

GUIDELINES

In respect of Procedural Rules Relating to Limitation of Liability in Maritime Law adopted at the 39th Conference of the CMI, held in Athens in October 2008

A. INTRODUCTION

1. In accordance with its Constitution, the purpose of Comité Maritime International is “*to contribute by all appropriate means and activities to the unification of maritime law in all its aspects*”.

To this end the CMI shall (a) “*promote the establishment of national associations of maritime law*” and (b) “*co-operate with other international organizations*”. The CMI has promoted the unification of maritime law very successfully in the past by preparing a number of important conventions. Now, that treaty making has passed to intergovernmental organizations, especially within the system of the United Nations, the CMI continues its activities in accordance with its Constitution by co-operating with international organizations and in particular with the IMO. More specifically, it carries out surveys of national legislation through the “*questionnaires*” which the CMI sends to the National Maritime Law Associations and prepares reports and draft instruments that are submitted to the appropriate international organizations.

In addition, the CMI continues its autonomous activity for the unification for maritime law in the area of implementation of international conventions for the purpose of contributing to a more harmonized application of the conventions. In this connection, the CMI carries out surveys (through the questionnaires) of national legislations to establish how the international conventions on maritime law have been implemented and applied by various countries and also collects decisions of national courts concerning the interpretation and application of these conventions. These court decisions in summary are exhibited on the web site of the CMI and they may also contribute to a more harmonized understanding and a hopefully more harmonized interpretation and application of the maritime conventions. In the context of this activity the CMI has noted that although limitation of liability in maritime law is regulated by International Conventions, the procedural 0020 rules of various states relating to limitation have similarities but also differences which justify an effort of harmonization.

2. For this reason the Executive Council of the CMI decided in 2004 to prepare and distribute to National Associations a Questionnaire with the view to finding out which rules of procedure had been enacted in States parties to the Convention on Limitation of Maritime Claims (LLMC) and to the Conventions on Civil Liability for Oil Pollution Damage 1969 and 1992(CLC 1969-1992) in order to implement them. The Questionnaire was prepared by Prof. F. Berlingieri (Italy) with contribution from Dr. Gr. Timagenis (Greece).
3. After responses had been received from a number of National Associations, a synopsis (Digest) was prepared by Prof. F. Berlingieri as well as an analysis of such responses. These documents were posted on the CMI website.

4. A report on the work that had been done was presented by Gr. Timagenis, also on behalf of Fr. Berlingieri, at the Colloquium held in Cape Town in February 2006.
5. All the above documents were published in the CMI Yearbook 2005-2006.
6. At its meeting (in November 2006), held by means of electronic communications, the Executive Council of the CMI decided to establish an International Sub-Committee to cover the three Conventions relating to limitation of liability, namely LLMC, CLC and the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention), and to work towards guidelines rather than an International Convention.
7. The first meeting of the International Sub-Committee was held in Dubrovnik during the Symposium jointly organised by the CMI and the Croatian Maritime Law Association. The meeting took place on Saturday 12th May 2007 under the chairmanship of Prof. Fr. Berlingieri with Dr. Gr. Timagenis as Co-chairman and Rapporteur.
8. The second meeting of the International Sub-Committee was held in Paris (13-14 September 2007) under the chairmanship of Dr. Gr. Timagenis. The results of the work of that meeting are reflected in this document.
9. The Sub-Committee met further in the context of the 39th CMI Conference in Athens (12 – 17 October 2008) under the Chairmanship of Dr. Gr. Timagenis (Greece) with Helen Noble (Ireland) as Rapporteur and negotiated the Guidelines further. Finally, the Plenary Session of the Conference at its meeting in Athens on 17 October 2008 adopted the Guidelines which follow.
10. In addition to national legislation reviewed through successive questionnaires, the main Conventions relating to limitation of liability which provided the background for the preparation of the Guidelines, are:
 - (a) The “*International Convention on Limitation of Liability for Maritime Claims London 1976*” (LLMC);
 - (b) the “*International Convention on Civil Liability for Oil Pollution Damage*” 1969 and that Convention as amended by the 1992 Protocol thereto (CLC 1969 and 1992); and
 - (c) the “*International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious substance by Sea*” 1996 (HNS Convention).
11. The following clarifications are important for the purpose and the role of the Guidelines:
 - (a) The specific conventions referred to in paragraph 10 above and in the Introductory Note of each Guideline are mentioned for reference purposes only and as a background for a better understanding of the relevant Guideline.
 - (b) The Guidelines are general so as to be applicable to procedures under any of the above conventions or any other past or future convention concerning the limitation of liability, or under any national legislation, also in respect of states which have not ratified any convention relating to limitation of liability.

- (c) Consequently the Guidelines may not apply to all the conventions in the same way or even they may not be applicable at all. For this reason, each guideline should be read as including at its beginning a sentence to the effect that it is “subject to and/or without prejudice to any specific provisions in any applicable international conventions”. In addition, in the Introductory Note and the Commentary relating to each Guideline (and in few cases in the Guidelines themselves) reference is made to the relation of such Guideline to certain conventions.
- (d) The Guidelines do not concern limitation of liability per package or unit or per passenger, but only to global limitation of liability especially through establishment of a limitation fund as understood in the conventions referred to in paragraph 10 above.
- (e) The Guidelines do not refer to international funds like the ones established under the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (1992 Fund Convention) or under the HNS Convention.
- (f) The Guidelines do not intend to impose the solutions suggested, although these solutions are the preferred ones. Other solutions to each issue are possible and the Guidelines mainly intend to raise the issues and invite States to provide solutions in their national legislation rather than overlook the issue.
- (g) Certain of the Guidelines seem to state the obvious. However, the discussions in the course of the preparation of the Guidelines have shown that the recommendations included even in these Guidelines are not necessarily obvious. Further what seems to be obvious for States which have ratified maritime conventions relating to limitation of liability, is not necessarily obvious for States which have not ratified these conventions but have dealt with the issues in their national legislation or for states which may ratify the conventions subsequently. Consequently these Guidelines remind such States of the issues which should be regulated by their national legislation.

GUIDELINES

In respect of Procedural Rules Relating to Limitation of Liability in Maritime Law

The Comité Maritime International (CMI):

1. bearing in mind its purpose, in accordance with its Constitution, “to contribute by all appropriate means and activities to the unification of maritime law in all its aspects”,
2. noting that international conventions in connection with limitation of liability have contributed to the unification of maritime law but there is considerable diversity procedurally in the way they are implemented and applied in various States,
3. noting that a considerable number of States have not ratified any relevant convention and that they apply national law, which is not based upon any convention, relating to the limitation of liability in maritime law.

4. believing that it may contribute to the harmonization of the procedures relating to the limitation of liability in maritime law by preparing procedural guidelines,

adopted at its 39th Conference, held in Athens in October 2008, the following Guidelines in respect of Procedural Rules relating to Limitation of Liability in Maritime Law.

1. RELATIONSHIP OF GUIDELINES TO MARITIME CONVENTIONS

These Guidelines are subject to and / or without prejudice to any specific provisions of any international convention.

2. INTERPRETATION

For the purposes of these Guidelines:

“Bunker Convention” means the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

“Claim(s)” means the claims subject to the Limitation of Liability and/or, where the context so requires, claims submitted for satisfaction out of the distribution of the Fund and “Claimant” is to be construed accordingly.

“CLC” means the International Convention on Civil Liability for Oil Pollution Damage 1969 and the International Convention on Civil Liability for Oil Pollution Damage 1992 as applicable.

“Fund” means the fund established, for the purpose of Limitation of Liability, by the provision of cash, bank guarantee or other acceptable guarantee, and out of which claims subject to limitation may be satisfied.

“HNS Convention” means the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious substance by Sea 1996.

“Limitation of Liability” means the limitation of liability in maritime law, through the possible establishment of a fund, and does not include limitation per package or unit or per passenger nor does it relate to international compensation funds established under international conventions.

