The Scope of art. 29 CMR Convention in Spain: wilful misconduct and the default equivalent to wilful misconduct:

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1: Introduction:

Art. 29 is the cornerstone of the system of liability behind the CMR Convention. Indeed, the Convention sets in Art. 23 a general rule of limitation of liability based on the kilograms of the cargo damaged or loss (8’33 x SDR x gross weight) and that in case of delay compensation cannot exceed the carriage charges. The application of this limitation of liability can only be excluded by the declaration of value (Art. 24) which is not the object of the present article and Art.29 which states as follows:

“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 wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to wilful misconduct” [emphasis added].

There are two controversial aspects of Art. 29 which lead to the problem of lack of uniformity. First, the text has two original versions with two different legal concepts to describe the same behaviour -the English concept of wilful misconduct and the French concept of dol-. Second -apart from those behaviours which fall within the concept of dol or wilful misconduct- the Convention allows to exclude the limitation of liability in when there is a negligent behaviour or default equivalent to wilful misconduct in accordance with the law of the court sized of the case. Therefore, instead of providing an autonomous meaning of such type of negligence the Convention reverts to the lex fori in a clear resignation from the vocational principle of uniformity implicit in any International Convention1.

The lack of uniformity has lead to a problem of interpretation and application of the concept of “default equivalent to wilful misconduct” in many Contracting States, starting from the point that it is not clear in many jurisdictions whether this concept exists. This has been the traditional starting point of discussions in Spain. In this article we shall analyse the recent evolution of Spanish Law which might lead to consider that there is no negligence equivalent to wilful misconduct in contrast with the development in the Spanish case law of a concept of gross negligence equivalent to wilful misconduct

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1 This specific desire of standardization is found as well in the Preamble of the CMR Convention, and particularly to the carrier’s liability.
–culpa lata dolo aequiparatur- which will certainly have an important impact in the future relations between carriers and cargo owners.

2: The Position of Spanish Positive Law

The concept of “wilful misconduct” from the English version is closer to the Spanish concept of “dolo” in civil liability, described by constant doctrine of the Spanish Supreme Court -not only as the malicious intention to produce a damage dolo directo- but also as the “consciousness” to breach an obligation of due care. This wide concept of wilful misconduct under Spanish Law incorporates the upper level of the French concept of dol and the lower level of the English concept of wilful misconduct.

Once clarified the first point -which is not controversial under Spanish Law- we must answer if under Spanish laws exists a concept of “default equivalent to wilful misconduct” which has its origins in the Roman law concept of “culpa lata dolo aequiparatur”. Such concept would mean that from a certain degree of default –gross or reckless negligence- the consequences shall be assimilated to wilful misconduct.

It is difficult to assert under Spanish law whether there is any degree of default equivalent to wilful misconduct so far as the general law -Spanish Civil Code (CC) - contains no clear definition of wilful misconduct and negligence which can shed light on the matter. In fact, Art. 1102 and 1107 of CC do not provide definition of wilful misconduct and even the later distinguishes –without defining- between “fault in good faith” and “wilful misconduct”. In addition, Art.1104 CC in a mere approximation to the concept of negligence states that “The debtor’s fault or negligence consists of the omission of the diligence required by the nature of the obligation that corresponds to the circumstances of the persons, the time and the place” but does not clarify if there is any degree of default equivalent to a conscious or malicious behaviour which could implicitly refer to wilful misconduct.

Consequently, most of the authorised Spanish legal doctrine considers that under Spanish Law we can only talk about wilful misconduct or negligence and exclude any tertium gens which would allow equivalence between both concepts. This argument was reinforced by the specific laws regarding the carriage of goods by road in Spain – which can be also used to clarify the scope of Art. 29 CMR Convention so far as the expression “(...) the law of the court or tribunal seized of the case (...)” does not precisely point to the general or the specific laws of a Contracting State.

Art.3.4 of the Reglamento de Ordenación de los Transportes Terrestres (ROTT) -which is an administrative rule to organise road transport in Spain- pointed that: “the limitations of liability set in the two paragraphs of this article shall not apply when the

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2 The word dolo is the concept applied to translate “wilful misconduct” in the last official translation from Spanish Authorities BOE of 15th June 1995.
damage is caused by wilful misconduct of the carrier”. Nevertheless, it has been criticised that the argument offered by this provision is rather weak as it refers to administrative law. However it is very important to notice that in 2009 the Spanish Parliament approved the Law 15/2009 of the 11th of November, The Contract of Carriage of Goods by Road (LCTTM), though applicable to national carriage, it was made in the light of the CMR Convention. For this reason, the LCTTM contains a general principle of limitation of liability similar to the CMR Convention and a provision –Art.62- announcing in which cases such limitation shall be excluded. This provision states as follows:

“Do not apply the rules of this chapter which exclude or limit the liability of the carrier or the burden of proof, to invest when the loss or damage has been caused by him or by his assistants, dependent or independent, with fraudulent or a conscious and voluntary breach of its assumed legal obligation that dismember that, without being directly dear they are a necessary consequence of the action”.

