

LexTrasporti



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Insurance act 2015: what changes for insurer and insured

The Insurance Act 2015 received Royal Assent on 12 February 2015. When it comes into force in August 2016, it will (together with the consumer insurance reforms that came into effect in 2013), represent the greatest change to insurance contract law in UK in over 100 years. It will amend certain key sections of the Marine Insurance Act 1906, although it is worth noting that the 1906 Act has not been repealed. We would like to set out below the key changes being implemented by the Act. The 2015 Act will apply to contracts of insurance governed by English law which are: (i) new agreements concluded after 12 August 2016; and (ii) variations made after 12 August 2016 to existing contracts of insurance entered into at any time. The 2015 Act will also apply in the context of reinsurance and retrocession which are contracts of insurance under English common law. It is important to note that the 2015 Act distinguishes between a “consumer insurance contract”

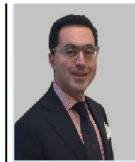


Insurance Act 2015

and a “non-consumer insurance contract”. The 2015 Insurance Act (2015 Act) applies to all commercial contracts of insurance, and variations to existing contracts of insurance, from 12 August. The Act introduces substantial changes to the laws governing disclosure in non-consumer insurance contracts; warranties and other contractual terms; and insurers’ remedies for fraudulent claims. With reference to new disclosure duties in non-consumer insurance contracts, we note that previously, insured parties were required to disclose every circumstance that they knew, or ought to have known, which would influence an insurer in fixing a premium or deciding whether to underwrite a risk. This required insured parties to “predict” what factors a prudent insurer would be influenced by. It is important to note that the same obligation is extended to brokers acting on behalf of insured parties. Insured parties will be considered to have known: (i) matters that could be expected to be revealed by a reasonable search of information available to the insured party – (for example, information held by a broker); (ii) insured organizations will also be deemed to have the knowledge of anyone who is a part of the organization’s senior management, or who is responsible for their insurance; (iii) anything known by a person responsible for their insurance – for example, a broker. Insurers will be considered to have known, or ought to have known: (i) knowledge held by the insurer and readily available to the person deciding whether to take the risk; (ii) matters known to individuals who participate on behalf of the insurer in deciding whether to take the risk and on what terms (underwriting teams); (iii) matters known by an employee or agent of the insurer and which should reasonably have been passed on to the person deciding whether to take the risk. Under the Act, disclosure must be made in a reasonably clear

and accessible way, material representations of fact must be ‘substantially correct’ and material representations of expectation or belief must be made in ‘good faith’. Some practical implications from these changes are: (i) Insured parties will have to review their disclosure processes to ensure that those responsible for procuring insurance disclose all matters they will be presumed to know; (ii) senior management should be involved in any disclosures made; (iii) the steps taken to obtain information must be carefully evaluated. Insurers will have to review what information is readily available to those who decide whether to accept risks and the terms on which to do so. Previously, an insurer was able to refuse all claims under an insurance contract if the pre-contractual disclosure duty was breached, even if the breach was committed by the broker. The 2015 Act has now introduced a range of proportionate remedies, applicable depending on the scale of the breach and the state of mind of the insurer. So, if the breach is deliberate or reckless the insurer will be able to avoid the contract and keep any premiums; if the breach is neither deliberate nor reckless and the insurer would not have entered into the contract, the insurer will be able to avoid the contract but must return any premiums; if the breach is neither deliberate nor reckless and the insurer would have entered into the contract on different terms, other than terms relating to premium: the insurer will be able to treat the contract as if those different terms apply – for example, any additional exclusions that would have been imposed.

These remedies will only be available if the insurer would not have entered into the insurance contract had the breach not occurred, or would have done so on different terms. Obviously there are some practical implications from these changes, for example (i) disclosure of underwriting guides and other relevant documents may now be required; and (ii) the Insurers will need to consider the extent to which they are willing to disclose commercially sensitive information contained within such records or documents. With reference to remedies for fraudulent claims by policyholders, in the past in the event of fraud, an insured party would give up the whole claim and insurers could also avoid the whole contract. The 2015 Act sets out three remedies available to an insurer in the event that an insured submits a fraudulent claim, as follows: •the insurer is not liable to pay the claim. The insurer will likely be entitled to reject the whole claim, even if parts of the claim were validly made; •the insurer is entitled to recover any sums which it may have already paid to the insured in respect of that claim. This will also be a useful remedy for an insurer if it discovers a historical fraudulent claim; •The insurer may, by notice to the insured, treat the contract of insurance as having been terminated with effect from the time of the fraudulent claim (and in such a case may retain any premiums paid by the insured). However, the insurer would remain liable for any claims for legitimate losses made prior to the fraudulent claim. Some provisions of the 2015 Act remain uncertain and will likely need to be tested in court proceedings to better understand how they will be interpreted and applied to different scenarios, anyway it was described by the UK government as “the biggest reform to insurance contract law in more than a century”, we are sure it is but we need time to fully appreciate the effect of it in the market.



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The lifting of sanctions on Iran and shipping: opportunities and cautions for operators

Former Secretary-General of the UN Kofi Annan correctly defined international sanctions as “a necessary middle ground between war and words”. Sanctions are indeed a “means of pressure” provided under international law to force a state to cease its unlawful conduct. Since 1978 the international community has imposed several sanctions on Iran, including the trade prohibition by the United States (1995) and the oil embargo imposed by the European Union (2012). These sanctions represented a “reaction” to various significant actions over time by Iran (e.g., the siege of the American Embassy in Tehran and activities aimed at using nuclear energy for military purposes). Furthermore, since the Iran Sanction Act came into force in 1996, some sanctions imposed by the US have extraterritorial effects. In other words, they are designed to prevent non-US persons from conducting business with Iran (known as “secondary sanctions”). Specific sanctions imposed by the UN directly addressed the shipping (affecting, among others, the Islamic Republic of Iran Shipping Lines) and insurance sectors (preventing European and American insurers from providing insurance to Iranian entities and persons and covering risks connected to the energy and transport sectors). Other sanctions involved the freezing of assets belonging to Iranian legal and natural persons and bans on exporting goods intended for the implementation of nuclear proliferation programmes and the development of the energy sector. The complexity of the drafting technique used for these sanctions created a considerable degree of uncertainty for operators, which over the years have had to implement their own compliance systems to avoid incurring sanctions. What’s more, what are known as “sanction clauses” have become standard in many contracts. These are clauses aimed at enabling a legally bound party to legitimately refuse to fulfil a contractual obligation that could result in sanctions being imposed (e.g., the “Intertanko - Sanction Clause” provides that “Any trade in which the vessel is employed under this Charterparty which could expose the vessel, its Owners, Managers, crew or insurers to a risk of sanctions imposed by a supranational governmental organization or the United States, {insert other countries} shall be deemed unlawful and Owners shall be entitled, at their absolute discretion, to refuse to carry out that trade. In the event that such risk arises in relation to a voyage the vessel is performing, the Owners shall be entitled to refuse further performance and the Charterers shall be obliged to provide alternative voyage orders”). Despite these efforts, there have been plenty of high-profile cases in which the competent supervisory authorities held that the sanctions in force had been violated, imposing fines that were sometimes in the billions (BNP Paribas, for example, was required to pay approximately USD 8.9 billion for having violated US sanctions legislation). In contrast, English courts have sometimes “punished”

persons who instrumentally made use of anti-Iran sanctions to release themselves from their own contractual duties when no breach had actually occurred. One example of this is the “Nancy” case ([2013] EWHC 2116 (Comm)), in which, following a total loss due to a fire on a ship, an H&M insurer from Dubai refused to pay hull coverage (which was subject to English law) on the assumption that the owner would have been paid in US dollars by a Chinese charterer for the freight for transporting sulphur from Iran to China. In this respect, the English courts rejected the insurer’s objection and stated that “*there is no reason why public policy should be applied so as to give insurers a defence to a claim under an insurance policy which is completely unconnected with the breach of US law*”. The economic losses due to sanctions have been considerable, and not only for Iranian operators: we need only look at the drop in crude oil exports from 2.2 million barrels per day to just 700,000 following the oil embargo imposed by the EU. The negotiation and execution of the “*Joint Comprehensive Plan of Action*” (JCPOA) on 14 July 2015 by Iran, on the one side, and the E3/EU+3 (i.e., the US, the Russian Federation, China, France, Germany, the UK and the EU High Representative for Foreign Affairs and Security Policy), on the other, therefore certainly represents a “*Copernican revolution*”. The JCPOA includes a plan for the gradual lifting of sanctions on Iran by the international community, in exchange for Iran’s fulfilment of certain duties provided under the JCPOA. Should Iran fail to comply with these duties, what is known as a “*snap-back*” would occur, i.e., sanctions would come back into force (solely having an effect on future transactions and not on transactions concluded in the meantime). Since the “*Implementation Day*” on 16 January 2016, in terms of the shipping and insurance sectors, the UN and EU sanctions forbidding Iran’s import and export of oil products and preventing services in favour of Iranian ships or ships chartered by Iranian persons have been lifted. Similarly, the corresponding “*secondary sanctions*” imposed by the US, which prevented non-US persons from doing business in the insurance and maritime sectors (including shipbuilding), have also been lifted. However, both: **(a)** the sanctions (imposed by the UN, US and EU) preventing transactions with certain black-listed persons (known as SDNs), whose assets are currently mostly frozen; and **(b)** the primary sanctions imposed by the US, which do not allow US natural and legal persons to do business with Iranian parties, are still in force. For this purpose, operators have taken steps to obtain waivers to enable them to conduct business despite this restriction. For example, The American Club (P&I) obtained authorisation from the competent authority (OFAC) to provide insurance coverage for the transport of crude oil and petroleum products from Iran. Although there are certainly new and interesting commercial opportunities for most Western dealers in this current situation, it cannot be denied that the fact that the US primary sanctions have yet to be lifted jeopardises the effective resumption of commercial relations with Iran. This is not only because this circumstance fundamentally excludes US players from the market (with the exception of those who obtain – in very few cases – “*waivers*” from the OFAC), nor is it only because it prohibits commercial transactions in US dollars, but also because it requires operators from all over the world to conduct a careful compliance analysis to assess each prospective transaction on a case-by-case basis, so as to ascertain the impact of the sanctions still in force on the specific transaction in question.



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Estratto da **DIRITTO DEI TRASPORTI**

In the third volume of the magazine *Diritto dei Trasporti* of 2015, I rise to the challenge of commenting on judgment no. 15107 of Division III of the Supreme Court, of 17 June 2013. The judgment regarded the case of a company which has assigned to a carrier the transport of goods from Cagliari to Leghorn. Before being finally redelivered to the receiver, the goods were stolen on two occasions, on 2.10.1997 and on 20.11.1997, together with the trailer on which they were loaded, while it was stationed unattended at Leghorn dock. The insurance company indemnified the company which had sent the goods, and the sender's rights against the carrier were subrogated to the insurance company. The Court of Cagliari, with a judgment of 26.02.2004, dismissed the claim on the grounds that the receiver, and not the sender, had the right to the indemnity. The decision was reversed by the Cagliari Court of Appeal which, with a judgment of 17 January 2007, found against the carrier. The Supreme Court, with judgment no. 15107 of 17 June 2013, observed that “*The interest in stipulating an insurance contract lies not only in connection with the owner's rights or any other concrete right to the object insured, but also in connection with any economic-legal agreement pursuant to which the holder of the insurance contract sustains economic damage by effect of a damaging event. Therefore in the case of the insurance of the load against loss and damage occurring during transport stipulated in the name and in the interests of the seller-sender - and not on behalf of the entitled subject - in order to establish the holder of the right to the indemnity for the goods transported, it is necessary to consider the incidence of the prejudice consequent to the loss or deterioration of the transported goods, therefore the receiver's right exists, pursuant to Article 1689, paragraph 1, of the Civil Code, only from the moment when, the objects having arrived at destination or the term within which they should have arrived having expired, the receiver has requested redelivery to the carrier.*” The Supreme Court confirms that for recognition of a relevant interest, as contemplated by Article 1904 of the Civil Code, in the stipulation of the insurance contract, it is not necessary for the insured party to claim the right of ownership or another concrete right, inasmuch as it is sufficient for the insured party to support the economic prejudice deriving from the damaging event. Given this, the judgment, consistently, premises that “*in the case of insurance against the loss and damage of transported goods, to establish the holder of the right to the indemnity it is necessary to consider the incidence of the prejudice consequent to the loss or deterioration of the transported goods*”. Successively, however, in the humble opinion of the undersigned, this consistency is lacking when the judge of the Supreme Court identifies in practice the incidence of the prejudice on the basis of the legitimacy to enforce against the carrier the indemnity rights for the loss or damage of the goods, arising from the transport contract pursuant to Article 1689 of the Civil Code, consequently stating that otherwise the receiver would be entitled to claim the indemnity only after having requested the goods to be redelivered to the carrier, the sender remaining the legitimate holder of the right to receive the

insurance indemnity. The judgment thus seems to confuse the right referring to the interest pursuant to Article 1904 of the Civil Code which must be evaluated in order to verify the *ex-post* nullity of the agreement, with that arising from the transport agreement in relation to the exercise of the indemnity rights enforceable against the carrier. In fact, it cannot be taken for granted that the receiver has suffered the prejudice in spite of the request for the re-delivery of the goods. The Supreme Court Judge, for that matter, omits any kind of evaluation based on Article 1510 of the Civil Code or on the principle of *res perit domino* contemplated by Articles 1465 and 1378 of the Civil Code, or on the incidence of the actual damage, since the transport was included in a purchase-sale transaction, and therefore in practice does not investigate into the permanence of the seller-sender’s interest in the indemnity based on such necessary criteria. Being a policy stipulated on one's own behalf and not on behalf of the entitled subject, in this specific case, precisely according to the first part of the maxim contained in the judgment, a precise check should have been carried out to verify if the seller-sender had sustained an effective economic prejudice from the event but not on the basis of the holding of the rights deriving from the transport agreement pursuant to Article 1689 of the Civil Code. In fact, it must be specified, in my opinion, that it is not relevant to verify who has suffered the prejudice in a policy on one's own behalf (unlike the case of a policy stipulated on another's behalf), but whether the insured sender/seller - being precisely a policy on its own behalf - has sustained the prejudice and therefore has maintained the interest contemplated by Article 1904 of the Civil Code. This is the only entitled subject, always if it has suffered the prejudice on the basis of the results of the procedural inquiries according to the above-mentioned criteria. It follows that, for the correct identification and entitlement to the indemnity, the Court should have investigated to discover if the seller/sender had demonstrated that it had sustained a concrete economic prejudice from the loss of the goods and that it was, therefore, the holder, at the moment of the incident, of the interest contemplated by Article 1904, Civil Code, which interest is, precisely, protected by the coverage stipulated in the its own specific interest. In business practice, in fact, especially trading involving transport, it is frequent for the sender/seller, in the case of loss or damage of the transported goods, to take on the prejudice for commercial reasons, sustaining the entire economic damage (usually issuing a credit note to reverse the previous sale invoice). However, this is by no means automatic or obligatory, nor can it ever be taken for granted. On the contrary, this verification should be carried out both by the insurance company which pays, but above all by the judge called upon to rule on the existence of the interest in taking out the insurance, in order to check the entitlement of the subject which receives the indemnity according to the relevant interest contemplated by Article 1904 of the Civil Code. In conclusion, the judgment can be criticised where it takes into consideration, for identifying the subject holding the right to the insurance indemnity, the criterion deriving from Article 1689 of the civil code, relative to the right to reimbursement deriving from the transport agreement, thus perfunctorily maintaining the sender to be the “*damaged*” on the level of the transport agreement pursuant to Article 1689 of the Civil Code, and not on the level of the interest contemplated by Article 1904 of the Civil Code and of the relative entitlement to the insurance indemnity, inasmuch as the subject whose interest was protected by the policy and which has suffered the prejudice.



