Article 29 CMR overview countries

FRANCE

How Article 29 of the CMR Convention is interpreted by the French courts

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In France, in the eyes of the courts, wilful misconduct and default equivalent to wilful misconduct are two separate and alternate notions under which a carrier can be deprived of the benefit of limitations. In short, they are two separate causes for ruling out a limitation of liability.

The French courts however apply their own definition of '*dol*' when assessing wilful misconduct as specified in Article 29 of the CMR Convention (1). Furthermore, the meaning of 'default equivalent to wilful misconduct' evolved in French law from 'gross misconduct' up to 2009 to 'inexcusable fault' thereafter (2). Contrary to subsection 1, the courts strictly apply subsection 2 of Article 29 of the Convention (3).

1. Wilful misconduct

The French concept of '*dol*' was evolved by the courts. According to the Cour de Cassation, 'the debtor's actions amount to wilful misconduct where the debtor deliberately refuses to perform their contractual obligations even though they do not intend to cause their contracting partner harm thereby'.[1]

Therefore, for the carrier's actions to amount to wilful misconduct, they must have acted wilfully with the intention to breach the contract, though not necessarily with the intention to cause harm to their contracting partner.

According to Article 1150 of the French Civil Code, a debtor whose actions amount to wilful misconduct is deprived of the benefit of any statutory or contractual limitations (for an application of this principle in transport law, see Cour de Cassation, commercial division, 4 March 2008, case no. 07-11.790).

Pursuant to Article 1151 of the French Civil Code, the carrier's wilful misconduct only deprives them of the benefit of the limitation of liability for the immediate and direct consequences of their failure to perform the contract.

When applying Article 29 of the CMR Convention, the French courts interpret the concept of wilful misconduct as they would under French law.

For instance, the actions of a carrier who diverted a lorry from its planned itinerary for the benefit of thieves were ruled to amount to wilful misconduct in the meaning of Article 29 of the Convention.[2] Likewise, a carrier who failed to comply with the instruction not to subcharter was found guilty of wilful misconduct.[3]

2. Default equivalent to wilful misconduct

The French legal definition of default equivalent to wilful misconduct has evolved over time.

Initially, gross misconduct on the carrier's part amounted to a default equivalent to wilful misconduct in the meaning of Article 29 of the CMR Convention.

Gross misconduct has been consistently defined by the courts as 'extremely serious negligence bordering on wilful misconduct that shows that the carrier, who is in control of their actions, is unable to perform the contractual task they took on'.[4]

For instance, a carrier who fails to properly load the entrusted goods (computer hardware) despite being aware of 'both the fragility and value thereof' and personally overseeing the loading is guilty of gross misconduct,[5] so is a carrier speeding on a slippery road while disregarding speeding limits.[6]

The French Act no. 2009-1503 of 8 December 2009, which came into force on 10 December 2009, inserted Article L133-8 into the French Commercial Code, according to which 'The only equipollent to wilful misconduct is the carrier's or the forwarder's inexcusable fault. An inexcusable fault is deliberate misconduct that implies that the person committing it was aware of the likelihood of the damage which they nonetheless recklessly accepted without any good reason. Any clause to the contrary shall be deemed to be invalid.'

The above Article therefore expressly draws a parallel between French law and Article 29 of the CMR Convention: only an inexcusable fault can amount to a default equivalent to wilful misconduct in the meaning of Article 29 of the Convention provided the four cumulative requirements of Article L133-8 of the French Commercial Code are met.

For instance, for a carrier to stray from their itinerary for no good reason (for a social call) and to leave the goods unattended is an inexcusable fault amounting to a default equivalent

1. Cour de Cassation, 1st civil division, 4 February 1969, case no. 67-11.387.
2. Versailles Court of Appeal, 25 June 2013, case no. 11/09237.
3. Cour de Cassation, commercial division, 4 March 2008, case no. 07-11.790.
4. Cour de Cassation, commercial division, 27 February 2007, case no. 05-17.265.
5. Paris Court of Appeal, 4 July 2001, case no. 1999/11647.
6. Cour de Cassation, commercial division, 16 October 2012, case no. 11-10.071.

to wilful misconduct in the meaning of Article 29 of the Convention.[7]

Gross misconduct, which retains its original meaning in French law, can no longer be considered as amounting to wilful misconduct in the meaning of Article 29 of the CMR Convention, unless the events at issue date back to before Article L133-8 of the French Commercial Code came into force.[8]

3. Limitation for subcontractors

The French courts enforce a strict interpretation of subsection 2 of Article 29 of the CMR Convention, applying the liability rules of subsection 1 even where the default equivalent to wilful misconduct was committed by the substitute carrier[9] who then cannot avail themselves of the liability ceilings (see, e.g., the ruling of the Lyon Court of Appeal of 9 September 2011, case no. 08/07104, which was not quashed on that point).

GERMANY

International conference 60 years CMR

Rotterdam, 06./07.10.2016
Article 29 CMR

By Dr. Tobias Eckardt

Germany is sometimes referred to as a country in which it is comparatively easy to break the limitation of liability under the CMR. Indeed, there is a wealth of case law reported on Article 29 CMR. I will endeavour to provide some insight as to the requirements to establish wilful misconduct and gross negligence under German case law with regard to the CMR. Further, I will try to provide some explanation as to the aspects of procedural law which come into play here and, finally, highlight situations in which a contribution of the sender to the occurrence of the loss might lead to the carrier not having to bear the full amount of the loss even though gross negligence has been established.

1. What is gross negligence?

When considering liability under Article 29 CMR one will need to note that in 1998 there was a reform of German transport law which changed the requirements for gross negligence. Whereas before 1998 it was only necessary to establish that the carrier had grossly ignored the interests of the sender,[10] it is now necessary to prove a very grave violation of the carrier's duty in which the carrier grossly disregards the security interests of the sender;[11] this is not only an objective test to be met but there is also a subjective side which requires that the person acting/omitting to act did realise that the occurrence of the loss was a likely consequence of this negligence act or omission.[12]

2. Establishing gross negligence by means of the secondary burden to state facts

So in essence one would have thought that the requirement of unlimited liability was difficult to be met. However, this change in the statutory situation of the material law was in effect counter-acted by a development in the procedural law approach.

The secondary burden to state facts is a universal concept of German procedural law. It is therefore not limited to CMR cases, but also to domestic road transport cases as well as to

7. Lyon Commercial Court, 13 May 2013, case no. 2011J03109, IDIT issue 41613.
8. Cour de Cassation, commercial division, 1 April 2014, case no. 12-14.418.
9. Versailles Court of Appeal, 17 June 2010, case no. 09/02778.
10. BGH, 16 July 1998, I ZR 44/96, *TranspR* 1999, 19 which defined gross negligence for the purpose of s. 435 HGB as follows: 'Grobe Fahrlässigkeit liegt […] nach ständiger Rechtsprechung des Bundesgerichtshofes vor, wenn die im Verkehr erforderliche Sorgfalt in besonders schwerem Maße verletzt worden und unbeachtet geblieben ist, was im gegebenen Fall jedem einleuchten mußte [references omitted].'
11. BGH, 25 March 2004, I ZR 205/01, *TranspR* 2004, 309: 'a) Die aufgrund des Transportrechtsreformgesetzes vom 25. Juni 1998 (BGBl. I S. 1588) mit Wirkung vom 1. Juli 1998 in Kraft getretene Neufassung des § 435 HGB ist Ausdruck des schon bis dahin im gesamten Transportrecht geltenden Prinzips, daß dem Frachtführer die ihm wegen vertragstypischer Risiken eingeräumten Haftungsprivilegien nicht zugute kommen sollen, wenn ihn oder eine Person, deren er sich bei der Ausführung der Beförderung bedient, ein qualifiziertes Verschulden, also ein über die einfache Fahrlässigkeit hinausgehender Verschuldensvorwurf, trifft [references omitted].
b) Der Verschuldensmaßstab des § 435 HGB, der – wenn nicht Vorsatz gegeben ist – neben der Leichtfertigkeit das Bewußtsein voraussetzt, daß ein Schaden mit Wahrscheinlichkeit eintreten werde, ist an den Wortlaut deutscher Übersetzungen internationaler Transportrechtsübereinkommen (u.a. Art. 25 WA 1955) angelehnt. Der Begriff der Leichtfertigkeit bezweckt einen möglichst weitgehenden Einklang des deutschen Transportrechts mit dem internationalen Recht [references omitted]. Der Gesetzgeber ist dabei von dem Bedeutungsgehalt ausgegangen, der dem Begriff schon bisher in der deutschen Rechtsprechung zu Art. 25 WA 1955 zukam [references omitted]. Dem entsprechend muß die Auslegung des neuen Verschuldensbegriffs in erster Linie diesem Verständnis entnommen werden [references omitted].
Das Tatbestandsmerkmal der Leichtfertigkeit erfordert einen besonders schweren Pflichtenverstoß, bei dem sich der Frachtführer oder seine "Leute" in krasser Weise über die Sicherheitsinteressen der Vertragspartner hinwegsetzen [references omitted]. Das subjektive Erfordernis des Bewußtseins von der Wahrscheinlichkeit des Schadenseintritts ist eine sich dem Handelnden aus seinem leichtfertigen Verhalten aufdrängende Erkenntnis, es werde wahrscheinlich ein Schaden entstehen. Dabei reicht die Erfüllung des Tatbestandsmerkmals der Leichtfertigkeit für sich allein allerdings nicht aus, um auf das Bewußtsein von der Wahrscheinlichkeit des Schadenseintritts schließen zu können. Eine solche Erkenntnis als innere Tatsache ist vielmehr erst dann anzunehmen, wenn das leichtfertige Verhalten nach seinem Inhalt und nach den Umständen, unter denen es aufgetreten ist, diese Folgerung rechtfertigt. Es bleibt der tatrichterlichen Würdigung vorbehalten, ob das Handeln nach dem äußeren Ablauf des zu beurteilenden Geschehens vom Bewußtsein getragen wurde, daß der Eintritt eines Schadens mit Wahrscheinlichkeit drohe [references omitted]. Dabei sind in erster Linie Erfahrungssätze heranzuziehen. Zudem kann der Schluß auf das Bewußtsein der Wahrscheinlichkeit des Schadenseintritts auch im Rahmen typischer Geschehensabläufe naheliegen [references omitted].'
12. See quote supra n. 11.

sea transport[13] and was recently also applied in the field of medical law.[14]

It is generally upon the claimant to demonstrate that the carrier acted with gross negligence. However, the sender or the consignee of the cargo will only know little or nothing about how the particular shipment was carried out. He will, consequently, rarely be in a position to state the necessary facts and adduce the necessary evidence in order to establish the gross negligence. Failing to do so would mean that the carrier's liability remains limited.

The Federal Supreme Court has firmly established that the principle of good faith aids the claimant here. In cases where a party who is obliged to state the facts and to prove these facts can only make a general statement while the other party has the relevant facts at hand and can easily disclose them, that latter party is under an obligation to do so.[15]

As a consequence thereof it is upon the claimant to (only) point out those aspects in case which make a grossly negligent transport by the carrier seem at least possible.[16] The second burden to state facts then obliges the carrier to state (but not prove!) the facts surrounding the transport. Once the claimant has been supplied with these facts it is upon the claimant to make use of them to prove his claim to the court's satisfaction. So there is no reversal of the burden of proof.[17]

Once the prerequisites for the secondary burden to state facts have been satisfied by the claimant the defendant carrier needs to set out in detail which steps had been taken in order to prevent a theft or damage for this particular carriage. The haulier will have to explain how these preventive steps were documented and he is further obliged to make his own enquiries about the loss and disclose the findings to the claimant. The haulier's obligation is not limited to those facts and events which he himself witnessed. The haulier is also obliged to adduce those facts known or possessed by his

13. See for example: BGH, 29 July 2009, I ZR 212/06, *TranspR* 2009, 331: 'Das Berufungsgericht ist im rechtlichen Ansatz zutreffend davon ausgegangen, dass auch im Rahmen des § 660 Abs. 3 HGB der Grundsatz gilt, nach dem die den Anspruchsteller treffende Darlegungs- und Beweislast für die besonderen Voraussetzungen der unbeschränkten Haftung des Spediteurs dadurch gemildert wird, dass dieser nach Treu und Glauben (§ 242 BGB) wegen des unterschiedlichen Informationsstands der Vertragsparteien zu den näheren Umständen aus seinem Betriebsbereich soweit möglich und zumutbar eingehend vorzutragen hat [references omitted]. Voraussetzung dafür ist, dass der Anspruchsteller Anhaltspunkte für das Vorliegen eines qualifizierten Verschuldens darlegt, die sich insbesondere aus der Art und dem Ausmaß des Schadens ergeben können [reference omitted]. Dieser für Verlustfälle entwickelte Grundsatz kann auf Fälle der Beschädigung von Transportgut übertragen werden, wenn der entstandene Schaden auf einer unzureichenden Sicherung des Frachtgutes beruht. Der Frachtführer hat in diesem Fall, soweit es ihm im konkreten Fall zuzumuten ist, in substantiierter Weise darzulegen, welche auf der Hand liegenden Schadensverhütungsmaßnahmen er getroffen hat [references omitted]. Kommt er seiner sekundären Darlegungslast nicht im gebotenen Umfang nach, so spricht eine widerlegliche tatsächliche Vermutung dafür, dass ihn in objektiver wie in subjektiver Hinsicht ein qualifiziertes Verschulden trifft [references omitted]'.
14. BGH, 16 August 2016, VI ZR 634/15: 'Bei der neuen Verhandlung wird das Berufungsgericht Gelegenheit haben, auf die weitere Aufklärung des Sachverhalts hinzuwirken. Es wird dabei zu berücksichtigen haben, dass die Beklagte die sekundäre Darlegungslast hinsichtlich der Maßnahmen trifft, die sie ergriffen hat, um sicherzustellen, dass die vom Sachverständigen als Voraussetzung für ein behandlungsfehlerfreies Vorgehen aufgeführten Hygienebestimmungen eingehalten wurden [references omitted]. Zwar muss grundsätzlich der Anspruchsteller alle Tatsachen behaupten, aus denen sich sein Anspruch herleitet. Dieser Grundsatz bedarf aber einer Einschränkung, wenn die primär darlegungsbelastete Partei außerhalb des von ihr vorzutragenden Geschehensablaufs steht und ihr eine nähere Substantiierung nicht möglich oder nicht zumutbar ist, während der Prozessgegner alle wesentlichen Tatsachen kennt oder unschwer in Erfahrung bringen kann und es ihm zumutbar ist, nähere Angaben zu machen [references omitted]. So verhält es sich hier. Der Kläger hatte konkrete Anhaltspunkte für einen Hygienevorstoß vorgetragen. Er hatte insbesondere darauf hingewiesen, dass er als frisch operierter Patient neben einen Patienten gelegt worden war, der unter einer offenen, mit einem Keim infizierten Wunde im Kniebereich litt und sein "offenes Knie" allen Anwesenden zeigte. Dieser Vortrag genügt, um eine erweiterte Darlegungslast der Beklagten auszulösen. Denn an die Substantiierungspflichten der Parteien im Arzthaftungsprozess sind nur maßvolle und verständige Anforderungen zu stellen. Vom Patienten kann regelmäßig keine genaue Kenntnis der medizinischen Vorgänge erwartet und gefordert werden. Er ist insbesondere nicht verpflichtet, sich zur ordnungsgemäßen Prozessführung medizinisches Fachwissen anzueignen. Vielmehr darf er sich auf Vortrag beschränken, der die Vermutung eines fehlerhaften Verhaltens des Arztes aufgrund der Folgen für den Patienten gestattet [references omitted]. Zu der Frage, ob die Beklagte den vom Sachverständigen genannten Empfehlungen der Kommission für Krankenhaushygiene und Infektionsprävention des Robert-Koch-Institutes nachgekommen ist, konnte und musste der Kläger nicht näher vortragen. Er stand insoweit außerhalb des maßgeblichen Geschehensablaufs. Welche Maßnahmen die Beklagte getroffen hat, um eine sachgerechte Organisation und Koordinierung der Behandlungsabläufe und die Einhaltung der Hygienebestimmungen sicherzustellen (interne Qualitätssicherungsmaßnahmen, Hygieneplan, Arbeitsanweisungen), entzieht sich seiner Kenntnis [references omitted].'
15. For example BGH 19 July 2012, I ZR 104/11, *TranspR* 2013, 111: 'Das Berufungsgericht ist allerdings zutreffend davon ausgegangen, dass grundsätzlich der Anspruchsteller die Voraussetzungen für den Wegfall der zugunsten des Frachtführers bestehenden gesetzlichen oder vertraglichen Haftungsbegrenzungen darzulegen und gegebenenfalls zu beweisen hat. Danach trägt er die Darlegungs- und Beweislast dafür, dass der Frachtführer oder seine Leute vorsätzlich oder leichtfertig und in dem Bewusstsein gehandelt haben, es werde mit Wahrscheinlichkeit ein Schaden eintreten [references omitted]. Dem Prozessgegner der beweisbelasteten Partei können aber ausnahmsweise nähere Angaben über die zu seinem Wahrnehmungsbereich gehörenden Verhältnisse zuzumuten sein, wenn die primär darlegungspflichtige Partei – wie im Streitfall – außerhalb des maßgeblichen Geschehensablaufs steht und keine Kenntnisse von den näheren Umständen des Schadensfalls hat, während der Schädiger in der Lage ist, nähere Angaben zu machen [references omitted].'
16. For example OLG Saarbrücken, 5 U 418/05, *TranspR* 2006, 300: 'Hinsichtlich der Verteilung der Darlegungslast geht der Bundesgerichtshof für den Bereich der ADSp- und CMR-Haftung in ständiger Rechtsprechung davon aus, dass der Anspruchsteller die ihm hinsichtlich des grob fahrlässigen Verhaltens des Anspruchsgegners obliegende Darlegungslast bereits dann erfüllt, wenn sein Klagevortrag nach den Umständen des Falles ein grob fahrlässiges Verschulden mit gewisser Wahrscheinlichkeit nahe legt und allein der Anspruchsgegner zur Aufklärung des in seinem Bereich entstandenen Schadens zumutbarerweise beitragen kann. Gleiches gilt dann, wenn sich die Anhaltspunkte für das Verschulden aus dem unstreitigen Sachverhalt ergeben.'
17. OLG Saarbrücken, 5 U 418/05, *TranspR* 2006, 300: 'Dies führt nicht zu einer Beweislastumkehr; vielmehr bleibt der Anspruchsteller auch dann, wenn der Anspruchsgegner seine Einlassungsobliegenheit erfüllt, beweisbelastet dafür, dass der vorgetragene Organisationsablauf den Verschuldensvorwurf rechtfertigt [reference omitted]. Kommt der Anspruchsgegner seiner Einlassungsobliegenheit nicht nach, kann daraus je nach den Umständen des Einzelfalls aber der Schluss auf ein qualifiziertes Verschulden gerechtfertigt sein [reference omitted].'

