Duarte Lynce de FARIA

The liability emerging from the Maritime Safety Law and the importance of the I.S.M. Code – the MSC Patricia oil spill court case in Sines (Portugal)

DOI: https://doi.org/10.34625/issn.2183-2705(35)2024.ic-25

Secção I

Investigação Científica*

* Os artigos presentes nesta secção foram sujeitos a processo de revisão segundo o método *blind peer review* / The articles in this section have undergone a blind peer review process.

The liability emerging from the Maritime Safety Law and the importance of the I.S.M. Code – the MSC Patricia oil spill court case in Sines (Portugal)

A responsabilidade emergente da Lei sobre a Segurança Marítima e a importância do Código I.S.M. - o caso do derrame de hidrocarbonetos do MSC Patrícia em Sines (Portugal)

Duarte Lynce de FARIA[1]

ABSTRACT: The deepening and development of the rules on maritime safety have the effect of gradually eliminating clauses exempting or limiting liability. In general, this regards the international liability system for damage caused by spills in the marine environment and the application of compensation funds.
While minimising "risks" and errors, compliance with maritime safety standards also strengthens the fight against "threats" and limits the application of clauses on exoneration and limitation of liability. Among other instruments, these are present in the conventions on pollution resulting from oil spills and those relating to the maritime transport of goods.
The I.S.M. Code, when used as a reference to qualify the conduct in question, significantly impacts insurers and criminal liability. This is particularly evident in the trials of the most severe spills, including the recent case of the N/M 'Patrícia' in Sines in October 2016.
With new techniques and modern types of equipment on board vessels, the increasingly demanding nature of ship management requires a new approach to exoneration clauses (of civil liability and its limits). It requires considering their complete appliance, leading international references, and quality assessment.

RESUMO: O aprofundamento e o desenvolvimento das regras de segurança marítima têm como consequência a eliminação progressiva das cláusulas de isenção ou de limitação da responsabilidade, designadamente, no regime internacional de responsabilidade por danos causados por derrames no meio marinho e na aplicação de fundos de indemnização.
Ao mesmo tempo que minimizam os "riscos" e os erros, o respeito pelas normas de segurança marítima reforça a luta contra as "ameaças" e limita a aplicação das cláusulas de exoneração e de limitação da responsabilidade. Estes instrumentos estão presentes, entre outros, nas convenções relativas à poluição resultante de derrames de hidrocarbonetos e nas convenções relativas ao transporte marítimo de mercadorias.
O Código I.S.M., quando utilizado como referência para qualificar a conduta em causa, tem um impacto significativo na avaliação da responsabilidade civil pelas seguradoras e na responsabilidade penal. Este facto é particularmente evidente nos julgamentos dos

[1] PhD in Law, Professor and Researcher. ORCID ID 0000-0002-9569-4281. Affiliation Centres (Portugal): CEDIS (NOVA School of Law, Lisboa), CINAV (Naval Academy, Portuguese Navy, Alfeite), CDIUM (Military University Institute, Minister of Defense, Lisboa), CID (Maritime College, Minister of Economy, Paço d'Arcos), duarte.lynce.faria@gmail.com.

derrames mais graves, incluindo o recente caso do N/M "Patrícia" em Sines, em outubro de 2016.
Com as novas técnicas e os modernos equipamentos a bordo dos navios, o carácter cada vez mais exigente da sua gestão obriga a uma nova abordagem das cláusulas de exoneração (da responsabilidade civil e dos seus limites), considerando as principais referências internacionais e os padrões de qualidade e de boas práticas a bordo.
Palavras-chave: segurança marítima, responsabilidade internacional, Regras de Haia, cláusulas de exoneração, Código I.S.M., derrame de hidrocarbonetos.

1. Introduction

To understand civil liability, including exoneration and limitation clauses, we must examine its evolution over the last 150 years[2]. Before the mid-nineteenth century, European ship operators enjoyed a favourable limited liability regime, contrasting with their North American counterparts. This limited the growth of "New World" shipping. In 1851, the U.S. Congress passed *"The Limitation of Liability Act,"* which limited the ship operator's liability to the co-ownership of the ship and the value of its freight, provided they were unaware of the damage. However, the Act allowed the shipowner[3] exemption from liability if the damage was caused by a fire and not due to their intentional or negligent behaviour.

This exemption was considered more comprehensive than the first, as it was difficult to prove the operator's intentional or negligent actions in cases of fires. However, it was still more restrictive than the corresponding British Law of 1786, which provided a complete exemption of the operator's liability in cases of fires on board. During the last quarter of the 19th century, European operators introduced loose exemption clauses in bills of lading to avoid liability for damage to goods.

In response, the U.S. Congress passed the *"Harter Act"* in 1893, which unlawfully exempted the operator from liability for cargo damage in fault cases. However, if the operator behaved with due diligence in ensuring the ship's seaworthiness, the Harter Act exempted them from liability resulting from navigational errors or ship management. Meanwhile, the general application of

[2] For the aim, goals and framework in Maritime Safety, see Faria, Duarte Lynce de, *"The (New) Law of Maritime Safety - the Ship, States, Conventions and their Autonomy",* 2nd edition, Almedina, Coimbra, Portugal, October 2023, ISBN 978-989-40-1295-5.
[3] The shipowner was usually the operator and carrier. See Calamari, Joseph A., "The Eternal Conflict Between Cargo and Hull: The Fire Statute – A Shifting Scene", St. John's Law Review, Vol. 55, No. 3, Article 1, pps. 417 to 449, St. John's, Canada, 1981.

the principles of this U.S. legislation only came about with the adoption of the 1924 Hague Rules.

With certain amendments, the United States introduced the Hague Rules into its domestic legislation through the Carrier of Goods by Sea Act, 1936, known as the "C.O.G.S.A.". The Hague Rules required the operator to take all necessary precautions to prepare the ship before departing and at the start of the journey.

This involved ensuring that the vessel was suitable for sailing, properly outfitted and sufficiently equipped. The holds, refrigerating and cool chambers, and all other parts of the ship where goods were carried had to be in good condition for their receipt, carriage, and preservation[4]. Compliance with these obligations was necessary to benefit from the exemption clauses in Article IV of the Hague Rules[5].

The International Maritime Organization (I.M.O.) implemented new regulations in the late 1960s to improve safety in the maritime industry. One of these regulations was the "recklessness clause," first introduced in the 1955 amendment to the Warsaw Convention on Air Transport. This clause was later included in the Hague Rules in 1968 and subsequently in other liability conventions, such as L.L.M.C. (1976), CLC92 (1992), BUNKERS (2001) and H.N.S. (2010).

The new conventions aimed to eliminate liability-limiting clauses and enhance the international liability system for damage caused by spills in the marine environment, as well as the application of compensation funds (C.L.C. and FUND).

The old maritime law clauses were over a century old and based on the "fault or privity" principle. These tended to limit or exempt liability for shipowners' or operators' negligent conduct. The new international instruments were initially

[4] See Article III (1) of the Hague Rules.

[5] In the United States, the Fire Statute's exoneration clause ("design or neglect") combined with Article IV(2)(b) of the Hague Rules states that the operator's liability for fire on board would be excluded if the loss were caused by the operator's "actual fault or privity". However, two different expressions were used to describe the "wrongful act" of the shipowner in this case. American Case Law has gradually made these two words equivalent, but jurisprudence still differs. It becomes complex to articulate the initial diligence of the operator alongside the proof of their liability for the cause of the onboard fire. See Mandaraka-Sheppard, Aleka's Book "Modern Admiralty Law - With Risk Management", Cavendish Publishing Limited, London and New York, 2001.

based on air and maritime transport conventions and were thus limited by the constraints of these laws.

Cases of marine pollution caused by hydrocarbons have been resolved using conventional funds, with insurers facilitating the process. However, courts have yet to decide on whether the benefit of limitation has been breached.

