The Response of Japanese Maritime Law Association to the Questionnaire of CMI IWG on the Collision Conventions

May 31, 2023

Background Information

Japan ratified the Collision Convention 1910 in 1913 but is not a member of the Collison/Civil Jurisdiction Convention 1952. The Japanese Commercial Code 1899 is to be applied to the cases where the Collision Convention 1910 does not cover. A typical example is the case where all interested parties are Japanese (Article 12(2) of the Collision Convention 1910).

1. Definitions

1.1 Vessel

The 1910 Collision Convention applies to the collision of vessels (Art. 1) but does not feature a definition of a vessel.

Should the revised Convention define "vessel"?

It would be preferable for the revised Convention to define vessels to clarify its scope of application.

If so, should the definition include all floating structures?

At present, JMLA does not have any concrete and consolidated idea regarding the meaning of vessels covered by the revised Convention.

Information on Japanese Law

Japanese law does not define vessels but, generally, it is understood as a floating structure on water irrespective of self-propelled ability. Provisions of the Commercial Code limit its application to the ships used for the sea voyage[1] (Art. 684 of the Commercial Code and Art. 35 of Ships Act). In addition, the boats steered solely or mainly using oars or paddles are excluded from its scope. The exclusion has been justified because such boats are typically small, and there is no need to

[1] The provisions on carriage of goods are applied to fluvial vessels etc. (Article 747).

apply special rules for sea-going ships.

It is unclear whether just floating structures such as barges and buildings on water are also excluded from the application of the collision rules. The problem arises when a sea-going ship collides with a barge solely floating without a tugboat. This case might not be construed as "collision of vessels" under Japanese law.

1.2 Ocean/Inland Navigation Vessels

The 1910 Convention applies to collisions between sea-going vessels and between sea- going vessels and vessels of inland navigation (Art. 1), and thus not to collisions between vessels of inland navigation.

Should the revised Convention apply to any collision between vessels?

It depends on the substance of the revised Convention.

Information on Japanese Law

The Japanese Commercial Code does not cover the collisions between vessels of inland navigation since there is no reason to apply special liability rules such as the short period of time bar.[2] However, the rule may arguably be based on situation unique to Japan is an island country and contains no international rivers and canal ways. In addition, vessels in inland navigation are presumed as relatively small and having a short number of cargos, if any.

1.3 Collision

The 1910 Convention applies to collisions between vessels but does not say what a collision is.

Should the revised Convention define "collision"?

Yes. It is preferable to define collision to clarify its scope of application.

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[2] According to the general principle, the period is three (for property damage) or five years (for personal damage) after the victim knows the damage and the tortfeasor, or twenty years from the time when the accident occurs (Article 724 and 724-2 of the Civil Code).

If so, should it include cases where damage is caused to one vessel by the manoeuvre of another even though there was no physical contact between the two?

Yes. The current convention already implies collisions without physical contact (Article 13). It is preferable that the revised Convention expressly defines it.

Information on Japanese Law

Japanese Commercial Code explicitly covers the above situation (Article 790).

Article 790 Quasi-collision

The preceding two Articles shall apply mutatis mutandis to an accident where a ship gets extremely close to another ship due to an act in navigation or management of the ship or due to the breach of a regulation regarding ships, and the other ship, or persons or goods in the other ship suffer damage.

Should it include vessels engaged in a towing situation?

Yes.

Should it include collisions where both vessels are owned by the same beneficial owner?

Yes. If the vessels caused damage against third parties on board (crew, passengers, or cargo owners), the liability claims should be covered by the Convention irrespective of the identity of owners of each vessel.

2. Scope of Application

2.1 Reference to the Flag

The 1910 Convention applies if all vessels involved fly the flag of Contracting States (Art. 12), in whatever waters the collision occurs (Art. 1).

Should the scope of application of the revised Convention be expanded (i) to the effect that the revised Convention applies, irrespective of the involved vessels' flags, if the collision occurred within a Contracting State's internal waters, coastal sea and/or exclusive economic zone and (ii) to the effect that the revised Convention applies to any collision in any other waters if one or more of the colliding vessels flies the flag of a Contracting State?

