Anglo-saxon institutes in international transport conventions referring to the carriers’ liability and the position of continental lawyers

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1. INTRODUCTION

Liability for damages represent the kind of relationship of obligation wherein one party of the relationship (liable person) is bound to compensate for damage another party (injured party), who is entitled to such compensation1. Liability for damages represents a civil sanction, which can be exercised by the other party of the legal relationship who suffered damage. A common characteristic of all civil sanctions is that they interfere in the property of a liable party and not in his personal status.

In the theory and court practice of different countries there are very precisely elaborated institutes of liability. Although within each legal system there exists some question regarding different legal aspects regarding the institutes of liability, they represent a challenge for theoretical discussions rather than obstacles in practice. The real problem in practice arises

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1 M. Vedriš, Osnove imovinskog prava, Opći dio imovinskog prava, stvarno, obveznosno i nasljedno pravo, 1983, p. 296.
in cases involving institutes of liability from different legal systems and above all when they involve institutes of Anglo-Saxon and Continental law system.

The problem in interpretation of legal institutions from different legal systems became relevant in the twentieth century with globalisation of world trade. One of the first areas of this kind was transport, wherein the first international conventions regulating the carriers’ liability appeared. A lot of institutes of Anglo-Saxon law entered into these conventions, which were not known to the lawyers of the Continental law because they were developed under specific circumstances which were not present in Continental law. This is a difficult situation for Continental lawyers. To overcome such a situation they had mostly been making attempts to find out which institutes of Anglo-Saxon law in the international conventions are comparable with those of Continental law. The main reason for the dilemma is that many Anglo-Saxon institutes in international transport

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2 With the emergence of national states after the absolutist period national states recognized no other law other than their own. As a consequence, legal customs were pushed to the bottom of the legal hierarchy. Private law and especially lex mercatoria was nationalized: it entered in the commercial codes, on the basis of which the states introduced their vision of the law (Gaigano, F., Lex mercatoria, Società editrice il Mulino, Milano, 2001, p. 109). In Europe, such a situation led to the emergence as many legal systems as states (P. Grilč, Lex mercatoria in mednarodno gospodarsko pravo, Podjetje in delo, 1998, p. 685).

3 In the legal books from the Anglo-Saxon area the expression common law is used to refer to the legal system from the Anglo-Saxon territory, while civil law refers to the legal systems in use in Continental Europe. In this article the expression Anglo-Saxon law will be used for the law deriving from the Anglo-Saxon area; for the law deriving from the Continental Europe on the other hand will be used the expression Continental law. Common law can not be used as the general notion for the law deriving from the Anglo-Saxon world for historical reasons. The branches of English law were traditionally connected to the particular court organisation. From the traditional division of English law till the reform in the 19th century the narrowness of Common law (Common law represented a group of legal rules, which were used by courts of Common Law till the 1873; Court of Common Pleas, King’s Bench and Court of Exchequer) was evident, which was only one of the legal branches. Besides Common law existed:
   - Admiralty law which represented the rules in principle used by the Court of Admiralty,
   - Equity as a group of legal rules used by the Court of Chancery and,
   - Family law (hereditary and the law of marriage) was applied by sacral courts.
Reforms in the 19th century secularised family law whereas the other three law branches were unified by reforms in such a way that they were incorporated in the frame of High Court of Justice. (P. Vlačič, Nejupravičenost omejitve višine odgovornosti v prevoznem pravu, 2005, p. 15-16).
Also the expression Civil law is not an adequate expression for the law present in Continental Europe because it comprehends the law which regulates the relationships between the private persons and not all the law branches which exist on the continent.

4 The first conventions were the conventions of the Committee Maritime International (CMI): the Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, 1910 and International Convention for the Unification of Certain Rules of Law Relating to Collision Between Vessels, 1910.
conventions represent the standard of carriers’ conduct or a situation in which he can no longer limit his liability. Therefore the Continental lawyers are interested in defining institutes of Continental law which contain the same or similar standards of conduct.

The method of comparison can only be partly successful because not every institute of Anglo-Saxon law has its comparable institute in Continental law. The question arises whether Anglo-Saxon law without correlative institutes in Continental law should be interpreted as they are in Anglo-Saxon law or whether Continental law can infuse them with meaning grounded on its own institutes.

2. LIABILITY IN CONTINENTAL LAW

The continental system of liability is based on two main types of liabilities: fault liability and strict liability.

Fault liability represents the relation of the person causing damage toward the consequence. This relation has many stages.

The highest degree of fault liability is intention. It includes not only the will to cause the act of damage but also the consciousness that the act is noxious for the rights of a third person. The intent can have different extremes. One of them is when a certain conduct is at the start evaluated as likely to bring about the damage, person acts completely wrong and indifferent to the probability of damage being caused. Such type of intent is called also eventual intent, which differs from direct intent; in the frame of the latter the actor is not indifferent towards the consequence - he is very interested that the consequence arises. The division between direct and eventual intention is more important in criminal law than in civil law, where few cases exist when the grade of intention is important in determination of the amount of estimation of civil compensation.

A less strict degree of liability is negligence, which represents omission to do something that should be done by the person who disposes with certain skills and knowledge. There are several forms of negligence.

6  P. Cendon in Digesto delle discipline privatistiche, 1991, p. 37.S.
8  In the Slovenian Obligation Code intention is not mentioned, but it should be respected in the case of defining the compensation (recourse) of joint and several debtors (Obligation Code Art. 208). In such a situation the intensity of intention of each joint and several debtor should be respected, which means that the compensation is greater when damage is caused by the direct intention than in the cases caused by eventual intention.
Irrespective of which form of negligence is referred to, common to all the types of negligence is that a consequence is not desired and that a criteria to estimate certain conduct as negligence is abstract. Conduct of the person causing damage is compared with an imaginary third person who conforms to the standard of correct conduct in a certain circumstance. This standard can be a ‘usual’ person, a reasonable man, a good master, expert, etc. In estimating these standards it is very important to elaborate all circumstances in which a certain person caused damage and than on the basis of standards which are relevant for the case in which damage was caused to estimate whether he acted correctly or neglected his duties.

