

# LOSS OF THE CARRIER'S LIMITATION OF LIABILITY UNDER THE HAGUE-VISBY RULES AND THE WARSAW CONVENTION: COMMON LAW AND CIVIL LAW VIEWS

Marel Katsivela\*

This article provides a comparative analysis of selected issues arising under Article 4.5.e of the Hague-Visby Rules (the Visby Rules)<sup>1</sup> and Article 25 of the 1929 Warsaw Convention<sup>2</sup> as amended by the Hague Protocol (the Hague Protocol).<sup>3</sup> These provisions focus on the loss of the international ocean and air carrier's right to limitation of liability respectively. The following laws and case law giving effect to the abovementioned provisions will be considered: English, Australian, Canadian (Common Law), French and Greek (Civil Law).<sup>4</sup> On certain issues, reference will also be made to the laws and case law of Italy, Germany, China, Japan (Civil Law), and Hong Kong (Common Law).<sup>5</sup> All these jurisdictions constitute important seafaring and — most of them — air faring nations.

Article 4.5.e of the Visby Rules and Article 25 of the Hague Protocol provide as follows (emphasis added):

**Article 4.5.e of the Visby Rules:** Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph *if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.*

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\* Assistant Professor, University of Ottawa, Faculty of Law, *Programme de Common Law en Français*. I would like to deeply thank the Foundation for Legal Research for sponsoring this study, my research assistants and all the law professionals who have guided me in completing it.

<sup>1</sup> The Hague-Visby Rules refer to the Hague Rules as amended by two Protocols. The first Protocol, *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* (commonly known as the Visby Protocol 1968), was adopted at Brussels on 23 February 1968 and entered into force on 23 June 1977. The second protocol, *Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (25 August 1924, as Amended by the Protocol of 23 February 1968)* (commonly known as the SDR Visby Protocol 1979), was adopted at Brussels on 21 December 1979 and entered into force on 14 February 1984.

<sup>2</sup> *Convention for the Unification of Certain Rules Relating to International Transportation by Air*, 12 October 1929, ICAO Doc 9201.

<sup>3</sup> *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Transportation by Air*, 28 September 1955, ICAO Doc 7632.

Some information contained in the present article (especially concerning the Civil Law jurisdictions of France, Italy, Germany and Greece) first appeared in another of my articles: Katsivela, M, 'Ocean Carrier's Loss of Liability Limitation – Interpretation of Article IV.5(e) of the Hague-Visby Rules in French, Greek, Italian and German Law' (2012) 18(1) *JIML* 1, 21-38.

<sup>4</sup> Although most Canadian provinces follow the Common Law tradition, the province of Québec is a Civil Law province. Cases that have mostly commented on the mentioned provisions, however, are federal cases and cases from Common Law provinces. These will be the main focus of the present study. The United Kingdom, Hong Kong, Australia, Canada, France, Italy, Germany, Greece, Japan and China have applied the Hague Protocol. ICAO, *Contracting Parties to the Warsaw Convention as Amended by the Hague Protocol*, <<http://legacy.icao.int/icao/en/leb/wc-hp.pdf>>. Moreover, these countries (for China and Japan see below, n 5) have either ratified/acceded to the Visby Rules or incorporated them into domestic enactments. For some of these (for example, Greece, France, Italy, the UK and Hong Kong, which have ratified the rules) see CMI, *CMI Yearbook — Status of Ratifications to Maritime Conventions*, (2009), <<http://comitemaritime.org/Uploads/pdf/CMI-SRMC.pdf>>. For Australia see Griggs, P, Williams, R, and Farr, J, *Limitation of Liability for Maritime Claims* (4<sup>th</sup> Ed, 2005), 169, 177, 178; White, M, *Australian Maritime Law* (2<sup>nd</sup> Ed, 2000), 68-69, and the *Carriage of Goods by Sea Act 1991* (Cth), <<http://www.comlaw.gov.au/Details/C2011C00070>>, which gives effect to the Visby Rules but contains some provisions of the Hamburg Rules. Part 5 of the Canadian *Marine Liability Act* (formerly known as the *Carriage of Goods by Water Act*) implements the Visby Rules: see <<http://laws-lois.justice.gc.ca/eng/acts/M-0.7/page-11.html>>. Both the Australian and the Canadian Acts reproduce the Visby Rules provision under examination.

<sup>5</sup> Germany did not sign the Visby Rules, which were later incorporated into the General German Commercial Code: see Ashton, R, 'A Comparison of the Legal Regulation of the Carriage of Goods by Sea under Bills of Lading in Australia and Germany' (1999) 14(2) *MLANZ Journal*, 24, <[https://maritimejournal.murdoch.edu.au/archive/vol\\_14/1999part2ashton.pdf](https://maritimejournal.murdoch.edu.au/archive/vol_14/1999part2ashton.pdf)>. China has not signed the Hague, Visby or the Hamburg Rules. However, the *Maritime Code of the People's Republic of China* (CMC), which entered into force in 1993, adopts various basic rules contained in the Hague, Visby and Hamburg Rules. Zhang Lixing, 'Recent Maritime Legislation and Practice in the People's Republic of China' (1993-1994) 6 *USF Mar LJ*, 273, 281, 284. Article 59 of the CMC is similar to art 4.5.e of the Visby Rules. The CMC can be found at <<http://www.cosco.com/en/pic/research/025109361827329146.pdf>>. Hong Kong is a Common Law jurisdiction and a Special Administrative Region of the People's Republic of China: see Department of Justice, *The Legal System in Hong-Kong*, (2004), <<http://www.doj.gov.hk/eng/legal/>>. Japan is a party to the Hague Rules and the 1979 Visby Protocol, reflected in the *Japanese Carriage of Goods by Sea Act*: see (1993) 25 *The Bulletin of the Japan Shipping Exchange Inc.*, 9, 17, <[http://www.jseinc.org/en/bulletin/list\\_of\\_nos.html](http://www.jseinc.org/en/bulletin/list_of_nos.html)>. Article 13bis of this Act (which is also referred to as the *International Carriage of Goods by Sea Act* in Japan) contains a similar provision to art 4.5.e of the Visby Rules. Also see Griggs, Williams and Farr, above n 4, 217, 290-291.

**Article 25 of the Hague Protocol:** The limits of liability specified in Article 22 shall not apply *if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result*; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.<sup>6</sup>

The expression ‘with intent to cause damage or recklessly and with knowledge that damage would probably result’, which constitutes the main focus of the present study, is common to both Article 4.5.e of the Visby Rules and Article 25 of the Hague Protocol. This is not a mere coincidence. Article 4.5.e of the Visby Rules was drafted in conformity with corresponding provisions contained in earlier conventions governing the carriage of persons by sea, which were, in turn, inspired by Article 25 of the Warsaw Convention as amended by the Hague Protocol.<sup>7</sup> The fact that the later drafters of Article 4.5.e of the Visby Rules deliberately adopted the expression ‘with intent to cause damage or recklessly and with knowledge that damage would probably result’ that had previously been used in Article 25 of the Hague Protocol, necessarily suggests that they shared the same drafting intent. Case law principles developed under Article 25 of the Hague Protocol equally constitute a valid source of inspiration and guidance for cases commenting on Article 4.5.e of the Visby Rules. This becomes even more obvious since — as we are going to see — doctrine and case law commenting on the ocean carrier’s unlimited liability often refer to air transport cases as well.<sup>8</sup>

In devising these provisions, the drafters of the Visby Rules and the Hague Protocol intended to put an end to divergent legal terms used (wilful misconduct, *dol*, gross negligence) in connection with the carrier’s unlimited liability under the Hague Rules and the Warsaw convention.<sup>9</sup> In this regard, the new Articles were not as vaguely

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<sup>6</sup> The French version of the Visby Rules is equally authentic to the English and provides (emphasis added): ‘Ni le transporteur, ni le navire, n’auront le droit de bénéficier de la limitation de responsabilité établie par ce paragraphe *s’il est prouvé que le dommage résulte d’un acte ou d’une omission du transporteur qui a eu lieu, soit avec l’intention de provoquer un dommage, soit témérairement et avec conscience qu’un dommage en résulterait probablement*’. The official French version of the Hague Protocol provides (emphasis added): ‘Les limites de responsabilité prévues à l’article 22 ne s’appliquent pas *s’il est prouvé que le dommage résulte d’un acte ou d’une omission du transporteur ou de ses préposés fait, soit avec l’intention de provoquer un dommage, soit témérairement et avec conscience qu’un dommage en résultera probablement*, pour autant que, dans le cas d’un acte ou d’une omission de préposés, la preuve soit également apportée que ceux-ci ont agi dans l’exercice de leur fonctions’. The italicised terms reflect the common elements of the two provisions.

<sup>7</sup> Article 4.5.e of the Visby Rules was inspired by art 7 of the 1961 *International Convention for the Unification of Certain Rules relating to Carriage of Passengers by Sea* (Brussels, 1961) and by art 7 of the *Draft Convention relating to Passenger Luggage by Sea* (Stockholm, 1963). Royaume de Belgique, Ministère des Affaires Étrangères et du Commerce Extérieur, *Conférence Diplomatique de Droit Maritime (Douzième session)*, (1967), 676, 293. Article 7 of the 1961 Brussels Convention provides: ‘The carrier shall not be entitled to the benefit of the limitation of liability provided for in Article 6, if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage or recklessly and with knowledge that damage would probably result’. The 1961 Brussels Convention was inspired by air carriage rules and was known as the ‘little Warsaw’: see Gehringer, A, ‘After Carnival Cruise and Sky Reefer: An Analysis of Forum Selection Clauses in Maritime and Aviation Transactions’ (2001) 66 *JALC* 633, 671. See also reference to the Warsaw Convention and the Hague Protocol in the minutes of the 1961 Brussels Convention: Royaume de Belgique, Ministère des Affaires Étrangères et du Commerce Extérieur, *Conférence Diplomatique de Droit Maritime (Onzième session)*, (1961), 169, 178-179. On art 25 of the Hague Protocol being the basis for art 4.5.e of the Visby Rules see also Tetley, W, *Marine Cargo Claims* (Vol 1, 4<sup>th</sup> Ed, 2008), 286; and Diamond, A, ‘The Hague-Visby Rules and the Carriage of Goods by Sea Act, 1971’ (Lloyd’s of London Press Ltd seminar, London, 8 December 1977), 13, 14. We will refer to the Visby Rules/Hague Protocol provisions to signify the common expression of the two Articles.

<sup>8</sup> Moreover, the absence of extensive case law and commentary on art 4.5.e of the Visby Rules in some of the jurisdictions under consideration justifies recourse to art 25 of the Hague Protocol, which has been described as one of the most controversial and litigated provisions. Cheng, B, ‘Wilful Misconduct: From Warsaw to the Hague and from Brussels to Paris’ (1977) 2 *Ann Air & Sp L*, 55.