employees and sub-contractors.[18] The reason behind this is that the haulier should not escape his obligations by sub-contracting the carriage. The haulier is obliged to detail the security measures in place to such a degree that the claimant and the court can see how the different measures interact in real life in an ordered, clear and reliable manner. Also, it must become clear which steps were taken to ensure that the steps which should be taken according to the planning were in fact actually taken.[19]

The secondary burden of course only covers those aspects which are relevant to the case. If a consignment was stolen, the haulier would not have to give details about his fire prevention measures.

18. BGH, 19 July 2012, I ZR 104/11, *TranspR* 2013, 111, para. 19 et seq.: 'Entgegen der Annahme des Berufungsgerichts ist die Beklagte der ihr obliegenden sekundären Darlegungslast nicht im erforderlichen Umfang nachgekommen. Dazu hätte sie insbesondere vortragen müssen, welche konkreten Ermittlungsmaßnahmen sie hinsichtlich der streitgegenständlichen Sendungen eingeleitet hat und was ihre Nachforschungen, insbesondere die Befragung der jeweiligen Mitarbeiter, die mit den verlorengegangenen Paketen in Berührung gekommen sein mussten, ergeben haben [reference omitted]. Es ist Sache des Frachtführers, unmittelbar nach Bekanntwerden eines Verlustfalls konkrete Nachforschungen anzustellen und diese zu dokumentieren, um sie in einem nachfolgenden Rechtsstreit belegen zu können. Substantiierter Vortrag zu den durchgeführten Recherchen ist vor allem deshalb von besonderer Bedeutung, weil allein zeitnahe Nachfragen sowohl bei den eigenen Mitarbeitern als auch – je nach den Umständen des Einzelfalls – bei anderen Empfängern von Sendungen die realistische Möglichkeit bieten, ein außer Kontrolle geratenes Paket doch noch aufzufinden. Unter Umständen kann es auch erforderlich sein, beim Versender nachzufragen, ob eine vom Empfänger als verlorengegangen gemeldete Sendung an ihn zurückgesandt wurde.
Die Beklagte und ihre Streithelferin haben sich nach den Feststellungen des Berufungsgerichts hinsichtlich der von ihnen angestellten Nachforschungen lediglich auf zwei Sendungsrecherchen [reference omitted] berufen und mitgeteilt, diese seien ergebnislos verlaufen. Die Revision macht mit Recht geltend, dass dies zur Erfüllung der sekundären Darlegungslast bezüglich der konkret durchgeführten Nachforschungsmaßnahmen nicht ausreicht. Die vorgelegten Anlagen geben nur den angeblichen Verlauf der Sendungen bis zur Verladung in das Transportfahrzeug der Auslieferungsfahrerin der Streithelferin wieder. Darüber, ob die streitgegenständlichen Pakete tatsächlich an die Klägerin ausgeliefert wurden, enthalten die in Rede stehenden Anlagen gerade keine Angaben. Die Beklagte hätte daher weitere Ermittlungen, wie sie in dem von ihr vorgelegten Formblatt "Überprüfung Verlustreklamation" [reference omitted] vorgesehen sind, anstellen müssen. Nach dem eigenen Vortrag der Beklagten enthält das genannte Formblatt diejenigen Maßnahmen, die bei einem Schadensfall üblicherweise zu treffen sind und grundsätzlich auch abgearbeitet werden müssen. Die Beklagte und ihre Streithelferin haben nicht einmal ansatzweise dargelegt, dass dies auch nach der Anzeige der streitgegenständlichen Verluste sowohl durch die Versender als auch seitens der Klägerin geschehen ist. Allein dies rechtfertigt schon den Schluss auf ein qualifiziertes Verschulden der Beklagten.
c) Dem Berufungsgericht kann auch nicht darin beigetreten werden, dass die Betriebsorganisation der Beklagten keine groben Mängel aufweist.
aa) Das Berufungsgericht hat angenommen, die Vorgaben der Beklagten und ihrer Streithelferin zur Ablieferung des Gutes beim Empfänger entsprächen einer ordnungsgemäßen Betriebsorganisation. In der Prozessbeschreibung "Auslieferung" [reference omitted] sei ausdrücklich bestimmt, dass die Auslieferung im Regelfall in der Weise erfolgen müsse, dass jedes einzelne für den Empfänger bestimmte Paket gescannt werde. Dementsprechend hat die Beklagte auch vorgetragen, die Auslieferungsfahrer seien angewiesen, bei Ablieferung die Barcodes der einzelnen Packstücke zu scannen und sich danach den Erhalt der Packstücke auf dem Handscanner in einem speziellen Feld per Unterschrift quittieren zu lassen.
Nach den Bekundungen der mit der Auslieferung der streitgegenständlichen Pakete beauftragten Fahrerin J. der Streithelferin werden die Pakete beim Abladen – entgegen der ausdrücklichen Anweisung der Beklagten – durchweg nicht gescannt. Die praktische Durchführung des Ablieferungsvorgangs widerspricht damit den ausdrücklichen Anweisungen der Beklagten und den Vorgaben in der Prozessbeschreibung "Auslieferung". Dies hätte der Beklagten auch auffallen müssen, da sie keine ihrer Anweisung entsprechenden Ablieferungsnachweise erhalten haben kann. Nach dem Vortrag der Beklagten kann nicht davon ausgegangen werden, dass sie oder ihre Streithelferin konkrete Vorkehrungen getroffen haben, um sicherzustellen, dass die vorgesehenen Sicherungsmaßnahmen bei der Ablieferung in der Praxis von den eingesetzten Fahrern tatsächlich eingehalten werden. Das stellt einen schwerwiegenden Mangel in der Betriebsorganisation der Beklagten dar. Es ist auch nichts dafür dargetan, dass diejenigen Fahrer, die Güter ohne Scannung der einzelnen Packstücke abgeliefert haben, dazu angehalten worden sind, die Anweisung der Beklagten und die Vorgaben in der Prozessbeschreibung "Auslieferung" zu befolgen.
Hätte die Fahrerin der Streithelferin die Ablieferung des Gutes bei der Klägerin entsprechend der Anweisung der Beklagten und der Vorgabe in der Prozessbeschreibung "Auslieferung" vorgenommen, wäre das Fehlen der beiden streitgegenständlichen Pakete mit großer Wahrscheinlichkeit schon zum Ablieferungszeitpunkt bemerkt worden mit der Folge, dass unverzüglich Ermittlungen zum Verbleib des Gutes hätten angestellt werden können.
bb) Die von der Beklagten im Streitfall konkret durchgeführten Verlustrecherchen sprechen ebenfalls für eine grob mangelhafte Betriebsorganisation im Unternehmen der Beklagten.
Die Versender der beiden in Verlust geratenen Pakete haben die Beklagte bereits am 2. und 5. April 2007 – die Anlieferung des Gutes bei der Klägerin hätte am 30. März 2007 erfolgen sollen – darüber informiert, dass die Empfängerin den Nichterhalt der Ware reklamiert hatte. Diese Mitteilungen haben die Beklagte lediglich zu der Prüfung veranlasst, ob die beiden Pakete "nach Datenlage" zugestellt wurden. Dies hat die Beklagte den Angaben in den beiden Sendungsrecherchen [reference omitted] in Verbindung mit der von einer Mitarbeiterin der Klägerin unterzeichneten Empfangsquittung entnommen. Weitere Nachforschungen wurden daraufhin zunächst nicht angestellt. Insbesondere unterblieb die zeitnahe Einschaltung des Ermittlungsdienstes mit der Folge, dass die am 30. März 2007 in der Umschlagshalle der Beklagten gefertigte Videoaufzeichnung später nicht mehr ausgewertet werden konnte.
Die nach der Anzeige der Verluste unterlassene unverzügliche Einschaltung des gerade für Verlustfälle eingerichteten Ermittlungsdienstes stellt einen weiteren schwerwiegenden Sorgfaltsverstoß der Beklagten dar. Die Beklagte durfte aufgrund des Inhalts der Sendungsrecherchen und der von einer Mitarbeiterin der Klägerin unterzeichneten Empfangsbestätigung nicht von einer ordnungsgemäßen Auslieferung der beiden streitgegenständlichen Pakete an die Klägerin ausgehen. Die Reichweite der Empfangsbestätigung hat sich – wie das Berufungsgericht in anderem Zusammenhang zutreffend festgestellt hat – im konkreten Fall lediglich auf einzelne Frachtstücke und Paletten sowie deren Anzahl erstreckt, weil nur der Empfang einzelner Packstücke bestätigt worden ist. Die auf jedem Paket angebrachten Barcodes wurden nicht gescannt, so dass die Beklagte nicht davon ausgehen konnte, dass die von den Versendern angezeigten Verluste nicht eingetreten sein konnten. Unter den gegebenen Umständen hätte die Beklagte nach der Meldung, dass zwei Pakete die Klägerin nicht erreicht hätten, unverzüglich ihren Ermittlungsdienst einschalten müssen, damit dieser zeitnahe Nachforschungen zum Verbleib der beiden Pakete anstellen kann. Hierzu hatte die Beklagte auch deshalb besondere Veranlassung, weil ein für die Klägerin bestimmtes Paket nach dem eigenen erstinstanzlichen Vortrag der Beklagten zunächst fälschlich beim Robert-Bosch-Krankenhaus in Stuttgart abgeliefert worden war, obwohl es nach der "Datenlage" an die Klägerin ausgeliefert worden sein musste. Unzureichende Nachforschungen zum Verbleib einer als nicht angekommen gemeldeten Sendung rechtfertigen ebenfalls den Schluss auf ein qualifiziertes Verschulden des Frachtführers im Sinne von § 435 HGB [references omitted].'
19. OLG Saarbrücken, 5 U 418/05, *TranspR* 2006, 300: 'In diesem Fall darf sich der Anspruchsgegner zur Vermeidung prozessualer Nachteile nicht darauf beschränken, den Sachvortrag schlicht zu bestreiten. Er ist nach Treu und Glauben vielmehr gehalten, das Informationsdefizit des Anspruchsstellers durch detaillierten Sachvortrag zum Ablauf des Betriebs und zu den ergriffenen Sicherungsmaßnahmen auszugleichen [references omitted]. Hierzu sind die konkreten Organisations- und Sicherungsmaßnahmen so eingehend darzulegen, dass für den An-

Another example from the case law of the Federal Supreme Court: a machine being transported on a truck was damaged due to insufficient lashing and securing of the cargo. The Federal Supreme Court stated that the haulier needed to detail by which concrete steps it was ensured that the truck would only leave his premises with sufficiently secured cargo. The Court held that the defendant should have stated which employee had carried out the loading of the cargo and who was the supervisor at that time. Further, the haulier should have detailed what concrete instructions were given to the supervisor in relation to safety checks and in what way it was ensured that the supervisor did indeed take these steps. Also, the Court found information lacking on how the person carrying out the lashing of the cargo had been informed as to how such lashing is to be done. The statement that the employees were regularly schooled in the theory and practice of securing of cargo was found to be insufficient. The Court insisted on information on the intervals at which this schooling was given and what the contents of the schooling were.[20]

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spruchsteller und das Gericht erkennbar wird, wie die einzelnen Maßnahmen in der Praxis geordnet, überschaubar und zuverlässig ineinander greifen, und welche Maßnahmen getroffen worden sind, um sicherzustellen, dass die theoretisch vorgesehenen Maßnahmen auch praktisch durchgeführt werden [references omitted].

[…]

Da der Schaden sich – nach den unbestrittenen Feststellungen des Landgerichts – im Gewahrsam der Beklagten bzw. deren Unterfrachtführer ereignet hat, kann dieser mithin nur entweder während des Transports selbst oder beim (Um-) Verladen entstanden sein, wobei es aufgrund der Schadensmerkmale sowohl an der Verpackung als auch an den Schaltschränken selbst nahe lag, dass eine starke Stoßbelastung infolge eines Sturzereignisses stattgefunden hat, die Packstücke – etwa bei Handlingsarbeiten mit dem Gabelstapler – seitlich ins Kippen geraten und umgestürzt sind [reference omitted]. Auch wenn der konkrete Schadenshergang somit nach wie vor unklar ist, so steht aber jedenfalls fest, dass die Schadensursache entweder ein Fehler beim (Um-) Verladen oder eine unzureichende Ladungssicherung während des Transports war. Die Klägerin kann nicht wissen, welche Sicherungsmaßnahmen die Beklagte ergriffen hat, um einen Beschädigung des Transportguts beim Transport oder beim (Um-) Verladen möglichst auszuschließen. Demgegenüber ist es der Beklagten grundsätzlich möglich und durchaus zumutbar, zu den in ihren Bereich fallenden Betriebs- und Organisationsabläufen näher vorzutragen.

Das Landgericht hat die Beklagte deshalb zu Recht für verpflichtet gehalten, den von der Klägerin bereits in der Klageschrift – wenn auch zwangsläufig lediglich in unsubstantiierter Weise – erhobenen Vorwurf eines qualifizierten Verschuldens i.S.d. § 435 HGB durch nähere Angaben zu den von ihr gegen die Beschädigung von Transportgut während des Transports selbst und während des (Um-) Verladens konkret getroffenen Sicherheitsvorkehrungen zu entkräften [references omitted]. Die Beklagte muss also im Einzelnen darlegen, was sie zur Vermeidung des konkreten Schadens getan hat. Die Darlegungslast der Beklagten umfasst daher neben Angaben zu dem konkreten Weg des Transportguts und zu den mit dem Transport befassten Mitarbeitern insbesondere Angaben dazu, welche konkreten Sicherheitsvorkehrungen zum Schutz des Transportguts während des Transports und des (Um-) Verladens – hier vor allem zum Schutz besonders kippgefährdeten Transportguts – getroffen werden und auf welche Weise die Einhaltung dieser Sicherheitsvorkehrungen – auch durch die beauftragten Unterfrachtführer – sichergestellt und überprüft wird.

b) Dieser Darlegungslast ist die Beklagte – auch in der zweiten Instanz – nicht nachgekommen.

