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LOSS OF THE RIGHT TO LIMIT UNDER ARGENTINE MARITIME LAW

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A) Introduction

The aim of this paper is to explain a particular cause for which ship-owners and carriers may lose their right to limit liability under Argentine law.

My approach to the subject will be purely theoretical, taking into account that Argentine courts have not considered the issue[1].

As it is provided in international conventions, loss of limitation requires the claimant to prove that the damage resulted from an act or omission done with intent to cause (such) damage/loss, or recklessly and with knowledge that (such) damage/ loss would probably result.

In this sense, I must point out that Argentina is part of the Hague Rules, but not of the Visby Rules, which make reference to the topic at hand. Nevertheless, as you will see, the provisions of the Hague Visby Rules were incorporated to the shipping act of 1973.

Furthermore, Argentine is not part of the Convention on Limitation of liability for maritime claims (London 1976), but accepted the CLC/FUND protocols of 1992.

On the other hand, Lawmakers and judges have been reluctant to recognize degrees of fault.

In this context, the sanction of loss of the right to limit is provided in three areas:

- Ship-owners' liability
- Carriers' liability (cargo/passengers)
- Liability for oil spills.

Appealing to brevity I will only refer to the first two subjects.

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1 An explanation may come from the fact that gold parameters in the limitation system in force make limits too high – often beyond the value of the damages involved-. On the other hand, air carriers/operators liability rules are not of direct application in maritime cases as stated inter alia in "Antartida Compañía de Seguros c/ The Paola C" Court of Appeals in Federal Civil and Commercial matters, Buenos Aires, 13/09/1988.

B) Shipowners Liability

Regarding ship-owners liability[2], the system is similar to the outcome of the US Sirovich Act of 1.936: a mixed of abandonment and gross tonnage limitation in case of personal injuries or death.

According to art. 175 of the shipping act, the owner cannot limit liability when there is personal fault from his part[3].

But on the other hand, seafarers cannot limit when the damage was intentional or if they acted being aware that their acts would cause damage, as states art. 181 2nd paragraph.

C) Carriers Liability

With regard to carriers' liability, I must point out that according to the applicable local rules, both to Bill of Ladings and voyage charter parties.

In this sense, the act is clear and provides in art. 278 that the carrier shall not be entitled to limitation if the damage resulted from an act or omission done with intent to cause damage, or recklessly and with knowledge that damage would probably result (*dolus eventualis*).

In the same cases, servants or agents cannot invoke the provisions regarding the benefit of limitation, according to article 290[4]5 .

As you see, the Argentine regime accepts in this respect the provisions of article 4 point 5 e) of the Hague Visby Rules.

D) To conclude.

By way of conclusion with this brief review, I would like to make a final comment and to pose a question.

It deserves clarification that while Argentina is not part of neither the Hague Visby rules nor to the 1976 Convention on Limitation of liability, this fact does not imply that the parties involved in a particular claim, at time to solve it privately, would not take into account the legal extent of the benefit of limitation, which parties know may be invoked if the case is presented before courts. Then, at some point, the risk of loss of the right to limit determines the way the conflicts are actually settled.

Moreover, a question may arise minding any insertion of paramount

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2 The shipping act of 1973 was modelled following the Italian Code of 1942.

3 Note that Argentine is not part of 1957 Convention on limitation (Nor to the 1924 Convention).

4 Art. 340 of the shipping act -related to liability of carriers of passengers – refers to an act or omission done with intent to cause damage, or recklessly and with knowledge that damage would probably result. Same formula as the Athens convention 1974, art. 13 (accepted by Argentina).

clauses, is fully permitted under argentine law. All of the sudden, we need to answer:

Up to what extent Argentine judges should apply, in international cases governed by the Hague rules, the sanction of loss of limitation, as an application of the international public policy from internal/local source?

RECKLESSNESS WITH KNOWLEDGE

Duygu Damar*

Ladies and gentlemen,

The topic of today's panel is "recklessness with knowledge of the probable consequences", a fault degree, which deprives the actors of the maritime sector of their privilege to limit their liability. I would like to start with a brief look at the historical background and explanations on this fault degree in common and civil law[1]. Thereafter, in the light of these explanations, I would like to share my comments on a recently decided case by the Canadian Supreme Court.

The phrase "intent to cause damage, or recklessly and with knowledge that damage would probably result" has its roots in English law. Sec 55 Marine Insurance Act of 1906 first states the general principle that the insurer is liable for any loss proximately caused by a peril insured against. Then, the provision states another general principle and provides that the insurer is not liable for any loss, which is not proximately caused by a peril insured against; the insurer, particularly, is not liable for the loss caused by the wilful misconduct of the assured. Thus, if the assured deliberately caused the loss, it will not be entitled to the insurance benefit.

The term "wilful misconduct" was first employed in an international transport law convention by the Warsaw Convention on international air carriage in 1929. Art 25 of the Convention provides that the carrier will be deprived of its right to limit, if the damage was caused by its wilful misconduct or by such fault which is considered to be equivalent to wilful misconduct. This awkward formulation goes back to the discussions held during the diplomatic conference, which has given its final shape to the Convention. The authentic version of the Warsaw Convention is in French. The French term "*dol*", which was first used to define the fault degree resulting in unlimited liability, caused heated discussions at the diplomatic conference. In order to

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1 For more information see Duygu Damar, *Wilful Misconduct in International Transport Law* (Springer 2011).

enable jurisdictions to choose the equivalent legal term used by their own legal system, the drafters came up with the phrase "*dol* or fault considered being equivalent to *dol*". Thus, courts of the civil law system would deprive the air carrier of liability limits in case of *dol,* which corresponds to the Roman law fault degree *dolus*; and courts of the common law or other law systems alien to the concept *dol* would use an equivalent fault degree to break the liability limits. After the final version of the provision had been adopted, the British delegation stated that it is a question of legal terminology and that they will translate the French term *dol* into English as wilful misconduct which is a well-known and well-defined term in English law.

