

CMI Unified Interpretation Questionnaire

Submission of the Swiss Maritime Law Association

Contributors:

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Introductory Remarks

There are in Switzerland no decisions which have interpreted the requirements for liability of shipowners according to art. V(2) CLC 1992 / art. 4 LLMC and arts. 7(5) and 9(2) HNS (not ratified by Switzerland) or any relevant implementing domestic legislation. The answer to the questions in the questionnaire must therefore be found elsewhere, i.e. in rules and decisions which deal with analogous requirements and may provide some guidance.

In this connection, when submitting LLMC 1976 and CLC 1992 for parliamentary approval, the Federal Government has pointed out that the respective provisions on limitation of liability and on breaking the limits should be interpreted in analogy to the reasoning adopted when the limits of liability of an air carrier are at issue and are to be examined according to the relevant international conventions. As such statements are, in the absence of any relevant judicial decisions, an important, if not decisive element for the interpretation of a legal instrument (such as also an international convention), it can be assumed that a Swiss court would follow the government's consideration and consider them as an emanation of the historical will of the legislator which is probably the most important topic for the interpretation of legislative acts and international convention according to Swiss practice.

The conventions on the air carrier's liability to which the Federal Government referred when it submitted LLMC to the federal parliament in 1986 were still those inspired by the old Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air of 12 October 1929 as subsequently amended and revised by the Hague Protocol No. 4 of 28 September 1955 and the additional Montreal Protocol of 25 September 1975. Their distinctive features are the rules which allow the breaking of the limits of the air carrier's liability. According to the relevant provisions, the usual limits of liability shall not prevail and the carrier shall not be entitled to avail himself of the provisions which exclude or limit his liability, if the damage is caused by the "wilful misconduct" of the carrier or by such default on the air carrier's part (see art. 25 of the original Warsaw Convention) or, as this notion was successively defined in the later instruments, if it is proved that the damages resulted from an act of omission of the carrier, his servants or agents done "with intent to cause damage or

recklessly and with knowledge that damage would probably result” (see arts. 25 of the 1995 Hague Protocol and of the 1975 Montreal Protocol No. 4).

Accordingly, when explaining, the notions used by art. 4 CLC 1992 in its memorial of 10 March 1986 (in: “Bundesblatt” 1986 II 717 et seq. at 740 / “Bundesblatt” 1986 II 741 et seq. at 764) the Federal Government referred to the standard of “wilful misconduct” and a decision of the Federal Tribunal (i.e. the Swiss Supreme Court) rendered in 1972 (in: Supreme Court Decisions “SCD” 98 II 231 et seq.) which has interpreted this standard in the light of the definition in art. 25 of the Hague Protocol. The subsequent memorial requesting the approval of CLC 1992 dated 3 May 1995 (in: “Bundesblatt” 1995, IV 241 et seq. at 252 / “Bundesblatt” 1995 IV 233 et seq. at 247) refers, as for the explanations of the various provisions of the 1992 protocol also to the earlier memorial of 1986 which had already recommended the approval of the 1984 Protocol, which, however, never entered in force in Switzerland and soon was superseded by the 1992 Protocol.

For the sake of completeness, it should be added that similar analogies are proposed for the interpretation of the legal requirements for breaking the limits of liability under the provisions of art. (V)(e) of the Hague-Visby Rules and the rule of domestic Swiss Maritime Law in art. 105a of the Swiss Maritime Navigation Act.

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.
 - b. 1992 Protocol to the CLC 1969 ('CLC 1992')**
Yes.
 - c. Convention on Limitation of Liability for Maritime Claims 1976 ('LLMC 1976')**
Yes.
 - 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.
 - f. 2010 Protocol to the HNS 1996 ('HNS 2010') (references to 'HNS' shall be understood as references to either FINS 1996 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.

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

Yes.

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.

Switzerland applies the so-called monistic system. According to that system any international treaty is automatically part of the Swiss legal system, i.e. without the need for an introductory domestic legislation. Provided that an international treaty is self-executing, i.e. if the rules contained in such international treaty are detailed enough to be applied in a specific case and are applicable to individuals, then the specific clauses of the treaty will be applied directly. This is the case with all the above conventions and they would therefore directly apply even without the references to these conventions in Arts. 48, 49, 120 and 121 of the Swiss Maritime Navigation Act.

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?

n/a. See answer to Question 2.

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

n/a.

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

n/a. The Conventions are applicable and the respective limitations therefore apply.

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?

n/a.

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)?

As a general rule, international conventions prevail over national law. According to the Federal Tribunal an exception to this rule may apply if the Swiss legislator knowingly introduces legislation which is contrary to an international convention. In the areas governed by the Conventions, no such contrary national legislation exists. The rules of the Conventions therefore override any national legislation. While general principles of law always apply, it seems rather unthinkable that recourse to a limitation provided for in an international convention would be considered as abuse of right.

