

# COMITÉ MARITIME INTERNATIONAL

## International Working Group (Polar Shipping)

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| Subgroup              | Antarctic Shipping   |
| Chair                 | David Baker  |
| Authors               | Ansam Okbani and Dharshini Bandara; revised and edited by David Baker  |
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### WORKING PAPER ON QUESTIONS ON THE LIABILITY ANNEX VI:

### FINANCIAL SECURITY, TO THE PROTOCOL ON ENVIRONMENTAL PROTECTION TO THE ANTARCTIC TREATY

*[Background: The Protocol on Environmental Protection to the Antarctic Treaty was adopted in Madrid in 1991. The Protocol has six annexes (five of which have already entered into force), it is the last Annex (Annex VI) which we have been asked to analyse. Annex VI deals with Liability issues arising from Environmental Emergencies]*

#### **INTRODUCTION**

1. We have been asked to look into the following three issues:
  - a) *The limits contained in Article 9 of the Annex appear to represent a minimum requirement. If this is correct, then in a jurisdiction that is a party to the Liability Annex (so to speak) where lower limits (e.g. the 1976 LLMC Convention) are applicable, the lower limits will be superseded by the Annex VI limits and in a jurisdiction where higher limits (e.g. the 1996 LLMC Protocol as amended in 2012) are applicable, such higher limits will prevail. Is this a correct interpretation?*
  - b) *It is unclear how Article 9(2) of the Annex will operate. The article provides that the Annex shall not affect the liability or right to limit liability under any applicable international limitation of liability treaty. Presumably, this primarily means the existing LLMC regimes that are in force. However, the LLMC regimes do not contain their own jurisdiction clauses.*
  - c) *Whilst Article 7 of the Annex seeks to address where actions may be commenced against the relevant operator it is also unclear how this dovetails with Article 9 (2) of the Annex and the LLMC regime. For example, does the reference in Article 9 (2) to an operator's "liability or right to limit liability" refer to such a right that exists in the Party that took response action, or where the*

*operator is incorporated or has its principal place of business or is habitually resident, or does it mean the "Party of that Operator" as per Article 2 (d) of the Annex?*

2. Each of these questions will be discussed separately below.
3. For ease of reference, relevant extracts of Articles 9, 7 and 2 of the Liability Annex are set out in Appendix I to this document:

**QUESTION 1:**

**The limits contained in Article 9 of the Annex appear to represent a minimum requirement. If this is correct, then in a jurisdiction that is a party to the Liability Annex (so to speak) where lower limits (e.g. the 1976 LLMC Convention) are applicable, the lower limits will be superseded by the Annex VI limits and in a jurisdiction where higher limits (e.g. the 1996 LLMC Protocol as amended in 2012) are applicable, such higher limits will prevail. Is this a correct interpretation?**

1. Briefly, we are asked to look at the interplay between the limits contained in Article 9 of the Liability Annex and the LLMC regimes (to include both the LLMC1 1976 and the 1996 Protocol). The limits set out in Clause 9(1) of the Liability Annex are in keeping with the 1996 Protocol limits. This means however that, in countries applying the 1976 LLMC limits, or those applying the new 2012 limits, there would be different limits applicable under the Liability Annex and the LLMC regimes. Further, since both the LLMC and the Liability Annex have a mechanism whereby the limits can be increased, the disparity between the LLMC regimes and the Liability Annex can widen in the future.
2. Therefore, it is important to make sure that there is clarity as to which limits are to apply in such a situation – would the limits under the Liability Annex or those under the LLMC apply?
3. Article 9(2)(a) of the Annex is set out in Appendix I. The limits set out in the second paragraph are those which apply under the Liability Annex.
4. What 9(2)(a) says is that as long as limits applicable by the LLMC are as high as those applicable under the Liability Annex, then the Annex does not affect the application of the limits under the LLMC. Therefore, where the limits under the LLMC are at least as high as the limits under the Liability Annex, the (higher) limits under the LLMC can be applied. Applying this to the 1996 Protocol or the 2012 limits, then of course the application of the limits in these instruments would not be affected by the Annex.
5. However, this does not automatically mean that where the limits in the LLMC are lower than the limits under the Liability Annex, the higher limits under the Liability Annex will apply. Article 9(2)(a) does not say so. That Article only deals with the situation where the LLMC limits are equal or higher, and leaves open (intentionally or unintentionally), the question as to what would happen where the Liability Annex limits are higher.