A typical aspect of Continental law is the graduation of negligence. The highest degree of negligence is gross negligence (culpa lata) which signifies the lack of the kind of care which is expected from each person. Less strict is ordinary negligence (culpa levis), which means the failure to use that degree of care which the ordinary or reasonably prudent person would have used under the circumstances and for which the negligent person is liable. Besides gross and ordinary negligence exists also slight negligence (culpa levissima). It represents the failure of care which is expected from an extraordinary careful person.

In the civil codes of Continental law systems two types of fault liability exist: the fault liability where the burden of proof is on the claimant and presumed fault liability. The first type prevails and entails that the plaintiff should prove all the elements of liability including the fault. In the second type of fault liability the claimant need not prove the fault of the wrongdoer, because the latter should prove that there was no fault on his side for the damage caused. Up to this moment his fault is presumed. Presumed fault liability is a basic type of liability in very few Continental law legal systems. Presumed fault liability is very present in the area of maritime transport in both legal systems: Anglo-Saxon and Continental, and it was introduced by the Hague rules.

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9 S. Cigoj, supra 7, p. 185.
10 Ibidem.
11 The elements of fault liability are: injurious event, causation between the act of the wrongdoer and damage caused, inadmissible damage, and fault. – Ivi, p. 173
12 Presumed fault liability is a basic type of liability in the region of former Yugoslavia and it was introduced by the Code of obligation relationship (ZOR), which defines a person who causes damage to another liable unless he proves that the damage appeared without his liability (154. čl. Obligation). When a new Obligation code in Slovenia was accepted it preserved presumed fault liability.

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Besides fault liability there is also strict liability, which represents liability irrespective of fault. The liable person becomes the person under the obligation in all situations when his conduct is in causation with the damage. In the legislation such a type of liability can be found in the case of dangerous activity. Today there exists relative strict liability, meaning that there exist reasons for exculpation. In most cases these reasons are: *force majeure*\(^\text{14}\), act of a third person, act of war, act of Government etc\(^\text{15}\). For all of the above mentioned reasons of exculpation, another condition should be present, i.e. that they are an inevitable and unexpected occurrence.

3. LIABILITY IN ANGLO-SAXON LAW

In Anglo-Saxon law there also exist two main types of liability: fault liability and strict liability.

Fault liability assumes three forms: malice, intention (including recklessness) and negligence\(^\text{16}\). Malice is the most reprehensible state of mind. It has assumed different meanings in different contexts, but it could broadly be equated to spite\(^\text{17}\). In the conduct by malice enters: malicious prosecution, malicious abuse of process, malicious falsehood, etc.

Intention signifies the state of mind of a person who foresees and desires a particular result. In tort law there are three main groups of torts requiring intention (a) the torts having their origin in the old writ of trespass which protects personal liberty and security (b) fraud and injurious falsehood (c) a group of torts which protect against interference with contractual relations and trade\(^\text{18}\).

Negligence represents omitting to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or doing something which a reasonable and pru-
dent man would not do\textsuperscript{19}. Negligence is strictly connected to the institute of foresee-ability which represents the ability to see or know in advance the reasonable anticipation that harm or injury is likely to result from certain acts or omissions. From this aspect the negligence can be defined also as a state of mind of a person who fails to advert to the foreseeable consequences of his conduct, as a reasonable man would have done\textsuperscript{20}. Typically for the institute of negligence in Anglo-Saxon law is that except in bailment cases the graduation of negligence is rejected by nearly all courts because it adds difficulty and confusion to the already nebulous and uncertain standards which must be exhibited to a jury\textsuperscript{21}. The degrees of negligence in the bailment of Anglos-Saxon law were borrowed from Roman law through the case Coggs v. Bernard\textsuperscript{22} and given support by learned writers. There are three «degrees» of negligence: \textit{gross negligence}, \textit{ordinary negligence} and \textit{slight negligence}:

- \textit{Gross negligence}; as it originally appeared, this was very great negligence, or the want of event scant care. It has been described as a failure to exercise even that care which a careless person would use\textsuperscript{23}. From the court practice are evident different elements in describing gross negligence. In the case of R. v Adomako\textsuperscript{24} the House of Lords agreed with the definition of gross negligence given by the Court of Appeal which exposed three characteristics of gross negligence: (i) indifference to a obvious risk of injury to health, (ii) or actual foresight of the risk coupled, either with a determination nevertheless to run it, or with an intention to avoid it, but involving a high degree of negligence in the attempt to avoid it; or (iii) inattention, or failure to avert a serious risk, going beyond mere inadvertence in respect to an obvious and important matter of the defendant’s duty demanded of him.

- \textit{Ordinary negligence}; the omission of that care which a person of common prudence usually takes on his own\textsuperscript{25}.

- \textit{Slight negligence}; an absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use, or in other words, a failure to exercise great care\textsuperscript{26}.

The most general definition of strict liability in Anglo-Saxon law is liabili-

\textsuperscript{20} S. Deakin, et al., supra 16, p. 20.
\textsuperscript{22} (1703) 2 Ld.Raym. 918.
\textsuperscript{23} W.L. Prosser, supra 21, 183.
\textsuperscript{25} R.J. Nolan, et al., supra 19, p. 1034.
\textsuperscript{26} W.L. Prosser, supra 21, p. 183.
ty without fault. In Anglo-Saxon law it was introduced by the case Rylands v. Fletcher. In this case the court took a decision that anyone who in the course of «non-natural» use of his land «accumulates» thereon for his own purpose anything likely to do mischief if it escapes is answerable for all direct damage thereby caused. The concept of strict liability is applied in liability for animals, employers’ liability, vicarious liability and product liability. The sole modern instance of a significant juridical creation of strict liability has been the American development of product liability. England has followed the same lines, but by statute.

