# Nuclear damage claims regulation in Poland: Analysis and Diagnosis

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**Abstract:** The construction of Poland's first nuclear power plants is scheduled for the upcoming decade. This presents an opportunity to review the legal framework that will govern nuclear power plants once they become operational, particularly regulations concerning claims for nuclear damage. The Vienna Convention does not address the specifics of claims procedures, establishing only general rules. A particular challenge in the claims process is the multitude of claimants seeking compensation compared to the limited amount of funds available. This necessitates the adoption of rules for the satisfaction of claims, including the distribution of available funds and order of satisfaction. Polish regulations concerning claims are incomplete. In procedural terms, the Atomic Law Act requires the establishment of a limitation of liability fund if the amount of the liability limit is insufficient to satisfy all claims. However, there is no autonomous regulation regarding substantive law principles for the distribution of the available amount. The Atomic Law Act refers to the Civil Code and the Maritime Code. The Maritime Code refers to LLMC. This gives rise to interpretive uncertainties. Poland, therefore, faces the challenge of regulating the issue of claims in advance, both in terms of out-of-court settlement and the procedure for mass litigation, as well as substantive law principles for the distribution of the available amount. A revision of the regulations seems necessary.

**Key words:** nuclear damage, nuclear law, a limitation of liability fund, mass litigation

## I. Introduction

Poland is developing its nuclear energy program, with the first installations expected to commence operations within the next decade. This presents an opportune moment to revise the existing legal framework governing nuclear power plants, particularly during their operational phase. Regulations pertaining to the pursuit of claims for nuclear damage warrant particularly close scrutiny, especially in light of international law and contemporary legislative trends. The rules governing the claims process should be designed to ensure speedy and efficient proceedings, enabling both liable entities and claimants to conclude compensation processes promptly and smoothly without undue or additional costs.[1] In particular, the experience gained from the Fukushima accident has highlighted the critical role of a precise claims process[2] in

[1] See R. Majda, *Cywilna odpowiedzialność za szkodę jądrową w polskim prawie atomowym*, Łódź 2006, 260.

[2] The system adopted in Japan evolved over time, and it was essentially working on a living organism. See more E. Feldman, *Fukushima: Catastrophe, compensation and justice in Japan*, "DePaul Law Review" 62, no. 335 (2013): 3352.

situations where hundreds of thousands of individuals may be affected.[3] Regardless of the merits of the claims, the operator, insurer, and, ultimately, the court must be equipped to handle this immense organizational challenge.[4]

Poland is a party to the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963[5], and has also acceded to the Protocol Amending the Vienna Convention of 12 September 1997[6] and the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention (on Nuclear Third Party Liability) of 21 September 1988[7]. However, it is not a party to the CSC.

Domestically, the principles of civil liability for nuclear damage have been implemented into the Act of 29 November 2000 – the Atomic Law[8] (Articles 100-108). Polish law generally complies with the fundamental principles of the 1997 Vienna Convention and implements the liability rules derived therefrom. However, in terms of the rules for claiming compensation, the Atomic Law introduces an original solution that may give rise to interpretative doubts—the limited liability fund (Article 102(2)).

The Atomic Law does not establish a comprehensive, autonomous set of procedural and substantive rules for the compensation of nuclear damage. Deciphering the relevant norms requires reference to numerous legal acts. Consequently, a pertinent question in the current state of affairs is whether the law fulfills its intended purpose despite the dispersion of regulations. Regarding procedural norms, this purpose is the efficient and prompt payment of compensation to victims, with the operator's resources being used rationally. Indeed, in the event of a significant-scale accident, where hundreds or thousands of claims are anticipated, it is evident that as the duration of the claims settlement process increases (whether through litigation or other solutions), the operator's costs of handling these claims will rise proportionally. In terms of substantive legal grounds, the goal should be a fair distribution of available funds to compensate victims to the fullest extent possible. The challenge lies in the multiplicity of creditors in conjunction with the limited amount of funds available to satisfy their claims. In the current state of affairs (both legislative and in terms of the organizational realities of the Polish judiciary), the demands for speed and equitable distribution of funds may be practically

3 See N. Pelzer, *Facing the challange of nuclear mass tort processing*, "Nuclear Law Bulletin" 99, No. 1 (2017): 45.
4 *Ibidem*, 46
5 Official Journal of Laws "Dziennik Ustaw" 1990, No. 63, item 370.
6 Official Journal of Laws "Dziennik Ustaw" 2011, No. 4, item 9.
7 Official Journal of Laws "Dziennik Ustaw" 1994, No. 129, item 633.
8 Consolidated text as published in the Official Journal of Laws "Dziennik Ustaw" 2024, item 1277.

impossible to meet without detailed, dedicated regulations. Although the risk of a large-scale accident is very low, if such an event were to occur, the dynamics of the situation would not permit the ongoing refinement of these rules.

