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## Aviation product liability insurance in US, UK, and Italian law systems

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Scientific debate

### Abstract

The article offers an analysis of the aviation product liability regime and related insurance issues as developed in Italy through a comparison with US and UK insurance practice. A comparison is made between the US ABC (Aircraft Builders Council Inc.) form, the London Aircraft Insurance Policy form AVN1D with the Italian form. The analysis also considers how the new technologies applied to aircraft and air transport infrastructure (such as ATM - air traffic management, ATN - aeronautical telecommunication network, etc.) have influenced the product liability insurance policies. The current allocation of risks and liabilities among the various operators of the aviation sector could be changed by the implementation of the EU Single European Sky Programme. Moreover, the improvement of anti-collision devices should increase safety and lead to review the allocation of risks among the ATM stakeholders and consequently change the allocation of responsibility and the relevant insurance obligations. This is what occurred in recent cases examined in the article.

*Key words:* product liability, insurance, direct action, occurrence

### 1. INTRODUCTION

Aviation accidents may cause the loss of many human lives and consistent material damage, as evidenced by the serious accidents of recent years. Therefore, it is no surprise that aircraft accidents are counted among the catastrophic damage that could determine disputes for significant amounts of money. However, air transport is considered one of the safest ways to travel, due to technological developments applied to this sector, which have made aircraft and the

entire air transportation system more reliable in terms of safety.

However, it is this technological evolution that seems to represent a 'risk factor' for the aviation industry and its insurers, as the issues related to the defectiveness of a product or a technological device gradually assume greater importance, as evidenced by the recent ruling of the Spanish Supreme Court<sup>1</sup> - which will be examined further in this paper - that decided the civil proceedings against the designer and manufacturer of air collision avoidance system TCAS II (Traffic Collision Avoidance System). The Spanish Court has recognized a liability of the aviation industry not only for defects or deterioration of a product or of a technological device, but rather because of the inability of this important manufacturing industry<sup>2</sup> to achieve, in this particular case, those levels of performance and security that you would expect as a result of the continuing technological developments.<sup>3</sup>

This strict position taken by the Spanish courts<sup>4</sup> leads to the view that if, on the one hand, the improvements and technological innovations in the aviation industry

<sup>1</sup> Tribunal Supremo, Sala del lo Civil, sentencia n. 649/ 2014, 13 enero 2015.

<sup>2</sup> As shown in "2016 Global aerospace and defense sector outlook - Poised for a rebound" edited by Deloitte, the global commercial aerospace sector is likely to experience strong revenue and operating earnings growth in 2016, as a result of continued record production levels driven by strong demand for next-generation aircraft and growing passenger traffic (See: [www2.deloitte.com](http://www2.deloitte.com)). See also: *Il settore aerospaziale resiste alla crisi: dal 2008 +43% di fatturato*, in [www.infodata.ilsole24ore.com](http://www.infodata.ilsole24ore.com). In 2010, the turnover of the US aerospace industry was \$210.55 billion (AIA 2011) i.e. €159.50 billion (rate of exchange €/ \$ 1.32), showing an increase in respect of 2009 turnover of \$208.87 (See UNIONCAMERE LAZIO, *Osservatorio sull'internazionalizzazione del Lazio, Analisi di settore: L'industria Aerospaziale nel Lazio*, in [www.unioncamerelazio.it](http://www.unioncamerelazio.it)).

<sup>3</sup> In this paper Italian provisions and rulings of Italian Courts are translated into English while ruling of Spanish Courts are reported in their original language.

<sup>4</sup> The Supreme Court with judgment n. 649/2014 confirms the appeal judgment of Audiencia Provincial de Barcelona.

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are designed to reduce accidents, on the other hand they seem to introduce new vulnerabilities and major risk exposures for their producers, resulting in an increase in aviation claims.

The growing accountability of the aviation industry for damage caused by defective products implies the inevitable involvement of the insurance industry, in order to meet the demands for compensation. It is estimated that the maximum potential loss undertaken by insurers in the aviation sector with regard to hull policies only, has improved considerably in the last decade due to the constant increase in the number of passengers and in the air fleets. This figure has increased from \$576 billion in 2000 to \$896 billion in 2014. If the growth rate remains unchanged, we can therefore expect that the total value of the maximum potential loss to which insurers are exposed will exceed the threshold of one billion dollars by 2020, if not before.<sup>5</sup>

Therefore, insurance for aviation product liability represents the insurance sector that offers coverage for those subjects that can be defined as 'primary' aircraft manufacturers (such as the engine manufacturers) as well as for manufacturers of components or sub-components and for those who are even accidentally at risk from defective products. This category embraces all those persons whose main activity is the production of aviation components, but which are nonetheless exposed to product liability, as distribution and maintenance companies. We can, therefore, define such type of insurance cover as one designed to protect the insured for death or injury to third parties, as well as for loss or damage to the property of third parties resulting from faulty design, manufacture, maintenance or material supply, as well as by the lack of or insufficient indication in the relevant manuals of the dangers that can arise from the use of such aeronautical products.

The peculiarities of this insurance system will be examined together with the distinctive features of the most common policies at the international level as it regards their interpretation and application.

## 2. PRODUCT LIABILITY INSURANCE POLICIES. THE ITALIAN PRACTICE

There is no doubt that UK and US insurance markets have had a fast and consistent development before many other countries. Especially in the US the product liability insurance has a long story that step-by-step has

<sup>5</sup> Such amount concerns the fleet's average value during the insurance annual period (therefore to the hull policy only) See ALLIANZ GLOBAL CORPORATE & SPECIALTY, *Global Aviation Safety Study 2014*, 44, in [www.agcs.allianz.com](http://www.agcs.allianz.com).

produced sophisticated policy models that have become the basis for other countries' policies. Given the close historical relationship between the United Kingdom and the United States, it was therefore inevitable that the British policies were very similar to the American ones while taking into account the European reality.

Therefore, not surprisingly the Italian insurance policies for covering product liability in the aviation industry derive from the British and American standard policies, which represent a consolidated practice of this sector. In particular, the Italian insurance covers are based on the British contractual model - known by the acronym AVN (Aviation)<sup>6</sup> - as well as the equivalent US standard ABC (Aircraft Builders Council Inc.). Italy has its product liability Reference Policy for aeronautical and *grounding* products drawn up by ANIA (National Association of Insurance Companies). In the course of the present description reference will be made to the most recent edition of 2009 ANIA policy.

As mentioned, the Italian policies refer to the listed English and American models<sup>7</sup> and according to these models they provide two distinct types of cover: one for liability for defective products in the strict sense (product liability) and one for interruption of activity (*grounding*).<sup>8</sup> The ABC policy, for example, obliges the insurer "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of personal injury, sickness or disease, including death at any time resulting therefrom sustained by any person [...] and because of injury to or destruction of property including the loss of use thereof [...], caused by an occurrence arising out of products hazard"<sup>9</sup>. In addition, the same policy in the section on *grounding* liability establishes that the insurer is obliged to "Pay on behalf of the Insured all sums which the insured shall become legally obligated to pay as damages for the loss of use of completed aircraft occurring after delivery to and acceptance by a purchaser or purchasers or operators of such aircraft for flight operations, and caused by a *grounding* following an occurrence arising out of products hazard"<sup>10</sup>. As shown, the nature of such coverage does not seem to deviate from that of the product liability

<sup>6</sup> Recently (August 2014), the London Aircraft Insurance Policy - for many years the reference point for this matter - has been updated taking the new denomination AVNID.

