

Interpreting Carrier’s CMR defenses in Greece (Art. 17.2 and 17.4)

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1. Introducing the Greek judicial thinking

Judicial interpretation of the CMR generally tends to focus in on such areas as the liability of the carrier (Art. 17 and particularly what should constitute a defense under 17.2) and what constitutes a “wilful misconduct” conduct such as to deprive the carrier from his right to limit liability (Art. 29).

Carrier’s defenses in a nutshell are presented in Art. 17.2 and can exonerate a carrier from his *a priori* presumed liability when the loss or damage occurred following a) the wrongful act or negligence of the claimant, b) the instructions of the claimant, c) an inherent vice, or finally d) an unavoidable and unpredictable circumstance. Carrier’s defenses under Art. 17.2 is considered to be a key concept for the CMR’s liability regime².

Furthermore, Art. 17.4 presents more precise by restrictively listing the cases of special risks that can exonerate carrier’s liability.

The basis of liability as set under Art. 17.1 and then re-set under Art. 17.2 created a long and interesting discussion in Greek doctrine and jurisprudence in an effort to identify the exact legal identity of carrier’s liability. In the Greek literature it has been disputed whether the liability of the carrier should be considered as a strict one or as a liability based on fault. It could be said that Greece applies a mixed regime of a subjective presumed basis of liability with a reversed burden of proof. Hence, as a first step, Greek judges will examine carrier’s liability under the scope of a strict liability regime where the carrier faces a presumption of his responsibility once the cargo is damaged. Nevertheless, since the carrier can present the defenses of Art. 17.2 or 17.4, Greek courts have decided to lighten this basis of liability by introducing a new regime of a “counterfeit objective liability” (*nothos antikimeniki efthini – νόθος αντικειμενική ευθύνη*)³.

The burden of proof for the existence of exonerating circumstances rests always upon the carrier. Furthermore, as far as Art. 17.2 is concerned, the carrier will have to prove a causality link between the exonerating event and the damage to the cargo and even more prove that this was the only cause of the damage⁴. Nevertheless, when the carrier is seeking to set up a defense under Art. 17.4, he will need to prove that the risk actually occurred. He will not

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² Clarke, “International Carriage of Goods by Road: CMR”, (Informa Law, Sixth Edition 2014), p. 225, para. 74.

³ For an extensive analysis see among others I. Rokas, “Civil Liability in Road Transport (especially under the CMR)”, (Sakoulas, 1984, pp. 182 – 183); Karagounidis, “Wilful Misconduct and Equivalent Fault in International Carriage of Goods by Road”, EpiskED 1995, p. 285, not. 4 - 6; viz. inter alia Thessaloniki CA 1872/1999, EpiskED 1999, p. 1194, Thessaloniki CA 998/1994, Armenopoulos 1994, p. 554; Piraeus CA 1209/1992, EEmpD 1993, p. 42; Athens CA 1379/1987, EllDik 1987, p. 753; for a criticism on this approach see A. Kiantou - Pampouki, “Legal Nature of the International Road Carrier, especially under Art. 17.2 CMR”, EpiskED 1999, pp. 995-1007.

⁴ Piraeus CA 45/1997, Piraeus Law Review 1997, 58.

though need to prove a causality link between the special risk invoked and the cause of loss or damage. Greek courts accept that it is sufficient for the carrier to prove that the loss or damage could have been caused by a special risk, creating a presumption of non-responsibility and shifting the burden of proof back to the claimant⁵.

Greek doctrine and jurisprudence are rich on the subject but tend to be concrete⁶. In a nutshell one could say that Greek courts will examine each case *in concreto* but recognize that excluding carrier's liability should be dealt with extreme cautious, identifying a more delicate regime in Art. 17.2 defenses and a more clear set regime in Art. 17.4 defenses.

Contractual clauses limiting carrier's liability outside the provisions of Art. 17.2 and 17.4 or in case of *force majeure* are considered to be null and void. Hence a clause limiting carrier's liability in case of theft cannot apply⁷.

