

PROCEDURAL RULES IN LIMITATION CONVENTIONS

I

ANALYSIS OF THE RESPONSES RECEIVED AS OF 2ND FEBRUARY 2006

Responses to the Questionnaire have been received from the following Associations:

Argentina, Chile, China, Denmark, France, Finland, Germany, Greece, Ireland,
Italy, Netherlands, Mexico, Norway, Slovenia, Sweden and Venezuela

All the above countries are parties to CLC 1969 (Denmark) or 1992 while only the countries underlined are also parties to the LLMC Convention 1976. However Chile has incorporated some of the provisions of the LLMC Convention into its national law and the NMLA of Chile has provided responses also to the questions relating to that Convention.

Question (a): Whether the constitution of the limitation fund is a condition for the availability of the benefit of limitation (this question is relevant only for the LLMC Convention).

Limitation of liability may be invoked notwithstanding that a limitation fund has not been constituted in Chile, Denmark, France, Greece, Ireland, Norway and Sweden. In Germany, Mexico, the Netherlands, Slovenia and Venezuela the constitution of the fund is required.

Question (b): In which manner the limitation of liability may be invoked and whether this action must precede the constitution of the fund.

Article V(3) of CLC 1992 so provides in its relevant part:

3. For the purpose of availing himself of the benefit of limitation provided for in paragraph 1 of this Article the owner shall constitute a fund for the total sum representing the limit of his liability with the Court or other competent authority of anyone of the Contracting States in which action is brought under Article IX or, if no action is brought, with any Court or other competent authority in anyone of the Contracting States in which an action can be brought under Article IX.

Article 11 (1) of the LLMC Convention so provides in its relevant part:

1. Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation.

(i) How limitation may be invokedCLC 1992

Only Argentina, Germany, Greece, Ireland and Sweden have made a specific reference to the CLC and to the LLMC Convention, while, probably owing to the generality of the question, the other Associations have not expressly indicated to which Convention the response was related. But, except Mexico, who stated that the domestic rules apply to both Conventions, it would appear that it was meant to refer to the LLMC Convention and, therefore, reference will provisionally be made to that Convention, save a future change if such assumption will appear to be incorrect.

In Argentina, Greece and in Italy in order to invoke limitation the fund must be constituted, while in Germany and Mexico limitation may be invoked both before and after an action is brought, but must not precede the constitution of the fund. That appears to be in line with Article V(3). In Finland limitation may be invoked before and after an action is brought or by constituting a fund where proceedings are instituted in respect of claims subject to limitation, but the right to limit requires the constitution of the fund. In Ireland the owner must first apply to the Court for an order limiting his liability, whereupon the Court will order payment of the limitation amount

LLMC Convention

In Chile, China, Denmark (probably), France, Germany, Greece, Ireland, Mexico, Netherlands, Norway and Slovenia limitation may be invoked either before proceedings in respect of claims subject to limitation are brought against the person liable (in which event the constitution of the fund is required in Venezuela) or as a defence, after proceedings have commenced. In the former case the competent Court is in the Netherlands the Court of the place where the vessel is registered or, if the vessel is of a foreign nationality, the Court of Rotterdam. In Greece the competent Court is the Court before which a claim is brought. In Norway the competent Court must be a Court competent in respect of claims arising out of the event in respect of which limitation is sought. In Sweden no specific action is needed nor is there any specific manner in which the limitation may be invoked.

Question (c): In which manner the limitation fund may be constituted, in addition to depositing the sum.

CLC 1992

The type of security is decided by the competent Court, in its absolute discretion, in Chile, China, Denmark, Finland, Germany, Mexico, the Netherlands, Norway and Slovenia. Some restrictions exist instead in Argentina, where it is required that the guarantor, besides being solvent, must be domiciled in Argentina; in Greece, where the fund may be constituted either by depositing the sum with a bank operating in Greece or

by a guarantee issued by a bank operating in Greece; in Italy, where the guarantee must be either a bank or an insurance guarantee issued in conformity with the laws and regulations that authorise and govern the banking and insurance services in Italy. Even more strict requirements exist in Ireland, Sweden and Venezuela, where the limitation amount must be paid into Court.