<sup>7</sup> For a short comment on the Italian insurance covers of the aviation sector and on the common practice to borrow most of the contractual clauses prepared by AICG, see M. Rossetti, *Il Diritto delle Assicurazioni*, Vol. II, *Le assicurazioni contro i danni*, Padova, 2012, 323.

<sup>8</sup> Article 1 of the mentioned Reference ANIA Policy 2009.

<sup>9</sup> ABC, Product Liability Policy, Coverage A.

<sup>10</sup> ABC, Product Liability Policy, Coverage B.

insurance policies used for products other than those of the aviation industry. However, the policies of the aviation industry, inspired by the British and American models, are characterized by the presence of a large exclusion of insurance coverage clauses, with the aim to limit the insurer's exposure to risks.

### 2.1. Definition of the aeronautical product

The liability of the insured arises from the entry into circulation of products manufactured, sold, operated, maintained or distributed by the same insured. For this reason, a description of the term '*aeronautical product*' in the insurance policy is of particular importance. The Italian policy, after stating that aircraft means the machine intended for the air transportation of persons or property as defined by current regulations,<sup>11</sup> provides that, by aeronautical products, is meant "*the finished aircraft, the individual components of the same and in general all that is used in connection with its operation or use on the ground and in flight. Not considered as aeronautical products are missiles, satellites, spacecraft, their equipment and generally all that is used in relation to their working and use on the ground and in flight*"<sup>12</sup>. ANIA policy excludes the military aeronautical product defined as "*the aeronautical product owned or in use and/or supplied to the armed forces*".<sup>13</sup> In general, the Italian insurance policies tend also to exclude from the definition of aeronautical product those products used for space activities.

In contrast, in the US and UK models, the definition of aircraft appears enoughwide to include all products used for such activities. British AVN 98- after having determined that aircraft means the "*aircraft and shall be deemed to include missiles, air cushion vehicles/hovercraft, lighter-than-air aircraft and helicopters*"- defines an aviation product as "*a completed Aircraft Space Vehicle and Satellite and any article forming part thereof, or supplied for installation in, or for use*

*in connection with, or for spare parts for, or an Aircraft Space Vehicle or Satellite including ground handling tools and equipment and also means training aids, instructions, manuals, blueprints, engineering or other data or any article in respect of which engineering or other advice and services and labour have been given or supplied by the Insured in connection with an Aircraft or Space Vehicle or Satellite*".<sup>14</sup>

Like the British approach, the ABC American model also resorts to a broad definition, which may include products used for space activities as well as activities and services which at first glance would seem unrelated to such a definition. The clause begins by establishing that an aeronautical product is: "*an aircraft or missile or spacecraft or satellite or spaceship or Launch Vehicle and any ground support or control equipment used therewith, and any article furnished by the Insured or the Insured's Predecessors in business and installed in, or used in connection with, or for spare parts for an aircraft or missile or spacecraft or satellite or spaceship or Launch Vehicle and any ground support or control equipment used therewith or tooling used for the manufacture thereof, including ground handling tools and equipment*".<sup>15</sup> To provide a better understanding of this, the American form contains an extension of this definition that can also include the following activities and services related to the product and the documentation and manuals in support of such goods: "*Aircraft products also means training aids, instruction, manuals, blueprints, engineering or other data, and/or any article in respect of which engineering or other advice and / or services and / or labour have been given or supplied by the Insured or the Insured's predecessors in business relating to such aircraft or missile or spacecraft or satellite or spaceship or Launch Vehicle and any ground support or control equipment used therewith*".<sup>16</sup>

It is precisely because of the complexity of the definition of the term and, therefore, of the potential magnitude of insurers' indemnity obligations, that insurers often request detailed information about the manufacturer, the productive sector, the nature of the product, the necessary certification, the use that will be made of such certification (for example, whether civilian or military), the risks to which the user is exposed, and the guarantees offered to buyers. The ABC policy, for example, has set up an "*Application for aircraft products liability insurance*" that requires the above-mentioned information as well as the possible presence of subcontractors involved in the production

<sup>11</sup> The new definition of aircraft contained in the Italian Navigation Code – Article 743, as amended by legislative decrees 2005/96 and 2006/151 – states: *Aircraft is any machine for air transport of persons or goods. Aircraft are also the remotely piloted aircraft, as so defined by special laws, by ENAC (the Italian Civil Aviation Authority) regulations and, for the military aircraft by the Ministry of Defence. The aircraft distinctions according to their technical characteristics or their deployment are established by ENAC regulations and, in any case, by special provisions. The provisions of the first book of the second part of this code are not applicable to the aircraft built for recreational activity included in the limits of the Annex to Law 25 March 1985, n.106.*

<sup>12</sup> See definitions contained in ANIA reference policy 2009.

<sup>13</sup> See definition 13 in ANIA reference policy 2009. Article 5 of ANIA reference policy 2009 cit.

<sup>14</sup> See Definitions in AVN 98.

<sup>15</sup> Definition A) in ABC – PRODUCTS LIABILITY POLICY.

<sup>16</sup> *Ibidem*.

that can find coverage in the context of that offered to the enterprise. This form also requires an indication of the main buyers of the product and the percentage of goods sold to each of them. This, obviously, with the aim of making known to the insurer its risk exposure.

The Italian policies use a more synthetic form, with a few questions asked to the insured before signing the contract and the answers to such questions forming an integral part of the contract once it has been concluded.<sup>17</sup> Like the American form, the questionnaires for the Italian policies also collect information on possible geographical markets and, in particular, whether such goods are exported to the United States, Mexico and Canada. This is because in these countries the insurers would find themselves exposed to indemnity claims also extended to what is known as *punitive damages*, as will be explained below. This is the reason why ANIA reference policy provides for a special extended warranty for products delivered in those countries.<sup>18</sup>

The same obligation of information arises also in the case where the producer puts a new type of product on the market or changes the composition or destination of an existing one.<sup>19</sup> The insurer will then be free, usually within a period of 30 days, to accept or decline the new risks, specifying if so the warranty and premium conditions.

### 3. THE INSURANCE OBJECT AND THE CONSTITUENT ELEMENTS OF THE DAMAGE

As seen above, the object of the insurance contract for damage caused by a defective product is the civil liability of the aircraft producer for the damage that the product brings to goods and persons. In particular, the Italian policies cover liability for damage caused to third parties for death, personal injury and damage to property and/or aircraft (including the resulting loss of use of such property).<sup>20</sup> Similarly,

<sup>17</sup> It should be mentioned that the proposal-questionnaire, although it does not oblige a commitment to sign the policy, will be integral part of it once undersigned and will be relevant also in connection with Articles 1362 and successive of the Italian Civil Code to permit a correct interpretation of such articles. Moreover, incorrect statements or reticence become relevant according to Articles 1892 and successive of the Italian Civil Code.

<sup>18</sup> Clause RcProd.Aer n.4 of ANIA reference policy 2009.

<sup>19</sup> Clause RcProd.Aer n.7 of ANIA reference Policy 2009.

<sup>20</sup> See "Article 1 – Object of the insurance – A) Civil responsibility for damages to persons, aircraft and goods. The Company is obliged to keep unharmed the insured for what he should pay as liable party by law to refund (capital, interests and

the American standard ABC policy provides that the insurer undertakes to indemnify the damage related to "personal injury, sickness or disease, including death at any time resulting therefrom sustained by any person (Personal Injury) [...], to injury or destruction of property including the loss of use thereof (Property Damage)".<sup>21</sup> The Standard British policy in its latest version AVN 98 also refers to coverage by the insurer for any injury related to *bodily injury* and *property damage*, of which it provides a definition, containing at the same time, the relevant litigation.<sup>22</sup> On the contrary, in the Italian practice we cannot find a single definition of compensatory damage nor other definitions that would contribute to its delimitation.<sup>23</sup> Consequently, jurisprudence has assumed a prominent role in establishing the boundaries of indemnity obligations.

