Should one adapt art. 29 CMR?
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General remarks (1)

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

- In case of wilful misconduct or by such default of the carrier or of his agents/servants which is considered as equivalent to wilful misconduct the carrier can not invoke the provisions of Chapter IV of the CMR, the provisions “excluding or limiting” the liability of the carrier.

- Notable is – conventions aim at uniformity – that the drafters of the CMR have let the filling in of this concept to the lex fori. See also Clarke 2014, p. 101. However, Tuma have said that the Preamble of the CMR makes clear that it can not have been the intention of the drafters simply to refer to the law of the lex fori because uniformity is pursued by the CMR. See Tuma, ETL 1998, p. 13 e.v

General remarks (3)

- In case of differences between the leges fororum on the present subject this leads to forumshopping and a race to the jurisdiction which guarantees the best result for the party in question. See also De Wit 2013, p. 1956
General remarks (4)

In the sequence of my lecture I will pay attention to the following two questions:

1) How is the filling in of the concept of "wilful misconduct or by such default which is considered as equivalent to wilful misconduct" according to Belgian, Dutch, English, French, German, Italian and Spanish law? My starting point is the case law since 2007 because the situation till 2007 has already been described by me and two other authors in 2007. See TVR 2007-2. Because of the lectures earlier today I will keep it short. My description can be seen as a summary of these speeches. This summary is necessary for a good understanding of the second part of my lecture.

2) Is there a reason to adapt the present concept in the CMR by introducing a uniform concept and what would be the most desirable form of this new concept?

General remarks (5)

My comparative law approach would not have been possible without the help of my colleagues abroad. I am very grateful to them. I thank (in alphabetical order): Malcolm Clarke (England) Cécile Legros (France), Elena Orru (Italy), Maria Victoria Petit Lavall (Spain) en Paul Verguts/Ralph De Wit (Belgium).
Belgium (1)

- In Belgium nothing has changed since 2007 with respect to the point in question. The leading cases are the judgements of the Hof van Cassatie van 27 januari 1995, T.B.H. 1995, 232 and 30 maart 2000, E.T.L. 2000, 392. The basis for these judgements can be found in the judgement of the Hof van Cassatie van 25 september 1959, Arr. Cass. 1960, 86 in which it was considered that the rule ‘culpa lata dolo aequiparatur’ is not applicable in Belgian law.

Belgium (2)

- The cited judgements of the Hof van Cassatie van 1995 en 2000 make clear that the claimant has to prove wilful misconduct of the carrier or of his agents/servants where wilful misconduct in this context means that an intentional element must be present. So there is a subjective criterion and dolus eventualis is excluded in this criterion.
England (1)

- The person who invokes the legal effects of art. 29 CMR has to prove there is *wilful misconduct or equivalent default*. See Clarke 2014, p. 312. This will be the claimant.

- According to English law the addition “or equivalent default” has no meaning because according to English law “there is no default equivalent to wilful misconduct under the CMR”. See Clarke 2014, p. 320.

England (2)

- What is – according to English law – the scope of the concept *wilful misconduct*? LJ Toulson describes the concept in the case TNT Global SpA vs. Denfleet [2007] EWCA Civ 405 under nr. 25 strikingly as follows: “To establish wilful misconduct within the meaning of the CMR, it is not enough to show that the carrier was at fault in failing to take proper care of the goods and that the carrier's conduct was the product of a conscious decision. It has to be shown that the actor knew that his conduct was wrong or was recklessly indifferent whether it was right or wrong; and, as part of that requirement, he must have appreciated that his conduct created or might create additional risk to the goods.” The cited words make clear that it is a *subjective* criterion and *dolus eventualis* is included in this criterion.
England (3)

- However, the case Datec Electronics Holdings Ltd vs. United Parcel Service Ltd [2007] UKHL 23 is an example of a more objective approach of the concept wilful misconduct. See point 50 of Lord Mance: “(..) Inevitably, any systematic consideration of the possibilities is subject to a risk that it may become a process of elimination leading to no more than a conclusion regarding the least unlikely cause of loss. But, as I have said, I do not consider that Richards LJ fell into that trap. I share, without hesitation, the view which he formed overall that theft involving a UPS employee was shown on a strong balance of probability to have been the cause of this loss.”

