

UK P&I CLUB



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LEGAL BRIEFING

Sharing the Club's legal expertise and experience

Your environmental liabilities under the Antarctic Treaty

UK P&I CLUB
IS MANAGED
BY **THOMAS
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Sharing expertise

This briefing is one of a continuing series which aims to share the legal expertise within the Club with our Members.

A significant proportion of the expertise in the Managers' offices around the world consists of lawyers who can advise Members on general P&I related legal, contractual and documentary issues.

These lawyers participate in a virtual team, writing on topical and relevant legal issues under the leadership of our Legal Director, Chao Wu.

If you have any enquiries regarding this briefing, please contact Dingjing Huang (dingjing.huang@thomasmiller.com or +44 20 7204 2085) and he will be pleased to respond to your query.

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Previous issues

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The Antarctic Treaty and its Environment Protocol

Annex VI of the Environment Protocol, which deals with liabilities arising from environmental emergencies, has not yet come into force, but shipowners trading to the Antarctic should be aware of their potential liabilities under this instrument.

During the International Geophysical Year (IGY) in 1957-58, 67 countries participated in the first substantial research programme in the Antarctic. Twelve of these countries¹ that had significant interests, including scientific stations and in some cases territorial claims, in the Antarctic during the IGY decided to enter into a Treaty to ensure the use of Antarctica is for peaceful purposes only. The Antarctic Treaty was agreed in 1959 and came into force in 1961.

Increasing concerns about the environment have led to four additional agreements – the Convention for the Conservation of Antarctic Seals, the Convention for the Conservation of Antarctic Marine Living Resources, the Convention on the Regulation of Antarctic Mineral Resource Activities², and the Protocol on Environmental Protection. Collectively, these together with the Treaty are known as the Antarctic Treaty System.

The Treaty's Protocol on Environmental Protection came into force in 1998. Its objective, as set out in Article 2 of the Protocol, is the "comprehensive protection of the Antarctic environment and dependent and associated ecosystems", and to that end, the Parties "designate Antarctica as a natural reserve, devoted to peace and science". Article 3(3) of the Protocol emphasises the priority that must be given to scientific research in the Antarctic and to its preservation for these purposes.

The Protocol imposes strict regulations on all activities carried out in the Antarctic. As well as prohibiting mineral exploitation of the continent (Article 7



There are currently 53 signatories to the Antarctic Treaty: 29 Consultative Parties (decision-makers) and 24 Non-Consultative Parties (non-decision-making attendees).

of the Protocol), almost all other activities taking place there, such as scientific research programmes and tourism, are subjected to environmental impact assessments (Article 8 of the Protocol).

Environmental emergencies

One of the most significant aspects of the Protocol is its treatment of environmental emergencies. Under

Article 15 of the Protocol, the Parties are committed to providing "prompt and effective" response actions to emergencies arising from activities carried out in the Antarctic area, which include shipping activities. In order to respond to such emergency incidents, the Parties also commit to establishing contingency plans. The Parties agree to "elaborate" rules and procedures relating to liability for damage arising from the activities taking place in the Antarctic

¹ Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom, and the United States of America. ² Although signed in 1988, it has not come into force.



Treaty area (Article 16 of the Protocol).

The Protocol does not contain specific liability regimes for breaches of these obligations but leave this issue to its annexes. There are six annexes to the Protocol. Annexes I to IV was adopted at the same time as the Protocol was adopted and also entered into force in 1998. These four annexes cover environmental impact assessments, fauna and flora, waste disposal and marine pollution. Annex V, which deals with protected areas, entered into force in 2002. Adopted in 2005, Annex VI concerns liability arising from environmental emergencies, corresponding to Article 15 of the Protocol. Amongst all, Annexes IV and VI are particularly relevant to shipping activities. Annex IV was designed to complement MARPOL 73/78 with regard to marine pollution in Antarctic area. The obligations and liability under Annex IV are generally the same as those under MARPOL. In contrast, Annex VI establishes a stand-alone liability regime for environmental emergency response.

Annex VI liability arising from environmental emergencies

Annex VI is not yet in force. However, Members involved in activities in the Antarctic region are advised to be aware of the potential impacts of Annex VI.

(i) Application of Annex VI

Annex VI applies to “environmental emergencies”. These are defined as accidental events that result in, or imminently threaten to result in, any significant and harmful impact on the Antarctic environment. The Annex covers such emergencies where they are connected to scientific research programmes, tourism and “all other governmental and non-governmental activities in the Antarctic Treaty area for which advance notice is required under Article VII(5) of the Antarctic Treaty, including associated logistic support activities”. The Antarctic Treaty requires each Contracting Party to give notice to the other Contracting Parties of all expeditions to and within Antarctica, on the part of its ships or nationals, and

of all such expeditions organised in or proceeding from its territory, of all stations in Antarctica occupied by its nationals and of any military personnel or equipment intended to be introduced by it into Antarctica.