“Limitation Proceedings” means the proceedings or procedures for the Limitation of Liability including, but not limited to, the establishment of the Fund, the submission and proof of Claims, decisions as to whether a Claim is subject to limitation and the distribution of the Fund.

“Person liable” means any person seeking to limit his liability.

3. JURISDICTION

1. Introductory Note

- (a) All Conventions relating to limitation of liability contain provisions on the jurisdiction of the court where the limitation may be sought and the limitation Fund may be established and administered (LLMC Art.11(1) possibly in combination with Art.13(2); CLC Article V(3) in combination with Article IX; HNS Art.9(3) in combination with Art.38(1), (2) and (3)). In fact, the CLC and the HNS Convention require expressly Contracting States to ensure that their courts possess the necessary jurisdiction to entertain actions for compensation.
- (b) However, these provisions only govern the distribution of jurisdiction between States 1 but do not regulate the jurisdiction of the courts within a State. For this reason in some cases situations have arisen where there are

1 Only the LLMC in 13(2) (a)(b) and (c) but not (d) refers to “port” rather than state. However, this should be also understood as “the state where the port...”

uncertainties or even conflicts as regards the jurisdiction of the national courts of a State on limitation issues and in this way difficulties and delays in the satisfaction of Claimants may arise.

- (c) For this reason it is advisable for any State –whether or not a party to any convention relating to limitation of liability – to regulate the internal jurisdiction of its courts regarding limitation of liability and a Guideline to this effect was adopted.

2. Guideline

When the courts of a State have jurisdiction in relation to Limitation Proceedings, whether pursuant to an international convention or pursuant to national law, it is preferable that one court should have jurisdiction to deal with Limitation Proceedings. The court(s) having such jurisdiction should have the capacity to deal with complex multiparty cases. If more than one court has jurisdiction, their respective jurisdiction should be clearly delineated to avoid conflicts, and where Limitation Proceedings start in one of these courts, all related limitation proceedings should be referred to that court.

3. Commentary

- (a) *This Guideline relates to the internal jurisdiction of the courts of one State. It has been observed e.g. in pollution cases that frequently more than one local court have jurisdiction for dealing with the limitation of liability and the establishment of the Fund and delays are caused in the limitation proceedings as a result of jurisdictional conflicts among the courts of this particular State.*
- (b) *For this reason the Guideline encourages States to specify preferably one court to deal with limitation of liability and, if more than one court have jurisdiction, to delineate clearly the jurisdiction of these courts to avoid conflicts and to concentrate all the Limitation Proceedings in one court (principle of concentration).*

- (c) *The Guideline does not deal with the distribution of jurisdiction between States, because this is regulated by the conventions themselves, although it was recognized that the concentration principle would be desirable at the international level as well.*
- (d) *The Guideline finally does not deal with the more complex issue whether the claims pending in various courts (in the same or different countries) should be concentrated to one court. Although such concentration was thought to be desirable it was recognized that practically it is often very difficult to transfer pending proceedings from one court to another.*

4. LIMITATION OF LIABILITY WITHOUT THE CONSTITUTION OF A FUND

1. Introductory Note

- (a) *Under certain Conventions relating to limitation of liability the establishment of the Fund is a condition for the limitation of liability (Art.V(3) of CLC and Art.9(3) of the HNS). The LLMC provides for the possibility of limitation without establishing a Fund, provided that States may provide otherwise in their national legislation (Art.10 LLMC). From the replies to the CMI questionnaire it appears that some countries have made the establishment of a Fund a condition for limitation under the LLMC while others have not.*
- (b) *Practically, limitation without establishment of the Fund is meaningful mainly in cases where there is only one Claimant or where more than one Claimant bring their claims against the person liable before the same court in the same set of proceedings, in which case the right of limitation may be invoked as a defence. In this case, the court will issue a judgment for the full amount of the claim, which however will be enforceable only up to the amount of limitation but may be enforced on any assets of the defendant (person liable). For this reason the judgment should specify the amount of limitation applicable to each Claim. If the person liable establishes the Fund after the judgment, the Claimants will participate in the distribution of the Fund for their respective shares. If other - additional- claimants appear at that stage, each of the Claimants will participate for the full amount of his respective claim which will be reduced proportionately.*
- (c) *The possibility of the Fund being established after the judgment is the reason why a judgment for the full amount is proposed. If the judgment is not for the full amount but for the limited amount and a Fund is established after the judgment, the question will arise for what amount the claim will participate in the distribution of the Fund.*
- (d) *In the case where limitation is effected without establishment of the Fund, Art.12(1) of the LLMC (and the reference to it in Article 10(2)) applies where more than one Claimant participate in the same set of proceedings against the person liable.*
- (e) *If the person liable wants to limit its liability vis-à-vis more than one claimant in more than one court, then the establishment of the Fund seems to be inevitable.*
- (f) *For these reasons a Guideline was adopted covering the above issues (i.e. limitation without establishing a Fund and the consequences of such limitation).*

2. Guideline

- (a) **If a person liable may limit his liability without the establishment of a Fund, the court should:**
 - (i) **judge each Claim for its full proven amount (provided that all the requirements for the adjudication of the Claim have been satisfied) and,**
 - (ii) **declare the right of the person liable to limit his liability and, for the purpose of enforcement, the amount of limitation applicable to the respective Claim.**
- (b) **If Limitation of Liability is invoked without the establishment of a Fund, assets arrested or other security provided should not be released but the security may be reduced to the amount of limitation judged applicable to all respective Claims.**

3. Commentary

This Guideline does not apply of course to procedures under conventions (like the CLC and the HNS Convention) or to national legislation which provide that the establishment of the Fund is a condition for the limitation of liability.

5. TIME LIMIT FOR STARTING LIMITATION PROCEEDINGS

1. Introductory Note

- (a) A question which arises in connection with Limitation of Liability is whether there is any time limit within which the right of limitation should be invoked and the Fund, where required, established in order to have the effects of limitation, at least provisionally.
- (b) None of the conventions relating to limitation of liability includes any provision on this point. From the replies to the CMI questionnaire it seems that none of the countries whose National Associations replied, has set a time limit in its national legislation for the commencement of Limitation Proceedings. Certain countries provide for a time limit for the establishment of the Fund or the submission of the bank guarantee, before or after the court decision allowing Limitation (e.g. Italy requires the guarantee to be deposited together with the request for limitation). In some other countries the Fund should be established or the guarantee deposited within a time limit -fixed by the law or by the court- after the decision for Limitation is issued).
- (c) However, Limitation of Liability by its nature is subject to certain time limits. Thus:
 - (i) Where it may be raised as a defence in pending proceedings (without establishment of a Fund), the latest point in time when limitation may be invoked is the latest time when defences may be submitted (or amendments presented) to the court where the proceedings are pending in accordance with its rules of procedure.
 - (ii) Where limitation is sought to be achieved by establishment of the Fund through separate independent proceedings, then it is also inevitable that the right of

limitation cannot be invoked against a Claim after its satisfaction through enforcement on certain assets of the defendant.

- (iii) Practically otherwise the need for limitation to be invoked may arise when the person liable wishes to prevent arrest of its assets or obtain release of arrested assets.
- (d) Consequently, a question which arises is whether States should establish in their national legislation any time limit (starting from the incident or the damage) within which the (independent) Limitation Proceedings should be initiated.
- (e) Taking into account that:
 - (i) the Limitation of Liability is a right and not an obligation; and
 - (ii) the Limitation of Liability does not amount to admission of the claims, it is suggested that no time limit for invoking the right of Limitation should be set.
- (f) For these reasons a Guideline relating to certain time limits in respect of limitation seems to be appropriate.