Die von der Beklagten hierzu vorgelegte "Auftragslegende/Abwicklung" [reference omitted] wird den oben dargelegten Anforderungen an Inhalt und Umfang der Darlegungslast auch unter Berücksichtigung der näheren Erläuterung dieser Übersicht in der Berufungsinstanz nicht gerecht. Diese gibt lediglich den konkreten – räumlichen, nicht zeitlichen – Sendeverlauf wieder und weist insoweit keine Anhaltspunkte für irgendwelche Unregelmäßigkeiten auf, enthält aber keinerlei Angaben zu der Frage, wie der konkrete Ablauf des Transports und der (Um-) Verladung organisiert war und welche Sicherheitsvorkehrungen die Beklagte selbst oder die von ihr eingesetzten Personen zur Sicherung des Transportguts vor Beschädigungen getroffen haben.

Ebenso wenig sind die in der Berufungsinstanz vorgelegten allgemeinen "Verfahrensanweisungen" [reference omitted] geeignet, diese Anforderungen zu erfüllen. Dies enthalten zwar Anweisungen darüber, wie mit beschädigtem Transportgut zu verfahren ist, insbesondere dass dieses zu melden und in Berichten zu vermerken ist, auch sie geben aber keinerlei Aufschluss darüber, welche konkreten Maßnahmen zur Sicherung des Transportguts während des (Um-) Verladens oder des Transports, insbesondere gegen das Kippen des Transportguts, getroffen werden.

20. BGH, 8 May 2002, I ZR 34/00, *TranspR* 2002, 408: 'b) Den danach der Beklagten obliegenden prozessualen Mitwirkungspflichten ist diese mit ihrem Prozeßvortrag nicht gerecht geworden.

Verläßt ein Lkw – wie im Streitfall – das Betriebsgelände mit unzureichend gesicherter Ladung, so spricht dies zunächst für ein grobes Organisationsverschulden der Beklagten, zumal die Maschine auch schon während des Transportes von Salzgitter nach Frankfurt am Main durch Verzurren gegen ein Umkippen gesichert worden war. Daher muß die Beklagte im einzelnen vortragen, was sie zur Vermeidung des konkreten Schadens getan hat. Ihre bisherigen Darlegungen reichen dafür nicht aus.

aa) Dem nur allgemein gehaltenen Sachvortrag der Beklagten zur Organisation ihres Umschlagslagers in Frankfurt am Main läßt sich schon nicht entnehmen, ob und auf welche konkrete Weise sie organisatorisch sichergestellt hat, daß Wechselbrücken mit nicht ausreichend gesicherter Ladung das in Rede stehende Umschlagslager nicht verlassen.

bb) In bezug auf den streitgegenständlichen Schadensfall hätte die Beklagte darlegen müssen, welcher Mitarbeiter die streitgegenständliche Verladung vorgenommen hat und wer zu diesem Zeitpunkt verantwortlicher Lagermeister war. Ferner hätte es der Darlegung bedurft, welche konkreten Anweisungen sie dem Lagermeister in bezug auf die Vornahme von Sicherheitskontrollen erteilt hat und auf welche Weise dieser die erforderlichen Kontrollen vornimmt. Daran fehlt es bislang.

Dieser Vortrag ist der Beklagten entgegen der Auffassung des Berufungsgerichts nicht deshalb unzumutbar, weil die Klägerin erst nach mehr als zehn Monaten Ersatzansprüche wegen des hier in Rede stehenden Schadensereignisses gegenüber der Beklagten geltend gemacht hat. Das Berufungsgericht hat bei seiner Beurteilung unberücksichtigt gelassen, daß die Empfängerin in Karben die Annahme des Transportgutes am 23. Dezember 1997 wegen der vorhandenen Beschädigung verweigert und der Beklagten die Weisung erteilt hatte, die zu Schaden gekommene Maschine zur Herstellerfirma zum Zwecke der Instandsetzung zu transportieren. Der Beklagten war mithin der Schadenseintritt unmittelbar nach dem Verladen des Gutes am 23. Dezember 1997 bekannt. Sie hätte daher sofort die für die Aufklärung des Schadensereignisses erforderlichen Maßnahmen einleiten können und müssen, weil sie nach der Lebenserfahrung damit rechnen mußte, daß ihre Auftraggeberin oder deren Transportversicherer Schadensersatzansprüche gegen sie geltend machen würden.

cc) Das Vorbringen der Beklagten läßt auch offen, wann und in welcher konkreten Weise ihre Lagerarbeiter darüber unterrichtet worden sind, wie eine ausreichende Ladungssicherung vorzunehmen ist. Das ergibt sich insbesondere nicht aus den vom Berufungsgericht seinem Urteil als Sachvortrag der Beklagten zugrunde gelegten Angaben des Mitarbeiters S. der Beklagten, wonach diese für ihre Mitarbeiter in regelmäßigen Abständen umfangreiche Schulungen in Theorie und Praxis zum Thema Ladungssicherheit durchführe. Den Darlegungen des Mitarbeiters der Beklagten kann weder entnommen werden, in welchen zeitlichen Abständen die Schulungen durchgeführt werden, noch, welchen Inhalt und Umfang sie haben. Auf den von der Revision gerügten Verfahrensverstoß gegen § 160 Abs. 3 Nr. 4 ZPO kommt es danach nicht entscheidend an.

Another example:[21] after a consignment disappeared during transport, the defendant informed the sender in a letter simply stating that the load 'was damaged and its contents fully destroyed'. Later the defendant claimed that the letter had been a standard text and that in actual fact the truck containing the goods was stolen while it was parked on the premises of Linz airport. The defendant claimed that a) the airport was surrounded by a high barbed wire fence, secured by a gate and under video surveillance and that b) the premises were patrolled by guards at night.

The Court found that the defendant had not given full details of the security measures taken. The Court set out that the defendant should also have provided information regarding the questions of how truck was secured against theft, whether the gate had been forced or opened with a key, why the CCTV did not record the removal of truck, how often and at what intervals guards patrolled the premises, what exactly was checked by the patrols and who controlled the guards. Further, the Court expected information as to how often thefts had occurred previously and what measures had been taken to prevent further losses as well as the names of the persons involved (driver, guards, etc.).

The Court held that the defendant was liable as per Articles 17, 29 CMR as he was found not to have discharged the burden of showing that sufficient organisational steps were taken to ensure the safety of the goods transported. This in turn gave rise to the finding that the measures to hinder a loss of the goods were so insufficient as to be grossly negligent. Further still, the Court held that since not only the first information given by the defendant reporting the loss was incorrect but the defendant also refused to give further information regarding the loss despite numerous requests by the claimant, this gave rise to a presumption of grossly negligent organisation of the defendant's business operations.

3. The sender's contributory negligence as a means to lessen the liability

Based on the principle of good faith, a number of decisions handed down by the Supreme Court in 2004-2006 established that the sender's contributory negligence may lessen the carrier's liability in cases of Article 29 CMR. Prior to these decisions the Court had already held[22] that contributory negligence was also to be considered in cases of unlimited liability under domestic transport law.[23]

In cases relating to the CMR it has been held that the sender's negligence contributed to the loss in cases where the sender failed to inform the carrier about the risk of an unusually high loss due to the value of the goods.[24] A loss is unusually high if it exceeds the CMR limit of liability by a factor of ten.[25]

Similar considerations apply in situations where the carrier has (for example in his general terms and conditions) stated that he will not accept certain valuable goods for transport. If the sender knew or should have known of this stipulation and nevertheless had the carrier transport such goods without informing the carrier of the value of the goods or their nature, this can be considered a contributory factor to the loss.[26] The sender's failure to inform the carrier of the nature/value of

21. German Supreme Court, judgement of 18 December 2008, I ZR 128/06.
22. For example: Decision dated 9 October 2003, I ZR 275/00. 'Die Berücksichtigung eines mitwirkenden Schadensbeitrags kommt […] grundsätzlich auch dann in Betracht, wenn dem Frachtführer ein qualifiziertes Verschulden i.S. von § 435 HGB anzulasten ist [reference omitted].'
23. See the detailed overview in *Thume/Harms* Art. 29 CMR para. 74 et seq.
24. BGH, 20 January 2005, I ZR 95/01, *TranspR* 2005 311: 'c) Das anspruchsmindernde Mitverschulden kann sich aber gemäß § 254 Abs. 2 Satz 1 BGB daraus ergeben, daß der Geschädigte es unterlassen hat, den Schädiger im Hinblick auf den Wert des Gutes auf die Gefahr eines ungewöhnlich hohen Schadens aufmerksam zu machen, die dieser weder kannte noch kennen mußte [references omitted]. Die Obliegenheit zur Warnung hat den Zweck, dem Schädiger Gelegenheit zu geben, geeignete Schadensabwendungsmaßnahmen zu ergreifen [references omitted]. Dabei kommt es nicht darauf an, ob der Auftraggeber Kenntnis davon hatte, daß der Frachtführer das Gut mit größerer Sorgfalt behandelt hätte, wenn er den tatsächlichen Wert der Sendung gekannt hätte. Den Auftraggeber trifft vielmehr eine allgemeine Obliegenheit, auf einen außergewöhnlich hohen Schaden hinzuweisen, um seinem Vertragspartner die Möglichkeit zu geben, geeignete Maßnahmen zur Verhinderung eines drohenden Schadens zu ergreifen. Daran wird der Schädiger jedoch gehindert, wenn er über die Gefahr eines ungewöhnlich hohen Schadens im Unklaren gelassen wird. Da das Unterlassen geeigneter Schadensabwendungsmaßnahmen durch eine Obliegenheitsverletzung des Geschädigten zumindest mitverursacht worden sein kann, ist es gerechtfertigt, die Haftung des Schädigers nach § 254 Abs. 2 Satz 1 BGB einzuschränken.
    d) Die Anwendung des § 254 Abs. 2 Satz 1 BGB ist im Streitfall nicht ausgeschlossen. Unabhängig davon, ob das Haftungssystem des Art. 17 Abs. 1 CMR den Mitverschuldenseinwand nach § 254 BGB wegen unterlassener Angabe des tatsächlichen Warenwerts ausschließt, kann jedenfalls im Rahmen der Haftung nach Art. 29 CMR eingewandt werden, daß der Ersatzberechtigte nicht vor Vertragsschluß auf die Gefahr eines außergewöhnlich hohen Schadens hingewiesen und der Frachtführer deshalb keinen Anlaß sah, besondere Vorsorgemaßnahmen zur Schadensverhinderung zu treffen. Insoweit ist lückenfüllend nationales Recht heranzuziehen [references omitted]. So liegt der Fall hier.
    Die Beklagte hat unter Beweisantritt vorgetragen, der die Vertragsverhandlungen auf seiten der Klägerin führende Mitarbeiter habe bei einem Telefonat vor der Auftragserteilung auf Nachfrage der Beklagten ausdrücklich einen Warenwert von 39.000 DM genannt. Transporte in die GUS mit einem – wie von der Klägerin behauptet – 100.000 US-Dollar übersteigenden Warenwert würden bei ihr (gegen Zahlung einer höheren Vergütung) bis zur Ankunft am Bestimmungsort mit einem bewaffneten Begleitfahrzeug eskortiert. Diesem – von der Klägerin bestrittenen – Sachvortrag wird das Berufungsgericht im wiedereröffneten Berufungsverfahren nachzugehen haben. Denn es erscheint nicht von vornherein ausgeschlossen, daß die erheblich zu niedrige Wertangabe die Beklagte von der Ergreifung der von ihr genannten zusätzlichen Sicherungsmaßnahmen abgehalten hat und diese die Gefahr des Verlustes des Transportgutes verringert hätten [references omitted].
    Die Klägerin begehrt im Wege der Drittschadensliquidation den Ersatz des ihrer Streithelferin entstandenen Schadens. In einem solchen Fall muß sich der den Schaden des Dritten geltend machende Vertragspartner des Schädigers das Verschulden des Dritten zurechnen lassen [references omitted]. Die Streithelferin der Klägerin kannte den tatsächlichen Warenwert und hätte deshalb darüber aufklären müssen, daß dieser um etwa das Zehnfache höher war als der in der Proforma-Rechnung angegebene Betrag von ca. 39.000 DM.'
25. Cf. ibid., last paragraph and BGH, 21 January 2010, I ZR 215/07, *TranspR* 189; *Thume* Art. 29 CMR, para. 79e.
26. MüKo, *Jesser-Huß*, Art. 29 CMR para. 38 b.

the goods has contributed to loss in cases in which the carrier would have declined the transport of said goods.[27]

The third scenario in which the sender's contributory negligence is of relevance lies in the sender's failure to declare the true value of the goods (in order to obtain cheaper transport). Decisions on this aspect centre on the transport of parcels for which the carrier was willing and able to offer increased protection for parcels with a declared value over a certain threshold.[28]

The sender's contributory negligence may even completely nullify the carrier's liability.[29]

