

THE ITALIAN REFORM OF TRANSPORT AND FREIGHT FORWARDING CONTRACTS

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INTRODUCTION

On 14 January 2022, the reform of the Italian Civil Code (ICC) concerning transport and freight forwarding came into force. The reform was introduced by Article 30-bis of Law Decree no. 152 of 6 November 2021 (containing, inter alia, urgent provisions for the implementation of the National Recovery and Resilience Plan), as added by conversion Law no. 233 of 29 December 2021.

The main changes introduced by the reform are related to the carrier's limitation of liability for loss or damage to transported goods pursuant to Article 1696 ICC, the definition of "freight forwarder," and some of the main obligations of the freight forwarding contract.

THE CARRIER'S LIABILITY FOR LOSS OR DAMAGE TO TRANSPORTED GOODS

The first matter addressed by the reform is the transport contract and, in particular, the carrier's liability for loss or damage to transported goods.

As known, paragraph 2 of Article 1696 ICC, introduced by Legislative Decree no. 286/2005 concerning road transport of goods, limits the carrier's liability for damages to €1 for kilogram of gross weight of lost or damaged goods in case of domestic road transports and to the amount provided by paragraph 3 of Article 23 of the CMR Convention (i.e., 8.33 SDR per kilogram of gross weight short) in case of international road transports. The reform expressly introduced also a reference to air, maritime, river, and rail transports, clarifying that these kinds of transports are subject to the limitations of liability provided by the applicable international conventions and national laws to the extent the related requirements are met.

The main change of the reform to Article 1696 ICC is the introduction of a limitation of the carrier's liability also in case of multimodal transports. Paragraph 3 of Article 1696 ICC now provides that, if the transport is performed by different means of transport and it is not possible to understand where the damage occurred, the carrier's liability for damages cannot exceed €1 per kilo of gross weight of lost or damaged goods in case of domestic transports and €3 per kilo of gross weight of lost or damaged goods in case of international transports. The possibility to clearly assess the carrier's liability should now simplify the risk assessment of transport services.

In any case, the provision of Article 1696 ICC according to which the carrier may not invoke any limitation of liability in case of gross negligence or willful misconduct remains unchanged.

According to a settled caselaw, the reform also amended Article 1741 ICC, extending the application of the limitation of liability for damages under Article 1696 ICC also to freight forwarders acting as carriers.

THE FREIGHT FORWARDING CONTRACT: THE RELATIONS BETWEEN SHIPPER AND FREIGHT FORWARDER

The reform also addressed freight forwarding contracts.

Article 1737 ICC now specifies that the freight forwarding contract is an agency contract. According to this provision, the freight forwarder may enter into transport contracts not only in his own name and on behalf of the shipper, but also, if provided with powers of representation, in the name and on behalf of the shipper. In accordance with the nature of the freight forwarding contract as an agency, Article 1739 ICC now properly defines the freight forwarder's counterpart as "shipper."

The new provision may have a significant impact on demurrage and detention disputes: By entering into contracts in the name and on behalf of the shipper, the freight forwarder should no longer be charged with liability in case of claims by carriers for failure of the shipper to comply with its contractual obligations.

Article 1737 ICC also specifies that the freight forwarder may enter into several transport contracts with one or more carriers and carry out ancillary operations: The new provision is in line with industry practices, where freight forwarding contracts are intended to cover several transport contracts.

The reform has also modified Article 1739 ICC, concerning freight forwarder's obligations, and deleted paragraph 3 of said provision, according to which the freight forwarder had to credit any premiums, allowances, and tariff benefits to the shipper. This provision was already usually derogated by general terms and conditions of freight forwarding contracts. The reform also replaced the freight forwarder's obligation to abide by the shipper's instructions as route, means and methods of transport, and the obligation to pursue the shipper's best interests with a more generic obligation to follow the shipper's instructions. The freight forwarder's duty to insure handled goods has been repealed too, and it is now limited to the case the shipper makes a specific request to do so.

RIGHT OF RETENTION AND SPECIAL LIEN OF THE FREIGHT FORWARDER

The reform has partially modified paragraph 1 of Article 2761 ICC and extended to the freight forwarder the special lien on transported goods, as long as they remain with the freight forwarder, as regards the credits arising from the freight forwarding contract and those for tax expenses paid by the freight forwarder. This right was previously provided only in favor of the carrier.

According to a settled caselaw, the reform has also specified in paragraph 1 of Article 2761 ICC that the carrier and the freight forwarder may also exercise such lien on goods related to other transport or freight forwarding contracts than the one from which the claim has arisen to the extent such contracts are part to the same contract for periodic or continuous services.

FAILURE TO COLLECT GOODS AT DESTINATION: OPEN ISSUES

The Italian legislature did not accept the proposed amendments to Article 1740 ICC, which would have clarified that the parties of a freight forwarding contract are free to determine the fees due under the contract, thus renouncing the assessment of such fees by professional tariffs.

The proposed changes to Article 1740 ICC also charged on the shipper any risks of failure of the goods being collected at destination. The shipper would have been liable towards the freight forwarder for the payment of freight costs and other expenses sustained by the freight forwarder in the performance of the contract, including

costs arising from the misbehavior of third parties, regardless any existing agreements between such third parties and the shipper. The reformed Article 1740 ICC could have also clarified that the freight forwarder is not liable toward the shipper in case of failure by the third parties entrusted with the performance of the transport, including carriers, to comply with their contractual obligations.

There are thus a few issues that remain open still after the reform, especially as regards the allocation of risks of third-party misbehavior. Costs for storing goods at destinations not covered by the shipper can be a significant burden that the reform may have regulated in favor of the freight forwarder.

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