

# ASSOCIAZIONE ITALIANA DI DIRITTO MARITTIMO



## CMI Questionnaire

### Unified Interpretation for standard to break limitation under IMO Conventions

#### I. PRELIMINARY QUESTIONS

1. Has your jurisdiction ratified the following conventions (the 'Conventions'):

a. **International Convention on Civil Liability for Oil Pollution Damage 1969('CLC 1969')**

Yes by Law n. 6.4.1977 n. 185 relating to the ratification of 1969 CLC Convention, 1971 Fund Convention and 1969 Intervention Convention<sup>1</sup>.

b. **1992 Protocol to the CLC 1969('CLC 1992')**

Yes by Law 27.5.1999 - n. 177.

c. **Convention on Limitation of Liability for Maritime Claims 1976('LLMC 1976')**

No.

d. **1996 Protocol to the LLMC 1976('LLMC 1996')** (references to 'LLMC' shall be understood as references to either LLMC 1976 or, where applicable, to LLMC 1976 as amended by LLMC 1996)

No.

e. **International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996('HNS 1996')**

No<sup>2</sup>.

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<sup>1</sup> The Decree of the President of the Republic of 27.5.1978 n. 504 contains provisions on the implementation of said international conventions. Among others, art. 11 governs the territorial jurisdiction of the Italian courts in relation to the judicial proceedings concerning the shipowners' liability for damages and proceedings for establishment of a limitation fund (Court of Messina, 24 June 1985, *Patmos Shipping & U.K. Mutual Steamship*, Dir. Mar. 1986, p. 438; Court of Genova 21 April 2007, *Mauro Pesca and others v. Venha Maritime Ltd and others*, Dir. Mar. 2007, p. 887).

<sup>2</sup> Liability of vessel source marine pollution (by oil and by other noxious substances) is also governed by Italian domestic Law 31.12.1982 n. 979 and subsequent modifications (for an application of this legislation see, among others, Court of Genova 13 November 2003, *Sidermar Trasporti c. Athenian Tradition S.A.*, Dir. Mar. 2005, p.1418.), as well as, with respect to damage to the environment, by the provisions of Legislative Decree

f. **2010 Protocol to the HNS 1996('HNS 2010')(references to 'HNS' shall be understood as references to either or, where applicable, to HNS 1996 as amended by HNS 2010)**

No.

g. **International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 ('Bunkers Convention')**

Yes by Law 1.2.2010 n. 19.

h. **Nairobi International Convention on the Removal of Wrecks 2007('WRC')**

No

**2. Please indicate whether the a.m. Conventions apply directly in your jurisdiction or whether the stipulations have been translated and incorporated into domestic legislation.**

The a.m. Conventions are incorporated as such in the Italian legal system. The original text of the relevant Convention is reproduced as an attachment to the implementing legislation, which normally consists of few articles. In some cases, the Italian translation of the Convention is also attached but this does not amount to an official and binding translation. When necessary the incorporation of the relevant Convention is accompanied by the adoption of domestic implementing legislation (see for instance Decree of the President of the Republic of 27.5.1978 n. 504 mentioned in footnote 1).

**3. Is the wording of domestic provisions incorporating art. V(2) CLC 1969/art. V(2) CLC 1992/art. 4.LLMC/arts. 7(5) and 9(2) HNS/art. 6 Bunkers Convention/art. 10(2) WRC into domestic legislation different to the original text of the Conventions?**

No. The answer is only for the CLC Convention being the sole Convention ratified in Italy (see above). Art. 2 of Law n. 6.4.1977 n. 185 provides that full execution is given to the international convention (i.e. CLC, FUND and Intervention Convention).

**3a. If the answer to the previous question is in the affirmative, what are the differences?**

XXXXX

**4. If your jurisdiction has not ratified the Conventions, does your jurisdiction recognize a right of limitation of liability for claims that would otherwise fall under the Conventions(the 'Equivalent Claims')?**

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03.04.2006 n. 152 (implementing Directive 2004/35/CE of 21.04.2004). As HNS Convention is not implemented in Italy, this domestic legislation law can be of reference in matters of liability for vessel source pollution due to noxious and dangerous substances.

Pursuant to Art. 7 of the Code of navigation (c.n.) limitation of shipowner's liability is governed by the law of the flag State. Italian provisions on limitation of liability – therefore – only apply to Italian flag ships.

Under art. 275 c.n. the owner of a ship of less than 300 GRT is entitled to limit his liability for all obligations contracted in occasion or for the needs of a voyage or for facts and acts made during the same. No right of limitation applies when said obligations derive from personal gross negligence and willful misconduct of the owner. Art. 275 c.n. provides that the limit corresponds to the value of the ship at the end of the voyage or when limitation is requested. But art. 276 c.n. specifies that, if at the end of the voyage the value of the ship is higher than 2/5 of her value at the beginning of the voyage, liability is limited to 2/5 of the value at the beginning of the voyage. Conversely, if the value at the end of the voyage is lower than 1/5 of the value at the beginning of voyage, liability is still limited to 1/5 of the value at the beginning of the voyage. The peculiar feature of this complicated system of limitation is represented by the fact that same is based on the value of the ship, a parameter which most jurisdictions decided to abandon in favor of the tonnage based regime adopted by international instruments, namely the 1957 Limitation Convention and then the LLMC 1976/1996.

Arts 620 to 641 of c.n. govern the procedure for limitation. The benefit of limitation is made conditional to the constitution of a limitation fund up the invoked limit. For the purpose of limitation, it is assumed that the value of the ship corresponds to her agreed value in the insurance policy.