The AVN 98 policy also pays particular attention not only to defining the concepts of *bodily injury* and *property damage*, but also to limiting the exposure to risk. *Products hazard* is described as, "the handling or use of (other than by the Insured) or the existence of any condition in an Aviation Product provided, as regards Coverage A - Aviation Products Liability - such Aviation Product has ceased to be in the possession or under the control of the Insured; nevertheless it is understood and agreed that the indemnity provided by this section shall not be invalidated when a completed aircraft is temporarily returned to the Insured for modification or repair or whilst being flown by aircrew of the Insured after acceptance by a purchaser or lessee".<sup>24</sup> The ABC policy also defines products hazard as: "the handling or use of (other than by the Insured) or the existence of any condition in an Aircraft Product: (a) When such Aircraft Product is not in the possession of the Insured, and (b) When such Aircraft Product is away from premises owned, rented or controlled by the Insured." There is no similar definition in the Italian insurance policies, being the same mechanism of producer responsibility introduced by Directive 85/374/EC to make the risk

charges) for damages involuntarily caused to third parties for defects of the insured aeronautical products as described in the Particular Conditions after their distribution in the marketplace and for which he appears to be the producer, for death, personal damage and destruction or material deterioration of goods or aircraft", ANIA Reference Policy 2009.

<sup>21</sup> Posner-Marland-Chrysal, *Margo on Aviation Insurance*, Fourth edition, Lexis Nexis UK, 2014, 291.

<sup>22</sup> AVN 98 defines bodily injury as «bodily injury, sickness or disease, including death at any time resulting therefrom». Property damage is defined thus: «Property Damage means physical loss of or damage to or destruction of tangible property, including the loss of use of such property».

<sup>23</sup> ANIA Reference Policy 2009 cit.

<sup>24</sup> See definitions in AVN 98.

coincide with the entry into circulation of the goods.<sup>25</sup> On this point the case law is quite clear in stating that entry into circulation exists when the goods are materially available to the purchaser or user, including on approval or on trial.<sup>26</sup>

Beyond the above definitions, it should, however, be remembered that the concept of defective product should not be considered a static concept as it is destined to change and expand with the evolution of technology and the use of aeronautical products. This evolution has also been recognised by the courts asked to decide on claims related to defective products. In this regards, it goes without saying that the role played by the decisions of the courts in the aviation insurance system is essential, being it mainly built on the case law. In the past, Community case law meant that the producer, in order to be released from his responsibility under Article 7, letter e) of Directive 85/374/EC, had to prove that the objective state of technical and scientific knowledge, including their most advanced level at the time of the marketing of the product, did not permit him to discover any fault in the latter. In particular, with specific regard to the meaning to be attributed to the latest technical and scientific knowledge, the Court stated that these should still be “*accessible at the time of introduction of the product into the market*”.<sup>27</sup> The use of the term ‘*accessible*’ obviously poses some problems. A distinction must be made between accessibility from the technological point of view and its actual use which, in a controlled area such as the aviation sector, can take place only after the issuing of a special certification.

<sup>25</sup> The definition of “*entry into circulation*” is contained in Article 119 Cod. Cons. Leg. Decree 206/2005, which establishes that entry into circulation of goods occurs also by the delivery to a forwarding agent for the despatching of goods to the purchaser or user.

<sup>26</sup> On this matter see the conclusions of the European Court: “*Article 7(a), letter a) of Directive 85/374/EEC of 25 July 1985 on liability for damage caused by defective product, which provides an exemption from the principle of producer’s responsibility for the damage caused by a defect in his product, if this product has been ‘put into circulation’ by the same manufacturer, it must be interpreted as meaning that a defective product is put into circulation when it is used during the provision of a medical service such as that consisting in preparing a human organ for transplantation, and the damage caused to the organ is due to the said preparation (covering such exemption primarily cases in which the putting into circulation has been made by a person other than the manufacturer, and it took place against the will of the latter, or the product is used for private purposes)*”. European Court of Justice Sec. VI May 10, 2001 n. 203 H. *Veefald c. Arhus Amtskommune*.

<sup>27</sup> European Court of Justice, 29 May 1997 n.300, *Comm. Ce c. United Kingdom et al.*

The above mentioned European Court case law has been followed by national Judges charged to decide upon the meaning of the term ‘*accessible*’. In particular, the Spanish courts have reached the same conclusions of the European Court when deciding the disputes brought against the manufacturer and the designer of the TCAS (Traffic Collision Avoidance System), installed on both aircraft involved in the Uberlingen accident previously recalled. The Court of Appeal of Barcelona noted that the producer’s and designer’s responsibility exists for “*concebido, diseñado, fabricado, comercializado, vendido y/o instalado un producto defectuoso (TCAS II) system, que no cumplía con los estándares de seguridad impuestos por la industria y la normativa.*” In addition, the Barcelona Court took into consideration the fact that the producer could gain access to a more recent and secure version of TCAS, although the latter was still in the planning stage and not yet certified by the FAA, the American Federal Aviation Administration. The Catalan court stated: “*El producto podría ser más seguro, es decir, si existía un diseño alternativo que podría haber reducido el riesgo de danos sin comprometer el servicio o la utilidad del mismo, CP112, aunque no se podía fabricar porque no se contaba con la financiación y las autorizaciones necesarias*”.<sup>28</sup>

Actually, it is a particularly broad definition aiming to include in the term under consideration a concept of defects that not only contemplates the possibility of product’s malfunctioning, but also includes the case of a product that has not reached the expected level of performance in light of the technical knowledge achieved and the technical regulations of the country of production (in this case the United States).

The severity with which the Court assessed the liability of the producer and designer was certainly affected by the aim that the product in question, namely the TCAS, was to pursue. The aim was to continuously provide the position of the aircraft in respect of other aircraft flying in the area, in order to avoid collisions and, therefore, a catastrophic event. It is precisely the context of air navigation, in which the product in question is employed, that motivates the particular severity with which the Spanish courts have come to their decision after giving account of the organizational shortcomings of the air traffic control centre concerned, and the error committed by the air traffic controller, who left one of the two aircraft positioning itself at the same altitude of the aircraft arriving from the opposite direction. The Spanish courts still considered that the ultimate cause capable of preventing the event was the

<sup>28</sup> Audiencia Provincial De Barcelona, Sección X, Sentencia núm.230/2012.

technological equipment with which the two aircraft were equipped.

In the end, if such equipment had offered a higher performance, the accident would probably not have occurred; this, despite the many human errors made before the event. On this point the Court observed that *“Todo lo anterior permite afirmar la relación de causalidad exclusiva directa entre los defectos de diseño, fabricación e información del TCAS II, versión 7, y el accidente de Überlingen, de julio de 2002, en el que murieron los familiares de los ahora demandantes. Pocos reproches caben hacer a la tripulación, como han concluido hasta ahora los demás jueces en estos otros procedimientos mencionados. E incluso el mal funcionamiento del Centro de Control Aéreo de Zúrich, gestionado por SKYGUIDE, no fue la causante final de la colisión”*.