A proposed maritime safety code of conduct requires carriers to ensure their ships are seaworthy. This proposal could eliminate exemption clauses under Article IV (2) of the Hague Rules relating to purely faulty or negligent conduct, which also applies to fires. However, the question remains whether the existing conventions and codes on maritime safety are sufficient for this purpose.

2. The main conventional exemption clauses

This analysis deals with the Hague Rules of 1924, which introduced the concept of "nautical fault" (Article IV(2)(a)), which covers any act, neglect, or default of the carrier and "actual fault or privity of" (Article IV(2)(b)) which refers to fires on board, unless caused by the fault of the carrier. The carrier can use these grounds to avoid liability for any damage caused to the cargo.

A) The "fault or privity fault"[6]

The provision mentioned above falls under the exception regarding fires on board the ship under the Hague Rules. This provision is also included in the 1957 Convention on the Limitation of Liability of Owners of Seagoing Ships, as well as in the original version of the CLC69. It is outlined in Article V (2) of the Hague Rules, which clearly states that the owner will lose the right to limit their liability if the incident occurs due to their own fault[7].

---

[6] The Hague Rules, international regulations for the carriage of goods by sea, were originally written in French. One clause in the rules is *"par le fait ou la faute"*, which has been translated to "fault or privity" in English and *"por facto ou culpa"* in Portuguese. Another clause pertains to "nautical fault", translated to "act, neglect or default" in English.

[7] This clause is mentioned in Article V (11) and Article VII (8), which states that the owner's benefit will not be limited by liability. It is also present in Article 1(1) of the Brussels Convention of Oct. 10, 1957, which is the predecessor of LLMC76. Article III (1) of the Convention on the Liability of Owners of Nuclear Vessels, concluded in Brussels on May 25, 1962, translates the expression as "personal fault". Therefore, this translation has been chosen, as it also represents the meaning in the English language: *"Privity does not mean that the owner personally did a wrongful act; it means that it was done by someone else, and the owner concurred in it. Therefore, an owner can only limit liability if the act is done without his actual "fault or privity." Therefore, there is no personal fault, knowledge, or concurrence on the owner's part without the owner's "privity," which means without his knowledge or agreement*.
The expression "actual fault or privity" (also sometimes expressed as "a wrongful act", translated in the Hague Rules as "fact or fault") is well known. It has been subject to interpretations that are only sometimes uniform in the courts since it appeared in the United States in section 503 of the

The various court decisions (and the historical interpretation of the drafting of LLMC76 and the 1955 Hague Protocol to the 1929 Warsaw Convention on Air Transport) suggest this formula is more demanding on the owner than the current one regarding "recklessness". In the case of a crane accident at a terminal (in this case, in Hong Kong), it was held that the terminal director should have devised a system for its employees to check the crane's operation and perform maintenance actions. Failing to do so would have made this omission imputable to the company. As such, it would lose the benefit of the limitation of liability.

Several court verdicts, particularly in the United States and Canada, have made it relatively easy to hold a ship owner accountable for violating the limitation of liability clause. This justifies why, during the I.M.O. diplomatic conference in 1984, the delegations intended to modify the clause. During the LLMC76 and CLC92 negotiations, delegations sought to increase the severity of the owner's conduct, which would allow the clause to be amended by adopting a "recklessness" clause. The court decisions were always provided over a prolonged period, and the varying interpretations by national courts likely resulted in different compensation claims, creating unequal outcomes depending on the jurisdiction. Therefore, the liability limits would be substantially increased to balance this situation.

The study of two confirmed cases led to the following conclusions in the event of a fire on board[8]:

a) The I.S.M. Code is a set of mandatory guidelines for managing and operating shipboard systems, equipment, and procedures;

Merchant Shipping Act of 1894. Several times, the breach of the benefit of the limitation clause has been raised, with opposing positions of the various courts dragging out many litigations with this object and with prejudice to the legal security itself. It should be added that the interpretations by the English and North American courts are also different (in the case of using the term "owner" only). In contrast, in the English case, the benefit may also be jeopardised by the (wrongful) conduct of the owner/operator's agents and employees; in the American case, the interpretation only tends to rule out the clause due to the (wrongful) conduct of the owner/operator and, possibly, of the crew. It seems, however, that the word "privity" itself means the agent's "knowledge or acquiescence" in the (wrongful) conduct of his agents or employees, with the word "fault" referring to his behaviour ("without any actual fault by the owner personally").

[8] The fire on the ship MSC "Charlotte Maersk" in the approaches to the Port of Klang (Malaysia) in July 2010 as reported by the Danish Maritime Authority, Marine Accident Report, Charlotte Maersk, Fire, Jul. 7, 2010, in main.dk/media/9153/ charlotte-maersk-fire-on-7- july-2010.pdf. The 2012 M.S.C. "Flaminia" ship fire in the mid-Atlantic whose legal review and decision by the New York Court in M.S.C. Flaminia, 12-cv-8892 (K.B.F.) (S.D.N.Y. Nov. 17, 2017). See https://www.shippingandfreightresource. com/shipper-and-container-operator-liable-for-explosion-on-msc-flaminia/ and https://www. burgoynes.com/articles/2019/02/msc-flaminia-a-brief-account-of-an-investigation.)

b) If the carrier has complied with these guidelines, it cannot be held personally at fault (or "reckless") for any incidents that may occur unless it has contributed to the incident through the actions of its subordinates and
c) Small shippers are always recommended to insure their cargo, regardless of the carrier's obligations[9].

The word "fire" contains no implicit qualification for how the fire is started (i.e., accidentally, deliberately, negligently, or otherwise), nor is there an implicit qualification depending on who may be responsible.

There is also no proper basis for implying such words as a matter of ordinary meaning – indeed not where Article IV Rule 2(b) of the Hague Rules contains an express qualification ("unless caused by the actual fault or privity of the carrier"). This makes it clear that a fire gives the owner/carrier a defence to a claim unless caused by the owner's/carrier's actual fault or privity (which was not the case here).

In a recent court ruling, the English Court of Appeal stated that a fire can be considered an exception under the Hague-Visby Rules even if a crew member deliberately caused it. This is because the fire cannot be attributed to the personal fault of the carrier. This ruling highlights the difficulty shippers face in holding carriers accountable for fires. Simultaneously, it emphasises the importance of the carrier's duty to ensure the seaworthiness of the ship and their due diligence as stipulated in Article III. The carrier's duty takes priority over any exoneration clauses.

The interpretation of "personal fault" reduces the attribution of liability for the actions of those involved in operating the ship. However, there is no standard definition of this term. There is a difference in the interpretation of the exclusion

[9] "English Court of Appeal", case Glencore Energy U.K. Ltd & Anr v Freeport Holdings Ltd (The 'Lady M') [2019] E.W.C.A. Civ 388. "The judgment clarifies the scope of the fire defence under Article IV Rule 2(b) and its availability to a carrier. It makes clear that the defence is available so long as there is no actual fault or privity on the part of the carrier, even where the fire was deliberately caused by a crew member" in https://www.wfw.com/wp-content/uploads/2019/04/wfw-briefing-fire-on-board.pdf. However, the court held that the verification of the unseaworthiness condition precludes any of the exceptions present in Article IV (2) in the following terms: The words "fire, unless caused by the actual fault or privity of the carrier" have a clear, natural and ordinary meaning: they exclude the owner/carrier from liability for fire, provided that:
a) their actual fault or privity did not cause it, and
b) they did not breach their seaworthiness obligations under Article III (which overrides the Article IV defences).

of liability for nautical fault and fire under the Hague-Visby Rules and the benefit of the limit of liability resulting from the CLC69 Convention.

Suppose we want to exclude liability for nautical fault. In that case, it is more complex than fire because it frees the captain, master, pilot, or carrier's servants from any acts, negligence, or fault in navigation or ship management. On the other hand, to exclude liability for fire, one must demonstrate the carrier's fault, which is challenging.