As is suggested in (i), the Convention may be revised as defining its scope of application geographically without a reference to vessel's flag if the collision occurred within a Contracting State's territory. However, a careful discussion is required regarding whether it should be extended to the cases where accidents occurred in the exclusive economic zone of a Contracting State.

Most of the members of JMLA consider that the suggestion (ii) is not acceptable since so revised Convention would lead to be applied to vessels flying flags of non-Contracting States and involve those who have not predicted the application of the Convention.

2.2 REIO-Clause

Should the revised Convention include a REIO-Clause (Regional Economic Integration Organisation) which would in particular allow the EU to become a contracting party? This may in particular be relevant if the revised Convention features provisions on international private law (point 5 below), jurisdiction and recognition/enforcement (points 6 and 7 below).

JMLA does not oppose to the inclusion of REIO Clause if it could increase the number of ratifications.

3. Liability

3.1 Fault-Based Liability

The principal underlying decision of the 1910 Convention is that the vessels' liability arising from a collision is fault-based (Art. 2(1), Art. 3 and Art. 4(1)) and that there is no strict liability.

Should fault-based liability be maintained? If not, can you provide your reasoning for abandoning fault-based liability?

Yes. The fault-based liability should be maintained. It is difficult to find circumstances which require or justify the introduction of strict liability. The same applies even to the collision liability arising from autonomous vessels (see, Question 8).

3.2 Fault of the Vessel

The 1910 Convention's liability concept is based on the fault of the vessel. However, the Convention does not identify the persons who must act negligently, but merely refers to "the vessel" being in fault.

Should this concept be maintained in the revised Convention, or should the revised Convention identify who needs to be at fault?

It is difficult to identify a specific person whose fault or negligent act is attributable to the vessel. It is the matter of fact accessed on case-by-case basis and the matter of applicable law of torts.

3.3 Title to Sue

The 1910 Convention is silent as to who is entitled to bring an action against the liable "vessel".

Should the revised Convention identify which parties (registered shipowners, bareboat charterers, etc.) may bring suit against the liable vessel?

Yes. It is unreasonable to reject any tort claims from the victims other than the listed parties. The issue of title to sue should be left to applicable law.

3.4 Crew, Pilot etc. Channelling of Negligence

The 1910 Convention does not preclude entities other than the shipowners being liable for collision damage.

Should this concept to be maintained in the revised Convention or should liability be channelled solely to the owner of the liable vessel?

There are no reasonable grounds to introduce the channeling of liability.

3.5 Pro Rata versus Joint Liability

The 1910 Convention liability system provides for joint liability of the involved vessels in relation to third parties' personal injury claims (Art. 4 (3)). A vessel that settles the full amount of the claim may recover from the other vessel in proportion to its share of liability (Art. 4 (3)).

The 1910 Convention does not apply to damage caused to the property of third parties *not* on board one of the vessels involved. For example, a collision leading to damage to a bridge. It is to be presumed that national law would apply to any claim for such damage.

However, in respect of claims to property damage on board one of the colliding vessels, the 1910 Convention provides for a pro-rata liability in proportion to the degree of fault of the vessels involved (Art. 4 (1) and (2)). This becomes relevant in cases where two or more than two vessels are involved in the collision and one vessel seeks to recover from one or more of the other vessels, or where there is damage to property, in particular cargo, and the property owner claims from the two (or more) vessels involved.

Should the joint liability for *personal injury* claims of all involved vessels found to be at fault be explicitly extended to liability for third-party *property* damage in the revised convention? Even if not on board one of the colliding vessels? If so, what justifies your reasoning?

The joint liability should be introduced with respect to the liability for third party property damage. This is in accordance with the general principle of current tort law.

Information on Japanese Law

Japanese law already applies the joint liability irrespective of whether the third party was on board or not. The result is achieved through the application of general tort law (Article 719 (1) of Civil Code (Liability of Joint Tortfeasors)).

3.6 **Defects in the Vessel**

Under the 1910 Convention, the vessel owner will not be liable if the collision was caused by some defect in the vessel which the owner, by applying due diligence in all respects, was unable to detect.

Should there be an exception to the effect that the vessel should be strictly liable for such defects irrespective of fault?

If so, should the revised Convention then define "defects", for which no fault is required to lead to liability?