In the application of the provision, courts of common law analysed wilful misconduct only, since common law system is not familiar with any type of fault that is equivalent to wilful misconduct. Therefore, they have emphasized the state of mind of the wrongdoer and analysed whether the wrongdoer intentionally caused damage or harm, or whether the wrongdoer's act or omission was accompanied with reckless and wanton disregard of the probable consequences. In contrast, courts of civil law based their judgements not only on the Roman law concept of *dolus*, but also on gross negligence which was considered an equivalent fault degree to *dolus* by all civil law jurisdictions. Regarding gross negligence, the crucial point is whether the wrongdoer showed the necessary care that is expected of a reasonable person; not his/her state of mind.

This difference in the interpretation of Art 25 led to a severe difference between common and civil law judgements which in return caused forum shopping. Therefore, among other provisions, Art 25 has been amended by the Hague Protocol of 1955. Instead of making reference to legal terminology, condition giving rise to unlimited liability has been defined. As a result, according to the amended version of Art 25 of the Warsaw Convention, the air carrier is deprived of its right to limit if the damage is the result of an act or omission done with intent to cause damage, or recklessly and with knowledge that damage would probably result. It is clear that this phrase is the definition of the common law fault degree of wilful misconduct.

This phrase has been employed by nearly all international conventions on transport law, including by international conventions on the carriage of passengers and goods by sea, pollution conventions and convention on limitation of liability. With slight variations, all of these conventions provide that the person in question is not entitled to limit its liability if it is proved that the damage is caused by its act or omission done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

The fault degree in this phrase has two components: the first one is an "act or omission done with the intent to cause damage." It refers to the gravest degree of fault for which it is necessary that the person in question have acted

or omitted to act intentionally and in order to cause the damage he or she has foreseen and chosen to cause. This component poses no difficulty for civil law systems: It is intentional wrongdoing which is known as *dolus directus*.

However, the second component, an "act or omission done recklessly and with knowledge that such damage would probably result" is quite unfamiliar to civil law systems. This degree of fault requires both a reckless act or omission, and knowledge of the probable consequences of that act or omission. A reckless act or omission requires a conduct of conscious and unjustifiable risk taking. Moreover, the person in question must foresee the consequences of the reckless act or omission. Thus, perception of the wrongdoer as to the existence of the unjustifiable risk plays a crucial role for the second component. Finally, it is not sufficient that the wrongdoer foresees the risk; he/she should also believe that it will not occur. In short, the wrongdoer's act or omission is reckless, if not intentional. And the wrongdoer foresees the probable result of that act or omission, but simply is not concerned with whether it may occur or not.

This second component causes difficulties in determining the corresponding fault degree in civil law. There have been a variety of views on the issue ranging from advertent gross negligence to *dolus eventualis*. In advertent gross negligence, the person in question violates the duty of care in an unusually grave manner and foresees the probable consequences; however believes that the harmful result will not occur. Where recklessness with knowledge differs from advertent gross negligence is the attitude of the wrongdoer towards the probable consequence of the act or omission. In advertent gross negligence, the wrongdoer sincerely believes that the act or omission will not result in damage; whereas in recklessness with knowledge, the wrongdoer just does not care. Therefore, in my opinion, the phrase "recklessly and with knowledge that the damage would probably result" corresponds to the civil law fault degree *dolus eventualis*.

With this historical background and explanations in mind, I now would like to focus on the Peracomo decision of the Canadian Supreme Court[2] which has been brought to our attention by the organizers of this panel[3]. Mr Vallée who is the sole shareholder of the Peracomo Incorporation which owns a fishing vessel, was fishing in the St. Lawrence River when the anchor snagged a submarine cable on the river bottom. Mr Vallée was aware of the risk that the cable might be in use, but believed that it was not and therefore cut the cable. It was a live fiberoptic cable and the cut resulted in almost $ 1 million damage. The court of first instance and the Court of Appeal ruled that Mr Vallée was

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[2] *Peracomo Inc. v. Telus Communications Co.*, 2014 SCC 29.

[3] For a detailed comment on the case see Duygu Damar, 'Limitation of Liability without Insurance Benefit', LMCLQ (forthcoming).

not entitled to limit his liability according to Art 4 LLMC, and he has also lost his insurance cover according to the Canadian Marine Insurance Act, which states – like the English Marine Insurance Act – that the insurer is not liable for the loss caused by the wilful misconduct of the assured. On appeal, the Supreme Court ruled that the fault standard in Art 4 LLMC and the Marine Insurance Act are not the same; that the Convention requires a higher degree of fault compared to the Marine Insurance Act; thus that the "breakability and insurability are [not] coextensive." The Court further took the view that the fault degree wilful misconduct does cover not only intentional wrongdoing but also "conduct exhibiting reckless indifference in the face of a duty to know". According to the Court, Mr Vallée's "conduct exhibited a reckless indifference to the possible consequences of his actions of which he was actually aware" and that wilful misconduct "requires, […], simply misconduct with reckless indifference to the known risk despite a duty to know." As a result, the Supreme Court decided that Mr Vallée did not lose his right to limit liability, but did lose his insurance cover.

First of all, I – with reference to the historical background of the phrase "recklessness with knowledge of the probable consequences" – respectfully disagree that the fault degree employed by Art 4 LLMC and the wilful misconduct are not the same. As addressed earlier, the phrase which is commonly used in international maritime conventions is the definition of the common law fault degree "wilful misconduct". Therefore, the criterion for unlimited liability and loss of the insurance cover is the same. If a person is guilty of wilful misconduct, he/she can benefit neither from limitation of liability nor from insurance cover. The breakability starts, indeed, where insurability ends.

Secondly, in my opinion, the phrase "reckless indifference in the face of a duty to know" is somewhat problematic. The Court uses this phrase as a component of wilful misconduct. However, duty to know relates to the standard of the duty of care expected of a reasonable person, thus to the standard of negligence. For wilful misconduct, actual knowledge is required. The wrongdoer must be actually aware of the possible consequences of the act or omission, and must be nevertheless indifferent to those consequences. Thus, reckless indifference "in the face of a duty to know" is not sufficient for a finding of wilful misconduct; reckless indifference despite the knowledge of the probable consequences is required.