As a matter of fact, Italy has not ratified the LLMC 1996. Nevertheless, with Legislative Decree (L.D.) 28.06.2012 No. 111 – implementing Directive 2009/20/EC of 23 April 2009 on insurance of shipowners for maritime claims - in an attempt to adapt Italian legislation to the LLMC standards, a new system of limitation for ships over 300 GRT (i.e. those ships to which LLMC 1996 is applicable) was introduced in Italy.

Art. 7 of L.D. 111/2012 – under the title “general limits” - substantially reproduces the text of Art. 6 of LLMC 1996 in its original wording, i.e. prior to the increase of the respective limits, entered into force on 19.04.2015 pursuant to IMO Resolution of 19.04.2012. Art. 7 applies not only to the specific maritime claims enumerated under Art. 2 of LLMC 1996, but generally to all maritime claims, with the exception of passengers' claims for personal injury and loss of life.

Limitation of liability for passengers' claim for personal injury and loss of life is governed by Art. 8 of L.D. 111/2012. This also substantially reproduces the wording of art. 7 of LLMC 96, setting out the limit – for a single event - of 175,000 SDR multiplied by the number of passengers which the ship is

authorized to carry according to the ship's certificate.

Unlike LLMC 1996 and art. 275 c.n., L.D. 111/2012 does not contain provisions barring limitation in case of willful misconduct, recklessness or gross negligence of the ship owner.

While this system of limitation has not been tested so far by case law, scholars and commentators have expressed criticism to the limitation provisions under Arts. 7 and 8 of L.D. 111/2012, due to the remaining inconsistencies with the international regime of LLMC 96 doubts have also been expressed as to the actual viability of the system, due to the fact that no special procedural rules for its actual implementation have so far been adopted, while doubts have been raised as to the possibility to adapt the limitation procedures under arts. 620-641 c.n. to the newly introduced tonnage based limitation<sup>3</sup>. The Italian Maritime Law Association has urged the Italian Government to promote the adoption of a comprehensive substantial and procedural legislation for the implementation in Italy of the LLMC 1996 system in its entirety. Pending this, the issue of limitation of liability in Italy remains problematic.

**4a. If the answer to the previous question is in the affirmative, what are the requirements for breaking the right to limitation for Equivalent Claims?**

According to art. 275 c.n., the shipowner cannot limit his liability in case of willful misconduct and gross negligence.

**5. Are there any general principles of law in your jurisdiction that may serve to break the right to limitation otherwise than through the specific provisions contained in the Conventions (e.g. abuse of right)?**

General principles of willful misconduct and gross negligence are used in order to evaluate the break the limitation of liability. The burden of proof in this respect is on the party claiming the breaking of limitation.

**II. "PERSONAL ACT OR OMISSION" – Attribution to the person liable**

**6. How is the requirement for a "personal act or omission" in art. V(2) CLC 1992, art. 4 LLMC, and arts. 7(5) and 9(2) HNS interpreted in your jurisdiction?**

There are no specific court precedents in relation to these provisions.

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<sup>3</sup> With the preliminary ruling of Court of Nola, 14 February 2017, Dir. Mar. 2018, p. 178, the limitation provisions under L.D. 111/2012 were disregarded and the owners of a ship exceeding 300 GRT were granted limitation under the domestic legislation based on the principle of analogy. This decision was challenged and the matter was settled out of court.

7. **Where the party entitled to limitation is an entity, what are the requirements for attributing an act or omission to the party entitled to limitation?**

See answer to 6 above.

8. **Are there court decisions or legal texts in your jurisdiction where the right to limitation under the Conventions or equivalent domestic legislation has been broken (or where it has been submitted that such right should be broken), respectively confirmed (or where it has been submitted that such right should be confirmed), for acts/omissions of:**

8a. The Master?

8b. Crew members?

8c. The Designated Person Ashore/Company Security Officer?

8d. Other individuals within the entity entitled to limitation?

8e. Third-party contractors (e.g. agents of the vessel)?

There are no reported court decisions addressing the above

If your answer is in the affirmative in any of the above questions, please briefly describe (a) the relevant facts; and (b) the rationale for the attribution of the relevant act or omission to the party entitled to limitation.

### III. "WITH THE INTENT"/"RECKLESSLY" – Degree of fault

9. **How is "intent" in art. V(2) CLC 1992 / art. 4 LLMC / arts. 7(5) and 9(2) HNS or relevant implementing domestic legislation interpreted in your jurisdiction?**

According to Italian Courts, "*intent*" is a conscious willful misconduct, characterized by the element of intentionality. Such an element consists in the full awareness to act in a wrongful way with the voluntary omission of due diligence, in the awareness of causing damages to third parties.

In particular it occurs when an agent, who is fully aware to cause damages to other parties by means of such "intentional" conduct, persists in acting in this way, assuming all the risks deriving from it.

From the Italian law perspective, "*intent*" corresponds to "*dolo*". The notion of the latter is provided for by art. 43 of the Italian penal code (p.c.), according to which a crime is perpetrated with "*dolo*" when the harmful or dangerous event which is the result of the act or omission, and on which the law makes existence of the crime depend, is foreseen and desired by the actor as a consequence of his own act of omission.

10. **How is recklessness under art. V(2) CLC 1992 / art. 4 LLMC / arts. 7(5) and 9(2) HNS or relevant**

**implementing domestic legislation interpreted in your jurisdiction? Does negligence qualify as recklessness (“Qualifying Negligence”) under art. V(2) CLC 1992/art. 4 LLMC/arts. 7(5) and 9(2) HNS in your jurisdiction?**

There are no Italian precedents directly addressing the notion of “recklessness” as per the above mentioned Conventions.