This article presents a step-by-step analysis of the system of procedural and substantive norms governing the recovery of claims for nuclear damage under Polish law. The aim of this analysis is to assess the existing legal framework and identify legislative areas that do not meet the aforementioned criteria. This enables the formulation of several *de lege ferenda* proposals.

## II. The Legal Framework for Pursuing Claims for Nuclear Damage in Poland

The Atomic Law does not establish a comprehensive, autonomous set of procedural and substantive rules for the redress of nuclear damage. Rather, it is a mosaic of numerous provisions scattered across various legal acts. Procedural rules, in particular, are only partially regulated in an autonomous manner within the Atomic Law. According to Article 100a(1) of the Atomic Law, the redress of nuclear damage occurs on the basis of the provisions of the Civil Code, subject to the exceptions provided for in the Act. Moreover, pursuant to Article 107(2) of the Atomic Law, in matters of compensation, to the extent not regulated in Chapter 12, the provisions of the Civil Code also apply. The provision regarding compensation is superfluous in light of the broader concept of damage reparation (redress). For court proceedings concerning compensation, the provisions of the Code of Civil Procedure shall apply (Article 106(2) of the Atomic Law). In terms of subject-matter jurisdiction, pursuant to Article 106(1) of the Atomic Law, where nuclear damage has resulted from a nuclear accident on the territory of the Republic of Poland, cases relating to the recovery of claims for nuclear damage fall within the subject-matter jurisdiction of district courts.[9]

A particularly unique feature of the Atomic Law is the limited liability fund (Article 102(2) et seq.), which, presumably, was intended to serve as a mechanism for consolidating all claims within a single legal proceeding and possibly establishing rules for distributing the fund among the victims. The institution of the limited liability fund was included in the original version of the Act of 2000, but a detailed explanation and justification for introducing these regulations

[9] The Act does not, however, specify exclusive local jurisdiction, so the general rule in this regard must be assumed, which in practice means that the district court having local jurisdiction over the defendant's registered office, and thus primarily the operator, will be the competent court (Article 30 of the Code of Civil Procedure). Nevertheless, the provisions of the Act provide for the possibility of claiming compensation for nuclear damage directly from the insurer, and in the event of the insurer's failure to fully compensate the damage, the subsidiary liability of the State Treasury for nuclear damage, but limited to the amount of 300 million SDR. Since there may be at least two defendants independently, this means that different courts may have local jurisdiction to hear the cases.

cannot be found in the explanatory memorandum to the draft.[10] The provisions of the Act of 18 September 2001 – the Maritime Code[11] – on limiting liability for maritime claims apply *mutatis mutandis* to proceedings concerning the establishment and distribution of the fund, subject to Articles 102(3-5) of the Atomic Law. In turn, the Maritime Code, in the provisions on the limited liability fund, implements the provisions of another international instrument – the Convention on the Limitation of Liability for Maritime Claims, 1976 (LLMC)[12] and the LLMC itself applies directly to the fund itself (Article 339(1) *in fine*).

The 1997 Vienna Convention, as a ratified international treaty, also finds direct application. However, regarding the rules for claiming compensation, the Convention does not provide detailed provisions, leaving this matter to the discretion of the contracting parties. This constitutes an additional argument in favor of the proposition that these rules should be regulated comprehensively in domestic law.

The legal situation outlined above leads to the conclusion that regulation is dispersed and does not constitute a single coherent system. This can, by its very nature, lead to difficulties in applying and interpreting the norms.

## III. The Limited Liability Fund

### 3.1 The Concept

A detailed analysis of the limited liability fund should be made, as an institution dedicated to consolidating claims in a single proceeding, in a situation where the amount specified in Article 102(1) of the Atomic Law (300 million SDR) is insufficient to satisfy all claims. The operator is mandated to establish such a fund in these circumstances. Consequently, a fund would be created in response to any significant nuclear accident.