"RECKLESSLY AND WITH KNOWLEDGE" IN JAPANESE LAW

Gen Goto*

I. Introduction

Current Japanese law utilizes two types of standard for breaking the limitation of carrier's liability. One is "recklessly and with knowledge that damage would probably result",[1] which derives from various international conventions. The other is "gross negligence",[2] which is more traditional to Japanese law.[3]

This paper analyzes how these two standards have been interpreted by Japanese courts.

II. Gross Negligence

Let's start with the traditional "gross negligence".

This concept is used in various areas of law, such as tort, contract, insurance and corporation law, in Japan, but in two different meanings.[4] One is

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1 Art.13-2 of the International Carriage of Goods by Sea Act (Japanese COGSA) (based on the limitation break provision of the Hague-Visby Rules, Art.4(5)(e), but also used for excluding the benefits of damage-computation rule (Hague-Visby Rules, Art.4(5)(b)); Art.3(3) of the Act on Limitation of Liability of Shipowner (based on LLMC '76/96, Art.4); Art.25 of the Warsaw Convention amended by the 1955 Hague Protocol; Art.22(5) of the Montreal Convention.

2 There is no statutory limitation of liability for land and domestic sea carriage in Japanese law. Art.581 and Art.766 of the Commercial Code, however, deny benefit of damage-computation rule to grossly negligent carriers for those carriers. Also, case law has applied the same standard for excluding exemption of carrier's liability for undeclared precious goods (Art.578, Commercial Code) and breaking contractual limitation of liability.

3 There is a possibility that the standard of Art.581 will be modified to "recklessly and with knowledge that damage would probably result" as a result of the current law reform project of transport and maritime law. No final decision has been made on this point yet as of September 30, 2014. For the backgrounds of this reform process, *see*, Manami Sasaoka, *Reform of Transport Law in Japan*, 35 Zeitschrift für Japanisches Recht/Journal of Japanese Law 39 (2013).

4 *See generally*, Hiroto Dogauchi, *Jyu-kashitsu Gainen ni tsuite no Oboegaki [On the Concept of Gross Negligence]*, in Minpo-gaku ni Okeru Ho to Seisaku [Law and Policy Making in Civil Law] (Yoshihisa Nomi et al. ed., 2007) 537.

state of mind that is nearly equal to "intentional" or "willful", focusing on the easiness of foreseeing the damage, and the other is significant lack of due care, focusing on the degree of deviation of the actual conduct from the expected conduct.[5] The former is a subjective standard whereas the latter is an objective standard, and it would be easier to establish gross negligence with the latter.

For "gross negligence" used in transport law, the Supreme Court of Japan seems to have adopted the latter meaning. For example, in a case where a cardboard box containing jewelry was lost presumably because it fell off from the carrier's minivan as the hatchback door of the van opened while driving, the court found that the driver was grossly negligent for the loss of the goods since he significantly lacked due care as he started the car without checking whether the door was completely locked, even though he had never experienced similar accident.[6] Also, in a case where a box of diamonds, marked as precious goods and received for air carriage, was found to be missing upon arrival of the aircraft, the court held that the cause of the loss of the box must be theft by employees of the carrier or mistake of them during loading or unloading, and that in the latter case the employees were grossly negligent as it should have been easy to notice a mistake by paying only a little attention.[7]

III. Recklessly and with Knowledge

1. How Different from Gross Negligence?

Then, is the standard of "recklessly and with knowledge that damage would probably result" interpreted differently from "gross negligence"? In the literature, it has been emphasized that the "recklessly" standard is a different concept from "gross negligence", closer to *dolus eventualis*, and should be interpreted as such. So, how about case law?

Unfortunately, there is no maritime case law interpreting the standards for the limitation break under Japanese COGSA or Japanese LLMC. The only published court decision on this subject regards a tragic accident of a passenger aircraft.[8]

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[5] Some cases and commentators use mixed expression such as "a significant lack of due care that is nearly equal to 'intentional' or 'willful'" to define gross negligence. They vary on whether to emphasize the first half or the latter half.

[6] Supreme Court of Japan, March 25, 1980, 967 Hanrei Jiho [Case Law Times] 61 (denied the carrier of exemption of liability for undeclared precious goods under Art.578 of Commercial Code, but at the same time reduced the amount of damage awarded to the shipper by taking the account of the shipper's fault for not declaring the value).

[7] Supreme Court of Japan, March 19, 1976, 30 Saiko Saibansho Minji Hanreishu [Private Law Cases of the Supreme Court] 128. This was a case regarding Art.25 of the original Warsaw Convention, and the court held that "fault —- considered to be equivalent to willful misconduct" meant gross negligence.

[8] Nagoya District Court, December 26, 2003, 1854 Hanrei Jiho [Case Law Times] 63, *affirmed by* Nagoya Court of Appeals, February 28, 2008, 2009 Hanrei Jiho [Case Law Times] 96.

2. In re China Airlines

On April 26, 1994, Flight 140 of China Airlines, departed from Taipei, clashed into Nagoya Airport just before its landing, killing 249 out of 256 passengers and all 15 crews. The main cause of the crash was an operational error by the co-pilot. Specifically, he first accidentally turned on the go-around mode switch during the landing procedure, which made the aircraft to go upwards. In an attempt to recover, he turned on the landing mode switch and the auto-pilot system without notifying the captain. As the aircraft was designed to be unable to cancel the go-around mode just by turning on the landing mode switch, the auto-pilot system was turned on under the go-around mode and the aircraft kept going upwards. The co-pilot then tried to override the auto-pilot system by pushing down the control lever very hard. This attempt made matters worse, as it moved the stabilizer and the elevator of the rear wing in the opposite directions and led the aircraft to a dangerous situation called "out of trim". This caused the auto-pilot system to increase propelling power. Eventually, the captain took over the co-pilot, and decided to give up landing and try again. This decision suddenly left the aircraft with a strong power to go upwards, and as the aircraft ascended in a sharp angle, it lost its speed and crashed.

One of the survivors and families of 87 victims sued the airline (and the manufacturer of the aircraft for serious design errors). China Airline invoked the limitation of liability under Warsaw Convention as amended by the Hague Protocol, which was 250,000 francs (approximately 20,000 USD) per passenger. Nagoya District Court, however, found that the damage resulted from an act that was done "recklessly and with knowledge that damage would probably result", and denied the benefit of limitation.