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?**

This question is answered together with Question 7. Therefore please see the answer to Question 7 hereinafter.

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?**

In its memorial of 10 March 1986 (in: "Bundesblatt" 1986 II 717 et seq. at 735) the Federal Government merely stated that the reference to "personal acts or omissions" means that the owner is not liable for acts or omissions of his auxiliaries. In regard to art. 4 LLMC the Federal Government didn't further elaborate on the notion of the "personal act" but rather only focused on those elements of the wording which were new as compared to the 1957 Liability Limitation Convention ("Bundesblatt" 1986 II 717 et seq. at 740). The memorial regarding the 1957 convention neither sheds any further light on this, since the Federal Government only pointed out that limitation shall be excluded in the event of a personal fault of the carrier ("Bundesblatt" 1965 II 1 et seq. at 15).

Unfortunately there are no court decisions on these questions. With no court decisions available and in the absence of clear indications in the memorials no clear statement can be made as to the meaning of "personal acts or omissions" in the cited conventions. Since the memorials use the term "auxiliaries" (Hilfspersonen) and since this is a term well known in Swiss law (e.g. art. 101 of the Swiss Code of Obligations) it can be assumed that a Swiss court would look at the doctrine and case law regarding art. 101 of the Swiss Code of Obligations in order to determine whether a specific act or omission was committed by an auxiliary or by a person who would have to be considered as the carrier's alter ego. Any individual who is either formally appointed as an executive body of an entity or who, while not being formally appointed, still in fact has an important influence on the decision-making of the company would be considered as alter ego of a company.

The distinction between auxiliaries and alter ego's (executive bodies) only answers the question whether an act or omission can be directly attributed to the company. However, when it comes to omissions, it has to be kept in mind that a personal fault (by omission) may even be considered if the person acting is an auxiliary. That could be the case if the company has positive knowledge of an omission, even if committed by an auxiliary, and does not act accordingly.

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:**

There are no respective decisions available. It has therefore not been ruled who would be considered as alter ego and who would be qualified as auxiliary. It has neither been decided whether (and to what extent) positive knowledge about personal acts of an

auxiliary (and the lack of counter-measures) could establish a personal fault of the company.

8a. The Master?

n/a.

8b. Crew members?

n/a.

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

n/a.

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

n/a.

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

n/a.

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?

It is therefore (see above, Introductory Remarks) submitted that the decisive criterion whether and when the limits of liability according to arts. V (2) CLC 1992 and 4 LLMC can be broken, are substantially the same as those set forth by art. 25 of the Warsaw Convention as amended by the 1955 Hague Protocol and/or the 1975 Montreal Protocol no. 4. It can be added that the new and now prevailing Convention of the "Unification of Certain Rules for International Carriage by Air" concluded at Montreal on 25 May 1999 and subsequently ratified by Switzerland and in particular its articles 17 et seq. have radically changed the system of liability and are therefore of no practical relevance to the present discussion.

According to the notions prevailing in Switzerland, "intent" (in: German "Vorsatz") in connection with liability either in contract or in tort, is the subjective inner side of a person committing a wrongful act. A person who acts with intent is therefore somebody who acts deliberately, i.e. wilfully and consciously, and with premeditation on purpose.

Furthermore, it is submitted that the decisions of the Swiss Federal Tribunal dealing with the provision of art. 25 of the Warsaw Convention 1929 / 1955 on liability in the international carriage by air and in particular of the notion of the "wilful misconduct" of the carrier or by "such default on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to wilful misconduct" should also guide the interpretation of the other terms defining the subjective aspects of liability on the side of a person for its wrongful acts (such as "recklessly" and other degrees of fault).

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?**

The most recent and practically most important decision of relevance for the interpretation of the notion of "wilful misconduct" is the Federal Tribunal's decision of 29 June 1987 (published as SCD 113 II 359 et seq.) which states that wilful misconduct is not simply gross negligence as previous decisions rendered under the original text of the Warsaw Convention 1929 had sometimes held. It is therefore believed that, in the jurisdiction of Switzerland, while simple negligence cannot at all qualify as "recklessness", even qualifying negligence in the sense of "gross negligence" is not sufficient to be considered as "recklessness".

- 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/a rt. 4 LLMC/arts. 7(5) and 9(2) HNS?**
n/a.