4. The most discussed Anglo-Saxon institutes regarding the carrier liability by the continental lawyers

In the international transport conventions there are many Anglo-Saxon institutes regarding the carriers’ liability but, as mentioned, in the interest sphere of the Continental lawyers are mostly those institutes which repressed a standard of conduct or a situation, where the limitation of the liability is no longer possible. One of the most frequent institutes of that type in the international transport conventions are: «actual fault or privity», «willful misconduct» and «recklessness».

4.1. Actual fault or privity

It was not until well into the early 19th century that the idea of limiting liability for damages resulting from collisions began to temper the common law and the maritime law notion of unlimited liability. The Merchant Shipping Act 1894 came into force, which besides limitation of liability to an amount calculated by reference to a ship’s tonnage, contained the institute of «actual fault or privity» which represents the type of conduct which prevents the ship-owner from limiting the liability.

In the first international convention regarding the limitation of the ship owner’s liability the notion of «actual fault or privity» was not used but rather «obligations arising out of acts or faults of the owner» which can be easily

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27 (1865) 3 H & C 774.
29 Merchant Shipping Act paragraph 1, Art. 503:
   ‘The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity (that is to say),
   - Where any loss of life or personal injury is caused to any person being carried in the ship,
   - Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship; ….’
30 Article 2, 1924 Limitation Liability Convention.
understood by Continental lawyers. The notion of «actual fault or privity»
was introduced in international conventions by the 1957 Limitation Li-
ability Convention. Whereas Convention 1976 on the Limitation of Li-
bility represents a significant alteration from its equivalent articles in the
1957 convention because it no longer uses the institute of «actual fault or

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31 Convention 1957 Article 1

(i) The owner of a sea-going ship may limit his liability in accordance with Article 3 of this
Convention in respect of claims arising from any of the following occurrences, unless the
occurrence giving rise to the claim resulted from the actual fault or privity of the owner:
(a) loss of life of, or personal injury to, any person being carried in the ship, and loss of, or
damage to, any property on board the ship;
(b) loss of life of, or personal injury to, any other person, whether on land or on water,
loss of or damage to any other property or infringement of any rights caused by the act,
neglect or default of any person on board the ship for whose act, neglect or default the
owner is responsible or any person not on board the ship for whose act, neglect or default
the owner is responsible: Provided however that in regard to the act, neglect or default of
this last class of person, the owner shall only be entitled to limit his liability when the
act, neglect or default is one which occurs in the navigation or the management of the
ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or
disembarkation of its passengers;
(c) any obligation or liability imposed by any law relating to the removal of wreck and
arising from or in connection with the raising, removal or destruction of any ship which
is sunk, stranded or abandoned (including anything which may be on board such ship)
and any obligation or liability arising out of damage caused to harbour works, basins and
navigable waterways.
(2) In the present Convention the expression “personal claims” means claims resulting
from loss of life and personal injury; the expression “property claims” means all other
claims set out in paragraph 1 of this Article.
(3) An owner shall be entitled to limit his liability in the cases set out in paragraph (1) of
this Article even in cases where his liability arises, without proof of negligence on the
part of the owner or of persons for whose conduct he is responsible, by reason of his ow-
nership, possession, custody or control of the ship.
(4) Nothing in this Article shall apply:
(a) to claims for salvage or to claims for contribution in general average;
(b) to claims by the Master, by members of the crew, by any servants of the owner on
board the ship or by servants of the owner whose duties are connected with the ship, in-
cluding the claims of their heirs, personal representatives or dependents, if under the
law governing the contract of service between the owner and such servants the owner
is not entitled to limit his liability in respect of such claims or if he is by such law only
permitted to limit his liability to an amount greater than that provided for in Article 3 of
this Convention.
(5) If the owner of a ship is entitled to make a claim against a claimant arising out of the
same occurrence, their respective claims shall be set off against each other and the provi-
sions of this Convention shall only apply to the balance, if any.
(6) The question upon whom lies the burden of proving whether or not the occurrence
giving rise to the claim resulted from the actual fault or privity of the owner shall be
determined by the lex fori.
(7) The act of invoking limitation of liability shall not constitute an admission of liability.
privity» but the institute «recklessly and with knowledge that such loss would probably result»

The words «actual fault or privity» infer something personal to the owner, something blameworthy, as distinguished from constructive fault or privity such as fault or privity of his servants or agents. Under the 1957 Limitation convention, the onus of proving that the loss occurred without fault or privity lies with the claimant, the reason for this being that limitation under this regime is not as of a right, but a privilege, for which the party claiming limitation must first satisfy certain conditions.

«Actual fault or privity» should be understood as a linking of two notions; «actual fault» and «privity». The first notion represents the personal fault which is imposed on the carrier; the second notion requires a little more explanation. If one is «privy» to something this means, generally speaking, that one has a certain knowledge, either confidential or otherwise, of some relationship or agreement or situation existing between two or more other people. In other words, one could virtually but perhaps not entirely describe the word «privity» as being equivalent to the word «knowledge».

In the past when the owner of a ship was often also the master, the problem of deciding whether or not there had been actual fault or privity was very easy. The master was present all the time when the ship was sailing and all the navigational decisions regarding the ship as well as its commercial exploitation was his responsibility. In the modern day complexities of large shipping organizations, subsidiary companies, consortia, etc., it can be and very frequently is, extremely difficult to pinpoint whether or not the actual fault is that of the ship-owner himself or somebody so closely identified with the company owning the ship as to be said to be a person who spoke and acted as the ship owning company itself or whether it is the neglect or default or act of a servant of the ship-owner.

To establish whether the personal fault of the shipping organization is in issue the theory of alter ego was developed. It was first used in relation to application for a decree of limitation of liability under the provisions of the Merchant Shipping Act, 1894, by Counsel in Lennard’s Carrying Co Ltd v. Asiatic Peroleum Co Ltd and later embellished by other cases.