The court's logic to break the limitation of liability was as follows: First, the court found from evidences including conversation recorded in the flight recorder that the co-pilot recognized that the control lever was heavy and that the co-pilot knew from the heaviness of the control lever that he was trying to override the auto-pilot system. From the basics of aircraft operation, highlighted warnings in the operation manual and particular training that the co-pilot took with a flight simulator, this knowledge meant that he knew that his attempt would put the aircraft in out-of-trim and might cause crash. Thus, the co-pilot had knowledge that damage would probably result, and continuing to push down the control lever with such knowledge was indeed reckless.

3. Analysis

This case might be a rare one that found an operator of an aircraft acted "recklessly and with knowledge that damage would probably result" even though his own life was at stake.[9] To reach such conclusion, the court inferred

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[9] *See*, Duygu Damar, Wilful Misconduct in International Transport Law (2011) at 104.

the co-pilot's "knowledge" from objective circumstances such as basics of aircraft operation. This is quite similar to questioning whether he has acted as he should have.[10] Although there is no reference to "gross negligence" in the decision, this is in line with the Supreme Court's cases discussed in Part II above.

Would this decision on air transportation affect future maritime case law? In author's view, the stance of Nagoya District Court is applicable to "recklessly and with knowledge" standard in maritime law and not specific to air transportation, as the court rejected the plaintiffs' argument that the limitation break should be made easier since the limitation of liability for passenger damage in air carriage is out of date.[11] There is, however, a large difference between air transport conventions and maritime conventions that recklessness of servants and agents counts for limitation break in the former but not in the latter.

Thus, court decisions breaking limitation of liability of carriers of international sea carriage or liability of shipowners would still remain rare.

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[10] Interestingly, the court also held that it cannot break the limitation of liability with a finding that the actor "should have known" that damage would probably result, by referring to the drafting process of the Hague Protocol.

[11] The plaintiffs referred to the so-called "Japanese Initiative" in 1992 (Japanese airlines declared not to invoke the limitation of liability for passengers) and the formation in 1999 and entry into force in 2003 of Montreal Convention that has no limitation of liability for passengers.

RECKLESSLY AND WITH KNOWLEDGE THAT DAMAGE WOULD PROBABLY RESULT: THE INTERPRETATION OF TERM BEFORE THE CROATIAN COURTS

Mišo Mudrić*

1. Introduction

The application of term "*recklessly and with knowledge that damage would probably result*" before the Croatian courts has not, as of yet, made an impact with regard the loss of right to limit liability in the maritime related cases.[1] The older case practice (dating to the Yugoslavian jurisprudence) did, however, recognize and apply the term with regard the issue of limitation of liability. The article analyzes older, Yugoslavian case practice, and discusses the impact of that practice on the current Croatian law and practice, especially due to the fact that a number of recent cases, also to be discusses in the article, demonstrate the (negative) impact of the reckless behavior on the loss of marine insurance coverage. The term recklessness is readily interpreted and employed before the Croatian criminal and minor offences courts (usually applied in cases of the breach of statutory norms in general and the breach of traffic regulation with regard the application of mandatory motor vehicle liability insurance). In relation to the maritime related regulation, the reckless behavior standard is regularly utilized within the Croatian Maritime Code,[2] usually following the ratification and implementation of relevant international law.[3] Thus, the term can be found, to name a few examples, in Article 390 in

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1 This being of no surprise, given the perceived lack of similar case law in other jurisdictions. See, for example, the decision of the Canadian Supreme Court in: *Peracomo Inc. v. TELUS Communications Co., 2014 SCC 29*; and, the opinion of Lord Phillips MR in: *Schiffahrtsgesellschaft MS 'Merkur Sky' m.b.H. v Ms Leerort Nth Schiffarhts G.m.b.H (The 'Leerort')* [2001] 2 Lloyd's Rep 291, CA, at 294, para 11 and para 13. See, however: *Margolle and Another v. Delta Maritime Co. Ltd. and Others* (*The "Saint Jacques II" and "Gudermes"*), [2002] EWHC 2452 (Admtly.).

2 Maritime Code (Official Gazette, No. 181/04, 76/07, 146/08, 61/11 i 56/13)

3 For more general information on the Croatian maritime related regulation, see: Mudrić, Mišo "*Panorama del derecho comparado: Croacia*", Anuario de derecho marítimo, vol. 29 (2012), at 309 *et seq*.

relation to the 1976 Convention on Limitation of Liability for Maritime Claims, in Article 566 in relation to the Hague-Visby Rules, in Article 623 in relation to the Athens Convention, in Article 816 in relation to the 1992 CLC Convention, and in Article 823b in relation to the Bunkers Convention.

2. *Overview of Legal Theory*

The Croatian legal theory classifies the term "*recklessly and with knowledge that damage would probably result*" as a type of *dolus* (intentional behavior) with a subjective element.[4] The recklessness is considered to be an ultimate breach of due diligence (the objective criteria to be determined by the court) with an actor's awareness that the damage will probably occur. The latter implies that it is necessary to establish a link between the actual damage and the actor's cognitive recognition, at that precise moment under those precise circumstances, of a strong possibility that such damage will occur (the subjective criteria to be determined by the court).[5] Thus, the reckless behavior is generally perceived as an intentional conduct of a lesser magnitude (*dolus eventualis*). In comparison to other legal systems, the Croatian theoretical approach predominantly resembles the German theory and practice, where the recklessness is included in the wider definition of intentional conduct (the actor has had knowledge of all the relevant circumstances and a clear understanding of obligations, but was indifferent as regards the consequences of the conduct[6]). The German court practice also recognizes such instances where a gross negligent conduct (*grobe Fahrlässigkeit*)[7] constitutes such a grave violation of professional duties (*grober Verstoß gegen Berufspflichten*), that it is automatically presumed that the actor has caused the damage.[8]

The Croatian approach to a certain extent resembles the French theory and practice with regard the instance where the gross negligent conduct (*faute*

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[4] For an analysis of relevant case law with regard the loss of limitation of liability, see: Marin, Jasenko, "*General and particular limitation of liability for maritime claims in the recent foreign court practice*", Comparative Maritime Law, vol. 50 (2011), 165, (in Croatian) at 91-115. For more general information, see: Grabovac, Ivo, "*A note on the contemporary interpretation of the term recklessly and with knowledge that damage would probably result: with regard the case practice*", Split Faculty of Law Collection of Papers, vol. 49, 3/2012, (in Croatian) at 443-448.