<sup>9</sup> *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, Aug 25, 1924, 120 *LNTS* 155 (1924) (the Hague Rules) provides (emphasis added): ‘Neither the carrier nor the ship shall *in any event* be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading’. The expression ‘in any event’ has been made the object of various interpretations in different countries. For wilful misconduct at United States law, see Tetley, above n 7, 255, 266-267. For *dol* at French law, see Bonassies, P, and Scapel, C, *Droit Maritime* (2<sup>nd</sup> Ed, 2010), 766. For *dol* (δολος) and divergent opinions regarding gross negligence (‘βαρεια αμελεια’) at Greek law, see Kiantou-Pampouki, A, *Ναυτικο Δικαιο II* (6<sup>th</sup> Ed, 2007), 657-658. For the uncertainty regarding the interpretation of this term under English law, see also Griggs, Williams and Farr, above n 4, 151-152 and Wilson, J, *Carriage of Goods by Sea* (7<sup>th</sup> Ed, 2010), 202-203. Likewise, the Warsaw Convention’s reference to ‘wilful misconduct’ (*dol* in the French text of the Convention) or ‘default equivalent to wilful misconduct’ was problematic since it gave rise to divergent interpretations, not only in countries belonging to different legal systems, but also in countries sharing the same legal tradition. For example, following the Civil Law maxim *culpa lata dolo aequiparatur* — signifying that gross negligence is equivalent to *dol*, some Civil Law jurisdictions would assimilate gross negligence (*faute lourde*) to *dol*, while others would not: Cheng, above n 8, 76-77. Further, Common Law approaches to wilful misconduct (for example, under English and US law) differ: Clarke, M, ‘Way with Words: Some Obstacles to Uniform Transport Law’ (1998) 3(2-3) *Unif L Rev*, 351, 364-365; and Mankiewicz, R, ‘From Warsaw to Montréal with Certain Intermediate Stops’ (1989) 14 *Air Law* 239, 247.

worded as the corresponding provision in the Hague Rules, nor did they use domestic law concepts as the Warsaw Convention did.<sup>10</sup> As such, they appeared to respond to the need for international uniformity in this area.

Based on the negotiations of the Hague Protocol, Article 25 contains two conduct requirements that are not easy for a claimant to establish. The first requirement ('intent to cause damage') was not commented upon in great detail during these negotiations. The second requirement ('recklessly and with knowledge that damage would probably result') received more attention from the drafters. Some country delegates opined that the term 'recklessly' amounted to no more than gross negligence, and that its presence should be established based on an objective standard.<sup>11</sup> Others concluded that a subjective approach underpinned this concept.<sup>12</sup> As a result, there was no definite pronouncement on the definition or assessment of the term. What seems to be clear, however, from these negotiations is that the 'knowledge that damage would probably result' requirement was intended to be based on a subjective (or *in concreto*), rather than an objective (or *in abstracto*) test.<sup>13</sup> The subjective assessment favors the carrier, since it is very difficult for a claimant to establish actual knowledge that damage would probably result. On the contrary, the objective assessment is protective of claimants because they do not have to prove actual knowledge of the likelihood of damage, but simply that the person in question should have had such knowledge when compared to a reasonable, prudent person (imputed knowledge).<sup>14</sup> In all cases, actual knowledge must relate to the presence of probable, not possible damage.<sup>15</sup> This is a more stringent, carrier-protective requirement than merely establishing the possibility of damage. The German reference to a 'possible danger', and the Belgian formula of 'damage might or probably would result', did not receive a second glance.<sup>16</sup>

This article will examine how different Common Law and Civil Law jurisdictions have viewed the two requirements of the Visby Rules and Hague Protocol provisions.<sup>17</sup> This question will be the main focus of the commentary. Issues arising solely under Article 25 of the Hague Protocol or Article 4.5.e of the Visby Rules (for example, whether the Visby Rules term 'carrier' should also include its agents, or what the Hague Protocol expression 'within the scope of his employment' means)<sup>18</sup> will not be discussed.

The ultimate goal of the present study is to determine to what extent the Visby Rules and the Hague Protocol requirements are being uniformly interpreted in the statutes and case law in the aforementioned jurisdictions. If uniformity exists, the intent of the drafters would be honored. In its absence, the vices of divergent domestic law interpretations prevailing before the adoption of the two sets of rules will persist.

The complexity of such a comparative analysis is not negligible. One is commenting on the statutes and case law of a large number of Common Law and Civil Law countries regarding two provisions governing international ocean and air carriage. This involves a cross-modal (ocean-air) and cross-country legal study which, by its very nature, constitutes a challenging task.

In undertaking this task, the author aligns herself with the third category of comparative law scholars described by Professor von Mehren; namely, those who do not reject or embrace the convergence of different legal systems.<sup>19</sup>

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<sup>10</sup> To ensure uniformity, it was deemed necessary to replace abstract legal definitions by concrete specifications: Cheng, above n 8, 83.

<sup>11</sup> *Ibid.*, 86.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, 90-91. Mankiewicz, R, 'L'Origine et l'Interprétation de l'Article 25 de la Convention de Varsovie Amendée à la Haye en 1955' (1977) 26 *ZLW* 175, 186.

<sup>14</sup> On the description of these tests, see Rodière, R, 'La Faute Inexcusable du Transporteur Aérien – Appréciation Concrète ou Abstraite' (1978) 13 *ETL* 24, 26; McKay, J, 'The Refinement of the Warsaw System: Why the 1999 Montréal Convention Represents the Best Hope for Uniformity' (2002) 34 *Case W Res J Intl L* 73, 91-92.

<sup>15</sup> See Cheng, above n 8, 88.

<sup>16</sup> *Ibid.* The meaning of possible and probable damage will be commented on below.

<sup>17</sup> However, it should be noted that, due to the number of countries considered, this comparative study will not thoroughly examine all aspects of the relevant conduct. Moreover, art 4*bis* of the Visby Rules and art 25A of the Hague Protocol will not be discussed.

<sup>18</sup> These issues will probably be the focus of a future article.

<sup>19</sup> For what follows in this paragraph, see von Mehren, A, 'The Rise of Transnational Legal Practice and the Task of Comparative Law' (2001) 75 *Tul L Rev* 1215, 1215-1216.

These scholars simply believe that such convergence may or may not occur. Until or unless it takes place, however, they opine that it is the responsibility of comparative law to determine the degree and the manner in which convergence exists or may be occurring, and to provide the analytical tools to enable jurists from different legal cultures to achieve a shared understanding of their respective intents, positions or views. This is precisely the approach the author adopts.

The goal of this article is to determine to what extent uniformity in implementing these provisions exists. This will allow legal professionals in the field of international transportation law to achieve a better understanding of these provisions, helping them to better operate in a world that seeks closer interaction between Common Law and Civil Law rules.

The analysis is divided into four sections. The first two sections contain a description of the two requirements of the Visby Rules and Hague Protocol provisions as interpreted in the Common Law jurisdictions (Section 1) and Civil Law jurisdictions (Section 2) under consideration. Section 3 compares and analyzes the respective laws. Section 4 provides a concluding summary.

## 1 The Two Requirements of the Visby Rules and Hague Protocol Provisions in Common Law Jurisdictions

Under Canadian, English and Australian law, the first requirement of the Visby Rules and the Hague Protocol provisions, an ‘intent to cause’ damage, requires proof of the state of mind of the defendant (a subjective test). This places a heavy burden of proof on the claimant, since it is hard to imagine a person who actually intends to cause damage to cargo.<sup>20</sup> As such, the first requirement has not attracted much judicial attention in these three countries, or — as we have seen — during the negotiations of the Hague Protocol.

In analyzing the components of the second requirement, ‘recklessly and with knowledge that damage would probably result’, English and Hong Kong decisions have sided with a subjective test to establish the required knowledge of probable damage. In the well-known English case *Goldman v Thai Airways International Ltd*,<sup>21</sup> (hereinafter *Goldman*), the court commented on this test. *Goldman*, a personal injury air transport case, has been extensively cited by air and ocean cargo decisions worldwide on the carrier’s unlimited liability. It involved a passenger who sustained injuries when the plane he boarded encountered severe turbulence. The pilot had received warnings as to the possibility of such turbulence but no sign was given by the aircraft control panel to keep the seat belt fastened. The court had to determine whether the pilot had acted recklessly and with knowledge that damage would probably result in not switching on the ‘fasten seat belt’ sign. In concluding that it had not been proven that the pilot actually knew that damage would probably result, Eveleigh J stated:<sup>22</sup>

If the pilot did not know that damage would probably result from his omission, I cannot see that we are entitled to attribute to him knowledge which another pilot might have possessed or which he, himself, should have possessed.

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<sup>20</sup> Canadian law: *Connaught Laboratories Ltd v. British Airways*, (2002) OJ No 3421 (QL), [53], 32 (Ont S Ct J) (*Connaught*); *Rembrandt Jewelry Manufacturing Ltd v Air Canada*, [1985] OJ No 1382 (QL), [15] (Ont SC). Australian law: see Heerey, P, ‘Limitation of Maritime Claims’ (1994) 10(1) *Austl & NZ Mar LJ*, 1, 14, referring to English doctrine. English law: see Aikens, R, Lord, R, and Bools, M, *Bills of Lading* (2006), 299; Griggs, Williams and Farr, above n 4, 37.

<sup>21</sup> Air: (1983) 1 WLR 1186, 1199-1202 (CA). This case was followed by *Nugent v Michael Goss Aviation* (2000) 2 Lloyd’s Rep 222 (CA). Sea: Wilson, above n 9, 204 referring to air case law. The author notes, *ibid*, that it remains to be seen how courts will describe the second requirement under art 4.5.e of the Visby Rules. Also see Boyd, S, Burrows, A, and Foxton, D, *Scrutton on Charterparties and Bills of Lading* (20<sup>th</sup> Ed, 1996), 452 n 64, referring to *Goldman*; Griggs, Williams and Farr, above n 4, 38, referring to air and maritime case law. We found no English Visby Rules case addressing this point.

<sup>22</sup> (1983) 1 WLR 1186, 1194. In more explicit terms, Purchas J stated (*ibid*, 1202): ‘I agree that the true interpretation of article 25 when it is read as a whole involves the proof of actual knowledge in the mind of the pilot at the moment at which the omission occurs...’

This holding clearly opts for a subjective test to assess the knowledge of probable damage (actual knowledge); as opposed to an objective standard (the knowledge the carrier should have possessed — imputed knowledge). In reaching this conclusion, the court cited the negotiating history of the Hague Protocol.

In the Hong Kong case of *Chiu Pui Yin v China Airlines Ltd*<sup>23</sup> the plaintiff suffered injuries during landing at Hong Kong airport. At that time, a number 8 typhoon signal was hoisted. The claimant contended that the defendant airline had acted recklessly and with knowledge that damage would probably result in failing to take a series of measures to prevent such injuries. In siding with the subjective test to establish knowledge of probable damage following English case law, Saunders J stated:

I am satisfied that it is arguable that it was within the actual contemplation of the crew of the aircraft, that the anticipated landing in the course of the typhoon in Hong Kong, of an aircraft at maximum landing weight or thereabouts, would be such as to probably cause damage.

Following English and Hong Kong cases, therefore, actual knowledge of probable damage needs to be established in order to determine the carrier's unlimited liability. Actual knowledge can be proven by direct evidence or by the drawing of inferences based on the facts of the case.<sup>24</sup> In this regard, case law refers to the knowledge of probable, not merely possible, damage. Probable damage has been viewed as something likely to happen.<sup>25</sup>

The definition of the term 'recklessly' does not seem to be settled under English case law.<sup>26</sup> Some decisions have stated that recklessness involves deliberately running an unjustifiable risk.<sup>27</sup> Others have concluded that recklessness amounts to gross carelessness — as opposed to gross negligence — and is assessed on an objective standard.<sup>28</sup> In this regard, the likelihood that damage will follow — not whether there is actual knowledge that damage would probably result — is one element to be considered.<sup>29</sup> In *Goldman*, Eveleigh J noted that a person acts recklessly when he behaves in a manner 'which indicates a decision to run the risk or a mental attitude of indifference to its existence'.<sup>30</sup> He explained that a deliberate disregard of instructions that the pilot knows to be for the safety of the passengers may be qualified as reckless.<sup>31</sup> Such behavior, however, was not present in the case at bar.<sup>32</sup> In arguing that 'it is in relation to that knowledge [that damage would probably result] ... that his conduct is to be judged in order to determine whether or not it was reckless',<sup>33</sup> the court opined that recklessness and the prescribed knowledge cannot exist independently but rather in relation to one another. Since, as mentioned above, this case concluded that knowledge of probable damage needs to be assessed on the basis of a subjective test, establishing recklessness involves taking into account subjective considerations.