As mentioned, the provisions of the Maritime Code apply *mutatis mutandis* to proceedings concerning the establishment and distribution of the fund, subject to Article 102(3-5) of the Atomic Law. An additional complication arises from the fact that specific provisions are not

10 Parliamentary document “Druk Sejmowy” No. 1724 of 15 February 2000.

11 Consolidated text as published in the Official Journal of Laws “Dziennik Ustaw” of 2023, No. 1309.

12 Journal of Laws “Dziennik Ustaw” of 2012, No. 146; Article 97(1) of the Maritime Code: The liability of a debtor for maritime claims may be limited in accordance with the provisions of the Convention on the Limitation of Liability for Maritime Claims, 1976, done at London on 19 November 1976 (Journal of Laws of 1986, No. 175), as amended by the Protocol done at London on 2 May 1996 (Journal of Laws of 2012, No. 146), hereinafter referred to as the "Limitation Convention", together with any amendments in force as of the date of their entry into force in respect of the Republic of Poland, which have been properly published.

listed, and a technique of subject-matter reference is used instead.[13] The provisions on the limited liability fund are generally found in Articles 339-344 of the Maritime Code. However, the reference in the Atomic Law mandates the application of all provisions of the Maritime Code that in any way relate to the establishment of the fund, its distribution, and the limitation of liability for maritime claims. The Maritime Code itself adds an additional layer of complexity, which both implements and directly refers to the LLMC.

The foregoing leads to two significant systemic conclusions:

a. First, from the outset, significant difficulties and doubts will arise at the stage of decoding the norms that should apply, both at the substantive and procedural levels. Additionally, regarding the reference to the Maritime Code, whose provisions, within the scope specified by the legislator, are to be applied *"mutatis mutandis"*. A need will arise for their appropriate interpretation, adapting them to the proceedings concerning nuclear damage.[14] This may be particularly difficult because, due to the exceptional nature of such events and the status of the Polish nuclear program, no ongoing practice of their application is being developed.

b. Secondly, the reference to the Maritime Code has another important implication. Since the Maritime Code implements the provisions of the LLMC and refers directly to it, in a sense, we are dealing with the penetration into the regime of civil liability for nuclear damage, which is intended to be regulated autonomously in accordance with the rules of the 1997 Vienna Convention and domestic law not inconsistent with the Convention, of another international legal act that does not directly concern this issue.[15] Although both regimes are based on a similar mechanism of a quantitative limitation of liability, the limitation of liability for maritime claims is regulated differently and is of a facultative nature. This creates interpretative challenges and raises doubts from the perspective of public international law.

### 3.2 Proceedings concerning the determination of the right to establish a fund

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13 Section 156(4) of the Regulation of the Council of Ministers of 20 June 2002 on "Principles of Legislative Technique" (consolidated text: Journal of Laws "Dziennik Ustaw" of 2016, No. 283): If a given legal institution is regulated as a whole, and an exhaustive list of the legal provisions to which reference is made is not possible, a subject-matter reference may exceptionally be made, provided that these provisions can be unambiguously distinguished from others; the referring provision is formulated as follows: "To ..... (definition of the institution) the provisions on ..... (subject-matter definition of the provisions) shall apply *mutatis mutandis*."

14 G. Wierczyński, *Redagowanie i ogłaszanie aktów normatywnych. Komentarz*, Warsaw 2016, 793.

15 A similar conclusion is drawn by R. Majda. See R. Majda, *Cywilna odpowiedzialność*, 262.

Pursuant to Article 102(2) of the Atomic Law, the only party with standing to initiate proceedings for the establishment and distribution of a fund is the operator. Thus, even though Article 104(1) of the Atomic Law grants the insurer passive standing, it cannot initiate fund proceedings. As it follows from Article 339 § 1 of the Maritime Code in conjunction with Articles 102(3) and (4) and Article 106(2) of the Atomic Law, the proceedings are conducted in the form of non-litigious proceedings and are subject to the provisions of the Code of Civil Procedure, as well as – as mentioned – the provisions of the LLMC. The District Court of Warsaw is the competent court for fund proceedings[16]. The application to initiate proceedings must meet the formal requirements specified in Article 102(4) of the Atomic Law and Articles 511 in conjunction with Articles 187 and 126 of the Code of Civil Procedure and must contain at least the following elements:

a. designation of the court to which it is addressed;

b. designation of the parties (and their legal representatives and attorneys) - in this case, it seems that it is sufficient to designate the applicant, since the other parties to the proceedings are not known at this stage - creditors will only come forward at a later stage of the proceedings. Alternatively, whether the insurer is a party to the proceedings may be considered; however, this is not explicitly stated in the provisions. It may be argued that the insurer should be a mandatory party to these proceedings, both due to its obligations under the insurance contract and its passive standing (Article 104(1) of the Atomic Law);

c. designation of the type of document filed - an application to initiate proceedings for the establishment and distribution of a fund;

d. the substance of the application and statements;

e. the name of the nuclear installation;

f. a statement of the facts on which the party bases its application or statement, and an indication of the evidence to prove each of these facts - from a combined interpretation of Article 126 § 1(5) of the Code of Civil Procedure with Article 102(4),(1) and (2) of the Atomic Law, it follows that the statement of facts will consist primarily of identifying the nuclear accident from which the claims arise, and information about the proceedings aimed at establishing the course of this accident, and determining the type