[5] Compare: *Peracomo Inc. v. TELUS* Communications, *supra note 1*, where the Canadian Supreme Court argued that the defendant was not aware of the actual loss that has occurred due to his conduct; *MSC Mediterranean Shipping Co SA v Delumar BVBA* (*the* "*Rosa M*") [2000] 2 Lloyd's Rep 399; and, *Schiffahrtgesellschaft MS Merkur Sky MBH & Co v MS Leerort Nth Schiffahrts Gmbh &Co KG*, *supra note 1*.

[6] See: *Markesinis, Basil S./Unberath, Hannes/Johnston, Angus/Hirsch, Günter*, The German Law of Contract, A Comparative Treatise (Oxford: Hart, 2nd ed., 2006), at 439.

[7] See: *Grundmann, Stefan,* Verantwortlichkeit des Schuldners, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 2, Schuldrecht, Allgemeiner Teil, §§ 241-432 (München: Beck, 6th ed., 2012), 752, Rn. 83 *et seq*. (at 786 *et seq*.).

[8] See: *Sprau, Hartwig,* Unerlaubte Handlungen, in: Palandt Bürgerliches Gesetzbuch (München: Beck, 72nd ed., 2013), 1312, § 823, Rn. 45, at 1324

lourde and *faute inexcusable*) – perceived as an extremely serious negligence[9] – includes the reckless behavior,[10] in which case it is plausible that the court will decide against allowing the right to limit the liability.[11] The English (England and Wales) case practice tends to merge the effects of gross negligent and reckless behavior, as visible from the *Hellespont Ardent*,[12] where the court determined that a gross negligent conduct is to be understood as a serious negligence consisting of a reckless disregard of the risk involved and the consequences of a specific conduct.[13] The American (United States) approach retains the objective criteria in assessing the reckless behavior. The Third Restatement of Torts defines a reckless behavior as such behavior where an actor has the knowledge that the harm will occur, but fails to adopt such minimal precautions in order to prevent the harm from occurring, thus being indifferent to the harm occurring.[14] American authors predominantly consider the difference between willful, wanton or reckless and gross negligent conduct to be more a question of quality than a degree of lack of care.[15]

3. *Older Case Practice*

3.1. Reckless behavior leading to the loss of right to limit liability

During the last 24 years, there is no Croatian maritime related case practice in existence that would demonstrate the application of the term recklessness with regard the loss of right to limit liability. It is, therefore, necessary to examine the older case practice from the Yugoslavian period,

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[9] See: *Fabre-Magnan, Muriel*, Droit des obligations, Vol. 2: Responsabilité civile et quasi-contrats (Paris: Presses Universitaires de France, 2nd ed., 2010), at 260 *et seq*.

[10] For more information, see: *Viney, Geneviève/Jourdain, Patrice*, Traité de Droit Civil, Les Conditions de Responsabilité (2006), at 644-659; and, Katisvela, Marel, "*Loss of the Carrier's Limitation of Liability under the Hague-Visby Rules and the Warsaw Convention: Common Law and Civil Law Views*", (2012) 26 A&NZ Mar LJ, at 128-129. Also see: Cass. com., Bull. civ. 2006 IV No. 143 p. 152.

[11] For more on this issue, see: Miribel, Stéphane, "*L'*affaire Rosa Delmas*:* Limitation *et* faute inexcusable*, une* nouvelle approche*?*", Le Droit Maritime Français, vol. 63, No. 730, (2011), at 863-872.

[12] *Red Sea Tankers Ltd v Papachristidis* (*The Hellespont Ardent*), [1997] 2 Lloyd's Rep. 547.

[13] Compare to: *Joint Stock Discount Co. v. Brown*, (1869) L.R. 8 Eq. 381, "willful neglect" – a conduct where a person is aware that such a conduct will result in a breach of duty, and intends to undertake such a conduct, or is reckless by not caring whether the breach of duty occurs; *Albert E. Reed & Co., Ltd. v. London & Rochester Co. Ltd.*, [1954] 2 Lloyd's Rep. 463, at 475; *Nugent and Killick v. Michael Goss Aviation Ltd. and Others*, [2000] 2 Lloyd's Rep. 222; and, *Shawinigan, Ltd. v. Vokins & Co., Ltd.*, [1961] 2 Lloyd's Rep. 153. – on the term "recklessness".

[14] *American Law Institute*, Restatement of the Law Third: Torts – Liability for Physical and Emotional Harm (St. Paul: American Law Institute Publications, 2010), Volume 1, § 2., Recklessness, at 16-17.

[15] *Prosser, William Lloyd/Keeton, W. Page*, On the Law of Torts (St. Paul: West, 5th ed., 1984), at 212-214.

delivered by the same courts (in terms of jurisdiction and location), but within a (to a certain effect) different maritime legal setting and court order setting. It is important to note that, with regard the older case practice to be discussed in the further text, the Hague-Visby Rules were still not in force. Thus, in order to successfully deny the defendant's right to limit the liability, it was necessary to prove either the intentional conduct (*dolus omnia corumpit*) or the gross negligent conduct (Hague Rules standard) on the side of the defendant (concerning the case practice to be analyzed, the courts have, nevertheless, attempted to incorporate a more burdensome standard into their deliberations).[16] Although the Croatian legal system does not apply the Law of Precedence principle, the lower courts and practitioners tend to carefully consider the decisions of higher courts. In addition, it is not unusual to find recent judgments where both the parties and the courts have referred to the older practice, dated before the 1990's.