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<sup>23</sup> Air: [2007] HKCU 1839 (QL), [22] (Court of First Instance); *Ericsson Ltd v KLM Royal Dutch Airlines* [2006] 1 HKLRD 584 (WL), [190] (Court of First Instance). Both cases cite English law on this point. See also *Amconics Infotech (HK) Ltd v. Menlo Worldwide Forwarding Inc.*, [2006] HKEC 506 (WL), [13] (CA) (*Armonics*).

<sup>24</sup> English law — air: *Rolls Royce plc v Heavylift-Volga DNEPR Ltd* [2000] 1 All ER (Comm) 796 (QL), [36] (QB) (*Rolls Royce*). Sea: Griggs, Williams, and Farr, above n 4, 38 referring to air case law. See also the Hong Kong cases *Amconics*, above n 23; and *Kwok Kam Ming v China Airlines Ltd* [2008] HKEC 1802 (WL), [9], [13], [15], [18] (CA).

<sup>25</sup> Air: *Goldman*, above n 21, 1195-1196. Maritime: Griggs, Williams and Farr, above n 4, 38, where the *Goldman* case is cited.

<sup>26</sup> As was stated in the non-transport case of *Herrington v British Railways Board* (1971) 2 QB 107 (CA): "'Reckless" is an ambiguous word which may bear different meanings in different contexts. In some branches of the law it is used to connote a rare state of mind between negligence however gross on the one hand and deliberate wrongdoing on the other. In other contexts "reckless" simply amounts to gross negligence...'. This case has often been cited when commenting on this term. On the multiple meanings of 'reckless' in general, see Cheng, above n 8, 73-76. See also the suggestion of Anthony Diamond on how recklessness should be defined: Diamond, above n 7, 15.

<sup>27</sup> *Albert E Reed & Co v London & Rochester Trading Co Ltd* [1954] 2 Ll LR 463, 475 (QB) (*Albert*). This maritime (albeit not Visby Rules) case has been cited by Canadian air cargo decisions on the definition of recklessness.

<sup>28</sup> Megaw J in *Shawinigan Ltd v Vokins & Co Ltd* [1961] 3 All ER 396, 403 (QB) (*Shawinigan*). This is a maritime (albeit not Visby Rules) case. As we will see, this case has been cited by Canadian air cargo cases on the definition of recklessness.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Goldman*, above n 21, 1194.

<sup>31</sup> *Ibid.*, 1194

<sup>32</sup> *Ibid.*, 1200.

<sup>33</sup> *Ibid.*, 1199. In interpreting the term 'reckless' maritime doctrine refers to air case law: Griggs, Williams and Farr, above n 4, 38; Aikens, Lord, and Bools, above n 20, 299.

The English and, to a lesser extent, the Hong Kong courts have also described the Visby Rules/Hague Protocol requirement of ‘intent to cause damage or recklessly and with knowledge that damage would probably result’ in terms of the domestic legal concept of ‘wilful misconduct’.<sup>34</sup> A person engages in wilful misconduct if he knows and appreciates that it is misconduct on his part in the circumstances to do or to fail or omit to do something and yet: (a) intentionally does or fails or omits to do it; or (b) persists in the act, failure or omission regardless of the consequences; or (c) acts with reckless carelessness, not caring what the results of his carelessness may be.<sup>35</sup> In this regard, English law insists on examining both the state of mind of the actor (a subjective test) and the wrongful character of his conduct.<sup>36</sup>

The English definition of wilful misconduct approximates the Visby Rules/Hague protocol requirement.<sup>37</sup> In effect, the awareness of probable damage, and the persistence to proceed to an act despite such a realization are elements present in both concepts. However, differences do exist. For example, ‘wilful misconduct’ does not refer to an intent to cause damage (Visby Rules/Hague Protocol standard), but rather to an act that needs only to create a risk of probable damage.<sup>38</sup> Moreover, the Visby Rules and the Hague Protocol provisions spell out the requirement of ‘knowledge that damage would probably result’,<sup>39</sup> contrary to the abovementioned definition of wilful misconduct, where the awareness of the likelihood of damage is not explicitly stated. The former concept probably places some restraint on the permissible bounds of inferences of such knowledge.<sup>40</sup> In doing so, the Hague Protocol clarified what ‘wilful misconduct’ meant under the Warsaw Convention, and the Visby Rules adopted a more precise and specific wording than its predecessor, the Hague Rules.<sup>41</sup>

Canadian and Australian cases do not dwell on the concept of wilful misconduct when commenting on the carrier’s unlimited liability. Cases that have used this term briefly usually cite English decisions or doctrine.<sup>42</sup> In examining the Visby Rules/Hague Protocol provisions, courts in the two countries simply seek to determine whether the claimant has met the onerous burden of proof of establishing an act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result.<sup>43</sup>

In *SS Pharmaceutical Co Ltd v Qantas Airways Ltd* (air carriage)<sup>44</sup> and *Sellers Fabrics Pty Ltd v Hapag-Lloyd AG* (ocean carriage)<sup>45</sup> the Australian courts followed the English approach in *Goldman*.

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<sup>34</sup> English — sea: *Cia Portoraffi Commerciale SA v Ultramar Panama Inc (The Captain Gregos)* [1990] 1 Lloyd’s Rep 310, 316 (CA). Air: *Antwerp United Diamond BVBA v Air Europe* [1996] QB 317. *Rolls Royce*, above n 24, para 37. A substantial majority of country delegates during the negotiations of the Hague Protocol maintained that the new rule should be drafted along the lines of the Common Law concept of wilful misconduct: Cheng, above n 8, 83. Hong Kong: *Sally Thirkell v Trans World Airlines Corp* [1968] HKDCLR 91 (WL), 91-100 (DC).

<sup>35</sup> See *The Thomas Cook Group Ltd v Air Malta Co Ltd* (1997) 2 Lloyd’s Rep 399, 408, commenting on the unamended Warsaw Convention. The Court added: ‘A person acts with reckless carelessness if, aware of a risk that goods in his care may be lost or damaged, he deliberately goes ahead and takes the risk, when it is unreasonable in all the circumstances for him to do so’. Several decisions defining wilful misconduct, including *Horabin v British Overseas Airways Corp* [1952] 2 Ll LR 450, 459, were mentioned therein.

<sup>36</sup> Clarke, above n 9, 364-365.

<sup>37</sup> Cheng, above n 8, 92; Matte, N, ‘De Varsovie à Montréal, avec Escalade à la Haye (Problèmes Posés par l’Augmentation de la Responsabilité du Transporteur Aérien International)’ (1966) 1 *RJT* 165, 168; McGilchrist, N, ‘Article 25 : an English Approach to Recklessness’ (1983) *LMCLQ* 488, 489, stating that the Hague Protocol provision reflects the Common Law philosophy in the *Horabin* case.

<sup>38</sup> Cheng, above n 8, 76; Diederiks-Verschoor, I, *An Introduction to Air Law* (8<sup>th</sup> Ed, 2006), 153.

<sup>39</sup> Cheng, above n 8, 92.

<sup>40</sup> *Ibid.*

<sup>41</sup> Air: for air carriage, see ICAO McGill University Institute of Air and Space Law, *Compensation for Damage Caused by Aircraft to Third Parties Arising from Acts of Unlawful Interference or from General Risks* (2009),

<[http://www.icao.int/DCCD2009/docs/DCCD\\_doc\\_25\\_en.pdf](http://www.icao.int/DCCD2009/docs/DCCD_doc_25_en.pdf)>, [2.2.2] (ICAO McGill). Sea: Griggs, Williams and Farr, above n 4, 153.

<sup>42</sup> Canada: *Swiss Bank Corp v Air Canada* (1981) FCJ No 167 (QL), [27], [28], [30] (FCC) (*Swiss Bank*).

<sup>43</sup> Sea: *Ontario Bus Industries Inc v Federal Calumet (The)* (TD) [1991] FCJ 535 (QL), [13] (FCC) (*Calumet*). The appeal on this case was rejected. Air: *Swiss Bank*, above n 42, [40]-[44]. *Harry Richer Furs Inc v Swissair* (1987) FCJ No 1155 (QL), [7] (FCC) (*Harry Richer*); *Tiura v United Parcel Service Canada Ltd* [2009] OJ No 6059 (QL), [10]-[11] (Ont SCJ) (*Tiura*). See, however, *Green Computer In Sweden AB v Federal Express Corp* [2002] FCJ No 1342 (QL), [15]-[17] (FCC), where the court used domestic concepts to describe the abovementioned provision.

<sup>44</sup> (1988) 92 FLR 231 (SC NSW) (*SS Pharmaceutical*). The case was affirmed on appeal: *Qantas Airways Ltd v SS Pharmaceutical Co Ltd* (1991) 1 Lloyd’s Rep 288 (CA NSW) (*Qantas Airways*).

<sup>45</sup> (29 Oct 1998) online: <<http://www.austlii.edu.au>> (SC NSW) (*Sellers Fabrics*). An appeal against the 1998 decision was commenced but the matter finally settled: see Derrington, S, and White, M, ‘Australian Maritime Law Update: 1998’ 30(3) *JMLC* 419, 426.

In *Sellers Fabrics*, containers were loaded in France on board a vessel travelling between Europe and Australia. During the voyage between Melbourne and Sydney there was rough weather and a stack of containers on board the vessel collapsed due to improper lashing undertaken in Melbourne under the supervision of the chief officer. The main issue in this case was whether the ocean carrier could benefit from his limitation of liability. It was common ground that the Visby Rules applied. The court reasoned that, in failing to ensure proper lashing or re-stowing of the cargo in circumstances where it was known that the vessel was going to sail into bad weather, the chief officer acted recklessly since, by taking this decision, he ran the risk that the cargo might collapse. From this and other circumstantial evidence the court also determined that he had actual knowledge that damage would probably result. Rolfe J specifically stated:<sup>46</sup>

[T]he decision in *Goldman* ... settled a number of questions arising under Article 25 ... [such as] the proof of actual knowledge in the mind of the [actor] at the moment at which omission occurs ... [and that] recklessness [exists] when the person concerned ... acts in a manner which indicates a decision to run the risk or a mental attitude of indifference to its existence.

I am satisfied that Mr Lewis was aware that the stack was not properly lashed and that he could, had he chosen, have re-stowed the two top containers. I am further satisfied that in failing to ensure proper lashing or re-stowing in circumstances where the vessel was to sail into weather, which he knew would be rough, he acted in a manner, which indicated as clearly as could be, a decision to run the risk that the stack would collapse ... . Obviously if the containers fell, as they did, there would, in all probability, be damage either to the goods in them or to the goods in containers onto which they fell. Mr Lewis knew this and, for that reason, immediately on the happening of the occurrence he left the bridge to try to minimise the damage, which he knew was, in all probability, occurring.

Despite this finding, the carrier's limitation of liability was finally upheld because the officer's conduct was not deemed to be the 'personal act' of the ocean carrier.