It should be noted that the TCAS manufacturer and designer had argued in their defence that the most evolved version, which the courts referred to in the light of the Eurocontrol technical reports during the investigation, had not been certified by the FAA at the time. Therefore, in the absence of such certification the latest version could not be issued on the market. This claim will be upheld by the Spanish Supreme Court, but still will not be sufficient to hold the aforementioned companies blameless. The Supreme Court, after having stated: *“Tratándose de un producto del sector de los sistemas de seguridad de la aviación civil, fuertemente intervenido por la administración de aviación civil y sujeto a estrictas regulaciones imperativas, el fabricante no puede apartarse del diseño aprobado por las autoridades administrativas competentes, ha de fabricar y comercializar el producto para que ha recibido autorización, y no puede introducir cambios en el mismo en tanto no sea autorizado por la autoridad administrativa de aviación civil tras haberse comprobado que se adapta a la TSO vigente. [...] Este segundo criterio, que integra la causa de exoneración consistente en la fabricación del producto conforme a normas imperativas, es el que se ha considerado procedente”*, still considered relevant, for the condemnation of the aforesaid companies, the shortcomings of appropriate information about the use of the manual, reiterating: *“La información puede ser defectuosa no solo porque contenga instrucciones equivocadas o erróneas, sino también porque las advertencias sobre los riesgos sean insuficientes”*.

The Italian courts have earlier taken a similar position recognizing the responsibility of the manufacturer for *“having assembled on the helicopter a dangerous mechanism, i.e. a piece inadequate regarding safety, according to the general and standard sense of this*

*term: the responsibility [...], for choosing and mounting on the helicopter a piece not sufficiently secure, equally contributes with that of the maintenance crew to the causation of the accident”*.<sup>29</sup>

The position of the Spanish courts seems to refer to the most recent European Court of Justice jurisprudence, which has recognized that the safety to be expected from a product should be assessed in relation to the performance that can be expected from the same in the light of the most advanced technical knowledge reached. The European Court has, in fact, recently stated that, regarding products intended to prevent a specific hazard, the potential lack of safety - which can give rise to liability of the manufacturer under European legislation - comes from the abnormal harmful potential that the same products may cause users. As stated by the Court *“Article 6(1) of Directive 85/374 must be interpreted as meaning that, where it is found that products belonging to the same group or forming part of the same production series, such as pacemakers and implantable cardioverter defibrillators, have a potential defect, such a product may be classified as defective without there being any need to establish that that product has such a defect”*.<sup>30</sup>

Such considerations, even if taken with regard to a product sector different from the present one, will help also with regard to those products of the aeronautical industry whose purpose is precisely to avoid a hazard that may cause a catastrophic event, such as that ruled on by the Spanish Courts, a judgement that should not remain isolated. Indeed, it is appropriate to observe that the conclusions reached by the European Court in 2013 may be particularly significant in light of what it has held recently with regard to air carrier liability.

By judgment C-257/14 of 2015, the European Court, in the wake of severe and consolidated case law - which has recognized the responsibility of the carrier for delay even in cases where the breach is attributable to a malfunction of the aircraft<sup>31</sup> - has determined that an air carrier can be discharged only in cases where it can prove that the delay resulting from malfunctioning of the aircraft was due to defects of one or more products

<sup>29</sup> Italian Supreme Court n. 984/2009.

<sup>30</sup> Joint cases C-503/13 and C-504/13: Court sentence (Fourth Section) of 5 March 2015 (request of ruling proposed by Bundesgerichtshof, Germany) - Boston Scientific Medizintechnik GmbH./AOK Sachsen-Anhalt (C-503/13), Betriebskrankenkasse RWE (C-504/13).

<sup>31</sup> See *ex multis* the Court's judgment (Fourth Section) of 22 December 2008 (request of ruling proposed by Handelsgericht Wien, Austria Friederike Wallentin-Hermann/Alitalia LineeAereeItaliane Spa (Case C-549/07)

installed on its entire fleet.<sup>32</sup> This means that the delay, so that it can constitute a waiver of liability, must be attributable to a factor involving another subject, which in the present case, and in the light of the above, is the manufacturer. On this point the European Court ruled that: “*It cannot be excluded at the outset that Article 13 of Regulation No 261/2004 may be relied on and applied with respect to a manufacturer which is at fault, in order to reduced or remove the financial burden born by the air carrier as a result of its obligations arising from that regulation*”.<sup>33</sup>

In conclusion, despite the apparent clarity of the *defective product* definitions, examined here in relation to the various models of ABC and AVN 98 policies and with regard to the EU countries, the legislation on product liability and the boundaries of risk which the insurer bears must be assessed in the light of the most recent case law, which favours a broader definition taking into account the technological advances that a sector, such as aviation, constantly promotes.

Such conclusion must, however, consider that the implementation of the Single European Sky implies the adoption of many new technologies, still being tested [or example, see ACAS X<sup>34</sup>], to ensure greater safety in air traffic control operations, on account of traffic forecasts that anticipate for a doubling of traffic by 2030.<sup>35</sup> It is precisely in such a technologically advanced environment that the responsibility of the aviation manufacturers has to be assessed. Already a particularly strict approach is emerging, aiming to hold the producer responsible if it proves unable to keep pace with the most advanced scientific and technological progress applied to aeronautical products.

#### 4. DEFINITION OF THE TERM “OCCURRENCE”

As part of the insurance contract, the term *occurrence* implies its involuntary or accidental nature. As pointed out above, in insurance practice the term *occurrence*

means an accident caused by a defective product, which is “*neither expected nor intended from the standpoint of the insured*”.<sup>36</sup> This phrase has given rise to considerable litigation on this issue, with various jurisprudential positions taken, especially in the US.<sup>37</sup> Currently, according to US case law, the aforementioned terms are counted both as synonyms<sup>38</sup> and as bearers of different and precise meanings.<sup>39</sup> In US and UK, however, the term *expected* is intended as applicable to the prejudice, the occurrence of which the insured was certain of or of which he was informed, although he did not act with the purpose of causing it.<sup>40</sup>

It is interesting to note that the debate in the Italian context has developed in a way similar to that which affected the *common law* courts with regard to the term *occurrence*. While the concept ‘involuntary’ is of intuitive evidence and understanding, the fortuity requirement is more problematic, without a common interpretation thereof. The Court’s legitimacy has shown over time very divergent positions. Part of case law has held that this concept brought unnecessary differentiation between degrees of guilt, sometimes going as far as equating it with a fortuitous event.<sup>41</sup> However, that interpretation ultimately frustrate this clause, since the fortuitous event, not giving rise to civil liability, would render meaningless the insurance contract itself. Another case law, however, is trying to save the concept of accidental event. This would be an event with respect to which, even though there was a generic possibility of its occurrence, extraneous circumstances beyond the insured’s activity intervened, realizing the abstract damaging potential of such activities in a specific damage to an asset belonging to a third party. In contrast, the insurance coverage of liability does not apply in respect of those risks to which the insured’s business activity is normally exposed.<sup>42</sup> Consequently, under Italian law - unlike the US and UK legal systems - it is not the unpredictability that counts, but the uncertainty, the decisive requirement to encompass the event in the object of risk coverage for

<sup>32</sup> CGUE has actually stated: “*some technical problems may be included in such exceptional circumstances. For example, in the case where the manufacturer of the equipment installed on the air carrier’s fleet, or a competent authority would reveal that those equipment already in service have a hidden manufacturing defect affecting the flight safety*” (CGUE sentence, Section IX, 17 September 2015 C-257/14).

<sup>33</sup> *Ibidem*

<sup>34</sup> The latest generation of the ACAS X (Airborne Collision Avoidance System) is a family of systems designed for large commercial aircraft (Xa), Unmanned Aircraft System (Ua) and General Aviation (Xp). See: Kusters, Sethsson, Masutti, 2015, 15.