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Carriage and limitation of liability under Italian law

According to Article 1696 of the Italian Civil Code, the Carrier – who performs a carriage of goods governed by Italian law – is entitled to a limitation of liability equal to a compensation which shall not exceed 1 EUR per gross Kilogram of the damaged or lost goods, compensation which usually results in being a real benefit to the Carrier on one hand, with extreme prejudice to the interests of the Shipper/Claimant on the other. This if and when the damage is not caused and / or facilitated by *Gross Negligence* or *Wilful misconduct* of the carrier in performing his obligation as, in such case(s), the Claimant shall be entitled to the whole amount of the damage suffered. Further, there is to be noted that according to Article 1693 of the Italian Civil Code the Carrier shall be fully relieved of liability in cases where *force majeure* is established (i.e. when the event is totally beyond the Carrier's control). Therefore, when a damage to the goods occurs, the key issue is to ascertain what circumstances can be considered as giving rise to a case of gross negligence and / or wilful misconduct since in such instances the limitation shall be broken through. After all, such compensation is around 10 times smaller than the limitation to which the Carrier is entitled under Article 23.3 of CMR Convention and it would be beneficial to the Cargo Interests ascertain whether an action against the Carrier might or might not be upheld in Court for its full amount. It is important to note that for both national law and Courts gross negligence and wilful misconduct have a very different meaning as they refer to different circumstances where the Carrier's negligence gives rise to losses. The latter (w.m.) occurs when there is intention of the Carrier to damage the goods (such as in the embezzlement of the cargo), the former (g.n.) when the loss takes place independently from, and outside of, the intention of the Carrier but, notwithstanding, his degree of negligence is so serious as to disregard any reasonable standard of care in performing his obligation. The task of the Courts is therefore to establish for each dispute submitted to their attention the principles and the guide-lines according to which the circumstances of a loss may give rise to a case of gross negligence, or otherwise. Incidentally, there is to be noted that the Italian Courts' interpretation of gross negligence results in being very much the same whether it be a case governed by national law or a carriage of goods subject to CMR rules. Claims for gross negligence are more likely to be upheld when the conduct of the carrier was as such as to be in breach of even the minimum standard of diligence that can be reasonably expected from him. It is a burden of proof which stays on the Claimant. To be "in breach of even the minimum standard of diligence" means that in ascertaining the degree of negligence the Court does not look at the intention of the carrier in causing a damage but considers his conduct as an

indication that the damage was accepted as a likely or probable consequence of it. In order to establish this the Courts will look at all circumstances of the carriage, i.e. time when it was performed, type and length of voyage, value of the goods (see *Corte di Cassazione* n. 21679 of 13.10.2009). In fact, the Carrier may organize the transport as he pleases but he will have to adopt suitable means of performance which are likely to avoid the exposure of the goods to any risk of loss or, at least, can diminish it (Milan Court n. 7156 dated 9/03-13/07.1995; *Corte di Cassazione*, n. 7533 27.03.2009). The expected "standard of care" is of course not as high as, say, that of a "banks" (which in consideration of an expensive fee will take in custody and take special care of valuables). However, the carrier will be expected, especially when travelling in "high risk" areas, to take at least a minimum degree of precautions (so called "reasonable" measures), such as those that any diligent carrier in the same circumstances of place and time as his would adopt to guarantee the safety of the goods. It is often the case that a Court holds the carrier grossly negligent or allows the claim in full because the vehicle was parked in an unguarded area by night or was left (even locked) along a public road for "a considerable time" (even 20 minutes might be regarded long enough to allow the criminal to commit the deed, according to Torino Court back in 1993). In fact "...leaving a vehicle unguarded in the middle of the night in a public road is almost equivalent to an invitation to the ordinary criminal to act..." (see *Corte di Cassazione* no. 4195, dated 22.02.2010, and Torino Court, 1993). Sometimes even the alarm setting might not be considered sufficient diligence when other precautions could have been taken in those circumstances, such as electing to park the vehicle in a guarded area (Milano Court 29.12.2010). Suitable and / or reasonable precautions may be also considered those adopted by the Carrier who performs the transport using a vehicle with an operating anti-theft or anti-robbery device or a satellite system of tracking on board. Also, when travelling in areas subject to frequent hijacks, employing two drivers rather than one is considered a very good precaution (the idea is that one of the two could have the chance of locking the doors and/or calling the Authorities when the potential attack is launched; whether this precaution ends up with being successful is honestly in doubt, since both drivers are likely to be scared at the sight of firearms, still it is considered a thoughtful precaution on the side of the carrier). Usually, it is also recommended that stops overnight are avoided unless impossible otherwise. Ideally, the diligence of the Carrier is reflected in the careful planning made in advance of the carriage which does not contemplate any stops since, after all, his exposure to liability starts from the time when he takes over the goods until the time when he delivers them. The care of the goods entrusted to his custody shall in fact be his principal obligation and he must aim at preserving them according to all available means of organization. It is interesting to note that the more professional the haulier's organization is, the stricter the Courts will be in assessing his liability. In fact the Courts usually base their argument on the grounds that those hauliers who can rely on a large organisation of means and employees will, for this reason, be more likely to be considered reliable in handling goods than others and, for this reason, more likely to be instructed of carriages. On point of evidence, there is to be noted that in order to be entitled to the limitation, it is the carrier who must offer the proof that the event was

inevitable and unforeseeable, in other words that all possible and practical precautions were taken at the given time to protect the vehicle and its cargo during that specific carriage. In fact the carrier must prove "...to have adopted, amongst the many options open to him, those best indicated in the specific circumstances in order that the carriage is performed regularly so that the event of damage would be inevitable even for a professional carrier" (*Corte di Cassazione* 2001 n. 4236). If such evidence is not offered, the carrier will be held responsible for the full value of the goods. Lastly, in case of mishandling of the goods, it is fundamental that evidence of the circumstances of the loss (time and place of the mishandling) is offered, since only in this case the limitation of liability shall apply. More specifically, when the carrier cannot establish, and therefore prove, when, how and where the loss occurred, he shall be exposed to the full liability for the damage, since being unable to do so is equivalent for the Courts to having neglected the organization of the carriage, to the extent that the damage might, as far as the shipper (or anyone) knows, have arisen from the misappropriation of the cargo by the Carrier (or his employee and/or his subcontractor).



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Damage assessment for bodily injury in Italian case law

Over the last twenty years the amount of damages awarded for bodily injury cases in Italy has been constantly increasing. The courts have added to pecuniary damages an array of non-pecuniary damages, and the class of parties entitled to claim non-pecuniary damages in the case of the death of a relative has been substantially expanded. The Italian Supreme Court, however, recently handed down a couple of landmark rulings aimed at reorganizing the subject matter and ensuring legal certainty and uniformity. **Assessment and liquidation of the damages** There are under Italian law two main sources of liability: liability arising from breach of contract (*responsabilità contrattuale*) and liability for damages caused to a third party in the absence of a contractual relationship, for breach of a duty of care (*responsabilità extracontrattuale*). Liability arising from breach of contract is regulated by articles 1218-1229 of Italian civil code. Under article 1218 c.c. the party in breach must pay damages unless the non-performance is excused by law (in case of impossibility) or by agreement (for instance by virtue of an exemption clause). The criteria for the assessment of damages are set out under article 1223 – 1227 c.c.: the indemnity includes pecuniary damages (*damnum emergens*) and loss of earnings (*lucrum cessans*) in accordance with the Roman law tradition. The claimant must prove causation, i.e. that the damages are direct and immediate consequence of the event (pursuant to article 1223 civil code). Article 1225 c.c. sets out a further limitation establishing that (unless the breach is caused maliciously or in bad faith) recoverable damages are limited to those the debtor could, on the basis of a diligent and prudent assessment,

consider as likely arising from the breach. As regards claims in tort, the above provisions apply, excluding however article 1225 c.c. As a result: the plaintiff is required to prove the damages claimed, damages are not limited to those reasonably foreseeable, but must be reasonable and directly connected to the negligent conduct: damages too remote or lacking a causal link with the negligent conduct are not recoverable. **Pecuniary damages** Pecuniary damages arising from an accident are restored provided that they are reasonable and duly proven, and there is a causal link with the accident. The victim is therefore entitled to recover therapy and medical treatment costs, medical aids, paid domestic assistance, adaptation to the home and the like, provided that they are reasonable. The victim is equally entitled to recover loss of earnings, past and future. The loss of earnings are based on the earnings indicated in the three previous consecutive tax returns, and according to the criteria set out by the law¹ and taking into account the degree of invalidity of the victim. It should be noted in this respect that there is no automatic correlation between invalidity and loss of capacity to earn, and the victim must necessarily prove the correlation between the accident and the reduced earnings (Cassazione 10/7/2008 n. 18866; 29/4/2006 n. 10031). **Non pecuniary damages** The Court of Cassation has consistently held that the victim of an accident is entitled to obtain "compensation for non-pecuniary damage ...since such damage is an immediate and direct consequence of the event". The compensation is designated to restore the inner pain and the affliction arising from the event. Compared to patrimonial (pecuniary) damages, compensation for non-patrimonial damages has a more subjective orientation. Compensation for non-pecuniary damages was in the past only admitted for damage caused by actions that constituted a crime under article 185 of the criminal code and/or the other cases expressly provided by the law. In 2003 the Constitutional Court reversed the position and stated that article 2059 of the civil code (the provision which governs in our system the recoverability of non-patrimonial damages) includes any non-pecuniary damage resulting in a damage to the fundamental values protected by the Italian Constitution (such as the right to health). Like pecuniary damage also non-pecuniary damage must be proven by the claimant, pursuant to article 2697 civil code, which states "The party making a claim at trial must prove the facts that constitute its basis (...)". As a general principle of law compensation must be awarded only as a result of the assessment of damages actually incurred, never as a penalty for liability in tort. Such proof can be given by any means; since non-pecuniary damage are by definition "intangible", legal presumptions generally apply. The liquidation of non-pecuniary damage by the Court is generally made in accordance with art. 1226 civil code on an equitable basis; the Court will take into account the severity of the injuries, the habits of life of the claimant, the family relationships (Cassazione n. 20667/2010; Cassazione n. 22909/2012; Cassazione 2011, n. 7844; Cass. civ., 2012, n. 2228). The amount due of non-pecuniary damages is therefore assessed on a case by case basis. It should be noted in this respect that over the recent years the Italian Courts have elaborated a (sometimes confusing) array of subspecies of non-pecuniary damages. The issue is complex, since the case law is still not entirely settled. The Courts

indeed coined three different categories of non patrimonial damages: - Danno biologico: impairment, medically relevant, of the integrity and personality (physiological / psychological damages) of the victim. Danno morale: moral damage, i.e. psychological suffering and concern arising from the event. Danno esistenziale: deterioration of the living conditions of the victim different from the loss of income (for instance the impossibility to carry out leisure activities due to some physical impairment). The existence and recoverability of the *danno esistenziale* is somewhat controversial: some Courts held that it is specifically recoverable, others that it is an item included in the *danno biologico*. In order to avoid duplications and overlapping of claims in a few recent cases the Court of Cassation held that non-patrimonial damages must be consolidated in a single package, to be assessed taking into account all the various features of non-patrimonial damages in the case at hand. The same Court of Cassation however very recently held that moral damages are separately recoverable from biological damage. This ruling is based on the assumption that the protection of the human dignity is guaranteed by Articles 2 and 3 of Italian Constitution (moral damage) whilst the violation of the right to health by a different provision (Article 32). The case law is therefore not yet settled. Nonetheless, the Cassazione has pointed out (Cassazione 2015 n. 16788) that regardless of whether the non-pecuniary damages are included in one single package or are instead separated in different subspecies, the judge must recognize and liquidate all the damages that are duly proven by the victim, avoiding duplications and artificial distinctions. **Assessment of the non pecuniary damages** As for the *quantum* of the compensation, the system is gradually reaching some uniformity. Local courts generally rely on the parameters set out in the charts elaborated and regularly updated by the Courts of Milan and Rome (but the latter is now very sporadically adopted outside Rome). The so called "Milan tables" (the latest edition was updated in 2014) essentially sum up compensation for both biological and psychological damages, taking into account the specific features of the case. The chart elaborated by the Court of Rome still maintains the original distinction between the three kinds of non-patrimonial damages, in that they use the tables only for quantification of biological damage and then separately use a percentage of that amount to assess the other non-patrimonial damages, such as those arising from fundamental rights different from health (i.e. existential). The Milan tables have become however the reference throughout Italy, following the indications given by the Court of Cassation in several recent decisions. As a general rule the compensation must be full and "tailor made". In applying the Milan tables the judge therefore must consider all the relevant factors (like the severity of the injury and the age of the victim) and find the figure within the limits set by the chart which fits best with the facts and circumstances of the case.