The main responsible person under Annex VI is the “operator”. An “operator” is defined to include any natural or legal person, governmental or non-governmental, that organises activities to be carried out in the Antarctic Treaty area. It excludes natural persons who are acting as employees, contractors or agents of a person organising such activities. Also excluded are legal persons acting as contractors on behalf of a State operator. An operator is linked to a particular Party where that operator organises, in the Party’s territory, activities to be carried out in the Antarctic Treaty area and is subject to authorisation or a comparable regulatory process by that Party.

(ii) Obligations and liability

There are essentially three aspects of

obligations and liability under Annex VI, reflecting those outlined in the Protocol itself: a. the prevention and mitigation of environmental emergencies; b. responding to such emergencies; and c. assigning liability for meeting the costs of responding. The Annex’s main focus is on the third aspect but it is equally important to understand the first two.

a. Prevention and mitigation of environmental emergencies

Article 3 (Preventative Measures) of the Annex imposes an obligation on Parties to require their operators to undertake reasonable preventative measures designed to reduce the risk of environmental emergencies and their potential adverse impact.

A non-exhaustive list of what preventative measures may amount to is set out in Article 3(2) of Annex VI. These include the incorporation of specialised structures or equipment into the design and construction of facilities and means of transportation, the incorporation of specialised procedures into the operation or maintenance of

facilities and means of transportation as well as specialised training of personnel.

b. Responding to environmental emergencies

Alongside the preventative measures discussed above, under Article 4 (Contingency Plans), each Party shall require its operators to establish contingency plans for responding to incidents with potential adverse impacts on the Antarctic environment or dependent and associated ecosystems. Operators are also required to cooperate in the formulation and implementation of the contingency plans.

Contingency plans shall include procedures for conducting an assessment of the nature of the incident, notification procedures, the identification and mobilisation of resources, response plans, training, record keeping and demobilisation.

A Party is obligated, where an environmental emergency arises from the activities of its operator, to require that the operator takes “prompt and effective response action” under Article