Although navigation equipment and procedures have improved and become safer, these systems still have limitations that must be overcome to avoid nautical faults and navigation errors. Under the current liability regime, any mistakes made by the master and crew can have severe consequences. Therefore, it is crucial to assess these errors and take appropriate action to prevent them in the future[10].

In the case of "The Lady Gwendolen"[11], a tanker was sailing through thick fog between Dublin and Liverpool when it collided with the vessel M/V Freshfield. The tanker captain failed to reduce the speed and to use the radar, which could have resulted in a dismissal for nautical misconduct. However, the court deemed this not to be applicable, as it was the carrier's responsibility to ensure that the master correctly used the radar. Therefore, this demonstrates that the carrier must monitor the master's conduct and take necessary measures to avoid such accidents[12].

Another important outcome of this case was that the leader of the fleet management department at a lower level of management, who was responsible for the company's fleet management, was found to be acting on behalf of the company. This is because they failed to provide clear instructions to the masters regarding the use of the radar.

The interpretation of the term "personal fault" has been changed, making it difficult for the claimant to prove. The reason behind this is that it is challenging

[10] If the carrier's employees and agents must be exonerated from liability, the definition of "personal fault" may be reinterpreted. The Hague-Visby Rules' new Article IV bis has initiated this process. However, the intention behind this change goes beyond simply redefining "personal fault." The term has been replaced by "recklessness," which is considered for exclusion from the limit of liability under the new Article IV(5)(e).

[11] [1964] 2 Lloyd's Rep. 99.9.

[12] Critics may question the exoneration of the master, but the main objective is to emphasise the responsibility of the maritime carrier. In some situations, the carrier has the right to seek compensation from the master. The operator and the master are jointly and severally liable for any liabilities arising from their actions.

to attribute the acts of third parties to the owner or carrier. The "recklessness" clause was developed in the 1960s, which reflects an increased subjective element in the agent's conduct to solve that problem. However, it is essential to reconsider the range of individuals whose conduct can be attributed to the owner or carrier.

In "Glencore Energy U.K. Ltd & Anr vs Freeport Holdings Ltd (The 'Lady M')," the engineer foreman caused a severe breakdown of the propulsion machinery. Unless the carrier or owner was declared unaccountable or a cause of force majeure was accepted, they would be held responsible. However, this was not the case with the "personal fault" clause.

Furthermore, to overcome the exception of "nautical fault," the courts analysed the ship's management by the company and its requirements. However, in 1964, there was no mention of "codes of conduct."

It was clear and undisputed that it was difficult to absolve the carrier of responsibility for the "negligent" actions of the crew, particularly the captain[13]. As a result, it was no longer acceptable to use "navigational error" as an excuse. The traditional requirement for the carrier to exclude personal fault in the case of a fire was interpreted logically: Article III (1) and (2) of the Hague-Visby Rules take precedence over the exoneration clauses of Article IV (2).

B) The "recklessly" clause

The Visby Protocol of 1968[14] introduced a new clause (subparagraph e) in the new paragraph 5 of Article 4) which exempts the carrier from the limit of its liability if it is proven that the damage was caused intentionally or recklessly with the knowledge that damage would probably occur. This clause operates as an evolution in the rules governing carrier liability[15].

[13] It also seems that this subjective element should be treated in the same way as "personal fault", especially since it is French in origin, as opposed to "fault or privity" with a common law tradition.
[14] The so-called "Hague-Visby Rules" are a consolidated version of the 1968 Brussels Protocol. We will leave out of this analysis the more specific clauses of "due diligence" (Article 3.1) and "properly and carefully load" (Article 3.2). On the interpretation of these exoneration clauses in favour of the carrier and the polluter, see, for all, Coelho, Carlos O., "Poluição Marítima por Hidrocarbonetos e Responsabilidade Civil", Almedina, Coimbra, 2007, pps. 85 *et seq.*
[15] See Katsivela, Marel, "Loss of the Carrier's Limitation of Liability Under the Hague-Visby Rules and the Warsaw Convention: Common Law and Civil Law Views" in (2012) 26 A&NZ Mar L.J., pps. 118 to 135, in http://classic.austlii.edu.au/au/journals/ANZMarLawJl/2012/7.pdf. Visby's article was inspired by Article 7 of the International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers by Sea (Brussels 1961) – which in turn took as a reference the 1955 Hague Protocol to the Warsaw Convention on Air Transport – and by Article 7 of the

The following paragraph from the Hague-Visby Rules[16] has been adopted into several civil liability conventions related to ships with similar wording. These include:

(i) CLC92 regarding oil spills (Article 5/2);

(ii) HNS2010 regarding HNS product spills (Articles 7/5 and 9/2)[17];

(iii) BUNKERS2001 regarding bunker fuel spills (in addition to Article 6 referring to LLMC76, the regime for the limitation Article 4/1 indicates its subsidiary nature concerning the CLC92);

(iv) LLMC76 regarding the limitation of maritime claims (Article 4); and

(v) PAL74, Athens Convention relating to the Carriage of Passengers, 1974 (Article 13/2).

In 1955, a new formula for exclusion from liability in air transport was adopted. It aimed to replace previously used terms such as "willful misconduct", "dol", and "gross negligence". During the preparatory work, the discussion focused on interpreting the second part of the expression, which reads "recklessly and with the knowledge that damage would probably result". Some delegations believed that "recklessly" meant "gross negligence" and was objective *in nature,*

---

preparatory text for the Convention relating to the Carriage of Passenger Baggage by Sea (Stockholm, 1963).
The first formulation of this new type was expressed in Article 25 of the Warsaw Convention on Air Transport in the version given by the Hague Protocol of 1955, which would only be taken up, notwithstanding the Visby Protocol of 1968, International Convention on Civil Liability for Oil Pollution Damage, 1992 in this case and to balance the amendment, by drastically increasing the quantitative limits.
The new expression ("done with intent to cause damage, or recklessly and with the knowledge that damage would probably result") did not merit any objection about the intentional part of the agent ("intend to cause damage", "a wilful misconduct"), this did not apply to the second part, which corresponds to a "reckless" action or omission that derives from criminal law.
"Reckless" action is defined as "A standard conduct that a person ought to have known might have to the damage sustained". Of course, it would be necessary to prove the existence of the "danger" or of the "damage", which would mean, in practice, that the violation of the maritime safety rules would only compose a "reckless action" (or "imprudent") with the concrete consequence of the "damage" or, at least, of the "danger". See Fogarty, Aengus R. M., "Merchant Shipping Legislation", 3rd Edition, Informa Law from Routledge, Oxon (U.K.), New York (U.S.), 2017, at pps. 648ff, Mandaraka-Sheppard, Aleka, "Modern Admiralty Law – With Risk Management Aspects", Cavendish Publishing Limited, London (U.K.), Sydney (AUS), 2001, at pps. 906ff and 910ff and Christodoulou-Varotsi, Iliana, and Pentsov, Dimitry A., "Maritime Work Law Fundamentals: Responsible Shipowners Seafarers", Springer Ed., Verlag, Berlin, Heidelberg, 2008, on pps. 646 et seq.

[16] Inspired by Article 25 of the 1955 Hague Protocol relating to the 1929 Warsaw Convention on Air Transport.

[17] Article 7/5 as regards the benefit of exemption from liability outside the Convention for the drivers and participants in the operation of the ship – "exclusive liability for the Convention ("channelling") or "channelling of liability"- and Article 9/2 as regards to the benefit of the owner limitation.

while others argued that subjective elements were necessary to determine imputation. However, a consensus was formed that the expression "knowledge that damage would probably result" should be assessed subjectively and not in the abstract.

This view would benefit the carrier since it would be difficult for claimants to prove the carrier's knowledge of the probable harm. On the other hand, assessing the expression in the abstract would consider the knowledge that the prudent person should have in the agent's position, which would be more favourable to the claimant. Nonetheless, the "probability" of harm, not the simple "possibility," was necessary.