27. BGH, 3 July 2008, I ZR 132/07, *TranspR* 2008, 379: 'bb) Das Mitverschulden der Versenderin besteht nicht allein darin, dass sie die Beklagte nicht auf die Gefahr eines ungewöhnlich hohen Schadens hingewiesen und diese dadurch davon abgehalten hat, besondere Vorkehrungen gegen den Verlust des wertvollen Transportguts zu treffen. Die Beklagte hat in ihren Beförderungsbedingungen zum Ausdruck gebracht, dass sie Pakete im Wert von über 50.000 US-Dollar im Standardtarif überhaupt nicht befördern will. Ein Versender kann in einen nach § 425 Abs. 2 HGB beachtlichen Selbstwiderspruch geraten, wenn er wertvolles Gut ohne Hinweis auf dessen Wert dem Frachtführer zur Beförderung übergibt und von diesem im Falle des Verlusts gleichwohl vollen Schadensersatz verlangt, obwohl er weiß oder wissen müsste, dass der Frachtführer das Gut in der gewählten Transportart wegen des damit verbundenen Verlustrisikos nicht befördern will [reference omitted].
Eine Haftung des Transporteurs, die über die Wertgrenze hinausgeht, ab der er Güter nicht mehr befördern will, ist bei einem Mitverschulden des Versenders wegen unterlassenen Hinweises auf die Gefahr eines ungewöhnlich hohen Schadens i.S. von § 254 Abs. 2 BGB in der Regel zu verneinen [reference omitted]. Dagegen kommt – abhängig vom Ausmaß der Kenntnis und von der Schadenshöhe – eine noch weitergehende Beschränkung des Schadensersatzanspruchs des Versenders wegen Mitverschuldens in Betracht. Obwohl auf Seiten des Frachtführers ein qualifiziertes Verschulden vorliegt, kommt in Fällen, in denen das Paket aufgrund der Beförderungsbedingungen des Frachtführers von einem Transport ausgeschlossen ist, ein Mitverschuldensanteil von mehr als 50% in Frage [references omitted]. Hat der Versender positive Kenntnis davon, dass der Frachtführer bestimmte Güter nicht befördern will und setzt er sich bei der Einlieferung bewusst über den entgegenstehenden Willen des Frachtführers hinweg, so kann sein darin liegendes Mitverschulden bei einem Verlust der Sendung sogar zum vollständigen Ausschluss der Haftung des Frachtführers führen [references omitted]. Bei einer entsprechenden Schadenshöhe und einer erheblichen Überschreitung der für den Ausschluss von Gütern vereinbarten Wertgrenze kann die Haftung des Transporteurs wegen des Mitverschuldens des Versenders weitergehend sogar dann vollständig ausgeschlossen sein, wenn lediglich von einem Kennenmüssen des Versenders von dem Beförderungsausschluss auszugehen sein sollte [reference omitted].
cc) Nach den bislang getroffenen Feststellungen hätte der Versenderin zumindest bekannt sein müssen, dass nach den Beförderungsbedingungen der Beklagten Transportgut mit einem Wert von über 50.000 US-Dollar von der Beförderung ausgeschlossen war. Danach ist von einem Mitverschuldensanteil der Versenderin auszugehen, bei dem jedenfalls eine Haftung der Beklagten über den vom Berufungsgericht der Klägerin zugesprochenen Betrag hinaus ausgeschlossen ist. Da der Wert der Sendung deutlich über dem für den Beförderungsausschluss maßgeblichen Betrag von 50.000 US-Dollar lag, kommt nach den oben wiedergegebenen Grundsätzen eine noch weitergehende Minderung des Klageanspruchs in Betracht.'
28. BGH, 30 March 2006, I ZR 57/03, *TranspR* 2006, 250: 'c) Nicht zutreffend ist ferner die Auffassung des Berufungsgerichts, ein der Klägerin zurechenbares Mitverschulden sei auch deshalb zu verneinen, weil die Versicherungsnehmerin Angebote preislich relevanter, höherer Schutzvorkehrungen gegen Verlust nicht genutzt habe. Entgegen der Beurteilung des Berufungsgerichts ist ein sich hieraus ergebendes Mitverschulden nicht schon deshalb abzulehnen, weil die Beklagte die Kosten für die Tarife "Sameday" und "Courieron-Board" nicht dargelegt hat. Ebenso wenig steht der Umstand, dass der Ort nicht bekannt ist, an dem der Schaden in den einzelnen Fällen jeweils eingetreten ist, der Annahme entgegen, dass die insoweit gegebene Obliegenheitspflichtverletzung zum Eintritt des Schadens mit beigetragen hat.
aa) Ein Mitverschulden gemäß § 254 BGB, § 425 Abs. 2 HGB liegt vor, wenn diejenige Sorgfalt außer Acht gelassen wird, die ein ordentlicher und verständiger Mensch zur Vermeidung eigenen Schadens anzuwenden pflegt [reference omitted]. Ein vernünftiger und wirtschaftlich denkender Versender würde bei einem Wert des Transportguts, der die in § 431 HGB, Art. 23 CMR geregelten Haftungshöchstgrenzen erheblich übersteigt, im eigenen Interesse weitergehende Schutzvorkehrungen verlangen und in Anspruch nehmen. Zwar ist es grundsätzlich Sache des Spediteurs, eine Sache auch ohne vereinbarte zusätzliche Schutzvorkehrungen sicher zu befördern. Angesichts des bei Transportgut erfahrungsgemäß gegebenen Verlustrisikos legt aber der besonders hohe Wert einer Sendung schon in eigenem Interesse des Versenders zusätzliche Schutzmaßnahmen nahe; denn dieser trägt das die Haftungshöchstbeträge übersteigende Verlustrisiko selbst, wenn – wovon grundsätzlich auszugehen ist – den Frachtführer kein qualifiziertes Verschulden trifft.
Bietet der Frachtführer weitergehende Schutzvorkehrungen an, die der Versender nicht in Anspruch nimmt, kann das sich daraus ergebende Risiko auch dann nicht vollständig auf den Frachtführer verlagert werden, wenn diesen ein qualifiziertes Verschulden trifft. Der Versender geht mit dem Verzicht auf weitergehende Schutzvorkehrungen bewusst ein Verlustrisiko ein, das ihm deshalb auch anteilig zuzurechnen ist [reference omitted]. Das gilt auch dann, wenn die weitergehenden Schutzvorkehrungen nur gegen eine zusätzliche Vergütung angeboten werden. Die Berücksichtigung des Mitverschuldens basiert auf einem Verschulden des Versenders gegen sich selbst. Der Versender kann in einen beachtlichen Selbstwiderspruch geraten, wenn er Kenntnis von einer sichereren Beförderungsalternative hat, diese aber aus Kostengründen nicht in Anspruch nimmt und einen aus diesem Grund eingetretenen Schaden gleichwohl in voller Höhe ersetzt verlangt. Diese zu § 254 Abs. 1 BGB entwickelte Rechtsprechung ist auf den bei Verstößen nach dem Inkrafttreten des Transportrechtsreformgesetzes am 1. Juli 1998 anwendbaren § 425 Abs. 2 HGB ohne inhaltliche Änderung zu übertragen [reference omitted].
bb) Nach diesen Grundsätzen tragen die vom Berufungsgericht getroffenen Feststellungen die Verneinung eines Mitverschuldens der Versicherungsnehmerin nicht.
Nach dem vom Berufungsgericht zugrunde gelegten Vortrag der Beklagten hat die Versicherungsnehmerin das Transportgut dadurch freiwillig einem erhöhten Verlustrisiko ausgesetzt, dass sie die ihr bekannten Angebote preislich relevanter, höherer Schutzvorkehrungen (Tarife "Sameday" und "Courieron-Board") nicht genutzt hat. Ein daraus herzuleitendes Mitverschulden der Versicherungsnehmerin scheitert nicht daran, dass die Beklagte die Kosten für diese Tarife im vorliegenden Rechtsstreit nicht dargelegt hat. Es steht hier außer Frage, dass die Beklagte erhöhte Schutzvorkehrungen nur gegen eine erhöhte Transportvergütung anbietet und zur Anwendung bringt. Feststellungen dazu, dass eine erhöhte Vergütung im Einzelfall für die Versicherungsnehmerin unzumutbar gewesen sein könnte, hat das Berufungsgericht nicht getroffen. Eine Unzumutbarkeit der erhöhten Vergütung hat die Klägerin zudem nicht geltend gemacht. Sie liegt angesichts des erheblichen Werts des Transportguts wie insbesondere im Fall 1 auch fern.'
29. BGH, 13 August 2009, I ZR 3/07, *TranspR* 2010, 143: 'cc) Die weitere – auf eine entsprechende Bemerkung in einer früheren Senatsentscheidung [reference omitted] zurückgehende – Annahme des Berufungsgerichts, dass der dem Versender anzurechnende Mitverursachungsbeitrag auch bei hohen Werten nicht höher als mit 50% angesetzt werden darf, trifft dagegen nicht zu. Wie der Senat inzwischen entschieden hat, kann nach den Umständen des Einzelfalls auch ein Mitverschuldensanteil von mehr als 50% in Betracht kommen. Dies gilt vor allem in Fällen, in denen das Paket aufgrund der Beförderungsbedingungen des Transporteurs von einem Transport ausgeschlossen ist. Ebenso kann eine höhere Quote als 50% anzunehmen sein, wenn der Wert des Pakets – unabhängig vom Überschreiten einer in den Beförderungsbedingungen gesetzten Wertgrenze – ganz erheblich über dem Betrag liegt, ab dem ein Hinweis auf einen ungewöhnlich hohen Schaden hätte erfolgen müssen [references omitted].

4. Summary

While German case law quite often shows a breaking of the carrier's liability, this is not so much to be attributed to the courts' interpretation of the CMR, but to the overarching principle of the secondary burden to adduce facts. Also, German courts allow for the sender's own negligence to fully mitigate the carrier's liability.

GREECE

Article 29: The Interpretation of 'Wilful Misconduct' under Greek Law

Evangelia Patrikalaki[30]

There is no doubt that the CMR Convention[31] has successfully governed the international road transport for 60 years. In general terms, the 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 longevity of its application.

However, there are some 'bad' points which frustrate the purpose of the international Convention, namely the uniformity of law. The indication is that there are some 'unsuccessful' articles in the Convention is the ambiguity of some provisions that have led to legal uncertainty due to different interpretation among the Contracting States. The difficulty of a uniform approach by the national courts to certain terms of the Convention creates an important divergence between common and civil legal traditions. As is evident, from this perspective, an international convention can be 'more efficient if the provisions are more explicit'.[32] The uneven application of the Convention in case of a 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 international transport law, the carrier is liable in any case for loss of or damage to the goods. If he can prove before the court that some specific circumstances apply, then he has the ability to exclude or limit his liability.[33] Nevertheless, all regimes have held that a 'really bad breach' – if proven by the claimant – can deprive the carrier of any defence.[34]

One of the most discussed articles of the Convention is undoubtedly Article 29 and specifically the matter of interpretation of the 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 always be the same.

Article 29 refers not only to a 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'. Obviously, the CMR takes on 'local colour' as *lex fori* is called upon to determine which kind of default is equal to wilful misconduct.[35]

The term 'wilful misconduct' was used by the draftsmen of the Convention even though they understood 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 of or damage to the cargo. Thus, the interpretation of this article by each country is one of the most important factors to be taken into consideration by lawyers and the claimant before starting legal proceedings.

In Greece, the CMR Convention has been ratified by Law no. 559/1977. According to Article 28(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 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 legal status and prevails over any other law, as an integral part of the Greek legislation.

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

The term 'wilful misconduct', unknown to Greek jurisprudence and law practice, was inserted into the Greek legal system by the following three international conventions:[36]

a. Hague-Visby Rules (International Convention for the Unification of Certain Rules of Law relating to Bills of Lading) (1924)/First Protocol (1968)/Second Protocol (1979), Article 4(5)e;

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dd) Schließlich muss die Art und Weise der Abwägung der Mitverschuldensquote bei geringeren Paketwerten im Blick haben, dass sie bei hohen Warenwerten nicht zu unangemessenen Ergebnissen führt. Diesem Erfordernis wird die vom Berufungsgericht vorgenommene stufenweise Kürzung des Schadensersatzanspruchs nicht gerecht. Die Revision weist mit Recht darauf hin, dass nach der Tabelle des Berufungsgerichts bei Warenwerten, die dem Gegenwert von 50.000 US-Dollar entsprechen, der Schadensersatzanspruch im Ergebnis lediglich um einen Wert gekürzt wird, der unter 25% liegt. Nach der Rechtsprechung des Senats kann in derartigen Fällen – je nach den Umständen des Einzelfalls – jedoch ein Mitverschuldensanteil von mehr als 50% bis hin zu einem vollständigen Ausschluss der Haftung in Betracht kommen [reference omitted]. Die in der Tabelle des Berufungsgerichts vorgesehenen Quoten werden dem nicht gerecht.'

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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.
31. 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.
32. Souichirou Kozuka, 'The economic implications of uniformity in law', *Uniform Law Review* (2007), 683-695.
33. Svante O. Johansson, 'The scope and the liability of the CMR – is there a need for changes?', *TranspR* 10 (2002), 385-392.
34. Malcolm Clarke, 'The transport of goods in Europe: patterns and problems of uniform law', *Lloyd's Maritime and Commercial Law Quarterly* (1999), 36-70.
35. Ibid.
36. Christos Sp. Chrissanthis, 'Η ένταξη της "ηθελημένης κακής διαχείρισης" στο σύστημα αστικής ευθύνης του διεθνούς μεταφορέα', *EEmpD* (1999), 688 et seq. [in Greek].

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

c. CMR Convention (Convention on the Contract for the International Carriage of Goods by Road) (1956), Article 29.

Greek case law and doctrine on Article 29 CMR has concluded that wilful misconduct cannot be compared with any other form of liability under Greek law.[37] Greek courts need to clarify the circumstances under which a carrier is fully liable, meaning without any right to avail himself of the provisions which exclude or limit his liability in case of damage. Interpretation of Article 29 is essential for carriers as well as claimants as it can result in unlimited liability of the carrier. According to Greek jurisprudence, when damage is due to wilful misconduct, the carrier is liable for full compensation based on the general law provisions of the Greek Civil Code (Articles 914, 330, 297, 298).[38]

Greek law recognizes the intent (French word '*dol*', Greek word '*δόλος – dolos*'); nevertheless a Greek Judge has translated the English 'wilful misconduct' as '*ηθελημένηκακήδιαχείριση*', a term which is unknown to Greek legal practice.[39] 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 (immediate or eventual) intent – the behaviour of the carrier (or its agents or servants), under which he acts with knowledge that his act or omission will result in an increase of the risk of an injurious result for which he is indifferent or constitutes a reckless disregard for the probable consequences.[40]

The above interpretation has not always been used. The landmark date of the new approach can be considered as 1998 after the 'successful' judgement[41] of the Greek Supreme Court no. 18/1998.[42]

Before the above judgement and especially before 1990, Greek courts did not follow the same reasoning but in most cases, they accepted that 'wilful misconduct' was equivalent to 'gross negligence'.[43]

Since 1990,[44] the Supreme Court started to examine the term from another perspective and stated that wilful misconduct means intent and that in order to obtain a full recovery, it is not enough for the claimant to prove that the damage resulted from gross negligence of the carrier.[45]

Another decision of the Supreme Court no. 281/1994[46] concluded that even the most extreme conduct of gross negligence cannot be compared with a fault 'equivalent' to wilful misconduct.

What was held in both decisions was totally different from the previous approach and the matter was finally resolved 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 has expanded by accepting there is some conduct that falls between the definition of intent and 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 main categories of fault: intent and negligence. As to 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 perpetrator 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 logical consequence of his action or omission. On the other hand, 'eventual intent' is present when the perpetrator of the act neither premeditates nor seeks the unlawful outcome but expects that it may occur, as the sole possible consequence of his actions, and proceeds while being aware of this eventuality. This means that he approves of the outcome as the eventual result of his actions.

Negligence under Greek law can be classified either as gross or 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 the 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 either great indifference or recklessness, he cannot be aware of the harmful consequences of his behaviour. In such 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 actor who knows that his act increases the risk of damage (knowledge and indifference).[47]

Consequently, the Greek courts have created a new *formula* for default which, as was mentioned, is something between intent and gross negligence.

37. Otmar J. Tuma, 'The degree of default under article 29 CMR', *Uniform Law Review* (2006), 585-607.
38. Supreme Court 205/2007, NOMOS.
39. Eleni Gkologkina-Oikonomou, *Η ευθύνη στη συνδυασμένη μεταφορά εμπορευμάτων* (Sakkoulas, 2nd edn, 2010), 264 et seq. [in Greek].
40. Supreme Court (Plenary Session) 18/1998; Supreme Court 1628/2001; Supreme Court 270/2002; Supreme Court 1885/2005; Supreme Court 1319/2011, NOMOS.
41. Apostolos Karagkounidis, 'Η έννοια του όρου "ηθελημένη κακή διαχείριση" (wilful misconduct) στο δίκαιο της CMR', *EpiskED B* (1998), 397-401 [in Greek].
42. Supreme Court (Plenary Session) 18/1998, *EpiskED B* (1998), 392 et seq. [in Greek].
43. Court of Appeal of Piraeus 948/1985, *EpiskED* (1986), 63 et seq.; Court of Appeal of Athens 779/1986, *EpiskED* (1987), 236 et seq.; Court of Appeal of Athens 7086/1990, *EpiskED* (1990), 618 et seq. [in Greek].
44. Supreme Court 2010/1990, *EpiskED* (1992), 49 et seq. [in Greek].
45. Nikos Papachronopoulos, 'Η απεριόριστη ευθύνη του διεθνούς οδικού μεταφορέα εμπορευμάτων (Παρατηρήσεις στην απόφαση ΑΠ2010/1990)', *EllDni* (1991), 121 et seq. [in Greek].
46. Supreme Court 281/1994, *NoB* (1995), 59 et seq. [in Greek].
47. Court of Appeal of Piraeus 268/2001, *EpiskED* (2002), 557 et seq. [in Greek].

All courts, after the judgement of 1998, follow the same reasoning resulting in a broader concept of wilful misconduct.

A cargo-owner, as claimant and beneficiary of compensation, has two options:[48]

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

b. to file a counterclaim which means to reply to the carrier's objection related to the one-year time bar under Article 32(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 (normally the essential element for limitation of liability). However, what he needs to invoke and prove is the specific situation, the specific circumstances which resulted in the carrier's 'wilful misconduct'. Accordingly, it is not enough to produce facts that prove his unlawful behaviour.[49] The subjective element of knowledge must be satisfied in order to establish 'wilful misconduct' and this can only be proved by other criteria, such as the track record of the carrier in international transport.

The carrier, on the other hand, may argue in his defence that he took all necessary measures to protect the cargo such as the fact that there was a second person or driver in the truck, the driver parked in a parking area with an alarm or anti-theft system, locks and security officer, and so forth.