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The electronic bill of lading: the "Bolero system"

Preamble. The traditional paper bill of lading has been causing inconveniences for a long time, as compared to the other, more effective and quick method of transfer of the rights over the goods incorporated in it. Such inconveniences may be summarized as: (i) delays

due to the late arrival of the bill of lading: with the modernization of maritime transport, the ship and its cargo might reach their destination while the documents are still being verified by the bank for documentary credit purposes; (ii) paper system costs: it has been assessed that about 10-15% of the transport costs are due to the generation of paper documents. Those inconveniences may be solved by the electronic bill of lading (EBL), which can be sent by the carrier to the receiver or to the bank holding a pledge over the goods within a couple of seconds, and whose (issuance, sending and filing) costs are minimal, as compared with the paper bill of lading. Furthermore, there are other advantages. The electronic bill of lading may be verified on the same computer it has been sent to, and the text may be amended and/or integrated without having to issue a new document. Moreover, there are advantages in filing the documentation. Finally, the EBL is preferable because it is more secure against alterations and fraud. In order to understand the latter aspect, it is necessary to consider that the EBL is part of the E.D.I. (*Electronic Data Interchange*) system, which was created to facilitate commerce and documentation exchange in case of the unavailability of paper documents, and works as a closed communication system, based on the transfer of data structured according to standards agreed among the commercial parties (see C. REED and J. ANGEL, *Computer Law*, 4th edit., London, 2000, pp. 321-326; K. BURDEN, *EDI and Bills of Lading*, in *Computer Law and Security Report*, 1992, p. 269; D. FABER, *Electronic Bills of Lading*, in *Lloyd's Maritime and Commercial Law Quarterly*, 1996, p. 233. On the E.D.I. system, see G. FINOCCHIARO, *I contratti informatici*, in *Trattato di dir. comm. e dir. pubbl. econ.* directed by F. Galgano, vol. XXII, Padua, 1997, with detailed bibliographical references and documentation). The information contained in an EBL are secured through a private key that is issued as a replacement for the identification. The key holder is entitled to receive the goods. If the goods are sold while in transit, the private key is deleted, and replaced with a new private key, generated for the party entitled to the goods. Digital signature techniques are employed to guarantee secure data transmission. The question at hand is to understand if the electronic bill of lading is effectively equivalent to the paper bill of lading. The essential functions of the bill of lading, as we know, are: (1) a loading receipt for the goods; (2) a documentation of the transport contract; (3) a negotiable instrument necessary for the identification of the subject authorized to receive the goods' delivery (see, for all, N. GASKELL – R. ASARIOTIS – Y. BAATS, *Bills of Lading: Law and Contracts*, LLP Professional Publishing, London, 2000, p. 3; J. F. WILSON, *Carriage of Goods by Sea*, 4th edit., Pearson Education Ltd., Harlow, 2001, p. 122, 134, 137; K. BURDEN, *EDI and Bills of Lading*, in *Computer Law and Security Report*, 1992, p. 269; A. L. D'OVIDIO – G. PESCATORE – L. TULLIO, *Manuale di diritto della navigazione*, 10th edition, Milano, 2004, p. 552 et seq.; G. RIGHETTI, *Trattato di diritto marittimo*, II, Milano, 1990, particularly p. 990 et seq., with detailed references). Function (3) is very important, because the bill of lading becomes a negotiable tool, as the transfer of the document implies the transfer of the goods. From a practical point of view, it makes it possible for the goods in transit to be sold or used as a guarantee through the transfer of the bill of lading. The cryptography asymmetric double key system allows the electronic bill of lading, once received by the consignee's computer, to be evidence of the transport contract for all purposes (as if it were a

paper document). Likewise, it is a receipt of the goods' delivery acceptance. The only critical area which needs to be explored more is whether the *EBL* meets the proof of identity requirement for the purpose of the goods' delivery and marketability, as well as those for the circulation and transfer of the rights over the goods. As far as international trade is concerned, since quite some time exist "Soft Law" rules, that is to say non-binding guidelines, aimed at regulating the EBL (these are the *Model Law Prescriptions on Electronic Commerce* elaborated by UNCITRAL, *United Nations Commission on International Trade Law*, since 1996, and the *Rules on Electronic Bills of Lading* prepared by the CMI (Comitè Maritime International) in 1990. The CMI (Comitè Maritime International) rules on electronic bills of lading (*Rules for Electronic Bills of Lading*) are a set of voluntary rules that may be incorporated into the sales contract based on agreements). The "Bolero" system, see brief description below, has been adopted by various prestigious Italian and foreign banks. It can be referenced at the following link: <http://www.bolero.net/customers>. The "Bolero" system. The system named "Bolero", which means "Bill of Lading Electronic Registry Organization", was launched commercially in September 1999 (see www.bolero.net. R. CAPLEHORN, *Bolero.net. The Global Electronic Commerce Solution for International Trade*, 14 *Butterworths Journal of International Banking and Financial Law*, 1999, p. 421 et seq.; P. MALLON – A. TOMLINSON, *Bolero: Electronic "Bills of Lading" and Electronic Contract of Sale*, in (5) *International Trade Law Quarterly*, 1998, p. 257 et seq.; A. NILSON, *Bolero. An Innovative Legal Concept*, in (6) *Computers and Law (New Series)*, 1995, p. 17 et seq.). Bolero Ltd. is a joint venture between SWIFT (*Society for Worldwide Interbank Financial Transaction*) and TT Club (*Through Transport Mutual Insurance Association Ltd.*), and the project was also approved by the European Commission. The purpose of this project was to draft a contractual framework capable of guaranteeing that the electronic bill of lading could carry out the function of identification, by solving the problem of the electronic transfer of the rights over the goods. The specific feature of "Bolero" is that it offers a *multilateral contractual solution*: each party who wishes to trade within the "Bolero" electronic environment (loaders, carriers, banks, consignees and other related bodies, such as port authorities) has to become a member of the "Bolero User Association". The members must abide by the rules described in the "Bolero Rulebook", which include general rules and definitions, member admission rules, disciplinary provisions and rules on the Registry's role and responsibilities. The system solves the problem of internet's lack of evidence of a tangible receipt. Issuers are not always guaranteed that their internet message has been actually received by the recipient. The "Bolero" system provides an immediate confirmation once the message has been sent to the recipient. When the recipient downloads the message, an acknowledgment of receipt to "Bolero" is automatically sent, thus providing the sender with a "confirmation" that the message has been received. In case of objections, only one communication protocol proving the sending and receipt of the messages exists. In this way, the system guarantees the function of the electronic bill of lading as a delivery receipt as well as a proof of the transport contract. Concerning identification, the function of certainty towards third parties is carried out by the "title registry", which operates as a trusted third

party, transferring the rights over the goods by novation, whereas the carrier acknowledges the transfer by assignment of the rights (*attornment*). **Prerequisites for operating within the "Bolero" system.** The "Bolero" system operates based on agreements. It is therefore necessary for all parties involved (the carrier; the goods' purchaser; the financing credit institution, if any, holding a pledge over the goods) to accept to be subjected to the rules specified in the "Bolero Rulebook" (hereinafter, for the sake of brevity: "BRB"). Moreover, the registration procedure is necessary for all the parties in the "Bolero" association (hereinafter, for the sake of brevity: "BASS"). From a practical point of view, the required technology for joining "Bolero" is very simple. The technical training lasts, on average, between 1 to 3 days. **Legal enforceability of the messages as regulated by the "Bolero Rulebook".** Facing a crucial problem, the "BRB" requires that every user who has joined "Bolero" agrees to recognize (and not to contest) the authenticity of all communication, notice or any other type of information conveyed through "Bolero" in every respect: (i) authenticity of the signature; (ii) sender's identification; (iii) recipient's identification. Moreover, a respectively sending and receipt presumption of the aforementioned communications is provided for at the very moment they are sent through "Bolero". **Evidential effectiveness and binding and unobjectionable nature of all communications sent through "Bolero".** The "BRB" implies the absolute functional equivalence between electronic communication and paper communication. Therefore, any legal requirements, contracts, practices or customs related to any operation requiring written evidence, are considered met by the electronic communication, and all parties must accept its validity. Users expressly commit themselves to recognizing the function and evidential effectiveness of electronic communications in any judicial proceedings. **Operational rules of the "Bolero" electronic bill of lading.** Herebelow a synthesis of the operational rules for the "Bolero" electronic bill of lading. **Creation of the bill of lading.** – Each carrier accepts that the issued "EBL": (i) includes the acknowledgment (receipt) of delivery acceptance of the goods shipped on board of the vessel, or, anyway, of their acceptance for loading and (ii) contains evidence of the terms of the contract of carriage. This message is web-transmitted to the "Title Registry" of "Bolero". Upon generating the "EBL", the carrier is obliged to: (a) indicate the loader; (b) indicate the "EBL" holder's name; or (b.1) indicate the authorized buyer (which can be different from the nominal holder); (b.2) indicate a consignee; (b.3) blank endorse the "EBL", thereby designating the holder as a "Bearer Holder". The "EBL" may be transferable or non-transferable. The former may be issued as a "Bearer EBL" or a "Blank Endorsed EBL". In case of a "Bearer EBL", the carrier undertakes to recognize that such bearer may designate a new Bearer, Pledge Holder or Consignee, and that every subsequent Holder-to-order or Pledge holder has the same designation right. If, instead, the carrier provides the "Title Registry" with instructions to issue a "blank endorsed EBL", it undertakes to recognize that: (i) the Holder is a Bearer Holder, and may designate a new Bearer Holder, a To Order Party, a Holder-to-order, a Pledge Holder or a Consignee, and (ii) every subsequent endorsee, Pledge Holder or Holder-to-order has the same designation right. **The subsequent transfer of the rights over the goods.** – This is a crucial point, which is familiar to those who

are experienced in matter of negotiable instruments, since the discipline is almost identical. After the generation of an "EBL", the transfer of the rights over the goods incorporated in it ("*Constructive Possession of the Goods*") may occur through the designation of: (a) a new Holder-to-order; (b) a new Pledge Holder; (c) a new Bearer Holder, or (d) a Consignee Holder. Because of the aforementioned designation, the carrier is obliged to acknowledge that, from that time on, the goods described in the "EBL" belong to the aforementioned parties, as the case may be. **The right to delivery of the goods and the transition to the paper version.** – In this regard, the traditional rules related to the paper bill of lading are applied. The carrier may carry out the delivery only to the parties entitled as per the above paragraphs. The holder of a pledge over the goods, who also proves to be the current "Bearer to order" and who also exercises his rights to the guarantee over the "EBL", will automatically be defined as the "Bearer to order", with the consequent novation of the transport contract. The "BRB" states that, at any moment preceding the delivery of the goods by the carrier, the "Bearer to order" has the right to request the carrier to issue a paper bill of lading. **Jurisdiction and applicable law.** – The "BRB" prescribes the English jurisdiction and the applicability of English law exclusively in connection with: (i) disputes concerning non-compliance with the rules specified in the "BRB"; (ii) the interpretation of the rules specified in the "BRB". It must be pointed out that, for any other claims different from those above, the "BRB" prescribes the non-exclusive jurisdiction of the English Courts. Therefore, all Users have the right to submit claims – except those *subpoint* (i) and (ii) – to any competent jurisdiction. **Relation to international Conventions.** – A contract of carriage, regardless of the "EBL" issued, is subject to all international Conventions (or national laws ratifying such Conventions), which would be compulsorily applicable if a paper bill of lading in the same terms had been issued. Such international Conventions or national law shall be deemed incorporated into the "EBL". In case of conflict between the provisions of mentioned international Conventions (or national law giving effect to such international Conventions) and the other provisions of the contract of carriage as included in the "EBL"'s text, the provisions of that international Conventions or national law will prevail. **Conclusions.** Currently, at the second decade of the third millennium, *bytes* had replaced paper, and the dematerialization reigns in almost all activity sectors: from the electronic transfer of funds, to the circulation of shares, e-commerce and conclusion of on-line contracts, certified electronic communications (certified e-mails), and the list could be even longer. The traditional paper bill of lading presents the disadvantages illustrated in the foreword. Mainly for parties in a continuative business relationship, the electronic bill of lading offers competitive advantages in terms of security, not alterability of data, speed and lower costs. Is it time for a change?



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Proof of financial capability in selection process of licensee. Comparative analysis of National implementation measures of Directive 2013/30/EU on the safety of offshore oil and gas operations

As we know, Directive 2013/30/EU (hereinafter referred to as the Offshore Directive) comes from the need to reduce as far as possible the risk of major accidents when carrying out offshore oil and gas operations (i.e. activities related to the installation or connected infrastructures, including the project, planning, construction, management and disposal, relating to hydrocarbon exploration and production, but with the exception of transport of hydrocarbons from one coast to another) and the associated need to limit the consequences of such accidents, with a view to efficiently protecting the marine environment and the coastal economy. To this end, the Directive establishes minimum conditions for the safe management of activities and implements the response mechanism in the event of an accident. In view of this, it must be noted that the Directive in question introduces for the first time a criterion for assessing the candidate, their ability to guarantee the safety of operations and protection of the environment, which could only be read between the lines in Directive 94/22/EC (hereinafter referred to as the Hydrocarbon Directive); indeed, Article 5 of the said Directive does not explicitly mention the abovementioned criterion, but it simply stipulates that the competent authority must grant authorisation taking into consideration “the way in which the entities propose to prospect, to explore and/or to bring into production the geographical area in question.” Furthermore, it must also be noted that the gap I have mentioned is due to the fact that the Hydrocarbon Directive came from a different need, i.e. the need to guarantee non-discriminatory access to the prospection, the exploration and the production of hydrocarbons and their management, so as to encourage greater competition in this field, strengthening integration of the internal energy market; in this respect, it was necessary to introduce common regulations to ensure that all those with the necessary requisites could participate in the authorisation process, in accordance with harmonised and uniform conditions. Nevertheless, even before the Offshore Directive came into force, the competent authorities duly took into account – during the selection process – the need for the candidate to guarantee public interests related to the protection of the environment and thus exploiting precisely this generic nature of the wording in Article 5 of the Hydrocarbon Directive. Confirmation of this is found by analysing the national implementation measures of the Hydrocarbon Directive. In particular, in the case of Italy, the Legislative Decree no. 625 of 25 November 1996, when establishing the criteria for assessing competing applicants, declared that the selection must be decided taking into account the ways in which the operations are carried out, also in relation to safety and the protection of the

environment (Article 5, paragraph 1, letter d). Similarly Belgium, by means of the Decree of 30 October 1997, required the following documents to be produced when presenting an application for the granting of authorisation: - a report on the past record of the company's managers;- a report indicating the method selected to prevent pollution and, if necessary, to counteract it. It is clear, therefore, that the Offshore Directive ends up completing the Hydrocarbon Directive, broadening the body of requirements necessary for the granting and management as well as for the transferring of authorisation, wherever the competent authority has a legal obligation, when assessing the financial capability of the candidate, to thoroughly check their ability to guarantee safe operations at all stages and to guarantee the immediate launch and uninterrupted continuation of all measures necessary for an effective emergency response and subsequent remediation. In particular, Article 4 of the Offshore Directive stipulates that, when deciding whether to grant or transfer a licence, the competent authority must also assess the financial capability of the candidate and they must do so in the following terms: “assessment of the applicant's financial capabilities, including any financial



guarantees, where appropriate, to cover potential liabilities deriving from offshore gas and oil operations, including liability for potential economic damages, where such liability is provided for by national law.” Furthermore, the regulation provides specific procedures for the purposes of such an assessment where, in paragraph 6, the competent authority is required to pay particular attention to all environmentally-sensitive marine and coastal environments, especially to ecosystems that play an important role in climate change mitigation and adjustment, such as salt marshes and seagrass meadows, as well as protected marine areas, including special conservation areas pursuant to the Council Directive 92/43/EEC of 21 May 1992, relating to the conservation of natural and semi-natural habitats and of wild fauna and flora, special protection areas pursuant to the Directive 2009/147/EC of the European Parliament and of the Council, of 30 November 2009, on the conservation of wild birds, and any marine protected areas in accordance with that agreed by the Union or by the Member States concerned, under international or regional agreements to which they are party. For the purposes aforesaid, Article 4 of the aforementioned Offshore Directive requires Member States to oblige the applicant requesting the licence (or the transfer of a licence) to provide “appropriate” proof of their capabilities (also financial) and it also stipulates that the States themselves shall facilitate the use of sustainable financial instruments and other arrangements to assist applicants for licences in demonstrating their financial capability according to that standard. So let's take a look at how Article 4 of