In the internationally known *SS Pharmaceutical Co Ltd v Qantas Airways Ltd* — also cited by *Sellers Fabrics* — the plaintiff had shipped five cartons of drugs from Melbourne to Tokyo via Qantas Airlines. The cartons were marked with a symbol denoting that they were to be kept dry. Despite this, the air carrier's agents left the cargo exposed to rain, wind and thunderstorm without any particular precautions taken. The court stated that 'to have cargo, which is particularly vulnerable to damage by rain, and leave it exposed to the elements without particular precautions, is reckless'.<sup>47</sup> Moreover, in his letter, the director of cargo acknowledged the presence of 'deplorably bad handling'. This evidence, coupled with the defendant's failure to prove what, if anything, it did to protect the cargo, led the court to conclude that the defendant had acted recklessly and with knowledge that damage to the goods would probably result. As the trial judge (Rogers J) specifically stated:<sup>48</sup>

Article 25 has been subjected to critical examination by the English Court of Appeal in *Goldman* ... . The Court of Appeal [in *Goldman*] held that the applicable test was subjective ... . Here the defendant, who had such goods in its care, declined to give evidence of what, if anything, it did to protect the goods ... . I am entitled on the evidence, as I do, to hold the defendant's conduct to have been reckless. In my view, there was clear knowledge of the likelihood of damage to specially vulnerable cargo in the weather conditions then obtaining.

In affirming this holding, the appellate court sided with the subjective test and added that, 'where an inference is open and the defendant elects not to give evidence the Court is entitled to be bold'.<sup>49</sup> In making this finding, the

<sup>46</sup> *Sellers Fabrics*, above n 45. In reality, the court in *Sellers Fabrics* cited the *Goldman* case as stated in the *SS Pharmaceutical*. The last two holdings have often been cited by subsequent Australian and international case law and doctrine.

<sup>47</sup> *SS Pharmaceutical*, above n 44, 246. The appeal case specifically referred to the *Goldman* definition of recklessness: *Qantas Airways*, above n 44, 290-291.

<sup>48</sup> *SS Pharmaceutical*, above n 44, 246-247. See *Qantas Airways*, above n 44, 291 on the subjective test. On this test see also Davies, M, and Dickey, A, *Shipping Law* (3<sup>rd</sup> Ed, 2004), 229; and Heerey, P, above n 20, 15-16, referring to *SS Pharmaceutical*. Australian cases that have mentioned *SS Pharmaceutical* on this point are *Morrison v Peacock & Roslyndale Shipping Co Pty Ltd* [2000] NSWCCA 452 (QL), [70]-[76]; and *Smithers v Lokys* (2001) 108 FCR 303 (WL), [15] (FCA). These cases are interpreting similar loss of limitation of liability provisions.

<sup>49</sup> *Qantas Airways*, above n 44, 293. Subsequent Australian cases have cited this phrase. The similarity of the facts and holding of this case to the Canadian case *Connaught*, above n 20, is striking, and was noted by the Canadian court: see *Connaught*, above n 20, 419. We should note,

court was obviously of the view that actual knowledge can be inferred from evidence and the surrounding circumstances of each case.<sup>50</sup>

Both the *SS Pharmaceutical* and *Sellers Fabrics* holdings are consistent in their interpretation of the second requirement of the Visby Rules/Hague Protocol provisions. In aligning themselves with the English approach adopted in the *Goldman* case, the Australian courts assess knowledge of probable damage based on a subjective test and state that a person acts recklessly when she behaves in a manner which indicates a decision to run the risk or a mental attitude of indifference to its existence. In opting for the latter definition of recklessness, Australian decisions do not appear to adopt the variety of interpretations given to this term under English case law mentioned above.

Under Canadian case law the definition of recklessness does not seem to be settled. Following English cases, some Canadian courts have defined the term as gross carelessness — distinguishing it from gross negligence — and basing its presence on an objective test.<sup>51</sup> Other Canadian decisions describe it as ‘a conscious ... disregard for or indifference to ... risk of harm. Reckless conduct is more than mere negligence; it is gross deviation from what a reasonable man would do’.<sup>52</sup> The term has also been defined as gross negligence.<sup>53</sup> Despite this uncertainty of definition, judges have concluded that recklessness exists where there is failure of cargo services employees to inform the ramp services of the presence of dry ice in the compartment of the aircraft where live animals are being transported.<sup>54</sup> Likewise, there is reckless behavior where the shipper has specifically asked for the refrigeration of the cargo and the carrier has failed to refrigerate it, taking no steps to investigate the shipper’s claim or to preserve evidence regarding the subsequent damage.<sup>55</sup>

The use of the objective or the subjective tests to establish knowledge of the likelihood of damage has given rise to debate in Canada.<sup>56</sup> Federal court cases such as *Swiss Bank*<sup>57</sup> and *Prudential Assurance Co v Canada*<sup>58</sup> have adopted the objective test on this issue.

In *Swiss Bank*, a parcel of Canadian bank notes was shipped from Switzerland to Montréal by the defendant carrier. It disappeared after reaching Montréal. The plaintiff sought full recovery, relying on article 25 of the Hague Protocol. Air Canada admitted liability but sought to limit the amount of its liability. Applying the objective test, the court held for the plaintiff, reasoning that the bank notes were likely to have been stolen by an Air Canada employee, who must have had knowledge that damage would probably result. Walsh J stated.<sup>59</sup>

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however, that Kirby J dissented in the Australian Court of Appeal case and made the following remarks: ‘In the present case Qantas failed to call the officer who acknowledged that its handling of the subject cargo had been “deplorably bad”. It also failed to call Mr Johnson. But such omissions do not, in my view, fill the gaping void left by the respondents’ failure to prove that a servant or agent of Qantas acted recklessly and with knowledge that damage would probably result in the way the respondent’s goods were handled. No particular servant or agent was ever identified who had that attitude which allegedly occasioned the respondents’ loss. The issue was simply left to speculation.’ (*Qantas Airways*, above n 44, 305-306). Kirby J also referred to different definitions of the term ‘reckless’, mainly based on English law (*ibid*, 301).

<sup>50</sup> Heerey, above n 20, 16, commenting on this case.

<sup>51</sup> Air: *Newell v Canadian Pac Airlines* [1976] 74 DLR (3d) 574 (QL), [19]-[20] (Ont Ct) (*Newell*) based on English case law (*Shawinigan*, above n 28).

<sup>52</sup> Air: *Tiura*, above n 43, [13], following the *Black’s Law Dictionary* definition of ‘recklessness’. Commenting on this definition, the court (*ibid*, [14]) refers to *Goldman*.

<sup>53</sup> Sea: *Gundersen v Finn Marine Ltd* [2008] BCJ No 2366 (QL), [43]-[49] (BCSC). Other judicial and doctrinal definitions of the term are cited in this case, which comments on a similar provision of another international maritime convention. See also Gold, E, Chircop, A, and Kindred, H, *Maritime Law* (2004), 732, where the authors note that ‘recklessness suggests gross negligence’ (their reasoning being based on a similar provision to the Visby Rules).

<sup>54</sup> Air: *Newell*, above n 51, [20]. In this case, it was clear from the evidence that the cargo services employees knew that if live animals and dry ice were placed in the same compartment, there would be a risk that the animals would sustain injury or death.

<sup>55</sup> Air: *Connaught*, above n 20, [59]-[68].

<sup>56</sup> Air: ICAO McGill, above n 41, n 12. Sea: No Visby Rules case was found on this point. However, in the Visby Rules case *Calumet*, above n 43, [13], it was stated that, to establish unlimited liability, the claimant must meet a high standard of proof. The court cited English doctrine on this point.

<sup>57</sup> Above n 42.

<sup>58</sup> (1993) 2 FC 293 (QL), [28] (FCA) (*Prudential*).

<sup>59</sup> Above n 42, [41]. On appeal, the court referred to the controversy regarding the application of a subjective or an objective test but did not further comment on this point. *Air Canada v Swiss Bank Corp* (1987) FCJ No 619 (QL), [24] (FCA). The appeal decision (*ibid*, [11]) also stated



To interpret the Article [Article 25 of the Hague Protocol] otherwise would have the effect of rendering it virtually meaningless, and in my view the French Cour de Cassation has therefore quite properly adopted the objective approach for forming conclusions.

In adopting the objective standard, the court sided with French case law which we will be examining later on in our study. As we have stated in our introductory remarks, opting for the objective standard favors claimants in that they do not have to establish actual knowledge of the likelihood of damage, but simply that the person in question should have had such knowledge when compared to a reasonable, prudent person (imputed knowledge). According to the court, if the subjective test was followed, the difficulty of proof it would entail for the claimant would render Article 25 ‘virtually meaningless’, because it would rarely lead to full recovery.

In the more recent *Prudential* case, the Federal Court did not deviate from the conclusion in *Swiss Bank*. However, the court did refer to the subjective test. This case involved electronic goods shipped by air from Japan to Canada and stored in a warehouse pending customs clearance. The shipment was released to a person who misrepresented himself as the owner of the goods. The true owner claimed the full value of the goods based on Article 25 of the Hague Protocol, stating that the defendant carrier had acted recklessly and with knowledge that damage would probably result by releasing the goods to a non-authorized party. The Court held for the plaintiff and stated that any reasonable person would know that a failure to check identification could result in loss. In adopting the objective standard, however, MacGuigan J also considered the subjective test.<sup>60</sup>

In my view it is unnecessary for the present decision to get into the refinements of domestic criminal law as to recklessness. Whatever the criminal law standard of recklessness, the civil law interpretation of the various concepts of negligence (including recklessness as used in that context) is arguably objective ... . In any event, I am persuaded that the result would be the same in the case at bar whether the standard of recklessness be subjective or objective. S.E.B. Cargo had the onus of taking such care as to ensure proper delivery, and it can be concluded from the facts that it not only must have been but was aware that delivery to an unauthorized person was very likely to preclude the cargo’s coming into the hands of its rightful owner. In other words, the result is so obvious that it would be the same whether taken subjectively or objectively.

In concluding in this way, the *Prudential* holding seems to adopt a less strict stance than *Swiss Bank* in allowing consideration of a subjective test after examination of the objective standard when reasoning on the knowledge of probable damage. This flexibility may be significant in view of more recent provincial cases that have opted for the subjective test. It has been said, in this regard, that the trend in Canada is moving increasingly towards applying a subjective, rather than an objective test.<sup>61</sup>

A well-known provincial decision adopting the subjective standard is *Connaught Laboratories Ltd v British Airways*.<sup>62</sup> In this case, the plaintiff shipped cartons of vaccine from Toronto to Melbourne, Australia, via British Airways. Despite directions to do so, British Airways did not store the cartons at temperatures between 2 and 8 °C, and the vaccine was ruined. Connaught sued for damages, arguing that the air carrier acted recklessly and with knowledge that damage would probably result. British Airways — which took no steps to investigate the shipper’s claim or to preserve evidence regarding the incident — contended that damages, if any, should be limited to the amount established by the Warsaw Convention as amended by the Hague Protocol. Molloy J gave judgment for the plaintiff. Citing *Goldman* and extensively commenting on the Australian *SS Pharmaceutical* decision, and noting its similarity to the case at bar, Molloy J argued that the carrier must have actual knowledge that damage would

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that the trial court erred in its conclusion in failing to identify the perpetrator of the theft. For a discussion of the latter point under English law see Treitel, G, and Reynolds, F, *Carver on Bills of Lading* (2<sup>nd</sup> Ed, 2005), 641-642.

<sup>60</sup> Above n 58, [28]-[29].