32 Limitation Convention 1976 Article 4:
A person shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.


34 C. Hill, supra 28, p. 378-379.

35 Ivi, p. 378.

36 (1914-15) All ER Rep 280, HL.
In Lennard’s the ship had loaded a cargo of benzene at Novorossiysk for carriage to Rotterdam. Shortly after passing Dover the vessel encountered a strong north-westerly gale with heavy seas and when she was off the Dutch coast she hove to and set her head against the gale to prevent herself from being driven on to the lee shore, but she went aground because of insufficient power. She was unable to free herself and was subjected to heavy bumping causing the benzene to escape from the tanks and get into the furnaces with the result that the ship was set on fire and the cargo was thus lost. The appellant company, Lennard’s Carrying Co Ltd, was the owner of the vessel upon which the respondents’ cargo was carried. The ship was managed by another company, Lennard & Sons, where Mr. Lennard was registered managing director of the vessel and took an active part in the management of her on behalf of the owners.

The court held that Mr. Lennard knew, or had the means of knowing, of the defective condition of the boilers but gave no special instructions to the captain or the chief engineer regarding their supervision and took no steps to prevent the ship going to sea with her boilers in an unseaworthy condition. The House of the Lords held that Mr. Lennard was the alter ego of the company and as he could not show that he was not personally at fault, therefore the company was unable to limit its liability to the respondents’ claim.

In the case Lennard’s Carrying Co Ltd. v. Asiatic Petroleum Co. Ltd the explanation of the notion «alter ego» of judge Viscount Haldane LC should be mentioned. He pointed out that a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who in reality is the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.

Another very important case regarding the actual fault or privity and the doctrine of «alter ego» is The Lady Gwendolyn37. The vessel Lady Gwendolyn was in the ownership of the Arthur Guiness, Son & Co., concerned with brewing. Despite thick fog, the ship was proceeding at full speed with her radar operating but not continuously manned, and the Master only occasionally looked at it. The Master had been in the habit of sailing at excessive speed for some time and if the ship owner’s superintendent had examined the ship’s log, as should have been done, he would have discovered that this was the case and would have reprimanded the ship’s Master. On basis of the presented facts the court decided that the plaintiffs were

37 (1965) 1 Lloyd’s, Rep. 335.
not entitled to limit their liability since their «actual fault or privity» had contributed to the accident. A reasonably prudent ship-owner would appreciate the navigational problems involved in the use of radar in fog and would emphasize the vital nature of these problems to their ships’ Master.

In the case of the Lady Gwendolyn the court devised a two-part test to determine who in a corporate personality was the «alter-ego», the individual «mirror image» of the company itself. The two part test was:

- Who is or was the directing mind behind the voyage in question?
- If that person had acted as a person in his position should reasonably have done, would the accident still have happened?\(^3^{38}\)

The response to the first question was the superintendent; the response to the second question was that he could have prevented the accident if he had acted properly.

One of the recent cases regarding the «actual fault or privity» was the case Grand Champion Tankers Ltd v. Norpipe A/S and others (The Marion)\(^3^{39}\). The vessel Marion attempted to weigh her anchor. She was unable to do so because her anchor had fouled an oil pipeline which ran from the Ekofisk Field through Tees Bay to Teesside. The pipeline was severely damaged. The owners of the pipeline and other companies who contended that they had suffered loss by reason of the damage to the pipeline claimed damages exceeding U.S. $25,000,000. The plaintiffs claimed a decree limiting the amount of their liability in damages in respect of this incident to $982,292.06. They claimed that the Master had negligently used an out-of-date chart which did not have the pipeline marked on it. The Admiralty judge hearing the application to limit initially granted limitation on the ground that the provision and maintenance of the charts was the sole responsibility of the Master and it was his negligence in using an out-of-date chart which was the sole cause of the damage/losses. The Court of Appeal reversed this decision on the grounds that it was the ship managers’ duty to ensure that there was an effective and properly supervised system of chart provisions and maintenance and such a system was absent in this case. The year before the owner was warned by inspectors about the outmoded charts on the ship. This failure on the part of the ship’s manager was considered by the House of Lords to be directly causative of the oil companies’ losses, and furthermore the owners in turn were to be held legally responsible for the negligence of their managers. On this basis the owners were personally at fault and were denied the right to limit their liability.

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38 C. Hill, supra 28, p. 381.
This last case very clearly demonstrates that effective management control is necessary to obtain limitation of liability. On the other hand, it is very clearly emphasizes a situation in which a master in large ship company is becoming less and less the «Master of his own little world»\(^{40}\). Although that is the reality, the court decided that effective control in matters which are connected with the systematic management of the company is necessary.

In the United States the equivalent to the institute of «actual fault or privity» is «privity or knowledge». To ascertain whether damage was caused without «privity or knowledge» a «reasonable man» test is applied, directed at ascertaining whether or not the ship-owner had actual knowledge, or could have or should have obtained that knowledge by means of a reasonable inspection\(^{41}\). «Privity or knowledge» can be connected with ship equipment, diligence in selecting, training or supervising crew members, or even in respecting the standard which must be present during the building or reconstructing of the vessel. In the case of the Marine Sulphur Queen\(^{42}\) the demise charterers and the owners were unable to limit their liability in respect to wrongful death claims against them. They were not able to show that proved unseaworthiness was not the cause of the loss of the ship with the resultant loss of life, and since they were considered to be personally at fault in that the reconstruction of the vessel had not complied with American Bureau standards.

The institute of «actual fault or privity» creates for the Continental lawyers a number of problems in defining its meaning, because it is an institute which was originally developed in the Anglo-Saxon legal system. When the 1957 Limitation Convention was being prepared, the Continental lawyers put forth the question of what this institute means. A delegate from Norway was against allowing the institute of actual fault or privity entering into the conventions, because it is a part of the English Law tradition. The Netherlands and Italian delegations proposed that the notion of «willful misconduct» or «gross negligence», which is closer to continental law, be used instead, but the English delegation disagreed\(^{43}\). The president of the commission for preparation of the 1957 Limitation Convention explained that the notion «actual fault or privity» means personal fault, which is also known in the French legal system as the «faute personelle».