3.2. More than gross negligent

In the case Pž-1367/80-2,[17] held before the High Commercial Court in Zagreb in 1981, the consignor (claimant) claimed damages against the carrier (defendant) for the breach of contract of carriage. The consignor contracted the sea carrier to carry the cargo (state owned museum pieces and other artifacts to be show in an exhibition abroad). The carrier issued the Bill of Lading (in further text: B/L), but never actually loaded the cargo on-board. Upon arrival to the port of destination, this was discovered. The consignor – due to the timing of the exhibition – could not afford to await the second voyage of the same carrier's vessel or an alternative voyage of the same carrier's other vessel, or contract an alternative sea carrier, but instead contracted a road carrier and an air carrier to deliver the cargo to the place of delivery (location of the exhibition). After the carriage was completed, the consignor (acting as a shipper), demanded compensation from the sea carrier for the road and air carriage costs, which were necessary, as the claimant argued, due to the fact that the sea carrier breached the contract by not delivering the goods in due time. The first instance court held the carrier liable for the damage (the carrier was held to be in the breach of contract for the non-delivery of cargo) and furthermore held that the carrier is not to be allowed to limit his liability. The

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[16] The Hague-Visby standard reads as follows: Article IV, 4., (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*", The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968.

[17] Pž-1367/80-2, High Commercial Court, 1981. See: Vujović, Veljko, "*Decisions of domestic courts and other state authorities: Compensation of damage due to non-completion of the contract of sea carriage*", Comparative Maritime Law, vol. 24 (93), (1982), (in Croatian) at 56-57.

first instance court refused the defendant's plea to utilize the right to limit liability, arguing that the road and air carriage related costs did not occur during the sea carriage, thus rendering the maritime related provisions (including the carrier's right to limit the liability) irrelevant. The second instance court – the High Commercial Court – acting upon the defendant's appeal, confirmed the first instance court's decision, but offered an alternative reason with regard the loss of right to limit the liability. The Court argued that the defendant's conduct was "*almost intentional*", stipulating that the carrier was "*more than gross negligent*". Although the law in force (Hague Rules), as noted earlier, required the proof of intentional conduct or gross negligent conduct to prevent the defendant from availing the right to limit, the Court found it necessary to highlight the defendant's lack of proper conduct that constituted an ultimate breach of due diligence and disregard of the expected professional behavior standard. It is likely, although not clearly expressed in the Court's decision itself, that the adjudicators handling the case were fully aware of the change in the relevant international law (Hague-Visby Rules coming into force, and the significant change of the standard – reckless behavior instead of gross negligent behavior) – expecting this law soon to be ratified and incorporated into the relevant domestic law – and thus, already at that time, making an attempt to reason *de lege ferenda*. The Court, however, did not offer an explanation on what is meant by the expression "*more than gross negligent*", but, instead, pointed to the fact, established before the Court, that the sea carrier was dully informed about the time-frame (and the start) of the exhibition, therefore knowing in advance that the late delivery or non-delivery will cause serious problems to the consignor. The carrier attempted to escape liability by blaming the consignor for failing to oversee the loading operation, but the Court dismissed such claim. Instead, due to the fact that the defendant never actually loaded the cargo on-board, the Court determined that the carrier forged the B/L, exposing himself to the criminal charges and criminal responsibility. It is likely that the Court took into consideration the criminal courts' and minor offences courts' practice where such (or similar) behavior has been thoroughly analyzed and classified under the term recklessness.

3.3. Carrier knew and had to know that the damage will most probably result

Several years later, the same Court delivered a definitive explanation on what is to be understood by the phrase "*more than gross negligent*". In the case Pž-3312/87-2,[18] held before the High Commercial Court in Zagreb in

[18] Pž-3312/87-2, High Commercial Court, 1988. See: Eraković, Andrija, "*Decisions of domestic courts and other state authorities: Carriage of goods over sea – application of law*", Comparative Maritime Law, vol. 32 (3-4), (1990), (in Croatian) at 285-290.

Recklessly and with knowledge that damage would probably result, Mišo Mudrić

1988, the three insurers (claimants), who insured the cargo during carriage, claimed damages against the carrier (defendant) for the breach of contract of carriage. The carrier issued the B/L and promised to carry the cargo of jute (natural fiber) from the port of Calcutta (India), via port of Rijeka (at that time Yugoslavia, today Croatia), to the port of Valparaiso (Chile). The port of Valparaiso was a named port of delivery in the B/L. The sea voyage consisted of three major routes: the Indian Ocean, the Mediterranean Sea and the South Atlantic Ocean. Upon arriving to the South America, instead of circumnavigating the continent, the carrier discharged the cargo at the port of San Antonio (Argentina), this being a usual port of discharge (both for the operation of said carrier, and in general) when goods are delivered to Chile from the Atlantic approach to the South American continent. Following the discharge of the cargo, the carrier has first arranged for the cargo to be stored in the customs warehouse (customs was contracted as a storekeeper), and then contracted a road carrier to deliver the cargo to the port of delivery. Both the customs and the road carrier declared the cargo damaged. The packages of jute have been reported wet, with obvious damage to the goods themselves, and when the packages were opened at the port of delivery, it was found that more than 50% of the goods were completely lost.

The following points were disputed between the parties of the claim: (a) whether the carrier has notified the consignee of the discharge and whether such a notification is relevant for the case, (b) whether the carrier is liable for the cargo until it is delivered to the port of delivery, and, (c) whether the carrier can avail the right to limit the liability in case he is held liable for the breach of contract of carriage. The first instance court (P 398/82-31) held the carrier liable for the damage to cargo, and further held that the carrier is not to be allowed to limit the liability. The High Commercial Court, following the defendant's appeal, (fully) reconfirmed the position of the first instance court, and provided a very detailed explanation of the first instance court's decision. The defendant claimed that he has notified the consignee that the cargo is discharged at the port of discharge (San Antonio), and that from that point on, he is no longer to be held responsible for the risk of damage and/or loss of the cargo. The Court held that the defendant failed to prove that the consignee was actually informed of the fact that the cargo was discharged at the port of San Antonio. Nevertheless, as the Court explained, the consignee, unless specifically stipulated by the parties in the B/L, has a duty to receive the cargo at the B/L stipulated port of delivery (and not, as the defendant argued, at any point before the cargo is delivered to the said port).[19] Therefore, even if the