<sup>61</sup> ICAO McGill, above n 41, n 12. Even though we found no Visby Rules case on this test following Canadian law, maritime case law reasoning on a similar provision has cited the *Goldman* decision in opting for the subjective test. *Société Telus Communications v Peracomo Inc* [2011] FCJ No 602 (QL), [80] (FCC). Moreover, a Canadian conflict of laws case commenting on the Hague Protocol provision refers to *Goldman* in stating that there should be knowledge of probable damage and not merely of possible damage: *Johnson Estate v Pischke* [1989] SJ No 58 (QL) (Sask QB).

<sup>62</sup> *Connaught*, above n 20, [58].

probably result. Such knowledge does not need to be proven by direct evidence, but may be inferred from the circumstances of the case. He specifically stated:<sup>63</sup>

In the case before me, there is no direct evidence available as to the state of mind of the persons who handled the cargo in London. However, the requirement of refrigeration was clearly marked on the packages and on the waybills, and they were labelled as perishable. Refrigeration was available in London but not used. It is obvious that perishable goods requiring refrigeration will probably be damaged if they are not refrigerated. In my view, this gives rise to the inference that British Airways personnel deliberately took the risk of the damage. At the very least, it gives rise to circumstances requiring some response from British Airways and no explanation has been provided. This supports the drawing of an adverse inference against British Airways.

The *Connaught* case is not the only Canadian case which has embraced the subjective test. Cases like *World of Art Inc v Koninklijke Luchtvaart Maatschappij NV*<sup>64</sup> and *Tiura v United Parcel Service Canada Ltd*<sup>65</sup> have also favored this standard. With some Canadian cases siding with the objective test to determine the knowledge of probable damage, and others adopting the subjective standard, the dominant trend of Canadian jurisprudence on this matter is not entirely clear. This contrasts with the English and Australian decisions, which have clearly sided with the subjective test.

## 2 The Two Requirements of the Visby Rules and the Hague Protocol Provisions in Civil Law Jurisdictions

During the negotiations of the Hague Protocol it was thought that Civil Law countries would interpret the first requirement of the Visby Rules/Hague Protocol provisions ('intent to cause damage') as *dol*<sup>66</sup> (from the Latin *dolus*). This has proven to be true for the Civil Law countries under examination since *dol*, in its different domestic law denominations (in France, *dol*;<sup>67</sup> in Greece, *δόλος*,)<sup>68</sup> has been used to qualify this behavior. Strong subjective considerations underpin these concepts.<sup>69</sup>

*Dol* implies an act intentionally committed to cause harm. This concept has no precise counterpart in English language or Common Law. However, the split of mental states into '*dolus*' and '*culpa*' (the Latin term for fault) in Civil Law systems is said to correspond roughly to 'intent' and 'negligence' following Common Law reasoning.<sup>70</sup> Common Law terms that have been specifically used to describe *dol* are deceit<sup>71</sup> and wilful misconduct. Wilful misconduct was the Common Law concept used to translate the French term *dol* in the 1929 Warsaw Convention

<sup>63</sup> *Ibid*, [63]. See, however, *Harry Richer*, above n 43, [9], [22], where the court held that, in the absence of a definitive explanation as to why the cargo is lost, no conclusion on the carrier's unlimited liability can be reached.

<sup>64</sup> [2000] OJ No 4567 (QL). [1] (CA).

<sup>65</sup> Above n 43, para 14, where the court followed *Goldman*. The subjective test seems to have also been followed in *Newell*, above n 51, [21].

<sup>66</sup> Mankiewicz, above n 13, 180, 186.

<sup>67</sup> France — sea: Cour de Cassation, 24 May 1994 (92-13632) LEGIFRANCE; Air: Cour de Cassation, 21 July 1987 (86-12091) LEGIFRANCE.

<sup>68</sup> Greece — sea: Kiantou-Pampouki, *Ναυτικό Δίκαιο II*, above n 9, 658. Korotzis, I, *Η Ευθύνη του Θαλασσιού Μεταφορέα σύμφωνα με τους Κανόνες Χαγής-Βισμπύ*, (1994), 51-52. Air: Papaxronopoulos, N, *Η αστική ευθύνη του διεθνούς αεροπορικού μεταφορέα πραγμάτων κατά τις Συμβάσεις Βαρσοβίας και Μοντρεάλ*, (2002), 184-185. A corresponding term (*dolo*) has also been used in Italy — sea: D'Ovidio, A, Pescatore, G, and Tullio, L, *Manuale di Diritto della Navigazione*, (10<sup>th</sup> Ed, 2004), 542. Air: Busti, S, *Trattato di Diritto Civile e Commerciale*, XXVI T.3 (2001), 644. On the approximation of an intent to cause damage to an intentional fault under Chinese Civil Law, see Xia Chen, *Limitation of Liability for Maritime Claims* (2001), 81. Under Chinese law intentional fault exists when a person can foresee the consequences of his act and hopes that the latter will occur or wilfully allows it to occur: Zheng, H, *China's Civil and Commercial Law* (1988), 37; Yang Lixin, *Tort Law* (2004), 185.

<sup>69</sup> France — transport case : general comment: Cour d'Appel de Rouen 21 January 2010, 2011 DMF 267, 267; Ghafourian, A, *Faute Lourde, Faute Inexcusable et Dol en Droit Français - Étude Jurisprudentielle* (PhD Thesis, Paris II Droit d'Économie et de Sciences Sociales, 1977), 72, 82. Greece — air: Court of Appeal of Athens, 1982, NOMOS 3075/1982 ΕΦΑΘ (147861). See also Fragogianni, K, *Νομοθετικές διατάξεις για το διαδικαστικό δόλο* (2000), <<http://www.kostasbeys.gr/articles.php?s=5&mid=1479&mnu=3&id=18252>>. China: Yang Lixin, above n 68. On the classification of faults in China see *below*, n 127 and accompanying text.

<sup>70</sup> As reported by Martinez, J, 'Understanding *Mens Rea* in Command Responsibility' (2007) 5 *JINTCRJ* 638, 644.

<sup>71</sup> Government of Canada, Translation Bureau, *Law of Contracts and Law of Torts Glossary (Common Law)*, <<http://www.btb.gc.ca/publications/documents/droit-law.pdf>>. This publication is part of a national program for the integration of both official languages in Canada.

provision regulating the loss of the air carrier's limitation of liability.<sup>72</sup> However, the two concepts are not synonymous. Whereas in wilful misconduct the act needs only to create a risk of probable damage to others, in *dol* the act is designed to cause damage to others.<sup>73</sup> Moreover, wilful misconduct need not be intentional, but may instead be a reckless act with knowledge that damage will result, lowering the burden of proof in Common Law countries compared to the Civil Law *dol* concept.<sup>74</sup> These are some of the issues that necessitated the drafting of Article 25 of the Hague Protocol.<sup>75</sup> The latter provision uses descriptive terms to qualify the conduct leading to unlimited liability, and deliberately does not refer to domestic law concepts such as wilful misconduct or *dol*, even though such have been used in practice.

As is the case in Common Law jurisdictions, an intent to cause damage is a rather rare occurrence in Civil Law countries, since it is rather unlikely that a carrier will intend to harm the transported goods.<sup>76</sup> As such, this conduct has not attracted much judicial attention.

Under the laws of France and Greece, as in Civil Law systems in general, gross negligence is, in reality, assimilated to *dolus* following the maxim *culpa lata dolo aequiparatur* — signifying that gross negligence is equivalent to *dolus*.<sup>77</sup> Although there is a theoretical distinction between the two notions in Civil Law countries — gross negligence constitutes an extremely serious fault, or conduct far removed from that of a reasonable, prudent person, but, unlike *dol*, gross negligence does not require intent or wilfulness — the assimilation is well known and generally applied in practice. It contrasts, however, with the situation in Common Law jurisdictions where there is a sharp distinction between negligence and intent. English leading cases have stated that “there is no room for the [Civil Law] maxim [*culpa lata dolo aequiparatur*] in the Common Law.”<sup>78</sup>

Despite the general application of the assimilation of gross negligence to *dolus* in Civil Law jurisdictions, France and Greece do not give effect to this maxim with respect to the carrier's loss of limitation of liability.<sup>79</sup> As a result, only the required elements of the Visby Rules/Hague Protocol provisions can lead to unlimited liability. This conforms with the intent of the drafters of both sets of rules, who believed that the use of domestic legal concepts rendered the provisions of international conventions devoid of coherence.<sup>80</sup>

The expression ‘*témérement et avec conscience qu'un dommage en résulterait probablement*’ (the French equivalent of ‘recklessly and with knowledge that damage would probably result’) has been translated into French law as *faute inexcusable* (inexcusable fault).<sup>81</sup> The concept of inexcusable fault does not form part of the general hierarchy of faults in French civil law; it is well-known, however, at the domestic level in the areas of transport, employment law (workplace accidents), and traffic accidents.<sup>82</sup> Its origins lie in the area of workplace accidents. In

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<sup>72</sup> The official French text of Article 25.1 of the 1929 Warsaw Convention made loss of the carrier's limitation of liability dependent on the presence of *dol*, or fault equivalent to *dol*, according to the law of the court seized of the case. It was translated into English as follows: ‘The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to wilful misconduct’.

<sup>73</sup> Cheng, above n 8, 76.

<sup>74</sup> As reported by McKay, above n 14, 90-91.

<sup>75</sup> Above, 119-120 and accompanying footnotes.

<sup>76</sup> See the interesting analysis of Theodoridis, G, *Η Αδικοπρακτική Ευθύνη του Θαλασσιού Μεταφορέα Κανόνες Χαγγής-Βισμπω* (2000), 53-54.

<sup>77</sup> France: Mazeaud, H, L and J, and Chabas, F, *Leçons de Droit Civil - Obligations Théorie Générale* (1991), 773. Greece: see art 332 par 1 of the Greek Civil Code on this assimilation. See also Chrisanthis, C, ‘Η Εντάξη της ‘Ηθελημενης Κακης Διαχειρισης’ στο Σύστημα Αστικής Ευθύνης του Διεθνούς Μεταφορέα’ (1999) *ΕΕΑ*, 598, 711 referring to this assimilation in general.

<sup>78</sup> *Armitage v Nurse* [1997] 2 All ER 705 (CA). In *Goodman v Harvey* (1836) 4 111 ER 1011 (KB), the court stated: “gross negligence may be evidence of *mala fides*, but is not the same thing”.

<sup>79</sup> France — air: Cour de Cassation, Chambre civile 1, 24 June 1968 LEGIFRANCE; sea: Cour de Cassation, Chambres réunies, 11 March 1960 (2141) LEGIFRANCE. Remond-Gouilloud, M, *Droit Maritime* (2<sup>nd</sup> Ed, 1993), 386. Greece: see the commentary of Chrisanthis, above n 77, 711 on international air and sea carriage. The same is valid under German law: Bundesgerichtshof (German federal supreme court), July 16, 1998 1 ZR 44/96, <<http://ulr.unidroit.org/case.cfm?pid=4&do=case&id=274&step=Abstract>>, commenting on the CMR and the Visby Rules.

<sup>80</sup> Above, 119-120.

<sup>81</sup> Sea: Cour de Cassation, 19 October 2010 (09-68425) LEGIFRANCE, Bonassies and Scapel, above n 9, 766. Air: Cour de Cassation, 20 October 2009 (08-18502) LEGIFRANCE.

<sup>82</sup> Viney, G, and Jourdain, P, *Traité de Droit Civil, Les Conditions de Responsabilité* (2006), 644-659.