2. Guideline

States should in their national law take into account that:

- (a) Without prejudice (i) to the right to start Limitation Proceedings in respect of other Claims and (ii) to any rules concerning subrogation, Limitation of Liability may not be invoked against a Claim after its satisfaction through enforcement or otherwise.**
- (b) Limitation may be invoked in pending proceedings up to the time allowed by the procedural rules of the court where the proceedings are pending.**
- (c) Subject to paragraph (a) above, no other time limit seems to be necessary for the commencement of Limitation Proceedings.**
- (d) Where the prior approval of a court is required for the establishment of the Fund, it is advisable that States provide in their national law a time limit for such establishment or that such a time limit be fixed by the court after such approval has been given.**

3. Commentary

- (a) Although paragraph (a) of this Guideline seems to state the obvious, it was thought useful to be retained to ensure that in case of limitation of liability no refund may be claimed on the basis of undue enrichment or restitution. This Guideline, however, does not prevent the party liable to limit its liability in respect of other claims nor the party which paid to participate in the (subsequent) distribution of the limitation Fund on the basis of the rules concerning subrogation.*

- (b) *In connection with paragraph (c) one participant in the I-SC September 2007 meeting in Paris was of the view that some time limit should be set to avoid unfair surprise of the Claimant at the enforcement stage. The majority, however, was of the view that this is not allowed by the conventions and that it was not necessary or advisable.*
- (c) *In the context of the discussion of paragraph (d) at the Paris meeting) a distinction was drawn between the establishment of the Fund and the determination of the right to limit liability. In some States the Fund may be established in one court and the right of limitation be determined by another and as a result this distinction has practical consequences.*

6. PROCEDURE FOR THE ESTABLISHMENT OF THE FUND AND EVIDENCE

1. Introductory Note

- (a) The procedure for the Limitation of Liability and the establishment of the Fund is left by all the conventions relating to limitation of liability to the national legislation.
- (b) As it appears from the replies to the CMI questionnaire certain countries allow the person liable to establish the Fund (and limit its liability) immediately (subject only to a preliminary judicial review about quantum of the Fund with or without the issue of an order or other decision of the court). Claimants do not participate in this procedure but they may challenge the right of the person liable to limit its liability either by starting proceedings before the court where the Fund is established or by challenging the right to limit at the time when the person liable tries to obtain the release from arrest of other assets.
- (c) In certain other countries the approval of the court is required prior to the establishment of the Fund. From the replies it is not clear whether Claimants may participate in these proceedings (at least at this early stage), whether they may object to limitation (at this stage) and whether the limitation is delayed until such challenge is resolved by the court.
- (d) The procedure to be followed for the establishment of the Fund and for deciding whether the liable person is entitled to limitation is a matter which may be very closely related to the overall judicial system and procedure of each State, and it may be difficult to make any recommendation. However, it is clear that the procedure for the establishment of the Fund should be a quick procedure. This derives from the fact that the purpose of limitation is not only to limit the liability of the party liable but also to allow other assets (e.g. vessels) to be released from arrest.
- (e) For the same reason (i.e. release of other assets) it is important for national legislations to specify clearly the exact moment when the Fund is deemed to be established and/or the provisional consequences of limitation (i.e. release of other assets) become effective.
- (f) Finally, it is important to specify in the national legislation how (i.e. through what procedure and on the basis of what documents) the State where the limitation Fund is established can certify the effectiveness of the establishment of the Fund, so as to enable other States to recognize such establishment, e.g. a State where vessels should be released from arrest (Article X of CLC and Article 40 of the HNS Convention refer to another issue, i.e. recognition of a judgment against a person liable in another State). In

this connection it should be noted that in some countries the Fund is established without any court decision, while in others the court order or other decision allowing the establishment of the Fund is issued ex parte, i.e. without the participation of the Claimants. In addition, in this latter group of countries the order or other decision is issued prior to the establishment of the Fund and does not prove the establishment of the Fund as such. Consequently, the recognition of the establishment of the Fund and of its consequences (i.e. the provisional effects of limitation such as the right to the release of vessels etc.) is not self-explanatory, since most national legislations, bilateral treaties or multilateral conventions for the recognition of foreign judgments refer to court decisions issued with the participation of all parties (or at least requiring them to have been properly summoned). For this reason special rules should be established for the recognition of the establishment of the Fund and its effects.

This procedure has two aspects, one from the point of view of the State where the Fund was established (i.e. sufficient proof of its establishment) and another from the point of view of other States which may be called upon to recognize the establishment of the Fund and its effects.

For this reason a Guideline was adopted on the issues referred to above (i.e. expeditious procedure, time of effects of the establishment of the Fund, evidence). This Guideline is addressed to the State where the Fund was established.

2. Guideline

States should in their national law:

- (a) provide an expeditious procedure for the establishment of the Fund.**
- (b) specify when exactly the Fund is deemed to be established.**
- (c) specify that the right of Limitation of Liability becomes provisionally effective at the time of the establishment of the Fund.**
- (d) specify the evidence that proves the Fund is established.**
- (e) provide the person liable with appropriate confirmation of the establishment of the Fund, preferably through a court decision, thus facilitating the recognition of such establishment in other States.**

3. Commentary

- (a) In the course of the discussions at the meeting of the I-SC in Paris it was clarified that that the establishment of the Limitation Fund has provisional but not final effects on the right of Limitation. It may result in release of vessels or other security; however, the Limitation of Liability becomes (finally) effective when objections to Limitation have been finally dismissed by the Court or the time limit for raising such objection has lapsed. For this reason this Guideline refers to the establishment of the Fund and its effects or provisional effects of limitation, but it has been drafted in such a way so as to avoid confusion with the (final) effectiveness of limitation.*

- (b) *In this connection certain participants referred to stages of the Limitation Proceedings which include:*
- (i) *the establishment of the Fund;*
 - (ii) *the challenge of the right of limitation by Claimants;*
 - (iii) *the registration and proof of the claims entitled to participate in the distribution of the Fund; and*
 - (iv) *the distribution of the Fund.*
- (c) *At that meeting of the I-SC the issue was raised if the effective establishment of the Fund should depend on whether notice has been given to the Claimants (at least to those who are known). Following discussions the consensus seemed to be that no such notice should be required for such effectiveness . However, in practice, if the person liable wishes to invoke the right of Limitation vis-à-vis a particular Claimant, either as a defence or for the purpose of obtaining the release of other attached assets (such as arrested vessels) or other security (such as a bank guarantee), the request of the person liable to be entitled to limit its liability will inevitably have to be notified to the respective Claimant.*

7. CHALLENGING THE RIGHT OF LIMITATION

1. Introductory Note

- (a) Under all the conventions relating to limitation of liability the person liable may not limit its liability in respect of some or all the claims, either because certain claims do not fall within or are exempted from the scope of application of the relevant Convention relating to limitation of liability (e.g. Arts 2 and 3 of LLMC, Arts I (definition of Ship/ Oil) and II of CLC and Arts 1 (definitions) 3 and 4 of HNS Convention) or because the party liable is not among the persons entitled to limit their liability or because that party may not be entitled to limit its liability at all as a result of its conduct (Art.4, LLMC Art. V(2) CLC and Art.9(2)HNS Convention).
- (b) The circumstances barring limitation is a substantive issue governed by the respective substantive provisions of the conventions relating to limitation of liability or of the national laws. However, there are certain related procedural issues concerning the forum, procedure and time to challenge the right of Limitation.
- (c) Thus a Claimant may wish to challenge the right of Limitation in two situations:
 - (i) the first is before the court where a vessel is arrested and its release is sought on the basis of Limitation of Liability following the establishment of the Fund (in this case the challenge of limitation is made only for the purpose of maintaining the arrest); and
 - (ii) the second is before the court where the Fund was established and/or the procedure of verification of claims for distribution is conducted. This is the forum where the

Limitation will be challenged by those Claimants who had not arrested a vessel but also by those who had arrested the vessel (whether the vessel was released or not).

