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ÖZEL HUKUK ANABİLİM DALI

CARRIER'S LIABILITY AND CMR INSURANCES

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ABSTRACT

CARRIER’S LIABILITY AND CMR INSURANCES

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Carriage activity, which has been vital for humanity throughout history, has accelerated with the increase in trade and communication between people. Increasing carriage activities have emerged the need for uniform rules for international goods carriage. Convention on the Contract for the International Carriage of Goods by Road (the CMR Convention), prepared by the United Nations Economic Commission for Europe, introduced uniform rules regarding the carriage of goods by road.

The first paragraph of Article 17 of the CMR Convention regulates the liability of the carrier arising from damage, loss, and delay. The convention also includes provisions regarding other liability situations of the carrier and situations that the carrier will be relieved of liability. CMR insurances cover the carrier's liability arising from the CMR Convention.

In the first chapter of the study, given information regarding the concept of carriage, brief historical information regarding carriage activity, the development of carriage law, carriage contracts and parties of carriage contract. In the second chapter, the liability of the carrier and the general and special cases of non-liability are analyzed in terms of the provisions of the CMR Convention and the Turkish Commercial Code No. 6102. In the last chapter, CMR insurances, provisions which are applicable for CMR insurances, necessary conditions for the implementation of the CMR Convention, and insurance protection within the scope of CMR insurances are examined.

Key Words: CMR Convention, CMR Insurances, Carriage Law, Carrier, Liability.

ÖZET

CARRIER’S LIABILITY AND CMR INSURANCES

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Yüksek Lisans Tezi, Özel Hukuk Anabilim Dalı, Özel Hukuk (İngilizce) Programı

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Tarih boyunca insanlık için hayati önemde olan taşıma faaliyeti, insanlar arasındaki iletişimin ve ticaretin gelişmesi ile hız kazanmıştır. Artan taşıma faaliyetleri, uluslararası eşya taşımacılığı için yeknesak kurallara olan ihtiyacı ortaya çıkarmıştır. Birleşmiş Milletler Avrupa Ekonomik Komisyonu tarafından hazırlanan Karayolu ile Uluslararası Eşya Taşınmasına İlişkin Konvansiyon (Fransızca Orijinali: “Convention Relative au Contrat de Transport International de Marchandises par Route”) karayoluyla uluslararası eşya taşımasına ilişkin yeknesak kurallar getirmiştir.

CMR Konvansiyonu’nun 17. maddesinin ilk fıkrasında, Konvansiyon kapsamındaki bir taşımada taşıyıcının zarar, zıya ve gecikmeden doğan sorumluluğu düzenlenmiştir. Konvansiyon ayrıca taşıyıcının sorumluluğunu doğuran diğer durumlar ile taşıyıcıyı sorumluluktan kurtaran genel ve özel sorumsuzluk hallerine ilişkin de hükümler içermektedir.

Çalışmamızın ilk bölümünde, taşıma kavramı, taşıma faaliyetinin kısa tarihi, taşıma hukukunun gelişimi, taşıma sözleşmesi ve taşıma sözleşmesinin taraflarına ilişkin bilgi verilmiştir. İkinci bölümde, taşıyıcının sorumluluğunu doğuran olaylar, taşıyıcının sorumluluğunu ortadan kaldıran genel ve özel sorumsuzluk halleri 6102 sayılı Türk Ticaret Kanunu ve CMR Konvansiyonu hükümleri açısından incelenmiştir. Son bölümde ise taşıyıcının CMR Konvansiyonu'ndan doğan sorumluluğunu teminat altına alan CMR sigortaları, CMR sigortalarına uygulanacak hükümler, CMR Konvansiyonunun uygulanması için gerekli koşullar, CMR sigorta himayesi ve kapsamı incelenmiştir.

Anahtar Kelimeler: CMR Konvansiyonu, CMR Sigortaları, Taşıma Hukuku, Taşıyıcı, Sorumluluk.

INTRODUCTION

Carriage activities have been vital for humanity throughout history. With the invention of wheel, usage of land transport vehicles commenced. In time, carriage via seaway, railway and airway commenced as well. The improvement in carriage methods shows parallelism with the improvement of technology and commerce. Such developments provided improvements in commerce and communication between people, whereas the improvements in commerce and surplus production provided the application of new carriage methods. As the economic and social systems changed and the need for carriage work increased, such work began to be made by people who acquired carriage as a profession. Especially, subsequent to World War II, commercial activities did not remain restricted within country borders but gained international qualification. The improvements in international commerce and increase in carriage via road necessitated uniform regulations regarding carriage law between the countries which carriage is made.

