Article 29: The Interpretation of ‘Wilful Misconduct’ under Greek Law

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There is no doubt that CMR Convention\(^1\) governs successfully the international road transport for 60 years. In general terms, CMR can be considered as a uniform international regulation with influence on domestic road transport of many countries and its success can be proved by the long duration of its application.

However, there are some ‘bad’ points which frustrate the purpose of the international convention, meaning the uniformity of law. The big clue that there are some ‘unsuccessful’ articles in the Convention is the ambiguity of some provisions that lead to a legal uncertainty due to the different interpretation among the contracting states. The difficulty of a uniform approach into certain terms of the Convention by the national courts creates an important divergence between common and civil legal traditions. As it is evident, from this perspective, an international convention can be ‘more efficient if the provisions are more explicit’.\(^2\)

The asymmetric application of the Convention in case of carrier’s liability is primarily due to the difference between common and civil law systems.

As a starting point and as a general rule in the international transport law, the carrier is liable in any case of loss or damage of the goods. If he can prove before the court that some specified circumstances are at hand, then he has the ability to exclude or

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Abbreviations used in this paper: EllDni = Elliniki Dikaiosini (Greek Legal Journal), EEmpD = Epitheorisi Emporikou Dikaiou (Commercial Law Review), EpiskED = Episkopisi Emporikou Dikaiou (Greek Legal Journal), NoB = Nomiko Bima (Greek Legal Journal), NOMOS = <https://lawdb.intrasoftnet.com/> (Greek Legal Platform), TranspR = Transportrecht.
\(^1\) The convention on the international carriage of goods by road (Geneva, 19 May, 1956) as amended by protocol to the CMR, Geneva, 5 July 1978.
limit his liability. Nevertheless, all the regimes approve that a ‘really bad breach’ – if proven by the claimant – can deprive the carrier of any defenses.

One of the most discussed articles of the Convention is undoubtedly the article 29 and most specifically, the matter of interpretation of the English term ‘wilful misconduct’.

Despite the fact that both the English and French texts of the CMR are equally authentic according to article 51, the English and the French approach of the ‘same’ term cannot be the same.

Article 29 refers not only to carrier’s ‘wilful misconduct’ but also to ‘such default on his part as, in accordance with the law of the court or tribunal seised of the case, is considered as equivalent to wilful misconduct’. As it is obvious, CMR takes a ‘local colour’ as ‘lex fori’ is called upon to determine which kind of default is equal to wilful misconduct.

The term ‘wilful misconduct’ was used by the draftsmen of the Convention even though they could understand that this could lead to an ‘unacceptable divergence’ between the decisions of different jurisdictions.

In case of wilful misconduct, the limitation of liability cannot be invoked by the carrier and the cargo owner can claim full recovery for loss or damages to the cargo. Thus, the interpretation of this article by each country is one of the most important factors which have to be taken into consideration by the lawyers and the claimant before starting legal proceedings.

In Greece, the CMR Convention has been ratified by law n. 559/1977. According to article 28 par. 1 of the Constitution of Greece, ‘the generally recognised rules of international law, as well as international conventions as of the time they are sanctioned by statute and become operative according to their respective

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5 Ibid.
conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law.’ Hence, the CMR Convention enjoys an increased typical legal status and prevails over any other law, as integral part of the Greek legislation.

Under all the Conventions and Greek law relating to transportation, the carrier loses any possibility to invoke the provisions (if any) which exclude or limit his liability if he has behaved inappropriately or wrongfully. However, the degree of his default depends on the legal system of each country.

The English term ‘wilful misconduct’, unknown to Greek jurisprudence and law practice was inserted in Greek legal system with the following three international conventions:


b) Warsaw Convention (Convention for the Unification of certain rules relating to international carriage by air - 1929) as amended by the Hague Protocol, officially the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (1955), article 25a; and


Greek case law and doctrine on article 29 CMR concluded that wilful misconduct cannot be compared with any other form of liability under Greek Law. Greek Courts need to clarify the circumstances under which the carrier is fully liable, meaning without any right to avail himself of the provisions which exclude or limit his liability in case of damages. The interpretation of article 29 is essential for the carriers as well as for the claimants as it can finally result to an unlimited liability of the carrier. According to Greek jurisprudence, when the damage is due to wilful misconduct, the

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carrier is liable for full compensation based on general law provisions of Greek Civil Code (Articles 914, 330, 297, 298).8