In either situation (and especially in the second one) a procedural opportunity should be given to those Claimants to challenge the right of Limitation and a Guideline to this effect was adopted.

- (d) A related question is whether or not the procedure (or the proceedings) for challenging the right of Limitation should delay the effects of the establishment of the Fund. A reasonable reply seems to be “no” (because otherwise one of the major purposes of limitation, i.e. release of other assets from arrest, is defeated), unless there is no reasonable basis for the limitation of liability. For this reason a Guideline was adopted in order to strike a balance between the interests of all parties concerned (i.e. the interest of Claimants to challenge right of Limitation and the interest of the person liable to have other assets released).
- (e) Finally, if the limitation is originally allowed and all other assets released but subsequently (after some months or years) it is finally adjudicated that the person liable was not entitled to limit its liability, the first question is what happens to the Fund, taking into account that the Claimants have lost their security (and possibly even the assets of the person liable for enforcement), i.e. whether a procedure should exist for the orderly liquidation of the Fund or Claimants may have to resort to litigation (and if so under what rules). For this issue a separate Guideline was adopted subsequently in that regard (under 9). The present Guideline tries to address this issue preemptively.

2. Guideline

- (a) **States should in their national law make provision for the entitlement of Claimants to challenge the right of the person liable to limit his liability before the Court where the Fund is established or Limitation Proceedings are pending.**
- (b) **The procedure for challenging the right of limitation referred to in paragraph (a) above should not automatically stay or cause delay to the establishment of the Fund and its effects.**
- (c) **Without prejudice to the final determination of whether or not the right to limit liability exists by the court referred to in paragraph (a) above, and until such determination is made or recognized in another State where security is sought or security has been obtained by arrest of vessels or attachment of other assets or otherwise, States should consider requirements and procedures for the granting and/or the release and/or retention of such security.**

3. Commentary

- (a) *One participant in the I-SC Paris meeting drew the attention of the I-SC to the fact that while under Article 13.1 of the LLMC the (provisional) effects of Limitation arise “where a limitation fund has been constituted”, under Article VI of CLC and Article 10 of the HNS Conventions there are additional words stating that the effects arise where the party liable has constituted the fund “and is entitled to limit his liability”. As a result, in the view of this participant it is doubtful whether paragraph (b) of the Guideline is*

applicable to the CLC and the HNS Convention. Another participant was of the view that the same sentence was implied in the LLMC and that in any event the procedural issue, i.e. what happens to the effects of the establishment of the Fund and the vessels arrested or other security provided while objections are pending, was an issue which had to be faced. The I-SC did not discuss the issue extensively and there was no need to take a position on this interpretation issue, bearing in mind that the Guidelines are general and without prejudice to the provisions of specific international conventions and their interpretation.

- (b) *Paragraphs (b) and (c) deal with the possibility of a provisional stay of the effects of Limitation where the Claimants challenge the right of the person liable to limit its liability and the possible legal consequences during the period when the limitation is challenged (e.g. where a fund has been established and a Claimant challenges the right of limitation, should a vessel arrested be released or not?) This Guideline suggests that States should include in their national legislation procedures for the granting and / or the release and / or retention of such security during such period.*

8. CONSEQUENCES OF LIMITATION

1. Introductory Note

- (a) The consequences of the Limitation of Liability is a substantive issue regulated by the conventions relating to limitation of liability (Art.13 LLMC, Art.VI CLC and Art.10 HNS Convention).
- (b) However, there are certain procedural aspects of the consequences of Limitation which should be regulated by national legislation. Such issues are:
- (i) The recognition of the establishment of a Limitation Fund in another State; and
- (ii) The procedure for the speedy release of assets (e.g. vessel) arrested. For this reason a Guideline was adopted dealing with these issues.

2. Guideline

States should:

- (a) **Provide in their national law procedures for the recognition or non recognition of the effects of the establishment of the Fund in another State;**
- and**
- (b) **In the event of recognition, provide procedures for the release of attached assets, following the establishment of the Fund.**

3. Commentary

- (a) *One participant in the Paris meeting pointed out that in his country the establishment of the Fund is compulsory for the Limitation of Liability and as a result it is also a requirement for the recognition of the limitation effected in another State.*

- (b) *As mentioned above, the establishment of the Fund is inevitable in the context of the CLC and the HNS Convention, which make the establishment of the Fund a condition for the Limitation of Liability.*

9. LOSS OF RIGHT TO LIMITATION OF LIABILITY

1. Introductory Note

- (a) As already noted above (under 7 (1)(e)) the right of limitation of liability of the person liable may be denied by the court at a time much later than the establishment of the Fund and the release of the securities.
- (b) The consequences of loss of the right to limitation relate to the questions (i) what will happen with the Fund and (ii) what will happen with the proceedings pending (either before the Fund court or before any other court having jurisdiction) for the verification of the claims.
- (c) Most legislations do not include provisions as to what happens in this case and each Claimant seems to be entitled to pursue its claim in the usual manner independently from the others on any assets of the person liable, including the money of the Fund. As a result, litigation may take place with the person liable and between the Claimants themselves.
- (d) It is suggested that for the orderly liquidation of the Fund and the avoidance of conflicts between the Claimants, the Fund should remain in place (despite the loss of the right of limitation) and be distributed to the Claimants, as if the right of limitation had not been lost. Simply the Claimants may enforce the balance of their Claims on other assets of the person liable. Similarly, they should be able to seek security on other assets immediately. This matter has procedural aspects (i.e. how the Fund is liquidated), but it also has substantive consequences (i.e. different distribution of the money in the Fund). However, a relevant recommendation has been included in the Guidelines because it is in effect a post limitation issue (i.e. the liquidation of the Fund) which is not regulated by any convention or by most of the national legislations.
- (e) Further, for the avoidance of delays it is suggested that the procedure or proceedings for the verification or adjudication of the claims should continue until a final judgment on the existence and the quantum of the respective claim. Otherwise, certain of the Claimants (i.e. those who brought their claims to the Fund Court directly) may be required to start proceedings from the beginning for the adjudication of their claims.
- (f) Finally, the consequences of submitting the claim in the Limitation Proceedings (e.g. protection of time bar) should remain effective because otherwise the Claims (some of them being subject to brief time limits) may have become time barred.
- (g) For this reason a Guideline was adopted on these issues.

2. Guideline

- (a) States should provide in their national law that if it is determined after the establishment of the Fund (and the effective date of provisional right of Limitation of Liability) that some or all the persons liable are not entitled to limit their liability then:
 - (i) The Fund shall nevertheless remain in place and be distributed among the Claimants pursuant to the Limitation Proceedings.
 - (ii) The Claims shall be verified and/or adjudicated in the same manner and in the same procedure, as if the right of limitation had not been lost.
 - (iii) The Claimants, however, shall be entitled to immediately seek security from other assets of the person liable and to enforce the balance of their adjudicated verified claims on other assets of the person liable.
- (b) In case the right to limit liability has been lost, the consequences of bringing Claims in the Limitation Proceedings, including protection of the limitation of time (time bar), will remain in full effect.
- (c) States should provide in their national law that Claims which are not subject to limitation shall be pursued independently from the Limitation Proceedings.

3. Commentary

- (a) *On the basis of written comments submitted and discussions at the Paris meeting , this Guideline was expanded to cover the situations (i)where the right to limit liability is lost only in respect of one (or some) of the Claimants and (ii)where this right is lost in respect of all the Claimants.*
- (b) *Following these discussions a Guideline was included regarding claims which are not subject to limitation, to the effect that these claims shall be pursued in the usual manner outside and independently of the Limitation Proceedings.*

10. INFORMATION AND DOCUMENTS TO BE PROVIDED BY THE PERSON INVOKING THE BENEFIT OF LIMITATION

1. Introductory Note

- (a) In order to enable the court to verify that the Fund is constituted in accordance with the provisions of the relevant legislation (i.e. pursuant to the applicable international Convention or to the relevant provisions of the national legislation) and to administer the Fund properly, it is necessary that the person liable supplies the court with information about the Claimants to the extent that they are known, including their addresses, in order to enable the court or the Fund administrator to inform them about the institution of the Limitation Proceedings. Other Claimants are notified through some public announcement (e.g. through the press) in order to participate in the Limitation Proceedings and the distribution of the Fund.