6. In that case, it would then be up to the individual court dealing with the matter, to determine which limits it is going to give effect to. By way of example, if we were to assume that a country applying the 1976 LLMC is also party to the Liability Annex, and has before it a maritime dispute which comes within the scope of both the 1976 Convention and the Liability Annex, the court dealing with the issue in that country, will have to determine whether it is going to apply the lower limits of the LLMC 1976 or the higher limits of the liability Annex. Without further guidance, it will be difficult for the court to apply one over the other.
7. Therefore, if the wording of Article 9(2)(a) remains unchanged, then individual States when incorporating the Annex into national law, will, in all probability, take steps to ensure that the matter is clarified, so that a Court or Tribunal looking at the matter will then be guided by national law as to which limits to apply. The Antarctic Act 2013 in the UK would be an example of such an effort. Paragraph 1 of the Schedule to the Act sets out the Annex limits as the limits applicable under the Act. However, paragraph 2 of the Schedule states that where the LLMC and the Annex limits are both potentially applicable, then it is the higher of the two limits which are to be applied.
8. **In conclusion, our view is that the interpretation of Art 9(2)(a), actually goes further than the wording of that provision allows – i.e. in our view the Annex does not deal with the question of which limit should be applied where the LLMC limits are lower than the Liability Annex limits, leaving it then to the local courts/legislature to determine which limits to apply. It is hoped that individual member States will enact local legislation which would allow for the higher of the two limits to apply in such a situation.**

**Recommendation: It is recommended that, in order to ensure international uniformity when the Protocol enters into force, States give consideration in their implementing legislation to following the same approach as the UK and legislate to allow for the higher of the 1996 LLMC Protocol and Liability Annex limits to apply where both would otherwise be potentially applicable.**

**QUESTION 2:**

**It is unclear how Article 9(2) of the Annex will operate. The article provides that the Annex shall not affect the liability or right to limit liability under any applicable international limitation of liability treaty. Presumably, this primarily means the existing LLMC regimes that are in force. However, the LLMC regimes do not contain their own jurisdiction clauses.**

9. As explained above, as long as the LLMC regime limits are higher than the Annex limits, the Annex should not affect a) the LLMC limits and b) the application of a reservation made by a State to exclude limitation from certain claims. However, where the LLMC regime limits are lower than the Annex regime, then, the present wording could cause confusion as to which limits should be applied.
10. The Annex has its own jurisdiction regime. Article 7 of the Annex states that “...a Party that has taken response action pursuant to Article 5(2) may bring an action against a non-State operator for liability pursuant to Article 6(1) and such action may be brought in the courts of not more than one

*Party where the operator is incorporated or has its principal place of business of his or her habitual place of residence”.*