[Emphasis added].

The provision is based on its CMR equivalent; nonetheless, it provides more information as it refers to those behaviours which are “fraudulent” –this is connected with the French idea of dol or the Spanish dolo directo (see above in this section) - and a lower level of exclusion referred as “conscious and voluntary breach of its assumed legal obligation (...”) which leads to the concept of wilful misconduct also known in Spain as dolo eventual.

Therefore, it seems that the minimum requisite to exclude limitation of liability would be a “willingness” or “consciousness” or “bad faith” to breach a duty of custody of the cargo and we cannot depart from this idea. This reading of Art.62 leads to affirm that in accordance with the Spanish law there is no degree of negligence equivalent to wilful misconduct. Such position gains weight taking a look at the original proposal for Art. 62 presented at the Spanish Parliament which reads as follows:

“Do not apply the rules of this chapter which exclude or limit the liability of the carrier or the burden of proof, to invest when the loss or damage has been caused by him or by his assistants, dependent or independent, intentionally or acting recklessly and conscious of its probability”. [Emphasis added].

This initial proposal was changed to the final version we saw and emphasis was made on the exclusion of the term “recklessly” and “conscious of its probability” from the article. This, it can be argued that if the Spanish legislator would have wanted to include a certain degree of negligence as equivalent to wilful misconduct some

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6 Fernando Martínez Sanz et.al., Comentarios a la Ley de Transporte Terrestre, (Navarra: Ed. Aranzadi, 2010) 735.
7 BOCG- Congreso, Serie A, núm.11-16 of 10th june 2009, 5.
8 Fernando Martínez Sanz et.al., Comentarios a la Ley de Transporte Terrestre, (Navarra: Ed. Aranzadi, 2010) 739.
reference would have been kept to the word “recklessly” and to the term “conscious probability” or any other legal term like “wilful gross negligence”.

At this point, we shall conclude that despite the potential noxious effects to the legal relations, the Spanish Positive Law accepts a wide concept of wilful misconduct – including *dolo directo* and *dolo eventual* - but does not match well any degree of negligence equivalent to it.

3: The Parallel Evolution of Spanish Case Law

While the Spanish Parliament and laws are not very proactive to set the principal of *culpa lata dolo aequiparatur* -at least in transport law- the case law has evolved in many directions –sometimes with contradictory judgments- trying to conceal the positive law with an everyday wider concept of wilful misconduct whose limit with the concept of gross negligence is extremely difficult to determine.

In order to understand the different outcomes from rulings in lower courts we must take into account that up until the year 2015 there have been no Supreme Court judgments unifying criteria with respect to the concept of wilful misconduct and potential equivalent gross negligence. Indeed, two Supreme Court judgments in the nineties had the chance to analyse the applicability and equivalence of such concepts but did not enter to consider the question in full. Nevertheless, it is particularly interesting the 1999 Supreme Court judgment which annulled a lower court ruling that considered -in full application of the Spanish legal doctrine stated above in section two- that a driver, who did not follow the instructions, changed his route, tried to pass a level crossing of a train and got stuck in the middle of the railway finally colliding with a train, was to be considered gross negligence and limitation of liability was applicable. The Supreme Court reversed this judgment and decided that the limit of liability was not applicable and that this was a case of gross negligence -without entering to describe whether the element of consciousness was implicit in this case and included within gross negligence equivalent to wilful misconduct-\(^9\).

The lack of clarification from the Supreme Court gave subsequent way to many contradictory Court of Appeal rulings. Some case law kept the traditional view of Spanish doctrine of non-equivalence between gross negligence and wilful misconduct. Other rulings referred to a concept of gross negligence equivalent to wilful misconduct but without a legal analysis of such equivalence –following the 1999 Supreme Court ruling-. Still other case law tried to retake the Roman classic concept of *culpa lata dolo aequiparatur* and provided very interesting legal concepts\(^10\). Finally, two recent rulings of the Spanish Supreme Court from 2015 tried to unify criteria and also made an

\(^9\) STS (Civil Jurisdiction) nº 78/1999 9th of February, Thomson Reuters Aranzadi, (RJ\,1999\,1054).

interpretation in the light of Art. 62 LCTTM that would go towards a concept of “wilful” gross negligence equivalent to wilful misconduct.

3:1 The direct reference of Spanish courts to gross negligence equivalent to wilful misconduct

Though Spanish courts had a traditional tendency to apply the limit of liability, there were many judgments in the last years which seemed to set certain equivalence in Spanish Law between wilful misconduct and the concept of gross negligence –but without defining its scope- which would apparently be contradictory with the traditional Spanish doctrine denying such possibility.