- (b) Furthermore, since the limit of liability for loss of or damage to property is, in all conventions, based on the ship's gross tonnage, calculated in accordance with the tonnage measurement rules contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969², a copy of the measurement certificate must be produced as well as, and in case of passenger claims under the LLMC³, appropriate evidence of the number of passengers which the ship is authorised to carry.
- (c) For these reasons a relevant Guideline was adopted.

² Article 6(5) of the LLMC n, article V(10) of the CLC and article 9(10) of the HNS Convention.

³ Article 7(2) of the LLMC .

2. Guideline

States should specify in their national law what information and documents must be provided by the person invoking the benefit of limitation, such as:

- (a) The identity of the person invoking the right of Limitation of Liability.**
- (b) The name of the vessel involved.**
- (c) A copy of the relevant measurement certificate of the ship or any other document required for the calculation of the limitation amount.**
- (d) A list with the names and addresses, to the extent they are known, of the persons that may have Claims subject to the Limitation of Liability.**
- (e) Evidence of the appropriate deposit of the amount of the Fund or a bank guarantee or other acceptable guarantee equal to the amount of the Fund.**

3. Commentary

- (a) The documents required under paragraph (c) of the Guideline are necessary in all cases of limitation, i.e. whether the limitation is invoked as a defence in pending proceedings without establishment of a Fund and/or in case that the limitation is sought through the establishment of the Fund. The documents referred to in paragraphs (d) and (e) of the Guideline are required in case that the limitation is sought through the establishment of the Fund.*
- (b) The second possibility in paragraph (c), i.e. "or any other document required for the calculation of the limitation amount", was included in order to cover situations where the amount of limitation is calculated not on the basis of the tonnage but on the basis of other criteria, either on the basis of international conventions (e.g. LLMC in Article 7(2) for passenger vessels) or on the basis of national legislation of States which are not parties to the relevant international conventions.*

11. ISSUES RELATING TO THE FUND

1. Introductory Note

- (a) The first issue to be addressed in connection with limitation is that relating to the manner in which the Fund should be constituted. All Conventions relating to limitation of liability provide 4 that the Fund may be constituted either by depositing the sum corresponding to the limitation amount, or by producing a guarantee which is acceptable under the legislation of the State where the Fund is constituted and is considered to be adequate by

4 Article 11(2) of the LLMC , article V(3) of the CLC and article 9(3) of the HNS Convention.

the court. Therefore the question relating to the character of the guarantee seems to be left to the law of the relevant States.

- (b) The second issue relates to the calculation of the amount, which is left to the court to decide.
- (c) The first question relates also to the specific requirements of the bank guarantee, e.g. whether it must be issued by a bank authorised to operate in the State where the Fund is to be constituted, whether that bank must be a first class bank and what the wording of the guarantee should be. It also relates to the type of guarantee, other than a bank guarantee, such as a guarantee of an insurance company or of a P & I Club, that may be considered to be acceptable and in this connection it may be considered whether some recommendation could be made to the effect of allowing guarantees of first class insurance companies and P&I Clubs.
- (d) The second question relates to the amount of the Fund, and thus to the correct calculation of the limit or limits, the conversion of the unit of account used in the relevant Convention into national currency and the calculation of interest thereon. Reference to interest is found only in the LLMC (article 11(1)) while both the CLC and the HNS Convention, respectively in article V(3) and in article 9(3), provide that the Fund must be constituted for the total sum representing the limit of liability and interest is not mentioned. The question arises, therefore, whether States may, in the implementing legislation, require that interest be added and it is suggested that the reply should be positive because otherwise the person liable would benefit from any delay in the constitution of the Fund.
- (e) The question of whether an amount should be added for costs is separate from the question of interest. The reply to this question may be negative or positive. If no amount for costs is added to the Fund, it is obvious that the costs for the administration of the Fund will be deducted from the amount of the Fund. Practically it will be difficult to oblige the person liable to pay these costs after the limitation of its liability has been approved but also legally most conventions and legislations do not allow such further claims (for costs) against the person liable. If an amount is going to be added to the Fund for costs (so that the Claims of Claimants are not curtailed any further), this amount for costs will be based on an estimate and certain rules should exist for such calculation.

- (f) Any amount which must be added to the amount of limitation for costs and interest in order to establish the Fund should be clearly specified in the national legislation thus allowing the party seeking limitation to establish the Fund quickly and without delays and uncertainties.

2. Guideline

States should provide in their national law appropriate and clear rules relating to:

- (a) The sum that must be added to the amount of limitation for interest from the time of the incident up to the establishment of the Fund.**
- (b) The sum that may be added to the Fund in respect of the costs of administration of the Fund.**
- (c) The location and standing of the bank that may provide a guarantee.**
- (d) The guarantees that are acceptable other than bank guarantees.**
- (e) The duty of the court to verify expeditiously the calculation of the amount of limitation.**
- (f) The transfer of the amounts distributed by the Fund to the Claimants from the State in question without any restriction.**

3. Commentary

- (a) During the discussions at the Paris meeting of the I-SC it was suggested to deal with costs in a separate paragraph (i.e. not together with interest) because the CMI may wish to take different decisions for costs and interest.*
- (b) This Guideline deals with the interest up to the establishment of the Fund, not the interest for the time thereafter.*
- (c) In connection with subsequent interest, various suggestions were made (mainly in written comments). In case of the deposit of cash, the relevant amount may be interest bearing. (One participant in his written comments raised the question whether in the contemporary financial environment deposit in cash is old fashioned). The situation may be more difficult if a bank guarantee is given. Of course, a bank guarantee may provide for interest but the banks almost always need a maximum limit (which may not cover the whole period of the Limitation Proceedings since this period may not be foreseeable in advance). On the other hand it was suggested that it may not be fair for the person limiting liability to incur interest, if the delay in the Limitation Proceedings is not due to its actions in the Limitation Proceedings but to the disagreement of Claimants regarding the distribution of the Fund.*
- (d) The last paragraph (f) of this Guideline was added after the meeting of the I-SC in Paris as a result of a comment that the difficulty of the transfer of funds from certain countries is an obstacle to the effective participation of Claimants from countries other than that*

where the limitation Fund is established in the distribution of the Fund and a harmonization Guideline would be useful.

12. TIME LIMIT IN LIMITATION PROCEEDINGS

1. Introductory Note

- (a) The right of Claimants to participate in the Limitation Proceedings is inherent in the concept of limitation and, although it is not expressly regulated by any of the Conventions relating to limitation of liability, it is clearly implied by many of their provisions. Since the Fund should at some stage be distributed, whereupon the limitation proceedings would terminate, it is inconceivable that the right of participation be exercisable at any time during the proceedings, because that would disrupt the proper conduct of the proceedings.
- (b) None of the Conventions relating to limitation of liability provides for a time limit for the participation of the Claimants in the Limitation Proceedings and the matter is left to national legislation, provided however that provisions in the Conventions on other issues are respected.
- (c) Most national legislations regulate this aspect of the proceedings either by setting statutory time limits or by providing that such time limits be set by the court under the supervision of which the Limitation Proceedings are conducted. The time limits may relate, inter alia, to (a) to the filing of the claims, (b) the production of the relevant supporting documentation or, (c) the challenge of the right of limitation of liability. Even if no limit for such participation is expressly set, it is obvious that the ultimate point in time when a claimant may participate in the proceedings is the time of the distribution of the Fund. The date from which the various time limits commence to run should be also specified in the national legislation.
- (d) Finally a separate time limit is that within which the action must be brought against the person liable to prevent the substantive right from becoming extinguished. In respect of this time limit (limitation of action/ time bar/ prescription) there are provisions in the CLC and in the 1992 Fund Convention, as well as in the HNS Convention, while the time limit for the claims falling under the LLMC is determined by the law governing the respective claim. It is thought that it would be difficult to regulate time bar and prescription in respect of claims covered by the LLMC, in view of the varying nature of such claims and it is suggested that the only aspect that might be considered is that relating to the participation in the Limitation Proceedings.
- (e) At this point it should be clarified that the time limit for participating in the various stages of the Limitation Proceedings and the time limit (time bar) for a particular claim are two different types of time limits. When the person liable limits its liability and a Limitation Fund is established, the former set of time limits is put in operation. This set of time limits relates to the participation in the distribution of the Fund. The relation between the time limit for participation in the Limitation Proceedings and the time limit (time bar) for exercising a claim is a subject worthy of consideration.