France (1)

- For the French filling in of art. 29 CMR it is important to take notice of article L. 133-8 of the Code de commerce: “Seule est équipollente au dol, la faute inexcusable du voiturier ou du commissionnaire de transport. Est inexcusable, la faute délibérée qui implique la conscience de la probabilité du dommage et son acceptation téméraire sans raison valable. Toute clause contraire est réputée non écrite.”
France (2)

- Under the new – since 2009 – French criterion the claimant has to prove at least *dolus eventualis* and the fact that it must be probable damage while under the old regime *dolus eventualis* alone or maybe gross negligence was enough.

Germany (1)

- The claimant has to prove that there is *Vorsatz oder Verschulden das dem Vorsatz gleichsteht* of the carrier or of his agents/servants. See Koller 2013, p. 1152.

- The term “vorsätzlich” is broad. Not only “direkter Vorsatz” but also “bedingter Vorsatz” (dolus *eventualis*) are included. See Koller 2013, p. 402-403.

- The meaning of the words *Verschulden das dem Vorsatz gleichsteht* is spelled out in § 435 HGB.
Germany (2)

- § 435 HGB provides: “Die in diesem Unterabschnitt und im Frachtvertrag vorgesehenen Haftungsbefreiungen und Haftungsbegrenzungen gelten nicht, wenn der Schaden auf eine Handlung oder Unterlassung zurückzuführen ist, die der Frachtführer oder eine in § 428 genannte Person vorsätzlich oder leichtfertig und in dem Bewußtsein, daß ein Schaden mit Wahrscheinlichkeit eintreten werde, begangen hat (emphasis added. MLH).”

Germany (3)

- What is covered by the phrase “leichtfertig und in dem Bewußtsein, daß ein Schaden mit Wahrscheinlichkeit eintreten werde”?

Germany (4)

- ‘Leichtfertigkeit’ alone is not enough. The carrier or his agent/servant must have committed the act “in dem Bewußtsein, daß ein Schaden mit Wahrscheinlichkeit eintreten werde”. It does not have to be a certain damage. Enough is that one is aware that the conduct could result in a damage. See Koller 2013, p. 412.
- See for a example of “ein Vorsatzgleiches Verhalten”: BGH 19 March 2015, I ZR 190/13.

Italy (1)

- In the judgement of 14 March 2006, 2006/5449 the Corte di Cassazione considered among other things the concepts dolus en culpa are different concepts. The consequence is that both concepts can not be treated equally.
- In his contribution in NTHR 2007-1 (p. 16) Berlingieri concludes that according to Italian law art. 29 CMR is only applicable in case of dolus but he asks himself if the lower courts will follow the judgement because ‘a judgement of the Supreme Court has only persuasive force, but is not binding.’
Italy (2)

- If I see it well the judgement in question has not changed much. In the words of my contact in Italy: "I did not find any Italian source stating that art. 29 CMR applies only in case of "dolo"/wilful misconduct. On the contrary, all the doctrine and case-law I found are in the sense of the regime I wrote you about. (...) according to the Italian case-law and doctrine, in case of "colpa grave" (with the meaning I mentioned you, quoting the specific case-law and doctrine), the carrier cannot avail himself of the limitations under art. 23 CMR. (...) According to the Italian case-law, the level of negligence under art. 29 CMR is the colpa grave (gross negligence) (e.g.: Cass. Civ., 29.03.1985, No 2204; Cass. Civ., III Sect., 07.10.2008, No 24765). Please, note that Cass. Civ., III Sect., 16.05.2006, No 11362 mentions also the related decision of the Court of Appeal of Bologna, which referred to the dolo eventuale, instead of colpa grave, but it's the only one I found in this sense and it is a Criminal Law's concept."

The Netherlands (1)

- For the Dutch filling in of art. 29 CMR it is important to take notice of art. 8:1108 BW. This article provides: "De vervoerder kan zich niet beroepen op enige beperking van zijn aansprakelijkheid, voor zover de schade is ontstaan uit zijn eigen handeling of nalaten, geschied hetzij met het opzet die schade te veroorzaken, hetzij roekeloos en met de wetenschap dat die schade er waarschijnlijk uit zou voortvloeien." Wat is the scope of the italicised words?
The Netherlands (2)

- In fact this criterion means that the claimant has to prove *dolus eventualis* and the fact that it must be a probable damage. A probability of 50% is not enough. See also Claringbould (Haak-book, 2012), p. 152. In his opinion the words ‘aanzienlijk groter’ mean that the chance of the occurrence of the fact must be considerably more than 50%. In his opinion it must be at least 66.67%. He also notes that this threshold condition never really can be taken in cases of theft on a parking lot.