LLMC Convention

The requirements are the same in Chile, China, Denmark, Finland, France, Germany, Greece, Mexico, the Netherlands, Norway, Slovenia, Sweden and Venezuela. In Ireland the strict requirement existing for the CLC does not apply and rules similar to those existing in the other countries apply.

Question (d): Whether the limitation fund is a condition in order to invoke the limitation or not, is there in your law a time limit within which the fund must be constituted.

No statutory time limits exist in Denmark, Finland, France, Germany, Greece, Ireland, Mexico, Norway, Sweden and Venezuela. In Argentina, Chile and China the time limit is related to the completion of a certain stage of the proceedings, e.g. prior to the issuance of the judgment. In Italy, the Netherlands and Slovenia there are instead statutory time limits: in Italy the guarantee must be made available concurrently with the request of limitation, in the Netherlands the limit is fixed by the Court but cannot be beyond one month from the order of the Court, in Slovenia the fund must be constituted within 15 days of the decision whereby the constitution is authorized.

Question (e): Which information the owner must provide to the Court.

Since the information varies from country to country, a list of the matters in respect of which information is required follows, with the indication of the countries that require it.

- (i) description of the event giving rise to the liability: Chile, Finland, Germany, Greece, Mexico, Netherlands, Slovenia, Sweden, Venezuela;
- (ii) details of the vessel: Germany, Greece, Italy, Mexico (tonnage certificate required), Netherlands, Norway;
- (iii) list of claimants and amount of each claim: Chile, China, Finland, France, Germany, Greece, Italy, Mexico, Netherlands, Norway, Slovenia, Sweden, Venezuela;
- (iv) Limitation amount and manner of calculation: Argentina, Chile, China, France, Greece, Netherlands, Slovenia, Venezuela;
- (v) reasons for constitution of the limitation fund: China;
- (vi) manner of constitution: Chile, Greece, Slovenia;
- (vii) appointment of a process agent: Greece;
- (viii) official rate of exchange between national currency and US dollar and SDR: Mexico.

Question (f): Whether notice must be given to the claimants of the commencement of the limitation proceedings and which directions are set out as to the manner in which they must file their claims in such proceedings.

By whom and how notice of the proceedings must be given to the claimants

- (i) by the petitioner: Ireland;
- (ii) by the Court or by the Court appointed receiver or other officer: Argentina, Chile, China, Finland, France, Italy, Mexico, Netherlands, Slovenia, Sweden, Venezuela;
- (iii) by means of publication in the national Official Journal and in leading newspapers: Argentina, Chile, China, Denmark, France, Germany, Netherlands.

Information and directions

- (i) name of applicant: China, Finland, Venezuela;
- (ii) name of vessel: Venezuela;
- (iii) time by which claims must be filed: Chile, China, Finland, France, Italy, Mexico, Netherlands, Norway, Venezuela;
- (iv) particulars required for the proper filing of the claims: China, Finland, Slovenia, Venezuela;
- (v) other useful directions for the participation in the proceedings: Netherlands, Norway.

Question (g): Which is the time limit, if any, within which the claims must be filed and which are the consequences of the failure to file the claims within such time limit.

Time limit

It is fixed by statute in Chile (30 days), Finland (before distribution of the fund), France (30 days with possible extension to 40 and 50 days), Italy (30 days and 60 days for claimants resident abroad), Slovenia (90 days) and Venezuela (30 days).