In this regard, a Court of Appeal ruling in 2000 determined that a driver -whose cargo was stolen in a Service Area and police found no trace of mechanisms of security of the trailer and only footsteps of the driver next to the trailer- could benefit from the limitation of liability considering that it could not appreciate any action or omission from the driver consisting in wilful misconduct or “(...) gross negligence equivalent to it (…)” nevertheless, it does not develop such concept any further which is very disconcerting. Following the same tendency other judgments also applied the limitation of liability despite including –without defining- reference to “gross or reckless negligence” or “relevant level of negligence” as equivalent to wilful misconduct.

Progressively, and in spite of the lack of legal conceptualisation of gross negligence equivalent to wilful misconduct, the application of limit of liability has lost weight. For instance, limitation of liability was applied in a case in 2011 which the driver had parked in a place commonly used for it in the Spanish border with France and in another case in 2013 with rather similar facts – cargo stolen and driver had parked in a common place where other drivers were parked and slept in the truck- his behaviour was defined as gross negligence equivalent to wilful misconduct and therefore limitation was excluded.

The main criticism which can be made to this Spanish case law is not the fact that courts adapt the social and legal changes of perception of limits of liability but to the lack of clarification of the meanings given to legal concepts –in this case, gross negligence equivalent to wilful misconduct-.

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11 SAP Madrid (Sec 11th) of 28th November 2000, Thomson Reuters Aranzadi, (AC\2001\583).
12 SAP Barcelona (Sec 15th) 377/2004 of 14th July, Thomson Reuters Aranzadi, (JUR\2004\306003).
13 SAP Barcelona (Sec 15th) 23rd November 2005, Thomson Reuters Aranzadi, (JUR\2005\260127).
14 SAP Barcelona (Sec 15th) 224/2011 of 6 May, Thomson Reuters Aranzadi, (JUR\2011\294397).
15 SAP Guipuzcoa (Sec 2nd) 192/2013 of 25th June, Thomson Reuters Aranzadi, (JUR\2014\165677).
3:2 The efforts of Spanish courts to define the concept of gross negligence equivalent to wilful misconduct

On the other hand, following the idea that there is a concept of gross negligence assimilated to wilful misconduct -whether this is possible or not- a serial of rulings provided a definition as follows:

“(...) such a gross negligence (protected by the mention made in Art.29 CMR Convention) which is of difficult justification for a professional of the sector (e.g. to leave the trailer loaded and opened in and inadequate place to stop or unload, etc)\textsuperscript{16}.

Or another ruling which said:

“(...) unjustifiable or abnormal behaviour, difficult to understand and unrelated to the minimum and elementary diligence expected from a professional of the transport sector (...)\textsuperscript{17}.

Regardless of the effective possibility under Spanish law to find a gross negligence equivalent to wilful misconduct, at least these two definitions constitute an effort to define such gross negligence separated from any reference to the main element that compunds the essence of Spanish wilful misconduct –e.g. bad faith or malicious intention to provoke a damage (e.g. dolo directo) or to breach an obligation (e.g. dolo eventual).

3:3 The recent developments: the two Supreme Court rulings from 2015 and subsequent case law:

Two rulings of the Supreme Court from 9 July and 10 July 2015 try to unify the Spanish doctrine of gross negligence equivalent to wilful misconduct applicable to the carriage of goods by road. It is important to notice that both judgments analyse the existence of such gross negligence in the light of Art. 62 LCTTM which we discussed above in section two and in both cases the conclusion leads to exclude the limit of liability through and extensive interpretation including gross negligent cases within the scope of wilful misconduct through a new concept of “wilful” gross negligence.

In the first case, the Supreme Court explained that the first scenario of Art.62 LCTTM “fraudulent [behaviour]” would refer to the Spanish concept of “direct” wilful misconduct –assimilated to the French concept of dol- and the second scenario “a conscious and voluntary breach of its assumed legal obligation that dismember that, without being directly dear they are a necessary consequence of the action” would correspond to the Spanish concept of dolo eventual which could be assimilated to the

\textsuperscript{16} SAP Madrid (Sec 28th) 86/2008 of 3rd April, Thomson Reuters Aranzadi, (JUR\textsuperscript{2008\textbackslash189567}) and SAP Madrid (Sec 28th) 375/2011 of 23rd December, Thomson Reuters Aranzadi (JUR\textsuperscript{2012\textbackslash42107}).