2. Utmost care vs Unavoidable or unpreventable circumstances

Interpreting Art. 17.2 has always been a field of discussion for Greek scholars and judges, especially on issues concerning the nature of the carrier's liability, the extent of his defenses, the nature of the criteria to be considered when deciding what is truly an unavoidable or unpreventable circumstance. Nevertheless, all opinions intersect on one pre-condition and that is the level of care the carrier has shown prior and during the carriage under examination.

One of carrier's most usual defenses is that the cause of the damage could not be avoided. Greek courts use a "competent prudent professional carrier" standard in order to examine the carrier's conduct. The rule is well established in all areas of Greek civil and commercial law and applies subjectively in each case. The carrier will be exonerated only if and when he proves that the cause of damage could not be avoided even if he had presented the "highest amount of prudence"⁸.

In order to examine the carrier's prudent or not conduct, the court will examine four factors: a) the likelihood of loss or damage⁹, b) the possibility for the carrier to take precautions in order to avoid such loss or damage and c) the common practice of the industry in similar cases. It is also clear that the carrier will be released of his liability when he would be required to break the law in order to avoid the loss or damage or in case of an extensive use of violence.

Dealing with unavoidable or unpreventable circumstances within the Greek legal system, one could say that a new regime of a weakened definition of force majeure is created¹⁰. This regime, given its vagueness, will be specified by the court according to each case separately.

Greek doctrine and jurisprudence are very demanding when facing an Art. 17.2 defense.

As a result, the carrier has to show an utmost care even when the loss or damage was not caused directly by him but his conduct is found to be the starting point of events that led to the loss or damage. The Court of Appeal applied this rule in a case of CMR transport from Greece to the Netherlands via Italy¹¹. When the Italian authorities found illegal immigrants

⁵ Cour Cass. 390/1992, EIIDik 1993, p. 1334; Piraeus CA 1261/1997, EEmpD 1998, p. 777; Athens CA 3362/1991, EMD 5, p. 56; Athens CA 4926/1988, EIIDik 30, p. 144

⁶ Zekos, "Contracts of Carriage and the Carrier's Liability according to Greek Law", (Sakoulas 2002), p. 55 *et seq.*

⁷ Athens CA 7332/1988, EEmpD 1988, 618

⁸ Cour Cass. 1518/2001, EIIDik 44, p. 1619; Cour Cass. 826/2004, EIIDik 45, p. 1656; Thessaloniki CA 730/2005, EEmpD 2005, p. 528.

⁹ This factor is very essential especially in the cases of theft or robbery.

¹⁰ A. Kiantou - Pampouki, *op. cit.*, p. 1004 *et seq.*

¹¹ Larisa CA 157/2009, EpiskED 2010, p. 506.

hidden in the track (without the driver's knowledge), the driver was arrested and the track and cargo were confiscated and transported to an Italian Customs' warehouse. After several months, the claimant managed to retake possession of the confiscated goods which were destroyed while in the care of the Italian Customs. The carrier was found responsible since the confiscation of the track and goods could not be considered as unpredictable given that at that time the presence of illegal immigrants trying to enter the country was very common and he did not show an utmost care to prevent them from hiding in his track.

Although this decision may be considered to be extremely farfetched, creating a severe burden of utmost care on the carrier, it is very characteristic as to how Greek courts interpret carrier's prudence in Art. 17.2.

3. Traffic Accidents – Mechanical Failures

In a loss or damage due to a traffic accident, Greek courts will usually find an element of wilful misconduct. Thus, the carrier will have difficulty to invoke as a defense a *force majeure* argument. His liability though will be relieved if, according to Art. 17.2, he can prove that the accident occurred “*through circumstances which he could not avoid and was unable to prevent*”¹².

In a very characteristic case as to how Greek judges approach common traffic accidents, the Court of Appeal¹³ was asked to examine the case of a cargo damage as a result of a track going off road and hitting the side bars due to slippery conditions caused by an extensive snow blizzard. Carrier's argument of unpredictable and unavoidable weather conditions were denied since the Court considered that the driver should either stop the track until the weather gets better or lower speed and be extremely cautious. The Court considered as a key element on the merits the fact that prior to the accident a convoy of 40 trucks had passed through the place where the accident happened.