It is fixed by the Court, normally within a time frame fixed by statute, in Argentina (between 20 and 60 days), China (there does not seem to be a time frame), Denmark (not less than 2 months), Germany (not less than 2 months and 6 months for claimants resident abroad), Greece (not less than 15 days and not more than 6 months in respect of CLC, subject to extension, and 3 months in respect of LLMC), Mexico (fixed at the discretion of the Court), the Netherlands (not later than the date set by the Court), Sweden (not less than 2 months).

Consequences of non compliance

The consequences of the failure to file the claim within the prescribed time limits vary considerably in the various jurisdictions:

- (i) loss of the right to participate in the distribution of the fund: Argentina (subject to a Court decision), Chile, China, Denmark (only after judgment on distribution),

- Germany (only after judgment on distribution), Greece (in respect of CLC), Norway (only after judgment on distribution), Ireland, Netherlands (save later allowance by the Court);
- (ii) loss of the right to participate in the initial distribution, without prejudice to the right to participate in the distribution of the surplus: Italy, Finland;
 - (iii) deemed acceptance of the amount of the claim indicated by the petitioner : France (where, however, this rule does not seem to be applied in practice);
 - (iv) loss of the right to challenge the amount of the fund: Chile;
 - (v) loss of the right to challenge the benefit of limitation: Chile;
 - (vi) payment may be made only if an amount has been set aside by the Court: Sweden.

Question (h): In which manner the claims of the claimants are assessed and whether such assessment may be challenged and how.

In many jurisdictions there seem to be fundamentally two stages. In the first stage the claims are verified either by a judge or a person appointed by the Court (receiver, administrator, marshal, etc.) who prepares a project of distribution. In the second stage the project of distribution is discussed at a hearing amongst all parties and if it is challenged, the Court will issue a judgment confirming or amending the project; such judgment may be final or subject to appeal. This seems to be the case in Argentina, Chile, China, Denmark, Finland, France, Germany (probably), Greece, Italy, Netherlands, Norway and Sweden. There are of course variations as regards the original proof of the claim (for instance in China and Slovenia a distinction is made according to whether the claim is evidenced by a judgement or award or not) and the procedure within each of the basic stages.

Question (i): To which extent is the subrogation of any person who has paid any amount of compensation in respect of claims subject to limitation permitted.

The same rule holds in all jurisdictions except Slovenia. The person who has paid a claimant acquires by subrogation the rights of the claimant up to the amount paid.

Question (j): Within which set of proceedings and at which time may the counterclaim mentioned in Article 5 of the (LLMC) Convention be raised.

In Denmark, Germany, Netherlands, Norway, Sweden and Venezuela a counterclaim may be raised in the limitation proceedings prior to the final decision on the distribution of the limitation amount. In Finland, France, Greece, Ireland and Mexico it may be raised in the proceedings on the merits brought against the owner.

Question (k): What is the position of a person who has a claim subject to limitation and has recovered a part of such claim out of other assets of the person liable and subsequently makes a claim against the fund; how does Article 9 (of the LLMC Convention) apply in such case.

There does not seem to be any express provision in this respect in the laws of the countries whose NMLAs have sent responses so far. Slightly different views have been expressed:

- (i) the claimant may claim against the fund the unpaid balance of his claim (Chile, Finland, Germany, Norway and Sweden) and the person liable may claim against the fund the amount paid (Germany, Norway);
- (ii) any decision is left to the Court, who may even decide that the claimant has forfeited his right to claim against the fund: Netherlands, Venezuela;
- (iii) the amount recovered is deducted from that payable out of the fund (Mexico).

It is thought that the proper solution is, similarly to what happens in bankruptcy proceedings, to protect the other claimants and avoid that the recovery by one claimant of a part of his claim out of other assets of the person liable might reduce their share of the fund. At the same time also the person liable should, provided this does not adversely affect the other claimants, be protected. Probably a distinction should be made according to whether he has paid before or after the petition for limitation. Only if he has paid after filing the petition, he should be allowed to claim against the fund the amount paid.

Question (l): Whether a plan for the distribution of the fund among the claimants must be prepared and by whom.