[19] Articles 470-472 and 530, Maritime and Internal Waterways Navigation Act (Official Gazette SFRY, No. 22/77, 13/82 and 30/85). The corresponding norms in the Croatian Maritime Code are Articles 526 *et seq*.

consignee has been notified, this would have been irrelevant with regard the issue of carrier's liability for the damage on cargo occurring before the cargo is delivered at the port of delivery. The Court further held the carrier liable for the cargo until the same is delivered at the port of Valparaiso (the B/L stipulated port of delivery).[20] Thus, the Court held the carrier in breach of contract for failing to deliver undamaged cargo to the final destination. With regard the fact that the cargo was stored in (customs) warehouse, the Court held that the carrier is responsible both for the choice and work of the storekeeper. The carrier attempted to escape liability by claiming that his responsibility for the damage to or loss of the cargo ended at the point when the cargo was delivered to the storekeeper. The carrier argued that, in accordance with the law, he was responsible for the choice of the storekeeper, and not the work of the storekeeper. The Court denied the defendant's claim, stating that such a rule is applicable only in particular circumstances. In accordance with the law, if the cargo is stored at the port of discharge, the carrier will be liable both for the choice and work of the storekeeper, and remain liable until the cargo is delivered to the port of delivery.[21] The carrier will only be liable for the choice of storekeeper if the cargo has been delivered to the storekeeper at the port of delivery if: (a) the consignee did not appear at the port of delivery to receive the cargo after being notified, (b) the consignee could not be found, (c) the consignee refuses or is unable to receive the cargo, or, (d) several persons are claiming to be the valid consignee. In such circumstances, the carrier must seek advice from the consignor with regard the cargo, and only if no such instruction is received, or the instructions cannot be followed, the carrier has a right to store the cargo,[22] being liable for the choice of the storekeeper,[23] without being liable for the work of the storekeeper.[24] Due to the fact that, in the present case, the cargo was stored at the port of discharge (and not the port of delivery), the Court found that the

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[20] Article 529, Maritime and Internal Waterways Navigation Act. The corresponding norm in the Croatian Maritime Code is Article 547.

[21] In accordance with Article 523, paragraphs 1 and 2, Maritime and Internal Waterways Navigation Act, the carrier is required to complete the carriage in the contracted route, and in the absence of a contracted route, in a usual route. Any deviation, absent of justifiable reasons, and resulting in damage or late delivery of the cargo, falls under the carrier's responsibility. The corresponding norm in the Croatian Maritime Code is Article 521. The rules on carrier's right to release the cargo to the storekeeper have not substantially changed in the Croatian Maritime Code.

[22] Article 545, Maritime and Internal Waterways Navigation Act. The corresponding norms in the Croatian Maritime Code are Articles 536 and 540.

[23] Article 544, Maritime and Internal Waterways Navigation Act. The corresponding norm in the Croatian Maritime Code is Article 543.

[24] Article 546, Maritime and Internal Waterways Navigation Act. The corresponding norm in the Croatian Maritime Code is Article 550, paragraph (1) – referring to the carrier's responsibility for all persons working for him (absent of the special preconditions as noted in previous text).

carrier continued to be liable for all damage occurring prior to the delivery of the cargo to the consignee at the B/L stipulated port of delivery. Furthermore, irrespective of the fact that the cargo in question (jute) was extremely sensitive to the elements, and necessitated a diligent care and special storage requirements (an in-door storage facility), the cargo was, upon discharge and delivery to the customs for storekeeping, kept in open, due to the scarce in-doors facilities available at the customs warehouse in San Antonio port. The claimant provided a witness testimony stating that the carrier was aware of the conditions and the capacity of the customs warehouse in San Antonio, as the carrier had previously carried the same or similar cargo to (or via) the same port, and had similar issues with regard the damage on the cargo occurring during the storekeeping. The Court accepted the witness testimony, and held that, due to the fact that the carrier had previous knowledge of the warehouse capacity (and the noted lack of proper capacity) in the port of discharge, the carrier was not just in breach of due diligence,[25] but also in breach of the general duty of fairness and diligent conduct,[26] as well as in breach of a general duty to act in accordance with the fair trade customs.[27]

In accordance with the law at that time, the carrier could not avail the right to limit the liability if the damage occurred as a result of his personal[28] intentional conduct or gross negligent conduct.[29] The Court summarized the findings, and provided the following logical progression of the decision held. The carrier, first of all, knew (based on the previous experience in the same port) that the in-door storage capacity of the customs warehouse in San Antonio port is small, and that, therefore, the discharged cargo will be kept in open. The carrier, furthermore, knew that the nature of the cargo demands in-door storage in order to prevent the damage to the cargo. And finally, the carrier knew that keeping the cargo in open creates a real and high possibility of the damage occurring. Thus, the Court held that the carrier knew and had to know that the damage would most probably occur, and nevertheless acted in a way that obviously exposed the cargo to the danger and the consequent damage. Therefore, the carrier was not allowed to avail the right to limit his

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[25] Article 553, Maritime and Internal Waterways Navigation Act. The corresponding norm in the Croatian Maritime Code is Article 549.

[26] Article 12, Obligations Act (Official Gazette SFRY, No. 29/1978, 39/1985, 46/1985, 57/1989). The corresponding norm in the Croatian Obligations Act (Official Gazette, No. 35/2005, 41/2008, 125/2011) is Article 4.

[27] Article 21, Obligations Act. The corresponding norm in the Croatian Obligations Act is Article 12.

[28] On this point, see the decision in: *Tasman Orient Line CV v New Zealand China Clays Ltd & Ors* (*the "Tasman Pioneer"*) [2010] 2 Lloyds Rep 13.; and, *Sellers Fabrics Pty Limited and Anor v Hapag-Lloyd Ag*, Matter No 12/96 [1998] NSWSC 646 (29 October 1998).

[29] Article 570, paragraph 1, Maritime and Internal Waterways Navigation Act, based on the Hague rules. The corresponding norm in the Croatian Maritime Code is Article 566, incorporating the Hague-Visby standard.

liability for the damaged cargo. Such finding of the Court perfectly adheres to the reckless behavior threshold as established by the Hague-Visby rules, and represents an important, ground-breaking decision to be followed in future cases.