However reference to “recklessness” is also made at art. 4.5(e) of The Hague Visby Rules and art. 22 of the 1929 Warsaw Convention for the Unification of Certain Rules for International Carriage by Air, as amended by the 1955 Hague Protocol.

A number of Italian precedents try to allocate recklessness as per the Hague Visby Rules in national law classifications with different outcomes<sup>4</sup>. In fact recklessness is alternatively defined as:

- “*dolo eventuale*”<sup>5</sup>, i.e. an intentional behavior accompanied by the acceptance by the perpetrator of the risk that its action or omission, although not aimed at causing a damage, would likely cause it;
- “*colpa cosciente*”<sup>6</sup>, i.e. a negligent behavior accompanied by the effective awareness of the likely occurrence of a harmful event as a consequence of the action (or omission) carried out;
- *gross negligence*<sup>7</sup>, i.e. a conduct carried out disregarding the most elementary rules of diligent behavior.

Judgment no. 8328/2001 of the Italian Supreme Court addresses the meaning of recklessness as per art. 22 of the 1929 Warsaw Convention for the Unification of Certain Rules for International Carriage by Air, as amended by the 1955 Hague Protocol<sup>8</sup>.

Although such Convention concerns the specific field of international carriage by air, it is to be noted that this judgment is to be considered the Italian leading case as to the meaning of recklessness since it has been issued by the Supreme Court.

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<sup>4</sup> A number of scholars maintain that the recourse to national concepts is to be criticized since the aim of the Conventions at stake is to ensure uniformity. See, *ex multis*, F. Berlingieri, *Le Convenzioni Internazionali di Diritto Marittimo e il Codice della Navigazione*, 2009, p. 149; G. M. Boi, “Recklessness” e previsione del danno nell’art. 2(e) del Protocollo del 1968 alla Convenzione di Bruxelles sulla polizza di carico, *Dir. Mar.* 1987, p. 167.

<sup>5</sup> Court of Appeal of Genova 6 June 2002, *Dir. Mar.* 2004, p. 191.

<sup>6</sup> Court of Appeal of Torino 15 December 2005, in *Dir. Mar.* 2007, p. 479.

<sup>7</sup> Court of Napoli 27 February 2004, *Dir. Mar.* 2006, p. 1224.

<sup>8</sup> Court of Cassation 19 April 2001, no. 8328, *Dir. Mar.* 2002, p. 1288. It is also to be mentioned an older precedent, Court of Appeal of Roma 27 October 1982, *Dir. Mar.* 1984, p. 293, according to which “recklessness” as per art. 22 of the 1929 Warsaw Convention is to be interpreted as mere “*dolo*”. Such an interpretation wrong is not agreed by the literature to the extent that it is not in line with the wording/literal meaning of the provision.

According to above art. 22 the limit to the carrier's liability is excluded "if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result".

The Supreme Court states that "recklessness" corresponds to the Italian "*colpa con previsione*" (or "*colpa cosciente*") as per art. 61, no, 3, Italian Criminal Code.

The latter can be defined as a negligent behavior characterized by the awareness that the conduct carried out would probably cause damages to third parties; in other words, the agent is conscious to run a risk that may result damages.

According to the leading case at stake, recklessness is characterized by two combined requirements: (i) "*temerarietà*" (which can actually be translated as "recklessness" or "negligence"), which is the lack of safety and carefulness; and (ii) "*consapevolezza*" ("awareness"), which is the actual consciousness of the possibility to damage third parties.

As to the qualification of recklessness as negligence, in light of the above it can be argued that under Italian jurisdiction "recklessness" is considered as something more than mere negligence.

As just reported in fact a reckless conduct is necessarily characterized by the combined presence of both negligence and awareness of causing damages.

**10a. If the answer to the previous question is in the affirmative, what are the elements of Qualifying Negligence under art. V(2) CLC 1992 / art. 4 LLMC / arts. 7(5) and 9(2) HNS?**

Pursuant to the above leading case, judgment no. 8328/2001 of Italian Supreme Court, the elements of the Qualifying Negligence represented by the recklessness are "*temerarietà*" ("recklessness" or "negligence"), intended as the lack of safety and carefulness, and "*consapevolezza*" ("awareness"), intended as the actual consciousness of the possibility to damage third parties.

**11. What is the standard for recklessness under art. V(2) CLC 1992 / art. 4 LLMC / arts. 7(5) and 9(2) HNS?**

Pursuant to the said judgment no. 8328/2001 of Italian Supreme Court it can be maintained that the standard for recklessness depends on the degree of either negligence ("*temerarietà*") and awareness ("*consapevolezza*") which characterize the harmful conduct concretely carried out and which are to be assessed on a case-by-case basis.

**12. How is "actual fault" in art. V(2) CLC 1969 interpreted in your jurisdiction?**

**13. How is "privity" in art. V(2) CLC 1969 interpreted in your jurisdiction?**

There are no relevant Italian precedents on the interpretation of the expressions "*actual fault*" and "*privity*" as per CLC 1969.

However reference to “*actual fault or privity of the carrier*” is also made by art. IV.2.b) of the Hague-Visby Rules (as well as by art. 422 c.n., at national level).

According to such provision, the carrier and the ship are not responsible for loss or damage resulting from fire, unless caused by the actual fault or privity of the carrier.

Italian precedents<sup>9</sup> on the above provision do not focus on the notion of (and the differences between) “actual fault” and “privity”, but only clarify two issues concerning said rule. In particular the judgments hold that:

- in order to exclude the limitation of liability it is necessary for the consignee to prove the negligence of the carrier (or crew);
- not only the negligence of the carrier but also of the crew is relevant in order to exclude the fire defence.