Greek law recognizes the intent (French word ‘dol’, Greek word: ‘δόλος – dolos’); nevertheless the Greek Judge translated the English text of ‘wilful misconduct’ as ‘ηθελημένη κακή διαχείριση’, a term which is unknown to the Greek legal practice.9 Hence, the interpretation followed by the Greek courts can be described in a nutshell as follows: ‘wilful misconduct’ as a degree of default will include – apart from the intent (immediate or eventual) – the behavior of the carrier (or its agents or servants), under which he acts with knowledge that his act or omission results to the increase of the risk of an injurious result for which he is indifferent but he does not necessarily accept it.10

The above way of interpretation was not always the same. As a date – landmark of the new approach can be considered the year 1998 after the ‘successful’ judgment11 of the Greek Supreme Court n. 18/1998.12

Before the above judgement and especially before 1990, the Greek Courts were not following the same reasoning but in most of the cases, they were accepting that ‘wilful misconduct’ was equivalent to ‘gross negligence’.13

Since 199014, the Supreme Court started to examine the term from another perspective stating that wilful misconduct means intent and that in order to obtain a full recovery, it is not enough if the claimant proves that the damage resulted from gross negligence of the carrier.15

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8 Supreme Court 205/2007, NOMOS.
9 Eleni Gkologkina – Oikonomou, ‘Η ευθύνη στη συνδυασμένη μεταφορά εμπορευμάτων’, 2nd ed. (Sakkoulas, 2010), 264 et seq. [in Greek]
Then, another decision of the Supreme Court n. 281/1994\(^\text{16}\) concluded that even the most extreme conduct of gross negligence cannot be compared with a fault ‘equivalent’ to wilful misconduct.

What it was held in both decisions was totally different from the previous approach and then the matter was finally solved by the Supreme Court in 1998 which clarified for once and for all what should be considered as wilful misconduct under Greek law.

Indeed, since the Supreme Court’s 18/1998 decision, the concept of wilful misconduct was expanded by a way of including the conduct between the eventual intent and the gross negligence. Thus, jurisprudence inserted a new definition of fault which cannot be compared with any other form under Greek law.

In general terms, Greek civil law recognises two big categories of fault: the intent and the negligence. As for the first category, there are two types or degrees: ‘immediate intent’ and ‘eventual intent’. More specifically, ‘Immediate intent’ is present in two cases: (i) when the author of the act premeditates the unlawful outcome, that is to say when he acts with the purpose of committing an offence in full awareness of its illegal results; and (ii) when he does not premeditate the outcome of the offence but expects it as a necessary consequence of his action or omission. On the other hand, ‘eventual intent’ is present when the author of the act neither premeditates nor seeks the unlawful outcome but expects that it may occur, as the sole possible consequence of his acts, and proceeds though aware of this eventuality. This means that he approves the outcome as eventual result of his acts.

The negligence under Greek law can be classified either as gross negligence or as unconscious negligence.

Wilful misconduct, under Greek jurisprudence cannot be compared with gross negligence because of the subjective element of knowledge which has to be proved in the former case.

In case of ‘gross negligence’, the person does not exercise the diligence and care of a reasonably prudent person because of the fact that due to a great indifference or

\(^{16}\) Supreme Court 281/1994, NoB (1995): 59 et seq. [in Greek]
recklessness, he cannot be aware of the harmful consequences of his behavior. In that case, the measure of ‘diligence’ is based on objective elements.

However, in case of ‘wilful misconduct’, a subjective element is required, that is to say the mental attitude of the specific carrier who knows that his act increases the risk of damages (knowledge and indifference).\(^{17}\)

Consequently, the Greek courts have created a new formula of default which, as aforesaid, is something between the intent and the gross negligence.

All the Courts, after the judgement of 1998 are following the same reasoning resulting to a broaden concept of wilful misconduct.

The cargo-owner as claimant and beneficiary of the compensation has two options\(^{18}:\)

a) To invoke the ‘wilful misconduct’ in order to establish his claim as in ordinary suits, claiming a full compensation by the respondent – carrier, that is to say without quantitative restrictions or limitations; or

b) To file a replication which means to reply to carrier’s objection related to the annual time bar under article 32 par. 1 CMR.

Consequently, if the claim of the cargo-owner is based on ‘wilful misconduct’, it is useless to determine the exact weight of the lost or damaged cargo (otherwise, essential element for the limitation of liability). However, what he needs to invoke and prove is the specific circumstances which result to the carrier’s ‘wilful misconduct’. Accordingly, it is not enough to only invoke some facts that prove his unlawful behavior.\(^{19}\) The subjective element of knowledge must be satisfied in order to establish ‘wilful misconduct’ and this can only be proved by some other criteria as the experience of the carrier in international transport.