<sup>35</sup> See EASA, *Annual Safety Review 2014, 2015, 22*.

<sup>36</sup> ABC International Product Liability Policy. Definitions (I) and AVN 98, Definition (I).

<sup>37</sup> Posner-Marland-Chrysal, *supra* n. 21.

<sup>38</sup> Patrons-Oxford Mut Ins Co v. Dodge 426, A2d 888 (Maine 1981).

<sup>39</sup> Ohio Cas. Ins. Co. v Harbor Ins. Co., Civ. No. 8607. Fourth Dist., Div. Two. Feb. 20, 1968; US Fid & Guar Co v TK Stanley, Inc. 764 F Supp 81, 82-84 (SD Miss 1991).

<sup>40</sup> Posner-Marland-Chrysal, *supra* n. 21.

<sup>41</sup> Italian Supreme Court n. 4118/1995 and Sup.Court n. 2863/1990 and Sup.Court n.6071/1983

<sup>42</sup> Italian Supreme Court 4 February 1992, n.1214.

damage resulting from accidental events.<sup>43</sup> On this point the Court has stated “*For third party liability insurance, where the insured risk is limited to the ‘accidental facts’, the accidental nature of the event does not require the unpredictability of the harmful event, as a genre, but the uncertainty in its specificity, so that occurs when, although theoretically possible to predict the occurrence of an event of a certain type, the complex of factors that contribute to producing that event is uncertain, according to physical and time modalities and with the consequences that occurred exactly to the detriment of the subject hit, and this for circumstances beyond the insured’s domain that are not necessarily inherent in the activity considered by the insurance contract and in the nature of the assets employed in such activity.*”<sup>44</sup>

### 5. THIRD PARTY LIABILITY POLICIES: THE EXCLUSIONS

In the Italian system there is a particular limitation of insurance cover linked to a typical principle of civil law countries. This is the exclusion of what is known as punitive or exemplary damages.<sup>45</sup>

Through punitive damages, the judgement on the party who caused the damage also assumes, in addition to the value of restoration/restitution recognized in the Italian legal system, a punitive value. The institution of punitive damages, in fact, was developed by American jurisprudence to target particularly reprehensible behaviour of the agent, from whom, in so doing, a further economic sacrifice is demanded, greater than that resulting from the mere compensation for the damage done.

Italian case law denies entry into the Italian judicial system of punitive damages.<sup>46</sup> Their sanctioning function is judged contrary to domestic public order, which does not grant a similar function to civil liability.<sup>47</sup> The admission of punitive damages in the

judicial system of countries such as the USA, Canada and Mexico prompted insurers operating in Italy to exclude such damages from the policy conditions.

Therefore, in most policies a limitation of insurance cover for exports to the US, Canada and Mexico frequently appears, which in some cases, although not expressed, is deduced from the limitations of the territorial extension of the guarantee.<sup>48</sup> The insurance coverage can anyway be extended to these countries through a special agreement, which usually involves the application of additional ceilings and risk limitations because of higher grants to which insurers are exposed.

However, it should be noted that various American states prohibit insurance coverage involving punitive damages. The purpose of punitive damages would be rendered worthless if the producer could transfer the economic risk they represent to the insurer.<sup>49</sup>

However, recently the First Division of the Italian Supreme Court issued an interim decision (no. 9978, 16th of May 2016) about the possible enforcement in Italy of American Courts judgments ordering the payment of punitive damages. The Court stated: “*first of all, the Italian civil liability system already provides for remedies which also have a punishing function (e.g. article 96, paragraph 3, of the Italian Code of Civil Procedure), which in case of abuse of the civil trial obliges the losing party to pay an ‘equitably determined amount of money’.* Furthermore, doubts arise over the evolution of the notion of public order. In fact, this notion has been changing over the years and it has been identified with the wider concept of ‘international public order’. This evolution means that public order is no longer limited to the principles of the domestic legal system, but it has to be referred to the complex of fundamental rights which are shared and protected by the entire international community”.

Based on these arguments, punitive damages should not be considered contrary to public order under Italian law as long as the compensation awarded is not considered ‘anomalous’. Consequently, according to the

<sup>43</sup> Italian Supreme Court n.2652/1981 and Genoa Appeal Court 25 November 2004.

<sup>44</sup> Ibidem

<sup>45</sup> For example, Article 5 of ANIA reference police “*Excluded damages and costs*” establishes “*Insurance does not cover (...) damages, costs and any other charge the insured should pay as a punishment (“punitive or exemplary damages”).*”

<sup>46</sup> Italian Supreme Court n.1781/2012; Genoa Court 7 October 2010; Appeal Court of Trento-Bolzano 16 August 2008.

<sup>47</sup> Italian Supreme Court 19 January 2007 n.1183 “*The penalty and punitive function, typical of the compensation of punitive damages, is contrary to the fundamental principles of domestic law which assigns to civil liability only countervailing duties that preclude the victim to gain sums in excess of actual harm.*”

<sup>48</sup> Article 3, Territorial extension of 2009 reference ANIA Policy: “*The insurance applies to products, for which the Insured is a producer, put into circulation by the Insured in the territories of any country other than the US, Canada and Mexico and for wherever damage occurs ..*”

<sup>49</sup> JP Morgan Sec. Inc. v Vigilant Ins Co, 992 NE2d 1076 (New York 2013); Am Int’l Specialty Ins Co v Res-Car Inc, 529 F3d 649 (5th Cir Texas 2008); PPG Indus Inc v Transamerica Ins Co, 975 P2d 652 (California 1999); Regent Ins Co v Strausser Enter Inc, 902 F Supp 2d 628 (ED Pennsylvania 2012); Lira v Shelter Ins Co, 913 P2d 514 (Colorado 1996); Certain Underwriters at Lloyd’s of London v Pacific Southwest Airlines Inc, 786 F Supp 867, 872 (CD California 1992).

Court, foreign decisions condemning a party to pay for punitive damages could be enforceable in Italy.

One element, common to all of the policy models examined here, is the exclusion of other specific types of risk. Both the US and UK policy models and the Italian one exclude from insurance cover war risks (and assimilated risks) as well as risks arising from noise, pollution and nuclear activity.<sup>50</sup> This is worth mentioning as both the Italian and the American policies refer to the English model and in particular to clauses AVN 38B “*Nuclear Risks Exclusion Clause*” and AVN 46B “*Noise and Pollution and Other Perils Exclusion Clause*”.<sup>51</sup> Finally, a further specific exclusion that often arises in the Italian policies relates to terrorist acts identified in the “*U.S. Terrorism Risks Insurance Act of 2002*” (TRIA).<sup>52</sup>

To conclude these brief remarks on exclusions in civil liability for products in the aviation sector, it must be mentioned that a further, but fundamental element required is the “*clarity*” of the policy. The insurer must make sure that every contract exclusion is clear and unambiguous, for the reason that Courts - both foreign<sup>53</sup> and Italian - on the *interpretatio contra proferentem* principle laid down in Article 1370 of the Italian Civil Code interpret this type of clause in favour of the insured. It is evident that the clearer the wording of the exclusion, the less will be the possibility that it is interpreted in a manner unfavourable to the insurer, which by such clauses is intended to limit the risk assumed.

## 6. OTHER TYPES OF DAMAGE ELIGIBLE FOR COMPENSATION

In addition to personal injury and damage to third party property discussed in the previous chapters, the British and American policies, and as a result the Italian ones, have additional forms of damage eligible for compensation, albeit with different approaches.