#### IV. KNOWLEDGE OF THE LIKELIHOOD OF THE HARMFUL RESULT

##### 14 How is the requirement for knowledge in art. V(2) CLC 1992 / art. 4 LLMC / arts.7(5) and 9(2) HNS interpreted in your jurisdiction?

There are no Court precedents in Italy interpreting the requirement for knowledge in relation to the specific above-mentioned provisions. The LLMC have not been implemented in Italy and the HNS Convention is not yet in force at international level. However, it can be assumed that an Italian Court would interpret the above provisions in the light of the case law developed in relation to similar provisions contained in other international instrument including the Hague Visby Rules<sup>10</sup> and the International Conventions in the matter of the liability of air carrier. In this connection, the concept of *knowledge that damage would probably result*, was interpreted by the Court of Cassation as follows in the judgment n. 8328/2001 and in relation to art. 25 of the Warsaw Convention 1929 as amended by the 1955 Hague Protocol: “*The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.*” The Court of

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<sup>9</sup> Court of Cassation 13 April 1957, n. 1957, Dir. Mar. 1958, p. 434; Court of Livorno 31 December 1986, Dir. Mar. 1987, p. 363; Court of Appeal of Firenze 18 June 1990, Dir. Mar. 1991, p. 752; Court of Livorno 14 February 1996, Dir. Mar. 1998, p. 138.

<sup>10</sup> The specific case of art. IV (5) (e) of the Hague Rules as amended by the Visby Protocol is addressed *infra* in Part VIII.



Cassation rejected the argument of the carrier that the wording “with knowledge that damage would probably result” could be assimilated to the specific condition of “*dolo eventuale*” as defined in Italian penal law<sup>11</sup> and held that said wording rather describes a conduct comparable to the Italian penal law concept of “*colpa con previsione dell’evento*” - which operates as an aggravating factor for negligent penal offences<sup>12</sup>. In the reasoning of the decision, however, the assimilation to “*colpa cosciente*” does not appear to be essential for the purpose of the interpretation of art. 25. The Court states that – irrespective of any comparison to domestic Italian law concepts, the wording of this provision is in itself sufficient to qualify the degree of fault which implies the breaking of the limit. In particular, according to the Court, art. 25 requires the existence of a subjective state of mind of the wrongdoer consisting in the effective knowledge of the probable occurrence of the harmful event<sup>13</sup>. This reading opens the gate to the complicated issue of the investigation into the actual state of mind of the carrier. However, in the captioned case this process was simplified by the Court of Cassation by holding that the fact that the pilot had acted “with knowledge that damage would probably result” could be deducted from the objective circumstances of his conduct, i.e.: from the fact that during take-off the pilot carried out an unusual

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<sup>11</sup> The categories of *dolo* (to some extent assimilated to wilful misconduct) and *colpa* (to some extent assimilated to negligence) are defined in art. 43 p.c. This provides that a crime is committed with “*dolo*” “when the harmful or dangerous event, which is the result of the action or omission and from which under the law derives the existence of the crime, is foreseen and wanted by the wrongdoer as a consequence of his act or omission”. A distinction is made by case law between “*dolo diretto*” and “*dolo eventuale*”. While in “*dolo diretto*” the harmful event represents the intentional purpose of the conduct of the wrongdoer, in the case of “*dolo eventuale*” the wrongdoer, while not acting in pursuance of the harmful event, accepts the risk of this happening as an ancillary consequence of his behaviour. Court of Appeal of Roma 27.10.1982, in Dir. Mar. 1984 p. 293, held that the expression “recklessly and with knowledge that damage would probably result” used in art. 25 of Warsaw Convention as amended by the 1955 Hague describes “*dolo*” qualified with “*voluntas*” and “*scientia*”, which is not the correct interpretation in the light of the literal meaning of the provision and respective case law of the Court of Cassation as commented in the text.

<sup>12</sup> Under art. 43 of the Italian penal code a crime is committed with “*colpa*” when “the event, even if foreseen, is not pursued by the wrongdoer and it occurs as a consequence of negligence or imprudence or unskilfulness, or for non-compliance with laws, regulations, orders and disciplines”. “*Colpa*” may be “*lieve*” (light or ordinary) or “*grave*” (gross) the latter occurring where the author disregards even the elementary rules of diligent behaviour. Where the wrongdoer acts with knowledge of likelihood of the event, *colpa* qualifies as “*colpa con previsione*” (or “*colpa cosciente*”). This latter category is close to (but dogmatically distinct from) “*dolo eventuale*” as described in footnote no. 12, the difference being that in the case of “*colpa con previsione*” the wrongdoer foresees the harmful event, but does not accept the risk of its occurrence, because he acts with the belief that he/she will avoid it. The assimilation of the standard of negligence required by art. 25 to the concept of “*colpa con previsione*” is also made in the decision of the Court of Cassation 18.7.1991 no. 7977, *Diritto dei Trasporti* 1992, p. 165.

<sup>13</sup> In the first instance decision it was held that the burden of proof of effective knowledge of the wrongdoer was excessively difficult to be discharged and made the limitation virtually unbreakable. Hence, the Court of first instance found that the “knowledge” under art. 25 was demonstrated simply because – based on an objective analysis of the behaviour normally expected from a pilot – same should have had the knowledge that a harmful event would have probably occurred: Court of Busto Arsizio 10.1.1996, in *Diritto dei Trasporti*, 1997, p. 173.

procedure of flaps retraction, it was possible to infer, by way of deduction, that this was done by him for the purpose of countering a foreseen loss of lift of the plane caused by the adverse weather conditions.