\(^{40}\) C. Hill, supra 28, p. 383.
\(^{42}\) (1973) 1Lloyds Rep. 88.
\(^{43}\) V. Filipović, Neograničena odgovornost brodovlasnika u slučaju njegove osobne krivnje, 1966, p. 214.
At the end, after very fiery polemics, the final text of the 1957 Limitation Convention nevertheless included the expression «actual fault or privity».

4.2. Recklessness

The institute of recklessness can be found in many international transport conventions which were ratified by countries belonging to Anglo-Saxon legal systems as well as by countries belonging to the Continental legal system.

In international conventions the institute of recklessness first appeared in the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 (The Hague Protocol to the Warsaw Convention 1955) which in Article 13 defines reckless conduct with the knowledge that damage would probably result as a conduct where limitation of liability is not possible. After the Warsaw-Hague Convention this institute also appeared in other conventions.

Recklessness is often bracketed with intention, which represents the state of mind of a person who foresees and desires a particular result. Foreseeing a consequence is the element which is common to both recklessness and intention, but on the other hand there is an important difference. In the case of recklessness the actor does not desire a particular result that is not regarded as inevitable. In theory recklessness is often defined as a state of mind accompanying an act, which either pays no regard to its probable or possible injurious consequences, or which, though foreseeing such consequences, persists in spite of such knowledge; and it is emphasized that to be reckless the conduct must be such as to evince disregard of or indifference to consequences, although no harm was intended. Indifference to consequences can be found also in court cases. In Goldman v. Thai Airways International, which represents one of the important cases treating recklessness in transport, the judge took the position that when a person acts recklessly he acts in a manner which indicates a decision to run a risk or a mental attitude of indifference to its existence.

Warshaw-Hague Convention 1929, Art. 25: «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».

See point 4.1.1.
S. Deakin, et al., supra 16, p. 20.
For continental lawyers the institute of recklessness is mostly studied in their attempts to identify the analogy or difference between it and the institute of gross negligence. This question is for them very important because in continental law gross negligence is a type of conduct in which the liable person can not exclude or limit his liability. From that point of view it is very important to determine whether gross negligence is an analogical institute to that of recklessness, or whether the latter represents an institute which contains a higher degree of fault than the gross negligence. In such a case, according to Anglo-Saxon law and international conventions, which adopted the institute of recklessness, a carrier is in a better position than in Continental law, wherein the national legislations define the carriers’ conduct with gross negligence, when the limitation or exclusion of his liability is not possible. Till now the continental lawyers in their efforts to define the analogy or difference between these two institutes haven’t had easy work. One of the reasons is that in the Anglo-Saxon law few detailed studies regarding the analogy or difference between recklessness and gross negligence exist. That is one of the reasons why the Continental lawyers very often do not differentiate between the institutes of recklessness and gross negligence.

Those Continental lawyers who studied the institutes of gross negligence and recklessness and also institutes like wanton conduct and willful misconduct in a systematic way, classified these as semi-intentional types of conduct which can not be enacted with gross-negligence. They came to such a conclusion because in Anglo-Saxon law the institutes of recklessness, wanton and willful misconduct are defined by some authors as «quasi intent» which represents a special category lying between intent to do harm and negligence. All three institutes exceed all the types of negligence, even gross negligence. That confirms the comparison of the institute of gross negligence and recklessness. The last one is in comparison to wanton conduct and

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49 The provisions of that kind can be found in many legislative passages. Art. 276 BGB does not allow the exclusion of the liability for damage caused by intent in advance. Art. 1229. CC (I) defines that every agreement which exonerates or limits preventively the liability of the debtor in the case of gross negligence is void. Similarly the Slovenian Obligation code in Art. 242 does not permit exclusion or limitation of liability when damage is caused by intent or gross negligence.


51 One of the authors of Anglo-Saxon law who makes a very detailed study regarding negligence and intent is Prosser, who could not arrange recklessness, wanton and willful misconduct in the group of negligence, because they contain some elements of intent although they are not so distinctive as they are in real intent. – W.L. Prosser, supra 21, p. 184.
willful misconduct the closest to gross negligence, though it can not be submitted to it. In contrast to gross negligence, wherein the consequence is not desired, within the institute of recklessness the deliberate indifference toward the consequence is already present.

4.2.1. Recklessly and with knowledge that such loss would probably result

When speaking of the institute of recklessness in transport we cannot overlook the phrase «recklessly and with knowledge that such loss would probably result» or similar wordings which represents in several international transport conventions the type of conduct in which the carrier cannot limit his liability. As mentioned, this text first appeared in The Hague Protocol to the Warsaw Convention 1955, and then was slightly modified in other conventions in the sphere of maritime and air transport: Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Visby Amendments), United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules), Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974 (Athens Convention), Convention for the Unification of

G. Boi, supra 50, p. 164; I. Grabovac, supra 50, p. 74-75.

Visby Rules, Article (5) 4:

5 (a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 666.67 units of account per package or unit or units of account per kilo of gross weight of the goods lost or damaged, whichever is the higher. (b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged. The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality. (c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit. (d) The unit of account mentioned in this Article is the special drawing right as defined by the International Monetary Fund. The amounts mentioned in h_visby/art/art04__asub-paragraph (a) of this paragraph shall be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the Court seized of the case. (e) 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. (f) The declaration mentioned in sub-paragraph (a) of this paragraph, if embodied in the

Bill of lading, shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

(g) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.

(h) Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.