The approaches made by the common law and civil law systems to the expression also lead to somewhat different applications. In the case of the common law system, the phrase "intention to cause" must be subjectively assessed, making it difficult for the claimant to prove, and it has not received much attention. For the second part of the expression, the English and Hong Kong courts provided a subjective test to establish "knowledge of the probable harm"[18].

"Actual knowledge" refers to knowledge of potential harm that can be proven directly or inferred from facts. "Recklessness," on the other hand, is not easy to extract from judicial decisions. However, it is generally understood as deliberately taking an unreasonable risk or exhibiting gross carelessness that may lead to damage. A pilot's deliberate violation of safety instructions aimed at passengers is also considered reckless. Recklessness and likely knowledge of damage must be assessed together.

Efforts have been made to equate recklessness with "willful misconduct," which refers to conduct that creates the risk of damage but does not necessarily include knowledge that damage would probably occur.

[18] As a reference, the case of Goldman v Thai Airways International Ltd in Air: (1983) 1 WLR 1186, 1199-1202 (C.A.). In this case, one passenger was injured on a flight (Goldman), which was often cited in air and sea transport for exclusion from the liability limit. The passenger's injury was caused by heavy turbulence on board. The pilot had received several warnings of the possibility of turbulence, but the passengers were not told to fasten their seat belts. The conclusion, with the subjective appeal, results from the failure to prove that the pilot knew that the injury was likely to result from his omission (as opposed to the objective view not upheld concerning the conduct of a prudent pilot in his position and with his knowledge, should have taken).

When containers fell overboard from a ship during stormy weather because lashing and re-stowing had not been done correctly, the act was considered reckless, and the limitation of liability based on the Hague-Visby Rules was removed. The subjective assessment regarding the indifference to the probability of the harmful result plays a significant role in determining recklessness. Although the case favoured the benefit of the limitation, this only happened because the officer in charge of the stevedoring's conduct was not imputable to the carrier ("personal act").

Regarding the interpretation of civil law, "intention to cause damage" refers to the subjective element of "intent." The delegations have agreed that this implies deliberate conduct to cause damage, but only in cases of "direct intent." In the continental system, the concept of "recklessness" may fall under "gross negligence" or "eventual intention." However, the statement about "indifference to the result" would suggest a tendency towards the latter subjective element[19].

The French legislator used the expression *'faute inexcusable'* to translate the second part of the expression, which refers to conduct that is reckless and performed with the knowledge that damage is likely to occur. This conduct is objectively assessed and is favourable to shippers due to the posthumous prognosis judgment on the behaviour. In Greece, the law defines the second part of the regulation *as "indifference,"* a broader concept than *"recklessness".* However, some authors link it to the *"conscious negligence"* concept, which means that the carrier would be exempted from the limit of liability if they did not follow the required standards. In Germany, it is defined as a *"gross negligence"* action that is subjectively evaluated. In Italy, it refers to the lack of diligence and unjustified risk-taking[20].

---

[19] See Martinez, J, 'Understanding Mens Rea in Command Responsibility', (2007) 5 JINTCRJ 638, 644 and Government of Canada, Translation Bureau, Law of Contracts and Law of Torts Glossary (Common Law).
Although the term "intent" does not have a direct equivalent in the common law, it can be considered as corresponding to "intent" itself and "fault" to "negligence". However, in Canada, the terms "deceit" and "wilful misconduct" are used specifically for "intent". The latter term was used to translate "dol" into French in the Warsaw Convention of 1929. It is important to note that these concepts do not fully coincide since the common law expression only considers "eventual intent." In continental systems, "gross negligence" is often equated to "intent" (*culpa lata dolo aequiparatur*). However, strictly speaking, this position should not be taken because there is no "intent or wilfulness" in the latter.

[20] Part of the doctrine notes, for this clause, "a unitary concept of fault equivalent to malice". See Coelho, Carlos O., "Poluição Marítima por Hidrocarbonetos e Responsabilidade Civil", Almedina, Coimbra, 2006, pps. 85 et seq..

This update includes a notable amendment through the new provision of "recklessness". The lawmakers aimed to make it more difficult to violate, referred to as a "strong right to restrict liability". However, the straightforward explanation of the new clause may lead to a different interpretation than the previous one. The strengthening of the right of restriction comes at the cost of an increase in the limitation values and the emergence of other participants. These participants could contribute to the breach of the owner's or carrier's limitation clause despite the "channelling" that translates into their responsibility being exclusive to what is contained in the applicable conventions.

The old system had a subjective element of a lower degree known as "personal fault". Although it was a "personal" feature and not transferable, the new Hague-Visby Rules (new Article IV bis) and the LLMC76 and CLC92 conventions have a so-called "channelling" that shifts responsibility. This "channelling" leads to several joint liabilities between the ship owners and the oil industries (through contributions to the indemnity fund). The most significant benefit of this new system is that claimants can directly sue the insurers, which was previously difficult with the successive invocation of exceptions.

Insurers are familiar with how the fund (and the 2003 supplementary fund) operates, which provides some "peace of mind" to the limitation benefit clause. Until now, this has usually fully ensured compensation for damages.

When the European Commission proposed adopting the *"recklessness"* clause, they offered a more severe alternative—"gross negligence"—with clearer contours at a civil law level. This particular expression does not appear stronger than "imprudence," so gross negligence falls somewhere between it and "personal fault," as previously mentioned.

The court has determined that the claims have been met, and the controversial clause has never been violated. This determination is a significant improvement from previous scenarios where the clause had been a point of contention, resulting in inconsistent court rulings and hindering the right to compensation. The limitation has been better regulated by eliminating "personality" in the subjective benefit aspect, adopting the new clause[21], and

[21] See the strict liability system adopted by the CLC92 and the various positions of the delegations in Coelho, Carlos O., "Poluição Marítima por Hidrocarbonetos e Responsabilidade Civil", Almedina, Coimbra, 2006, pps. 118 et seq. The legislator intended to progress from the "personal

increasing compensatory amounts. The new conventions have achieved a better balance.

Various countries have been working on developing legislation to deal with hydrocarbon spills in the marine environment. The U.S. Oil Pollution Act of 1990, created in response to the Exxon Valdez accident, is considered a paradigm in this area[22]. It is important to note that the benefit of the limitation of liability clause may be waived in certain situations. These include:

a) If the owner's conduct can be classified as "gross negligence" or "willful misconduct", which will be evaluated with consideration to the continental system, where "gross negligence" or "intent" would apply;
b) If the owner (operator or charterer) violates a federal safety, construction, or operation regulation and
c) If the owner (operator or charterer) fails to report, cooperate, or follow a U.S.C.G. order.

It should be noted that failure to comply with an administrative decision by the Coast Guard may lead to the exclusion of the benefit of the limitation of liability, in addition to the fulfilment of types of administrative and criminal offences.

The Hague-Visby Rules have made it challenging to prove "nautical misconduct" and break down its contours of "personal fault". Courts have realised that proving the master's intent in a misdirected manoeuvre or even ruling out what would be the "administration of the ship" would be very difficult. "Seaworthiness" has become more important in determining the captain or crew's responsibility for errors or faults. This concept has a dynamic vision in the organisation on board, which must comply with the terms of the Convention at the start of the voyage. Compliance with the rules of safety at sea, particularly the I.S.M. Code, is also essential.

3. Analysis of exoneration clauses in maritime safety conventions in the light of the I.S.M. Code

fault" exoneration clause to the "imprudence or reckless clause". In civil liability conventions, the change would mean better protection for the owner, making it more difficult to prove that they could not benefit from the exoneration clause while simultaneously increasing the quantitative limits of their liability.

[22] In https://www.bsee.gov/sites/bsee.gov/files/federal-register-notice/presentations/opa 90.pdf.

Consider a scenario where a crew member is operating equipment or handling a situation on a ship. Despite following the guidelines of the I.S.M. Code, the crew member causes damage to the ship. Suppose the damage is severe, such as a spill or collision. In that case, it raises questions about how exclusion or limitation of liability clauses can be applied beyond any possible misdemeanour or criminal liability.