A type of damage eligible for compensation, as already mentioned, is the cost of a *recall*, i.e. the withdrawal of defective products from the market. To this end, however, it is necessary to apply an agreement to extend the insurance coverage in this case, since it is not generally afforded under the general terms of the policy. In the American ABC policy, this extension includes the

<sup>50</sup> ABC, International Products Liability Policy - War, Hijacking and other Perils Exclusion Clause (Aviation) and Articles 6 and 7 of the 2009 ANIAS reference policy cit.

<sup>51</sup> ABC, International Products Liability Policy.

<sup>52</sup> Clause RcProd.Aer n.2 – 2009 ANIA reference policy cit.

<sup>53</sup> See *Economy Premier Assurance Co. v. Western National Mutual Insurance Co.*, A13-0621 Minn. App. 11/25/2013.

reimbursement of a percentage of the costs incurred by the insured for the withdrawal of the product as a result of a measure of authority.<sup>54</sup> The AVN 98 model uses similar terms, providing for a 90% refund of the costs incurred by or supported on behalf of the insured.<sup>55</sup> In Italian insurance practice, however, this type of risk is generally not insured, because the costs of withdrawal of products from the market tend to be very high and it is preferable to exclude them from coverage.

In addition, even in the case of coverage of damage from *grounding* in the general conditions referred to above, there are specific exclusions. With reference to insurance for aircraft stopped by legal request (what is known as *grounding*) the AVN policy 98 provides for the following exclusions: “*a) loss of use of any Aircraft occurring during maintenance, routine overhaul or alteration, or whilst being modified for purposes other than those relating to grounding; b) loss of use of any Military Aircraft; c) loss of use of any Space Vehicle, or Satellite Launch Vehicle; d) any Aircraft after it is designated by the Prime Manufacturer or required by the direction of the Civil Aviation Authority of the United Kingdom (CAA) or the Federal Aviation Administration of the United States of America (FAA), or any similar civil aviation authority to be removed from all flight operations to its certificate of airworthiness being withdrawn by reason of the Aircraft’s safe operational life having been reached or exceeded.*”<sup>56</sup>

The US and UK policies provide for the full compensation of legal fees incurred by the insured, in contrast to Italian insurance practice, where such fees are refunded up to a quarter of the limit, in accordance with the provisions of the third subparagraph of Article 1917 of the Civil Code. On the other hand, the same Article 1917 specifies that in the event that a sum exceeding the insured capital is due to the injured party, the legal costs are split between insurer and insured in proportion to their interest. It clearly appears that in the US and UK system the insurer feels exposed to legal costs, which are not quantified at the time of conclusion

<sup>54</sup> „*This policy is extended to reimburse the Insured for 90% of the Expenses incurred by or on behalf of the Insured for the recall of Aircraft Products under a Mandatory Order of the Federal Aviation Administration of the United States of America (FAA), the European Aviation Safety Agency (EASA), or any similar Civil Airworthiness Authority, issued during the Policy Period because of an existing, alleged or suspected like defect, fault or condition in an Aircraft Product.*” ABC - PRODUCTS LIABILITY POLICY – AIRCRAFT PRODUCTS RECALL EXTENSION.

<sup>55</sup> AVN 98, Aviation Products, Grounding and Other Aviation Liabilities Insurance, Aviation Products Recall Extension.

<sup>56</sup> AVN 98, Aviation Products, Grounding and Other Aviation Liabilities Insurance, Section One, Coverage B, Exclusions Applicable to Coverage B.

of the contract, nor does the insurer benefit from mechanisms such as those of Article 1917 of the Italian Civil Code, with the result that the absence of such a mechanism could lead to a bitter surprise.

In the Italian system, recent case law has established that, regarding insurance for civil liability, the defence of the insured, in the proceedings started by the damaged party, is also performed in the interest of the insurer,<sup>57</sup> aiming to make an objective and impartial verification of the obligation to compensate. For this reason, even where the ruling does not recognise any compensation to the claimant, the insurer is required to bear the legal costs of the insured, within the limits laid down by Article 1917, subparagraph 3, of the Civil Code.<sup>58</sup>

## 7. AVIATION PRODUCT LIABILITY: THE PARTIES TO THE INSURANCE CONTRACT

The insured is usually the manufacturer of the goods for the aviation industry. The use of such products can cause damage to third parties for which responsibility can be attributed to the manufacturer. Third parties are therefore eligible for compensation for damage resulting from defects in the insured's products and/or third parties' acting on behalf of the same, as a result of errors or negligence relating to the installation, mounting, regeneration, repair, or maintenance of products designed and/or manufactured by the insured and/or by others.

It may happen that this type of liability may also affect the distributors of aeronautical products. In a case related to a plane crash which caused the death of the owner and the pilot of an ultra-light aircraft, for example, the Court of Appeal of Barcelona, applying Spanish law on liability for defective products, recognized the responsibility of the aircraft importer. In particular, the Court attributed to the importer the role of producer provided for in Directive 85/374/EC, even though it had not produced the aircraft, but had only imported it from a country (Poland) that at the time of import was not yet member of the Union and thus its producers were not subject to discipline under the Directive.<sup>59</sup> The importer is therefore subject to

the same liability as the producer in order to protect consumers from the damage suffered.

Insurance coverage is also usually extended to the subsidiaries that hold the position of the insured's subcontractors against an increase in the insurance premium. The *application form* provided by the American ABC, for example, asks the insured to declare the presence of subsidiaries and the type of products manufactured or sold by them.<sup>60</sup>

As regards maintenance activities, Italian regulation requires product civil liability coverage for maintenance or repair of the aircraft after the return of the same to the operator. This means that the insurance practice takes into account the complexity of the sector in question, where the producer is accompanied by the figure of the aircraft maintenance operator. Maintenance activities may also be carried out by the same manufacturer that contractually agrees to provide this service to the purchaser of its aircraft, with the result that the policy must also cover product liability for defective goods relating to the exercise of such activities.

Similar to what happens in Italian insurance practice, the ABC model includes a special policy for the maintenance and repair of aircraft,<sup>61</sup> which provides coverage substantially identical to that of a general product liability policy. The object of this insurance coverage concerns the responsibility that the maintenance company may incur regarding the regularity of the maintenance performed on aircraft, engines and components for the period they are available to it. This type of coverage provides a number of exemptions for cases where the harmful event is due to the maintenance company or its employees or assistants, but it is in force for the intervention of a third party in the maintenance phase, such as an input by the pilot or other employees of the carrier.

## 8. ACTIONS AGAINST THE INSURER

Another relevant aspect of the insured's action against its insurer is that concerning the moment in which such action may be brought. In British and American policies constitute conditions for bringing an

<sup>57</sup> As better explained further on, in some judicial system the injured third party may exercise direct action against the insurer.

<sup>58</sup> Italian Supreme Court n.19176/2014

<sup>59</sup> "Porque, según el artículo 4, apartado 2 de la Ley 22/1994 (en lo sucesivo, LRCPD), a los efectos de lo en ella previsto, "se entiende por importador quien, en el ejercicio de su actividad empresarial, introduce un producto en la Unión Europea para su venta, arrendamiento, arrendamiento financiero o cualquier otra forma de distribución" (régimen que, en idénticos términos, recoge

en la actualidad el artículo 138 LCU). Concepto en el que encaja Aero Brettsa SL teniendo en cuenta que en la fecha de la discutida compra - única que interesa a los fines analizados - Polonia no formaba parte de la UE." (Audiencia Provincial de Barcelona, Sección 16, sentencia n. 452/2013).

<sup>60</sup> ABC - APPLICATION FOR AIRCRAFT PRODUCTS LIABILITY INSURANCE.