[16] Article 102(3) of the Atomic Law.

of claims and creditors for whose satisfaction the fund is to be allocated, as well as information about claims already pursued in court that are known to the applicant;

g. information on whether the interested parties have attempted mediation or other alternative dispute resolution, and if such attempts have not been made - an explanation of the reasons for not making them - this requirement resulting from Article 187 § 1(3) of the Code of Civil Procedure in the case of claims for nuclear damage should be understood to mean that the applicant should indicate whether and to what extent the claims arising from the accident have been voluntarily satisfied outside of court proceedings or whether such an attempt has been made. Prior voluntary satisfaction of any claims will have an impact on the amount of the fund due to the quantitative limitation of liability;

h. a statement of readiness to establish the fund, justification of its amount, and a definition of the method of its establishment;

i. the signature of the applicant (legal representative or attorney) and a list of attachments - in accordance with Article 102(5) of the Atomic Law, the application must be accompanied by documents containing data that affect the amount of the fund.

The filing of an application implies an obligation for the court to conduct a hearing to examine the grounds for establishing the fund.[17] It is assumed that filing an application for the establishment of a fund is not subject to a time limit.[18] After conducting the hearing, the court should issue a preliminary ruling on the right to establish a fund.[19] Already at this stage, due to the differences between the regimes of liability for nuclear damage and maritime claims, doubts arise as to what and how the court should examine before issuing a preliminary ruling. This is primarily because the limitation of liability for maritime claims is facultative[20], while the mandatory nature of the limitation of liability for nuclear damage results from Article 102(1) of the Atomic Law. In addition, more entities are entitled to benefit from the facultative limitation of liability (Article 1 LLMC). In contrast, according to the principle of direction expressed in Article 101(1) of the Atomic Law, the only liable entity is the operator. Moreover, Article 6 of the LLMC establishes different liability limits depending on the nature of the

17 Article 342 § 1 of the Maritime Code.
18 I. Zużewicz-Wiewiórowska [w:] *Kodeks morski. Komentarz*, red. Dorota Pyć, Cezary Łuczywek, Iwona Zużewicz – Wiewiórowska, Warszawa 2022, 1078.
19 Article 342 § 1 of the Maritime Code.
20 *Ibidem*, 1078.

damage, which should result in the establishment of two sub-funds (separate property masses) - one intended to cover claims for death or personal injury of passengers and the other intended to cover other claims.[21] There is, therefore, a clear doubt as to whether two sub-funds should also be established for nuclear damage.

Even the premise for establishing a fund can give rise to interpretative doubts. Neither the Atomic Law nor the provisions of the Maritime Code provide a clear answer on how this assessment should be made - whether it should be based on claims that have already been brought to court or whether it is sufficient to merely report a claim for payment to the operator or insurer? Or perhaps the court should make some kind of approximate estimate, taking into account the scale of the event? In the literature, the view has been expressed that the operator will not be obliged to establish a fund if it only suspects that the total value of claims may exceed the statutory limit, and only when the value of claims exceeds 300 million SDR does this obligation become actual, and until then, claims should be satisfied in full.[22] Although the literal wording of the premise justifies this view, such an interpretation will cause the institution of the fund to fail to fulfil its role of accumulating and satisfying claims in a single proceeding quickly, effectively and fairly. In the event of a large-scale event, for which there will be a high probability of the resulting damage exceeding the statutory limit, waiting to establish a fund until a sufficient number of claims are reported will be inefficient and will not contribute to the fair distribution of available funds. This is all the more justified since the Atomic Law establishes a number of obligations regarding the monitoring of radiation events (Chapter 11). The scale of potential damage could be easily estimated. It is possible to formulate a proposal to change the premise of the mandatory establishment of a fund to the existence of a high probability that claims from a given event will exceed 300 million SDR.