However, modern maritime safety standards have made the definition of "negligent" conduct stricter regarding civil liability. This restricted approach includes spills of oil and other hazardous substances. Compliance with these safety standards can minimise risks and errors and strengthen the fight against threats. At the same time, the application of clauses for exoneration and limitation of liability, which are present in conventions related to pollution caused by oil spills and maritime transport of goods, can be limited[23].

The use of clauses that limit the liability of shipowners or operators in maritime transport contracts is gradually reduced. These clauses are often the result of international agreements or conventions that consider the conduct of the parties involved as negligent. By adhering to current maritime safety standards and minimising risks, the fight against potential threats becomes stronger, and the use of exoneration and limitation clauses should decrease.

The introduction of "safeguard clauses" in the maritime acquis aimed to protect ship operators due to the high risks involved in maritime shipping. In case of any mishap, these clauses would limit the operator's liability to a specific value, which would benefit the applicable insurance policies. However, the ship operator would still be obligated to transport the goods while fully assuming various ancillary duties.

When goods are carried by sea, the carrier and shipper must follow certain obligations. The carrier is responsible for safely loading and stowing the goods

[23] As is the case with "nautical fault" as an exoneration clause under Article IV (2) of the "Hague Rules". It specifically states that the clause only applies to the "Acts, negligence or fault of the captain, master, pilot or employees of the carrier in the navigation or administration of the ship". This issue is applicable under the Convention on Civil Liability for Spills of Oil or Noxious or Hazardous Substances in the Marine Environment. See Coelho, Carlos, "Poluição Marítima por Hidrocarbonetos e Responsabilidade Civil", Almedina, Coimbra, 2007, pps. 86 et seq. In Faria, Duarte Lynce de, "O Contrato de Volume e o Transporte Marítimo de Mercadorias – Dos granéis aos contentores, do "tramping" às linhas regulares", Thesis Collection, Almedina, Coimbra, 2018, ISBN 978-972-40-7675-1, pps. 73 et seq. note No. 80, it defends an in-depth analysis of the application of these safeguard clauses although, at that time, without the generalisation that is now intended to be sustained.

and ensuring that the ship is fit for the journey. The shipper must accurately document the cargo to match the shipment. So, seventeen exemption clauses are listed in Article IV (2) of the Hague Rules to protect against unforeseeable events.

It is important to review the civil liability of shipowners under the terms of the I.S.M. Code. This Code serves as a precise manual of procedures that guides the behaviour and attitude of ship operators, ensuring adherence to the SMS, updating guidelines, and acting professionally and prudently. Therefore, reviewing the Code's various aspects and exoneration clauses is essential to ensure validity.

Four types of actions commonly observed in maritime transport are categorised as non-compliant and negligent. These are:

a) Breaching the duty of care in loading and stowing goods and ensuring the seaworthiness of the means of transport. These actions are covered under Article III (1) (2) and Article IV (1) of the Hague Rules, which pertain to the contract for the carriage of goods by sea;
b) The acts or errors committed by the captain, master, pilot or employees of the carrier during navigation or administration of the ship that are not due to negligence. This interpretation is covered under Article IV (2)(a) of the Hague Rules;
c) The fault or act of the carrier in a fire that results in the inability to benefit from the exoneration clause mentioned in Article IV (2)(b) of the Hague Rules and Article 5(4)(a)(i) of the Hamburg Rules. In the latter case, this is expressed as "fault or neglect of the shipowner, his employees or agents";
d) Article 13 of the Athens Convention 1974 relates to the carriage of passengers by sea; Article 25 of the Warsaw Convention 1929 as amended by the Hague Protocol of 1955, which pertains to the carriage by air; and the CLC92 Convention, Article V.2.

It is important to note that there are now two interpretations of negligence in the Visby Protocol due to adding a new subparagraph in Article IV(5)(e). As a result, the carrier's exoneration has become more demanding and must now meet new criteria. These include:

a) The carrier must prove that they have taken due care to ensure that the ship is seaworthy before and at the beginning of the voyage and that they have

taken care of loading and stowing the goods. This issue means complying with the provisions of Article III (1) and (2) of the Hague Rules;

b) The carrier must prove that the fire exoneration clause (Article IV(2)(b)) is not a result of any fault or action on their part; and
c) The Visby Protocol added to paragraph 5 of Article 4 the "recklessness" clause, which establishes that the carrier will not benefit from the quantitative limitation of liability if the damage is the result of an act or omission that was committed with the intent to cause such damage or was committed recklessly with the knowledge that such damage would normally result[24].

In 1992, the C.L.C. Conventions replaced the "personal fault" clause with the "recklessness" clause to protect the shipowner, to make exceeding the liability limit more difficult, and to decrease the need for lengthy legal proceedings. However, this change almost doubled the quantitative liability limits[25].

Regarding imputation, holding the owner accountable for their actions is crucial to deliver severe consequences for any actions that risk harm or damage. Once it has been established that the crew's actions cause a risk, it should be evaluated according to the relevant international conventions on maritime safety and protection of the environment, such as the I.S.M. Code.

This evaluation will determine whether the ship operator, agents, and employees acted with due diligence, recklessness, or imprudence. For instance, the company's response to non-conformities should be examined to ensure they were addressed promptly and appropriately.

If an action or inaction (omission) violates certain standards, it may lead to either "danger" or "damage":

a) In case of "danger", the operator's behaviour will be considered equivalent to that of specific dangerous crimes, and any exoneration or limitation clauses under negligence will be considered inapplicable. To prove the creation of "danger", the operator must provide evidence; or

[24] As Portugal has not ratified the 1968 Visby Protocol, the translation has been followed in Article 4 of the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996 (L.L.M.C. 76 P.R.O.T. 96), both instruments approved by Decree No. 18/2017 of Jun. 16.

[25] See Wu, Chao, "International Conventions on Liability and Compensation for Tanker Spills – Some current issues to resolve", 2002, that revises C.L.C. 92 after the loss of the M/V Erika in 1999 off the coast of Brittany (France), essentially concerning the use of the compensation funds (CLC/FUND 92), in www.ukpandi.com/UK-P&I/legal/clcfc2002.

b) On the other hand, in case of "damage", the operator's behaviour will be considered illegal if they knew or should have known the appropriate action in terms of maritime safety but failed to act, thus creating a foreseeable occurrence of damage. Such behaviour would be considered eventual intent, and the operator will not be able to benefit from exoneration or limitation of liability clauses.

The I.S.M. Code is a document that helps determine whether an operator's behaviour is reckless or has breached due diligence in certain dangerous or damaged circumstances. For example, suppose the person responsible for communicating with the company onshore does not comply with the SMS or fails to take appropriate action. In that case, it will be considered a breach of due diligence.

If a maritime incident leads to severe consequences, even if it was not intentional, and if there is proof of a breach of maritime safety and environmental protection regulations, it is deemed "willful" conduct due to the predictability of significant damage. This approach needs to distinguish between occurrences with or without deliberate human intervention. It guarantees that "security" is linked with "deliberate" harmful or disruptive human behaviour and circumstances where humans may not have acted intentionally.

It is possible that the crew's actions, which violate maritime safety rules and create danger or harm, could be classified as a breach of "security" as it indicates a deliberate intent on the part of the individual. This issue could be classified as "willful danger" or "willful damage" in criminal terms. Furthermore, this perspective is derived from Article 3 of the 2002 Protocol to the 1974 Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea[26].

It is crucial to be aware that any action violating conventions or maritime safety codes and leading to danger or damage can be considered willful misconduct, even if it was not intended. This behaviour could prevent the operator from benefiting from clauses limiting their liability. Thus, it is essential to strengthen security frameworks to tackle incidents and oil spills at sea, as they can cause significant environmental harm. Although some criminal law violations have been established, in civil law, reckless endangerment or eventual intent can

[26] The 2002 Protocol was approved for accession by Decree No. 13/2015 of Jul. 14.

be considered serious fault or intent, supporting the view that the behaviour is willful[27].

