RULES APPLICABLE TO NAVIGATION ACCIDENTS

25TH JANUARY 2007

Generally, navigation accidents are governed by the Italian Navigation Code.

Article 1 of the Navigation Code provides that

> "*With reference to nautical, internal and flight navigation, this code, the laws, the regulations and the related usage apply. In the absence of specific provisions of the Italian Code of Navigation and in the event such provisions are not applicable by way of analogy, the rules of general civil law apply*".

In other words, Article 1 of the Navigation Code explicitly provides that in the absence of a specific provision of the Navigation Code addressing the circumstances of an aviation accident, the accident will be governed by the Italian Civil Code[1].

Article 2050 of the Italian Civil Code ("Responsibility for carrying out dangerous activities") provides that

> "*Anyone who causes damage to others while carrying out an activity that is hazardous either because of its nature or because of the means utilized to carry it out, is required to compensate said people for the damages that they have sustained unless the person who caused the damage can prove that he/she adopted all necessary precautions to avoid the damage*".

This provision has been used by the Italian Courts to establish a non-fault based liability system (in particular with reference to product liability).

Italian Courts generally consider an activity to be hazardous when

- it is so defined by laws on public safety and/or by other special laws, or
- it is so inherently or, in view of the characteristics of the means used to carry out the said activity, it is likely to cause harm or damage.

The Italian Supreme Court has constantly maintained that air navigation cannot be considered *per se* a dangerous activity, thereby excluding the applicability of Article 2050 of the Italian Civil Code.

In particular, the Italian Supreme Court (Supreme Court no. 6175/1990; Supreme Court no. 2575/1964) has held that

a) as air navigation, and any damaging consequences arising there from, is so heavily regulated by the Code of Navigation, air navigation cannot be considered as falling within the category of hazardous activities. In other words, the lawmaker does not consider air navigation to be a hazardous activity;

b) furthermore, air navigation cannot, by its very nature or, in view of the characteristics of the means used to carry it out, or the likelihood of causing harm, be defined as objectively hazardous if it is taken into account that the activity is carried out using a common means of transport that is viewed as posing a lower level of risk compared to other means, in abstract and in general.

Article 2050 of the Italian Civil Code was applied for the first time to air navigation matters by Supreme Court decision no. 11234/1997. This stated that the operation of an aircraft is not *per se* a dangerous activity when carried out in normal conditions. However, it is a hazardous activity governed by Article 2050 if carried out in irregular or unsafe conditions:

> "*… the civil code provision set forth in article 2050, is normally not applicable when the air navigation activity is carried out in normal conditions such as in compliance with flight plans and safety conditions, but it is applicable and complements special laws, when carried out in irregular or dangerous conditions*".

The Supreme Court recently reiterated the applicability of Article 2050 to air navigation on the same basis as set out above:

[1] There is no provision in the Navigation Code addressing the liability of a carrier towards other persons who are not passengers in the carrier's aircraft. The leading case is Supreme Court no. 1855/1989, in which the court affirmed the liability of an air carrier for harm suffered by third parties as a consequence of an air accident, on the basis of Article 2043 of the Italian Civil Code.

> *"This Court holds that air navigation cannot be considered per se a dangerous activity, thereby excluding applicability of Art. 20050 of the Italian Civil Code, however, in actual fact, this element of dangerousness arises each time the said activity is not carried out according to its normal and specific conditions, that is, not in compliance with flight plans, in conditions of safety, in normal atmospheric conditions; Article 2050 would be therefore applicable whenever air navigation fails to be carried out in conditions of safety or when the conditions in which it is carried out are irregular"* (Supreme Court decision no. 10551/2002).

The Supreme Court has made it clear that the level of danger does not refer to the conduct of the agent (that is, the aircraft operator) but to the objective conditions in which the navigation was carried out.

With reference to the burden of proof, this rests with the party who has suffered damage (the 'damaged party') and who claims that the activity is hazardous. This party must therefore give evidence of the specific circumstances and specific characteristics that made that particular incident of air navigation, which is generally considered non-hazardous, hazardous. In addition, the damaged party must prove the causal link between the hazardous activity and the damages suffered.

If the damaged party provides sufficient proof of the dangerousness of the activity and of the causal link between the hazardous activity and the damage suffered, the operator (the 'damaging party') must prove that it had in fact taken all necessary measures to prevent the damage.

If the damaged party does not meet the required standard of evidence, the damaging party will not be required to rebut evidence of his liability, since there is no liability under Article 2050 of the Italian Civil Code.

It has to be pointed out that

1) Article 2050 of the Italian Civil Code is applicable both where the tortfeasor (the damaging party) personally carries out the hazardous activity and where the said activity is carried out through a third party under the tortfeasor's control (Supreme Court no. 294/1981);
2) when the hazardous activity is performed by a corporate entity (e.g. an air carrier), there is no reason to exclude the concurrence of liability of that entity under Article 2050 of the Italian Civil Code with the liability of the individual (e.g. a pilot) who actually carried out the activity. This gives raise to joint and several liability pursuant to Article 2055[2] of the Italian Civil Code. This however concerns only the external relationship between the damaged and the damaging parties, while the internal relationship between the tortfeasors is governed by different rules concerning contractual liability or liability in tort pursuant to Article 2043[3] of the Italian Civil Code (or pursuant to the special provisions of the Italian Navigation Code).

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This note is written as a general guide only and should not be relied upon as a substitute for specific legal advice .
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[2] Article 2055 of the Italian Civil Code: "Joint and several liability. *If a tort is committed by more than one person, then all the persons liable are jointly and severally liable for the damages caused by that tortious act. The person who compensated the damages is entitled to act against the other liable parties, in the measure determined on the basis of the degree of their fault and of the related consequences. In case of doubt, the faults of each wrongdoers are supposed to have the same degree*".

[3] Article 2043 of the Italian Civil Code: "Compensation for unlawful damage. *Any wilful or negligent conduct, causing an unjust harm to third parties, obliges the tortfeasor to compensate the damages*". Article 2043 is the basic provision establishing the system of liability in tort. This liability is fault based and requires plaintiffs to prove that the unlawful damage was caused by wilful and negligent action.