**15 Does imputed or background knowledge suffice for the purposes of art V(2) CLC 1992 / art. 4 LLC / arts.7(5) and 9(2) HNS?**

**15 a. If the answer to the previous question is in the affirmative , what are the relevant requirements?**

**15a** The judgment n. 8328/2001 of the Court of Cassation suggests that the effective knowledge that the harmful event will probably occur would be required for breaking limitation under the captioned provisions (although in some instances lower Courts held that the simple fact that, based on common experience, the wrongdoer should have had that knowledge may be sufficient for the purpose). Effective knowledge could be imputed *ex post* based on the observation of objective circumstances such as the conduct of the wrongdoer.

**16. Does failure to obtain the necessary information suffice for the purposes of art. V(2) CLC 1992 / art. 4 LLC / arts.7(5) and 9(2) HNS?**

**16 a. If the answer to the previous question is in the affirmative , what are the relevant requirements?**

**16.a.** Failure to obtain necessary information would not be sufficient, if not accompanied by knowledge that a harmful event would probably result.

**V. "SUCH DAMAGE"/"SUCH LOSS"**

**17. How has the term "such loss"/"such damage" (art, 4 LLMC - art. V(2) CLC 1996/arts. 7(5) and 9(2) HNS 1996, respectively) been interpreted in your jurisdiction?**

There seems to be no specific Court precedents on the interpretation of the term "such loss"/"such damage" with reference to art. 4 of the LLMC, art. V(2) of the CLC 1992 and art. 7(5) and 9(2) of the HNS 1996 Conventions.

As mentioned the LLMC and HNS 1996 Convention have not been ratified by Italy.

The CLC 1992 is currently in force, but the issue of the breaking of the right to limit was submitted to the Courts before the entry into force of the 1992 Protocol and under the different rules applicable with the original text of 1969<sup>14</sup>.

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<sup>14</sup> Court of Genoa 20 July 1992, *International Oil Pollution Compensation Fund v. Venha Maritime Ltd.*, Dir. Mar. 1992, p. 449.

As mentioned the word “damage” in article 25 of the Warsaw Convention 1929 (as modified by The Hague Protocol 1955) has been interpreted by the Italian Court of Cassation in two decisions regarding the break of the right to limit of air carriers as “harmful event”<sup>15</sup>.

These two decisions seem to recognise the peculiarity of uniform law and the appropriateness of an approach not oriented to domestic law concepts. The national concept of gross negligence (“*colpa grave*”) has not been applied in favour of a more subjective assessment of the state of mind of the person liable in order to verify his actual knowledge of the damage that could probably result from his act.

Literature observed that other provisions of transportation conventions<sup>16</sup> referring to “such loss”/“such damage” seem to confirm that the act (or omission) of the person liable must be evaluated under a subjective perspective. The right to limit is lost when the person liable had knowledge that his act would have probably caused the damage he actually produced, not merely when any kind of damage had been foreseen as probable<sup>17</sup>.

The authority of the two decisions of the Court of Cassation on article 25 of the Warsaw Convention suggests that future judgements concerning the loss of limitation of liability under maritime conventions in question are likely to be influenced by such aviation decisions<sup>18</sup>. The term “such damage” of the conventions in question compared to the provision of article 25 of Warsaw Convention (and, in perspective, to the provisions of articles 22.5 and 30.3 of the Montreal Convention 1999), which simply refer to “damage”, might strengthen the trend of Italian Courts to consider the liable person’s knowledge of the damage (or loss) under a subjective perspective and clarify the circumstances under which the right to limit is lost<sup>19</sup>.

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<sup>15</sup> Court of Cassation 19 June 2001, n.8328, *Empresa Consolidada Cubana de Aviacion v. M.A. Toscano et Al.*, Dir. Mar. 2002, p. 1288, stated that the behaviour of the air carrier relevant in order to lose the right to limit requires a subjective state characterized by the effective awareness and actual representation of the probability of an harmful event (“*uno stato soggettivo di effettiva coscienza, di concreta rappresentazione della probabilità del verificarsi di un evento dannoso*”). Similarly, the Court of Cassation 18 July 1991, n.7977, *Deutsche Lufthansa AG v. E. Maresca*, Giust. civ. 1992, I, p. 1543, distinguished the act done recklessly described under article 25 of the Convention from the notion of gross negligence, stating that only the former, but not the latter, requires the person acting to foresee an harmful event as probable (“*l’agente prevede come probabile l’evento dannoso*”).

<sup>16</sup> Article 8 of 1976 Hamburg Convention as well as Article 21 of 1980 Geneva Convention and Article 13 n. 1 of 1974 Athens Convention.

<sup>17</sup> A. Zamponi in *La Condotta temeraria e consapevole nel diritto uniforme dei trasporti*, Cedam 1999, p. 127; Seriaux in *Le fautes du transporteur*, 1984, 210.

<sup>18</sup> The decisions in footnote n. 16 have been applied by the Court of Cassation in judgments 8 May 2015 n. 9313, *Eurosa S.S. v. Royal Air Maroc*, Dir. Mar. 2016, p. 535 and 15 July 2005 n. 15024, *Compagnie Nationale Air France SA v. D.L.M.*, Giust. civ. Mass. 2005, 7/8 relating to aviation cases on the break of the right to limit under article 25 of 1929 Warsaw Convention.