Spain (1)

- For the Spanish filling in of art. 29 CMR it is important to take notice of Article 62 LCTTM (2009-versie): *Artículo 62 Pérdida del beneficio de limitación (loss of the benefit of limitation)*. No se aplicarán las normas del presente capítulo que excluyan o limiten la responsabilidad del porteador o que inviertan la carga de la prueba, cuando el daño o perjuicio haya sido causado por él o por sus auxiliares, dependientes o independientes, *con actuación dolosa o con una infracción consciente y voluntaria del deber jurídico asumido que produzca daños que, sin ser directamente queridos, sean consecuencia necesaria de la acción* (with dolo or a knowing and willful violation of the assumed legal duty resulting in damages, without being directly wanted, are a necessary consequence of the action (willful misconduct)).
- What is the scope of this criterion?
Spain (2)

- According to the case law of the Tribunal Supremo the concept dolus includes also dolus eventualis. See F.M. Sanz/A.Puetz, Comentarios a la Ley de de Transporte Terrestre, ed. Aranzadi, Navarra, 2010, p. 732.
- Culpa grave is not part of the concept. Zie Sanz/Puetz 2010, p.737.
- In fact the causality condition in this criterion restricts the possibility to invoke Article 62 LCTTM in the case of dolus eventualis. Theoretically speaking this means that only intention and the necessitas-variant of dolus are within the scope of this criterion but in practice one sees something else. My contact in Spain summarises this practice as follows: “They don’t require strictly that damages be a necessary consequence of the action, but that the carrier be conscious of the probability that it will produce damage. It’s probably something more than willful misconduct of Montreal and Vilna.”

Concluding remarks (1)

- Art. 29 CMR leads to forumshopping which is - in my view - difficult to reconcile with the purpose of uniformity of the CMR.
Concluding remarks (2)

- It is important that art. 29 CMR will be a part of a revision in the (near) future. Revision of art. 29 CMR must - in my opinion - lead to a uniform concept.
- One of the consequences of the uniform concept-approach is the presence of a precise description of the the dolus-concept because in some countries – for example England, Germany and Italy - dolus eventualis is included while in other countries – for example Belgium - dolus eventualis is excluded or is – for example in The Netherlands and Spain – only included when dolus eventualis is combined with the circumstance that that it must be a probable damage.

Concluding remarks (3)

- I have a preference for the English approach because this approach is a nice balance between the interests of both the carrier and the claimant. In this approach all gradations of dolus have the consequence that the carrier has not the possibility to invoke the provisions of Chapter IV of the CMR, the provisions “excluding or limiting” the liability of the carrier. In my opinion this is right because there is insufficient justification for the present distinction in legal consequences which is made between the different gradations of dolus because in blameworthiness they hardly differ from each other. The fact that a specific result is a possible or probable consequence of a conduct of the carrier or of his agent/servant and this person was recklessly indifferent whether it was right or wrong, does not make (or hardly make) the conduct less condemnable than in the case the result has been intended or certain. It is right that beyond dolus art. 29 CMR is not applicable because the reprehensible nature of the conduct is too small for the severe consequences of the application of art. 29 CMR. In such a case one can at most speak of gross negligence for which is characteristic that although there has been a serious breach of a duty, the originator is not indifferent towards the the sequel. If he had known what would be the result of his conduct, he would have acted differently. That is the big difference with dolus eventualis in which case the actor has accepted the significant chance that damage will occur.
Proposal for a new art. 29 CMR

- Art. 29 CMR according to Marc Hendrikse: “1) The carrier shall not be entitled to avail himself of the provisions of this Chapter which exclude or limit his liability or which shift the burden of proof if the damage was caused by his wilful misconduct (dolus). It has to be shown that the carrier knew that his conduct was wrong or was recklessly indifferent whether it was right or wrong; and, as part of that requirement, he must have appreciated that his conduct created or might create additional risk to the goods. 2) The same provision shall apply if the wilful misconduct is committed by the agents or servants of the carrier or by any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment. Furthermore, in such a case such agents, servants or other persons shall not be entitled to avail themselves, with regard to their personal liability, of the provisions of this Chapter referred to in paragraph 1.”