Article 8 Hamburg Rules:
1. The carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.
2. Notwithstanding the provisions of paragraph 2 of article 7, a servant or agent of the carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

Article 13 Athens convention:
1. The carrier shall not be entitled to the benefit of the limits of liability prescribed in Articles 7 and 8 and paragraph 1 of Article 10, if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.
2. The servant or agent of the carrier or of the performing carrier shall not be entitled to the benefit of those limits if it is proved that the damage resulted from an act or omission of that servant or agent done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

Article (5) 22 Montreal rules:
The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its 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 such servant or agent was acting within the scope of its employment.

Article 4, 1976 Liability Convention:
A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.
ability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.  
The main question in the phrase «recklessly and with knowledge that (such) loss would probably result» is whether the knowledge should be objective or subjective and whether in the mind of the actor should have been present exactly such damage had been caused.

58 Article 21, United Nations Convention on International Multimodal Transport of Goods, 1980:  
1. The multimodal transport operator is not entitled to the benefit of the limitation of liability provided for in this Convention if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the multimodal transport operator done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.
2. Notwithstanding paragraph 2 of article 20, a servant or agent of the multimodal transport operator or other person of whose services he makes use for the performance of the multimodal transport contract is not entitled to the benefit of the limitation of liability provided for in this Convention if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant, agent or other person, done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

59 Article 4., International Maritime Organization Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969:  
1. Paragraph 1 is replaced by the following text:  
1. Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident, or, where the incident consists of a series of occurrences, at the time of the first such occurrence, shall be liable for any pollution damage caused by the ship as a result of the incident.
2. Paragraph 4 is replaced by the following text:
4. No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention. Subject to paragraph 5 of this Article, no claim for compensation for pollution damage under this Convention or otherwise may be made against:  
(a) the servants or agents of the owner or the members of the crew;  
(b) the pilot or any other person who, without being a member of the crew, performs services for the ship;  
(c) any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship;  
(d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;  
(e) any person taking preventive measures;  
(f) all servants or agents of persons mentioned in subparagraphs (c), (d) and (e);  
unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

60 Article (5) 7, International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996:  
5. Subject to paragraph 6, no claim for compensation for damage under this Convention or otherwise may be made against:  
(a) the servants or agents of the owner or the members of the crew;  
(b) the pilot or any other person who, without being a member of the crew, performs services for the ship;  
(c) any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship;
Speaking of the knowledge of a reasonable person about the possibility of causing damage in terms of intelligence and ability to make a judgment of the possible damage, objective or subjective criteria can be applied. Objective criteria are an abstraction of the knowledge of an imaginary person in a certain person on the basis of standards existing for a certain group of persons (pilots, drivers, doctors, etc.). Subjective knowledge on the other hand is taken from the aspect of an individual person who causes damage. The knowledge of such person can be inferior or superior to that of a ‘normal’ reasonable person.

The Anglo-Saxon legal system considers the subjective concept of knowledge. There are many points of view which try to sustain such a concept. The conduct which leads to damage and represents a condition for breaking the liability is the conduct of a particular person (be it individual or the alter ego of a company) and not just any person in question. Another argument is that the subjective element dictates the consistent use of the 1976 Limitation Convention, which is to award an almost unbreakable right to limitation to the person liable. The fact that the 1976 Limitation Convention has deemed it fit to place the burden of proving the requisite conduct on the party claiming full damage is also an indication that the right to limitation should be made that much more difficult to break. Finally, it could be argued that, read ejusdem generis with first limb (intent to cause such loss), the second limb recklessly and with knowledge must embrace conduct of the same ilk as that envisaged by the first. This is echoed in the words of Kirby J in the Qantas case: “The extreme exceptions provide a clue, without more, to the high stringency involved also in the alternative ground of exception (recklessly, etc.).”

The subjective concept of knowledge is very evident from the judgments of Anglo-Saxon courts. One of the most known cases dealing with the question of whether the knowledge should be objective or subjective is the Goldman case wherein the judge gave a consideration that if the pilot did not know that damage would probably result from his omission, than it is not possible to attribute to him a knowledge which another pilot

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(d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
(e) any person taking preventive measures; and
(f) the servants or agents of persons mentioned in (c), (d) and (e);
unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

Ibidem.
might have possessed or which he himself should have possessed. Such a position definitely demonstrates the subjective nature of knowledge, which was confirmed also by Lord Justice Purchase who in the same judgment mentioned «actual knowledge» and defined it as a knowledge in the mind of the pilot at the moment at which the omission occurs and stated that art. 25 of Warsaw-Hague Convention includes only that kind of knowledge. The same position Lord Justice Purchase took in the Goldman case was taken in the case of Nugent and Killick v. Michael Goss Aviation Ltd. and others\(^6\) where the court stated that article 25 of the Warsaw convention (The Hague Protocol to the Warsaw Convention 1955) does not introduce an imputed knowledge; it was not sufficient to show that by reason of his training and experience the pilot ought to have known that damage would probably result from his act or omission; the test was subjective; actual knowledge was required.

In some legal systems, like in France, objective knowledge is required. In the case Emery v. Ors v. SABENA Belgian World Airlines the court held that aggravating circumstances that qualify the wrongful act are to be assessed objectively having regard to the normal behaviour of a good pilot\(^6\). Very similar was the position of the court in the case Lamberth v. Guiron, where the court states that the actor must have been aware of the risk\(^6\). The French court persisted with the objective test even after the amendment to The Warsaw Convention by the Hague Protocol Protocol to the Warsaw Convention 1955\(^\text{68}\). In the past also Belgium and United States courts had been practicing the objective test adopted by the French Courts, but today such a practice was been abandoned. The Belgian Court de Casation in the case of Tondriau v. Air India\(^6\) declined to follow the objective test adopted by the French Courts and required that the knowledge of the operatives of the air-carrier should be assessed subjectively. The same happened in the United States with the case Berner v. British Commonwealth Pacific Airlines Ltd\(^7\) and in the Swiss with the case Lacroix Baartmans Callens Und Van Tichelen v. Swissair\(^7\).