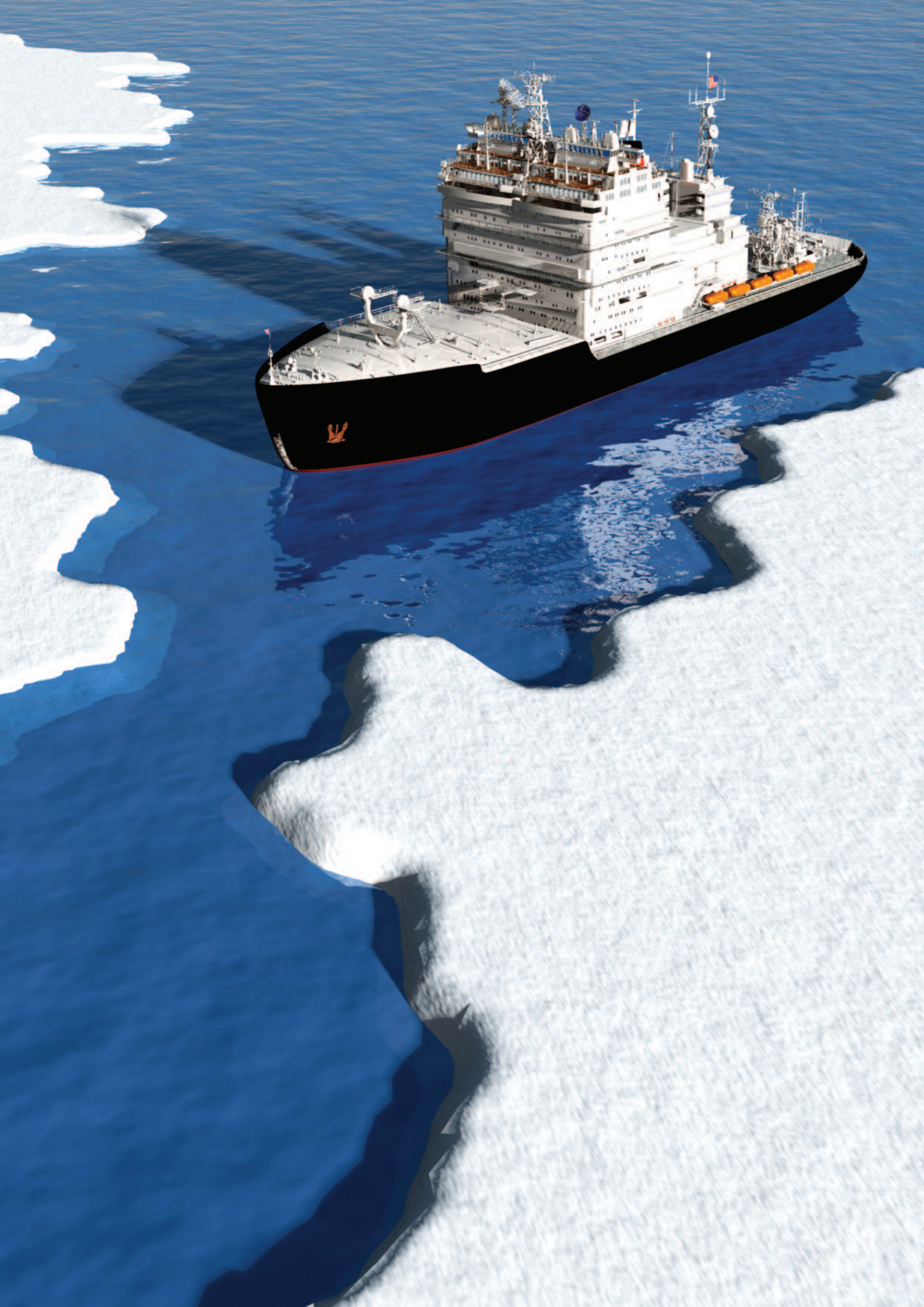
5 of Annex VI (Response Action). If the operator does not do so, the Party to which the operator is linked (“linked Party”), as well as other Parties, are encouraged to take such action, but are under no obligation to do so. If other Parties do wish to take actions, they must notify their intention to the linked Party and the Treaty Secretariat beforehand with a view that the linked Party may want to take the action itself. Where a threat to the environment is imminent and it would be reasonable to take immediate response action, the notification may be sent after the action is taken. Such arrangement should only take place in the circumstances where a threat of significant and harmful impact to the Antarctic environment is imminent and the linked Party has failed to take the response action or notify the Treaty Secretariat within a reasonable time.

If the linked Party wishes to be assisted by another Party or Parties, the linked Party shall coordinate the response action.

The above is important when considering the allocation of liability dealt with in the rest of the Annex.



Flags of original signatory nations of the Antarctic Treaty at the South Pole, Antarctica



EXEMPTIONS

c. Liability for responding to environmental emergencies

Article 6 of Annex VI (Liability) makes an operator that fails to take the required response action liable for the costs of actions taken by any Parties (including the linked Party and other Parties). This is a strict liability.

When a State operator should have taken prompt and effective response action but failed to do so, and no response action was taken by any Party, the State operator shall be liable to pay the costs of the response action into a fund administered by the Secretariat of the Antarctic Treaty (The “AELF”, see below).

When a non-State operator who should have taken the response action failed to do so, and no response action was taken by any Party, the non-State operator is liable to pay an amount of money that reflects as much as possible the costs of the response action that should have been taken, into the AELF, or alternatively, to the Party of the operator or to the Party taking enforcement action against it under Article 7(3) of the Annex.

Operators are jointly and severally liable where the emergency is the result of the activities of two or more of them. It is, however, possible under Article 6 for an operator to establish that only part of the environmental emergency results from its activities and limit its liability to that part accordingly.

d. Jurisdiction and time limit

Actions against a non-State operator's liability under Article 6, can only be brought by a Party that has taken a response action. Such an action may be brought in the courts of only one of the following Party or Parties: where the operator is incorporated, has its principal place of business or is habitually resident. If these locations are not within the territory of a Party, the action may be brought in the courts of the linked Party. Parties are under a duty to ensure that their courts have the necessary jurisdiction for such actions. Where no Party has taken a response action, the operator's liability is to the AELF. State operators are treated differently. The liability of a state

operator is established by the other Parties, including through the Antarctic Treaty Consultative Meeting.

Actions for compensation must be brought “within three years of the commencement of the response action or within three years of the date on which the Party bringing the action knew or ought reasonably to have known the identity of the operator, whichever is later”. An absolute time limit of 15 years after the commencement of the response action also applies.