4. Recent Case Practice

4.1. Unseaworthiness

More recent court practice recognizes instances where the unseaworthiness of the vessel has led to the inability of the owner to avail the right to limit the liability. The following two cases, to be briefly noted, refer to a breach of statutory norms concerning the safety of navigation and a breach of due diligence in selecting the appropriate crew (choice of crew), leading to a direct loss of right to limit the liability. In the case Pž-2542/90,[30] held before the High Commercial Court in Zagreb in 1990, it was held that, following the collision of two vessels, due to the fact that the defendant failed to ensure the seaworthiness of his vessel (the lack of the required number of crew aboard, including the steering master), the vessel in blame is personally responsible for the collision, thus not being allowed to avail the right to limit the liability.[31] In the case Pž-2187/96,[32] held before the High Commercial Court in Zagreb in 1997, the Court held the members of the crew guilty for stealing the goods on-board (case of theft on-board), and additionally held the owner liable for the poor choice of crew (*culpa in eligendo*), determining such conduct to be gross negligent, and not allowing the owner to avail the right to limit the liability.

4.2. Loss of Marine Insurance Cover

In the case Revt-116/06-2,[33] held before the Supreme Court of Republic of Croatia in 2006, following an incident at sea resulting in the loss of life aboard and the sinking of the vessel, the owner of the vessel (claimant) claimed the insurance payment (loss of vessel), whereas the insurer (defendant) denied the insurance coverage on the basis of improper behavior of the insured. In accordance with the Maritime Code, the insurance coverage is excluded if the insured intentionally or gross negligently fails to act in due diligence.[34] The general insurance terms and conditions, that were relevant for the case, indicate several reasons for coverage exclusion: the inadequate technical equipping of the vessel, the lack of a required number of and properly trained

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30 Pž-2542/90, High Commercial Court, 1990.

31 See: Vujović, Veljko, "*Decisions of domestic courts and other state authorities: Carrier's guilt – lispendence*", Comparative Maritime Law, vol. 35 (1-4), (1993) at 161-164.

32 Pž-2187/96, High Commercial Court, 1997.

33 Revt-116/06-2, Supreme Court, 2006.

34 Article 719, paragraph (2), point 1), and paragraph 3, Croatian Maritime Code.

crew, irregular or excessive loading of the cargo, and etc. In accordance with the decision of the High Commercial Court (Pž-523/05-3) in 2005, in the same case, based on the findings of independent surveyor, and the official investigation of the local port authority and the relevant Ministry (for maritime affairs), (a) the owner of the vessel failed to procure all the necessary requirements to ensure the seaworthiness of the vessel (the lack of the required number of crew aboard)[35] and the cargoworthiness (the cargo was not properly stored and secured),[36] (b) the single crew member present at the bridge during the accident failed to take proper measures to prevent the accident, and, (c) the captain of the vessel continuously and relentlessly committed various maritime offences (multiple entries and exits from various ports despite clear prohibition, being sanctioned several times for such behavior). The Supreme Court reconfirmed the decision of the High Commercial Court, and denied the claimant's right to receive insurance payment. The Court argued that the said captain was evidently unfit (element of social irresponsibility) to perform the Master's duties, especially with regard to ensuring the safety and security of the vessel, its crew, and cargo on-board. The Court further held that, in accordance with the law – which allows a court determination of a reason justifying the unseaworthiness of the vessel[37] – the decision of the owner of the vessel to employ and retain such a person as the Master of the vessel, despite all the noted offences and lack of proper behavior, definitively corresponds to the classification of unseaworthiness. The Court argued that the noted behavior of the captain (and the vessel) could not be prolonged indefinitely without serious repercussions for the vessel, the crew, the cargo on-board and (possibly) third parties. The fact that, after around 20 voyages on the same route, with the same kind of misbehavior, the accident has ultimately occurred, points to the fact that this was not an occurrence of an Act of Good (*vis major*), a blameless incident or a bad luck, but a foreseeable consequence of intentional and continuous violation of the safety of navigation regulation. Due to the fact that the insurance contract, the Court concluded, is based on good faith between the contracting parties, the insured is under an obligation to perform to his best abilities to prevent the occurrence of an insured peril. In this case, this was obviously not the case.[38] Therefore, the Court denied the insurance coverage.

As the Canadian Supreme Court's decision in the *Peracomo*

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35 Articles 147 and 148, Croatian Maritime Code.

36 Article 110, Croatian Maritime Code

37 Article 427, Croatian Maritime Code.

38 Compare: *Peracomo Inc. v. TELUS* Communications, *supra note 1*, where the Court held that, for the purpose of denying the insurance coverage, it was sufficient to prove willful misconduct without having to proving the actor's subjective knowledge of that fact that the damage would occur.

demonstrates,[39] the loss of insurance coverage does not directly lead to the loss of the right to limit the liability. The Canadian decision, although recognizing the reckless behavior on the side of the insured, required establishing a clear link between the awareness of the actor that a particular ("*such*") loss will occur as a result of the noted behavior, in order to prevent the utilization of the right to limit liability. The question that comes to mind with regard the last analyzed case is whether the hiring and/or retaining such a Master constitutes a serious breach of due diligence and a reckless behavior on the part of the owner of the vessel (or a designated person/an *alter ego* acting on behalf of a shipping company). In the previously examined case Pž-2542/90, the High Commercial Court held that the absence of a steering master is directly linked to the resulting collision, and that the owner of the vessel had to know that the absence of a steering master is likely to (will most probably) result in such an event. It could be argued that, in connection to the last analyzed case, the owner's knowledge of Master's behavior – continuous breach of the safety of navigation and the security of the vessel, most probably leading to a serious damage (including collision, sinking, damage to the cargo, and probable loss of life) – constitutes a reckless behavior (not actually wanting the damage to occur, but being aware of the high possibility of such occurrence, and being indifferent about it). Such a claim, however, never appeared before a court, and remains open for further consideration.

[39] See: *supra note 5*.