11. It is indeed correct to say that the LLMC Conventions do not have their own express jurisdiction provisions (Article 11 is seen by some jurisdictions as a jurisdiction provision, but certainly in England it is not seen as one). Whilst the LLMC regimes envisage limitation to be invoked primarily as a *response* by a Defendant shipowner, rather than in a pre-emptive manner, in practice this is not always so. In many jurisdictions, limitation is not only pleaded in Defence to a claim made, but action is pre-emptively brought by *claimant* shipowners for either a decree of limitation or indeed in order to set up a limitation fund.
12. The English court’s jurisdiction to deal with limitation issues arose traditionally from section 20(3)(c) of the Senior Courts Act 1981, which provides that the court has the broadest possible jurisdiction to deal with “*any action by shipowners or other persons under the Merchant Shipping Act 1995 for the limitation of the amount of their liability in connection with a ship or other property*”. Where this jurisdiction applies (as set out below this jurisdiction is now somewhat restricted by the application of the Regulation 44/2001), the English Court can also deal with limitation. The LLMC is incorporated into national law by Schedule 7 of the Merchant Shipping Act 1995 and section 185 of the Merchant Shipping Act 1995. Therefore, where the case in question comes within the scope of Article 2(1) of the LLMC, the English Courts will deal with limitation issues by reference to the LLMC. Therefore, there is no need for the LLMC regimes to have their own jurisdiction provisions. This is also how the LLMC regimes work in other jurisdictions – the LLMC regimes are part of national law, and the local courts will apply the LLMC limits where the case in question comes within the scope of Article 2(1) of the LLMC.
13. Where the English Court’s jurisdiction is based on Article 7 of the Liability Annex, the English Courts would not be concerned about the fact that the LLMC regime has no jurisdiction provisions of its own. The English Courts will then have to apply Article 9 of the Annex, and where the matter in question comes within the scope of Article 2(1) of the LLMC, also the LLMC limits. At the moment, the applicable LLMC limits in England are: the 1996 limits for incidents happening prior to June 2015, and the new 2012 limits for incidents happening after June 2015. Since both the LLMC limits are in fact as high as the Annex limits (article 9(2) of the Annex), the English Courts will have no problem applying these LLMC limits. The result will be the same also under the Antarctic Bill, which allows for the higher of the two limits to be applied.
14. However, where a shipowner knows that it is going to be faced with a claim under the Annex, it may want to use the LLMC regimes to its advantage, and thereby try to commence limitation proceedings or set up a limitation fund in a country which applies the pre-1996 limits which will always be lower than the Annex limits. In such a situation:
  - a) The first question is whether one of the states will stay their proceedings in light of the other proceedings. In England for example, the court is of course bound by the Brussels 1 Regulation. Therefore, where limitation proceedings in England are commenced notwithstanding liability provisions in another EU state, the English Courts will stay the limitation proceedings in light of the two actions being “related actions” within the scope of Article 22. [Although, article 71 of the

Regulation says that it will not affect the application of any other Conventions which specifically deal with jurisdiction etc., since the Annex does not deal with competing claims, our view is that in the situation envisaged in paragraph 20 above, the English Courts will apply Article 22 and where necessary will stay its own proceedings]. Where the limitation action is commenced first, then arguably, limitation will be a matter for the country in which the shipowner/operator commenced the limitation action, and that court can properly make a limitation decree based on the pre-1996 limits.

- b) Any court in which a claim under Article 7 of the Annex is commenced, will then have to determine whether it is bound by the limitation decree already issued by the other country. The most reasonable step would of course be to recognise the limitation decree. However, as explained above, if our understanding of Article 9(2) is correct, then Article 9(2) is silent on what would happen in this scenario.
15. Therefore, we would envisage that even when the Annex comes into force, the LLMC regime will continue to be used by shipowners/operators as a means of pre-emptive action and in order to secure the jurisdiction of a more favourable limitation regime. In such an instance, where a shipowner/operator brings limitation proceedings (for a decree or to set up a fund), in a country which is not party to the Annex, that country will be able to determine the limit of liability of the shipowner/operator by reference to the LLMC regime applicable in that country, without reference to the Annex limitation scheme. Where the LLMC regime applicable in the country is pre-1996, then a lower limitation figure than the one envisaged in the Annex will be available to the shipowner/operator.
16. Where a shipowner/operator brings the pre-emptive limitation proceedings in a country which is also party to the Annex, then in our view the following considerations will apply: where the LLMC limits are as high as the Annex limits, the LLMC limits will be applicable. Where however a pre-1996 LLMC limit is applicable, i.e. the LLMC limits are lower than the Annex limits, then it will be a question of national law as to which limit is applicable. Whilst the intention of Article 9(2) is for the higher limit (i.e. the Annex limit) to apply, the wording of article 9(2)(a) is not conclusive in this respect. See the above-mentioned Recommendation re Question 1 in this regard.
17. **In summary therefore, even though the LLMC does not have its own jurisdiction provisions, the LLMC countries will still look to the LLMC regime even when dealing with Liability Annex cases. We do not see a problem with this as long as article 9(2) clearly sets out which limits are to be applied when they are both potentially applicable. As explained above, article 9(2) does not state which limits apply when the country where the matter is heard, applies LLMC limits which are lower than the Annex limits. It will therefore be up to the individual countries to make sure that their local legislation deals with the issue, preferably by ensuring that local laws implementing the Annex makes clear that the higher limit between the LLMC and the Annex would always apply.**
18. **This “conflict” between the pre-1996 LLMC limits and the Annex/post 1996 LLMC limits is one which also exists in other non-Liability Annex limitation cases. A shipowner faced with a substantial liability will look to bring limitation proceedings in a pre-1996 LLMC state to benefit**