the Offshore Directive has been transposed in the internal jurisdiction of some member countries. **ITALY.** Italy has transposed the Offshore Directive into the Legislative Decree of 18 August 2015, no. 145, Article 4 of which implements the corresponding Community Law, acting in the following terms with reference to the part in question: “1. Exploration licences, the granting of cultivation of offshore liquid and gas hydrocarbons and individual franchises shall be granted, according to the Laws of 11 January 1957, no. 6, and 21 July 1967, no. 613, and of the Decree-Law of 12 September 2014, no. 133, converted with amendments by Law of 11 November 2014, no. 164, as well as with due regard for the requirements of Article 6, paragraph 17, of the Legislative Decree of 3 April 2006, no. 152, to the entities listed in Article 1 of the Legislative Decree of 25 November 1996, no. 625, and of Article 38, paragraph 6, letter c), of the Decree-Law no. 133 of 2014, which demonstrate that they have the general requirements, technical, economic and organisational capabilities and they offer guarantees appropriate to the programmes presented according to the requirements of the guidelines pursuant to Article 38, paragraph 7, of the Decree-Law no. 133 of 2014, and to Article 14 of the Legislative Decree of 25 November 1996, no. 625. 2. When assessing the technical, financial and economic capabilities of an applicant requesting offshore mining rights, according to requirements in paragraph 1, due account shall be taken of the following: a) risks, hazards and any other information relevant to the area in question, including the costs of potential degradation of the marine environment provided for in Article 8, paragraph 3, letter c), of the Legislative Decree of 13 October 2010, no. 190; b) the particular stage of any offshore oil and gas operations; c) the financial capability of the applicant, including any financial security to cover liabilities potentially deriving from the offshore oil and gas operations in question, including liability for potential economic damages. These must be provided and checked at the time of application for authorisation to carry out a project, together with the draft implementing measures; d) all available information relating to the safety and environmental performance of the applicant, including in relation to major accidents, as may be appropriate to the operations for which the licence has been requested. 3. In order to grant or transfer a licence for offshore oil and gas operations, the authority, in addition to opinions, clearance, authorisations laid out by existing legislation, can request the opinion of the Committee referred to in Article 8. 4. Applicants, at the time of application for a licence, must present the appropriate documents, according to requirements of the regulatory measures referred to in paragraph 1, which demonstrate that they have taken adequate measures to cover potential liability resulting from offshore oil and gas operations, as well as any other information relevant to the operations to be carried out in the proposed area. 5. The licensing authority, after hearing the opinion of the Committee referred to in Article 8, shall assess the adequacy of the documents in order to establish whether the applicant has sufficient financial, economic and technical resources for the immediate launch and uninterrupted continuation of all

measures necessary for an effective emergency response and subsequent remediation. Applicants for offshore mining rights can use sustainable financial instruments and other arrangements to demonstrate their financial capability as specified in the first paragraph. To ensure compensation is managed quickly and efficiently, the licensing authority shall promote with the industry's operators and insurance companies the adoption of agreements for quick liability cover for damages resulting from offshore operations, also of a cross-border nature, in the hydrocarbon sector. The applicant must guarantee the continuation of economic and financial capabilities necessary to satisfy their financial obligations arising from liability for offshore oil and gas operations". From the analysis of the internal regulation it would seem that the licence applicant could use sustainable financial instruments and other arrangements to demonstrate their financial capability, subject to the assessment on the actual "adequacy" of the documents by the competent licensing authority. Indeed, with the Decree of 25 March 2015 concerning the update of regulations in accordance with Article 38 of the Decree-Law of 12 September 2014, no. 133, converted with amendments, by the Law of 11 November 2014, no. 164, the Ministry of Economic Development anticipated the aforementioned provision where, in Article 4, paragraph 3, he stipulated that for exclusive licences and for all other licences, the granting of new authorisations for activities to be carried out shall be subject to the applying company demonstrating that they have the economic guarantees necessary to cover the costs of a potential accident during the activity, proportionate to those deriving from the most serious accident in various scenarios envisaged in the risk analysis of the project in question, according to the arrangements specified in a Directorial Decree to be established in accordance with Article 19, paragraph 6, of the same Ministerial Decree. The following Directorial Decree (of the Ministry of Economic Development) of 15 July 2015, implementing the abovementioned recalled Decree of the Ministry (and still prior to the Legislative Decree no. 145/2015 of transposition of the Offshore Directive), established, with Annex I, that: 1. The economic guarantees to cover the costs of a potential accident, provided for in Article 6, paragraph 11, Article 11 paragraph 4, letter e), Article 19, paragraph 2, Article 21, paragraph 2 and Article 35, paragraph 1, letter a), are defined with reference to the most serious accident in various scenarios relating to the management and carrying out of the activities for which authorisation is requested. 2. In order to determine the abovementioned guarantees, the member must carry out a study and risk analysis that takes into account all the possible risks that the activity in question could cause to persons, to the environment and to objects and the measures proposed to mitigate such risks must be highlighted. 3. Once the most serious accident has been identified by the abovementioned study and risk analysis, the operator must carry out an analysis of costs deriving from the most serious accident in various scenarios, in the context in which the activity is carried out, considering the operative response and all possible damages to persons, to the environment and to objects. 4. The operator must file the study and risk analysis and the related costs analysis at the National Office for Hydrocarbons and Geothermal Energy (UNMIG) responsible for the area concerned and must provide evidence that he has the appropriate economic guarantees to

demonstrate his financial accountability for a sum at least equal to that necessary to cover all such costs. 5. For authorisations related to drilling, the sum of the economic guarantees referred to in point 1 must not be less than the values in the table reported in paragraph 5 of the regulation in question (Article 4 of the directorial decree of 15 July 2015). We are therefore dealing with minimum thresholds. 6. UNMIG, in order to authorise activity and according to existing safety regulations, shall acknowledge the documents referred to in points 2 and 3 and shall check that the guarantees presented correspond to the figures referred to in points 4 and 5. 7. Proof that economic guarantees, illustrated above in points 4 and 5, exist, does not in any way limit the liability and obligations of the operator, who will still be liable for all eventual damages that a potential accident could cause to the health of persons, to the environment and to objects present in the area in which the operations are carried out. 8. The existence of economic guarantees referred to in Annex I of the Directorial Decree of 15 July 2015 must be demonstrated in one of the following ways: a. by means of an insurance policy or a guarantee insurance policy, issued by an insurance company authorised to practice in Italy, under the freedom of establishment or freedom to provide services (Law of 10 June 1982, no. 348), or recognised and practicing in European Union countries; b. by means of forms of guarantee considered by the Ministry, according to the Ministry of Economic Development's Commission for hydrocarbons and mining resources (CIRM), to be in line with requirements of Article 38, paragraph 6b, of the Decree-Law no. 133/2014, converted with modifications, by the Law no. 164/2014; paragraph 6b, according to which "the granting of new authorisations for exploration and production of hydrocarbons is bound to a check on the existence of all the applying company's economic guarantees, to cover the costs of any potential accident during the activity, proportionate to those deriving from the most serious accident in various scenarios envisaged in the study and risk analysis stage." 9. If the operator carries out more than one activity at the same time in different areas or with different licences, he must demonstrate that he has economic guarantees referred to in Annex I for just one case of an accident, which is considered the most risky case and the worst scenario amongst all the activities that the applicant is carrying out. The guarantee provided must cover the entire cost of the procedure to secure the installation where the activity takes place, the costs of restoration and remediation and costs related to damages to persons and to objects in the area where the activity is carried out, referring to the most serious accident realistically envisaged. Should more than one accident take place under the same licence holder, the guarantee provided can be used, limited to the defined amount, to cover more than one accident. 10. Each member must maintain the level of financial guarantee, required for the entirety of the activity for which authorisation is requested. In the case of exhaustion, expiration, or depression of the guarantee, the member must re-establish the determined level of guarantee by substituting it with another guarantee of the same level, or by renewing it immediately. 11. Should the applicant be a joint venture, each co-owner must, on a pro-rata basis, provide evidence of their financial accountability in relation to the established level of guarantee for which authorisation is required. This is without prejudice to the possibility for one single representative to provide proof of all economic

security for the entire joint venture; all owners are however jointly and severally liable for all obligations arising from the licence. From the analysis of the framework illustrated above it appears, basically, that Italy has identified the instruments of financial guarantee not only in an insurance policy or a guarantee insurance policy, but in any form of guarantee that the Ministry considers appropriate to cover the costs of a potential accident during the activity, proportionate to those resulting from the most serious accident in the various scenarios envisaged in the study and risk analysis stage. It follows that, as a result of the prevision referred to in the above illustrated point 8, letter b, the competent authority has considerable discretionary power in relation to the assessment of adequacy of guarantee instruments other than insurance policies and surety policies. **FRANCE.** France has transposed the Offshore Directive into: Loi n° 2015-1567 du 2 décembre 2015 portant diverses dispositions d'adaptation au droit de l'Union européenne dans le domaine de la prévention des risques. Titre Ier "Dispositions relatives à la sécurité des opérations pétrolières et gazières". This contains the regulations of interest that are quoted below: **Article 1** Après l'Article L. 123-2 du code minier, il est inséré un Article L. 123-2-1 ainsi rédigé : « Art. L. 123-2-1.-Sans préjudice de l'Article L. 122-2, un permis exclusif de recherché d'hydrocarbures liquides ou gazeux ne peut être délivré si le demandeur n'a pas fourni la preuve qu'il a pris les dispositions adéquates pour assumer les charges qui découleraient de la mise en jeu de sa responsabilité en cas d'accident majeur et pour assurer l'indemnisation rapide des dommages causés aux tiers. Ces dispositions, qui peuvent prendre la forme de garanties financières, sont valides et effectives dès l'ouverture des travaux. » Lors de l'évaluation des capacités techniques et financières d'un demandeur sollicitant un permis exclusif de recherché d'hydrocarbures liquides ou gazeux, une attention particulière est accordée aux environnements marins et côtiers écologiquement sensibles, en particulier aux écosystèmes qui jouent un rôle important dans l'atténuation du changement climatique et l'adaptation à ce dernier, tels que: « 1° Les marais salants ; « 2° Les prairies sous-marines ; « 3° Les zones marines protégées, comme les zones spéciales de conservation et les zones de protection spéciale au sens de l'Article L.414-1 du code de l'environnement et les zones marines protégées convenues par l'Union européenne ou les Etats membres concernés dans le cadre d'accords internationaux ou régionaux auxquels sont parties. » Un décret en Conseil d'Etat fixe les conditions d'application du présent Article et détermine notamment la nature des garanties financières et les règles de fixation du montant des dites garanties. » **Article 2** Après l'Article L. 133-2 du code minier, il est inséré un Article L. 133-2-1 ainsi rédigé : « Art. L. 133-2-1.-Sans préjudice de l'Article L. 132-1, une concession d'hydrocarbures liquides ou gazeux ne peut être délivrée si le demandeur n'a pas fourni la preuve qu'il a pris les dispositions adéquates pour assumer les charges qui découleraient de la mise en jeu de sa responsabilité en cas d'accident majeur et pour assurer l'indemnisation rapide des dommages causés aux tiers. Ces dispositions, qui peuvent prendre la forme de garanties financières, sont valides et effectives dès l'ouverture des travaux. » Lors de l'évaluation des capacités techniques et financières d'un demandeur sollicitant une concession d'hydrocarbures liquides ou gazeux, une attention

particulière est accordée aux environnements marins et côtiers écologiquement sensibles, en particulier aux écosystèmes qui jouent un rôle important dans l'atténuation du changement climatique et l'adaptation à ce dernier, tels que : « 1° Les marais salés ; « 2° Les prairies sous-marines ; « 3° Les zones marines protégées, comme les zones spéciales de conservation et les zones de protection spéciale au sens de l'Article L. 414-1 du code de l'environnement et les zones marines protégées convenues par l'Union européenne ou les Etats membres concernés dans le cadre d'accords internationaux ou régionaux auxquels ils sont parties. *«Un décret en Conseil d'Etat fixe les conditions d'application du présent Article et détermine notamment la nature des garanties financières et les règles de fixation du montant desdites garanties. »*. At the time of writing this Article, 20 June 2016, the *décret* en Conseil d'Etat is pending publication (see <https://www.senat.fr/application-des-lois/pj14-693.html>). It remains to be seen, therefore, how France will actually determine the nature of financial guarantees and the regulations to calculate the sum of said guarantees. **UNITED KINGDOM.** The United Kingdom has transposed the Offshore Directive into: "The Offshore Petroleum Licensing (Offshore Safety Directive) Regulations 2015". Below the relevant regulations are reported. **Grant and transfer of offshore licences 3.—** (1) The licensing authority must not grant an offshore licence or consent to the transfer of an offshore licence to a prospective offshore licensee unless the authority— (a) takes into account the capability, including technical and **financial capability**, of the prospective offshore licensee to meet the requirements for operations within the framework of the licence and in particular the licensing authority must have regard to—(i) the considerations in paragraph (2); and(ii) any environmentally sensitive marine and coastal environments, including the environmental matters in paragraph (3); and (b) where appropriate, consults the competent authority. (2) The considerations referred to in paragraph (1)(a)(i) are— (a) the risk, the hazards and any other relevant information relating to the licensed area, including, where appropriate, the cost of degradation of the marine environment referred to in point (c) of Article 8(1) of Directive 2008/56/EC of the European Parliament and of the Council establishing a framework for community action in the field of marine environmental policy(a);(b) the particular stage of any offshore petroleum operations;(c) the prospective offshore licensee's financial capability, **including any financial security**, to cover liabilities potentially deriving from the offshore petroleum operations in question, including liability for potential economic damages; and (d) the available information relating to the safety and environmental performance of the prospective offshore licensee, including in relation to major accidents, as may be appropriate to the operations applicable under the offshore licence. (3) The environmental matters referred to in paragraph (1)(a)(ii) are—(a) ecosystems which play an important role in mitigation and adaptation to climate change, including salt marshes and sea grass beds; and (b) marine protected areas, including— (i) special areas of conservation pursuant to the Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora(b); (ii) special protection areas pursuant to Directive 2009/147/EC of the European Parliament and of the Council on the conservation of wild birds(c); and(iii) areas that are designated as marine protected areas within the

framework of any international or regional agreement entered into by the European Union or the United Kingdom. (4) The licensing authority may not grant an offshore licence unless it is satisfied that the prospective offshore licensee has made or will make adequate provision to cover liabilities potentially deriving from the prospective offshore licensee's offshore petroleum operations. (5) In considering whether or not it is satisfied about the matters set out in paragraph (4), the licensing authority must consider whether the prospective offshore licensee has, or will have at the start of offshore petroleum operations, sufficient financial resources for the immediate launch and uninterrupted continuation of all measures necessary for effective emergency response and subsequent remediation. English legislation incorporates the regulations of the Offshore Directive but it does not seem to refer to more detailed provisions with a view to selecting guarantee instruments, unlike what is seen in Italian and French legislation. It is precisely this, however, that seems to be the correct way to transpose Article 4 of the Offshore Directive, if it is considered in view of the contents of report COM (2015) 422 final dated 14 September 2015 that the Commission presented to the Parliament and to the Council in accordance with Article 39 of that Directive (Article 39 required the Commission to present to Parliament and to the Council a report on the availability of financial guarantee instruments and the handling of compensation claims, where appropriate, accompanied by proposals. See the associated *Recital 63*). In the report, the Commission has indeed observed how the instruments that cover all damages caused by the rarest and most costly accidents are nowadays very uncommon on the market for various reasons; one of these lies, according to the Commission, precisely in the fact that numerous regulatory authorities of the "target states" have always established a limit to the forms of cover accepted, thus preventing the possibility of providing a range of innovative solutions. The United Kingdom, therefore, seems to have fully grasped the rationale behind this regulation and its aim, by refraining from predetermining the forms of guarantee, while Italy essentially achieves the same result through the introduction (in the law) of the open clause referred to in Annex I, point b), of the Directorial Decree of 15 July 2015. Furthermore, considering the fact that some damage proves difficult to quantify (e.g. offshore biodiversity damage) and, therefore, not easily insurable, and above all given that economic losses could be susceptible to spreading from one sector to another with the risk of indubitable speculation, an appropriate investigation into the hypothesis of limitation of liability must be carried out (in the same vein, see COM (2015) 422 final, pg. 10). To conclude with an internal reflection, the question remains whether, faced with a regulatory framework which is so strict in terms of safety and the environment, the Italian measure consisting of the introduction of a general ban on granting new licences within territorial sea could actually make a lot of sense, even more so if we consider that such a measure does not exist in other member countries, even though they are characterised by a high touristic value and a significant coastal economy. Safeguarding security and the environment as well as the coastal economy could therefore be equally implemented *on a case-by-case basis*, through the eventual dismissal of projects where they are justifiably incompatible with the precautionary approach referred to in Article 3b of the Environmental Code.