In some jurisdictions (China, Italy, Netherlands) the plan for distribution is prepared by the claimants amongst themselves and only if they cannot reach an agreement is prepared by the Court. In other jurisdictions (Chile, Denmark, Finland, France, Germany, Greece, Mexico, Netherlands, Norway, Slovenia, Sweden and Venezuela) it is prepared by the Court or the person in charge of the fund (administrator, liquidator, etc.).

Question (m): Whether the plan may be challenged and how.

A distinction must be made according to whether the plan has been agreed by all claimants or not. If it has been agreed, it obviously cannot be challenged. If it has been prepared by the person in charge of the fund or by the Court it may be challenged (Finland, Greece, Italy, Mexico, Netherlands, Slovenia, Sweden and Venezuela: a time limit is specified in Greece, Italy and the Netherlands) or may be deemed to be final and binding (China, France).

Question (n): Whether in the case of the plan being challenged the distribution must be stayed until a final decision or not.

Distribution starts only when the plan becomes final in Denmark, Finland, Germany, Italy, Mexico, Netherlands, Norway, Slovenia and Sweden. Distribution may start after a reasonable part of the fund is set aside in Argentina, Chile, Finland, Greece, Venezuela.

Question (o): Which are the effects of the bankruptcy of the owner on the limitations proceedings.

In Argentina, Chile, France, Germany, Greece, Ireland, Italy, Mexico, Netherlands, Norway, Sweden and Venezuela after the fund is constituted a subsequent bankruptcy does not affect the fund and its distribution. In Denmark the fund proceedings continue, but with the bankruptcy estate acting as the competent party. It is not clear however, whether the relevant time is the date of commencement of the limitation proceedings or that of the actual constitution of the fund, if subsequent. It would appear that if bankruptcy proceedings are commenced before the limitation proceedings (or the constitution of the fund) the separate administration of the fund would not be permissible but this issue is worthy of further investigation. In Finland if the fund has been constituted by depositing a guarantee, the fund does not become part of the owner's bankruptcy estate; the position is instead unclear in case of a cash deposit.

Question (p): Whether there are any other issues relating to the limitation procedure that are worth mentioning.

The following issues have been mentioned in the responses to the Questionnaire:

Chile has raised the issue of the effect of limitation proceedings on enforcement or protective measures.

Denmark has raised the issue of the relationship between the European Convention on Jurisdiction and the Enforcement of Judgment (now Regulation (CE) 44/2001) and the LLMC Convention.

France has raised the issue of the competent Court by which limitation proceedings should be conducted and of the consolidation of all proceedings in respect of claims subject to limitation.

Greece has provided information on the jurisdiction of the Greek Courts and the challenge of the right to limit.

The Netherlands has raised this latter issue as well.

Venezuela has mentioned that after constitution of the fund all individual enforcement actions (arrest and seizure) on other assets of the debtor are stayed.

II**FUTURE ACTION**

It is suggested that the CMI might consider the feasibility of a guidelines on limitation proceedings in connection with the LLMC Convention, the CLC and the HNS Convention. It is also suggested that this investigation should start with the LLMC Convention. The following issues could be worthy of exploration if it will be decided to commence an investigation in respect of the LLMC Convention:

1. *Court competent for the conduct of limitation proceedings*
2. *Whether constitution of the limitation fund should be obligatory*
3. *Information to be provided and document to be produced by the person applying for limitation*
4. *At which stage of the proceedings the fund should be constituted*
5. *In which manner the fund should be constituted*
6. *Time limits for the filing of claims by the claimants*
7. *Consequences of late filing of claims*
8. *When and by whom the claims should be verified and whether consolidation of proceedings should be provided*
9. *Review of the plan for distribution of the fund*
10. *Consequences of recovery by claimants subject to limitation from other assets of the person liable*
11. *Subrogation*
12. *Bankruptcy of the person liable and its effect on limitation proceedings*