**from the lower limits. This will be seen also in relation to Liability Annex cases – i.e. a shipowner will continue to try to limit its liability in countries where the lower LLMC limits are applied.**

19. Finally, we would also draw attention to an issue in relation to the proviso in article 9(2)(a), which does not form part of the questions asked of us. The proviso sets out the limits applicable under 9(1)(a). Under article 9(4) the Antarctic Treaty Consultative Meeting is able to amend the limits every 3 years. If and when the limits are increased by the operation of article 9(4), then States may wish to consider reviewing the proviso wording in article 9(2)(a) since, if it were not amended at the same time as any increase in the limits, it would continue to refer to the old Annex limits. It may be more appropriate, therefore, for the proviso not to set out the limits as such but to refer to the Annex limits contained within article 9(1) (a). This way, whenever the Annex limits are amended, the proviso will follow suit.

**Recommendation: That consideration is given to amending Article 9.2 (a) if and when the limits are increased by means of Article 9 (4) in order to ensure that the limits referred to within Article 9 (2) (a) are not a previous set of limits that have since been updated.**

**QUESTION 3:**

**Whilst Article 7 of the Annex seeks to address where actions may be commenced against the relevant operator it is also unclear how this dovetails with Article 9(2) of the Annex and the LLMC regime. For example, does the reference in Article 9(2) to an operator’s “liability or right to limit liability” refer to such a right that exists in the Party that took response action, or where the operator is incorporated or has its principal place of business or is habitually resident, or does it mean the “Party of that Operator” as per Article 2(d) of the Annex?**

20. According to Article 7, the Party that has taken response action pursuant to Article 5(2), that is, the Party of the operator who did not take prompt and effective response action, and other Parties, may bring an action against a non-State operator for liability primarily in the courts of not more than one Party where the operator is incorporated or has its principal place of business or his or her habitual place of residence. Subsidiarily, in situations where the operator is not incorporated in a Party or does not have its principal place of business or his or her habitual place of residence in a Party, the action may be brought in the courts of the Party of the operator within the meaning of Article 2(d).
21. The Liability Annex purposefully contains a definition of the “operator” and of the “operator of the Party” in two separate paragraphs.
22. According to Article 2(c), the operator means any natural or juridical person, whether governmental or non-governmental, which organises activities to be carried out in the Antarctic Treaty area. An operator does not include a natural person who is an employee, contractor, subcontractor, or agent of, or who is in the service of, a natural or juridical person, whether governmental or non-governmental, which organises activities to be carried out in the Antarctic

Treaty area, and does not include a juridical person that is a contractor or subcontractor acting on behalf of a State operator.

