

FRANSEN
ADVOCATEN

WIM FRANSEN °
STÉPHANE VAN MOORLEGHEM °
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INGE VANHOUTTE
DOMINIQUE CLAES
ANNICK DE BOECK
VINCENT FRANSEN
ALEXIS VAN CUTSEM

in samenwerking met:

DIRK WUYTS °°
ADVOCATEN

Mr Francesco Berlingieri
Mr Gregory Timagenis

cc. Mr Jean-Serge Rohart
cc. Dr Thomas Remé
cc. Mr Patrick Griggs
cc. Mr Nigel H. Frawley
cc. Mr Karl-Johan Gombrii
cc. Mr John E. Hare
cc. Mr Henry H. Li
cc. Mr Frank L. Wiswall jr.
cc. Mr Benoît Goemans
cc. Mr José M. Alcantara
cc. Mrs Johanne Gauthier
cc. Mr José Tomàs Guzman Salcedo
cc. CMI – Antwerp
Att. Mrs. Pascale Sterckx

E-MAIL

Antwerp, 9th February 2006

Dear Francesco and Gregory,

RE : CMI - questionnaire
M. ref. : dx 11 P9
Yr. ref. : ---

Please find hereafter the answers to your questionnaire on Procedural rules in limitation conventions.

It seems that Belgium has not answered the questionnaire. Let me do it. I know that I am late but you will see that my answers can be easily fit in with the answers received from the other national states.

As a general comment I must say that - and I believe Patrick GRIGGS made the same observation - it would be unwise to impose too strict procedural rules binding all the national states. The *Travaux Préparatoires* of f.i. the Arrest Convention show that procedure is often left to the *lex fori* which seems logical.

In Belgium the ex parte application to the President works really well. In one particular collision case where my client wanted to avoid an arrest on one of his vessels I went to see the President at 23.00hrs. The limitation fund was put in place within 4days and an arrest that meanwhile had indeed been made was immediately lifted by my opponent.

Belgium is Party to both CLC 1992 and LLMC 1976.

Question (a)

LLMC Convention

It is not a condition. Belgium is Party to the LLMC Convention 1976 (not the 1996 Protocol).

Question (b)

LLMC Convention

1. The limitation may be invoked in substantive proceedings as to principle either before proceedings in respect of claims subject to limitation are brought against the person liable or as a defence. F.i. one can ask the Commercial Court to rule that no intentional or inexcusable fault has been made and that one has a right to limitation of liability even (see above) if the fund has not yet been constituted.
2. If one wants to constitute a fund however one should of course present a request for limitation to the President of the Commercial Court who gives a Court Order authorising to limit the liability and setting out the conditions (what sort of guarantee, amount of the guarantee, ...). After having seen the bank guarantee, other acceptable guarantee or proof of deposit of the limitation fund the President gives a new Court Order confirming that the limitation fund has been constituted.

Question (c)

LLMC Convention

The sum can be deposited at the *Caisse de Dépôt et de Consignation* or in the hands of the Court appointed Liquidator who will open a specific interest generating bank account.

A guarantee is also acceptable, usually from a well known Belgian bank and recently a Club security. It should cover the limitation amount together with a provision for future interests (for two/three years).

Question (d)

LLMC Convention

There is no limit within which the fund must be constituted but the constitution should of course proceed enforcement of Court Decisions against the Debtor in order to be useful.

Question (e)

LLMC Convention

1. Description of the event giving rise to the liability.
2. The details of the vessel, esp. tonnage upon which the limitation is to be calculated (to be proven by the tonnage certificate of the vessel).
3. The list of claimants (and of possible the expected amount of the claims).
4. The manner of calculation of the limitation amount.

Question (f)

LLMC Convention

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

Notice must be given by the Liquidator of the limitation fund appointed by the first Order of the President of the Court. He will inform in writing the known claimants of the constitution of the fund and will invite them to introduce their claim.

He will also in conformity with the second Order – confirming that the fund is in place - publish the constitution of the limitation fund in the State's Gazette and in the newspapers chosen by the President.

Information and directions

Can be found in the second Order of the President which is published.

The claimant wishing to introduce a claim in the fund must follow the procedural rules in respect of the filing of claims in a bankruptcy.

Question (g)

LLMC Convention

Time limit

There is uncertainty because article 48 of the Belgian Maritime Code refers to the old law on bankruptcy as far as the proceedings are concerned. According to this old law claims can be entered until distribution whereas under the new law on bankruptcy claims should be entered within three years after opening of the bankruptcy. It is generally believed though that the old rule is still applicable due to an oversight of the legislator and that claimants in a limitation fund can enter their claims until distribution.

Consequences of non-compliance

One can of course no longer claim after distribution. It is generally believed that a claimant has no claim against other assets of the Shipowner in Belgium and no right of arresting his vessels in Belgian waters.

Question (h)

LLMC Convention

The Liquidator appointed by the President draws up a report to the relevant section of the Commercial Court (in Antwerp this is the section that deals with bankruptcies). The claimants and the petitioner will in submissions give their comments to the draft report of the Liquidator who has of course the right to file submissions also. The Court will decide.

Question (i)

LLMC Convention

Subrogation is admitted as provided for in the LLMC Convention.

Question (j)

LLMC Convention

Any counterclaim should be raised in the proceedings on the merits against the owner.

As a general remark I should add that the right of the petitioner to limit his liability should be challenged within 3 months as from the publication in the State's Gazette and the newspapers. Any later challenge is null and void.

Question (k)

LLMC Convention

In Belgium there is no express provision in this respect.

The views expressed in points i) and ii) also seem to apply insofar as Belgium is concerned.

Question (l)

LLMC Convention

See above : the Liquidator of the fund will prepare a draft distribution where he comments both substance and amount of the claims, as well as the question whether the claim is subject to limitation.

Question (m)

LLMC Convention

See above : yes. In substantive proceedings before the Commercial Court by filing submissions.

There is no specific time-limit applicable, but before distribution of course.

Question (n)

LLMC Convention

The answer is yes.

Question (o)

LLMC Convention

It does not affect the fund and its distribution as per Article 49 of the Belgian Maritime Code, but the petitioner and the Trustee of the bankruptcy must be invited to be party to the distribution proceedings.

Question (p)

LLMC Convention

It is generally believed that arrests must be lifted immediately. However, the Arrest Judge has the right to decide *prima facie* without binding the substantive Court that the difference between the limitation fund and the amount of the claim should be secured and that the arrest is not lifted until

the difference will be secured by a bank guarantee if he finds that the Petitioner has committed an intentional or inexcusable fault barring him from the right to limit his liability. He may also - again on a preliminary basis and without binding the substantive Court - find that a particular claim falls outside the scope of the limitation (and should therefore be guaranteed).

Kind regards,

Wim FRANSEN