Front Comor* case will now return to Luxembourg, although a ruling is not expected for some time.

The case was heard in the House of Lords last week between respondent West Tankers and appellants RAS

Riunione Adriatica and others.

Commenting on the case, barristers at 20 Essex Street, which represented the Italian insurer, said that the effect of two recent decisions of the European Court of Justice, in *Gasser v Misat* and *Turner v Grovit*, "is that injunctions restraining proceedings brought in another member state in breach of an exclusive jurisdiction clause or in bad faith have been outlawed, but whether the same rule applies to proceedings brought to enforce an arbitration clause has been highly controversial."

The judgment has been "eagerly awaited" by the arbitration community. English courts have so far taken the view that injunc-

tions can still be granted, but the European Court of Justice will now have to decide, 20 Essex Street said.

The case dates back to August 2000 when the *Front Comor*, which was owned by West Tankers and chartered to Erg Petrol, collided with a jetty owned by Erg at Syracuse in Sicily.

Erg made a claim to its insurers RAS Riunione Adriatica di Sicurtà and Generali Assicurazioni Generali up to the limit of insurance cover and started arbitration proceedings against West Tankers in London for the excess.

In July 2003, the insurer commenced proceedings against West Tankers before the Tribunale di Siracusa to recover what it had paid Erg under the policies.

Proceedings had also been started in London between West Tankers and the insurers with West Tankers claiming that the dispute, which was the subject of proceedings in Syracuse, arose out of the charterparty and that the insurers, claiming by right of subrogation, were bound by agreement to refer it to arbitration in London.

At first instance Mr Justice Colman held that he was bound by the decision of the Court of Appeal in the *Through Transport* case and granted an anti-suit injunction.

However, according to 20 Essex Street he took the unusual course of certifying that the case was suitable for a 'leap frog' appeal direct to

the House of Lords, commenting that "the incidence of jurisdictional disputes relating to anti-suit injunctions in the Commercial Court is now so prevalent that it is important that a final authoritative ruling should be obtained" either from the House of Lords or the European Court of Justice.

Commenting on the Lords' judgment Ian Fisher, a solicitor at DLA Piper, said that while the Law Lords acknowledged that the answer to the central question of the appeal was not obvious and needed to be referred, they did set out their opinion on the question.

"In the leading speech given by Lord Hoffmann he commented that the general

principles by which the regulation allocates jurisdiction, giving priority to the domicile of the defendant, are unsuited to arbitration.

"In arbitration, the seat of arbitration and choice of law is often chosen by the parties on the basis of such considerations as neutrality and availability of legal services."

Mr Fisher added that Lord Hoffmann had pointed out that the way English courts exercised their jurisdiction to restrain proceedings brought in breach of an arbitration clause could be considered to be one of the benefits of arbitration in England.

Lord Hoffmann quoted Professor Peter Schlosser as "rightly" commenting that if

"other member states wish to attract arbitration business, they might do well to offer similar remedies."

Lord Hoffmann added that the European Union was engaged not only with regulating commerce between different member states but also in competing with the rest of the world.

"If the member states of the European Community are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there is no shortage of other states which will," he said.

New York, Bermuda and Singapore are leading centres for arbitration, he said, and "each of them exercises

the jurisdiction which is challenged in this appeal.

"There seems to me to be no doctrinal necessity or practical advantage which requires the European Community to handicap itself by denying its courts the right to exercise the same jurisdiction."

Mr Fisher said that the House of Lords' overall view was that arbitration should remain excluded from the scope of the regulation.

He added that until the European Court of Justice reaches a decision on the issue, "it remains the case that if a client wants to ensure that any dispute likely to arise in the EU is resolved in London, it should have the agreement in question subject to an arbitration agreement for London arbitration rather than an exclusive jurisdiction clause in favour of the High Court."