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Insurance profiles of drones

On 17th April 2016 the news reported that a drone had struck a British Airways plane flying from Geneva to Heathrow while it was landing. Previously, in July 2014, again at Heathrow airport, a drone just missed an Airbus A320 with 280 passengers on board. In New York a NYPD helicopter was flying over Brooklyn searching for a missing person when it was obliged to make a sharp change of course because of a drone. The UAV operator was arrested for having flown the drone illegally and for putting the NYPD helicopter into jeopardy. On 22nd May 2016, during a marriage ceremony, the bridegroom was struck in the face by the drone, used for the photo shoot, which the gusts of wind had turned into a loose cannon. These are but a few of the many news items reporting the wide variety of accidents occurring with and/or because of drones, highlighting how there is a real risk of a drone colliding with things or – worse – with people and that this must be given due consideration, especially considering that the use of drones has increased exponentially over the last few years (by about 19% per year) because of their versatility of use. Within the general category of drones, defined in international terms as Unmanned Aircraft System (UAS) or Unmanned Aerial Vehicle (UAV), Remote Controlled Aircraft – with no pilot on board – are featured. The drone's flight is piloted by a navigator on land or on another craft by means of a computer on the vehicle. The point is that the pilot is not on board the craft itself but controls it remotely by transmitting commands to the on-board computer. The ENAC (Italian Civil Aviation Authority) divides drones into two categories depending on their purpose, professional or recreational: 1) RPAS - Remotely Piloted Aerial Vehicles: professional aircraft for use in specialized operations; 2) Model aircraft – Remotely Piloted Aerial Vehicles used exclusively for recreational and sports purposes. Compulsory insurance regarding the former was introduced with the ENAC "Remotely Piloted Aerial Vehicles" Regulations of 16/12/2013, which came into effect on 30/4/2014 (amended again on 16/7/2015). The Regulations attempt to meet the demand by the operators of the sector for a regulatory framework able to guarantee the safety requirements which are emerging in light of the exponential increase in the use of drones. The Regulations take, as a premise, the definition of aircraft as provided by Art. 743 of the Navigation Code, which includes remotely piloted craft/vehicles: *"The word Aircraft signifies all machines intended for the transportation by air of people or things. Remotely piloted air vehicles are also considered as Aircraft and are defined as such by the special laws, the ENAC regulations and, for the military, by decrees issued by the Ministry of Defence. The distinctions between aircraft, based on their technical characteristics and the use to which they are put, are laid down by the ENAC regulations and, in any case, by the special legislation on the subject"*. Remotely piloted aircraft used or intended for use in experimental, scientific or research activities are established as being Remotely Piloted Aircraft Systems (RPAS) and the provisions of the Italian Navigation Code apply in so far as provided

by these Regulations. Model aircraft are not regarded as aircraft to which the provisions of the Italian Navigation Code apply, and can be used for recreational and sporting activities only. Nevertheless, the Regulations set out specific provisions and limitations applicable to the use of the model aircraft and use of airspace to ensure the safety of persons and property on the ground and of other airspace users. Under Regulation n. 216/2008 of the European Parliament and Council (CE), the ENAC is responsible for all RPAS having an operating take-off mass of less than 150 kg. and for all those designed or used for research, experimentation and scientific purposes. However, under that same Regulation, which lays down a common set of rules for the field of civil aviation and establishes a European Agency for aviation safety, RPAS' of over 150 kg. fall within the competence of the EASA (European Aviation Safety Agency). The ENAC Regulations do not apply to: a) the State RPAS provided for in articles 744, 746 and 748 of the Navigation Code; b) RPAS engaged in activities in enclosed spaces (indoors), with the exception of those covered by Art. 10, par. 7 of the Regulations; c) RPAS consisting of balloons used for scientific observation or tethered gas balloons. It is easy to see how the issues involved in identifying risk profiles are directly proportionate to the numerous ways in which drones can be used: territorial surveillance, aerial photography, observation of environmental conditions, monitoring archaeological sites, use in agriculture for the tighter control of fields and crops, use in searching for survivors in the event of natural disasters in inaccessible areas. These are but a few of the possible scenarios, destined to increase as technology (and hence potential use) advances. The not insignificant factor of cost-effectiveness also makes the market even more attractive. It will not be long before they are used as air couriers: in May 2016 DHL started its Parcelcopter project which is presently used – in agreement with the German government – for transporting essential commodities and medicinal products to the two thousand inhabitants of the island of Juist. It is therefore increasingly urgent that the issues relating to the sensitive area of civil liability be addressed: personal injury, damage to property, breach of privacy regulations, Data Protection. The insurance market must respond to the challenge of the use of drones, even if the risks involved cannot be wholly assessed and the claim ratio is statistically low as yet. The relatively low cost of the drone itself clashes – in financial terms – with the extent of the damage a drone can cause if used improperly or in the event of a technical failure. Last but not least, there is the risk of 'tampering': the first virus, known as "Maldrone", was remotely hacked into a aircraft's software and the drone was hijacked - a malware capable of changing the drone's destination or taking out of its rightful owner's sight. Or even worse, taking control of it and diverting it to sensitive targets. The implications – especially with regards to terrorism – are rather evident. Art. 20 [Art. 32 in the new edition] of the ENAC Regulations deals with the insurance profiles. The provision introduces an essential condition for operating with an RPAS - the stipulation and validity of "a third party insurance in place, adequate for the intended operations and for not less than the minimum insurance coverage reported in the table in Art. 7 of Regulation (EC) 785/2004" (regarding insurance requirements for aircraft and aircraft operators). Art. 7 of (EC) Regulation n. 785/2004 requires air carriers and operators to place third party insurance

coverage with minimum coverage which varies according to the type of craft and accident (ordinary risks and so-called war risks), depending on the OTOM (operating take-off mass). With regards to RPAS weight ranges, minimum coverage of 0.75 million of SDR (Special Drawing Rights) is required, corresponding to about 800,000,00 Euro per aircraft with an OTOM of less than 500 kg. Insurance cover is not compulsory for model aircraft, i.e. remotely controlled aircraft, without persons on board, used solely for recreation and sport, not equipped to fly autonomously and in continuous visual contact with its operator "without the aid of support of tools to enhance the view". Nor is it compulsory for State RPAS, for those which do not allow management of the flight by the Pilot nor, finally, for balloons used for scientific research or tethered gas balloons. It is apparent how the use of drones is raising serious problems in terms of safety, certainly not to be underestimated. The ICAO (International Civil Aviation Organization) is presently working on general guidelines with which member States must comply by the end of 2018. In the meantime, however, technology is advancing and presenting new reference scenarios, probably faster than the rules which are still being drafted.



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The Galatea - over valuation, An incursion on the Insurance Act2015

the decision offers an interesting comparison on how the case in question would have been decided if the Insurance Act, which comes into force and effect in August 2016, was applied at that particular time and how it has been decided in its absence. Full text of the judgment *Involnert Management Inc. v. Aprilgrange Ltd., AIS Insurance Services Limited and OAMPS Special Risks Limited* can be found here: <http://www.bailii.org/ew/cases/EWHC/Comm/2015/2225.html>.

In May 2007 the Claimant, a company incorporated in the British Virgin Islands whose ultimate beneficial owner was a wealthy businessman, purchased a brand new "Athena 115" (about 35 metres in length) named *Galatea* for €13,000,000.00. The yacht was insured at the purchase price and maintained insured for that amount throughout. In November 2009 the yacht managers obtained from a firm of professional valuers, the indication that the commercial value of the yacht had dropped to € 7,000,000.00 excluding VAT (€ 8,500,000.00 VAT included). In April 2011 the same beneficial owner acquired a 73 metres yacht, at the price of € 65,000,000.00, and was then interested in selling the *Galatea*. In May 2011 the *Galatea* was insured with the Defendant with an all risk cover for an agreed value of € 13,000,000.00. The cover was split between two separate sections of the policy: Section A, which provided Hull and Machinery cover in an amount of € 9,750,000.00;

and Section B, which provided cover for the "Increased Value of Hull and Machinery" in an amount of € 3,250,000.00. The Increased Value section provided cover only for a total loss (TLO) and thus carried a significantly lower rate of premium. The policy incorporated the American Yacht Form R12 (the "R12 Clauses"). In addition, the Increased Value cover under Section B was subject to the *American Institute Increased Value and Excess Liabilities Clauses*. On 3 December 2011, while she was at her home port, an Athens Marina, the *Galatea* was damaged by fire and became, as per Owners' allegation, a constructive total loss. On 10 July 2012 the Owners served a Notice of Abandonment to H&M Underwriters seeking an indemnity of € 13,000,000.00. H&M rejected the claim and the Owners pursued legal proceedings. The Owners joined as additional parties to the proceedings of the two insurance broker firms, who were responsible for arranging the insurance, namely the producing broker and the placing broker. During the proceedings the Underwriters "discovered" circumstances that they ignored when the policy was entered into and that the Owners had not disclosed at the relevant time. It was so ascertained that: 1) after two years of her purchase (namely in late 2009) and two years before the fire, the yacht worth € 7,000,000.00 excluding VAT and a formal valuation had been accordingly obtained by the Owners. Moreover that 2) the Owner had been advised by a professional contact to try and sell the yacht at € 8,500,000.00 (VAT included) but to consider a recovery of € 7,000,000.00 net in Owners' pocket as satisfactory. On top of the above that 3) the yacht was being marketed with an asking price of € 8,000,000.00 when the claimant was seeking to insure her for € 13,000,000.00. According to the Judge the yacht's valuation of € 7,000,000.00 obtained by the Owners in 2009 and the advice obtained in 2011 as well as the fact that the yacht was on the market since 2011 at € 5,000,000.00 below her insured value were all material circumstances that a prudent Underwriter would have taken into consideration, if known, before granting an agreed value cover of € 13,000,000.00. The consequence of the claimant's breach of the duty of disclosure was therefore to induce the Insurers to insure the Yacht for € 13,000,000.00 instead of € 8,000,000.00. The Judge held that, as these circumstances were not disclosed (even though there is no suggestion that the claimant's



failure to make disclosure was deliberate or reckless), the Owners' claim had to be dismissed.

However, according to the Judge, if attention had been given to the appropriate

insured value, the claimant would probably have been content to insure the yacht for the same amount of € 8,000,000.00 for which the yacht was put up for sale. Similarly, in the Judge's view, the Insurers would have agreed to insure the yacht for that sum if all the material facts had been disclosed to them. So that the just result in these circumstances would have been, in Judge's view, to treat the insurance as valid at the reduced amount of € 8,000,000.00. Interestingly the Judge highlighted

that the above would have been the outcome of the judgment had the Insurance Act 2015 applied to the case. He commented that the insurance law under which the case was decided (before the Insurance Act 2015 entered into force and effect) put the insurer in a better position as a result of the insured's innocent failure to make full disclosure than the insurer would have been in if full disclosure had been given. Further, in the Judge's view, it was a blot that in a case of the present kind the insurer was permitted to avoid liability altogether. As a matter of fact, notwithstanding the definite/obligatory/legal duty of the insured who must make a fair presentation of the risk and disclose all material circumstances known and not commit any misrepresentation, the new Act is now granting some remedies if the actions of the Insured is not a deliberate/reckless omission/breach (in which case the contract is avoided *ab initio*). Such remedies may vary from avoidance to rewriting the contract or proportionate reduction. As in the Judge's view the non-disclosure of such material circumstances was neither fraudulent or reckless, the contract would have been – under the Insurance Act 2015 - rewritten by law and imposed to the parties in a way to reflect what their will would have been. In this particular case it was Judge's opinion that Underwriters – had all the circumstances been disclosed to them at the time of cover - would have issued a policy with an agreed value of € 8,000,000.00 as this was the asking price which the claimant was hoping to get from the sale and it would have also been the logical amount of cover to purchase. As far as the objection raised by the Insurers based on the circumstance that the loss could not be considered as a total loss (but only as a partial loss) due to the delay of the Insured in tendering the notice of abandonment (NoA), the Judge confirmed the delay and rejected the Insured arguments that the NoA could not have been of benefit to the insurers but held that this would not have prevented the Insured to consider the fire as a total loss under the Increased Value section of the cover as it was not necessary to give notice of abandonment in order to make a claim under that section. During the proceedings the Insurers also relied on some policy provisions (the R12 clauses) according to which a set of requirements have to be complied with and the Insured did not so comply according to Insurers' statement. In the Insurers' view (i) the Insured failed to provide a proof of the loss within ninety (90) days from date of loss. The argument was accepted by the Judge assuming that such failure to comply with the policy's provisions prevented the Insured to claim under the H&M section even if not under the Increased Value section which the clause did not refer to; (ii) the Insured failed to provide documents of the yacht's valuation and its offer on the market. The Judge rejected the objection as the policy did not provide a time bar to produce such documents so that they could have been produced at any time; (iii) the Insured was not permitted by the policy to pursue proceedings having not complied with all the policy's requirements. In particular the omission regarding the sworn proof of the loss was sufficient in preventing the Insured to pursue proceedings. The Judge accepted the argument and rejected Claimant's argument that such failure would simply stay proceedings. In the Judge's view the stay resulting from a failure, for example, to provide a sworn proof of loss within 90 days from the date of loss would still inevitably be permanent. That is because, once there has been a failure to comply with this requirement, nothing done subsequently

can alter that fact and rewrite history: later provision of a sworn proof of loss would not constitute compliance with the requirement to provide it within 90 days. Therefore, if the policy had been valid, the claim under Section A would not have been settled as a total loss nor as a partial loss, as it would have been barred altogether by reason of the claimant's failure to comply with the R12 Clauses. However, there would not have been any bar to treating the loss as a total loss for the purpose of claiming under Section B of the policy. As it was common ground that the yacht was a constructive total loss, the claim under Section B would have succeeded. The Judge so found the negligence of the producing broker. In particular it has been held that the producing broker was negligent in filing the insurance proposal form as he did not take care to ensure that the form submitted to the Insurers gave opinion of the current market value of the yacht. If the producing broker had properly performed its duty, that would probably have led to the amount of cover being revised and to the insurance being written with a different agreed value for the yacht so that the claimant would probably have obtained a valid policy of insurance with cover of € 8,000,000.00 instead of a voidable policy with cover of € 13,000,000.00. The negligence of the producing broker deprived the claimant of the sum for which the yacht would have been insured under Section B of the policy if the broker had performed its duty. That sum would have been 25% of the total hull cover (having the relevant cover adopted the 75/25 split of cover between H&M and TLO Increased value sections), that is, € 2,000,000.00 (being ¼ of the amount of € 8,000,000.00 considered the cover which would have been granted). The decision is interesting as, among other arguments, it makes an anticipation on how the Insurance Act's new regime of remedies would play out in a case of the present kind.