There is another question which should be clarified and it is whether the damage which is in the mind of the actor should be particular. In an-

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\(^{64}\) (1983) 1 W.L.R. 1186.
\(^{66}\) (1968) 22 R.F.D.A. 184.
\(^{67}\) (1966) R.F.D.A. 448.
swering this question the decision of the Court of Appeal in the Goldman case, which stated that the trial judge was wrong to have read the term «damage would probably result» literally to mean «any damage» should be taken into account. The Court of appeal was of the opinion that the damage of the complainant must be the type of damage known to be the probable result. This means that damage of any kind will not suffice. To disqualify a ship-owner of his right to limitation, it has to be shown that he had knowledge that the particular (or special) damage would probably result from his reckless act. In practice it is extremely difficult for the claimant to prove such knowledge and this is also one of the reasons why this test is many times referred to as the “unbreakable test or limits” as opposed to “actual fault or privity”.

The problem whether the damage is particular or not was present in The Hague Protocol to the Warsaw Convention 1955 because the text did not include the adjective «such». Several conventions which followed The Hague Protocol to the Warsaw Convention 1955 contained the adjective «such» and given the word combination «such damage» it became incontestable that exactly such damage as occurred should be in the mind of the actor.

From the above it is evident that a subjective conception of knowledge prevailed. The actor should have in the mind at the moment when an act or omission occurs knowledge of particular damage, which favors the actor and not the injured party, who has a difficult task proving subjective knowledge on the part of the actor.

4.3. Wilful misconduct
The institute of willful misconduct today is not very frequently used because in the modern conventions it was replaced by the institute of «recklessly and with knowledge that such damage would probably result». In the international conventions it was introduced by the Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929 (Warsaw Convention 1929), representing the conduct of the carrier when he is not entitled to limit his liability. The institute of willful misconduct has the same role in the Convention on the Contract for the International Carriage of Goods by Road (CMR). The main question regarding willful misconduct is its nature. As with the

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70 346 F.2d 532 (1965).
72 (1983) 1 W.L.R. 1186.
Institute of recklessness, the question of its legal nature is present - or better said whether it is closer to intent or gross negligence.

In defining the nature of willful misconduct it is necessary to analyze some of the leading cases of the Anglo-Saxon court practice dealing with that institute. The definition most usually adopted regarding willful misconduct is that put forward by Lord Alverstone, C.J., in Forder v. Great Western Railway Co.\textsuperscript{75} wherein he adopted the definition of «willful misconduct» declaimed by Mr. Justice Jonson in Graham v. Belfast and Northern Counties Ry. Co\textsuperscript{76}: Willful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves a person willfully committing misconduct knowing and appreciating that it is wrong in the existing circumstances, or failing or omitting to do (as the case may be), a particular thing, intentionally doing or failing or omitting to do it, or persisting in the act, failure or omission regardless of the consequences. On the basis of this definition Lord Alverston continued: or acts with reckless carelessness, not caring what the result of his carelessness may be.

Whether in any given circumstances the acts or omissions of a person entrusted with the goods or property of another amount to willful misconduct must begin with an enquiry about the conduct ordinarily not expected in the particular circumstances and by then asking whether the acts or omissions of the person whose behaviour is called into question

\textsuperscript{73} Art. 25. Warsaw convention 1929:
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 willful 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 willful misconduct.
Similary the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.

\textsuperscript{74} Art. 29 CMR:
1. The carrier shall not be entitled to avail himself of the provisions of this chapter which exclude or limit his liability or which shift the burden of proof if the damage was caused by his willful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seised of the case, is considered as equivalent to willful misconduct.
2. The same provision shall apply if the willful misconduct or default is committed by the agents or servants of the carrier or by any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment. Furthermore, in such a case such agents, servants or other persons shall not be entitled to avail themselves, with regard to their personal liability, of the provisions of this chapter referred to in paragraph 1.

\textsuperscript{75} (1905) 2 K.B. 532.
\textsuperscript{76} (1901) 2 I.R. 13.
is so far outside the range of such conduct that it can properly be regarded as «misconduct». An important circumstance in any case would be a deliberate disregard of express instruction clearly given and understood. Further, a person could be said to act with reckless carelessness towards goods in his care if, aware of a risk that they may be lost or damaged, he nevertheless deliberately goes ahead and takes the risk when it is unreasonable in all the circumstances for him to do so.

Definition of willful misconduct as it was set in Forder v. Great Western Railway Co. in its basic characteristics does not differ from the more recent definitions, which also emphasize that willful misconduct is an action which goes beyond gross negligence when a person is conscious of his wrongdoing and persist regardless of the consequences.

In finding out whether willful misconduct is present each case where it is presumed present should be accurately studied before the conduct of the actor can be defined as willful misconduct. In Laceys Footwear (Wholesale) Ltd. v. Bowler International Freight Ltd and Another it was stipulated by contract with the carrier and forwarding agent for the transport of the shoes that, as the customer explicitly explained to the carrier, the goods should be delivered to the address which he gave him and that the driver should be instructed that he can deliver only to one address as advised. When the driver arrived at the destination he met two men who led the driver by their gestures to believe that the lorry was too big and that it was impossible to unload there. For this reason he followed them for three kilometers and delivered to them the shoes because he understood that they were the representatives of the shoes. The judge, Anthony Thomson, Q.C., held that the driver’s conduct amounted to willful conduct and for this reason the carrier could not avail of the protection afforded by arts. 23. and 27. CMR. That decision was overturned by the Court of Appeal which found that the conduct of the driver was only reckless, not willful.