<sup>61</sup> ABC AIRCRAFT SERVICERS AND REPAIRERS PRODUCTS AND PUBLIC LIABILITY POLICY

action against the insurer by the insured require that the former has fulfilled all the obligations set out in the policy and that the existence of liability and the amount of compensation have been determined either by a final judgment, or by an arbitral award or by an agreement signed by the insured, the insurer and the injured third party.<sup>62</sup>

This does not happen in the Italian judicial system, where the insured's right to be kept harm by the insurer for the sums to be paid to the injured party does not require, for its enforceability, a contractual or judicial finding of the insured's liability and of the total amount of compensation. It is, rather, necessary that payment to the damaged party be executed under a title that, while not definitive and not containing that finding, is nevertheless capable of conferring to the payment the character of dutifulness provided by the Article 1917 of the Italian Civil Code.<sup>63</sup>

Regarding the actions that can be carried out by the insured against the insurer (when the insurer refuses to pay compensation), it is worth highlighting that the application may contain a request for the company's conviction on grounds of mismanagement. This occurs when the civil liability insurer, in execution of the dispute management pact reached with the policyholder, assumes a procedural and extra-procedural conduct that is dilatory, or indolent, in any case not characterized by the diligent care of common interests. According to Supreme Court case law, non-compliance with due diligence in the execution of the management agreement of the dispute involves the liability of the insurer toward the insured, even beyond the limit of the insurance ceiling.<sup>64</sup>

<sup>62</sup> ABC, International Products Liability Policy, Condition 5; AVN 98, General Condition J.

<sup>63</sup> See Italian Supreme Court 30 December 2011 n.30795 „In terms of civil liability insurance, the insured's right to claim against the insurer, pursuant to Article 1917 of the Civil Code, for the sums paid to the injured third party, does not require for its enforceability a finding (contractual or judicial) of the insured's liability and of the total amount of compensation, but it postulates that the payment to the third party be executed under a title that, while not definitive and not containing that finding, is nevertheless capable of conferring to the payment the character of dutiful payment provided by Article 1917 of Civil Code”.

<sup>64</sup> On this point the Supreme Court stated: „In order to configure a responsibility that goes beyond the limits of the ceiling for 'mismanagement' of the insurer's liability, it is not necessary that he fails to pay the compensation despite the fact that the insured's liability to the injured third party has been established and quantified by a final judgment or as a result of negotiated settlement, but it is enough that there has been the above omission despite the insured's liability and the fact that the amount of damages was determined by the insurer in the same way as

With reference to the actions that can be carried out by the insurer, the first deserving mention is the action of recourse against the insured. Italian policy entails, for example, the insurer's right of recourse against the insured for damage derived from unfulfilled obligations concerning judicial cooperation.

In addition, the insurer, who has paid compensation to the insured-injured party has the right of subrogation, pursuant to Article 1916 of the Italian Civil Code, in the rights of the latter toward the third party for compensation of the funds paid. The third subparagraph of Article 1916 of the Civil Code provides “the insured is responsible to the insurer of the damage caused to the right of subrogation.” Very often conduct that would determine the prejudice foreseen by the third subparagraph of Article 1916 of the Civil Code is contained in precise policy terms, which in the event of inaction or omission by the insured may provide for a limit to the compensation or part thereof; however, as already noted this cannot cause the forfeiture of her right to compensation. Therefore, the prejudice of the recourse action determines the insured's obligation to compensate the damage suffered by the insurer.<sup>65</sup>

British and US policies also provide for the option of the insurer, as a result of the payment of compensation, for subrogation of the rights that the insured has against third parties. For this reason there are specific safeguard obligations of the right of subrogation and cooperation obligations in the judicial field.<sup>66</sup>

## 9. DIRECT ACTION OF THE INJURED THIRD PARTY AGAINST THE INSURER

In some jurisdictions (for example in France and Belgium) the injured party may act directly against the civil liability insurer.<sup>67</sup> That possibility is not permitted

ordinary diligence and the principle of good faith „(Sup.Court 13 May 2008 n. 11908).

<sup>65</sup> Genoa Appeal Court 30 November 1999, G.I.C. c. SIAT, Assitalia and Eagle Star, confirmed by the Supreme Court n. 9649/2004 and again in Genoa Court case law 17 April 1990, US and UKwwo Ltd C. Italia Assicurazioni.

<sup>66</sup> AVN 98, General Condition Applicable to All Sections K, ABC Condition 9.

<sup>67</sup> On the other hand, regarding this matter it is worth recalling that when the harmful event derives from a defect in a product and displays international elements, the 1973 Hague Convention may be applicable. As laid down in the Convention's Explanatory Report, this is concerned «exclusively with the law governing products liability in situations where the person claimed to be liable did not transfer the product, or the right to use the product, to the person suffering damage. The Convention does not deal with judicial jurisdiction or recognition or enforcement

in Italy<sup>68</sup> except in a few cases; an example is given by Article 1015 of the Italian Navigation Code where a direct action of the third party damaged on the surface is envisaged against the insurer of the party at fault (i.e. the operator of the aircraft).

In order to assess whether the injured party may take direct action against the insurer, the law applicable to non-contractual obligation should be considered. It is worth recalling that the Court of Justice has recently ruled that, in order to identify the applicable law, the identification mechanisms tracked by the so called Rome II Regulation have to be considered, regardless of the law chosen by the parties in the insurance contract.

The European Court stated: “Article 18 of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (“Rome II”), must be interpreted as meaning that, in a situation such as that in the main proceedings, it permits the injured party to exercise direct action against the insurer of the person liable to pay compensation, if such action is required by law applicable to the non-contractual obligation, regardless of the provisions of law applicable to the insurance contract chosen by the parties in the contract”.<sup>69</sup>

However, it should be recalled that - as noted by the European Court - Article 18 only allows the introduction of a direct action in the event that the law applicable to the non-contractual action so permits. As noted by the Advocate General in his conclusion, that provision does not constitute a conflict of laws considering the substantive law applicable for the establishment of the contractual obligation of the

of foreign judgments rendered in a product liability case». In other words, the convention only establishes the common rules on the applicable law. It is on this basis that the relatives of the Überlingen accident victims built their action against the manufacturer and the designer of TCAS that equipped the crashed aircraft.

<sup>68</sup> Aosta Court 15 October 2015: „The injured party that in the original application has formulated its claims for damages against the (only) injuring party, cannot later also ask for condemnation of the insurance company for civil liability of the tortfeasor, being an extension of the non-permitted application. Indeed, the insurance against civil liability, pursuant to art. 1917 of the Civil Code, cannot be included among the contracts in favour of third party since, due to the contract, there is no direct and immediate legal relationship between the injured person and the insurer, the insurer's obligation for payment being separate and independent from the compensation obligation which the insured is required to fulfil in relation to the injured party, resulting in the absence of this direct action against the insurer.”

<sup>69</sup> See Case C-240/14 Ruling of the Court (First Section) of 9 September 2015 (application for a Court ruling presented by the LandesgerichtKorneuburg – Austria) Eleonore Pruller-frey/Norbert Brodник, Axa Versicherung A.G.

insurer or insured by virtue of an insurance contract.<sup>70</sup> The liability of the insurer, therefore, continues to be subject to the jurisdiction chosen by the parties, despite the fact that the injured person can take direct action.