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Unfair terms and insurance contracts

European law provides a specific regulation of unfair terms concerning also insurance contracts. The Council Directive 93/13/EEC, according to steady case-law by the Court of Justice, establishes a system of protection based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier as regards both his bargaining power and his level of knowledge, which leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms. As regards such a position of weakness, Directive 93/13 requires Member States to provide for a mechanism ensuring that every contractual term not individually negotiated may be reviewed in order to determine whether it is unfair. Accordingly, it is for the national Court to determine, taking account of the criteria laid down in articles 3 paragraphs 1 and 5 of

Directive 93/13, whether, having regard to the particular circumstances of the case, such a term meets the requirements of good faith, balance and transparency laid down by that Directive. Nevertheless the Court of Justice has jurisdiction to elicit from the provisions of the Directive the criteria that the national Court may or must apply when examining contractual terms. According to this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms. In the case of insurance contracts, it is specified that the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer. Furthermore contracts should be drafted in plain and intelligible language because the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail. In accordance with the European law, Member States should ensure that unfair terms are not used in contracts concluded with consumers by a seller or supplier and that if, nevertheless, such terms are so used, they will not bind the consumer, and the contract will continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair provisions. The unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent. In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain and intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. In accordance with this Directive, the Court of Justice, by the judgment of the Court 23 April 2015, C-96/14, has clarified some issues related to the insurance matter. The case arises from a preliminary ruling, concerning the interpretation of article 4 paragraph 2 of the Directive 93/13, stating that "assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language". In particular, the referring Court asks, in essence, whether this article must be interpreted as meaning that a term of an insurance contract intended to ensure that loan repayments payable to the lender will be covered in the event of the borrower's total incapacity for work, will, if that term prevents the insured person from receiving that cover in the event that he is declared fit to carry on an activity, paid or otherwise, fall within the exception set out in that provision.



The Court of Justice clarifies two topics concerning the concepts of the “main subject-matter of the contract” and of “plain, intelligible language”. As far as the first topic is concerned, the Court establishes that contractual terms falling within the concept of “the main subject-matter of the contract”, within the meaning of article 4, paragraph 2 of Directive 93/13, must be understood as being those that lay down the essential obligations of the contract and, as such, characterise it (see, to that effect, judgments in *Caja de Ahorros y Monte de Piedad de Madrid*, C-484/08, EU:C:2010:309 and *Kásler et Káslerné Rábai*, C-26/13, EU:C:2014:282). By contrast, terms ancillary to those that define the very essence of the contractual relationship cannot fall within the concept of “the main subject-matter of the contract”, within the meaning of that provision (judgments in *Kásler et Káslerné Rábai*, C-26/13, EU:C:2014:282 and *Matei*, C-143/13, EU:C:2015:127). As regards the question whether a term falls within the main subject-matter of an insurance contract, the European judge highlights that, on the one hand, according to the case-law of the Court, the essentials of an insurance transaction are that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded (judgments in *CPP*, C-349/96, EU:C:1999:93, *Skandia*, C-240/99, EU:C:2001:140 and *Commission v Greece*, C-13/06, EU:C:2006:765). On the other hand, as regards a contractual term contained in an insurance contract concluded between a seller or supplier and a consumer, the terms which clearly define or circumscribe the insured risk and the insurer’s liability shall not be subject to an assessment of unfair character since those restrictions are taken into account in calculating the premium paid by the consumer. In the case subject of the preliminary ruling, the referring Court states that the contractual term at issue includes the definition of the concept of “total incapacity for work” and determines the conditions which a borrower must meet in order to receive the payment cover in respect of his loan. In those circumstances, according to the European judge, it cannot be ruled out that such a term will circumscribe the insured risk and the insurer’s liability and lay down the essential obligations of the insurance contract at issue, which is, however, a matter for the referring Court to determine. In that regard, the Court has had occasion to hold that the examination of a contractual term, in order to determine whether that term falls within the concept of the “main subject-matter of the contract” within the meaning of article 4 paragraph 2 of Directive 93/13, must be carried out having regard to the nature, general scheme and the stipulations of the contract and its legal and factual context (see, to that effect, judgment in *Kásler and Káslerné Rábai*, C 26/13, EU:C:2014:282, paragraphs 50 and 51). Therefore the Court of Justice decides that it is for the referring Court to determine to what extent, having regard to those factors, the term at issue in the dispute before it lays down an essential component of the contractual framework of which it forms part, and, as such, characterises it. If the referring Court were to consider that that term forms part of the main subject-matter of the contractual framework, that Court must also determine whether that term has been drafted by the seller or supplier in plain, intelligible language (see, to that effect, judgment in *Caja de Ahorros y Monte de Piedad de Madrid*, C-484/08, EU:C:2010:309 and order in *Pohotovost*, C-76/10,

EU:C:2010:685). As far as the concept of “plain, intelligible language” is concerned, the Court restates that the requirement of transparency of contractual terms, laid down by Directive 93/13, cannot be reduced merely to their being formally and grammatically intelligible. On the contrary, as the system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards, in particular, his level of knowledge, that requirement of transparency is to be interpreted broadly (see, to that effect, judgments in *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282 and *Matei*, C-143/13, EU:C:2015:127). Of fundamental importance to the consumer, therefore, it is not only the information given prior to the conclusion of the contract concerning the conditions as to liability, but also the information given concerning the specific features of the arrangements for covering the loan repayments payable to the lender in the event of the borrower’s total incapacity for work and the relationship between those arrangements and the arrangements laid down in respect of other contractual terms, so that that consumer is in a position to evaluate, on the basis of plain, intelligible criteria, the economic consequences for him which derive from it. That is so since the consumer will decide, in the light of those two factors, whether he wishes to be contractually bound by agreeing to the terms previously drawn up by the seller or supplier (see, by analogy, judgments in *RWE Vertrieb*, C-92/11, EU:C:2013:180, *Kásler and Káslerné Rábai*, C-26/13, EU:C:2014:282 and *Matei*, C-143/13, EU:C:2015:127). In the case subject of the preliminary ruling, the Court highlights that while the referring Court considers that the wording of the clause at issue is plain and precise, it also states that the expression “take up any activity, paid or otherwise”, set out in that clause, may be understood in various ways. Apart from the interpretation suggested by CNP Assurances, according to which that expression also allows insured persons who are not gainfully employed at the time of an accident or illness to be considered as being in a state of total incapacity for work, it cannot be ruled out that that expression can be interpreted as meaning that it does not allow a person who is fit to carry on any activity whatsoever to receive cover, under the invalidity guarantee, for payments that he owes to the other contracting party. The Court of Justice notes that it cannot be ruled out, in the present case, that, even if the term is grammatically intelligible, which it falls to the referring Court to assess, the scope of that term was not understood by the consumer. Indeed it is highlighted that the insurance contract is concluded in order to protect the consumer against the consequences of being unable to meet the monthly payments on his loans. Accordingly, the consumer could reasonable expect that the concept of “activity, paid or otherwise”, appearing in the insurance contract and included in the definition of “total incapacity for work”, corresponds to an employment that can, at least potentially, provide sufficient remuneration to enable him to meet the monthly payments on his loans. According to the European judge, the doubts as to the lack of clarity of the term at issue in the main proceedings are reinforced by the extremely broad and vague nature of the expression “activity, paid or otherwise” used in that term. Indeed, the word “activity” can encompass any human operation or activity carried out to achieve a specific purpose. In the case subject of the preliminary ruling, the consumer was not necessarily aware, when concluding the contract at issue in the main

proceedings, of the fact that the concept of “total incapacity for work”, within the meaning of that contract, did not correspond to that of “partial permanent incapacity” within the meaning of French social security law. Therefore the Court of Justice decides that it is for the referring Court to determine whether, having regard to all the relevant information, including the promotional material and information provided by the insurer in the negotiation of the insurance contract and, more generally, of the contractual framework, an average consumer, who is reasonably well informed and reasonably observant and circumspect, would not only be aware of the existence of the difference between the concept of “total incapacity for work”, within the meaning of the contract at issue in the main proceedings, and that of “partial permanent incapacity”, within the meaning of the national social security law, but would also be able to assess the potentially significant economic consequences, for him, resulting from the limitation of the cover included in the insurance policy. The fact that the contract at issue in the main proceedings forms part of a broader contractual framework and is related to the loan contracts could be also relevant in this context; indeed the consumer cannot be required, when concluding related contracts, to have the same vigilance regarding the extent of the risks covered by that insurance contract as he would if he had concluded that contract and the loan contracts separately. Finally should the referring Court come to the conclusion that a term, such as that at issue in the main proceedings, does not fall within the exception provided in article 4 paragraph 2 of Directive 93/13, it must be recalled that, under article 5 of that directive, if the wording of a contractual term is not clear, the interpretation most favourable to the consumer shall prevail.



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Maritime piracy: payment of ransom and insurance coverage

The Code of Navigation provisions on marine insurance (Articles 517 - 547 Cod. Nav.), coordinated with the Civil Code provisions on insurance, are seldom applied in the insurance practice. The Italian insurance market is in fact dependent on the reinsurance market, especially the English one. Therefore, one should first look to the English market to address some of the issues related to the request for ransom by pirates who have seized a ship and, in particular, to understand whether the payment of ransom is to be considered as lawful and the sums paid by the shipowner as a ransom for the release of the shipment may be reimbursed by the insurer. The English system has the Sue and Labour clause, contained in the Marine Insurance Act (MIA 1906). This clause provides that “it is the duty of the assured and his agents in all cases to take such measures as may be reasonable for the purpose of averting or minimizing loss”. Therefore, under English law, the payment of ransom can be included in those actions that the insured must take to prevent or reduce the damage resulting from the attack that he has suffered and for the insurer’s account. Italian law has a rule similar to the Sue and Labour Clause (Art. 1914 Civil

Code) which puts the insured under an obligation to do whatever he can to prevent or reduce the damage. Thus, it would appear that the immediate answer to the first question about the lawfulness of the payment of ransom by the shipowner to free the shipment should be affirmative. Yet one must distinguish between the payment of ransom to free the vessel and cargo and the payment of ransom to free the crew. In case of capture of a ship and cargo, the payment made by the shipowner to free the vessel and cargo is normally considered as a general average action, i.e. an expenditure made by the shipowner in the interest of the entire sea venture. It should be reminded that the general average action is the action whereby some of the properties involved in the shipment are sacrificed or expenses are incurred to save the whole sea venture. To be lawful, the general average action must be extraordinary (the damage caused must not be the same as would occur in the natural course of events), voluntary (in the sense that it must be aimed at the salvation of the whole sea venture) and reasonable. Where a lawful general average action occurs, the damages and expenses directly related to that action are apportioned among all the participants in the venture based on the value of the saved properties. If the shipowner paid the ransom for the release of the ship and cargo, he can declare general average to obtain the necessary guarantees from the other parties involved in the shipment (in particular, cargo insurers) and to get - at the same time - a general average contribution from cargo insurers in accordance with the provisions of Art. 536 Code of Navigation and Rule A of the York-Antwerp Rules. In such cases, the insurers will be liable to pay this contribution to the shipowner provided that the shipowner has taken all appropriate measures to avoid the risk of an attack by pirates. The issue of the payment of ransom arises, though in different terms, even when it is paid for the release of the crew kidnapped for extortion purposes. The UK insurance market introduced the "kidnap and ransom" (K & R) policies under the definition "piracy special risk insurance". The inclusion of a K & R clause in an insurance contract makes the K & R insurers liable to indemnify the insured losses including the ransom and the reasonable costs to pay it to the pirates, the "ransom in transit" and the "additional expenses", without recourse against the insurers covering Hull & Machinery and War risks (including piracy). The shipowner must have contracted a "full insurance" including the P&I where the vessel is entered; the cover is extended to the reimbursement of expenses incurred by the shipowner to pay the ransom. The full insurance, therefore, affects the operation of the K & R cover and is required as a warranty for the validity and effectiveness of the cover. In Italy, the problems relating to the payment of ransom for the release of the crew is particularly complex because of the express prohibition introduced by the Law Decree no. 8/1991 (converted into law with amendments by Law 15 March 1991, no. 82). This law provides in Art. 1 that "ensuring, by whatever means, that kidnapers obtain the payment of the price for the release of the victim" is a crime. Therefore, the payment of ransom by an Italian insurer could amount to the so called "illicit brokering in kidnapping for ransom" punished by Art. 630 Penal Code. Law no. 82/1991 provides for the extension of the crime of abetting (Art. 379 Penal Code) to those who by any means strive to let the kidnapers obtain the price for the release of the victim. Therefore, the payment of money for the release of the crew as a result of acts of piracy is

unlawful under Italian law pursuant to the combined provisions of Art. 1 Law no. 82/1991 and Art. 379 Penal Code. Moreover, Art. 2 Law no. 82/1991 punishes "any Italian citizen who signs, even abroad, insurance contracts covering the risk, in the Italian territory, of the payment of ransom in case of kidnapping for extortion". Thus, insurance contracts covering the risk of kidnapping for extortion are null and the shipowner's claim for reimbursement by his insurer of the sums paid for the release of the crew will be unlawful. Otherwise, considering the fact that in Italy the crime of abetting concerns only the kidnapping and that - as said - there is no prohibition to pay moneys for the repossession of seized properties (ship and cargo), only these latter actions are lawfully insurable. However, one should wonder whether an Italian shipowner, by entering into a K & R policy to strengthen the traditional insurance policy against the risk of piracy (R.G.), takes out a null insurance policy or can bypass the provisions of Art. 2 Law no. 82/1991. On this point, by a recent important decision of 27 February 2015, no. 15977, in the well-known case of the Italian ship "Montecristo" seized by pirates on 10 October 2011, the Supreme Court ruled that "when the crimes of piracy (and those connected with them) are committed in the Gulf of Aden and off the Somali coast, to the detriment of the Italian State or Italian ships, citizens or properties, they shall be prosecuted according to Italian law, and the Italian jurisdiction (and, in particular, the jurisdiction of the Tribunal of Rome) is not subject to any condition for prosecution". This decision reversed the former position: before the decision of the Supreme Court, the widespread opinion was that the prohibition under Law no. 82/1991 was confined to events occurred "in the State territory". That position - according to the previous construction - gave the crime a meaningful geographic characterization deemed incompatible with the risk of piracy in geopolitical contexts other than Italian. Basically, before the intervention of the Supreme Court, the common view was that the sentence "in the State territory" limited the typical area of the crime to such an extent to suggest that, in terms of the risk location, an Italian shipowner who had taken out an insurance policy including a K & R clause to strengthen the traditional piracy risk policy, could hardly be criminally prosecuted. Now the scenario has changed. Indeed, although territoriality is one of the principles regulating criminal law in the space, it is tempered by other principles, including that of universality and arises from the consideration of the territory as an object on which the State's political sovereignty is exercised. Under Art. 4 Penal Code, "for the purposes of criminal law.....ships and aircrafts are treated as territory of the State wherever they are," unless under international law they are subject to a foreign territorial law. In compliance with the principle of universality, Art. 7 Penal Code states that crimes are punishable under Italian law where special laws or international conventions provide for its the applicability. Now, the Law Decree no. 209/2008, converted into Law no. 12/2009, contains special provisions for the exercise of jurisdiction with respect to crimes of piracy. In particular, Art. 5, as amended by the Law Decree Law no. 61/2009 (converted into Law no. 100/2009), provides that the maritime piracy crimes referred to in Articles 1135 and 1136 Penal Code are subject to Italy's unconditional jurisdiction (Tribunal of Rome), if the actions are committed on the high seas or in foreign territorial waters and are established in areas where the "Atalanta" mission is operating and are related to actions committed to

the detriment of the Italian State or against Italian citizens or properties. Therefore, the special rules on jurisdiction provide that when the crimes of piracy (and those associated with them) are committed in the Gulf of Aden and off the Somali coast to the detriment of the Italian State, Italian ships, nationals or properties, they are punishable under Italian law and Italy's jurisdiction is not subject to any condition for prosecution. So, if the piracy action takes place in the national territorial waters, on the high seas or in foreign territorial waters to the detriment of an Italian ship, the crimes will be punished according to Italian Law irrespective of the place where they were committed. This conclusion implies that an Italian shipowner who paid the ransom to the pirates for the release of the crew kidnapped for extortion purposes, will encounter great difficulty to recover such sums from his insurer even under the K & R clause, if signed, because the intervention of the insurer will be just the conduct punished by Law no. 82/1991 that will apply even if the payment is made outside the country, where there is the Italian jurisdiction. To complete the foregoing, it should be noted that a similar prohibition and relative nullity of the contract is in Art. 12 of Legislative Decree no. 209 of 2005, where the prohibited actions include the "insurance covering the ransom in case of kidnapping" and is also stated that "in case of violation of the prohibition the contract is null and void and Art. 167, paragraph 2, of the same decree shall apply". However, this provision clarifies that "the nullity may be claimed only by the contracting party or the insured". It follows that, in this case, the nullity of the insurance on payment of ransom is an exception that cannot be raised by the insurer, who could not argue the aforementioned nullity to resist the insured's claim for payment under the contract signed with him. In this case the insured shipowner (whether criminally charged or not) will obviously be dissuaded from denouncing the invalidity of a "K & R" policy as he will be entitled to claim reimbursement of the ransom by the insurer who will not be entitled to refuse such payment.