Let us discuss an example related to the Conventions on the Carriage of Goods by Sea. Article IV(2)(a) of the Hague Rules provides an exoneration clause called "nautical fault." This clause only applies to acts, neglect, or faults committed by the captain, master, pilot, or employees of the carrier during the navigation or administration of the ship.

If breaching the essential rules of maritime safety, in a broad sense, is considered "nautical fault," it cannot justify the exoneration of the carrier/operator for cargo damage. However, proving this breach will be much more difficult, as it requires imputation under gross negligence or eventual intent of the conduct of the master or a crew member. It is easier to require that the seaworthiness of Article III (1) and (2) always necessitates compliance with maritime safety rules. This condition is further emphasised by the traffic duties of the person controlling the ship, whose goal is to minimise the incident, which is often a particularly dangerous resource.

Suppose a ship's captain steers the ship in restricted waters, meaning in a demanding and hazardous environment outside the recommended navigation channel. Due to an error in the electronic navigation system's position, the ship runs aground. In this case, this conduct is practised with "eventual intent."

In other words, the captain represents the harmful fact as a possible consequence of the behaviour and follows it, not confirming the position by other accurate navigation means or following good sailing practices. In such a case, he has relied solely on the navigation system, even though he has other systems at his disposal, including the geographical position obtained by azimuthal crossings and radar distances.

How can we determine this imputation? We must always consider safety rules in the maritime field[28].

---

[27] See Coelho, Carlos, "Poluição Marítima por Hidrocarbonetos e Responsabilidade Civil", Almedina, Coimbra, 2007, pps. 86 et seq. On the other hand, and also inspired by Criminal Law, the I.S.M. Code has an intrinsic typological nature that carries, in its provisions, subjective elements of the agent that are distinct from "guilt" and that may have consequences, for instance, at the level of co-participation in conduct in breach of the I.S.M. Code.

[28] In a recent article, "Le Navi Autonome e le Hague-Visby Rules" by Marco López de Gonzalo, in "Temas de Direito dos Transportes, volume V", Coord. M. Januário da Costa Gomes, Almedina, Coimbra, 2020, pps. 609 to 619, the author analyses the questions on using autonomous assets or resources in maritime transport, discussing the impact on the Hague-Visby Rules. Regarding

This example suggests that the high standards of safe navigation, which include using advanced technology and adhering to good conduct requirements, make it challenging to excuse liability for incidents like oil spills, whether contractual or non-contractual.

In the case of non-contractual liability, the C.L.C./92 conventions dictate that the shipowner is accountable for any navigation errors that cause the ship to run aground and spill hydrocarbons. This includes the infamous M/V "Exxon Valdez" incident, in which around 38,000 tons of crude oil was spilt off the coast of Alaska.

Furthermore, Article V/2 of the C.L.C./92 states that the owner may forfeit the right to limit their liability if the pollution damage was caused intentionally or recklessly and with knowledge of the damage that would result[29].

Based on our observations, if there is any hint of "gross negligence" or "eventual intent" violating maritime safety rules, the owner cannot benefit from clauses limiting or exempting their liability.

4. The MSC "Patricia" oil spill case in Sines (Portugal)

The standardisation of the I.S.M. Code, a crucial tool in setting and maintaining high standards of maritime safety, is valuable and can be used as a reference to determine appropriate conduct. This standardisation has significant implications for insurers and criminal liability cases, particularly in prosecuting severe spills. The ship MSC "Patrícia" case in Sines in October 2016 is a recent example.

Even though the responsibility of the criminal investigation into the MSC Patrícia spill in Sines was under the jurisdiction of the Criminal Investigation Section of the Judicial Court of Setúbal, the decision to accuse the defendants in

"nautical fault" (pps. 615 *et seq*), the author admits that concerning autonomous vehicles, the issue of "unseaworthiness" should be brought up again, given that navigational error leads back to the act of human conduct (except in remote-controlled vehicles) concerning their controllers. In the case of the fire exoneration clause, the author takes up the interpretation of "personal fault", admitting that the responsibility can, however, be attributed to the controllers of a remote vehicle or the developers of the autonomous vehicle, although in this case, with considerable doubt. This excerpt highlights the prevalence of "unseaworthiness" over the invocation of "nautical fault" for autonomous vehicles and that it will also serve perfectly when, successively, more robust and extensive maritime safety standards are inserted in codes of conduct.

[29] As seen, this formula is identical to that used in subparagraph (e) of the new paragraph 5 of Article IV of the Visby Protocol to the Hague Rules, which removes the limitation of liability if the action or omission "committed with intent to cause such damage or committed recklessly and with the knowledge that such damage would normally result".

the case[30] shows that they violated special duties while steering the ship. This violation is listed on pages seven and the following of the decision:

a) *"Competing, among others, with the former (the master) for general command functions and ultimate responsibility for the safety of the ship, his passengers, crew and cargo, as well as the protection of the marine environment from pollution caused by vessels;*
b) *The second party (the first mate) to replace him in the loading and unloading operations and precautions to be taken during carriage or handling of cargo, as well as for the safety of the ship, its passengers, crew and cargo, and the protection of the marine environment from pollution caused by the ship;*
c) *The third party (the chief engineer) is responsible for maintaining the mechanical propulsion system, controlling and maintaining the ship's mechanical and electrical installations, as well as the pumping and ballast systems, and for the safety of the vessel, its passengers, crew, and cargo and the protection of the marine environment from pollution caused by the ship".*

With a factual summary of the background on page 20:

"MSC PATRICIA's fuel tank No 6 E.B. lost, since its departure from Livorno, where it had been filled with 555 tons of "fuel oil", between 25 (twenty-five) and 29 (twenty-nine) tons of fuel (leaked) to the only possible place: the underlying ballast water tank."

As we advance, based on the existence of cracks in the fuel tank:

"It necessarily follows that the crew of the MSC PATRICIA – the defendants – could not have been unaware of this: since no instrumentation malfunction was even alleged, they necessarily knew how much fuel they had in that tank in Livorno; how much they had in Sines; and how much was likely to have been normally consumed."

In conclusion, on page 21:

"The defendants' intention is clear in fact ... the defendants "were perfectly aware of the absolute necessity of arranging for the immediate sealing of both tanks, as well as of the inoperability of the controls that would allow the movement of the fluids therein, whether deliberately, by poor execution or negligence".

[30] Decision to rule on case no. 3769/16.7T9STB of Feb. 23, 2021. The indictment, for this case, considers the facts alleged to be susceptible of constituting the practice of "a crime of pollution with common danger", provided for and punishable by articles 10(1 and 2) and 280, paragraph a), of the Criminal Code, by reference to article 279(7), of the same law, complemented by the following rules:
Article 4, paragraphs b), qq), ss), ccc) and d) of Law 58/2005 of Dec. 29 (Water Law which transposed Directive 2000/60/E.C. of the European Parliament and Council of Oct. 23);
Article 1(1), 2(c), 3(a), (b), (d), (f), (g), (i), (l), Article 11 and Annex I and Part A of Annex II of Decree-Law No 218/2015 of Oct. 7 (establishing environmental quality standards in the field of water policy) (amending Decree-Law No 103/2010 of Sept. 24, Annex IX, No 5); Decree-Law No 77/2006 of Mar. 30 (which complements the transposition of Directive No 2000/60/E.C., of the European Parliament and of the Council of Oct. 23, in development of the system established in Law No 58/2005 of Dec. 29); Regulation (E.C.) No 1272/2008 of the European Parliament and of the Council of Dec. 16 2008 (on classification, labelling and packaging of substances and mixtures); International S.T.C.W. Convention concerning the minimum level of training of seafarers, a convention which was approved for accession by Government Decree no. 28/85 of Aug. 8 and ratified on Jan. 30 1986, the part of which concerning training requirements for seafarers was reiterated and further developed under Council Directive no. 94/58/E.C. of Nov. 22 1994 (transposed by Decree-Law no. 156/96 of Aug. 31).