(iii) The “AELF” fund

Article 12 of Annex VI provides that the Secretariat of the Antarctic Treaty shall maintain and administrate a fund, which is known as the Antarctic Environmental Liability Fund (“AELF”). Unlike funds under other maritime liability regimes, the main purpose for the AELF is to reimburse costs incurred by a Party or Parties in taking response action, to the extent that such costs are reasonable and justified. It does not serve as a fund to compensate third parties (such as the IOPC fund).

The source of the fund will be voluntary contributions from any State or person.

(iv) Exemptions and limitation of liability

Operators may be exempted from liabilities if they can prove that the environmental emergency arose through an act or omission necessary for the protection of human life or safety, a natural disaster of exceptional character which could not have been reasonably foreseen in spite of preventative measures in place, or through an act of terrorism or belligerency against the operator. (Article 8 of Annex VI) Those involved in a response action resulting in an environmental emergency may also be exempted from liability, provided the response action taken was reasonable in all the circumstances.

Annex VI also imposes a limitation of liability system. Financial limits under Article 9 of the Annex are as follows:

- For an environmental emergency arising from an event involving a ship:
 - 1 million Special Drawing Rights (“SDR”) for a ship with a tonnage not exceeding 2,000 tons;
 - or a ship with a tonnage in excess thereof, the following amount in addition to that referred to 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;
- For an environmental emergency arising from an event which does not involve a ship, the limit is 3 million SDR.

The limits for ship related environmental emergency under Annex VI are the same as the limits for property damage set up in the original LLMC 1996.

Annex VI is stated not to affect the liability or the right to limit liability under any applicable international limitation of liability treaty, or the application of a reservation made under any such treaty to exclude the application of the limits therein for certain claims. A few jurisdictions, such as the UK, opt to apply a reservation for wreck removal liability under LLMC. The Annex should not affect such a reservation by imposing a limit for wreck removal liability, however, the limitation of liability for wreck removal may be governed by the Wreck Removal Convention.

The limits provided in Annex VI appear to represent a minimum requirement. If such understanding is correct, in a jurisdiction where lower limits (e.g., LLMC 1976 limits) are applicable, the lower limits will be superseded by Annex VI limits; in a jurisdiction where higher limits (e.g., LLMC 1996 as amended in 2012) are applicable, the higher limits will prevail. However, it remains unclear whether a separate and exclusive limitation fund needs to be established for the purpose of the Annex as liability hereunder may overlap with that under existing LLMC conventions.

ENTRY INTO FORCE

An operator's right to limit is lost in circumstances where it is proved that the environmental emergency resulted from an act or omission of the operator which was committed with the intent to cause such emergency, or recklessly and with knowledge that such emergency would probably result. Similar to the position of LLMC 1976 and 1996, this suggests a limit that is difficult to break.

(v) Compulsory Insurance

In order to underpin liability under the Annex, Parties must require their operators to maintain adequate insurance or other financial security (such as a bank guarantee) up to the applicable limits to cover their liability to Parties who step in to take the required response actions where they have themselves failed to do so. Parties can also require similar insurance or financial security to be provided to cover circumstances where the operator is liable to make a payment to the AELF, to the Party of the non-State operator or to a party that takes enforcement action against it in circumstances where no Party steps in to address the emergency.

Two questions remain unanswered by the Annex: 1. whether the insurer will be able to invoke defences available to the insured; and 2. whether the insurer may subrogate and claim reimbursement from the AELF fund. These questions seem necessary to be addressed before the Annex comes into force.

(vi) Coming into force of Annex VI

It is still not known when Annex VI will come into force. The Antarctic Treaty Consultative Meeting in May 2016³ reported that 13⁴ of the 23 Consultative Parties have approved Annex VI.

Parties that have already approved the Annex will have put measures in place ready for its coming into force. For example, the UK, which has a dualist system requiring international obligations to be incorporated into domestic law, does not approve or ratify international obligations until suitable domestic legislation is in place. The Antarctic Act 2013 transposes the

Annex VI requirements into UK law, including for example the liability to the AELF (Section 3) and the requirement to hold adequate insurance (Section 6), and is expected to come into force once it is clear when Annex VI itself will come into force.

The UK P&I Club will closely monitor the progress of the implementation of Annex VI and keep our Members updated. ■

Questions on this Legal Briefing may be directed to the authors or to the editorial team. Members are also directed to the UK Club's website (ukpandi.com) for additional information on Arctic Shipping and the Polar Code.



³ XXXIXth Antarctic Treaty Consultative Meeting, Chile, May – June 2016

⁴ Australia, Finland, Italy, the Netherlands, New Zealand, Norway, Peru, Poland, the Russian Federation, South Africa, Spain, Sweden and the UK

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