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The New Flamenco

Anyone involved in shipping in what are very challenging times will appreciate the clarity provided by the English Court of Appeal in the recent decision of *New Flamenco* [2015] EWCA Civ 1299. The Court of Appeal in that case examined the application of the laws of mitigation in a breach of charter case where there was no available market at the time of breach. After reviewing the judgements in "THE ELENA D'AMICO", "THE WREN" and "THE KILDARE" the Court important guidance on the test for deciding whether a benefit or loss resulting from an innocent party's reasonable attempts to mitigate its loss must be accounted for when it presents its claim. If Charterers terminate a charter early, Owners are expected to take all reasonable steps to mitigate and try to "claw back" their losses. Owners may not recover any losses which could have been avoided by taking all steps in mitigation. The compensatory principle is that Owners should be put in the financial position they would have been had the charter been performed. The measure of damages depends on whether there is an available market for a substitute fixture to the one terminated at the date of termination. For

example, if a 5-year time charter is terminated 2 years before the end of the charter period, there will be an "available market" for the purpose of assessing damages if Owners can re-enter the market and find a substitute fixture on materially the same terms as the terminated fixture for a period that covers the unexpired charter period of the terminated fixture (in this case, 2 years). Where there is an "available market", Owners can expect to recover the difference (if any) between the terminated charter rate and the market rate for a substitute fixture on the date of termination for the duration of the unexpired charter period. This rule provides some certainty to Owners about the level of damages they may recover in these circumstances. If there is an "available market" but Owners decide not to fix a substitute fixture, this decision will likely be considered to be independent of the early termination and any further losses resulting from that decision (in addition to the damages recoverable under the above measure) will not be recoverable. Where there is no "available market", Owners can expect to recover their actual losses (if any) resulting from the early termination between the date of termination and the end of the unexpired charter period – i.e. Owners may recover the difference between what they would have earned if the vessel was redelivered at the earliest redelivery date and what they in fact earned until that date. Even if an "available market" for a substitute fixture to cover the balance of the terminated charter period subsequently arises between the date of termination and the earliest redelivery date, the measure of damages remains the same. Owners must also give credit to Charterers for any benefit derived if Owners take mitigating action which arises out of the consequences of the early termination and (a) that step is taken in the ordinary course of Owners' business and (b) Owners derive a benefit from it. Additionally, given the time required to pursue legal proceedings, when damages are finally assessed by a tribunal or court, it may be possible to look back at what would have happened during the unexpired charter period if the charter had not been terminated early. Any factual circumstances which would apparently have affected Owners' earnings during the unexpired charter period may also be taken into account by the court of tribunal hearing the case when assessing damages. The application of the above mitigation principles is demonstrated in the *New Flamenco* case. In that case, Owners time chartered their ship (a cruiser) in 2004 to Charterers on a long-term time charter. The earliest redelivery date was in November 2009. In October 2007, Charterers gave notice of their intention to redeliver the vessel to Owners 2 years early. At the time of termination there was no available market on which the Vessel could be re-fixed on equivalent terms. Consequently the Owners decided to sell the Vessel and obtained a price of US\$23,765,000. Selling the vessel turned out to be a smart move in retrospect. The global financial crisis started in 2008 and by November 2009 (i.e. when the vessel should have been redelivered under the charter), the value of the vessel was only about US\$7m. In the circumstances, Owners earned about US\$16m more by selling the vessel immediately after termination in October 2007 than they would have earned if Charterers had redelivered the vessel in November 2009 as required under the charter. The Charterers argued that the laws of mitigation required that the cash gain made by the Owners from the early sale of the Vessel had to be set off against the Owners' claim for damages. The Owners claimed that the

Vessel's fall in value was legally irrelevant and should not be taken into account. The Court of Appeal emphasised that Owners sold the vessel in October 2007 as a direct result of the early termination on the basis that the sale was arranged promptly after Owners accepted Charterers' redelivery notice and that the sale was a reasonable business decision in the circumstances. The Court held that the profit from the sale was a benefit arising from Owners' steps in mitigation which should be taken into account in assessing Owners' damages claim. On that basis, it was held that Owners had effectively clawed back any loss of earnings that they would have suffered as a result of the termination and were even in a better financial position than they would have been if Charterers had redelivered on the earliest redelivery date under the charter. Consequently, Owners' claim for loss of earnings under the charter failed. The Court commented that assessing whether a benefit results from a step in mitigation is a question of fact which requires an examination of all of the factual circumstances surrounding the termination and Owners' subsequent efforts to mitigate their losses. The Court of Appeal's judgement makes it clear that the principles regarding mitigation established in *"THE ELENA D'AMICO"* are of limited applicability to cases where there is no available market at the date of breach. In such cases courts and tribunals should apply the basic general rules of mitigation, as set out in *British Westinghouse Electric v Underground Electric Railways* [1912] AC 673. In summary, as the law currently stands, the key question when deciding whether a loss or benefit must be taken into account is whether the loss or benefit arises from the consequences of the breach. The Court of Appeal in *"THE NEW FLAMENCO"* rejected the High Court Judge's attempt in that case to create a more restrictive test and cautioned against adopting an overly complex approach to considering whether a causative link exists between breach and benefit.



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Compulsory Mediation, Assisted Negotiation and Preventive Technical Expertise for conciliatory purposes: Alternative Dispute Resolution systems for insurance contracts

Most jurisdictions aim to find a solution to the judicial system slowness. In particular, the clear and remarked discrepancy between the average duration of a court case in Italy and the OECD European standards, brought the European Court of Human Rights to issue numerous judgements of convictions against Italian state. This fact is one of the reasons why foreign investors are reluctant to operate in the Italian market. Moreover, it's right on this premises that it is based one of the Recommendations issued by the European Commission on the 29th May 2013, which called on Italy to "shorten the length of civil proceedings, by reducing the high level of civil litigation and by promoting the use of extrajudicial procedures ". However, the need to dispose of the arrear plaguing our Courts and the exygency to reduce the length of trials, had already led the

Italian legislature to introduce ADR (Alternative Dispute Resolution systems) within the national legal order. This choice collided with a strong resistance coming from part of the Italian Advocacy, which was against the introduction of such alternative systems and, in particular, the mediaconciliation. The acronym ADR indicates a heterogeneous category of tools and procedures, which are able to solve conflicts, and are alternative or prodromal to the Ordinary Judicial System. Among them, an important role is played by the Preventive Technical Expertise for conciliatory purposes provided by Article 696 bis of the Civil Procedure Code, established by Decree Law 35/2005. This tool can be activated in disputes concerning the payment of sums of money, linked to contractual or extra-contractual illicit. It gives to the technical advisor appointed by the Court the possibility to evaluate both the causes and the amounts of the damages, as many judgements state (Trib. Mantova, 26 marzo 2010, Trib. Bari, sez. III, 21 maggio 2012, Trib. Reggio Emilia, Ord. 20 dicembre 2010). Afterwards, unlike the typical Preventive Technical Expertise provided by the art. 696 of Civil Procedure, this Conciliatory Expertise does not require the presence of "danger" or the "prejudice" in the verification delay. The Technical Advisor "tries, whenever it's possible, the reconciliation" before filing his report; if he succeeds, the conciliation minute becomes enforceable through a judicial decree. Otherwise, the expert's report will be worth a mere act of preventive instruction, which will be then used in the subsequent proceeding. Therefore, it seems clear that this instrument will provide a viable alternative to ordinary judicial system, whenever an Insurance Company is involved in a litigation. Appealing to Art. 696-bis means avoiding the cost and time necessary for an ordinary judgment and for an ordinary CTU arranged during the investigation. At the same time, it protects Companies against subsequent unfounded requests or exploration claims from counterparties, crystallizing the subject of the dispute. It also gives the parties a damage quantification made by a third part, this is to say the appointed expert. Another ordinary contentious deflation tool is the so called Compulsory Mediation. Its is defined as the activity "carried out by an impartial third party which aim to assist two or more parties in finding an amicable agreement to settle a dispute even by the formulation of a proposal for its resolution". This tool was included for the first time in Italian System through Legislative Decree n. 28/2010, in implementation of Law n. 60/2009, concerning mediation aimed at reconciliation, definition and prevention of civil and commercial disputes. The Constitutional Court, with the sentence n. 272/2012, declared the compulsory mediation, as a condition of admissibility of the proceedings, unconstitutional because of misuse of power. However, the so called "Decree of fare" (Decree Law 69/2013, converted into Law 98/2013), through the correction of the formal defect found by the Court, restored the compulsory mediation for civil and commercial disputes. The mediation is mandatory in those matters related to "condominium, real rights, division, inheritance, family agreements, lease, loan, rental companies, compensation for harm resulting from medical and health responsibilities and by defamation press or other means of advertising, insurance contracts, banking and financial ". The mediation process must last no longer than three months. However, already in the first meeting, whenever the unavailability of the parties to continue the mediation is declared, the attempt is

considered to be fulfilled, and it becomes possible to proceed judicially. In fact, "when the experiment of the mediation process is a condition of admissibility of the claim, the condition is considered fulfilled if the first meeting with the Mediator is concluded without an agreement" (paragraph 2 bis of art. 5). But when the mediation is successful, the agreement is signed by the parties and their lawyers thus becoming enforceable. Mediation represent an effective tool to find a mutually agreed solution, which is made by the parties of the litigation. Nevertheless, mediation is also a tool that helps the pacification of the social fabric, as it aims at restoring direct communication between parties who meet in a "neutral territory", which is the Mediation Body. Another important element of the mediation is the confidentiality nature of the reached agreements, and even the ability to maintain and perhaps strengthen, the commercial relationship between the parties. A staggering figure emerged from the official statistics pertaining the year 2015: the percentage of participation in the first meeting when the subject-matter concerns insurance contracts, is only a 15%, despite the obligatory participation and the provided sanctions in case of unjustified non-attendance at the first meeting. In particular, if the invited party is both a Bank or an Insurance Company, refractoriness against the institute of mediation is more pronounced. The proportion of agreements achieved following mediation, if one of the party is an insurance, confirm this all: only 23% in the insurance contracts. Therefore, although the mediation is of the most important ADR tools provided by the Italian Judicial System, the analysis of the above data seems to underline how the Companies have not yet taken advantage of the many possibilities that mediation can offer. Another tool was introduced with Decree Law 132/2014, converted by Law 162/2014: Assisted Negotiation. The legislator did not intend to replace one ADR instrument with another as he only wanted to offer an additional tool for the resolution of disputes. The difference between the two institutions, lies in the presence of an impartial third party, the mediator, which should facilitate dialogue between the parties, helping the achievement of an agreement between them. Assisted negotiation, instead, is a contract between the parties aimed at reaching an agreement (so-called Convention) through which they agree "to cooperate in good faith and loyalty", in order to resolve a dispute friendly, through the assistance of their lawyers. It is important to underline that there is no danger of overlap between the two institutions. Assisted negotiation is mandatory whenever someone wants to activate a legal action concerning compensation in case of damage resulting from circulation of vehicles and boats or to initiate proceedings relating to any payment by way of a sum not exceeding € 50,000 - except for disputes in which the mediations is compulsory. Assisted negotiation, then, was declared compulsory in case of disputes relating to contracts of carriage or sub-shipping, by the so-called Stability Law 2015 or the L. 190/2014. Of course, law excludes certain cases, this is to say everytime there is a need to request emergency or protective measures, such as a seizure or an injunction. However, the assisted negotiation is both for the carrier, both for the customer and for the transport recipient, which are in contrast, a valid dispute resolution tool. In fact, if the procedure ends with a positive outcome, a significant saving of resources and costs is registered, ensuring, moreover, also the achievement of further interest.

In fact, the assisted negotiation, in addition to allowing not to disclose the object of the dispute, avoiding damage to the image of the company, proves to be a useful instrument to protect and preserve the contractual relations especially in the cases of long-term transport contracts. In conclusion, it can be said that the Italian legal system offers a number of tools aimed at the extra-judicial settlement of disputes. However, under certain specialized subjects, including the field of Insurance, the ADRs encounter greater resistance that prevent the achievement of the desired results.