It is not necessary to introduce a special liability caused by the defect of

vessels. Courts would usually find shipowner's fault if the vessel contains a defect which has caused the collision and impose liability on the shipowner unless it excises due diligence.

3.7 Legal Presumptions

Art. 6 (2) of the 1910 Convention provides that legal presumptions relating to fault are not applicable when it comes to determining liability under the Convention.

Should the revised Convention expressly adopt some internationally recognised presumptions, and if so, what type of presumption?

It is not necessary to introduce any legal presumption.

3.8 Recoverable Damages

The 1910 Convention does not address what damages are recoverable. The Lisbon Rules 1987, issued by CMI, (https://comitemaritime.org/work/collision/), include detailed principles as to the recoverable damages and their assessment in typical collision cases.

Should the revised Convention define recoverable damages?
If so, should the Lisbon Rules 1987 on recoverable damages in collision cases be made part of the revised Convention?

It is preferable to refer to what damages are recoverable. However, it would be excessive to include the whole particulars listed by the Lisbon Rules which are too specific and detailed for the text of the Convention.

4. Mandatory Insurance

A number of international liability conventions, including oil pollution conventions, provide that the vessel owner must maintain insurance which covers claims under the respective conventions. These conventions often have a public policy aim and may not be an appropriate model for the 1910 Collision Convention. In Europe, EU-Directive 2009/20 provides that the vessel owner must maintain insurance that covers claims up to the limitation amounts of the 1996 LLMC relevant for the vessel. The Directive does not provide for direct action against the vessel's liability insurers.

Should the revised Convention provide for mandatory insurance? If so, what justifies this change in your view?

No. It is excessive for the Convention to impose the duty to procure insurance to cover damages inflicted by third parties on board. These damages are already expected to be insured through other conventions like the Athens Convention and generally insured by P&I insurances, general cargo insurances, and travel insurances.

A mandatory insurance required by the EU-Directive 2009/20 is to secure the compensation for the damages to be broadly limited through the application of LLMC irrespective of whether the claimant was on board or not. The same kind of mandatory insurance system, if reasonable and necessary, should be introduced through the revision of LLMC, not through the Collision Convention.

4.1 **Direct Actions and Defences**

If mandatory collision insurance is to be introduced, should the revised Convention provide for direct actions by the damaged parties against the liability insurers of the liable vessel? If so, what justifies this change in your view?

If so, how would this be achieved given the usual sharing of liability cover between the vessel's hull and machinery and P&I insurers?

If it were to be achieved, should the insurers benefit from any defence they might have had vis-à-vis their insured related to their policy? Would this include the bankruptcy or winding up of the vessel owner and pay-to-be-paid clauses?

As explained above (4), JMLA does not support the introduction of mandatory insurance into the Collision Convention.

5. **International Private Law**

The 1910 Convention provides for a unified liability regime covering claims arising from the collision. Any further issues, *e.g.*, the recoverable damages, the identity of the liable parties, title to sue etc., are left to the law otherwise applicable, determined by international private law principles. These principles normally consider each claim separately, to the effect that a claim by a first vessel against a second may be decided on different rules of law than those applicable in the claim by the second vessel against the first, even though both claims concern the same collision.

Should a revised Convention include international private law rules on the law otherwise applicable to all claims, seeking to identify one law that is relevant? If so, should the revised Convention adopt the choice of law provisions of articles 4 and 5 of CMI's 1977

Draft International Convention for the Unification of certain rules concerning civil jurisdiction, choice of law, and recognition and enforcement of judgements in matters of collision (the "CMI 1977 Rio Draft Convention"), published in the CMI Yearbook 1977 Part I, p. 22, https://comitemaritime.org/publications-documents/cmi-yearbook/ ?

Most of the members of JMLA do not recognize the necessity for the international private law provisions.

6. **Jurisdiction**

The 1910 Convention does not include any provisions as to jurisdiction.

Should a revised Convention provide for jurisdiction?

If so, should the jurisdiction be based on the International Convention on certain rules concerning civil jurisdiction in matters of collision, 1952 or on the CMI 1977 Rio Draft Convention?