Considering the mandatory content of the application, it can be assumed that the court should examine, as appropriate, whether the applicant has the status of an operator and is liable for claims arising from the incident, whether the claims constitute nuclear damage, and also - taking into account the information contained in the application and the evidence submitted - assess whether the claims exceed the statutory liability limit.[23] However, such an assessment

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21 *Ibidem*, 1080.

22 R. Orzechowska, *Wpływ różnic między Prawem atomowym a Konwencją wiedeńską o odpowiedzialności cywilnej za szkodę jądrową na osobie na warunki ubezpieczenia odpowiedzialności cywilnej za szkody jądrowe. Część I*, „Prawo Asekuracyjne" 117, no. 4 (2023), 42.

23 Cf. respectively in the area of maritime claims: D. Pyć, C. Łuczywek, I. Zużewicz – Wiewiórowska, *Kodeks morski*, 1087: "The preliminary ruling concludes the first stage of the proceedings. The court issues it after

may prove difficult without the involvement of an expert at this stage. Based on the general rules of evidence in civil proceedings, it can be assumed that a request to take expert evidence would be admissible already in the application. However, there is no explicit statutory regulation in this area.

According to Article 342 § 1 of the Maritime Code, a preliminary ruling on the right to establish a fund shall specify its amount and method of establishment, as well as the deadlines for the payment of sums or for the submission of security documents in a specified manner. The court has discretion to determine the method of establishing the fund - it may be established by paying an appropriate amount of money into an interest-bearing bank account held by the court, or by securing the payment of this amount by a bank or insurance company with its registered office in the Republic of Poland. Considering the obligation to conclude an insurance contract contained in Article 103 of the Atomic Law, it should be assumed that the primary method of establishing a fund in the case of nuclear damage should be the establishment of security by the insurer with whom the contract was concluded, provided that it has its registered office in Poland. If there are circumstances that preclude the establishment of a fund, the court shall refuse to establish it. In the event of a dispute as to these circumstances, the court may suspend the proceedings until the dispute is resolved through a lawsuit. At the applicant's request, the court may, to secure the claim, order the suspension of enforcement proceedings conducted to satisfy a claim covered by the fund (an optional element of the application), and a complaint lies against such a ruling. On the other hand, an appeal lies against the ruling on the right to establish a fund.

### 3.3 Proceedings concerning the establishment of a fund

The finality of a positive preliminary ruling opens the next stage of the proceedings - the actual establishment of the fund. The applicant must fulfill the obligations imposed on them by the preliminary ruling within a specified time. Pursuant to Article 343 § 1 of the Maritime Code, the court, after conducting another hearing, shall issue a ruling on the establishment of the fund

conducting a hearing. In the preliminary ruling, the court determines the applicant's right to establish a fund on account of its liability for maritime claims arising from a specific event, indicates the amount of the fund, determines the manner and deadline for completing the actions necessary for its establishment, and specifies the type of claims subject to limitation to the amount of the fund. The court should consider whether the subjective and objective conditions for establishing a limited liability fund are met and whether there are any circumstances excluding the establishment of the fund."

and the commencement of divisional proceedings or on the refusal to establish the fund. This ruling may be appealed.

It is important to determine the effects that arise upon the finality of the ruling establishing the fund. In this regard, Article 343 § 3 of the Maritime Code refers to Article 13 of the LLMC[24]. The evident influence of another international legal act that does not concern civil liability for nuclear damage is noticeable here. While Article 13(1) of the LLMC is unambiguous, paragraph 2 is not as clear. This provision regulates institutions specific to maritime claims, such as the release of a ship's arrest. Of course, attempts can be made to apply this provision appropriately if any property of the operator has been seized, but according to the already expressed view, the very concept of such a multi-source regulation creates uncertainty as to the wording of the specific norm.

The views expressed in the literature on the limitation of maritime claims agree that the establishment of a fund is a form of securing the debtor's assets: its establishment protects other components of the debtor's assets from actions by creditors who may assert their claims against the fund, taken in security and enforcement proceedings.[25] It is indicated that the constitution of a fund resembles the deposit of a claim with a court (Article 467(1) and (3) of the Civil Code). The effective deposit of a claim relieves the debtor of liability if the creditor is unknown to them and in the event of a dispute as to who the creditor is.[26] Personal liability is transformed into a property-based liability limited to the property mass, which is the fund.[27] It should be assumed that such an effect also occurs for the operator in the regime of civil liability for nuclear