When the damage is caused, directly or indirectly, due to a mechanical failure, the carrier is presumed liable and will be able to defend himself via Art. 17.2 only if he proves that the failure was a result of unforeseen events and that he took all the necessary measures to keep the vehicle in good condition. Greek courts are very strict on the meaning of “all necessary measures” and will rarely rule in favor of the carrier often combining the carrier's behavior in relation to the cause of the damage with Art. 29¹⁴. Hence, in a case where the cargo was damaged by fire due to overheated or burning tires, the carrier was held liable since it was held that he should have checked the tires' condition and make sure that the good condition will be maintained throughout the entire voyage¹⁵. On a similar context, the carrier was denied an Art. 17.2 defense and was found liable due to “wilful misconduct” in a case of fire caused by mechanical error due to the track's bad maintenance¹⁶.

The same approach applies in cases of total loss of goods due to inadequate maintenance conditions (cooling) during transport and the carrier will be relieved from liability only if he claims and proves that the loss took place due to unusual circumstances which he could not avoid¹⁷.

¹² Piraeus First Instance Multimember Court 2423/1980, EED, 1981, p. 235.

¹³ Thessaloniki CA 1219/2005, EpiskED 2005, p. 754.

¹⁴ Athens Multimember First Instance Court 3749/1980, Arm., 1981, p. 125.

¹⁵ Athens CA 796/2006, EpiskED 2006, p. 807.

¹⁶ Cour Cass. 1795/2012, EpiskED 2013, p. 111; Athens CA 3957/2006, D/NH 2008, p. 901.

¹⁷ Cour Cass. (Plenary) 1518/2001, EEmpD 2001, p. 698.

4. Theft - Robbery

Theft will not be considered as a *prima facie* Art. 17.2 exonerating circumstance, since in most cases the event could be avoided¹⁸. Robbery on the other hand is more easily considered to fall within Art. 17.2's scope of application.

Once theft or robbery takes place, the carrier will always argue that the event was unavoidable no matter his reaction asking for the exoneration of his liability. Nevertheless, his behavior prior to the actual event is of essence and will be examined in combination with the likelihood that the event could or would be attempted¹⁹.

In case of theft while the track is parked in parking stations, Greek courts are very reluctant to grant an Art. 17.2 defense. This will happen only in the case where the parking station is sufficiently guarded. Hence, the carrier will be relieved of liability in a case of theft when he proves that he showed utmost care by parking the track in a properly fenced parking station secured by guards²⁰. On the other hand, Courts have rejected an argument of unpredictable or unavoidable event in cases where the carrier parks the track in an open unguarded parking lot or in areas where similar events are common²¹.

It should be pointed out though that most part of the relevant jurisprudence rules in favor of the claimant, going one step further and considering any non prudent behavior as a proof of carrier's wilful misconduct.

Following the above, the Supreme Court denied an Art. 17.2 defense even in case of the theft occurred when the driver was forced to park the vehicle in a crowded but unguarded place in order for him to go to the hospital for a few hours due to a severe injury he had suffered in the head while exiting the track. The Court held that his conduct could not be considered as prudent and the circumstances as unavoidable given that he has left the vehicle unguarded and there was no co-driver to be left beside with the track and goods²².

It is clear that a successful defense in relation to theft is rare in Greek jurisprudence. On the other hand, courts present more lenient in cases of robbery, where the element of violence is present and expressed²³. But even in cases of armed robbery, Greek courts will ask from the carrier to present an utmost care in relation to all aspects that could lead to the damaging event.

Hence, in a case reaching the Supreme Court²⁴, a CMR transport was agreed from Italy to Greece. The carrier, being experienced, decided to park the track near the town of Cassino in an open parking lot in order to rest. The driver, given his previous experience, knew that the area had no theft history and the parking lot was always crowded. At the moment more than 30 tracks were parked alongside. During the night, the driver was attacked by armed robbers and was kidnapped together with the track and cargo. Several hours later, after being injured,

¹⁸ For an analysis on Art. 17.2 defenses in theft cases see K. Pampoukis, "Issues in International Carriage of Goods by Road, Remarks in relation to Thessaloniki CA 230/2002", EpiskED 2002, pp. 525 *et seq.*, 542-543.