The decision, which refers to several laws and regulations, charges individuals for the crime of common crime pollution. Along with the criminal charges, it also invokes the S.T.C.W. Convention and Council Directive No 94/58/E.C. of November 22, 1994 (transposed by Decree-Law No 156/96 of August 31, 1996) concerning the minimum level of training of seafarers.

Conventions like S.O.L.A.S., S.T.C.W., and M.A.R.P.O.L. are implemented onboard through the I.S.M. Code. They can be used to investigate the conduct of a ship's crew and may also affect the liability of ship owners and operators. This assessment could lead to exoneration or limitations on their liability[31].

The Bunkers Convention defines "pollution damage" (Article 1/9) as follows:

a) *loss or damage caused to the outside of the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such*

[31] Despite the terms of the indictment, the judgement, delivered on Apr. 27, 2021, acquitted all the defendants (Case No. 3769/16.7T9STB of the Setúbal Judicial Court, Setúbal Central Criminal Division, Judge 2).
On page 96, the judgment states that: "Effectively, it was not allowed from the evidence produced at trial and compiled in the record (and examined and jury) the probative and unequivocal demonstration of the prior knowledge of the existence of a leak in the starboard fuel oil tank No. 6 and, in that framework, an intentional (and inherently wilful) acting in full apt to cause the pollution of the surrounding marine environment."
Moreover, continuing, on page 97: "In this case, it is obvious that there was no knowledge of the existence of a malfunctioning ship and, within that framework, there was an intentional act aimed at causing the pollution".
On page 98: "We would therefore say, in the light of what has been made clear, that the solution to be adopted will inevitably involve acquittal of the defendants, insofar as, despite proof of the existence of a pollution-creating event, it would not be possible to impute the existence of a conscious and intentional desire (in a wilful or at least negligent way) on the part of the defendants". As such, the defendants were acquitted for lack of subjective imputation. Then, regarding water analysis, the judgment states, page 99, that: "In fact, the case file has no alternative analysis data, using which it sought to obtain an equivalent analysis and, with this, to remove the credibility of the first study. Furthermore, it should be said that the option of rejecting the first study indicated reveals itself to be contradictory insofar as it appeals to analyses carried out by the Portuguese Hydrographic Institute, an entity to which the public accusation grants credibility in gauging the findings that determine the imputation made in a public accusation".
As regards misdemeanour liability for pollution of the marine environment in areas under national jurisdiction, following the regime set out in Decree-Law no. 235/2000 and also in the light of Law no. 50/2006, which approved the framework law for environmental administrative offences and the reference to Decree-Law no. 433/82. The defendant company, "Ville de Mimosa", was the owner but did not directly operate the vessel. MSC. was responsible for all aspects relating to the detection of non-compliance or the repair of the ship and was also the company managing the crew, meaning that the court also acquitted the defendant owner.
In summary, although the indictment's legal construction was innovative regarding the agents' liability, it failed to correctly accuse the shipowner of the pollution crime and its liability for the administrative offence. The shipowner had nothing to do with the boat's operation, which was MSC.'s responsibility. The accusation was also hampered by the lack of necessary analysis to support the objective imputation of the damage and doubts regarding the subjective element of the crew's action. As a result, the court did not consider the crew liable for negligent conduct. This decision prevented what could have been a criminal and administrative offence conviction for the 15 to 25 tons of slops of fuel oil that were spilt in the port of Sines in October 2016. It is worth noting that the slops are residues of the fuel itself, which are much denser and more polluting than the fuel oil. The impact of the spill was considerable in the surrounding coastal area.

escape or release occurs, provided that compensation for damage to the environment, excluding loss of profit caused by the damage, shall be limited to the cost of reasonable measures of reinstatement undertaken or to be conducted;

b) the cost of safeguard measures and any other loss or damage caused by such actions".

When making a claim, it is essential to consider the extent of the damage. We must include the expenses incurred to prevent further damage and the cost of restoring the environment to its original state. It is crucial to include the value of these restorative measures in a civil claim, which a technical and environmental expert should assess. The calculation of damage should not include any loss of profit resulting from the incident.

Before being bound to the Bunker Convention, the national legislator was already equipped with Decree-Law no. 147/2008 (R.J.R.A.) of July 29 regarding environmental damage liability. This law resulted from the transposition of Directive 2004/35/E.C. and established the legal liability regime, with "polluter-payer" as the fundamental principle. Objective liability is imposed on the polluter[32].

Annex I (Article 2(2)(c)) of the R.J.R.A. specifies that Chapter III, which deals with administrative responsibility for preventing and remedying environmental damage, does not apply to environmental damage (or imminent threat thereof) resulting from incidents covered by the 1992 C.L.C./Fund Conventions, the 2001 Bunkers Convention, the 1996 H.N.S. Convention (now replaced by the 2010 version), and the 1989 Convention on Civil Liability for Damage Caused during the Carriage of Dangerous Goods by Road, Rail, and Inland Navigation. Therefore, the definitions provided in Article 11 of the R.J.R.A., which define "environmental damage" and "restoration and prevention measures," do not apply to specific situations, such as a bunker fuel spill, and the respective conventions take precedence.

Additionally, the possibility of establishing a maximum time limit of 5 years for a civil claim based on preventive and restorative measures under Article 19(3)

[32] This law incorporates mandatory measures for remediation and accountability based on the Basic Law on the environment (2008), which was modified by Law No. 13/2002 of Feb. 19 and subsequently repealed by Law No. 19/2014 of Apr. 14. The Basic Law defines the foundations of the State Environmental Policy. The Law on Procedural Participation and Popular Action (Law No. 83/95, dated Aug. 31) is also considered. However, Chapter III of the law applies only outside the scope of the conventions that will be mentioned.

is ruled out because the article is part of Chapter III, and the 3-year time limit of the Bunkers Convention takes precedence. However, this does not prevent calculating the amount of "pollution damage" under the terms of the Bunkers Convention, meeting the three-year time limit for the civil claim, without prejudice to the framework and application, outside of Chapter III of the R.J.R.A.

In any case, the state cannot recover the amounts corresponding to the "reasonable recovery measures" without deducting the respective request by the A.P.A. Under the terms of Article 29, the "Competent Authority" is the "Portuguese Environment Agency" (A.P.A.), which has not yet been deducted from the MSC. Patrícia case in Sines[33].

5. Conclusion

We have demonstrated that disregarding the fundamental safety rules of maritime transport would continue to justify the agent's safeguard clauses regarding civil liability. However, the interpretation of those clauses will be narrow, especially if the damage is significant. Therefore, the clauses will cover the harm to cargo or the advantage of limiting liability for cargo damage and damage to the marine environment.

Therefore, evaluating the defendant's subjective behaviour can also be considered in the context of misdemeanour and civil liability. In the case of oil spills, the burden of proof of "personal fault" seems more complicated than "reckless" conduct under the new clauses.

Considering the phrasing of the "recklessness" clause in the CLC92 and the severe impact of the Exxon Valdez spill on the coasts of Alaska, the United States passed several laws in 1990 that eliminated the benefit of the limit of civil liability, including "gross negligence" behaviour. This route is more favourable to the owner in breaking the use of the limitation, which also suits insurers.

[33] To receive compensation for environmental damage, you must provide evidence that the state had enough information about the damage before taking reasonable measures to restore it. Although the A.P.A. may not have been able to calculate the damage due to insufficient data, you must be able to identify and quantify the long-term environmental damage to support your claim. Suppose you are claiming compensation under the Bunkers Convention. In that case, the operator is liable for any damage caused, which differs from the CLC/FUND92 Conventions, where the registered shipowner is liable. Under the Bunkers Convention, any injured party can directly sue another claimant, whereas, in the other two conventions, the liability is "channelled" through the shipowner.