The carrier from the other hand may argue in his defence that he has taken all the necessary measures to protect the cargo meaning that there was a second person or

\(^{17}\) Court of Appeal of Piraeus 268/2001, EpiskED (2002): 557 et seq. [in Greek]

\(^{18}\) Supreme Court 157/2008, NOMOS.

\(^{19}\) Supreme Court 1729/2014, EpiskED (2014): 767 et seq. [in Greek]
driver in the truck, the driver parked in a parking area with alarm or anti-thief system, locks and security officer and so forth.

More specifically and according to Greek jurisprudence the following behaviors were considered as ‘wilful misconduct’:

1) **Theft into a war zone.** In that case, the Court held that the carrier should have preferred a different route in order to safely transfer the goods from Germany to Greece. His act was based on wilful misconduct as he knew the war situation in Croatia and the consequent risk of any unlawful act into the war zone but he ignored it and he chose to pass from this area instead of choosing a safer route via Romania, Bulgaria or Italy.20

2) **Transfer of grass as sensitive product.** In that case, the Supreme Court of Greece held that the carrier should have been in compliance with the agreed terms during the loading and unloading procedure, as well as very careful in respect of the dates and the temperature into the truck – fridge. The above elements were of particular importance because grass was a sensitive product, a living organism, with a maximum life of 8 days, under the specific circumstances. However, the carrier who had to transfer the grass from Spain to Greece failed to comply with the claimant’s instructions even though he knew that the cargo was sensitive and as a result, the cargo was damaged due to the delay and the high temperature.21

3) **Theft during the night.** This case clarifies the necessary measures that have to be taken by the carrier when he leaves the cargo in order to go home and sleep. The Court held that the carrier was liable for theft because of wilful misconduct. Despite the fact that the final destination was only 50 km away, he preferred to go home and sleep without leaving another person in the truck. Also, he didn’t secure that the truck had an anti-thief system for security reasons and despite his working experience he left the truck in an unsecured and isolated place during the night. Thus, a case of theft was predictable and he could have avoided it.22

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20 Court of Appeal of Thessaloniki 171/2005, NOMOS.
21 Supreme Court 157/2008, NOMOS.
22 Supreme Court 1715/2007, NOMOS.
4) **Delayed delivery of cargo.** In that case, the carrier has undertaken to deliver some clothes from France to Greece within 8 days from receipt. The cargo was intended to be sold until Christmas. Unfortunately, the carrier failed to deliver the cargo on time even though he knew that the clothes would be sold until Christmas holidays. His indifference led to ‘wilful misconduct’ and the carrier was finally held fully liable, even for lost profits, based on general law provisions (Articles 914, 297, 298 of Greek Civil Code).23

5) **Illegal immigration and seizure of the truck.** The carrier, in that case was undertaken to deliver the cargo from Greece to the Netherlands. Illegal immigrants entered the truck and Italian authorities arrested the driver and seized the truck. The driver knew the situation in Greece and he could avoid the entering of illegal immigrants into the truck. As he didn’t prove that the truck was well secured with alarm system, he was held fully liable for the non-delivery and damage of the cargo.24

6) **Theft in Italy.** The driver as well as the truck owner were held fully liable, each one for another reason. The cargo had to be transferred from Greece to the Netherlands via Italy, a country where the danger of theft is not rare. The Court in that case held that theft in Italy is not something unpredictable and could have been avoided a) by the driver as he could have slept in a parking area and not in an unsecured place and b) by the carrier-owner of the truck as he could have put an alarm system in the truck or hired another person (second driver) for the specific route.25

To conclude, the degree of default which can be considered as equal to wilful misconduct depends on lex fori. Greek law does not recognize this kind of default and subsequently, Greek courts had to establish the concept of wilful misconduct. The Supreme Court of Greece made a clear interpretation of this term in 1998, using a new formula between intent and gross negligence and its judgement became the basis for all subsequent judgements.

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23 Court of Appeal of Thessaloniki 3000/2003, EpiskED (2004): 100 et seq. [in Greek]
25 Court of Appeal of Thessaloniki 1100/2003, EpiskED (2003): 1172 et seq. [in Greek]
Uniformity of law may be achieved by satisfying two requirements: ‘the provisions must be properly enacted by the states parties of the Convention; and then they must be interpreted in a uniform manner by the courts of each state’. The interpretation given to article 29 CMR by each jurisprudence cannot ensure uniform liability resulting to a ‘comedy of errors’; therefore, the objective and purpose of the CMR and in particular, the uniform regulation of liability remains the biggest ‘enemy’ against the success of the 60 – year CMR Convention.

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