In order to eliminate such differences between countries in respect to rules of carriage of goods by international road, *"Convention Relative au Contrat de Transport International de Marchandises par Route" (in English text: "Convention Relating to the Contract of Carriage of Goods by Road" [hereinafter referred to as the CMR Convention])* is prepared by United Nations Economic Commission in 1956 for regulation of uniform rules regarding carriage of goods by international road. The Convention is originally issued in both English and French languages. According to Article 51 of the

CMR Convention, *"the English and French text are equally authentic."* The Convention is signed by ten countries[1] in Geneva on May 19, 1956 and came into force on July 2, 1961.

Turkey adopted the ratification of the Convention by regulating Code No. 3939 published in the Official Gazette numbered 21788 and dated 14.12.1993 by adding a reservation on Article 47 of the Convention and has become a party to the Convention and the additional Protocol.[2] With Turkey becoming a party to the CMR Convention, the provisions of the Convention gained practice as a domestic law regulation with respect to international carriage by road. In this regard, if the disputed carriage owns international qualification, the CMR Convention will be applicable, whereas if the disputed carriage is a domestic carriage, provisions of TCC will be applicable.

In Turkish law, carriage of goods by road is regulated in *"Turkish Commercial Code*", *"Road Transport Code"*, *"Highway Code"* and in *"Convention Relating to the Contract of Carriage of Goods by Road"*. *"Turkish Commercial Code"* is only applied to domestic carriages that the CMR Convention is not applicable.

The CMR Convention did not regulate all aspects of carriage activity. In this sense, in matters which are not regulated in the Convention, Turkish Commercial Code will be applicable. On the other hand, the CMR Convention is not applied to all carriages of goods

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[1] Austria, France, Luxembourg, Poland, Sweden, Switzerland, Belgium, Federal Germany, Yugoslavia, the Netherlands

[2] The Convention was amended with the Protocol dated 05.07.1978, and this Protocol entered into force on 28.12.1980. Turkey became a party to the Protocol on 02.08.1985. The latest Protocol was amended on 20.02.2008. This amendment Protocol entered into force in Turkey on 31.01.2018.

in a vehicle by road. The Convention is applicable to any kind of carriage contract regarding carriage by road in exchange for a fee, provided that the place where goods are taken for carriage and the place where the goods will deliver are located in two different states that at least one of them is a party to the Convention. Particularly, the Convention includes regulations regarding the liability of carrier arising from loss, damage and delay and compensation claims linked to such liability.

The CMR Convention is a convention which includes uniform rules regarding the liability of carrier in international carriage by road, and the CMR insurance is a type of insurance which covers the liability arising from a carriage under the CMR Convention.

The liability of carrier under the CMR Convention are included in different articles of the Convention. As per the first paragraph of Article 17 of the Convention, *"the carrier is liable for the loss, damage and delay"*. Liability of carrier arising from other situations is also regulated with relevant Articles of the Convention.

In terms of Turkish Law, it is possible to apply by analogy the provisions regulated in Articles from 1473 to 1486 of *"Turkish Commercial Code No. 6102"* on liability insurance for CMR insurances.

There is no general condition approved by the Undersecretariat of Treasury[3] pursuant to Article 11 of the Insurance Law No. 5684 for CMR Insurances, which provides

[3] According to the Insurance Law, general conditions are subject to the approval of *"the Ministry of Treasury and Finance"*. However, since the references made to the Ministry in Article 19 of the Presidential Decree No. 47 on the Organization and Duties of Insurance and Private Pensions Regulation and Supervision

unity of practice by insurance companies. Thus, the condition agreed upon by the parties of CMR insurance contract determine the scope of the contract. The parties are free to stray from the provisions of the CMR Convention in matters that are not issued as mandatory rules. However, the parties are still obliged to observe the provisions of CMR while settling on the terms of CMR insurance.