More specifically and according to Greek jurisprudence the following behaviour was considered 'wilful misconduct':

1) **Theft in a war zone.** In this case, the court held that the carrier should have chosen a different route in order to transfer goods safely 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 through this area instead of choosing a safer route via Romania, Bulgaria or Italy.[50]

2) **Transfer of grass as a sensitive product.** In this case, the Supreme Court held that the carrier should have complied with the agreed terms during the loading and unloading procedure, as well as being very careful in respect of the dates and the temperature in the refrigerated truck. These elements were of particular importance because grass is a sensitive product, a living organism, with a maximum life of eight days under 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.[51]

3) **Theft during the night.** This case clarifies the necessary measures that have to be taken by a 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 leaving the truck unattended. In addition, he didn't ensure 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 overnight. Thus, a case of theft was predictable and he could have avoided it.[52]

4) **Delayed delivery of cargo.** In this case, the carrier undertook to deliver clothes from France to Greece within eight days of receipt. The cargo was intended to be sold before Christmas. Unfortunately, the carrier failed to deliver the cargo on time even though he knew that the clothes would be sold in the 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 the Greek Civil Code).[53]

5) **Illegal immigration and seizure of the truck.** The carrier in this case undertook to deliver 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 have prevented the illegal immigrants entering into the truck. As he could not prove that the truck was well secured with an alarm system, he was held fully liable for the non-delivery and damage to the cargo.[54]

6) **Theft in Italy.** The driver as well as the truck owner were held fully liable, each one for a different reason. The cargo had to be transferred from Greece to the Netherlands via Italy, a country where danger of theft is not rare. The court in this case held that theft in Italy is not 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 (a second driver) for the specific route.[55]

To conclude, the degree of default which can be considered as equal to wilful misconduct depends on *lex fori*. Greek law does not recognise this kind of default and consequently Greek courts have 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.

Uniformity of law may be achieved by satisfying two requirements: 'the provisions must be properly enacted by the states parties of the Convention' and 'they must be interpreted in

48. Supreme Court 157/2008, NOMOS.
49. Supreme Court 1729/2014, *EpiskED* (2014), 767 et seq. [in Greek].
50. Court of Appeal of Thessaloniki 171/2005, NOMOS.
51. Supreme Court 157/2008, NOMOS.
52. Supreme Court 1715/2007, NOMOS.
53. Court of Appeal of Thessaloniki 3000/2003, *EpiskED* (2004), 100 et seq. [in Greek].
54. Court of Appeal of Larissa 157/2009, *EpiskED* (2010), 506 et seq. [in Greek].
55. Court of Appeal of Thessaloniki 1100/2003, *EpiskED* (2003), 1172 et seq. [in Greek].

a uniform manner by the courts of each state'.[56] The interpretation given to Article 29 CMR by each jurisprudence cannot ensure uniform liability[57] resulting to a 'comedy of errors';[58] therefore, the objective and purpose of the CMR and in particular, the uniform regulation of liability remains the biggest 'enemy' to the success of the 60 year-old CMR Convention.

ITALY

The Interpretation and Enforcement of Article 29 CMR in the Italian Law

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Similar to other international conventions concerning the carriage of goods, the CMR provides for a system of limitation of liability for the carrier and for the exclusion of this benefit where the damage was caused by a particularly intense degree of default by the carrier or his agents, servants or 'any other persons of whose services he makes use for the performance of the carriage': in this case it is 'the 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'.
The Italian case law on the matter is not uniform. Some courts interpreted it as the default with the consciousness of wrongdoing, but not the specific intent to cause the damage, whereas others as gross negligence. The main leading cases will be examined to assess whether the Italian case law conforms with the necessary interpretation of the Convention's provisions also according to its international character.

1. Setting the Scene: the Different Degrees of Default Under Article 29 CMR According to the English and French Versions

Despite being an international uniform convention, thus meant to provide legal certainty and foreseeability on the subject-matter it covers,[59] one of the complaints about the CMR is the wording of its Article 29.[60] As is well known, the article concerns the cases where the carrier cannot avail himself of the benefit of being relieved of or limit his liability where 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' or those of his agents, servants or 'any other persons of whose services he makes use for the performance of the carriage', 'acting within the scope of their employment'. The French version of the article refers to the carrier's '*dol ou (…) une faute qui lui est imputable et qui, d'après la loi de la juridiction saisie, est considérée comme équivalente au dol*'. The drafters' intent was indeed to find wording in both the official languages that could refer to similar concepts: this was probably the reason for the reference to the default equivalent to wilful misconduct, which however should include both the concepts expressed in Article 29.1.[61]
The absence of absolute identity of meaning between the legal terms of the different legal systems and the reference to the domestic law for the enforcement of Article 29 CMR have brought about a contrasting case law among the domestic Courts,[62] similar to what had happened with the 1929 Warsaw Convention for the unification of certain rules relating to international carriage by air.

2. The Interpretation Provided by Italian Courts

The prevailing Italian case law based its interpretation of Article 29 CMR[63] on the French version, whose legal system – especially the *Code Napoléon* – inspired the Italian Civil Code.[64] Moreover it has interpreted Article 29.1 CMR as referring to the substantive law of the forum, instead of its private international law.[65]
It is necessary to point out that there is little Italian case law on Article 29 CMR, probably because of the Italian courts'

56. Francesco Berlingieri, 'Uniform interpretation of international conventions', *Lloyd's Maritime and Commercial Law Quarterly* (2004), 153-157.
57. Konstantinos Pampoukis, 'Το κατ' άρθρο 29 CMR πταίσμα του μεταφορέα και των προστηθέντων του', *EpiskED* (2009), 616 et seq. [in Greek].
58. Krijn Haak, 'Revision der CMR?', *TranspR* (2006), 325-336.
59. Which were the main reason for concluding the Convention (cf. O.J. Tuma, 'The Degree of Default under Article 29 CMR', *Un. Law Rev./Rev. Dr. Unif.* (2006), 586).
60. Cf. Tuma, 585. Art. 29 CMR has been described as '*la seule erreur sérieuse*' (R. Loewe, 'La CMR a 40 ans', *Unif. L. Rev./Rev. dr. unif.* (1996), 439), '*ein Armutszeugnis*' [J. Basedow, 'Übereinkommen über den Beförderungsvertrag im Internationalen Straßengüterverkehr – CMR', in J. Basedow (ed.), *Münchener Kommentar HGB*, Band 7, *'Transportrecht'*, (Munchen: Verlag C.H. Beck, 1997), 1177], '*die schwächste Stelle im CMR-Gebäude*' (K.F. Haak, 'Haftungsbegrenzungen und ihre Durchbrechung nach der CMR in den Niederlanden', *TransportRecht* 3 (2004), 104), '*a testimonium paupertatis*' (F. Smeele, 'Dutch case law on Art. 29 CMR', *ETL* 3 (2000), 329).
61. As expressed by Sir Alfred Dennis at the II International Conference on Private Air Law. Cf. also S. Busti, *Contratto di trasporto terrestre* (Milan: Giuffrè, 2007), 1045 ff.
62. On the notion of 'wilful misconduct', cf. D. Damar, *Wilful misconduct in international transport law* (Berlin, Heidelberg: Springer, 2011).
63. The Convention was enforced in Italy with the Act 6 December 1960, no. 1621.
64. Cf., among the others, P. Berlingieri, 'Article 29.1 CMR from an Italian perspective', *Nederlands Tijdschrift voor Handelsrecht* (*NTHR*) 1 (2007), 16.
65. On this issue, cf. R. van Rooij, 'Private International Law Aspects of Road Transport', *Product Liability. Road Transport. Foreign Law. Hague-Zagreb Colloquium on the Law of International Trade – Hague Session 1976* (Alphen aan den Rijn: Sijthoff, 1978), 79.

prevailing approach towards the Convention's scope: according to an 'peculiar' interpretation of its provisions, the CMR is considered to govern a contract of international carriage by road only where the parties expressly provide for it in the contract itself.[66]

Focusing on the subject-matter of this contribution, for the sake of clarity, it seems also useful to remember that, in civil law countries, default mainly has three degrees: *colpa lievissima* or *culpa levissima* in Latin (slight negligence), *colpa lieve* or *culpa levis* (ordinary/simple negligence) and *colpa grave* or *culpa lata* (gross negligence). The Italian legal system also knows *colpa cosciente* and *dolo eventuale*, which are however better suited to criminal law: with regard to the former the action is undertaken with knowledge that damage could probably occur in general, but the actor excludes this risk in his own specific case, whereas, for the latter, the actor knows that the damage will probably be a consequence of his behaviour, but accepts this risk.

With regard to the interpretation of the *dolus* required by Article 29 CMR, the majority of case law and scholars refer to so-called *dolo contrattuale generico*, i.e. it is not considered necessary to fit the CMR's requirement of the specific intent to cause the damage (so-called *dolo specifico di danno*), but only the consciousness of the risk and willingness to breach the contract of carriage.[67]

According to the prevailing case law of Italian courts (both the Supreme Court and the courts of merit) and the majority of scholars, the default equivalent to *dolo* under the domestic regime – and as a consequence also for the purposes of Article 29 CMR – is gross negligence (*colpa grave*). The reasoning is based on the general provision of Article 1229,(1), of the Civil Code itself, according to which it is not possible to exclude or limit one's own contractual liability in case of wilful misconduct (*rectius*, *dolo*) or gross negligence.[68] However it is discussed among Italian courts and scholars whether a general principle of equalisation between *dolo* and gross negligence (*culpa lata dolo æquiparatur*) does exist in Italian law, as a result of the European continental legal tradition, in the absence of a more general express provision.[69]

The equivalence between *dolus* and *culpa lata* is interpreted by the majority as a general principle, thus also enforceable in the cases where it is not explicitly provided for. On the contrary, one of the reasons for the opposite view consists in the fact that Article 1229 of the Civil Code specifically

66. *Cass.*, 28 November 1975, no. 3983, *Foro Italiano* (*Foro It.*) (1976) I: 2859; *Cass.*, 1 March 1978, no. 1034, *Foro It.* (1978) I: 839; *Cass.*, 19 December 1978, no. 6102; *Cass.*, 26 November 1980, no. 6272, *Il Diritto Marittimo* (*Dir. Mar.*) (1981), 366; *Cass.*, 19 June 1981, no. 4029; *Cass.*, 29 October 1981, no. 5708; *Cass.*, 10 June 1982, no. 3537, *Rivista Giuridica della Circolazione e dei Trasporti* (*Riv. Giur. Circ. Trasp.*) (1982), 1091; *Cass.*, 8 March 1983, no. 1708, *Dir. Mar.* (1984), 554; *Cass.*, 10 April 1986, no. 2515, *Riv. Giur. Circ. Trasp.* (1986), 783, *Diritto del Commercio Internazionale* (1987), 613, with comment by G. Silingardi, 'La C.M.R.: da normativa uniforme di applicazione necessaria a disciplina pattizia'; *Cass.*, 24 May 1991, no. 5869, *Archivio Giuridico della Circolazione e dei Sinistri Stradali* (*Arch. Giur. Circ. Sin.*) (1991), 751; *Cass.*, 6 July 1991, no. 7472; *Cass.*, 23 February 1998, no. 1937, *Dir. Mar.* (2000), 132, with comment by L. Boggio, 'La C.M.R. in Cassazione: *errare humanum est* …', no. 87 *Trasporti* (2002), 191, with comment by F. Gei, 'Sui limiti di applicabilità della Convenzione di Ginevra sul trasporto internazionale di merci su strada'; *Cass.*, 7 August 2001, no. 10891, *Dir. Mar.* (2003), 806; *Cass.*, 2 October 2003, no. 14680, *Dir. Mar.* (2005), 864; *Cass.*, 27 May 2005, no. 11282; *Cass.*, 7 February 2006, no. 2529; App. Milan, 26 May 1981, *Dir. Mar.* (1982), 427; App. Trieste, 5 November 2001, *Dir. Mar.* (2002), 977, with comment by L. Boggio, 'Il trasporto di merci su strada tra CMR e Convenzione di Roma (sulla legge applicabile alle obbligazioni contrattuali)'; F. Motta, 'Sull'applicabilità della normativa di cui alla Convenzione di Ginevra del 19 maggio 1956, resa esecutiva in Italia con legge 6 dicembre 1960 n. 1621, modificata con legge 27 aprile 1982 n. 242', *Arch. Giur. Circ. Sin.* (2003), 767. *Contra*: App. Florence, 2 February 1981, *Dir. 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67. S. Zunarelli & C. Alvisi, *Del trasporto: art. 1678-1702* (Bologna: Zanichelli, 2014), 581 f.

68. *Cass.*, 16 September 1980, no. 5269, *Dir. Mar.* (1981), 217, with dissenting comment by G. Visintini, 'Osservazioni critiche sulla supposta esistenza di un principio di equiparazione della colpa grave al dolo'; *Cass.*, 29 March 1985, no. 2204, *Dir. Mar.* (1985), 402; *Cass.*, 16 May 2006, No 11362, *Arch. Giur. Circ. Sin.* (2007), 698; *Cass.*, 7 October 2008, no. 24765, *Contratti*, no. 5 (2009), 475, with comment by E. Betto, 'Trasporto internazionale di merci su strada e limiti risarcitori'; App. Milan, 20 April 2005, *Dir. Mar.* (2006), 518. In the sense of the existence of this principle in Italian law and its enforcement at least with regard to the international carriage covered by CMR, cf. Silingardi, Corrado, Meotti & Morandi, *La disciplina uniforme* 1994 (n. 66), 228. Cf. also F. Pellegrino, *Studio sulla limitazione del debito del vettore terrestre di merci* (Messina: CUST, 1994), 136 ff.: the author specifies that CMR refers to *dolus* or *culpa* considered as equivalent to the former, without simply referring to *colpa grave*.

69. The equivalence of gross negligence to *dolo* is expressed, for example, in Arts 1698, 1713.2, 1892, 1900.1, 2236 of the Civil Code and in Arts 275, 943, 952 and 971 of the Navigation Code. In the sense of affirming this general principle: e.g., *Cass.* no. 5269/1980; *Cass.* no. 2204/1985; *Corte Cost*., 22 November 1991, no. 420.

refers to contract terms ruling out or limiting the debtor's liability and therefore not only is its enforcement with regard to other kinds of contract terms discussed, but moreover the enforcement of this principle outside the scope of express provisions is ruled out by the dissenting case law and scholars' school of thought.[70]

Whereas under common law 'serious and wilful misconduct is much more than mere negligence. It involves something of a criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless regard of its probable consequences',[71] the Italian courts have interpreted the default equivalent to wilful misconduct (*rectius*, to *dolus*) as extraordinary and inexcusable imprudence and negligence, such as the omission of the minimum amount of diligence everyone observes, which is less than due diligence i.e. the diligence of the reasonably prudent man,[72] to be ascertained according to objective criteria.

Wilful misconduct is considered more like another type of negligence identified by Italian courts and scholars, but not applied by the majority in interpreting Article 29 CMR: the *colpa con previsione*[73] or the *colpa temeraria e consapevole*, which is the recklessness with knowledge that damage would probably result under The Hague Visby Rules and other uniform conventions concerning international carriage, and is considered more severe than gross negligence.[74]

3. The Italian Domestic Regime

The Italian regime for the carriage of goods by road is provided by Articles 1678 and 1683 ff. of the Civil Code. As for the carrier's limit of liability, Article 1696, second para. of the Civil Code, supplemented by Article 10 of Act no. 286 of 21 November 2005, states that for domestic haulage, compensation cannot exceed EUR 1 per kilo of gross weight of the goods lost or damaged, whereas for international carriage by road reference is made to CMR.[75] Previously the limitation of liability was governed by Act no. 450 of 22 August 1985, as subsequently modified, which however did not set any possibility to break the limitation and was therefore considered iniquitous for the consignor or the consignee, as explicitly confirmed by the Constitutional Court with its decision no. 420 of 22 November 1991.[76]

After the 2005 reform, the Civil Code mainly reproduces the wording of Article 29 CMR, providing that the carrier loses the benefit of liability if the plaintiff gives evidence that the damage was caused by his *dolo* or *colpa grave* (gross negligence) or that of his agents, servants or any other persons he availed himself for the performance of the carriage and acting within the scope of their employment.[77] The limits can be derogated only to the advantage of the consignor or the consignee.