Two safeguard clauses can be overridden if no force majeure situations arise. However, this is only possible under the following conditions:

a) In the case of pollution, the damage or danger created is significant enough. So, it applies even if there are no limitations on cargo damage;
b) The mandatory codes of conduct, such as the I.S.M. Code, are in effect for maritime safety. If there is a breach of their rules due to an action or omission, the "gross negligence" of the breach must be objectively assessed.

The two types of safeguard clauses may be set aside if no force majeure situations arise, provided that:

a) In the case of pollution, the damage or danger created is significant enough, given that there is no limitation in the case of cargo damage;
b) Mandatory codes of conduct, such as the I.S.M. Code, are in effect on board in maritime safety;
c) An action or omission has established a breach of their rules, and the "gross negligence" of the breach is objectively assessed.

The procedures used for a breach of the clause, referring to the codes of conduct on maritime safety, differ in two cases:

(i) In the case of "nautical fault" and "fire," the carrier's commercial fault is proven, and the unseaworthiness at the beginning of the voyage is invoked for the carrier not complying with the mandatory codes of conduct.
(ii) In the case of the "recklessness" clause, the owner's conduct under the heading of "gross negligence" will, in principle, be sufficient to negate the benefit of the limitation of liability.

This roadmap aims to establish a new framework of civil liability in maritime accidents. It considers the maritime conventions and the I.S.M. Code as references for the safe behaviour of the crew, companies, and other stakeholders. With new techniques and modern equipment on board at sea, there is an increasing demand for a new approach to exoneration clauses of civil liability and its limits. Ensuring complete compliance with leading international references and quality assessment is essential.

Recalling Marcus Aurelius, in "Meditations", on the future challenges:

"Never let the future disturb you. If you have to, you will meet it with the same weapons of reason which arm you against the present today."

REFERENCES

Anderson, P., "I.S.M. Code - a Practical Guide to the Legal and Insurance Implications", Lloyd's Practical Shipping Guides, Informa Law from Routledge, 3rd Ed., 2015 in https://www.routledge.com/rsc/downloads/9781843118855_ ISM_Code.pdf.

Calamari, Joseph A., "The Eternal Conflict Between Cargo and Hull: The Fire Statute – A Shifting Scene", St. John's Law Review, Vol. 55, No. 3, Article 1, pps. 417 to 449, St. John's, Canada, 1981.

Christodoulou-Varotsi, Iliana, and Pentsov, Dimitry A., "Maritime Work Law Fundamentals: Responsible Shipowners Seafarers", Springer Ed., Verlag, Berlin, Heidelberg, 2008.

Coelho, Carlos O., "Poluição Marítima por Hidrocarbonetos e Responsabilidade Civil", Almedina, Coimbra, 2007.

Cullen, Peter J., "International Conventions and Maritime Law with Emphasis on How the I.S.M. Code Will Shape Liability", C.M.L.A./Federal Court of Canada, April 12, 2002.

Faria, Duarte Lynce de, "O Contrato de Volume e o Transporte Marítimo de Mercadorias – Dos granéis aos contentores, do "tramping" às linhas regulares", Thesis Collection, Almedina, Coimbra, 2018, ISBN 978-972-40-7675-1.

Faria, Duarte Lynce de, "The (New) Law of Maritime Safety - the Ship, States, Conventions and their Autonomy", 2nd edition, Almedina, Coimbra, Portugal, October 2023, ISBN 978-989-40-1295-5.

Fogarty, Aengus R. M., "Merchant Shipping Legislation", 3rd Edition, Informa Law from Routledge, Oxon (U.K.), New York (U.S.), 2017.

Galierikováa, Andrea and Maternab, Matús, "World Seaborne Trade with Oil: One of Main Cause for Oil Spills?" in Transportation Research Procedia 44 (2020) 297-304.

I.M.O., (1993). - Resolution A.741 (18) adopted on November 4, 1993 - International Management Code for the Safe Operation of Ships and Pollution Prevention (International et al. (I.S.M.) Code) in http:// www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/ Documents/A.741(18).pdf

I.M.O., (2000). - Resolution MSC.104(73) adopted on December 5, 2000 - Adoption of Amendments to the International Safety Management (I.S.M.) Code in http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/ Maritime-Safety-Committee-(M.S.C.)/Documents/MSC.104(73).pdf;

I.M.O., 2015 edition - International Management Code for the Safe Operation of Ships and Pollution Prevention (International et al. (I.S.M.) Code) in https://safety4sea.com/wp-content/uploads/ISM-Code/ISM%20 Code%202015.

Incident and Case MSC Patricia in Case No. 3769/16.7T9STB of the Setúbal Judicial Court, Setúbal Central Criminal Division, Judge 2, Portugal.

Incident and case of Goldman v Thai Airways International Ltd in Air: (1983) 1 WLR 1186, 1199-1202 (C.A.).

Incident and Court Case Glencore Energy U.K. Ltd & Anr v Freeport Holdings Ltd (The 'Lady M') [2019] "English Court of Appeal", E.W.C.A. Civ 38 in https:// www.wfw.com/wp-content/uploads/2019/04/wfw-briefing-fire-on-board. Pdf.

Incident and Court Case, M.S.C. Flaminia, 12-cv-8892 (K.B.F.) (S.D.N.Y. November 17, 2017) in https://www.shippingandfreightresource.com/shipper-and-container-operator-

liable-for-explosion-on-msc-flaminia/ and https://www.burgoynes.com/articles/2019/02/msc-flaminia-a-brief-account-of-an-investigation.

Incident MAERSK Charlotte Maersk, Fire, Jul. 7, 2010, in main. dk/media/9153/charlotte-maersk-fire-on-7-july-2010. Pdf.

Katsivela, Marel, "Loss of the Carrier's Limitation of Liability Under the Hague-Visby Rules and the Warsaw Convention: Common Law and Civil Law Views" in (2012) 26 A&NZ Mar L.J., pps. 118 to 135, in http://classic.austlii.edu.au/au/journals/ANZMarLawJl/2012/7.pdf.

Kopacz Z., Morgas W., and Urbanski J., "The Maritime Navigation its Environment and its Safety System", Annual of Navigation, No 4/2002.

López de Gonzalo, Marco, "Le Navi Autonome e le Hague-Visby Rules" in "Temas de Direito dos Transportes, volume V", Coord. M. Januário da Costa Gomes, Almedina, Coimbra, 2020, pps. 609 to 619.

Mandaraka-Sheppard, Aleka's Book "Modern Admiralty Law - With Risk Management", Cavendish Publishing Limited, London and New York, 2001.

Martinez, J, 'Understanding *Mens Rea* in Command Responsibility', (2007) 5 JINTCRJ 638, 644 and Government of Canada, Translation Bureau, Law of Contracts and Law of Torts Glossary (Common Law).

Nunes, Adélia, "Derrames de hidrocarbonetos: quando o Oceano se cobre de negro", in Territorium: Portuguese Magazine on Risks, Prevention and Safety. N.° 10 (2003).

U.N.C.T.A.D., "Liability and Compensation for Ship-Source Oil Pollution: An Overview of the International Legal Framework for Oil Pollution Damage from Tankers", Studies in Transport Law and Policy - 2012 no. 1, Geneva, 2012.

Wu, Chao, and others, "International Conventions on Liability and Compensation for Tanker Spills—Some Current Issues to Resolve", www.ukpandi.com/ U.K. Pi/legal/clcfc2002.

Websites

https://comitemaritime.org.
https://ec.europa.eu/eurostat.
https://ec.europa.eu/info/publications/2021-commission-work-programme-key-documents_en.
https://ec.europa.eu/transport/themes/infrastructure.
https://www.amn.pt.
https://www.dgrm.mm.gov.pt.
https://www.equasis.org.
https://www.uscg.mil.

Data de submissão do artigo: 10/03/2024

Data de aprovação do artigo: 06/06/2024

Edição e propriedade:

Universidade Portucalense Cooperativa de Ensino Superior, CRL

Rua Dr. António Bernardino de Almeida, 541 - 4200-072 Porto

Email: upt@upt.pt