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[24] Article 13 LLMC:
1. If a limitation fund has been established in accordance with Article 11, no person making a claim against the fund may pursue his rights in respect of that claim against any other property of the person who or on whose behalf the fund was established.
2. After a limitation fund has been established in accordance with Article 11, any ship or other property belonging to the person on whose behalf the fund was established, arrested or attached within the jurisdiction of the Contracting State in respect of a claim which may be made against the fund, or any security may be released upon the order of a court or other competent authority of that State. However, such release shall always be ordered if the limitation fund has been established: a) in the port where the incident occurred or, if the incident occurred outside a port, in the first port of call, or b) in the port of destination in respect of claims for loss of life or personal injury, or c) in the port of discharge in respect of damage to cargo, or d) in the State in which the arrest was made.
3. The provisions of paragraphs 1 and 2 shall only apply if the claimant may make a claim against the limitation fund before the court administering the fund and the fund is actually available and freely transferable in respect of that claim.

[25] I. Zużewicz – Wiewiórowska, *Postępowanie*, 52; D. Pyć, C. Łuczywek, I. Zużewicz – Wiewiórowska, *Kodeks morski*, 1091.

[26] J. Łopuski, *Odpowiedzialność za szkodę w żegludze morskiej*, Gdańsk 1969, 269.

[27] D. Rydlichowska, *Charakter prawny funduszu ograniczenia odpowiedzialności za roszczenia morskie*, „Studia Prawnicze i Administracyjne" 19, no. 1 (2017), 57.

damage. Another important consequence of establishing a fund is the lack of liability for interest after the effective establishment of the fund.[28]

### 3.4 Proceedings concerning the distribution of the fund

The final establishment of a fund initiates the last stage of the proceedings: the distribution of available funds. A commendable solution is the institution of an expert commissioner, who should be appointed by the court at this stage. This means that in the phase of distributing funds, the court no longer acts independently but is supported by a specialized entity. The expert commissioner should have appropriate qualifications and may be a natural person or a legal entity.[29] Given the scale of claims that may arise from a nuclear accident, it would be justified to appoint a legal entity as an expert commissioner - an organization possessing the appropriate qualifications and the resources for the tasks assigned within the fund proceedings. The expert commissioner is obliged to prepare a draft list of creditors and a draft plan for the distribution of the fund, as well as a written justification of these documents.[30] The provisions of the Code of Civil Procedure relating to experts apply to them, but in addition, they are authorized to conduct correspondence with creditors. The conduct of the necessary evidentiary proceedings regarding disputed matters is reserved for the court, and the expert commissioner has the initiative in this regard. The court may entrust the expert commissioner with the management of the funds of the fund, to which the provisions on the management of property in enforcement proceedings apply accordingly.[31]

The detailed rules for the announcement of the establishment of a fund and the opening of divisional proceedings are set out in Article 346 of the Maritime Code. According to paragraph 1, claims should be filed within six months of the publication of the summons. Failure to file a claim within the deadline will result in its exclusion from the list of creditors and the distribution plan. The court, upon the request of a late filer but no later than the approval of the distribution plan, may, for justifiable reasons, reinstate the deadline for filing, applying the provisions of the Code of Civil Procedure accordingly. From the perspective of the types of damages that may occur - in particular, personal injuries in the form of ailments that may only manifest after a significant period of time following irradiation - this deadline should be considered relatively

28 D. Pyć, C. Łuczywek, I. Zużewicz – Wiewiórowska, *Kodeks morski*, 376.
29 Article 344 § 1 of the Maritime Code.
30 Article 344 § 2 of the Maritime Code.
31 Article 344 § 4 of the Maritime Code.

short and may prevent the full satisfaction of all claims. On the other hand, it contributes to the realization of the principle of the speed of proceedings. To some extent, the regulations of the Atomic Law prevent the failure to satisfy claims for damages that manifest with a delay. Firstly, pursuant to Article 103c(1), if a nuclear accident, in addition to damage to property or the environment, also causes personal injury, 10% of the insurance guarantee sum is allocated to secure claims for nuclear damage to persons. Secondly, pursuant to Article 103c(2), if within five years from the date of the nuclear accident, claims for personal injury made against the operator do not exceed in total the insurance guarantee sum allocated exclusively to the satisfaction of such claims (i.e., 10% of the total), the remaining part of the guarantee sum shall be allocated to satisfy claims for damage to property or the environment, as well as claims for personal injury made before the expiry of 10 years from the date of the nuclear accident. Since these regulations concern the securing of an appropriate part of the insurance guarantee sum and apply to situations where, within five years, the liability limit (which is determined by the level of the guarantee sum) has not been exceeded in practice, then, according to a literal interpretation of the condition for establishing a fund, they will have no significance for the fund.[32]