78 In Horabin v. British Overseas Airways Corporation (1952) Lloyd’s Rep. 450, Mr. Justice Barry stated: Willful misconduct is misconduct to which the will is a party and it is wholly different in kind from mere negligence or carelessness, however gross that negligence or carelessness may be. To be guilty of willful misconduct the person concerned must appreciate that he is acting wrongfully, or is wrongfully omitting to act, and yet persist in so acting or omitting to act with reckless as to what the results may be. Consciousness of committing misconduct must be present at the time when the person is acting or omitting to act. Mr. Justice Ackner in his judgment in Rustenburg Platinum Mines Ltd. v. South African Airways (1977) iLloyd’s rep. 564 exposed: ...It is common ground that »willful misconduct« goes far beyond any negligence, even gross or culpable negligence, and involves a person doing or omitting to do that which is not only the negligent but which knows and appreciates is wrong, and is done or omitted regardless of the consequences, not caring what the result of his carelessness may be.
court of appeal pointed out that the driver acted in breach of instructions, which the Judge found were clear and which he understood; a driver of his experience must have known that to allow persons whose identity he had made no effort to establish to unload the goods into an unmarked lorry in the road would expose those goods to risk of theft; his actions were deliberate in the sense that he plainly intended to do what he did even though he did not intend the goods to be stolen; but in the absence of any evidence from the driver to explain his conduct the Judges were entitled to conclude that he behaved recklessly.

In the case of Jones v. Bencher Ltd. the court pointed out that a deliberate disregarding by a driver of the EEC regulation which governs the length of time that it was permissible for him to drive was considered. He fell asleep at the wheel and the goods he was carrying were destroyed and it was found that this represented an act of willful misconduct. The same position was taken by the court in the case of Texas Instruments Ltd. v. Nason (Europe) Ltd. where the controlling director of the carrier was found guilty of willful misconduct because although knowing the high risk of theft from an area, he did not appreciate that risk and insisted on leaving a trailer unattended in a car park in East London, even assuming that it was going to be picked up a few hours later.

When speaking about systematic studying whether in certain cases willful misconduct is present the case The Thomas Cook Group Ltd. and Others v. Air Malta Co. Ltd should be mentioned, wherein Mr. Justice Cresswell, influenced by the definition of Lord Alverston and in particular by the case Lacey's Footwear Ltd. v. Bowler International Ltd. and Another, (C.A.) derived the following steps/propositions to ascertain whether a person committed willful misconduct:

- The starting point when considering whether in any given circumstances the acts or omissions of a person entrusted with goods of another amounted to willful misconduct is an enquiry about the conduct ordinarily to be expected in the particular circumstances.
- The next step is to ask whether the acts or omissions of the defendant were so far outside the ordinary conduct in the specific situation range as to be regarded as «misconduct». (An important circumstance would be a deliberate disregard of express instructions clearly given and understood).
- It is next necessary to consider whether the misconduct was willful.
- What does amount to willfully misconduct if he knows and appreci-

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80 (1986) 1 Lloyd's Rep. 54.
ates that it is misconduct on his part in the circumstances to do or to fail or omit.
- What does amount to willful misconduct? A person willfully misconducts himself 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 (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 (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 to do so).
- The final step is to consider whether the willful misconduct (if established) caused the loss of or damage to the goods.

In the Continental law system there are different points of view regarding the legal nature of willful misconduct. The most disputable are those which are often present between the Continental lawyers and are based on the interpretation by the suggestion of the words. They are based on the literal comparison of different institutes of the Anglo-Saxon legal system with institutes of the Continental legal system and then they by the suggestion of the words define the consequences. This method is described by Bonelli when he mentions one of the possible conducts of the Continental law judge when he encounter the institute of «willful conduct» and the institute «recklessly and with knowledge that damage would probably result»: «The distinction therefore in practical terms would become very fine; it resides more than anything else in the suggestion of the words or in an indication of lines of tendency; if the formula of «willful misconduct» is accepted, it is probable that the judges, especially those of continental law, will tend to interpret the norm in the more restrictive sense, in a manner, that is to say, whereby the carrier loses the benefit of the limitation of liability only as sanction for the more serious misconduct (premeditated or intentional breach of his obligation). Instead the formula of «recklessly and with knowledge that damage would probably result» is accepted, it is likely that the limitation is refused in cases of simple «gross negligence».

More realistic are these Continental Lawyers who start from the point of view that willful misconduct represents semi-intentional conduct which does not in any aspect reach the intention. Within the concept of willful misconduct they find the elements of intent, which are evident from the intentional violations of the prescriptions and in clear provision of the conse-

quences of actors, although they are not really desired. In this aspect willful misconduct is that with a higher degree of fault like recklessness where mostly the indifference toward the consequence is present. Although in the Anglo-Saxon law and Continental law there are some efforts to find the distinction between recklessness, willful and wanton misconduct, these efforts are present mostly on the theoretical level. In practice all such distinctions have consistently been ignored, and the three terms have been treated as meaning the same thing, or at least coming out at the same legal exit.

5. Conclusion

The institutes of Anglo-Saxon legal system regarding the liability of the carrier are demonstrably particular, which is the main reason why it is difficult to find their correlative institutes in the Continental legal system. Such a situation is the consequence of the separate development of institutes of both systems. In the 20th century there was significant progress toward unifying the law. A number of international conventions were adopted that facilitate solutions regarding the relationships of international elements, but on the other hand created some problems when they contained institutes from one legal system unknown to the lawyers of other legal systems.

The institutes of recklessness, willful misconduct and actual fault or privity, which take part in many international conventions dealing with the carrier’s liability are institutes of that kind. The main mistake which is made by Continental lawyers is that they very often try at every cost to correlate institutes from the Anglo-Saxon legal systems to those of the Continental legal system although there exist differences which can not be ignored. From that point of view, the best way to understand these institutes, is to study and understand them as they are perceived in the Anglo-Saxon legal system. Up to the present, any other comprehension has not appeared on the international level, and there are no prospects that this may happen. The main reason for that, is that in the last century the Anglo-Saxon law has had much greater influence on the Continental law than inversely, what is particularly evident in the field of the transport.

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85 See G. Boi, supra 50, p. 165.
86 W.L. Prosser, supra 21, p. 184.