- (f) For the above reasons a Guideline was adopted to the effect that the national legislation of States should set time limits for the various procedural steps in the Limitation Proceedings. However, not specific limits are proposed at this stage.

2. Guideline

- (a) **States should set in their national law a time limit, or give their courts the power to set such time limit, for the following actions by Claimants:**
 - (i) **challenging the right of the person liable to invoke the benefit of Limitation of Liability,**
 - (ii) **requesting a review of the amount of the Fund,**
 - (iii) **submitting Claims in the Limitation Proceedings.**
- (b) **In setting these time limits special attention should be paid to the relevant provisions of international conventions, including in particular the CLC, the HNS Convention and the Bunker Convention or any other applicable convention. In making interim and final distributions, due consideration shall be given to the possibility of damage arising after such distribution.**
- (c) **States should specify in their national law the point of time at which these time limits commence. The time limit for the participation of the Claimants in the Limitation Proceedings must not commence before Claimants are notified of the establishment of the Fund either individually, if their names and addresses are known, or through publications which have reasonably broad exposure.**

3. Commentary

- (a) *The main issue which was raised in connection with this Guideline both in written comments and at the meeting of the I-SC in Paris concerned the relationship between the time limit for participation of the Claimants in the Limitation Proceedings and the time bar of the claims, especially in cases where the international Conventions themselves set limits in time for taking legal actions (time bar), as is the case for example in the CLC and the HNS Conventions.*
- (b) *Following discussion the I-SC reached the conclusion that:*
 - (i) *It is advisable that States set in their national legislation (or give the authority or discretion to the courts to set) certain time limits for the presentation of claims in the Limitation Proceedings, but there is no need to specify such time limits at this stage.*
 - (ii) *States in fixing any such time limits should give careful consideration to international Conventions setting related time limits and especially to the CLC and the HNS Convention which set time limits for the extinction of the relevant claims.*
 - (iii) *The I-SC did not reach conclusions on the interpretation of any specific conventions.*

- (c) *Finally, on the basis of written comment submitted to I-SC the possibility of fixing the time limits by the courts was also provided for in paragraph (a) of the Guideline.*

13. CONSEQUENCES OF LATE PARTICIPATION

1. Introductory Note

- (a) None of the conventions deals with the consequences of late participation in the Limitation Proceedings and consequently this is left to the national legislation of States.
- (b) From the responses to the questionnaire circulated by the CMI it appears that the consequences vary in various jurisdictions and consist of:
- (i) the loss of the right to participate in the distribution of the Fund (in some countries only after the judgment on distribution) ,but in some countries an extension may be granted by the court while in others distribution may be made if the court has set aside an amount for such claim (on the basis of the list of Claimants given by the petitioner),
 - (ii) the loss of the right to participate in the initial distribution, without prejudice to the right to participate in subsequent distributions,
 - (iii) the loss of the right to challenge the amount of the Fund or the benefit of limitation.
- (c) For this reason a Guideline was adopted dealing with these issues.

2. Guideline

Subject to any related provisions in applicable international conventions, States should adopt provisions in relation to the following consequences of late participation of Claimants in the Limitation Proceedings:

- (a) **The right (or exclusion thereof) to challenge the right of the person liable to invoke the benefit of limitation or to seek review of the amount of the Fund.**
- (b) **The right (or exclusion thereof) to participate in the interim and final distribution of the Fund.**

3. Commentary

- (a) *In view of the discussions relating to the previous Guideline (under No.12), the view was expressed that the consequence of late participation in the limitation proceedings cannot be the loss of the right to participate in the distribution, if the time limit for participation is shorter than the time limit set by certain conventions (e.g. CLC and HNS) for the extinction of claims. The problem exists only for the CLC and the HNS Convention (not for the LLMC). Because this is a matter of interpretation of the conventions the I-SC did not take position on this issue.*

14. VERIFICATION OF CLAIMS

1. Introductory Note

- (a) No provision exists in any convention relating to limitation of liability concerning the procedure and the evidence for establishing (verifying) the claims which will participate in the distribution and, therefore, this is a matter to be regulated by the national legislation of States. From the responses to the CMI questionnaire it appears that the verification and establishment of the Claims (at least at a first stage) may be made either by the court itself or by a judge appointed by the court or by an administrator or liquidator of the Fund.
- (b) From the responses it also appears that the procedure of verification is conducted through various stages, which may include all or some of the following: (a) registration or notice of the Claims, (b) preparation of a first list of Claimants (by the administrator of the Fund or by the appointed judge or by the court), (c) possibility of challenging Claims in this first list (either in a meeting of Claimants and/or in separate proceedings), (d) resolution of the disputes either in subsequent hearings within the context of the Limitation Proceedings or in separate proceedings.
- (c) A Guideline outlining this procedure was adopted.

2. Guideline

States should provide in their national law procedures for the verification of Claims in the Limitation Proceedings including procedures for:

- (a) **the submission of the Claims and related evidence,**
- (b) **preparation of a first list of Claimants and Claims either by the Fund administrator, or by the appointed judge or by the court, and for notification of this list to the Claimants,**
- (c) **the time limit within which the list of Claimants and Claims may be challenged (either by Claimants or by the person liable, unless prevented from doing so by res judicata or by the specific provisions of any applicable international convention),**
- (d) **the procedure for the resolution of disputes concerning the list, and**
- (e) **the finalization of the list and the distribution of the Fund.**

3. Commentary

- (a) *On the basis of written comments submitted to the I-SC pursuant to which in certain countries the procedure is determined by the Court, this possibility was provided for in the Guideline.*
- (b) *As a result of the discussions at the Paris meeting of the I-SC in subparagraph*

- (c) *reference was made not only to res judicata but also to any specific provisions of applicable conventions.*

15. CHALLENGE OF CLAIMANTS' CLAIMS

1. Introductory Note

- (a) Because the existence and the amount of the Claim of each Claimant affect the amount which could be allocated to other Claimants, it is obvious that each Claimant has a legitimate interest to challenge the Claim of any other Claimant in respect of its existence, quantum or the right to participate in the distribution of the Fund.
- (b) The matter becomes more complicated when the Claim of a particular Claimant is based on a judgment issued in proceedings between the Claimant and the person liable which other Claimants who were not parties to these proceedings want to challenge in the context of the Limitation Proceedings.
- (c) On the other hand the person liable has an interest to challenge the Claims of the Claimants (unless and to the extent that it is barred from doing so as a result of res judicata) because if the aggregate amount of all Claims of the Claimants is less than the amount of the Fund, the balance will be returned to the person liable.
- (d) A related issue is the question whether the challenge of the distribution plan, i.e. the list of Claims or any of them, should suspend the distribution of the Fund until this matter is finally resolved by the court, which administers the Fund. It is suggested that the distribution should be suspended only in respect of Claims which are directly or indirectly adversely affected by the challenge (i.e. which may be reduced if the challenge is successful). However, in certain countries all the objections are tried collectively and only one judgment is issued. As long as challenge of certain Claims do not delay the payment of others interim distributions may well be an alternative.
- (e) A further related issue is what happens if one Claimant challenges the Claim of another and this other Claim is expelled from the list, e.g. who should benefit from the additional amount released, i.e. only the Claimant who made the challenge (since the others had tacitly accepted the distribution plan) or the other Claimants (who did not challenge) as well (i.e. objective and not only subjective effect of the challenge).
- (f) A Guideline was adopted referring these matters.