Therefore the prevailing case law on Article 29 CMR was codified to provide the regime for domestic carriage. However an important difference with the international regime is that whereas the CMR – following its Article 28.1 – applies notwithstanding the basis of liability, the domestic regime governs only claims based on contractual liability.[78]

4. Case Studies. In Particular, Theft and Robbery

In order to offer a more detailed analysis, it would be useful to examine some relevant case law on *dolus* or *culpa lata*.

An example is the delivery of the goods to the wrong person, without ascertaining their identity, role and position and without any express authorization by the recipient.[79] Another is the non-delivery of goods without being able to ascertain any reason for it.[80]

Other cases concern theft or robbery: according to the prevailing Italian case law, they do not amount to events excluding the carrier's liability *per se* under Article 17.2 CMR or Article 1693 of the Civil Code: on the contrary, theft is usually

70. E.g., *Cass.*, 14 March 2006, no. 5449, commented by P. Berlingieri; *Cass.* no. 11362/2006; Visintini, 'Osservazioni critiche' 1985 (n. 68), 217 ff.
71. *Burns's Case*, 218 Mass. 158, N. E. 601, Ann. Cas 1916A 787, Sheldon, J. Cf. also F. Berlingieri, *Le convenzioni internazionali di diritto marittimo e il codice della navigazione* (Milan: Giuffrè, 2009), 938.
72. E.g.: *Cass.* no. 5269/1980; *Cass.* no. 11362/2006; M. Riguzzi, *Lezioni di diritto dei trasporti* (Turin: Giappichelli, 2002), 95.
73. This interpretation was expressly rejected, for example, by the *Cass.* no. 5269/1980.
74. See *National Semiconductors (UK) Ltd v. UPS Ltd and Inter City Trucks* [1996] 2 Lloyd's Rep. 212, 214; Silingardi, Corrado, Meotti & Morandi, *La disciplina uniforme* 1994 (n. 66), 227 f.; S. Busti, *Contratto di trasporto terrestre* (Milan: Giuffrè, 2007), 1048. On the difference between wilful misconduct and *colpa grave* in Italian Law, cf. also, among the others, G. Boi, '"*Recklessness*" e previsione del danno nell'art. 2(e) del Protocollo del 1968 alla Convenzione di Bruxelles sulla polizza di carico', *Dir. Mar.* (1978), 155; P. Ivaldi, '*Wilful misconduct* e colpa grave tra diritto internazionale e diritto interno', *Rivista di Diritto Internazionale Privato e Processuale* (1986), 327; S. Zunarelli, 'La decadenza del vettore dal beneficio della limitazione della responsabilità', in *Il limite risarcitorio nell'ordinamento dei trasporti*, (Milan: Giuffrè, 1994), 133; A. Romagnoli, 'In tema di colpa grave del vettore per furto di merci trasportate su strada', *Dir. Trasp.* (1998), 976; M. Padovan, 'La decadenza del vettore dal beneficio del limite risarcitorio in caso di accertata colpa dei suoi preposti', *Dir. trasp.* (2009), 492.
75. '*Il danno derivante da perdita o da avaria si calcola secondo il prezzo corrente delle cose trasportate nel luogo e nel tempo della riconsegna.Il risarcimento dovuto dal vettore non può essere superiore a un euro per ogni chilogrammo di peso lordo della merce perduta o avariata nei trasporti nazionali ed all'importo di cui all'articolo 23, comma 3, della Convenzione per il trasporto stradale di merci, ratificata con legge 6 dicembre 1960, n. 1621, e successive modificazioni, nei trasporti internazionali*' (paras 1 and 2).
76. G. Silingardi, 'L'istituto del limite risarcitorio: controllo di costituzionalità ed autonomia delle parti', *Dir. Trasp.* (1992), 345. Cf. also, A. Dani, 'Norme relative al risarcimento dovuto dal vettore stradale per perdita o avaria delle cose trasportate', *Le Nuove Leggi Civili Commentate* (1986), 336; C. Pillinini, 'Criteri di aggiornamento dei limiti di responsabilità in materia di autotrasporto', *Il limite risarcitorio nell'ordinamento dei trasporti. Profili sistematici e problematiche attuali* (Milan: Giuffrè, 1994), 310 ff.
77. '*Il vettore non può avvalersi della limitazione della responsabilità prevista a suo favore dal presente articolo ove sia fornita la prova che la perdita o l'avaria della merce sono stati determinati da dolo o colpa grave del vettore o dei suoi dipendenti e preposti, ovvero di ogni altro soggetto di cui egli si sia avvalso per l'esecuzione del trasporto, quando tali soggetti abbiano agito nell'esercizio delle loro funzioni*' (4th para.).
78. *Cass.* no. 5269/1980; *Cass.* no. 2204/1985; *Cass.*, 19 November 2001, no. 14456, *Contratti* (2002), 804, with comment by S. Vernizzi, 'Colpa grave del vettore e limite risarcitorio', *Contratti* (2002), 804.
79. *Cass.* no. 24765/2008.
80. *Trib.* Rome 11 May 2016, *Dir. Mar.* (2016), 322, with comment by F. Berlingieri, 'L'incapacità del vettore di individuare il tempo e il luogo in cui si è verificata la sottrazione di parte delle merci trasportate costituisce colpa grave?'; App. Milan, 20 January 2009, *Dir. Mar.* (2011), 943, with comment by N. Medica, 'Autotrasporto di merce su strada: il furto, la colpa grave e "importanza di un'analisi approfondita della singola fattispecie concreta'. *Contra*: *Cass.*, 13 October 2009, no. 21679, *Dir. Mar.* (2011), 146, with comment by A. Frondoni, 'Notarella su colpa grave vettoriale e diligenza professionale'; *Cass.*, 15 April 2011, no. 8732, *Giustizia Civile* (2012) I: 209.

considered a case of gross negligence because it is one of the most common risks for the carrier who should therefore arrange a suitable organization of his personnel and means for successfully preventing or tackling it.[81] As for robbery, its qualification depends on the facts of any single case: the carrier must give evidence that the robbery was unpredictable and not preventable in order to be exempted from liability. However Italian case law is not consistent. For example, the theft of cargo from a truck both when it was parked in an unattended place during the night[82] and when it was parked in the daylight, with a non-satellite alarm system on, or in an enclosed parking lot was considered by some courts as a case of gross negligence.[83] Other courts, however, did not consider leaving a truck temporarily unattended near a restaurant in a parking lot without surveillance but not isolated amounted to gross negligence.[84]

5. Comparison with the Interpretation of Other Conventions on International Carriage as for Breakthrough of Limitation

With regard to the approaches chosen by more recent uniform conventions on international carriage, i.e. 'intent to cause damage, or recklessly and with knowledge that damage would probably result',[85] this approach was interpreted by Italian case law and scholars as requiring not simply (gross) negligence, because together with the gross disregard for the safety of persons or goods, the (at least potential) awareness of the risk that the damage would probably result is required.[86] Thus the concept is very similar to the abovementioned *colpa cosciente*.

The existence of both these elements must be ascertained case by case with objective methods, taking into consideration the behaviour of the carrier and his auxiliaries before the event and comparing this behaviour with the abstract model of a due diligent carrier in the same circumstances.[87]

6. The Interpretative Conflicts on CMR Carriers' States of Mind: No Way to a 'Uniform' Solution?

Following the previous considerations, even if the CMR itself refers to each domestic legal system, the intent of its drafters was indeed to provide a uniform regime. Therefore, a uniform interpretation of Article 29 CMR provided by the International Court of Justice according to Article 47 CMR or a modification of its provisions should be preferred in order to achieve – as much as possible – uniformity in the legal concepts at the basis of the carrier's liability regime, also following other international conventions.

However, one of the flaws concerning the interpretation by the Italian courts of international conventions providing autonomous regimes is the lack of uniformity, along with the particular approach of some case law that refers to legal concepts typical of the domestic system, whereas a uniform interpretation, based also on the analysis of the international case law and on co-ordination among the courts of the Contracting States should be implemented, conforming also to Article 31 of the 1969 Vienna Convention on the law of treaties.[88]

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81. Cf., for example, *Cass.*, 20 December 2013, no. 28612; *Trib.* Monza, 13 May 2003.
82. *Cass.* no. 5449/2006; App. Milan, 20 April 2005, *Dir. Mar.* (2006), 514; *Trib.* Bologna, 25 August 2015, *Dir. Mar.* (2015), 382, with comment by R. Martiriggiano, 'La responsabilità per colpa grave del vettore in caso di furto del carico: commento alla sentenza del Tribunale di Bologna del 25 agosto 2015'; *Trib.* Tortona, 8 May 2009, *Dir. Mar.* (2011), 1299; *Trib.* Verona, 21 September 2009, *Dir. Mar.* (2011), 570. With regard to a case governed by CMR, cf. *Trib.* Genoa, 21 August 2002, *Dir. Mar.* (2004), 511.
83. *Cass.*, 14 July 2003, no. 10980; App. Milan, 13 September 2006, *Dir. Mar.* (2007), 486. *Contra*: *Trib.* Ravenna, 24 December 2007, *Dir. Mar.* (2008), 448.
84. *Trib.* Milan, 14 June 2001, *Dir. Mar.* (2003), 188.
85. Cf. Art. 4.5 of The Hague-Visby Rules; Art. 4 LLMC 1976; Art. 25 Warsaw Convention as amended by the 1955 The Hague Protocol, etc.
86. E.g.: *Cass.* no. 15024/2005; *Cass.* no. 13082/2008; *Cass.* no. 7977/1991; Busti, 1041 ff.
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LITHUANIA

Article 29 of the CMR Convention

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Article 29 of the CMR Convention establishes unlimited civil liability of the carrier in cases when 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. It should be noted that in the case law of Lithuanian courts there have been relatively many cases when the courts acknowledged gross negligence on the part of the carrier and applied unlimited liability thereof.
Under the case law of Lithuanian courts the actions are considered as equivalent to wilful misconduct when the observance of minimum requirements of precaution would have prevented such misconduct, or omission – failure to perform all possible actions that could have possibly minimized or prevented the risk of damages. This applies to wilful, purposeful conduct committed by the driver of the carrier that causes danger to preservation of the cargo.
Recently Lithuanian courts started evaluating not only the objective but also the subjective criteria. Previously the evaluation of the courts was limited to the objective actions of the carrier.

Damages due to the confusion of goods

In one case an agreement on the carriage of goods from Denmark to Lithuania was concluded. A part of the cargo was not properly loaded and, therefore, it was transported to Russia without mandatory documents, where the cargo was detained and the investigation of an administrative offence was initiated.
The courts concluded that there were no grounds to consider the carrier's conduct involving the confusion of the client's cargo with the cargo of the other consignee as accidental, which could not be foreseen by the carrier. The courts established that the cargo was confused due to simple failure to separate the cargoes from each other, as well as due to infringement of the carrier's obligation to load such amount of cargo as indicated in the transportation documents and such carrier's conduct failed to comply with standard requirements of carefulness and good faith. The courts adjudged that carrier's confusion of the cargoes could not be considered as a freight forwarding mistake determined by an accidental factor but rather as a gross negligence equivalent to wilful misconduct of the carrier.[89]

Damages due to failure to properly complete a consignment note

The Supreme Court of Lithuania has interpreted that in cases when 'significant particulars that are entered in the consignment note contravene the ones that had been agreed upon by the parties that concluded the carriage agreement, and the carrier was aware of their inadequacy, or the inadequacy was obvious to him, and if the carrier signed such consignment note, such conduct of the carrier may be considered as wilful or gross negligence.'
The Supreme Court of Lithuania has noted that 'in case the carrier signs the consignment note bearing the particulars that contravene substantial particulars of the carriage agreement that he is aware of, by such wilful or negligent conduct he accepts the risk of the loss that could arise due to such inadequacy of the particulars; under such circumstances a compound liability for the loss of the sender and the carrier may be established.'[90]

Damages due to subcontracting of inadequate carrier

In one case the court concluded that the carrier subcontracting a third party for the carriage of the cargo was obliged to ensure a fluent takeover of the claimant's cargo and delivery to the consignee at the place designated for delivery, therefore a failure to properly implement this obligation through omission was considered as gross negligence that is equivalent to wilful misconduct, and such conclusion was well-grounded and complying to the case law of cassation court. The courts established that the circumstances under which a vehicle prior to loading of the cargo had been possibly illegally overtaken by a third party, had no influence on the evaluation of the carrier's actions, because he failed to act as a responsible person would be expected to act in an analogous situation, i.e. failed to timely inform the client of the obstacles impeding the loading of the cargo to the vehicle indicated in the agreement.[91] In this case the court established the gross negligence of the carrier.

Damages due to the traffic accident

According to the Lithuanian courts, the carrier's conduct according to the meaning of Article 29(1) of the CMR Convention may be regarded as gross negligence when the carrier's actions are irresponsible, or he deliberately fails to take necessary precautionary measures, however, without any intention to cause damage by such actions. The examples of such deliberate inappropriate actions may be running a red

89. Supreme Court of Lithuania, ruling of 10 March 2015 in civil case No. 3K-3-127-378/2015.
90. Supreme Court of Lithuania, ruling of 7 January 2016 in civil case No. 3K-3-58-915/2016.
91. Supreme Court of Lithuania, ruling of 9 May 2014 in civil case No. 3K-3-271/2014.

traffic light, drink driving, non-observance of driving and rest time periods, etc.

The Supreme Court of Lithuania has interpreted that 'wilful, purposeful conduct committed by the driver of the carrier that could cause a threat to the cargo may be considered as gross negligence, equivalent to deliberate act. The examples of such conduct may be material road traffic offences – non-compliance with restrictions, prohibitions, other express provisions, e.g., clearly established gross exceeding of the authorised speed, non-compliance with driving prohibitions indicated by interdictory signs, non-compliance with requirements to stop at the traffic lines and crossings, breach of vehicle operating prohibitions.'

The courts noted that there are no grounds to attribute the conduct bearing features of gross negligence, such as failure to choose a safe driving mode or speed, to such offences when such conduct is related to a particular evaluation of situation and adoption of decision in particular time, but has no obvious elements of gross offence. Due to the episodic nature and assessment character such conduct of the driver of the carrier should not be treated as gross negligence, equivalent to deliberate act according to Article 29 of the CMR Convention. Furthermore, the influence of the conduct of the carrier's driver on the occurrence of loss should be evaluated.

Exceeding of the authorised speed or any other violation of traffic law performed by the carrier's driver should not be entirely considered as a wilful act, equivalent to gross negligence, causing the loss of, or damage to the cargo. It has to be clear and gross, in order to reasonably determine the danger to the cargo (e.g. gross exceeding of the authorised speed, keeping maximum allowed speed during complicated driving conditions – mist, rain, or during the conditions that limit visibility, etc., fast driving with cargo on winding, mountainous roads, etc.).[92]

Damages due to the delay in delivery of the cargo

The courts established that the carrier discharged the cargo in a warehouse and delayed its carriage, provided false information regarding the loading of the cargo and leaving for the destination. The carrier delayed the carriage of the cargo for an excessively long time, exceeded the maximum deadline for delivery of the cargo twice; transported only a part of the cargo; did not pay the contracted carriers.

The courts concluded that the carrier did not employ maximum care and attention while discharging his contractual obligations in relation to the carriage of the goods to the destination in the terms that would be usually necessary for a dutiful carrier in order to perform the transportation, whereas such actions of the company as provision of false information to the client, warehousing of the cargo when it was not agreed under the contract of carriage, failure to pay for the carriage to other carriers, that conditioned the exceeding of delivery terms of the cargo, should be treated as purposeful, wilful acts, upon establishment thereof, the carrier should not be subject to the provisions of the CMR Convention which exclude or limit his civil liability.[93]

In this case the court established the wilful misconduct of the carrier and applied unlimited liability of the carrier due to the delayed delivery of the goods.

Damages in case of theft of goods

The Supreme Court of Lithuania has interpreted that when all or a part of the cargo is stolen during an international freight transportation, the theft may be regarded as an inevitable circumstance only in exceptional cases, i.e. when it is performed under exceptional circumstances (by force, using arms, assault or other means, that it would not be wise to oppose). Therefore, disregard of usual requirements of care and advertence that resulted in the illegal takeover of the transported cargo, in such cases would mean negligence on the part of the carrier which is considered equivalent to intent.