With regard to direct action, the English Courts, too, have had occasion to say that, if permitted by the applicable law, it may be brought by the injured party against the insurer of the injuring party in the country where the first is domiciled.<sup>71</sup> This is pursuant to Article 9 of Regulation (EC) No. 44/2001, now replaced by Regulation (EU) No. 1215/2012. The above provision, which refers to disputes relating to insurance contracts, according to the English Court should be interpreted broadly so as to include also the direct actions of the injured towards the insurance company. The interpretation of the English Court is based on a number of considerations, paramount among which is the fact that preventing the damaged party from exercising direct action in the country of his domicile would deprive him of the protection that he must be guaranteed as a ‘weak party’.<sup>72</sup>

<sup>70</sup> “Article 18 of Rome II Regulation does not constitute a rule of conflict of laws in the light of the substantive law applicable to the determination of the obligation owed to the insurer or the person responsible. This article has the sole purpose of determining the law applicable to the question, whether the victim may act directly against the insurer and not to the scope of the latter's obligations or of the person responsible. „(Advocate General's Maciej Szpunar, presented May 20, 2015 in relation to Case C 240/14).

<sup>71</sup> See *Keefe v Mapfre Mutualidad Compania De Seguros Y Reaseguros SA and another* [2015] EWCA Civ 598; [2015] WLR (D) 265.

<sup>72</sup> “Recital 13 in the preamble to the Regulation provides that in relation to insurance the weaker party should be protected by rules of jurisdiction more favorable to his interests than those provided under the general rules. That principle is reflected in Article 9(1) (b), under which the policyholder, the insured or a beneficiary may sue the insurer in the courts of the place where he is domiciled, rather than being required to sue in the courts of the place where the insurer is domiciled. An injured person who has a direct right of action against the insurer is in broadly the same position as the policyholder or insured and is therefore to be regarded as a weaker party for the purposes of his claim against the insurer. To enable him to sue only in the place where the insurer, the policyholder, the insured or a beneficiary is domiciled would be to ignore the fact that the three latter parties can all sue in the courts of the places where they are themselves domiciled and would be contrary to the spirit of the Regulation (paragraph 28). Therefore, an injured party should also be entitled to sue in the courts of the place of his own domicile and Article 11(2), which provides that Article 9 applies to actions brought by an injured party directly against the insurer, requires Article 9(1)(b) to be interpreted as if the word “injured party” were added to the categories of those who are entitled to sue the insurer in the courts of the place of their own domicile. The only condition which Article 11(2) imposes on the right of an injured person to sue the insurer in the place of his own domicile is that a direct action must be permitted under the national law (paragraph

## 10. COVERAGE OF PRODUCT LIABILITY AND AIRCRAFT LEASING AGREEMENTS

In aircraft leasing contracts, in which there is a clear distinction between the entity that provides the aircraft (lessor) and the one who uses it (lessee), the clauses relating to insurance cover - under which the company using the aircraft (lessee) enters into all contracts of insurance imposed by the contract - provide coverage, among others, for third party liability and against damage to the aircraft, including, in some cases, product liability coverage.<sup>73</sup> The provision is usually spelled out as follows: “*Lessee shall maintain in effect comprehensive third party aircraft liability insurance against bodily injury and property damage losses arising from ground, flight and taxing exposures, including, but not limited to, passenger legal liability, cargo liability and products liability.*” By this clause the lessee has to take out an insurance policy to cover also the product liability. Then, as a rule a constraint clause is added to the insurance contract by express provision of the leasing contract, whereby in the event of any damage compensation has to be paid by the insurer to the lessor. In fact, the latter is the insured party, who bears the risk of loss of the product (Masutti, Scaglione, 2013, 200).

In the US and UK insurance practice this function is performed by *apolicy endorsement*. However, the *endorsement* model that regards the coverage in relation to *leasing* contracts does not include product liability. The Airline finance/lease contract endorsement AVN 67C<sup>74</sup> says: “*This Endorsement does not provide coverage*

30.” (Keefe v Mapfre Mutualidad Compania De Seguros Y Reaseguros SA and another [2015] EWCA Civ 598; [2015] WLR (D) 265).

<sup>73</sup> What is known as *Airline Finance / Lease Contract Endorsement AVN 67B*, introduced in 1993 as a revision of the previous AVN 67A, tried to introduce an international standard on financial leasing of aircraft, so as to overcome the lack of uniformity in the insurance sector related to aircraft leasing.

<sup>74</sup> The AVN67 C is finalised to guarantee continuation of the insurances in respect of the interests of the banks and/or lessors for a maximum of thirty days following expiry or earlier termination of the lease provided that the airline remains obliged to insure the aircraft. The Clause confirms that Hull War Risk Cover may be cancelled on seven days’ notice, but this notice period may no longer be curtailed by the insurers to “such lesser period as is customarily available”, as is the case with the previous AVN67 B. It clarifies that failure by the airline to redeliver the aircraft on expiry or earlier termination of the lease will not constitute an insurable risk of theft of the aircraft. It provides the extension of liability cover made available to the financiers to include claims brought by pilots and crew employed by the airline, as if they were passengers. Finally, AVN67 C clarifies that there is no liability coverage for the financiers with respect to

*for any contract party with respect to claims arising out of its legal liability as manufacturer of, or performer of maintenance, repairs or other operational activities on, the Equipment*”.<sup>75</sup> In order to ensure, in any case, compliance with the above provisions on product liability, the aircraft leasing contracts provide for a final clause which is normally expressed as follows: “*Notwithstanding anything to the contrary contained in this Article, Lessor shall accept the terms of AVN 67B (“Airline Finance / Lease Contract endorsement”) where such endorsement is contrary to the terms of this Lease as long as such endorsement is customary in the London international insurance markets for commercial passenger airlines*”.<sup>76</sup> Before the introduction of the update in question, some rulings, according to a global interpretation of the relevant policy, have recognized that “*The Policy must be read by itself and the exclusions reasonably interpreted do not exclude negligent entrustment, repair or training, and do not exclude product liability*”.

## 11. CONCLUSIONS

The complexity of the insurance liability from defective aeronautical product and the high-risk level of the air transport sector imply a highly specialized insurance market. This market is characterized by principles common to the US, UK and Italian insurance practices.

The market in which insurance companies operate is characterized by continuous operating improvements and technical innovations that have allowed a reduction of aviation accidents. However, we have seen that the technologies bring new vulnerabilities due to new devices, as well as by the increasing regulation of the sector. This led to the configuration of further assumptions of liability and reimbursable damage.

Europe is now facing a new challenge with the initiative of the Single European Sky (SES-SESAR) aiming to improve the integration and efficiency of air traffic management, step up the air navigation services and increase safety. Therefore, the insurance practice should be re-evaluated in the light of SES and

claims arising out of their legal liability as “manufacturer of, or performer of maintenance, repairs or other operational activities in respect of, the Equipment”.

<sup>75</sup> Article 2, par. 3, AIRLINE FINANCE/LEASE CONTRACT ENDORSEMENT, AVN 67C.

See *State Farm Fire & Casualty Co. v. Keenan*, Civ. Nos. 69854, B008269, B008131, Court of Appeal of California, Second Appellate District, Division Four, 171 Cal. App. 3d 1; 216 Cal. Rptr. 318; 1985 Cal. App. LEXIS 2374, July 23, 1985.

the introduction of new technologies. Among the risk factors that the insurance market will have to take into account there is certainly the human factor, which is still a major cause of aeronautical accidents, including those due to product liability, at least with regard to the design and installation of aircraft components.

Therefore, it will be interesting to examine whether the development of SES will contribute not only to prevent aircraft accidents but also to develop new safeguards to protect the aviation sector, including the insurance services, allowing insurers to offer competitive policies appropriate for the future technological changes.

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