2. Guideline

- (a) **Subject to the rules of res judicata States should, in the context of Limitation Proceedings and the procedure for the verification of claims, give the person liable the possibility to challenge the Claims and the Claimants the possibility to challenge the Claims of other Claimants provided however that a claim or the amount of a claim accepted following consideration on the merits by a court in another State competent under the CLC, the HNS Convention, the Bunker Conventions or any other applicable convention in a judgment which should be recognised under the**

applicable convention, in other Contracting States, may not be challenged in the Limitation Proceedings.

- (b) The challenge of a Claim should not delay the interim distribution of the Fund to other Claimants. National law may provide for challenges to be tried collectively, provided this does not delay the interim distribution of the Fund.**
- (c) Any amount released by the rejection from the list of a Claim challenged should be distributed to all the Claimants on the list pro rata and in proportion to their respective Claims as a supplementary distribution.**

3. Commentary

- (a) The issue which was more extensively discussed during the meeting of the I-SC in Paris was the issue raised in the introductory note above under 15.1(b) especially in connection with the CLC and the HNS Convention.*
- (b) Because the problem seemed to appear in particular in connection with the CLC and HNS Convention while the Guideline was general, the Guideline was considered in its abstract form acceptable with a clear reservation at the beginning in respect of res judicata and a proviso at the end in respect of special provisions in the applicable international conventions with special emphasis on the CLC and HNS Convention.*

16. RELATION BETWEEN LIMITATION PROCEEDINGS AND PROCEEDINGS ON THE MERITS OF THE CLAIMS

1. Introductory Note

- (a)** In cases of Limitation of Liability the phenomenon is frequent that at the time that the right of Limitation is invoked and the Fund is established, proceedings on the merits are (well) under way in respect of various Claims against the person liable in various courts of the same or different States. For this reason the relation between various pending proceedings and the Limitation Proceedings should be considered.
- (b)** The situation has been partly considered (but not resolved) in paragraph 15 above, in connection with the possibility to challenge (in the context of the Limitation Proceedings) Claims adjudicated by other courts. However, on a broader basis the following comments could be made:
 - (i)** If Claims are pending in various courts (especially of different countries) and a Fund is established in one country, on prima facie consideration it appears to be ideal for all the pending proceedings to be referred to the court where the Fund is established and have the whole case adjudicated in a consistent manner. This might also avoid duplication of proceedings in cases where a case adjudicated against the person liable in one court having jurisdiction, then it is possibly challenged again in the context of the Limitation Proceedings by other Claimants (see above under 15).
 - (ii)** However, this may not be acceptable to the countries where the merits of the Claims are tried (especially in publicly sensitive pollution cases) and under some circumstances it may even not be advisable (especially in cases where the

proceedings on the merits are at an advanced stage, e.g. close to a judgment and the referral to the court where the Fund was established might oblige the Claimant to start in effect the proceedings from the beginning even against the person liable).

- (iii) It is suggested that provisions may be enacted in the national legislation of the State where the Fund is located to recognize, to the extent possible, procedural steps taken in the court which originally tried the merits.
- (c) Finally, if a judgment is issued in one country by a court having jurisdiction on the merits adjudicating a Claim, the *res judicata*, i.e. the binding effect of this judgment, should be recognized in the State where the Fund is located. The problem with this recognition is that the requirements of recognition vary from country to country (unless they are parties to multilateral treaties for the recognition of judgments like EU Regulation 44/2001, and/or the Brussels or Lugano Conventions) and perhaps more importantly the concept and the scope of *res judicata* differ from country to country . For this reason Articles X of the CLC and 40 of the HNS Convention which deal with recognition of judgments are important.
- (d) In view of the above, the I-SC decided not to recommend a Guideline for the transfer of proceedings but only for the recognition of judgments (at least for the cases where such recognition is not provided in and imposed by international Conventions).

2. Guideline

Subject to any specific provisions in the applicable international conventions, States should provide in their national law procedures for the recognition or non recognition of judgments issued on the merits of Claims by other courts having jurisdiction recognised by that State on the merits of these Claims.

17. MORE THAN ONE PERSON LIABLE

1. Introductory Note

- (a) In all conventions relating to limitation of liability it is envisaged the possibility of more than one person being liable (and entitled to limit liability) for the same claim, either directly or as guarantor (e.g. insurer).
- (b) Thus, in the LLMC persons potentially liable (and entitled to limit liability) are the shipowner (including owner, charterer, manager and operator of the ship), the salvor and the liability insurer (Art.1(1)(2)(3) and (6) of LLMC).
- (c) In the CLC and the HNS Convention (which establish channeling of the strict liability, see Arts III(4) of CLC and 7(5) of HNS Convention) persons liable (and entitled to limit liability) are the registered owner or the State operator (see Arts I(3) of CLC and 1(3) of HNS Convention) as well as the financial guarantor/ insurer (Arts V(11) of CLC and 9(11) of HNS Convention).

- (d) All the conventions relating to limitation of liability provide that any of the persons liable may limit its liability by establishing the Fund. The only difference between the CLC and the HNS Convention on the one hand and the LLMC on the other, is that the CLC and the HNS Convention provide that the insurer may limit its liability even if the owner has lost this right as a result of his conduct (Arts V(11) of CLC and 9(11) of HNS), while the LLMC provides that the insurer may limit its liability “to the same extent as the assured” which may imply that if the assured has lost the right to limit, this adversely affects the insurer as well.
- (e) In view of the above, and unless any person liable has lost its right of limitation, the establishment of the Fund by one of the persons liable seems to give the others the right to limit their liability as well (the amount of the Fund in respect of all persons liable is the same as this amount is calculated on the basis of the tonnage of the vessel). This seems to be supported by Articles 9 and 13(1) of the LLMC (“assets of a person by or on behalf of whom the Fund has been constituted”). Similar foundation seems to exist in Arts V(11) and VI of the CLC and 9(11) and 10 of the HNS Convention (“having the same effect as if it were constituted by the owner”).
- (f) Further, it is obvious that the subrogation provisions of the conventions relating to limitation of liability play a role in this connection, i.e. if the charterer establishes the Fund to limit its liability vis-à-vis cargo interests and pays the relevant claims through the Fund, the charterer may then claim (either directly under the charterparty or by subrogation) against the owner and then the owner may limit his liability vis-à-vis the charterer by establishing a further Fund or even without the establishment of a Fund. If, of course, the Fund was originally established by the owner, the charterer may participate in the distribution of the Fund (in addition to any claims of his own) by subrogation in respect of claims he paid to other Claimants entitled to participate in the distribution of the Fund.
- (g) In view of the above and although several of the issues relating to multiple persons liable are regulated by the conventions relating to limitation of liability and although any proposed Guideline may assume some interpretation of the conventions a Guideline was adopted to cover certain gaps in the conventions.