23. According to Article 2(d), the terms “its operator”, “Party of the operator” and “Party of that operator” shall be interpreted in accordance with the definition of the “operator of the Party” as per Article 2(d), that is, an operator that organises, in that Party’s territory, activities to be carried out in the Antarctic Treaty area, and: (i) those activities are subject to authorisation by that Party for the Antarctic Treaty area; or (ii) in the case of a Party which does not formally authorise activities for the Antarctic Treaty area, those activities are subject to a comparable regulatory process by that Party.
24. Article 7 provides that the Party that has taken response action, only, can bring an action against a non-State operator and only before the courts of the Party where that operator is incorporated or has its principal place of business or his or her habitual place of residence. When the operator is not incorporated or does not have its principal place of business or his or her place of residence in a Party, only then can the action against the operator be brought before the courts of the Party where the activities were carried out by the operator.
25. Article 9(2) b) provides that nothing in subparagraph a), which states that the Annex shall not affect the liability or right to limit liability under any applicable international limitation of liability treaty, shall affect the application of Article 7(1).
26. It is our understanding that the criterion used in Article 7(1) must be applied in order to determine what Party’s right is applicable as regards the limitation of liability. Therefore, if the operator is incorporated or has its principal place of business or his or her habitual place of residence in a Party, then this Party’s legislation related to the limitation of liability will apply. Subsidiarily, if the operator is not incorporated or does not have its principal place of business or his or her habitual place of residence in a Party, then the legislation related to the limitation of liability in the Party where the operator carried out the activities will apply.

**Articles 9, 7 and 2 of the Liability Annex***Article 9**Limits of Liability*

27. *The maximum amount for which each operator may be liable under Article 6(1) or Article 6(2), in respect of each environmental emergency, shall be as follows:*

a) *For an environmental emergency arising from an event involving a ship:*

i) *One million SDR for a ship with a tonnage not exceeding 2,000 tons;*

ii) *For a ship with a tonnage in excess thereof, the following amount in addition to that referred to in (i) above:*

- For each ton from 2,001 to 30,000 tons, 400 SDR;*
- For each ton from 30,001 to 70,000 tons, 300 SDR; and*
- For each ton in excess of 70,000 tons, 200 SDR;*

b) *For an environmental emergency arising from an event which does not involve a ship, three million SDR.*

28. a) *Notwithstanding para 1(a) above, this Annex shall not affect:*

i) *the liability or right to limit liability under any applicable international limitation of liability treaty; or*

ii) *the application of a reservation made under any such treaty to exclude the application of the limits therein for certain claims;*

*provided that the applicable limits are at least as high as the following: for a ship with a tonnage not exceeding 2,000 tons, one million SDR; and for a ship with a tonnage in excess thereof, in addition, for a ship with a tonnage between 2,001 and 30,000 tons, 400 SDR for each ton; for a ship with a tonnage from 30,001 to 70,000 tons, 300 SDR for each ton; and for each ton in excess of 70,000 tons, 200 SDR for each ton.*

b) *Nothing in subparagraph (a) above shall affect either the limits of liability set out in paragraph 1(a) above that apply to a Party as a State operator, or the rights and obligations of Parties that are not parties to any such treaty as mentioned above, or the application of Article 7(1) and Article 7(2).*

*Article 7  
Actions*

*1. Only a Party that has taken response action pursuant to Article 5(2) may bring an action against a non-State operator for liability pursuant to Article 6(1) and such action may be brought in the courts of not more than one Party where the operator is incorporated or has its principal place of business or his or her habitual place of residence. However, should the operator not be incorporated in a Party or have its principal place of business or his or her habitual place of residence in a Party, the action must be brought in the courts of the Party of the operator within the meaning of Article 2(d).*

*Article 2  
Definitions*

*For the purposes of this Annex:  
(...)*

*(d) "Operator of the Party" means an operator that organises, in that Party's territory, activities to be carried out in the Antarctic Treaty area, and:*

- (i) those activities are subject to authorisation by that Party for the Antarctic Treaty area; or*
- (ii) in the case of a Party which does not formally authorise activities for the Antarctic Treaty area, those activities are subject to a comparable regulatory process by that Party.*

*The terms "its operator", "Party of the operator", and "Party of that operator" shall be interpreted in accordance with this definition.*