Common Law terms, this French concept of *faute inexcusable* approximates the notion of wilful misconduct, since it may also refer to reckless behavior and implies the presence of knowledge of probable damage.<sup>83</sup>

In the areas of aviation and maritime law, an inexcusable fault has been applied in different contexts.<sup>84</sup> Two elements seem to characterize it: the presence of a reckless (*téméraire*)<sup>85</sup> behavior and the consciousness of the likelihood of damage (*la conscience de la probabilité du dommage*).<sup>86</sup> The two elements apply cumulatively.

Recklessness (*témérité*) denotes the persistence of the carrier to act in such a way that will result in damage, or the presence of a daring act on his part, or even the absence of measures taken to avoid foreseeable harm.<sup>87</sup> Some authors have described the term more briefly as ‘boldness that may reach imprudence’, ‘a behavior against law and reason’ (our translation for ‘*hardiesse qui va jusqu’à l’imprudence*’ and ‘*le comportement contre droit et raison*’).<sup>88</sup> In contrast to the English cases and doctrine examined above, the definition of this term has not attracted lengthy judicial and doctrinal commentary in France.

The consciousness of the likelihood of damage refers to the awareness that the carrier ought to have had of the likelihood of resulting harm. In effect, French courts assess the presence of an inexcusable fault based on an objective standard.<sup>89</sup> It has, therefore, been held that an inexcusable fault exists when the carrier loads cargo on the bridge of the vessel while bad weather conditions can be forecast and the possibility of damage is not excluded.<sup>90</sup> Likewise, the French Supreme Court (*Cour de Cassation*) has suggested that an inexcusable fault exists if the air carrier takes no measures to safeguard cargo at the arrival of the aircraft when he knows its value and cannot, therefore, ignore the likelihood of damage resulting from its treatment as regular cargo.<sup>91</sup> Finally, it has been concluded that an ocean carrier acts recklessly and with knowledge that damage would probably result when cargo is lost, no evidence is presented to explain the loss, but factual presumptions exist that it was delivered to a non-authorized party.<sup>92</sup>

The adoption of the objective standard to establish an inexcusable fault is compatible with the treatment of this concept in employment law cases in France<sup>93</sup> and certainly favors claimants. As mentioned in our introductory remarks, this is because the objective test does not require claimants to prove actual knowledge of the likelihood of damage like the subjective standard does but, rather, that the person in question should have had such knowledge

<sup>83</sup> See above, 123, on wilful misconduct. Cheng, above n 8, 79, on the comparison.

<sup>84</sup> Veaux, D, and Veaux-Fourmerie, P, ‘La pénétration en droit Français de la théorie de la faute inexcusable en matière aérienne et maritime sous l’influence des conventions internationales’ in *Mélanges en l’Honneur de Yvon Loussouarn* (1994), 394-397.

<sup>85</sup> Even though the two terms (‘recklessly’ and ‘*témérairement*’) appear to be synonymous, their equivalence has been disputed: see Cheng, above n 8, 94, based on the negotiations of the Hague Protocol. Cheng states, however, that there is little doubt from the preparatory work of the Hague Protocol that ‘*témérairement*’ is really the translation for ‘recklessness’. The definition of inexcusable fault in the different areas it is encountered is not identical.

<sup>86</sup> Air and sea: for the two elements of the concept, see Veaux and Veaux-Fourmerie, above n 84, 397. See also de Juglart, M, and du Pontavice, E, ‘Droit Aérien et Droit Maritime’ (1990) 43(1) *Rev Trim Droit Com*, 116, 129. We should note, however, that not all French authors agree with the mentioned elements of inexcusable fault.

<sup>87</sup> Corbier, E, ‘La Notion de Faute Inexcusable et le Principe de la Limitation de Responsabilité’ in *Études de Droit Maritime à l’Aube du XXI siècle — Mélanges offerts à Pierre Bonassies* (2001) 103, 110. See also Cour de Cassation, Chambre Civile 1, 5 November 1985 (84-11068), LEGIFRANCE (air case), Cour de Cassation, Chambre Commerciale, 14 March 1995 (93-13637) LEGIFRANCE (air case) to which the abovementioned author refers.

<sup>88</sup> Delebecque, P, ‘La Pontée Irrégulière : Une Faute Inexcusable du Commissionnaire mais une Faute Simple du Transporteur’ (2002) 54 *DMF* 620, 631.

<sup>89</sup> Sea: Bonassies and Scapel, above n 9, 766-769; Cour de Cassation 19 October 2010, 2011 DMF 155, 173 (note of Stéphane Miribel). Air: Cour de Cassation, Chambre Civile 1, 5 December 1967, LEGIFRANCE; Rodière, R, ‘La Faute Inexcusable du Transporteur Aérien — Appréciation Concrète ou Abstraite’ (1978) 13 *ETL*, 24, 26.

<sup>90</sup> Sea: *The Teleghma*, Cour de Cassation, Chambre Commerciale, 7 January 1997 (94-19035) LEGIFRANCE, also mentioned by Bonassies and Scapel, above n 9, 767. See also Cour d’appel d’Orléans, 9 Avril 2004, (2004) DMF 549, 556-557 (note of Antoine Vialard).

<sup>91</sup> Air: Cour de Cassation, Chambre Commerciale, 14 March 1995, (93-16196) LEGIFRANCE. Reference to this case has also been made by Scapel, C, ‘Vers la Fin de la Limitation de Responsabilité du Transporteur Aérien’ (1996) 49-50 *Rev Fr Dr Aérien et Spat*, 15, 18.

<sup>92</sup> Sea: Cour de Cassation, Chambre Commerciale, 4 January 2000, (96-22687) LEGIFRANCE. This case has been criticized in Delebecque, P, ‘La Carence du Transporteur: Une Faute Inexcusable?’ (2000) 52 *DMF*, 468, 468-470. Professor Delebecque argues that simple presumptions should not suffice to determine the presence or absence of an inexcusable fault.

<sup>93</sup> Viney and Jourdain, above n 82, 646-647, 649, 654-656; Vialard, A, ‘L’Évolution de la Notion de Faute Inexcusable et la Limitation’ (2002) 54 *DMF*, 579, 581.

when compared to a reasonable, prudent person (imputed knowledge). As favorable to claimants as this standard may be, however, it conflicts with the intent of the drafters of the Visby Rules/Hague Protocol provisions who concluded on the adoption of a subjective standard to assess the presence of knowledge that damage would probably result.<sup>94</sup> As a result, some authors have criticized the position of French courts. Professor Vialard, for instance, has referred to the ‘Franco-French’ interpretation of a concept with an international origin that presents the risk of isolation of French law.<sup>95</sup> Recent case law of the French Supreme Court also suggests that the subjective test should be used in this regard without, however, clearly abandoning the objective standard.<sup>96</sup> Authors argue that only court decisions concluding unequivocally on this issue can overrule the traditional approach maintained by the French courts.<sup>97</sup>

Finally, French maritime law is not clear on whether the second requirement of the Visby Rules/Hague Protocol provisions refers to the awareness of possible or probable damage. A probable damage is said to correspond to more than a 50% chance that damage will result, whereas a possible damage corresponds to merely a 25% chance.<sup>98</sup> Many maritime cases in France have required knowledge of possible, rather than probable, damage in assessing the presence of inexcusable fault qualifying the second requirement.<sup>99</sup> Such an interpretation aligns with the pro-shipper objective assessment of the concept of inexcusable fault adopted by the French courts, since it is easier for a claimant to establish a mere possibility, rather than a probability, of damage. Some authors, however, disagree with this interpretation, arguing that probability of damage goes beyond ‘a simple possibility’ (*‘une simple éventualité’*).<sup>100</sup>

In Greece, the translation of the second requirement of Article 4.5.e of the Visby Rules refers to ‘gross negligence and with knowledge that damage would probably result’ (*‘βαρεια αμελεια και με γνωση οτι πιθανον να προξενηθει ζημια’*).<sup>101</sup> Gross negligence — which translates the English term ‘recklessly’ — is a familiar domestic law concept which denotes an in habitual and particularly distant behavior from the one adopted by a reasonable, prudent person (an objective standard).<sup>102</sup> Greek doctrine, however, argues that the use of this concept in this context is unfortunate because it does not accurately translate the requirement.<sup>103</sup> What further complicates matters under Greek law is that the expression ‘recklessly and with knowledge that damage would probably result’ of Article 25 of the Hague Protocol is translated as: ‘by indifference and with knowledge that damage would probably result’ (*‘εξ αδιαφορίας και μετα γνωσεως οτι ζημια πιθανως θα επηρηγετο’*).<sup>104</sup> The term ‘by indifference’ — translating the word ‘recklessly’ — is thought to be quite broad, allowing for interpretations not intended for under article 25.<sup>105</sup>

In Germany, reckless conduct has been described as grossly negligent conduct<sup>106</sup> — a behavior that encompasses an objective and a subjective element — whereas in Italy, recklessness has been defined as the lack of respect of the

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<sup>94</sup> Above, 120.

<sup>95</sup> Vialard, above n 93, 581.

<sup>96</sup> Sea: Cour de Cassation 19 October 2010, above n 89, 172-173, 155-174, with reference made to other cases that have used the subjective test. Air: Cour de Cassation, chambre commerciale 21 March 2006, (04-19246) LEGIFRANCE, also commented upon by Bonassies and Scapel, above n 9, 767-768.

<sup>97</sup> Bonassies and Scapel, above n 9, 768.

<sup>98</sup> Below n 114, 115.

<sup>99</sup> See, for instance, Cour de Cassation 19 October 2010, above n 89, 159. This case seems to confuse possibility and probability of damage. See Bonassies and Scapel, above n 9, 301-302 on a similar provision of another international maritime convention. We are not certain whether the same tendency is present in French air cases.

<sup>100</sup> Delebecque, above n 88, 631.

<sup>101</sup> For the Greek translation of the Visby Rules see Gioggaras, G, *Κανονες Χαηης-Βισμπν Αμβουργουν* (2007), 97.

<sup>102</sup> This is a doctrinal definition of gross negligence. The Greek Civil Code does not define this concept. Beis, K and E, Balogianni, E, *Παραδεκτό και βασιμότητα ανααιρετικών λόγων* (2000), <<http://www.kostasbeys.gr/articles.php?s=5&mid=1479&mmu=3&id=18263>>, para. 3.2.2.

<sup>103</sup> Korotzis, above n 68, 52, Kiantou-Pampouki, above n 9, 658-659. In this regard, note needs to be made of the fact that no reference to gross negligence is made in the French, German or Italian versions/translations of art 4.5.e of the Visby Rules.

<sup>104</sup> Papaxronopoulos, above n 68, 290.

<sup>105</sup> Yokaris, A, ‘La Jurisprudence des Tribunaux Grecs sur la Convention de Varsovie’ (1977) *RFDA*, 125, 143.

<sup>106</sup> Schonert, D, ‘Article 25 Hague Protocol – Theft of Bank Notes: German Federal Supreme Court (Bundesgerichtshof), decision of 16 February 1979’ (1981) 6 *Air Law*, 97, 98.

minimum level of diligence<sup>107</sup> and as running an unjustifiable risk.<sup>108</sup> It is obvious, therefore, that a variety of terms has been used to describe the word ‘recklessly’ in the abovementioned Civil Law jurisdictions.