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The guarantee in the New Customs Code

According to the provisions of the Customs Code of the European Union (CDU) and its circular 8D/2016 ("the circular"), the constitution of the guarantee for the regular payment of duties and other charges, such as VAT and excise duties is mandatorily required for access to all Special regimes subject to authorization by the customs authorities. This authorization is required for the use of inward or outward processing arrangements, temporary admission or end-use, and for the operation of storage facilities for customs warehousing of goods, except in cases where the manager of the storage facility is the customs authority itself. There are additional cases in which, in relation to the payment of duties and other charges, the debtor or person who can become such (potential obligation), is required to issue a guarantee: that obligation occurs, for example, in case of suspension of a decision in the course of a judgment assessment as well as in case of granting a deferral or for obtaining advantages in their payment, as well as by a temporary storage, of goods junction or prior importation of replacement products and some other cases. With the entry into force of the new CDU, rules on guarantees have been introduced by means of which the establishment of a guarantee has become mandatory for all the regimes schemes and may be submitted by the debtor or by a third party on his behalf as an "individual" or a "global" guarantee, depending on the needs of the same borrower. In the event of an individual guarantee, or for specific goods or with a specific declaration, the debtor will have to provide for its establishment without prior authorization from the Customs, in order to verify the adequacy of its amount to offset the 'customs debt and to approve, if appropriate, the form of guarantee chosen. This guarantee may take the form of a cash deposit or other equivalent means of payment or by intake of commitment by a guarantor; the "isolated" guarantee surety will also be provided through the issuance of certificates for individuals who wish to be holders of the Union transit procedure. The guarantee may also be granted as a "global" one that is for more operations, declarations or customs procedures. Unlike the "individual" guarantee, owing to increased exposure and greater risks, even if only potential, that this guarantee will have to cover, both for its constitution to determine the appropriate amount and for possible exemptions or reductions, the "general security" is subject to the prior approval of the Director of the competent

customs, called to verify the degree of reliability of the applicant in addition to the requirement of "stability in the EU customs territory". In case of "global" guarantee, the operator who is deemed to have "healthy financial situation" and an adequate internal control system for customs purposes on the operations and the flow of goods, will in fact be allowed to benefit from a guarantee with a reduced amount or an exemption. Please note that, for the authorization of the status of economic operator should exist (art. 39 Commission Regulation (EU) 10/09/2013 n. 952) the following requirements: a) Absence of serious or repeated offenses against customs or tax laws ... omissis b) ... high level of control over its operations and the flow of goods ... which allows appropriate customs controls; c) Financial solvency, which is considered proven if the applicant is in a healthy financial position, enabling it to meet its commitments, taking into due consideration the characteristics of the type of business involved. The necessary conditions to be fulfilled are also provided in order to be able to be granted a reduction of the comprehensive guarantee at 50% or 30% of the reference amount, or a total exemption. In relation to the differences between the Customs Union and the national legislation on the issuance of the guarantee, it should be noted that according to the provisions of the TUD (art. 90D.PR 23.01.973 n. 43), the tax authorities may grant to the public administration and bodies as well as to "companies of recognized solvency," the obligation to pay the bail for customs duties levied on their goods or third subjects of the customs operations with the expectation that the waiver may be revoked when doubts about the solvency of the debtor company might arise. With the new CDU internal regulations regarding the mandatory guarantee for access to special schemes provided for by the TUD the old rules are exceeded, being the same primary supranational regulations to regulate reductions and the possible exemption of the guarantee. National legislation on the guarantee, including for the purpose of its exemption shall apply only in cases where the guarantee is requested and used to cover the duties and other charges in the Italian territory. Based on the provisions of the CDU when the guarantee for release already arisen customs debts and obligations that might arise that is purely potential, in the case of special schemes. It is also been extended the effectiveness of the guarantee which, if released, can also be used for the recovery of amounts of import duties and other charges due on the investigations and subsequent verification of the goods for which it was given, in accordance with the principle that the guarantee shall be released immediately when the customs debt or liability for other charges is extinguished or can no longer arise. The transitional period is also regulated with the specification that allows guarantees already issued to preserve their validity up to their review. As regards the customs prescription, the CDU, in art.103 par. 1 does not change anything compared to the previous regulations that, once expired the three-year deadline, Member States may no longer notify any customs debt to the debtor; it should be noted however that the following paragraph of the same article in substitution of the previous art.221 has determined that, in the presence of crime, the three-year term for customs notification to the taxpayer is extended from a minimum of five years to a maximum of ten years and is up to the Member States to establish a term in this threshold, applicable according to the new rules of their legal systems. With the new rules, the deadline for the

notification of the customs essentially assumes the value of a new term limitation period, with the result that, as from 1 May 2016, the Customs will not be able to enforce the tax claim if it is not notified to the operators within this period. The circular determines a limitation period of three years and makes it clear that, until the adoption of the rule, within the range set by the Community legislature to fix the period in the presence of the facts constituting the offense; this will amount to five years. The circular points out that, as a result of the new provision it is "precluded the customs offices every possibility to notify the debt and collect duties if the tax claim is not notified to the operators within that five-year period only applicable to debts established from 1 May 2016. There would be, then, a double deadline for customs notification: the one of three years relating to the ordinary assessment connected to the adjustment of one of the elements of the customs declaration and the other of five-year based on the assumption of an alleged criminal offense resulting in doubt that in the absence of a criminal offense occurred within the three-year deadline for the ordinary assessment, the extension of the period for notification may still occur.



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Freight forwarder: an overview of the Italian system

The contract of freight forwarding is ruled by the Third Section (entitled "The shipment"), Ninth Head ("The mandate"), Third Title ("About each single contract"), Forth Book ("The obligations") of the Italia Civil Code, involving articles from 1737 to 1741. Under art. 1737 of the Italian Civil Code "the contract of freight forwarding is that contact under which the freight forwarder, acting in its own name and on behalf of its principal, undertakes to enter into a contract of carriage and undertakes to perform any ancillary operation". In other words, the freight forwarder, under the contract of freight forwarding, should (i) provide for the organization of the carriage, entering into the relevant contract with a carrier; (ii) arrange for all the ancillary operations, that are preparatory and instrumental to the transport; (iii) acting in the interest of its principal, by removing the obstacles to the proper execution of the transport if necessary and (iv) performing its obligation with reasonable care. The framework given by the Italian legislator to the freight forwarding contract determines the application of all the provisions established for the mandate, except for what provided under art. 1741 (regarding the freight forwarder-carrier, see *infra*) and art. 2951 (on the shortage of the regular time bar for contractual actions). The freight forwarder thus has the obligation to take care of all the preparatory and instrumental operations regarding the transport with a wide margin of discretion as in the way, means and modes of transport to be used by performing its obligation with reasonable care (art. 1739 Civil Code). According to the relevant case law, the said obligations include the obligation to inform its principal in case of obstacles to the due performance of the carriage by the entrusted carrier (see Court of Appeal of Venice 31.5.1999, in *Dir. mar.* 2000, p. 912); making, whenever needed, appropriate prior investigations on the suitability of the means of transport (see Court of Prato,

14.9.1982, in *Dir. mar.*, 1983, 344) and verifying correctness and validity of the documentation accompanying the goods (see Court of Naples, 26.3.2009, in *Corr. merito*, 2009, 8-9, p. 843). The only ancillary operation expressly excluded by the law from the typical performances of the freight forwarder, unless it is expressly agreed (or in case of different usage, see art. 1739 Civil Code, second paragraph), is the stipulation of an insurance policy on the goods on behalf of the principal. The typical scheme involving the freight forwarder states that it acts in its own name. The question of whether the freight forwarder can act, typically, also in the name of the client is solved negatively by the case law on the basis of the literal content of art. 1737 cc: the case law in fact stated that if the freight forwarder acts in the name of its principal "its activity (would) exceed(s) the typical function of the shipping contract and (would) migrate(s) into the scope of application of the laws concerning the agency contract" (see Court of Appeal of Genoa 14.10.1992, in *Dir. trasp.*, 1993, 491). As a consequence, if the freight forwarder acts in its own name under the typical scheme of the freight forwarding contract, it risks to assume obligations on its own towards the carrier it enters into the contract of carriage with (*contra*, see Italian Supreme Court Corte di Cassazione, 28.2.2011, n. 4900, in *Dir. mar.*, 2012, p. 448, which seems actually to confirm the title of the freight forwarder to act in the name of its principal). Under article 1737 of the Italian Civil Code, the freight forwarder is expressly obliged to enter into the contract of carriage and to fulfill the ancillary operations. The interpretative issue regarding this clause is to detect those ancillary operations that the freight forwarder shall perform even if not expressly agreed under the freight forwarding contract. In particular, it should be understood whether the "ancillary operations" to the carriage are those needed for the material performance of the same or if they are considered just as an act of cooperation in the legal sphere of the sender. In order to detect the said ancillary operations, the case law focuses on principal according to which the ancillary activities are those "that the principal should perform if it handled the shipment by itself" (see Court of Appeal of Genova, 05.02.1960, in *Dir. Mar.* 1960, 457). The ancillary operations that are deemed to fall unanimously in the scope of the obligations upon the freight forwarder under art. 1737 cc, are the following: the taking over, the weighing of the goods, the measuring, the warehousing and the storage in transit, the loading and the unloading of the goods (on the definition of the ancillary operations see Italian Supreme Court Corte di Cassazione 27.1.1995 n. 1016, in *Dir. mar.*, 1997, 415; Court of Appeal of Genova 5.2.1960, *ibidem*, 1960, 457; Italian Supreme Court Corte di Cassazione 10.10.1962, in *Mass. Giur.* It, 1962, 984; Italian Supreme Court Corte di Cassazione 18.10.1991, n.11010, in *Rep. Foro it.*, 1991, 2; Court of Appeal of Milano, 3.9.1991, *ibidem* 1993, 328; Court of Prato 14.9.1982, *ibidem*, 1983, 344. See also Italian Supreme Court Corte di Cassazione 28.2.2011, n.4928, in *Dir. mar.*, 2012). However the main issue regarding the freight forwarder is its own difference with the carrier. It is a common ground in the Italian debate, that the difference between the contract of carriage and the contract of freight forwarding consists in the following: while with the first one the carrier undertakes (on a contractual basis) to perform the transport (by its own means or by means of third parties), taking upon itself the risks of the performance of the carriage, with the contract

of freight forwarding the freight forwarder undertakes only to enter into a contract of carriage in its own name and on behalf of its principal. In this sense, the typical obligation upon the freight forwarder is to enter into a contract of carriage with a trustful carrier and to arrange any ancillary operation to make the cargo be delivered safely to the consignee indicated by the shipper. Considering that only the carrier is liable for the damages occurred to the goods during the transport, the freight forwarder can be liable exclusively for "culpa in eligendo", that is, a fault in selecting an unreliable carrier (or, in other words, a carrier that, if the freight forwarder had used the needed care, would have not been appointed). The most authoritative case law states that the freight forwarder cannot be held liable for the damages to the goods during the carriage (see Cass. 29.3.1989, n.1489, in *Mass. Giur.* it., 1989; Cass. 17.5.1991, n.5568, in *Giur. it.*, 1992, I, 1, p. 514; Cass. 13.8.1997, n.7556, in *Dir. mar.*, 1998, p.406, *Trib. Milano*, 26.2.2004, *ibidem*, 2006, p. 1220 and Supreme Court 5568/1991). On the contrary, the nature of the freight forwarder-carrier is still under discussion. In fact under art. 1741 cc the freight forwarder that by its own or by third parties' means undertakes to perform the carriage, in whole or in part, has the obligations and rights of the carrier. The prevailing tenets state that it is the will of the parties which determines whether the freight forwarder undertakes to perform the carriage or not. A literal interpretation of the provision might rather suggest that the freight forwarder-carrier is the freight forwarder that, in the end, actually (and not for different contractual agreement) performs the transport. There is therefore a difference between the freight forwarder that undertakes to perform the carriage (in which case there cannot be any possible freight forwarding contract, but only and directly a contract of carriage) and the freight forwarder that undertakes only to arrange the shipment and then actually perform itself the carriage that should have been performed by a third party as per art. 1737 Civil Code: only in this second case there would be a freight forwarder-carrier. This interpretation seems to be confirmed by the Report on the provisions of the Civil Code regarding the freight forwarder contract by the Minister of Justice, whereas he stated that "in practise, sometimes the freight forwarder perform the carriage itself" (making reference to a usage in the carriage market) adding that "in such a case the art. 1741 grants to the freight forwarder the rights and duties of the carrier with reference to the transport operations performed by it". This also means that the freight forwarding contract does not become a carriage contract, but that, on the contrary, the freight forwarder remains a freight forwarder with the rights and duties of the carrier to the limited extent of the part of carriage performed. As a consequence thereof the hybrid role of "freight forwarder-carrier" is not an autonomous and typical contract under Italian law and these difficulties in framing its nature cause some uncertainties in the case law in the detection of the differences between the freight forwarder itself and the freight forwarder-carrier. The case law indicates as significant elements for the qualification as freight forwarder - carrier, rather than the header of the document of transport (for example the bill of lading), the allocation to the freight forwarder of a broad discretion on the choice of the way and of the means of transport as well as the agreement on a unit and global rate (see Court Corte di Cassazione 3.3.1997 n. 1867, in *Dir. mar.* 1998, 391). Nonetheless, the Supreme Court has clarified that the ascertainment on the will of the parties cannot be solved only on the basis of the stipulation of a fixed rate tariff but must be evaluated in the light of all the elements at hand. Significantly the article 1740, par. 2, of the Italian Civil Code states that the parties of a freight forwarding contract can agree on a global and unitary sum as reimbursement of the expenses and of the fees and among the latter the specific fee as freight forwarder is included (Italian Supreme Court Corte di Cassazione 6.3.1997 n. 1994, in *Dir. mar.* 1998, p. 394). In one word, the difference between the freight forwarder and the freight forwarder carrier is still under discussion and the ascertainment shall be made, time after time, upon the conduct of the freight forwarder itself.

INDEX

Prof. avv. Andrea La Mattina <i>Studio Legale Bonelli Erede</i>	The lifting of sanctions on Iran and shipping: opportunities and cautions for operators	2
Prof. avv. Carlo Rossello <i>Studio Legale BFP law Firm</i>	The electronic bill of lading: the “Bolero system”	5
Avv. Simona Coppola <i>Studio Legale Garbarino Vergani</i>	Insurance act 2015: what changes for insurer and insured	2
avv. Daniela D’Alauro <i>Studio Legale Turci</i>	Unfair terms and insurance contracts	11
avv. Francesca D’Orsi <i>Studio Legale D’Orsi</i>	Extracted from “Diritto dei Trasporti”	3
avv. Daniela Aresu <i>Studio Legale Aresu</i>	Insurance profiles of drones	9
avv. Massimiliano Grimaldi <i>Grimaldi Studio Legale</i>	Proof of financial capability in selection process of licensee. Comparative analysis of National implementation measures of Directive 2013/30/EU on the safety of offshore oil and gas operations	7
Dimitris Exarchou <i>Holman Fenwick Willan int. LLP</i>	The new Flamenco	13
avv. Claudio Perrella <i>Studio Legale LS LexJus Sinacta</i>	Damage assessment for bodily injury in Italian case law	4
avv. Fabio Pieroni <i>Studio Legale Siccardi Bregante & C.</i>	The Galatea over valuation, an incursion on the insurance act 2015	10
dr. Gianbattista Poggi <i>Studio Poggi & Associati</i>	The guarantee in the New Customs Code	15
avv. Barbara Pozzolo <i>Studio Legale Pozzolo</i>	Compulsory Mediation, Assisted Negotiation and Preventive Technical Expertise for conciliatory purposes: Alternative Dispute Resolution systems for insurance contracts	14
avv. Chiara Raggi <i>Studio Legale Mordiglia</i>	Maritime piracy: payment of ransom and insurance coverage	12
avv. Giancarlo Soave <i>Studio Legale Soave</i>	Freight forwarder: an overview of the Italian system	16
avv. Andrea Tracci & Elena Dell’Utri Vizzini <i>Studio Legale TDP</i>	Carriage and limitation of liability under italia law	4
avv. Cecilia Verneti <i>Studio Legale Camera Verneti</i>		8

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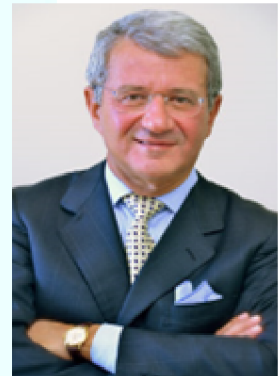
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- La rivista In Pdf
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- La struttura
- Le collaborazioni
- Le News
- Gli eventi segnalati
- Spazio Redazione
- I Contatti

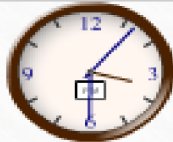


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