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

The standard for "recklessness" under art. V (2) CLC 1992 and art. 4 LLMC accordingly corresponds to the standard for "wilful misconduct" according to art. 25 of the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air of 12 October 1929 as amended by the Protocol done at the Hague on 28 September 1955 and by the Montreal Protocol no. 4 of 25 September 1975. It is therefore submitted that also the standard for "recklessness" under art. V(2) CLC 1992 and art. 4 LLMC should be the same as it is defined for the liability of an air carrier. In this regard, the latest and at the same time still leading case is the Swiss Federal Tribunal's decision of 29 June 1987 (published as SCD 113 II 359) which dealt with the air carrier's liability for the crash of an aircraft in the vicinity of the airport of Madrid-Barajas on 26 November 1983.

In this decision, the Federal Tribunal held that the notion of "recklessness" cannot be considered as an additional requirement for unlimited liability, but can be deemed to fulfilled, if and when it is proven the liable person was not conscious that damage would probably occur. This interpretation corresponded to the Federal Tribunal's earlier decision of 11 July 1972 (SCD 98 II 231 et seq.), which was therefore confirmed.

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

This question is answered together with Question 13. Therefore please the answer to Question 13 hereinafter.

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

As to the interpretation of the terms "actual fault" and "privity" in CLC 1969 we could not find in the jurisdiction of Switzerland any cases nor doctrinal opinions which could provide any guidance. This is hardly surprising because in Switzerland CLC 1969 was soon after ratification superseded by the subsequent protocol of 1992. However, it is interesting to note that the German translation ("Ist das Ereignis auf ein persönliches

Verschulden des Eigentümers zurückzuführen, so ist dieser nicht berechtigt sich auf die Beschränkung nach Absatz 1 zu berufen.“) seems to consider these terms as tantamount to personal fault of the shipowner.

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?

In international air law, which for the reasons indicated above, is also relevant for the interpretation of maritime law conventions such as LLMC and CLC 1992, the requirement of “knowledge” was interpreted strictly by the Federal Tribunal in its decision of 1987 published as SCD 113 II 359 et seq. It means that the air carrier must have had actual knowledge that the damage would probably occur.

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

The aforementioned case SCD 113 II 359 has furthermore clearly and explicitly ruled out that imputed or background knowledge of the air carrier would suffice for the purpose of breaking the limits of his liability. It is submitted that the same should apply for the purposes of the interpretation of the same requirement in arts. V(2) CLC 1992 and art. 4 LLMC

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

n/a.

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

The same remark should be made with respect to the relevance of the failure to obtain the necessary information.

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

n/a.

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 is no jurisprudence on this matter; the wording "such loss" would suggest however that the conduct of the shipowner leading to the consequences set out in LLMC and CLC 1992 would have to be the proximate cause of the loss for which the shipowner is seeking limitation.

VI. BURDEN OF PROOF

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

The burden of proof is cast on the person claiming the benefit of such fact (Article 8 Civil Code). This would mean that it would be the plaintiff(s) seeking to break the limit to prove the level of fault that would be sufficient for breaking the limit.

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?

There are ways in court proceedings which may result in a form of ease regarding the burden of proof as the Court may consider the proof to be established as a matter of almost prima facie evidence whereupon the "burden" would shift to the defendant. Those are less rules on the burden of proof rather than rules on the evaluation of evidence in the context of the case. Usually the problems for plaintiffs to establish the sufficient level of misconduct leading to the breaking of the limitation is less an issue of lack of evidence, but rather an issue of the burden of persuasion towards the court that the facts established and proven in course of the liability claim are sufficient to generate the breaking of liability limits provided in the Conventions. Furthermore, where the defendant has shown undue obstacles in providing access to the information or even are seen to have obstructed such access to decide on the matter, Swiss courts have shown in other context a relaxation of the level of burden of proof in favour of the plaintiffs. We could also imagine, that the fact that the shipowner had violated regulatory safety requirements relevant to the casualty at hand, could lead to a prima facie proof of such misconduct. We could see as additional problem in the context of the burden of proof the fact that in the maritime Conventions discussed here, the misconduct has to be proven to be the one of the shipowner ("actual fault"), which includes evidence on where in the organisation chart of the shipowner such misconduct was committed, a burden that could in some cases be difficult to be met due to lack of broad discovery possibilities in Swiss procedural law.

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?

n/a.

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

n/a.

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?

Yes, Switzerland has ratified the Visby Rules including the SDR Protocol. Switzerland made use of the rights under the Protocol to the Hague Rules to translate the Hague Rules into equivalent legislation, in our case into the Swiss Maritime Navigation Act.

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?

The respective rules are quite often involved in court proceedings but since those proceedings very often end in settlements very few cases are actually decided on Court level and even less reported. We are not aware of cases where the issue was considered or decided. There are some Swiss doctrinal opinions on the subject which - concerning Swiss law - very much follow the lines described in this reply to the questionnaire, i.e. that they follow the selective guidance established in the decisions made under the scope of the similar language in aviation law, with the exception of the limited personal scope of the breaking possibility for plaintiffs ("actual fault").

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