The foregoing naturally implies considerations regarding the substantive legal basis for the distribution of the available funds. Firstly, a general norm can be found in the Vienna Convention. Article VIII.1 provides that the nature, form, and extent of compensation, as well as its appropriate distribution, shall be governed by the law of the court seised of the matter. However, Article VIII.2 establishes a priority for the reparation of personal injury in the event that the sum of claims exceeds the amount allocated for their satisfaction. Article 103c of the Atomic Law is, in a sense, an implementation of the convention principle. According to the explanatory text to the 1997 Vienna Convention, as a result of this regulation, when compensating for damage, priority should be given to personal injury, as it is the most harmful

[32] R. Orzechowska seems to present the view that the regulations concerning the establishment and amount of the fund and those concerning the redistribution of insurance funds should be read separately, in the sense that the fund should be established in the amount of the statutory liability limit of the operator, and Article 103c of the Atomic Law is directed to the insurer, who is the beneficiary of the guarantee sum and acts pursuant to the provisions of insurance law. (see R. Orzechowska, *Wpływ*, 42-43). While the literal wording of the provisions allows for such an interpretation, it clearly reveals the lack of coherence in the regulation of the distribution of funds from the available amount. After all, the establishment of security in the form of concluding an insurance contract does not create an additional pool of funds from the insurer. There is one available limit of funds, and the performance of the obligation by the insurer relieves the operator in this respect of the obligation to provide compensation to the injured party. Hence, close cooperation between both entities is necessary at the stage of satisfying claims.

to the victims.[33] However, the explanatory text emphasizes the autonomy of states in establishing the principles of distribution of available funds.[34] Nevertheless, the Atomic Law does not provide further, detailed rules for the distribution of funds.

Given the reference to the Maritime Code also in the matter of the principles of fund distribution, it is necessary to refer to the provisions of this Act. Article 100 of the Maritime Code similarly allows for the derivation of the primacy of compensation for personal injury.[35] The Act itself does not contain autonomous substantive rules for the distribution of the amount, as these are contained in the LLMC. According to Article 12(1) of the LLMC, the fund should be divided among the claimants in proportion to their claims against the fund.[36] More detailed rules apply to the division of sub-funds for personal injury and other damages (Article 6(2) of the LLMC).[37] However, it is difficult to apply them appropriately to nuclear damage since the amount of the pool allocated to cover the various types of damage is calculated based on the ship's tonnage (Article 6(1) of the LLMC). Therefore, it is reasonable to conclude that in the Polish legal order, apart from the preferential status of personal injury and the requirement of proportional satisfaction of the victims, there are no other specific regulations, which places Poland at the opposite end of the spectrum compared to other European regulations.[38] This state of the law should be critically assessed.

Returning to the course of the divisional proceedings, in the absence of such clear criteria, the expert commissioner should prepare drafts of the list of creditors and the distribution plan, guided by the principles of the priority of personal injury and the principle of proportionality. The drafts are served on the participants, who have the opportunity to submit written comments

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33 International Atomic Energy Agency, *The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage — Explanatory Texts*, Vienna 2020, 49-50.

34 Ibidem: "Thus, for example, the law of the competent court is to direct the granting of annuities and their amounts, as well as the effect on the claim of contributory negligence on the victim's part. Moreover, it is for the law of the competent court to decide whether measures for equitable distribution should be taken in advance or at the time when the actions are brought. Such measures may involve providing a limit per person suffering damage or limits for damage to persons, damage to property and other kinds of nuclear damage."

35 Claims for damages to devices and port basins, waterways, and navigation devices shall be satisfied with priority over other claims, except for claims for death, personal injury, or impairment of health.

36 R. Majda, *Cywilna odpowiedzialność,* 262; Zużewicz – Wiewiórowska, *Postępowanie*, 58.

37 I. Zużewicz – Wiewiórowska, *Postępowanie*, 58.

38 For example, Slovakia, where a percentage distribution of the available amount has been established depending on the deadline for filing claims; See the Act dated 19 March 2015 On Civil Liability for Nuclear Damage and on its Financial Coverage and on changes and amendments to certain laws, Section 7 subparagraph 5 and 6 - English version: https://www.ujd.gov.sk/wp-content/uploads/2021/10/E54_2015.pdf (accessed: 21.09.2024)

and objections within a month. Both documents are approved by the court in the form of an appealable order: at a closed hearing in the absence of comments or objections; at a hearing if these have been submitted.[39] Disputed claims should be included in the distribution plan, and if, at this stage, a dispute arises as to the validity or amount of a claim included in the list of creditors and in the distribution plan, the court should refer the matter to the court process and decide on the exclusion of the appropriate amount.[40] A final approved distribution plan has the force of an enforcement title and serves as the basis for the payment of amounts from the fund, which the court may entrust to the expert commissioner.[41] If, at this stage, further creditors come forward and the fund has not yet been exhausted, the court should order the preparation of an additional list of creditors and a distribution plan.[42] An order to discontinue the proceedings closes the whole case, against which an appeal may be lodged.