The Court determined that the shipper had chosen a tilt trailer for the carriage of the cargo instead of a solid-side (more secure) trailer and additionally had not insured the high-value cargo. The cargo was loaded fairly late at night essentially due to the actions of the shipper or freight forwarders themselves, because the place of loading was changed and the cargo was not prepared in time for loading. After taking the cargo the carrier came to the customs in the evening and was not able to get the documents prepared by the end of working hours of the customs, therefore he was not able to leave to Germany that night. The carrier parked for the night at a pay car park located near the customs beside a petrol station. During the transportation of the cargo in the Kingdom of the Netherlands there were no protected parking areas for freight vehicles. In this case the Court applied the limited liability of the carrier.[94]

In another case the Court established that the carrier was aware of the composition of the cargo (12 boxes of footwear). Such cargo is regarded as highly marketable and no special equipment is required for its theft. These circumstances determine an increased risk of theft attempt. During the transportation of the cargo there always exists a certain objective risk for the loss of the cargo, therefore, the defendant as an entrepreneur – a freight transportation professional who is permanently engaged in paid freight transportation services – must foresee and evaluate all the potential risks that might occur during the transportation of the cargo and take all possible measures in order to eliminate or decrease the risks of cargo loss. The Court determined that parking at the parking lot that had no security and no illumination during the transportation of high-value cargo that is attractive to thieves should be regarded as gross negligence on the part of the carrier. The Court applied unlimited liability of the carrier.[95]

Summary

Article 29 of the CMR Convention is generally interpreted and applied by the courts in Lithuania in favour of the shipper rather than in favour of the carrier. The courts in Lithuania established gross negligence of the carrier and ap-

92. Supreme Court of Lithuania, ruling of 16 April 2014 in civil case No. 3K-3-219/2014.
93. Supreme Court of Lithuania, ruling of 3 May 2013 in civil case No. 3K-3-265/2013.
94. Supreme Court of Lithuania, ruling of 12 November 2012 in civil case No. 3K-3-484/2012.
95. Supreme Court of Lithuania, ruling of 17 January 2012 in civil case No. 3K-3-9/2012.

plied unlimited liability in various cases when damage or loss of goods occurred. Therefore, for the time being Lithuania should be considered as a shipper-friendly jurisdiction.

THE NETHERLANDS

Dutch interpretation of Article 29 CMR

By Rutger van Dijk, advocaat at AKD

It is firmly established that, in court proceedings in the Netherlands, it is virtually impossible to break CMR limitations on the basis of the fault equivalent of wilful misconduct. This has important implications for cargo-interested parties and for CMR carriers alike.
In the Netherlands, the fault equivalent of wilful misconduct is governed by Article 1108 of Book 8 of the Dutch Civil Code ('DCC'). This demands an 'act or omission which is committed recklessly and with the knowledge that loss would probably result from it.'

Landmark decisions of Dutch Supreme Court

On 5 January 2001, the Dutch Supreme Court rendered two important judgments about the interpretation of Article 8:1108 DCC.[96] The Supreme Court established the following requirements to get to the fault equivalent of wilful misconduct. According to the Supreme Court, the claimant must prove that:

- the carrier or driver was aware of the risks of his behaviour;
- the carrier or driver was conscious that the possibility that these risks would materialise was significantly greater than the possibility that this would not happen; and
- the carrier or driver was nevertheless unconstrained by these considerations.

Since these decisions, it has become common knowledge that it is very difficult for claimants to break the CMR limitations in Dutch court proceedings, unless it can be proven that the carrier was involved in the theft or damage, which would be considered wilful misconduct on the part of the carrier.[97]

The Supreme Court has made it clear that, in order to determine whether a carrier has acted recklessly and with knowledge that loss would probably result, one should not apply an objective test ('the driver should have known…') but a subjective test ('the driver knew…'). So, breaking limitations in the Netherlands on the basis of the fault equivalent of wilful misconduct requires some psychological skill, as the claimant will have to prove what was going on inside the driver's head.

Furthermore, the Supreme Court emphasized that it is *not* sufficient for claimants to prove that the carrier knew that the probability that loss would occur was *considerable*. Rather, claimants who wish to break the limitations in Dutch Courts must instead prove that the carrier knew that the probability that the loss would occur was *considerably greater* than the probability that the loss would not occur. This is where mathematics also kicks in, as the claimant will have to prove that the driver was able to perform some kind of risk calculation.

Ultimately, the claimant has to prove that the driver was nevertheless unconstrained by these considerations. This interpretation may seem unnecessarily complicated, but it has been the prevailing opinion for more than 16 years now.

The key consideration is that, in the Netherlands, it is practically impossible to meet the burden of proof for the fault equivalent of wilful misconduct. Therefore, limitation of liability is almost unbreakable, unless evidence can be produced to show that the carrier or the driver was involved in the theft.

Maat/Traxys

In the *Maat/Traxys*[98] case of 2012, the Supreme Court reconfirmed this prevailing doctrine. Dutch road haulier Maat was instructed to carry 20 large bags of roasted molybdenum concentrates from Moerdijk in the Netherlands to Marchienne-au-Pont, Belgium. The agreed amount of freight was EUR 250, whereas the invoice value of the cargo amounted to USD 974,385.80. The bags weighed approximately 20,000 kilograms. In view of the high value of the goods, Maat was instructed not to leave the vehicle unguarded.

Maat subsequently subcontracted the transportation to another carrier – Van Houwelingen – whose driver picked up the trailer and parked it, together with the truck, in a parking area at an industrial zone in Alblasserdam, near Rotterdam.

This area, which was fenced, was close to Maat's premises. It was lit by street lamps and was locked, although 31 keys to the gate were in circulation. Unlike the nearby premises belonging to Maat, the parking site was not guarded by Alert Security, the company that patrolled part of the industrial zone. On the morning following the night on which the truck and trailer had been parked up, the driver discovered that both truck and trailer had been stolen. The entrance gate to the parking area had been damaged and all 20 bags of cargo were missing.

Lower court rulings

In Dutch court proceedings against Maat in 2008, cargo-interested parties claimed full compensation in respect of their loss. The court duly held that Maat was fully liable pursuant to Article 29 of CMR, due to a lack of safety measures, which

96. Hoge Raad 5 January 2001, *S&S* 2001/61, ECLI:NL:HR:2001:AA9308 (*Cigna/Overbeek*); Hoge Raad 5 January 2001, *S&S* 2001/62, ECLI:NL:HR:2001:AA9309 (*Van der Graaf Waalwijk/Philip Morris I*).
97. See also: Hoge Raad 22 February 2002, *S&S* 2002/94, ECLI:NL:HR:2002:AD7348 (*De Jong & Grauss/Assuradeuren*); Hoge Raad 11 October 2002, *S&S* 2003/61, ECLI:NL:HR:2002:AE2120 (*CTV/K Line*); Hoge Raad 14 July 2006, *S&S* 2007/30 ECLI:NL:HR:2006:AW3041 (*Philip Morris/Van der Graaf II*); Hoge Raad 10 August 2012, *S&S* 2012/120, ECLI:NL:HR:2012:BW6747 (*Maat/Traxys*).
98. Hoge Raad 10 August 2012, *S&S* 2012/120, ECLI:NL:HR:2012:BW6747 (*Maat/Traxys*).

the court qualified as default, considered equivalent to wilful misconduct. An important element in this decision was the fact that, one year earlier, the same vehicle had been stolen from the same parking area when it had been loaded with nickel briquettes.

In 2011 the Den Bosch Court of Appeal upheld this judgment. The Court referred to the Supreme Court judgments of 5 January 2001 and decided that all requirements of Article 8:1108 DCC were fulfilled. Important factors taken into consideration in arriving at this verdict included the following:

- Thefts from parking lots in harbour areas occur very frequently, especially in the Rotterdam area; therefore, carriers must be well-prepared.
- The carrier, Van Houwelingen, had previously experienced similar thefts.
- The driver was aware of the high value of the cargo.
- The trailer had a door lock and a steering wheel lock, but no immobiliser or alarm system.
- The truck and trailer were connected during parking.

Supreme Court ruling

The Supreme Court held that, while the circumstances cited by the Appeal Court gave an indication that there was a real likelihood of this vehicle being stolen, the possibility of theft was not significantly greater than the possibility that theft would not occur. According to the Supreme Court, the driver may have been aware of the risk of theft. He may even have acted improperly with regard to the safety instructions, and a safer option may have been available to him (for example to park the trailer in the nearby area).

However, the Supreme Court concluded that it did not follow from the circumstances in this case that the driver had the required consciousness that the risk of theft was significantly greater than the possibility that no theft would occur. Such consciousness was not proven. The Supreme Court therefore overturned the judgment of the Appeal Court and concluded that the CMR limitation could not be broken. Thus, Maat could rely on the limitation provisions of Article 23.3 of CMR (approximately USD 250,000 at the time).

Options

The *Traxys/Maat* ruling once again confirmed that it is almost impossible to break CMR limitations on the basis of the fault equivalent of wilful misconduct in Dutch court proceedings. It is clear that it is very hard for claimants to meet the burden of proof when they wish to rely upon Article 29 of CMR in Dutch court proceedings and when there is no evidence of wilful misconduct. And there are few, if any, options available to them.

Over recent years, several lower Dutch courts have held that it is insufficient for a carrier to argue only that a driver did not have the required consciousness about the risk of theft.[99] In those cases, the courts required the carriers to provide more information about the facts and circumstances of the damage, to mitigate the onerous burden of proof on the claimants.

Furthermore, Article 39 of CMR can be helpful for recourse actions between carriers. The carrier-friendly Dutch courts may be obliged to enforce a judgment from a cargo-friendly jurisdiction under Article 39.2 of CMR.[100] So, Chapter VI of CMR on successive carriage might make it possible to circumvent the Dutch interpretation of Article 29 of CMR. However, the Dutch interpretation of the fault equivalent of wilful misconduct within the meaning of Article 29 of CMR stays the same: very carrier-friendly.

Conclusion

Cargo-interested parties should avoid Dutch jurisdiction if they wish to break the limitation, or claim VAT, excises or duties from a CMR carrier, on the basis of the fault equivalent of wilful misconduct within the meaning of Article 29 of CMR.

For CMR carriers who might be pursued for liability in respect of a loss during carriage, it is an attractive proposition to be involved in proceedings before the Dutch courts instead of a court in a cargo-friendly jurisdiction.

It is quite easy for carriers to ensure that a Dutch court will decide liability. They could start declaratory proceedings before such a court, and have only to issue a writ of summons asking the Dutch Court to 'declare' that the carrier's liability is limited to the CMR limitation and that they do not have to compensate VAT, excises and duties, which are only due in the Netherlands if Article 29 of CMR applies. After obtaining a declaratory judgment, carriers can rely upon the judgment against cargo interests.[101]

POLAND

Country report on Article 29 CMR

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1. Introduction

Undoubtedly, one of the advantages for a carrier's liability standardization under the CMR is limitation of this liability to SDR 8.33/kg. However, according to Article 29 CMR, this limitation together with provisions shifting burden of proof to other party are not applicable if the damage to the cargo 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. Even though the CMR is considered as the uniform law which requires autonomous interpretation, the Convention itself fails to provide a uniform criterion for the breakthrough of mentioned limitation. Thus, the purpose of this

99. Leeuwarden Appeal Court 9 April 2003 & 21 January 2004, *S&S* 2004/99, ECLI:NL:GHLEE:2004:AR6484; Leeuwarden Appeal Court 25 April 2007, *S&S* 2008/99 ECLI:NL:GHLEE:2007:BA3991, confirmed by Hoge Raad 24 April 2009, *S&S* 2009/97 ECLI:NL:HR:2009:BH0389; The Hague Appeal Court 31 July 2008, *S&S* 2009/29, ECLI:NL:GHSGR:2008:BI0488.
100. Hoge Raad 11 September 2016, *S&S* 2016/1, ECLI:NL:HR:2015:2528 (*C&J Veldhuizen Holding/Beurskens Allround Cargo*).
101. European Court of Justice 19 December 2013, C-452/21, *S&S* 2014/24, ECLI:EU:C:2013:858 (*Nipponkoa Insurance/Inter-Zuid Transport*).

report is to provide an overview of the Polish case law on the application of Article 29 CMR. The judgments of the Polish Supreme Court and lower courts are taken into consideration. All judgments are selected from the Polish public judgment databases[102] and the legal information service *Legalis.pl* according to the key phrase: 'art. 29 CMR'.
The following section introduces the Polish equivalent of a wilful misconduct. Then in section 3, examples of gross negligence are presented. The final section concludes.

2. The Polish standard: gross negligence

The CMR Convention as a source of universally binding law is applied directly and takes precedence over the national statutes. However, should it refer to the national legislation, Polish courts first apply the domestic transport regulation – that is the Polish Transport Law Act.[103] Then, should the matter not be covered by the Polish Transport Law Act, the judge will take recourse to the Polish Civil Code (PCC).[104]
Article 86 of the Polish Transport Law Act states that limitations of a carrier's liability do not apply if the damage has resulted from wilful misconduct or gross negligence of a carrier.[105] This complies with the general regulation on carriage of goods included in Article 788(1) and (3) PCC which state that compensation for loss to, or depletion or damage of a consignment that happened between the moment of receiving the consignment to the moment of handing it over to the sender cannot be higher than the normal value of the consignment, unless it resulted from wilful misconduct or gross negligence of the carrier. The same applies to loss of or damage to money, valuables, securities or other particularly valuable items.[106] In consequence, it should be recognised that gross negligence should be treated equally to wilful misconduct in the light of Article 29 CMR.
This view was supported by the Supreme Court in the decision of 29 September 2004[107] where the Court held that the reference to national law in Article 29 CMR implies applicability of the Polish Transport Act and specifically its Article 86.[108] As mentioned, Article 86 of the Polish Transport Law Act states that limitations of compensation for the loss of goods do not apply if the damage resulted from the carrier's wilful misconduct or gross negligence. The Court held that due to the fact that national rules provide that limitations of liability do not apply both in case of wilful misconduct and gross negligence, it should be assumed that gross negligence is equal to wilful misconduct in the light of the CMR Convention. By wilful misconduct it is meant that the carrier intends to cause harm or accepts that his act or omission can cause harm. Gross negligence occurs when acts of the carrier can be attributed to the violation of elementary prudential rules.
The assessment rules regarding gross negligence were explained in the judgment of the Supreme Court of 11 May 2005.[109] The Court emphasised that the starting point for assessing the degree of negligence is Article 355(1) PCC which states that the debtor is obliged to the diligence generally required in relations of a given kind.[110] Should the judge establish violation of Article 355(1) PCC, he determines on a case-by-case basis the level of this violation.
In its judgment of 8 November 2012,[111] the Court of Appeal in Kraków further decided that the general obligation of due diligence is subject to modification by Article 355(2) PCC. In this situation, due diligence is determined taking into account the professional nature of the business activity.[112] Hence, a higher standard of diligence is required from a carrier. A carrier as a professional business entity is supposed to have the necessary expertise which includes both formal qualifications and life experience.

3. Examples of gross negligence in the case law

a) Re-routing of goods without consultation

In the judgment of the Court of Appeal in Białystok of 15 March 2006[113] the Court defined the re-routing of goods without consultation as the definecarrier's gross negligence. The carrier changed the route and order of deliveries without the consent of the sender or freight forwarder working with him although in the transport order the route was described in detail. That happened when the carrier became aware of a potential delay in delivery caused, as he alleged, by the improper preparation of the consignment by the sender. According to the carrier the sender did not provide proper documents allowing to cross the border and did not pay transport charges which forced the carrier to change the route. Nevertheless, the carrier did not contact his driver, despite the fact that this was explicitly specified in the transport order. As a result it was impossible to determine the location of cargo and estimate the expected delivery time.