Greek case law has not clearly concluded on the application of the subjective or the objective tests to establish knowledge of probable damage. It has been held that, where the agents of the air carrier knew the value of the transported goods and consequently the probability of their loss, but failed to put them in a protected area, limitation of liability was unavailable to the carrier.<sup>109</sup> Likewise, where the agent of the carrier failed to take necessary measures to safeguard reported lost luggage where he knew that damage was likely, the air carrier cannot benefit from limitation of liability.<sup>110</sup> Italian law exhibits the same uncertainty on this issue.<sup>111</sup> Although recent German cases and doctrine side with the subjective test to assess the knowledge of probable damage,<sup>112</sup> the objective test has also been applied.<sup>113</sup> However, Greek,<sup>114</sup> German<sup>115</sup> and Italian<sup>116</sup> doctrine and, in some instances, case law refer to the probability, not merely the possibility, of damage within the context of the Visby Rules/Hague Protocol provisions.

When analyzing the second requirement of the Visby Rules/Hague Protocol provisions as a whole, many authors in Greece as well as the case law opine that it approximates the notion of ‘conscious negligence’ (our translation for the Greek term ‘εσυνειδήτη αμέλεια’).<sup>117</sup> Conscious negligence is a well-known domestic law concept that implies awareness of the results of one’s imprudent behavior coupled with the conviction that such results will be avoided.<sup>118</sup> This would be the case, for instance, of a carrier who did not properly stow the transported goods, not seriously taking into account the likelihood of a shipwreck such an act could cause, but instead believing that this incident would not occur. Similar notions have been used to qualify the second Visby Rules/Hague Protocol requirement in Italy (‘*colpa con previsione*’)<sup>119</sup> and in Germany (‘*bewusste grobe Fahrlässigkeit*’).<sup>120</sup>

In Japan and China, judicial controversy is avoided and emphasis is put on the amicable resolution of disputes.<sup>121</sup> As a result, case law commenting on the provisions under examination does not abound in these two countries. Despite

<sup>107</sup> Air: Corte di Cassazione, (Sez. 3) *Soc. Deutsche Lufthansa AG v Maresca*, 18 July 1991, 1992 Giustizia Civile 1543, 1545 (No 7977).

<sup>108</sup> Air: Busti, above n 68, 645. Sea: reference to this concept with respect to the loss of the carrier’s limitation of liability is also made by Carbone, S, *Contratto di Trasporto Marittimo di Cose* (2010), 473.

<sup>109</sup> Supreme Court (Αρειος Πάγος) 1999, NOMOS 428/1999 ΑΠ (275592), Court of Appeal of Athens 2005, NOMOS 5310/2005 ΕΦ ΑΘ (380319).

<sup>110</sup> Athens Trial Court 1995, NOMOS 7337/1995 ΜΠΠ ΑΘ (171456). However, there are earlier air decisions and doctrine that have reasoned on an objective standard: see Yokaris, above n 105, 142-145 and case law reported therein. We found no Greek cases commenting on this point under the Visby Rules provision.

<sup>111</sup> Sea: Bonassies, P, ‘Rapport de Synthèse’ (2002) 54 *DMF*, 1083, 1085 commenting on Italian law. On cases that have adopted the objective or the subjective standards in air carriage, see Busti, above n 68, 646-655.

<sup>112</sup> Subjective test — sea: Bundesgerichtshof, July 29, 2009, I ZR 212/06, <www.Bundesgerichtshof.de>; Schoner, above n 106, 98, commenting on case law; Giumulla, E, and Schmid, R, *Warsaw Convention* (2005), 19-21.

<sup>113</sup> Cases applying the objective test — air: Bundesgerichtshof, 10 May 1974, I ZR 61/73, 1974 *ETL* 630, also mentioned by Mankiewicz, R, *The Liability Regime of the International Carrier* (1981), 117.

<sup>114</sup> Sea: Theocharidis, above n 76, 55-56, following foreign doctrine. Air: Papaxronopoulos, above n 68, 191, following foreign case law and doctrine. We found no Greek case addressing specifically this question. It has been stated that probability of damage corresponds to more than a 50% chance that damage will result, whereas possibility corresponds to merely 25%: see Theocharidis, above n 76, 55-56, based on German doctrine.

<sup>115</sup> Air: Giumulla and Schmid, above n 112, 21, where the authors note that probability cannot be assumed until the chances of something happening are more than 50%. Although not specifically addressing this point, the ocean case Bundesgerichtshof, July 29, 2009, I ZR 212/06, <www.Bundesgerichtshof.de>, refers to the probability of damage.

<sup>116</sup> Under Italian law the concept of *colpa con previsione* (below, n 119) refers to the probability of damage. Air: Corte di Cassazione, (Sez 3) *Soc Deutsche Lufthansa AG v Maresca*, above n 107, Corte di Cassazione (Sez 3) *Cie Air France v De Luca*, 15 July 2005, <www.fog.it>, No 15024. See also the analysis of this issue in general by Zampone, A, *La Condotta Temeraria e Consapevole nel Diritto Uniforme dei Trasporti* (1999), 95.

<sup>117</sup> Sea: Kiantou-Pampouki, above n 9, 658-659. We should note the lack of Greek cases on the Visby rules on this issue. Air: Supreme Court (Αρειος Πάγος) 2010, ΝΟΜΟΣ 412/2010 ΑΠ (516038), Chrisanthos, above n 77, 704-705, reasoning on air carriage rules.

<sup>118</sup> As mentioned by Papaxronopoulos, above n 68, 189, based on civil law and criminal law doctrine.

<sup>119</sup> Sea: Carbone, S, Celle, P, and de Gonzalo, M, *Il Diritto Marittimo*, (3<sup>rd</sup> Ed, 2006), 297. A ‘*colpa con previsione*’ exists where the author deems the damaging event to be probable, but is convinced that it can nonetheless be avoided. Air: Corte di Cassazione (Sez 3) *Cie Air France v De Luca*, 15 July 2005, <www.fog.it>, No 15024, Corte di Cassazione (Sez 3), 19 June 2001 (2001), <www.fog.it>, No 08328.

<sup>120</sup> Sea: Herber, R, *Seehandelsrecht: Systematische Darstellung* (1999), 333.

<sup>121</sup> For this trend in Japan, see Toda, M, ‘Recent Developments and Changes in Japanese Maritime Laws’ (2008) 53 *Japan Shipping Exchange Bulletin* 1, <[http://www.jseinc.org/en/bulletin/list\\_of\\_nos.html](http://www.jseinc.org/en/bulletin/list_of_nos.html)>; and Baden, N, ‘The Japanese Initiative on the Warsaw Convention’ (1996) 61 *J*

this fact, a recent Japanese air case of the District of Nagoya, upheld on appeal,<sup>122</sup> stressed the importance of the subjective test to assess the knowledge of probable damage. Professor Fujita, an expert witness in this case, agrees with the court's adoption of the subjective test,<sup>123</sup> while maritime legal professionals from Japan also put emphasis on this standard.<sup>124</sup> At least part of Chinese maritime doctrine<sup>125</sup> seems to be moving in the same direction.

In China, some authors approximate the second requirement to an intentional fault or characterize it as an 'indirect intent'.<sup>126</sup> Often, however, this behavior is termed gross negligence.<sup>127</sup> Gross negligence in China refers to a serious breach which is assessed based on the behavior that a reasonable person would have adopted in the circumstances.<sup>128</sup> Although there are authors in Japan who share the same view and utilize domestic law concepts such as gross negligence to define this behavior, authoritative doctrine opines that the second requirement of the Visby Rules/Hague Protocol provisions should be assessed independently from such concepts.<sup>129</sup>

### 3 Comparative Analysis of Domestic Laws

Following the discussion of applicable laws regarding the Visby Rules/Hague Protocol provisions we will attempt to provide a comparative analysis. The focus of our analysis will revolve around the question of whether the implementation of these provisions promotes uniformity, ending the divergent interpretations that formerly existed regarding the requirements.

The answer to this inquiry is not monolectic. On the one hand, it is certain that the new rules clarified formerly applicable terms by describing the types of behavior leading to the loss of the carrier's limitation of liability. This has avoided, to some extent, the use of various domestic law concepts and their divergent interpretations that formerly existed. For instance, Civil Law jurisdictions which may have assimilated gross negligence (*faute lourde*) to *dol* under the Warsaw Convention or the Hague Rules cannot sustain this assimilation under the Hague Protocol/Visby Rules, which only refer to an intent to cause damage or to a reckless conduct with knowledge that damage would probably result. Equally, divergent Common Law interpretations of the term wilful misconduct under the Warsaw Convention and reference to various concepts with respect to the expression 'in any event' of the Hague Rules, do not form part of the Visby Rules/Hague Protocol provisions due to the descriptive terms chosen by their drafters.

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*Air L & Com*, 437, 453-455 respectively. For China and dispute resolution in general see Kaufmann-Kohler, G, and Fan Kun, 'Integrating Mediation into Arbitration: Why it Works in China' (2008) 25(4) *J Intl Arb*, 479, 480.

<sup>122</sup> District Court of Nagoya (26 December 2003), Hanrei Jihō no 1854, 63, upheld on appeal (Appeals Court of Nagoya (28 February 2008), Hanrei Jihō no.2009, 96). The case also referred to the negotiating history of the Hague protocol on this point. Both these cases were kindly forwarded to the author by Dr Souichirou Kozuka, Professor at Gakushuin University in Japan.

<sup>123</sup> Professor Fujita understands, however, why judges accepted exceptions to the ceiling of liability based on circumstantial evidence showing that pilots 'would have probably known' or 'must have been aware' of probable damage. The pilots were dead, and their actual knowledge of probable damage could not have been ascertained by the court. As reported by Fujita, K, 'On the Dramatic Decision of December 26, 2003 by the Nagoya District Court - In re the China Airlines Disaster of April 26, 1994' (Paper delivered at the International Conference at HAU Aerospace Center in Seoul, Korea, 17-19 June 2004), a document kindly provided by the author.

<sup>124</sup> Two Japanese law practitioners have discussed art 4.5.e of the Visby Rules with the author, and also believe that judges will determine the knowledge of probable damage based on the subjective test. However, there is no reported Japanese case on this point. Nor is there any clear consensus amongst Japanese academics.

<sup>125</sup> Xia Chen, 'Chinese Law on Carriage of Goods by Sea under Bills of Lading' (1999) 8 *WTR Currents: Intl Trade LJ*, 89, 97; Lu Shi-ping and Liu Xin, 'Research on Carrier's Responsibilities in Maritime Code of the PRC' (1) 19 *Journal of Weinan Teachers College* No 6.

<sup>126</sup> On intentional fault see Xia Chen, above n 68, 81, reasoning on a similar provision of another international maritime convention. On indirect intent where the author is aware of the damaging result of his acts or omissions but adopts a *laissez-faire* attitude regarding its occurrence, see Lu Shi-ping and Liu Xin, above n 126.

<sup>127</sup> Zhangjun Li, *The Study of International Sea Carrier Liability Regime*, (2006), 99-101, on similar provisions. This view has been confirmed by a conversation the author had with a law professional from China on art 4.5.e of the Visby Rules. The Chinese Civil Code does not define the concept of fault, but jurisprudence distinguishes between negligence (a category that also includes gross negligence) and intention. Zheng, H, *China's Civil and Commercial Law* (1988), 37; Jones, W, *Basic Principles of Civil Law in China* (1989), 156.

<sup>128</sup> Yang Lixin, above n 68, 187.

<sup>129</sup> As reported by Professor Akira Sano on his commentary of art 13.2 of the Japanese COGSA published in Toda, S, and Nakamura, M, (eds), *Chūkai Kokusai Kaijō Buppin Unsō Hō (Commentaries on the International Carriage of Goods by Sea Act)* (1997), 295. This document was kindly forwarded to the author by Dr Souichirou Kozuka, Professor at Gakushuin University in Japan.