\textsuperscript{17} SAP Madrid (Sec 28th) 86/2008 of 3rd April, Thomson Reuters Aranzadi, (JUR\textsuperscript{2008\textbackslash189567}).
English concept of wilful misconduct; however, it reaches the conclusion that the article includes the cases of gross negligence equivalent to wilful misconduct.\textsuperscript{18} The judgment concludes as follows:

“The different behaviours described in the appealed ruling, considered together and given the circumstances [knowing that this was a fragile cargo, the damages caused by a constant irresponsible behaviour] overwhelms the mere negligence and shows a conscious contempt to accomplish the contractual obligations, this means that not only the negligence in performing the obligations but also directly “the conscious breach (...)” that the Art. 62 determines in order not to apply the limits of liability”.

The judgment tries to objectivise the “consciousness” of the carrier analysing the facts in the light of the driver’s diligence rules that a professional of the sector cannot ignore. In purity, new conception of gross negligence can be criticized from two prospective: first, it seems that it goes against the intended interpretation of the legislator stated in section two above; and second, if we enter to analyse in any manner the “consciousness” of the driver –even the “unavoidable” consciousness we are actually not departing from the concept of wilful misconduct. On the other hand, we must point that the idea of trying to objectivise those behaviours which are “inexplicable reckless” considering that we are dealing with a professional might be considered by the legislator.

In the second case, this inclusion of gross negligence as equivalent to wilful misconduct becomes evident as the Supreme Court points that the behaviour of the driver has been qualified by the lower court as “negligent” or “evident lack of diligence” and concludes that such behaviour falls within the description set in Art. 62 and consequently it excludes the limitation of liability\textsuperscript{19}

This extension towards gross negligence equivalent to wilful misconduct has been recently applied in two judgments from the Court of Appeal of Barcelona\textsuperscript{20}.

In the first one, a driver who had a mechanical problem in his truck, left a friend travelling with him taking care of the trailer while he went to take another truck, the friend left the trailer at 17h and when the driver came back at 24h realized that the cargo had been stolen. The court concluded that they had “consciously” left unattended the trailer –bad faith- and therefore limitation was excluded.

In the second case, cargo was stolen and the carrier could not provide any explanation about the circumstances of the loss. The Court of Appeal considered this behaviour as a conscious breach in connection with Art. 62 LCTTM and that given the fact that the carrier did not provide any plausible explanation to such loss it was clear that they

\textsuperscript{18} STS (Civil Jurisdiction) 382/2015 9th July 2015, Thomson Reuters Aranzadi, (RJ2015/3692).
\textsuperscript{19} STS (Civil Jurisdiction) 399/2015 10th July 2015, Thomson Reuters Aranzadi, (RJ2015/4892).
\textsuperscript{20} SAP Barcelona (Sec 15th) 181/2016 27th July; SAP Barcelona 197/2016 13th September.
“unattended fundamental aspects of the service for which they had been contracted, and such disengagement should be assimilated to wilful misconduct”.

Therefore, from these two last rulings and the Supreme Court judgments, we can see a tendency to understand that up to a certain level of a gross negligence it is not possible to assume that a professional carrier will not be conscious of his reprehensible actions or omissions- “wilful” gross negligence-.

Another ruling of the Court of Appeal of Madrid\textsuperscript{21} follows the same reasoning but in this case it goes a step further in order to state which degree of gross negligence falls within a “conscious” gross negligence and concludes that in order to assimilate gross negligence to wilful misconduct the fault of the driver should be of such degree that the driver shall “foresee as inevitable” the result of his action or omission.

Conclusively, we can determine that there is an important mismatch between the intended sense that the Spanish legislative power gives to Spanish Transport Law and the evolution of Spanish case law with a flourishing new concept of “wilful” gross negligence equivalent to wilful misconduct.

4: Final Remarks:

Despite the lack of legal definition, the Spanish general law leave a poor ground to understand that it is plausible the existence of gross negligence equivalent to wilful misconduct. Where the general law remains silent, the specific Spanish transport law seems to deny the possibility of any negligence equivalent to wilful misconduct.

On the contrary, there has been a progressive tendency in Spanish case law to apply the ancient Roman law concept of culpa lata dolo aequiparatur. In this sense, the two last rulings from the Spanish Supreme Court consolidated a new concept of “wilful” gross negligence.

Two criticisms and one suggestion shall be made: first, it is not the function of Spanish courts -in our continental law system- to make interpretations of the laws which were not considered by our legislator. Second, given that court rulings show a change of social perception towards the principal culpa lata dolo aequiparatur in transport law, we believe it would be advisable to change Spanish Transport law to accommodate the new reality. Third, in case a legal change is made –to incorporate gross negligence equivalent to wilful misconduct– we would suggest a more objective approach -avoiding subjective elements of consciousness- and which could refer to “the action or omission that disregards the elementary diligence expected from a professional of the transport sector” as stated in some rulings (see section three subsection two above).

\textsuperscript{21} SAP Madrid (Sec 28th) 153/2016 23rd April.