102. Orzeczenia Sądów Powszechnych: http://orzeczenia.ms.gov.pl; Sąd Najwyższy: http://sn.pl/orzecznictwo/SitePages/Baza%20orzeczeń.aspx.
103. Ustawa Prawo Przewozowe z dnia 15.11.1984 (Dz.U.Nr 53, poz. 272) ze zmianami [in this submission referred to as the Polish Transport Law Act].
104. Ustawa Kodeks Cywilny z dnia 23 kwietnia 1964 r. (Dz.U. Nr 16, poz. 93) ze zmianami [in this submission referred to as the Polish Civil Code (PCC)].
105. Article 86 Polish Transport Law Act: Przewidziane w ustawie ograniczenia wysokości odszkodowania nie mają zastosowania, jeżeli szkoda wynikła z winy umyślnej lub rażącego niedbalstwa przewoźnika.
106. Art. 788 PCC: 1. Odszkodowanie za utratę, ubytek lub uszkodzenie przesyłki w czasie od jej przyjęcia do przewozu aż do wydania odbiorcy nie może przewyższać zwykłej wartości przesyłki, chyba że szkoda wynikła z winy umyślnej lub rażącego niedbalstwa przewoźnika. 2. Przewoźnik nie ponosi odpowiedzialności za ubytek nieprzekraczający granic ustalonych we właściwych przepisach, a w braku takich przepisów – granic zwyczajowo przyjętych (ubytek naturalny). 3. Za utratę, ubytek lub uszkodzenie pieniędzy, kosztowności, papierów wartościowych albo rzeczy szczególnie cennych przewoźnik ponosi odpowiedzialność jedynie wtedy, gdy właściwości przesyłki były podane przy zawarciu umowy, chyba że szkoda wynikła z winy umyślnej lub rażącego niedbalstwa przewoźnika.
107. Sąd Najwyższy - Izba Cywilna, 29 września 2004, II CK 24/04, Legalis no. 81602.
108. The same: Sąd Apelacyjny w Białymstoku, 15 March 2006, I ACa 48/06, Legalis no. 75254.
109. Sąd Najwyższy - Izba Cywilna, 11 May 2005, III CK 522/04, www.sn.pl/orzecznictwo/SitePages/Baza_orzeczen.aspx.
110. Art. 355(1) PCC: Dłużnik obowiązany jest do staranności ogólnie wymaganej w stosunkach danego rodzaju (należyta staranność).
111. Sąd Apelacyjny w Krakowie - I Wydział Cywilny, 8 November 2012, I ACa 963/12, www.orzeczenia.ms.gov.pl.
112. Art. 355(2) PCC: Należytą staranność dłużnika w zakresie prowadzonej przez niego działalności gospodarczej określa się przy uwzględnieniu zawodowego charakteru tej działalności.
113. Sąd Apelacyjny w Białymstoku, 15 March 2006, I ACa 48/06, Legalis no. 75254.

The sender submitted electronic documentation from his client working with the Renault company proving that the delay would have resulted in a stoppage of the Renault's production line. Due to the fact that the expected delivery time could not be estimated, the sender was obliged by his client to send the goods by air. According to the Court, when the carrier became aware of potential delays he could have easily contacted the sender in order to determine whether a change of route had any consequences for him.

b) Choosing unprotected parking places

In the abovementioned judgment of 8 November 2012,[114] the Court of Appeal in Kraków held the carrier grossly negligent for choosing an unprotected parking lot while carrying a consignment of TV screens.
The parties specified in the contract of carriage that stops during the carriage should take place only in guarded parking lots. The driver left the truck on a parking place next to a restaurant building where there was no monitoring. He did so despite the fact that there was a guarded parking lot within approximately 35 kilometers. In the proceedings it additionally turned out the carrier consciously disregarded agreed requirements regarding protected parking places and forbade his drivers from using such places.
The Court found that a higher standard of due diligence should be applicable to a professional carrier who had been offering his service for a long time. The carrier could have expected negative consequences from leaving a truck in a parking lot without a monitoring system and with no extra protection. In the opinion of the Court it is justified to expect a higher level of conscientiousness and ability to anticipate the consequences of his actions from a professional carrier, compared for example to non-professionals. The Court applied the abovementioned standard of due diligence of a professional carrier to the way the defendants performed their contractual obligations and concluded that the defendants not only behaved carelessly, but also did not fulfil their primary obligations connected with carrying the cargo. Consequently they were grossly negligent.

c) Wrong temperature

In the judgment of the Court of Appeal in Szczecin of 3 September 2015,[115] the Court decided that a carrier who performs a carriage not in accordance with an agreement, in this case who did not carry goods at the temperature indicated in the consignment note, is to be held grossly negligent. The consignment note showed clearly that during the journey the defendant was required to keep the temperature of fish products (cod roe) between -20 and -21 °C. During the proceedings it was admitted that the temperature did not comply with these requirements, being in the range -16 to -4.5 °C and that it was adjusted by the driver during transportation. The defendant relied on the fact that the temperature of the package was wrong at the moment the carrier received it from the sender. However, the Court found that in the absence of remarks included in the consignment note, there is a presumption that the product and its packaging were in good condition. In the absence of any other proof, the Court disagreed with the defendant. It was furthermore emphasised that the defendant, as a professional carrier, should comply with more stringent due diligence expected from him which is based among other things on the professional knowledge with regard to the goods carried and his overall professional experience.

4. Conclusion

As has been shown, gross negligence is considered in the Polish jurisdiction as equivalent to wilful misconduct. The starting point for assessing the degree of negligence is Article 355(1) PCC which states that the debtor is obliged to the diligence generally required in relations of a given kind. Should the judge establish violation of Article 355(1) PCC, he determines on a case-by-case basis the level of this violation. However, since a carrier is considered a professional business partner in relation with a sender, his due diligence is determined taking into account the professional nature of his business activity. Hence, a carrier as a professional business entity is supposed to have the necessary expertise which includes formal qualifications, knowledge necessary to transport particular types of goods transport and overall professional experience.

SWITZERLAND

Swiss Country Report
Article 29 CMR

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1. Introductory comments

The issues that appear most important in the context of Article 29 CMR and which will be outlined hereafter relate to the questions as to a) what defaults are equal to wilful misconduct and b) how is such action perceived under Swiss law. Swiss case law is very limited in both respects. With regard to item a) there exist, however, two cases that are worth shedding some light on and which may be viewed as the Swiss leading cases in the realm of Article 29 CMR.

2. Wilful misconduct and corresponding default

CMR liability exclusions and limitations, respectively, or CMR facilitations regarding the burden of proof do not apply according to Article 29 CMR in the event of the carrier's wilful misconduct or in case of such default on his part that is considered equivalent to wilful misconduct, to wit in accordance with the law of the court or tribunal seized of the case.
To date, the Swiss Federal Supreme Court has not had the opportunity to provide its view on what type of default is deemed equivalent to wilful misconduct. There exists, however, a decision of the Court of Appeal of the Canton of Basel-Stadt from 2000 that ruled on the question on the oc-

114. Sąd Apelacyjny w Krakowie - I Wydział Cywilny, 8 November 2012, I ACa 963/12, www.orzeczenia.ms.gov.pl.
115. Sąd Apelacyjny w Szczecinie, 3 September 2015, I ACa 453/15, www.orzeczenia.ms.gov.pl.

casion of a prescription period dispute related to Article 32 CMR.[116] The legal facts of the case were as follows.

'D. AG' was mandated by 'R. AG' to transport iron parts for a blast furnace from Contarina (IT) to Chiasso (CH) and from Chiasso (CH) further to Genua (IT). D. AG sub-contracted the transport to A.T.B which in turn instructed one Mario C. to perform the transport as the actual carrier.

Mario C. collected the iron parts for the second leg Chiasso (CH) to Genua (IT) on Thursday, 7 December 1989. As the next day was a holiday in Italy Mario C. decided to park the semitrailer with the goods aboard on an unattended parking lot at his domicile in Como (IT) for the weekend. He left the rear tarpaulin of the semitrailer open in order to demonstrate to possible thieves that the semitrailer did not load any goods of interest. From the facts of the case we may further infer that it was a new semitrailer that was left unattended.

In the night from 8 to 9 December 1989 the semitrailer was stolen together with the goods. X, R. AG's transport insurer, covered the damage in the amount of CHF 300,000 and instigated recourse proceedings before the court of first instance in the Canton of Basel-Stadt (CH). D. AG, the defendant, opposed the claim arguing that it had prescribed due to the one-year period of limitations as per Article 32(1) CMR. X argued, on the other hand, that Mario C. caused the theft through his grossly negligent behaviour which is why the three-year period as per Article 32 CMR applies. Article 32(1) CMR provides an extension of the statute of limitation in case of wilful misconduct or in case of such default as, in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to wilful misconduct.

Besides the prescription period issue, the courts of first and second instance had especially to deal with the question as to whether or not the CMR applies to the parties' dispute at all. For the purpose of this contribution, we will focus, however, on the legal argument regarding the meaning of gross negligence under the CMR and its effect on the limitation period.

Based on the facts of the case, the court of first instance concluded that the theft has to be attributed to Mario C.'s grossly negligent behaviour, however, his conduct may not be deemed as wilful misconduct or *dolus eventualis*. The court of first instance concluded further that under Swiss law only intent and *dolus eventualis* are equal to wilful misconduct, not gross negligence. Unfortunately, the decision of the Court of Appeal does not give any details as to the reasoning of the court of first instance. Be that as it may, the view of that court was overruled by the Court of Appeal holding the following.

In a first step and after some analysis of foreign case law the Court of Appeal found that the decision as to what behaviour is equal to wilful misconduct by virtue of Articles 29 or 32 CMR has to be decided in accordance with the *lex fori*, hence Swiss law in the present case.

The Court of Appeal referred then to the rules concerning the limitation of liability in accordance with Articles 100 and 101(3) CO. Both provisions provide that the exclusion or limitation of liability must not include acts of wilful misconduct or gross negligence. Then the Court of Appeal resorted to the limits on actions for damages or delay of transport by virtue of Article 454 CO. Article 454(1) and (3) CO provide that actions for damages against the carrier prescribe after one year in case of damage, destruction, loss or delay of the goods, subject to cases of malice or gross negligence in which case the limitation period is ten years.

The equal treatment of wilful misconduct and gross negligence as outlined was enough for the Court of Appeal to conclude that under Swiss law they are equivalent. Hence, the Court found that, in view of Mario C.'s grossly negligent behaviour, the longer limitation period of three years applies as per Article 32(1) CMR.

About ten years later, the Commercial Court of the Canton of Aargau had to render a decision with respect to the equality between wilful misconduct and gross negligence, too, this time not with respect to Article 32 CMR but rather Article 29 CMR.[117] The facts of the case were as follows.

The claimant was a company domiciled in England that ordered cosmetics and perfume from a Swiss vendor. The claimant commissioned a Dutch forwarding company that mandated a Dutch carrier, the defendant in the case, to perform the transport. The final actual carrier was a sub-sub carrier, also from the Netherlands. On 28 September 2010 the actual carrier collected the goods in Möhlin (CH) with a tarpaulin-covered truck. During the night from 28 to 29 September the driver parked the truck in an unattended and unsecured parking lot in France where parts of the goods were stolen while the driver was sleeping in the cabin. The truck had an alarm system installed that was, however, out of order and the driver did not know how to operate it, anyway.

The Dutch forwarder assigned his claim for damages against the first carrier to the English buyer who instigated proceedings against the actual carrier in Switzerland.

When the Commercial Court of the Canton of Aargau had to rule on the question of whether gross negligence under Swiss law breaks the liability limits as per Article 29 CMR, it resorted to the abovementioned decision of the of the Court of Appeal in the Canton of Basel-Stadt and confirmed its ruling based of the same reasons. The Court also concluded that actual carrier acted through gross negligence.[118]

At present we are not aware of solid arguments that would contradict the views as provided in the cited rulings. Hence, from a Swiss law perspective, it can be concluded that gross negligence corresponds to wilful misconduct and both break the liability limits as provided in Article 29 CMR.

The next question to be answered is, of course, what the standard of negligence and particularly of gross negligence is.

3. The notion of (gross) negligence under Swiss law

In order to become liable because of fault, the injuring party must act through negligence.[119] From a Swiss law point of view, one acts negligently if one fails to observe due diligence. The law provides some general directions in that respect under Article 321e (2) CO. According to that norm, the extent of duty of care owed is generally determined by the in-

116. Decision of the Court of Appeal of the Canton of Basel-Stadt, Basler Juristische Mitteilungen (2000) 311 et seq.
117. Decision of the Commercial Court of the Canton Aargau dated 7 June 2011, reported at HOR.2010.47.
118. Please see below at the end of section 3.
119. Peter Gauch, Walter R. Schluep, Jörg Schmid & Susan Emmenegger, op.cit., note 2963.

dividual contract, taking due account of the risk of the contractual obligation, the level of training and technical knowledge as required for the work as well as the aptitudes and skills of the performing party of which the other party was or should have been aware. The provision is understood by the doctrine and case law as reference to a person being able to observe the duty and care of a reasonable person under the specific circumstances. From that follows that under Swiss law an objective test is applied as to whether or not somebody acted through negligence.[120] Having regard to this, negligence is assumed if a party disregards such diligence that any reasonable person (i.e. the average responsible citizen or, in professional matters, a person with the skill of an average member of his profession) under the same circumstances would have exercised,[121] be it with respect to active behaviour or be it regarding actions that any such reasonable person would have omitted.

Despite such an objective standard, it is widely accepted in the doctrine that a debtor having skills and knowledge above average may be held liable if such additional capacity is not observed. In this respect, the objective standard becomes a minimum standard.[122]

In terms of negligence, Swiss law differentiates between three levels of negligence, i.e. simple negligence, mid-level negligence and gross negligence. The law does not provide specific guidelines as to how the different types of negligence should be defined and delimited. Doctrine and case law have, however, developed certain rules in that respect. We shall specificaaly deal with the term gross negligence.

Building up on the general definition of negligence, the Swiss Federal Supreme Court assumes gross negligence, if the most basic security measures that are evident or should be evident for any reasonable person under the prevailing circumstances were disregarded. As such, the behaviour in question must appear utterly unintelligible.[123]

In general, it can be said that the more dangerous the circumstances for certain goods are and the less security measures the person responsible takes to prevent any damage, the greater is the degree of negligence and the more likely it becomes that a court ascertains gross negligence.

One point worth mentioning is that a judgment with respect to gross negligence is the result of an overall appreciation of the facts of a case, i.e. gross negligent behaviour does not have to relate to a single act that is in itself an elementary violation of due care. It may also be that a number of different acts, each rather minor infringements of the care owed, however, taken together add up to behaviour that is perceived as gross negligence. In so far as different acts and behaviour of an injuring party are taken into consideration, only such behaviour may be assessed that actually had an influence on the damage.

The decision of the Commercial Court of the Canton of Aargau mentioned in the preceding section was actually a case where a sum of failures culminated in gross negligence. The Court held that the driver used a) a tarpaulin-covered truck, b) parked it on an unattended parking lot without any security measures and c) with a non-functional alarm system which the driver did not realise as he did not even know how to operate the system. In view of all that, the Court found that the stolen goods were the consequence of gross negligence.

4. Summary

Swiss law provides norms that prescribe the contractual restriction of liability in case of wilful misconduct and gross negligence (cf. Articles 100 and 101(3) CO). In addition, Swiss law sets forth a specific transport norm that extends the ordinary one-year limitation period in case of damage, destruction, loss or delay of goods to a ten-year limitation period if the carrier acted through malice or gross negligence (Article 454(1) and (3) CO). From these norms Swiss courts have inferred that gross negligence corresponds to wilful misconduct by virtue of Article 29 CMR so that an injuring party acting through gross negligence does not benefit from CMR liability limitations.

In terms of negligence, Swiss law applies an objective test to assess whether or not a person acted negligently. Any person performing contractual obligations is required to an objective standard as to the care owed. Any negative deviation of such standard care is deemed negligent behaviour. The concept of gross negligence builds upon on this definition. Gross negligence is assumed in case of a gross violation of the care owed in that the person performing a duty does not even observe precautionary measures of an elementary nature that would be obvious to any reasonable person.

120. Peter Gauch, Walter R. Schluep, Jörg Schmid & Susan Emmenegger, op.cit., notes 2989 et seq., decision of the Swiss Federal Supreme Court reported at BGE 115 II 62 consid. 3a p. 64.
121. Swiss Supreme Court judgments no. 4C.158/2006 of 10 November 2006, consid. 4.4.3, and no. 4C.45/2007 of 5 April 2007, consid. 3.1.
122. Peter Gauch, Walter R. Schluep, Jörg Schmid & Susan Emmenegger, op.cit., notes 2994 et seq.
123. Cf. decision of the Swiss Federal Court reported at BGE 119 II 443.