On the other hand, when we examine the interpretations of the Visby Rules/Hague Protocol provisions in the case law, we can see that uncertainty as to the applicable standard persists. With regard to the second requirement of the Visby Rules/Hague Protocol provisions, we have noted that the term ‘recklessly’ has been defined in different ways (gross negligence, gross carelessness, running an unjustifiable risk) in Common Law jurisdictions, and has been subject to subjective or objective tests, depending on the reasoning of the particular court. On the contrary, the French corresponding term, *témérairement*, has not been subjected to lengthy doctrinal or judicial discussions in France. Descriptions of the term in this country include boldness, a behavior against law and reason, the persistence to act in such a way that will result in damage, while case law assesses its presence based on an objective standard which is the test followed by French courts in order to establish inexcusable fault. Some Italian authors have described recklessness as running an unjustifiable risk, while in other Civil Law countries such as Greece and Germany it has been referred to as gross negligence or indifference, and such behavior has been variously tested on an objective or an objective-subjective standard. The large range of interpretations and assessments of the term ‘recklessly’ based on domestic laws is, therefore, obvious.

The negotiating history of the Hague Protocol perpetuates the prevailing uncertainty since, as we have stated, the country delegates were not in agreement on the assessment of the term or its qualification.<sup>130</sup> What is certain from these negotiations, however, is that the drafters intended to render uniform the conditions governing the carrier’s unlimited liability and to avoid the use of domestic law concepts. This means that qualifying the term ‘recklessly’ based on domestic legal terms — for example, gross negligence — is not the correct approach to follow.<sup>131</sup> Such a practice is precisely what the drafters of the Visby Rules/Hague Protocol provisions sought to avoid.

This leads us to believe that the use of more ‘neutral’ vocabulary such as taking ‘an unjustifiable risk’ (English case law, Italian doctrine), ‘behavior against law and reason’ (French doctrine), a ‘decision to run the risk or a mental attitude of indifference to its existence’ (English and Australian case law), or more descriptive definitions of the term such as ‘persistence to act in such a way that will result in damage’, ‘absence of measures taken to avoid foreseeable damage’ (France), are more appropriate ways to describe this term since they dissociate themselves from domestic law concepts, the use of which cannot promote uniformity at the international level. Evidently, opting for one or more of the above-mentioned expressions may still leave room to divergent interpretations at the domestic level. However, these provide a basis upon which uniformity may exist, something that is less likely to occur when reasoning on domestic law terms.

Moreover, when commenting on the knowledge of probable damage, we have seen that the English, Hong Kong, Australian, Canadian (in part, and according to more recent trends) and seemingly Japanese cases assess such knowledge based on a subjective test. However, the French courts have opted for the objective standard to establish an inexcusable fault (*faute inexcusable*). Some Canadian judges share this view. Other jurisdictions, (Greece, Italy and Germany) have not clearly sided with one or the other test. The adoption of a shipper-protective objective standard by France to establish the knowledge of probable damage may be compatible with the traditional stance of French courts regarding inexcusable fault as applied in employment law cases. It clearly conflicts, however, with the intent of the drafters of the Visby Rules/Hague Protocol provisions, who sided with the application of a subjective test on this issue.<sup>132</sup> It also conflicts with the standard adopted by other jurisdictions that reason on the subjective test, and it leads to uncertainty as to the applicable rule at the international level. It is the author’s belief that national judges cannot oppose the obvious intent of the drafters of international instruments by applying the objective standard based on pre-existing employment case law on the inexcusable fault concept. The author agrees with French authors criticizing the stance that courts have adopted in this country, and trusts that future cases will

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<sup>130</sup> Above, 120.

<sup>131</sup> We agree, in this regard, with authors from Greece who regard as unfortunate the reference to gross negligence in the Greek statute implementing the Visby Rules. This is even more so if we follow the opinion of some authors who have stated that an important deviation from the acts of a reasonable person (denoting the concept of gross negligence) is not a condition for unlimited liability. Papaxronopoulos, above n 68, 189.

<sup>132</sup> Above, 120.



overrule the traditional French judicial approach. The author also invites jurisdictions that have not clearly ruled on this issue to adopt a clear stance respectful of the intent of the drafters of the two sets of rules.

Further, following on from the above analysis, the courts and doctrine in most of the jurisdictions under consideration usually conclude that the second requirement of the Visby Rules/Hague Protocol provisions refers to the probability — not the possibility — of resulting damage. However, French maritime cases seem to reason otherwise, often referring to the possibility of damage. Such a conclusion contradicts both the strict letter and the negotiating histories of both sets of rules.<sup>133</sup> The stance of French courts can be explained by the overall pro-shipper view that these courts maintain of the inexcusable fault concept. This consideration, however, cannot effectively counter the letter and intent of the drafters of the two sets of rules and does not favor uniform case law conclusions at the international level. It is to be hoped that French courts will reconsider this line of case law in the future.

Despite the different approaches adopted on the elements of the second requirement, similarities can also be found in the jurisdictions examined. For instance, where the carrier fails to present evidence relating to the damage of the cargo and there is proof of deplorably bad handling (Australia), or failure to observe the shipper's instructions (Canada), or factual presumptions exist that the goods were delivered to a non-authorized party (France), cases in these countries have all held that the carrier may lose his limitation of liability.<sup>134</sup> Moreover, where the failure of agents of the air carrier to place valuable cargo in a safe area has resulted in its loss, French, German and Greek courts have not hesitated to find the presence of reckless conduct with knowledge that damage would probably result.

Assessed overall, even though the Visby Rules/Hague Protocol provisions undoubtedly settled issues prevailing before their adoption, and have given rise to some consistent holdings at the international level, they have nonetheless failed to establish a uniformly applicable standard regarding the carrier's unlimited liability. This is due to the fact that the terms of the mentioned provisions are neither clearly defined nor interpreted in the same way by courts. The latter have often tried to qualify the prescribed conducts based on domestic law concepts — for example, the inexcusable fault notion in France and the subsequent application of the objective standard as mentioned above.

In effect, apart from the inexcusable fault concept in France, we have seen that English and other Common Law cases refer to the notion of wilful misconduct to describe the required conduct under the Visby Rules/Hague Protocol provisions. The danger lurking behind this qualification is that judges who are more familiar with domestic law terms may focus on applying these instead of looking at the requirements contained in the international instruments and their negotiating history. For instance, by qualifying the prescribed conducts as wilful misconduct, English judges may not stress the importance of the knowledge that damage would probably result, which is implicit in the Common Law notion, but is explicit in the Visby Rules/Hague Protocol provisions.<sup>135</sup> Likewise, the concepts of '*colpa con previsione*' in Italy and conscious negligence ('*ενσυνείδητη αμέλεια*') in Greece that doctrine and case law have used to describe the second requirement imply awareness of the results of one's imprudent behavior coupled with the conviction that these results will be avoided. Such conviction, however, does not make part of the second requirement of the Visby Rules and the Hague Protocol. The two sets of rules simply refer to the awareness of the likelihood of damage without any specific mention made to a conviction of avoiding it, or to its acceptance for that matter.<sup>136</sup> Thus, the English, Italian and Greek concepts do not accurately translate the Hague Protocol/Visby Rules corresponding behavior and may, therefore, confuse judges in their assessment of the facts. Finally, although the use of *dol* to qualify an intent to cause damage in France may reflect more accurately the first prescribed conduct

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<sup>133</sup> *Ibid.*

<sup>134</sup> Referring to *SS Pharmaceutical* (Australia); *Connaught* (Canada); Cour de Cassation, Chambre Commerciale, 4 January 2000, (96-22687) LEGIFRANCE (France). For a Canadian holding similar to the French case, see *Prudential* (Canada), above n 58. These decisions have been criticized on the basis that an absence of evidence should not suffice to conclude on the carrier's unlimited liability. See the dissent of Kirby J in the appeal of *SS Pharmaceutical*; and the criticism of the French case by Delebecque, above n 49, 92.

<sup>135</sup> On the comparison of wilful misconduct to the requirements in the rules, see above, 123.

<sup>136</sup> Busti, above n 68, 655; Papaxronopoulos, above n 68, 189. Quite independently from this point, an excellent comparison of the *colpa con previsione* and *dolo eventuale* to the second prescribed conduct and their differences is made by Zamponi, above n 116, 166-175.

than the Common Law wilful misconduct,<sup>137</sup> these domestic law concepts are not synonymous. In effect, French ‘*dol*’, Italian ‘*dolo*’ and Greek ‘*δολος*’ imply an act that is designed to cause damage, whereas wilful misconduct presupposes an act that needs only to create a risk of probable damage.<sup>138</sup> The person who engages in wilful misconduct, therefore, probably has no intention to cause damage.<sup>139</sup> Evidently, translating the descriptive terms of the Visby Rules/Hague Protocol provisions into domestic law concepts does not promote uniformity at the international level, does not always accurately reflect the terms contained in the international instruments and is exactly what the drafters of these provisions intended to avoid. One wonders, therefore, whether reference to domestic law concepts to qualify the prescribed conducts is needed, or should be avoided as confusing. The author believes that clarity in the application of the law mandates the latter approach.

The conclusion to be drawn from analyzing all these examples of domestic law concepts used to qualify international document provisions is that having recourse to such notions may result in distancing or, at least, distracting domestic judicial attention from the wording of the Visby Rules/Hague Protocol provisions. It is, in fact, not necessary to characterize the first requirement as *dol*, *dolo*, *δολος* (Civil Law jurisdictions) or as wilful misconduct (Common Law jurisdictions). These Common Law and Civil Law concepts are not synonymous. Judges have to simply look at the facts of the case and identify the presence of an intent to cause damage, without necessarily qualifying this behavior following one or another domestic law term. Likewise, it is unnecessary to label the second requirement wilful misconduct, conscious negligence, inexcusable fault, *colpa con previsione*, or gross negligence. These notions do not accurately reflect the behavior contained in the two sets of rules. The elements of the prescribed conduct (recklessness, awareness of probable damage) can be examined based on the facts of the case — an approach that seems to be followed more faithfully by the Canadian and Australian courts<sup>140</sup> — and need not, therefore, attach to domestic law terms. The opposite trend perpetuates the uncertainty as to the applicable legal standard and is not respectful of the intent of the drafters of the rules.

#### 4 Conclusion

The Visby Rules/Hague Protocol provisions governing the international ocean and air carrier’s unlimited liability were adopted with the view to promoting uniformity in their application. The above comparative analysis has demonstrated that, although the said provisions may have responded, to a certain extent, to the call for uniformity, their divergent interpretations and the persistence to reason on domestic legal terms to describe their content have undermined this objective. Rising above parochial legal concepts and focusing on the prescribed conduct and the intent of the drafters seems to be the right path to follow in working towards their uniform implementation.

If uniformity is to be achieved, the Visby Rules/Hague Protocol prescribed conduct should be interpreted autonomously, without regard to domestic law concepts. The descriptive terms of the Visby Rules/Hague Protocol provisions were designed to avoid recourse to domestic law notions, not encourage it. Moreover, the negotiating history of the mentioned rules reveals that the subjective test should be used to assess the knowledge of probable damage. This is also the test that major seafaring nations have adopted. Any other standard followed (for instance, the objective test mainly applied by French case law) is not supported by the negotiating history of the rules and does not promote uniformity.

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<sup>137</sup> It has to be noted, however, that the illegality element inherent in the concept of *dol* is not explicit or, it might be argued, even implicit in the first requirement. Cheng, above n 8, 84-85.

<sup>138</sup> *Ibid.*, 76 and above, 127-128.

<sup>139</sup> *Ibid.*

<sup>140</sup> Above, 123-125