<sup>19</sup> Contrary to the decision cited in footnote n. 16, Court of Busto Arsizio 22 April 2003, n. 131, *SASA Assicurazioni e Riassicurazioni s.p.a. v. Emery Worldwide*, Diritto dei trasporti 2004, p. 598, on the loss of the right to limit the liability of the

## VI. BURDEN OF PROOF

### 18. Who bears the burden of proof to show that the requirements for breaking the right to limit are fulfilled?

A Court precedent of 1992 stated that the requirements for breaking the right to limit under art. V(2) CLC 1969 must be proved by the party who claims that he suffered a damage for an amount exceeding the sum of the compensation he would obtain in case of application of the limit<sup>20</sup>. Some literature allocated the burden of proving the fulfilment of the requirements set in art. V(2) CLC 1969 on the person liable<sup>21</sup>.

Literature and some decisions on the right to limit of carriers considered the burden to prove the loss of such right to be borne by the claimant who alleges that it has suffered a damage as consequence of the act or omission of the person liable<sup>22</sup>.

### 19. Is it possible under the procedural rules of your jurisdiction that the burden of proof may shift to the person liable under certain conditions?

Article 2697 of the Italian civil code sets a general rule on the burden of proof according to which whoever claims a certain right before a Court must prove the facts that constitute the grounds of that right (*onus probandi incumbit ei qui dicit*) and who either objects that those facts are not effective or objects that the right claimed has changed or it has expired must prove the facts that constitute the grounds of the objection. Some literature argued that the principle required the person liable to prove the fulfilment of the conditions stated in article 1.1 of 1957 Brussels Convention on the Limitation of the Liability of Owners of Sea-Going Ship<sup>23</sup>.

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air carrier, affirmed that the act of the person liable must be considered objectively and in abstract. According to the Court the knowledge must be intended as possibility to know, and not as actual knowledge, that a damage can derive from the act.

<sup>20</sup> Court of Genoa 20 July 1992, *International Oil Pollution Compensation Fund v. Venha Maritime Ltd.*, cited in footnote n. 14, p. 456.

<sup>21</sup> F. Berlingieri in *Problemi connessi con l'entrata in vigore per l'Italia della Convenzione di Bruxelles 29 novembre 1969*, Dir. Mar. 1979, p.314.

<sup>22</sup> For carriage of goods by air, Court of Cassation 8 May 2015 n. 9313, cited in footnote n. 19. The burden to prove the requirements stands on the air passenger according to L. Tullio-M. Deiana, *Codice dei trasporti*, Giuffrè 2011, p. 991. For maritime carriage of goods, Court of Appeal of Genoa 6 June 2002, *I. Messina & C. S.p.a. v. P. Trombi*, Dir. Mar. 2004, p. 203; in literature M. Bozano Gandolfi, *Brevi note sulla responsabilità del vettore marittimo secondo le Regole dell'Aja Vsby: onere della prova, beneficio del limite del debito ed esclusione dello stesso per condotta temeraria e consapevole*, Dir. Mar. 2004, p. 200.

<sup>23</sup> P. Manca, in *Commento alle Convenzioni Internazionali Marittime*, Giuffrè 1974, p. 211.

The burden of proving certain facts under Italian law may shift to the party that according to law does not bear it either when the parties have agreed so<sup>24</sup> or when a party clearly shows its will to assume the burden of proof.

Italian civil procedure provides a rule that might be worth mentioning. The rule does not allow an actual switch of the burden of proof but it may constitute a ground for relief of the person damaged from the burden of proof. Indeed, art. 115 of the code of civil procedure allows the Courts to base their decision on the evidences provided by the parties as well as facts alleged by a party and not objected by the counterparty. Where the facts that may result being acts or omissions relevant under art. 4 LLMC - art. V(2) CLC 1992 - arts. 7(5) and 9(2) HNS 1996 are alleged by the damaged person, he would not have to prove them if the same facts are not objected specifically by the person liable.

However, the limitation stated in Article IV,5(e) of Hague Visby Rules has been considered a law prescription for certain kind of transport and not a fact<sup>25</sup>. Following this interpretation, the person liable might not be bearing the burden to prove any circumstance in order to benefit of the limitation because the limitation is not an objection and does not require to be supported with evidence of facts.

## VII. INDICATIVE REFERENCE TO OTHER CONVENTIONS

### 20. **What is the wording used to implement art. 10(2) WRC and art. 10(2) Bunkers Convention in your jurisdiction?**

The answer is only for art. 10(2) Bunker Convention, as WRC has not been ratified in Italy. Pursuant to art. 2 of Law no. 19/2010 Italy gave full and complete execution to the Bunker Convention, which was referred to and attached to such law in its original language text.

Therefore, the whole Bunker Convention, thus also art. 10(2), applies in Italy in its original wording.

### 21. **How have art. 10(2) WRC and art. 10(2) Bunkers Conventions been interpreted in your jurisdiction in the context of breaking the right of limitation?**

Even in this case the answer is only for art. 10(2) Bunkers Convention, as WRC has not been ratified in Italy.

There are no Italian precedents regarding the interpretation of the Bunker Convention.

Should the reference to the Bunker Convention relate to art. 6 instead of art. 10(2), it should be noted

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<sup>24</sup> Article 2698 of the Civil Code states when agreements for the shift of the burden of proof are void.

<sup>25</sup> Court of Appeal of Torino 15 December 2005, *Medlift S.r.l. v. Zati S.p.a.*, Dir. Mar. 2007, p. 484. The Court stated that the limitation can be applied by Courts even where it has not been invoked by the carrier.

that according to art. 6 of Bunker Convention, any liability that should be ascertained on the basis of this Convention will be subject to the general liability limitation regime applicable.