## IV. Assessment and Directional Legislative Proposals - Summary

The above-described rules for claiming nuclear damages under Polish law should be assessed as fragmented and piecemeal, inadequate to contemporary procedural realities, especially when compared to international experiences, such as in the aftermath of the Fukushima disaster, or in relation to other European legislations. The provisions for the establishment of a limited liability fund remain unclear and may give rise to significant interpretative doubts in practice. The most serious conclusion is that the reference to the Maritime Code results in the infiltration into the nuclear damage liability regime of another international legal act - the LLMC. Moreover, the provisions of the Maritime Code and the LLMC relate to entirely different types of events, which makes their appropriate application difficult and leaves many interpretative gaps. In turn, the more uncertainty and room for interpretation, the worse the situation is for the operator and the victims.

The author's primary proposition is to autonomously describe the procedural and substantive legal principles for claiming damages in the Atomic Law and to abandon the reference to the Maritime Code. The idea of divisional proceedings concentrating claims is sound in itself, but the institution must be adapted to the realities of claims arising from nuclear damage. A reasonable solution would be to make it mandatory to pursue claims within a single formalized divisional proceeding conducted by a single entity, regardless of whether the amount

39 Article 346 § 2 of the Maritime Code.
40 Article 346 § 3 in conjunction with Article 344 § 5 of the Maritime Code.
41 Article 347 § 1 and 2 of the Maritime Code.
42 Article 347 § 3 of the Maritime Code.

of claims formally exceeds the statutory liability limit or whether there is only a high probability that funds will be insufficient to fully satisfy them. Within such proceedings, it would be possible to divide claimants into groups depending on the characteristics of their claims (e.g., claims for personal injury, property damage, damage to economic activity). This would promote transparency and proportionality in the awarding of damages in every situation and would also have a positive impact, in particular, on the economics of the proceedings. The legislator must consider where it wishes to place the jurisdiction to hear cases. At the European level, German, French, Swiss, and Dutch legislation allows for the establishment of an independent entity to resolve disputes that is not a court.[43] It seems that adopting a similar solution would be permissible under Polish law, provided that it does not violate the constitutional principles of the right to a court and the adjudication of a case in two instances (Articles 45, 78, and 176(1) of the Constitution of the Republic of Poland[44]). This would, therefore, require the voluntary submission of a dispute for resolution by a dedicated extrajudicial body, and the party dissatisfied with the decision would still have the right to file a lawsuit in a common court and have the case heard by a court of two instances. An additional advantage of this solution is also that the hearing of cases by a dedicated entity would constitute a kind of pre-selection for undisputed or trivial cases, and primarily difficult and complex cases requiring professional legal knowledge and experience would be referred for judicial resolution.

Another legislative solution worth considering, which could significantly facilitate the handling of claims at the operational level before the distribution phase of funds, would be to introduce an obligation for the operator and its insurer to prepare a claims management plan.[45] The purpose of this document would primarily be to formalize and streamline the process of filing claims at the initial stage. Such a plan should establish channels and communication between the victims and the operator and insurer, a sample claim form or a list of questions for victims if the claim is reported by telephone, and the rules of cooperation between the operator, insurer, and public authorities. The nuclear regulatory authority should also approve the plan before the nuclear power plant begins operation.

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[43] See N. Pelzer, Facing the challenge, 52.

[44] Official Journals of Laws "Dziennik Ustaw": 1997, no. 78, item 483, 2001, no. 28, item 319, 2006, No. 200, item 1471, 2009, No. 114, item 946.

[45] https://www.marsh.com/ie/industries/energy-and-power/insights/ten-fundamentals-effective-nuclear-liability-claims-management.html (accessed: 25.09.2024).

In summary, the rules governing the pursuit of claims for nuclear damage in Polish law require urgent legislative intervention. It is necessary to introduce a modern system for their satisfaction, taking into account past experiences and legislative trends in Europe and worldwide. This will improve not only the situation of potential victims but, above all, the liable entity - the operator.

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