The CMI 1977 Rio Draft Convention allowed for jurisdiction:

a) where the defendant has his habitual residence or domicile, or principal place of business;
b) in the internal waters or territorial sea of which the collision occurred;
c) where a vessel involved in the collision (other than the plaintiff's own vessel) or a vessel under the same ownership lawfully subject to arrest, has been arrested or security has been provided to avoid arrest on account of the collision;
d) where the defendant has property subject to attachment under the law of that State and such property has been attached or security has been provided to avoid attachment on account of the collision; or
e) where a limitation fund has been properly constituted by the defendant in accordance with the law of that State on account of the collision.

Most of the members of JMLA do not recognize the necessity for the jurisdiction provisions.

7. **Recognition and Enforcement**

Neither the 1910 nor the 1952 Convention include regulations on the recognition and enforcement of judgments in collision matters. The CMI 1977 Rio Draft Convention provided that State Parties would recognize judgments from other State Parties.

Should such provisions be adopted in the revised Convention, *e.g.*, to the effect that judgments in collision matters rendered by the court of one Contracting State may be enforced in another Contracting State?

Most of the members of JMLA do not recognize the necessity for the recognition and enforcement provisions.

8. **Autonomous and Unmanned Ships**

Maritime Automated Surface Ships are coming. It is not yet clear whether this will require amendments to several conventions or the creation of a single MASS convention.

Should the revised Convention stipulate that it applies to any vessel whether manned or autonomous or is it too early to consider including autonomous vessels?

If autonomous vessels should be included, should the revised Convention include specific rules for collisions involving autonomous ships?

Currently, it is unlikely that the autonomous ships would bring a dramatical change to the collision liability regime in the near future.

However, given the ongoing discussions regarding autonomous ships in the International Maritime Organization and other international bodies which might affect the future regime for the collisions in which autonomous ships are involved, it would be important that the revised Convention provides a safeguard not to hinder the application of this special regime.

9. Conclusions

In light of the above questions, do the revisions to the 1910 Collision Convention which your association supports justify the amendment of the Convention at all, or does the risk of creating a new convention which might not be as universally adopted as the 1910 Convention lead your association to the overall conclusion that the Convention should remain as it is at present?

As was indicated in the replies to the above questions, there are several provisions which need to be amended. However, JMLA is not convinced that they sufficiently justify the revision of the 1910 Collision Convention which has many contracting states and has been globally accepted.

Nevertheless, JMLA does not oppose to the further examination by CMI as to the possibility of the 1910 Collision Convention's amendment taking into account of the impact to the maritime practice and reaction from the maritime industry.

Information on Japanese Law

There are differences between the provisions of the Collision Convention 1910 and of the Japanese Commercial Code. The Japanese Commercial Code was revised in 2018 introducing the rules that partly align with those of the current Collision Convention 1910. This alignment had yet to be accomplished until 2018, kept untouched since 1899. The old rules provided a one-year time bar (the pre-revised Article 798(1) of the Commercial Code) but omitted when that period would commence.[3] The revised Commercial Code introduces the two-year time bar and clarifies when this two-year period will commence (at the time when the accident occurs) by following Article 7 of the Collison Convention 1910 (the revised Article 789 of the Commercial Code).

The point is that, however, the above rule will only be applied to the property damage caused by a collision of vessels, unlike the Convention. The compensation claim for the loss of life and personal injuries caused by the same collision will be barred under the general tort law. This means that the period is extended to five years and the starting point of it depends on the actual knowledge of the victim (Articles 724 and 724-2 of the Japanese Civil Code). This intentional deviation from the Convention is based on the thought that whether and how the personal damage should be compensated must be determined consistently inside Japanese jurisdiction.

The new Commercial Code does not mention how the tortfeasor (generally, each shipowner of colliding vessels) shall be liable against victims for both property damage and the loss of personal life and injuries. Article 798 of the Commercial Code merely introduces the first paragraph of Article 4 of the Convention while it does not follow the second and third paragraphs. Thus, the question of whether the shipowners shall compensate the damages jointly or on pro rata basis will be determined under the general tort law. In this respect, Article 719 of the Japanese Civil Code provides joint liability between joint tortfeasors.

However, JMLA is not convinced these differences sufficiently justify the revision.

[3] Thus, the Supreme Court of Japan inevitably decided that this period would start at the time when the victim identified the damage and the tortfeasor according to the general tort law (Supreme Court Decision, November 21, 2005, *Minshu* Vol. 59, No. 9, p. 2558).