2. Guideline

- (a) **Where more than one person liable exists (and is entitled to limit his liability) and unless a relevant convention provides otherwise and/or unless any such person has lost his right to limit his liability as a result of any provision, including provisions concerning his conduct, the establishment of the Fund and the Limitation of Liability by any of them shall benefit all such persons vis-à-vis third party Claimants.**
- (b) **States should include in their national law provisions regulating the right of subrogation and the apportionment of liability among the persons liable, an expeditious procedure for such purpose and that give effect to the subrogation provisions, if any, of the relevant convention or national law.**

18. MORE THAN ONE SHIP LIABLE

1. Introductory Note

- (a) An issue different from the situation of more than one person being liable for damage caused by one ship is the situation where a damage (pollution or other) is caused by more than one ship (e.g. in a collision case).
- (b) The situation is not expressly envisaged in the LLMC; it is envisaged in article IV of the CLC and more completely in article 8 of the HNS Convention. The latter conventions provide expressly for joint and several liability in respect of the pollution caused, while this may not be the case under the LLMC. The HNS Convention expressly provides that the owner of each ship may limit its liability separately (i.e. there may be more than one Fund for the same incident) and that nothing in that convention shall prejudice the right of one owner to claim against the other. The subrogation provisions of the convention may apply.
- (c) The solution adopted in the HNS Convention seems reasonable and compatible with the other conventions relating to limitation of liability and a Guideline to the same effect was adopted to cover existing gaps.

2. Guideline

- (a) Unless any applicable convention provides otherwise, where Claims arise from an incident involving more than one ship, the persons liable in relation to each ship may limit their liability separately and independently of the persons liable in relation to any other ship.**
- (b) Any Claimants having Claims against persons liable in relation to more than one ship may participate in any of the Limitation Proceedings commenced with regard to any ship involved and may submit their Claims to each of the relevant Funds for the total amount of their respective Claims.**
- (c) The subrogation provisions of any applicable convention apply in the relations between the persons liable in relation to the various ships and States that are not parties to the relevant conventions should enact similar provisions.**

19. SUBROGATION

1. Introductory Note

- (a) All existing conventions relating to limitation of liability include almost identical rules of subrogation (Art.12(2),(3) and (4) of LLMC, Art.V(5),(6) and (7) of CLC and Art.9(5),(6) and (7) of HNS Convention).
- (b) For the persons liable (and some other persons) the right of subrogation is established in the convention itself (Arts 12(2) LLMC, V(5) CLC and 9(5)HNS Convention) while for other persons who have paid Claims subject to limitation (and are entitled to participate

in the distribution of the Fund) the matter is left to the applicable national law (Art.12(3) LLMC, V(6) CLC and 9(6) HNS Convention).

- (c) The issues arising for the cases left to the national law are:
 - (i) which is the national law governing the subrogation. (There may be the law of more than one State cumulatively applicable, e.g. lex causa of the Claim which may or may not permit transfer of the Claim to the person who paid and the national law which determines the distribution of the limitation Fund (see Art.14 LLMC, IX(3) CLC and 38(5) HNS Convention); and
 - (ii) whether for harmonization purposes a Guideline should be adopted encouraging States to specify in their national legislation which law governs the right of subrogation or enact a direct rule specifying in which cases subrogation is permitted.
- (d) For this reason a very general Guideline was adopted on these subjects.

2. Guideline

States should, to the extent that this is a matter left to national law by any applicable convention, provide in their national law procedures concerning subrogation of rights.

20. SETTING OFF OF COUNTERCLAIMS

1. Introductory Note

- (a) Only the LLMC provides expressly for counterclaims (Art 5) and only for those counterclaims which arise out of the same occurrence. Counterclaims are envisaged in Art.III (5) of the CLC and Art.7(6) of the HNS Convention (and of course under the general provisions for counterclaims of lex fori).
- (b) However, the relevant provisions raise a number of procedural issues which may need clarification and harmonization in the national legislation of States.

Thus:

- (i) In the CLC and the HNS Convention, which do not have specific provisions for counterclaims, the question arises whether counterclaims may be raised in the context of the Limitation Proceedings and whether the Claimant will participate in the distribution for the balance. The alternative solution might be not to allow counter-claims in the Limitation Proceedings in which case the Claimant could participate in the distribution of the Fund for the whole of its claim and then the person liable claim the totality of its counterclaim against this particular Claimant separately. This second solution is less favourable to the Claimant and the other Claimants than the previous one. For this reason the former solution was adopted.
- (ii) In the LLMC the language of Article 5 leads to the conclusion that in respect of a counterclaim arising out of the same occurrence set off is compulsory (“shall”) and

the relevant Claimant participates in the distribution only for the balance, if any. This may be justified by the fact that this set off is beneficial to all the other Claimants as well (because one Claimant participates in the distribution after set off with a smaller claim). If this is the case (i.e. if set off is compulsory for this reason), however, the question arises as to whether, if the person liable does not raise the counterclaim and the set off, this counterclaim and set off may be raised by other Claimants (who have a legitimate interest to do so).

- (c) The conclusion from the above analysis is that:
 - (i) In the LLMC (Article 5) the set off of counterclaims out of the same occurrence is compulsory and the question is whether other Claimants may raise this issue in the context of the Limitation Proceedings (e.g. challenging the distribution list and the quantum of the specific Claimant's claim).
 - (ii) All other counterclaims under the LLMC and all counterclaims under the CLC and the HNS Convention may be raised and be set off (optionally). There is no reason to prevent the person liable from so doing and it is to the benefit of all Claimants, provided it does not cause undue delay to the whole distribution process.
- (d) An issue requiring further consideration is whether the person liable, who "paid" a claim through set off, is entitled to participate in the distribution of the Fund by subrogation. The correct reply seems to be in the affirmative, in which case the value of counter-claim and set off vis-à-vis other Claimants may be questioned. It may only regulate the relations of Claimant and counter-claimant in a more fair way.
- (e) For this reason a Guideline was adopted dealing with these issues.

2. Guideline

States should provide in their national law that:

- (a) Unless any applicable convention provides otherwise, counterclaims of the person liable may be raised and set off against Claims in accordance with the law applicable to such set off, in which case these Claims participate in the distribution of the Fund for the balance, if any, and**
- (b) If the applicable convention provides for compulsory set off of certain counterclaims, the issue of set off may be raised by any Claimant participating to the distribution vis-à-vis any other Claimant(s).**

3. Commentary

The second bracketed sentence was added on the basis of a written comment submitted by one NMLA.

21. PARTLY PAID CLAIMS

1. Introductory Note

- (a) If a Claimant has partially recovered his claim prior to the Limitation of Liability (or independently from the limitation, e.g. voluntarily by the person liable or by any third party or by any other Fund established in respect of another ship liable for the same damage), should this claimant participate in the distribution of the Fund in respect of the balance of its claim or in respect of the whole of its claim and the amount of (earlier) recovery should then be deducted from his share of the limitation amount? The two methods of calculation lead to different results, as shown by the following example. A claimant has a claim of \$100,000 and he has recovered \$10,000. The Fund satisfies say 50% of the claims. If the claimant participates with the balance of his claim he recovers \$45,000 (i.e. $\$90,000 \times 50\%$). If he participates with the whole of his claim and then the recovery is deducted he receives \$40,000 (i.e. $\$100,000 \times 50\% = \$50,000$ less recovery \$10,000 balance payable from the Fund \$40,000).
- (b) This issue may be related to the issue of subrogation because the party who paid may (possibly) participate in the distribution of the Fund by subrogation. For this reason it seems to be reasonable that the Claimant, whose claim was partially paid should participate in the distribution of the Fund in respect of their unpaid balance. In respect of the (paid) balance somebody else (the party who paid) may participate. If the original Claimant participates for the full amount of its claim and the subrogated Claimant participates for the (full) amount he paid, then an amount bigger than the original claim will participate in the distribution of the Fund (i.e. 100.000 the claim of the original Claimant and 10.000 of the subrogation i.e. 110.000 for a claim which was 100.000 only).
- (c) For this reason a Guideline to this effect was adopted.

2. Guideline

If a Claimant entitled to participate in the distribution of a particular Fund has been partially paid for his Claim outside of the Limitation Proceedings, then he will participate in the distribution in respect of the unpaid balance of his Claim.