Italy has not ratified the 1976 LLMC Convention, which is referred to in art. 6 of the Bunker Convention, but pursuant to L.D. 111/2012<sup>26</sup> (Implementation of Directive 2009/20/EC concerning rules on the insurance of shipowners for maritime credits), it is envisaged that every Italian and foreign flag ship, of gross tonnage equal to or greater than 300 tons that enters ports or transits in Italian territorial waters, with the sole exception of military ships and warships and other ships owned by the State or of which the State has exercise for non-commercial government services, must be provided with insurance coverage of liability in relation to the credits (*inter alia*) relating to the recovery, removal, demolition or aimed at rendering harmless a ship that sank, wrecked, stranded or abandoned, including everything that is or has been on board this ship, and therefore also in relation to the claims related to the liability of the shipowner provided for by Bunkers Convention.

In fact, the only exclusion of compulsory insurance in relation to pollution damage is that provided for by art. 5.b of L.D. 111/2012, relating to claims concerning to damage due to oil pollution as per CLC 1969 as amended by the 1992 Protocol, and therefore not also to the claims relating to damage caused by pollution caused by oils present on board ships as bunkers.

In this case, art. 7 of L.D. 111/2012 provides that shipowners' liability in relation to claims other than those deriving from death and personal injury is limited as follows:

- ship with a tonnage not exceeding 2,000 tons: 1,000,000 SDR;
- for ships with a tonnage over 2,000 tons: 1,000,000 SDR to which 400 SDR are added per ton from 2,001 to 30,000 tons; 300 SDR per ton from 30,001 to 70,000 tons, and 200 SDR per ton over 70,000 tons.

## VIII. EQUIVALENT PROVISIONS

### 22. The same language for the test for breaking the liability limits is used in art. IV (5)(e) of the Hague Rules as amended by the Visby Protocol:

#### 22a. Has your country ratified the Hague-Visby Rules or enacted these rules into their domestic legislation?

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<sup>26</sup> Compare: F. BERLINGIERI, *Alcune note sul d. lgs. 28 giugno 2012, n. 111 di attuazione da parte dell'Italia della Direttiva 2009/27/CE del 23 aprile 2009 sull'assicurazione (della responsabilità) degli armatori per crediti marittimi*, on Dir. Mar., 2012, 963.

**22a.** Italy is a party to the Hague-Visby Rules. Either the Protocol of 23 February 1968 and the Protocol of 21 December 1979 were ratified the 22 August 1985.

Entry into force took place the 22 November 1985 as a consequence of the coming into effect of the denunciation of the Hague Rules received by the Belgian Government the 22 November 1984<sup>27</sup>.

**22b.** If the answer to the previous question is in the affirmative, how are the relevant criteria as listed above (II-V) interpreted in the context of the respective provision incorporating art. IV, 5 (e) of the Hague-Visby Rules?

**22b.II “Personal act or omissions”**

The Hague-Visby Rules do not refer to the personal act or omission of the owner as in the LLMC 1976-1996.

In fact reference is merely made to the act or omission of the carrier. It is therefore to be considered whether the conduct of the carrier’s servants is relevant.

From an overall interpretation of the relevant provisions of the Rules, which dictate separate provisions for the carrier and his servants (art. 3 § 3 – art. 4 § 2, 4, 5 – art. 4bis), some literature is in favour of the reference to the carrier meaning reference to him personally<sup>28</sup>, whilst other literature expressed an opposite view<sup>29</sup>.

There is a Court precedent holding that the conduct of the carrier’s servants has been considered relevant to exclude the entitlement to limit<sup>30</sup>.

**22b.III “With the intent” / “Recklessly” – Degree of fault**

The trend of the Italian Courts is to make interpretations referring to concepts and principles prevailing in Italian law.

Whilst the behaviour expressed with the words “with intent” is certainly equivalent to “*dolus*” in civil law, and to “*wilful misconduct*” in common law<sup>31</sup>, a number of definitions have been provided to qualify

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<sup>27</sup> Dir. Mar. 1985, p. 202

<sup>28</sup> F. Berlingieri: *International Maritime Conventions*, Vol. 1, Informa Law for Routledge, 2014, 64; F. Berlingieri: *Le Convenzioni Internazionali di Diritto Marittimo e il Codice della Navigazione*, Giuffrè 2009, p. 145; A. Dani: *Persone che possono beneficiare del limite del debito*, Dir. Mar., 1986, p. 586; Lefebvre d’Ovidio, Pescatore, Tullio, *Manuale di Diritto della Navigazione*, Giuffrè Francis Lefebvre, XV ed., 2019, p. 601.

<sup>29</sup> S.M. Carbone: *La risarcibilità del danno alle merci ed i criteri della sua limitazione*, Dir. Mar., 1988, p. 321, at p. 379; F. Bonelli: *Il limite del debito del vettore*, Dir. Mar., 1986, p. 541, at p. 550; M. Riguzzi: *La responsabilità limitata del vettore marittimo di merci*, Giuffrè, 1993, p. 142.

<sup>30</sup> Court of Appeal of Torino 15 December 2005, *Medlift Srl v. Zati SpA, ABB Power Technologies SpA and XL Insurance Co. Ltd*, Dir. Mar., 2007, p. 479. A derrick rope broke due to wear and tear, with consequent collapse and damages to cargo constituted by machinery equipment.

<sup>31</sup> F. Berlingieri, *International Maritime Conventions*, Vol. I, cited, p. 66.



the word “recklessly”.