¹⁹ Clarke, *Ibid.*, p. 232, par. 75a.

²⁰ Athens CA 2871/2007, EMD, 2007, 292; Athens Multimember First Instance Court 7260/2005, EMD 2007, p. 185

²¹ Thessaloniki CA 554/2002, EpiskED 2002, p. 745.

²² Cour Cass. 304/2007, Nomos e-Database.

²³ Apart from violence, Greek courts have also accepted as an unavoidable circumstance the use of "unknown means" for the execution of the act of theft or robbery; This vague conception has created reasonable concerns as to the danger of deviating from the true concept of art. 17.2, see K. Pampoukis, "The unpreventable conditions in Art. 17.2 as a vague legal conception, Remarks on Thessaloniki CA 1872/1999", EpiskED 1999, p. 1194 *et seq.*

²⁴ Cour Cass. 1518/2001, EMD 4 (2001), p. 452.

he was abandoned tied and gagged. The Court granted an Art. 17.2 defense accepting the presence of unpredictable and unavoidable circumstances, even though, as expressly stated in the decision, the parking lot was not guarded, the track had no alarm system and there was no co-driver in order to avoid interrupting the voyage.

On a different and more strict approach, the Court of Appeal²⁵ held that Art. 17.2 will not *a priori* apply in cases of robbery, despite the clear presence of the element of violence. Thus, a CMR transport was agreed for the carriage of goods from Germany to Greece. The carrier chose, for cost saving reasons, to pass through Croatia despite the fact that the Yugoslavian civil war was raging. During traveling through Croatia, the driver was immobilized by a group of armed soldiers. The track and all carried goods were stolen. The carrier invoked Art. 17.2 arguing that the loss of cargo was due by an unpredictable and unavoidable event. The Court found the carrier liable, ruling that even if the track was violently stolen, the armed robbery could not be considered as an unpredictable event when passing through a war zone. Furthermore, the carrier could avoid the event by choosing a different route, namely through Romania and Bulgaria or Italy. The court went one step further and activated Art. 29, ruling that the carrier's behavior was clearly a case of willful misconduct.

5. Inappropriate loading or unloading and defective packing

In cases of inappropriate loading or unloading, the carrier will have to express his reservations prior accepting delivery of the goods. Should the carrier remain silent, Greek courts have ruled that a presumption as to the good order of the loading or unloading is presumed, creating an even more difficult environment for him to deny his liability²⁶. Nevertheless, this silence is considered as a mere presumption and not as a *prima facie* evidence that Art. 17.4 (c) will not apply. Cases where the carrier was able to invoke and prove this kind of defense even though no written reservations from his part existed are rare but do exist²⁷.

Greek courts approach Art. 17.4 (b) defense based on the same criteria as the above. Furthermore, when the carrier invokes a defective packing special risk he should present before the court what should be the appropriate packing²⁸. Same rules apply in the case of bad loading or unloading.

The above apply *mutandis mutandis* to the freight forwarder, resulting to a relief of the forwarder's liability when the carrier can defend through Art. 17.4 (b)²⁹ and (c)³⁰.

²⁵ Thessaloniki CA 171/2005, DEE, 2005, p. 984.

²⁶ Athens CA 310/1991, EMD 5, p. 103; Athens CA 10759/1988, EMD 4 (2001), p. 77.

²⁷ Larisa CA 347/2006, EpiskED 2005, p. 548; Piraeus CA 268/2001, EMD 3 (2001), p. 327.

²⁸ Piraeus CA 60/1993, EEmpD 1994, p. 54; Piraeus CA 268/2001, *Ibid*.

²⁹ Piraeus CA 1261/1997, EEmpD 1998, p. 777; Athens CA 4136/1990, EMD 5, p. 14.

³⁰ Athens CA 4136/1990, EMD 5, p. 14; Athens CA 15886/1988, EIIDik 32, p. 184.