Although in a matter pertaining to the application of art. 22 of the 1929 Warsaw Convention, as amended by art. 25 of the 1955 Hague Protocol<sup>32</sup>, it was qualified as recklessness a fault defined “*colpa con previsione*”, namely a conduct consisting of a fault typified by the knowledge that damages would probably result.

In the issue decided by the Court of Appeal of Torino previously cited<sup>33</sup>, the type of conduct entailing the loss of the benefit of limitation was qualified as “*colpa cosciente*”, or a conscious fault, by referring to the word “*conscience*” in the French text of art. 4 § 5 (e) of the Hague Visby Rules.

The qualification of the misconduct of the carrier not entitling to the benefit of limitation was also considered in a matter relating to carriage of goods by sea. It was held<sup>34</sup> that the subjective situation which, under art. 4 § 5 (e) of the Hague Visby-Rules, is linked with the loss of the right to limit, in a coordinated evaluation of its psychological and voluntaristic element, coincides with that which, in the Italian penal system, is qualified as “*dolo eventuale*”. This defines a behaviour which, although not finalized to cause the damage or which does not regard it as certain and absolute, is intended to be accepted as a consequence of the action or omission, with the taking of the relating risk.

There is then another Court precedent relating to carriage of goods by sea, holding that the limit is not applicable if the conduct of the carrier is that defined under art. 4, 5(e) of the Hague-Visby Rules, which in Italian law is equivalent to gross negligence<sup>35</sup>.

Recourse to national concepts has been widely criticized by the literature. In fact the observation is made that, to ensure uniformity, it is not advisable to make recourse to national concepts<sup>36</sup>.

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<sup>32</sup> Court of Cassation 19 April 2001 n. 8328, *Empresa Consolidada Cubana de Aviacion v. M.A. Toscano et Al.*, Dir. Mar., 2002, p. 1288. As a consequence as an air crash at Havana, 113 passengers of Italian nationality lost their lives. During taking off a loss of lift occurred to the plane. Although the Tower Control invited to postpone departure due to adverse weather conditions, the pilot took off and a loss of lift occurred. It was found out that the plane stand-off was considered probable by the pilot. In fact he made a partial retraction of the flaps, which is contrary to ordinary manoeuvring rules. It was held that this was previously contemplated in anticipation of a likely loss of lift of the plane.

<sup>33</sup> foot note n. 4.

<sup>34</sup> Court of Appeal of Genova 6 June 2002, *I. Messina & C. SpA v. P. Trombi, the “Jolly Rubino”*, Dir. Mar., 2004, p. 191. It related to the claim of the owner of a car loaded on board at La Spezia for its carriage and discharge at Abidjan. However discharge at Abidjan took place on the return trip when the car was found to be almost destroyed.

<sup>35</sup> Court of Naples 27 February 2004, *Fertilizers and Chemicals Ltd v. Grimaldi Compagnia di Navigazione*, Dir. Mar. 2006, p. 1224. It related to the carriage of a truck loaded in Amsterdam which was not delivered at the discharge port of Lagos. The loss of the truck, and the lack of any relating explanation by the carrier has been considered to amount to gross negligence which, in Italian law excludes limitation of liability as provided by art. 423 of the code of navigation.

<sup>36</sup> A. Zampone: *La condotta temeraria e consapevole nel diritto uniforme dei trasporti*, Cedam 1999, p. 31; M.F. Bozano Gandolfi: *Brevi note sulla responsabilità del vettore marittimo secondo le Regole dell’Aja-Visby: onere della prova, beneficio del limite del debito ed esclusione dello stesso per condotta temeraria e consapevole*, Dir. Mar., 2004, p. 199.



This is somewhat acknowledged also by the Italian Courts<sup>37</sup>

#### **22b.IV Knowledge of the likelihood of the harmful result**

There seem to be no specific Court precedents. However, also generally on the interpretation of art. 4 § 5 (e) of the Hague-Visby Rules, reference is made to what said in III above<sup>38</sup>.

#### **22b.V “Such damage” / “Such loss”**

There seem to be no specific precedents in the ambit of the interpretation of art. 4 § 5 (e) of the Hague-Visby Rules.

However it is observed<sup>39</sup> that, since everywhere else reference is made to loss or damage, the benefit of limitation is lost also in case of loss to the goods, and not only in case of their damage.

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Also F. Berlingieri, in *International Conventions*, cited, p. 67 notes that it is not advisable to make recourse to national concepts, and in *Le Convenzioni Internazionali di Diritto Marittimo e il Codice della Navigazione* cited, p. 149, that the international conventions, to ensure uniformity, are aiming at creating a concept distinct from that in the various jurisdictions. Reference is made to the judgments of the House of Lords in *Foscolo Mango & Co. Ltd v. Stag Line Ltd* 41 Ll. L. Rep., p. 165 and in *Deep Vein Thrombosis and Air Travel Litigation*, [2006] 1 Lloyd's Rep. 231.

<sup>37</sup> Court of Cassation 19 April 2001, n. 8328, cited in foot note 4. As to the difficulty, for the Italian Courts, to make a correct interpretation of *recklessly*: G. M. Boi, “*Recklessness*” e previsione del danno nell’art. 2 (c) del Protocollo del 1968 alla Convenzione di Bruxelles sulla polizza di carico, *Dir. Mar.*, 1978, p. 167.

<sup>38</sup> A complete and exhaustive review of the concepts of *recklessly* and of *knowledge that damage would probable result* is made by A. Zampone in *La Condotta temeraria e consapevole nel diritto uniforme dei trasporti*, cited, p. 59.

<sup>39</sup> F. Berlingieri, *International Maritime Convention*, cited, p. 63.