In our study, by giving information regarding the concept of carriage, brief historical information regarding carriage activity, the development of carriage law, carriage contracts and parties of carriage contract is explained. And besides that, we analyzed the liability of carrier in carriage by road in terms of TCC and the CMR Convention and we dwelled on the cases which the carrier is liable and released from liability. We also explained the scope of CMR insurances that cover the liability of carrier arising from carriages under the CMR Convention in terms of provisions regarding the liability insurance in Turkish Commercial Code. Additionally, we explained protection in CMR insurances, insurable interest, the conditions for application of the CMR Convention and the risks within the scope of the insurance.

Agency are considered to be *"Insurance and Private Pension Regulation and Supervision Agency"*, this expression should be understood as an Institution.

CHAPTER I

CONSEPT OF CARRIAGE, HISTORY OF CARRIAGE AND CARRIAGE LAW

1 - CARRIAGE

1.1 General Information About Carriage

Carriage can be basically defined as taking something somewhere. However, the concept of carriage is a subject of investigation from different perspectives in the fields of legal norms and logistics or transportation. Whereas the physical movement aspect of the concept of carriage is at the forefront in the transportation and logistics literature; The carriage process is at the forefront in the legal literature.[4] For example, in the definition of "the movement of an object from one place to another for the purpose of need and benefit"[5]

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[4] Nil Kula, *Türk Eşya Taşıma Hukuku* (Ankara: Seçkin Yayıncılık, 2018), s.15

[5] Emine Koban ve Hilal Yıldırır Keser *Dış Ticarette Lojistik,* Genişletilmiş 5. bs. (Bursa: Ekin Kitabevi Yayınları, 2013) s.122

in the logistics literature, movement is at the forefront in terms of logistics and transportation.

In terms of the legal literature, the definition of the concept of carriage or carriage contract is not included in Turkish Commercial Code No. 6102[6] (hereinafter referred to as TCC), which includes the general provisions of the carriage law. In Turkish Law, the definition of the concept of carriage is only included in Law No. 4295 on Road Transport Code[7]. In the Turkish Law Doctrine, the concept of carriage is defined as taking persons and / or goods from one point to another for a reward.[8]

1.2. History of Carriage

Carriage has been important to humanity throughout history. Even in ancient times, the need to collect products or hunt has led to the necessity of carrying the goods. In the course of history, the invention of the wheel has been a turning point in terms of both transportation and trade. As a result of the invention of the wheel, land transportation vehicles were used by people.[9] Owing to the invention of the wheel, people have increased their commercial activities and communication to more distant regions. Based on the

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[6] Turkish Commercial Code No. 6102 was published in the Official Gazette dated 14/2/2011 and numbered 27846

[7] In Article 3 of the Road Transport Law No. 4295, published in the Official Gazette dated 19/7/2003 and numbered 25173, carriage is defined as *"taking the passenger or the goods to the destination from the place where the passenger gets on the vehicle, or the goods are delivered to the carrier"*.

[8] Bülent Sözer, "Havayolu ile Yük Taşıma Sözleşmesinde Taşıyanın Sorumluluğu" *İstanbul Barosu Dergisi* C. 87, S. 2013/3 s. 50

[9] Reşat Atabek, *Eşya Taşıma Hukuku* (İstanbul: Sulhi Garan Mataası, 1960) s.3

example of the invention of the wheel, transportation has positively affected commercial life and communication. Likewise, the increasing trade demand of people over time, has also positively affected transportation. In short, trade had a positive effect on transportation, and transportation had a positive effect on trade.[10] Due to the parallel connection between trade and transportation, the development of the commercial process is also important for the development of the transportation.

The definition of trade is the exchanging of the goods persons need for other objects that are of economic value at first and then buying and selling of such goods for money. Subsequent to the period of industrial revolution, the increasing trade and market need of the surplus product contributed to the application of new transportation methods. Whereas the oldest and most common carriage method was by road, seaway carriage has become an option with the discovery of the use of seas in carriage. As a result of the developments in the field of industry and trade After the 19th century, railway carriage, which is a faster and more economical carriage method, has emerged besides land and sea carriage. Afterwards, airway carriage, which is faster and safer, however more costly, was used as a new carriage method.

From a historical perspective, such developments in trade and transportation have been beneficial to humanity, resulting in economical and time savings, as well as allowing trade to expand from national to international.[11]

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[10] Burak Adıgüzel, *Taşıma Hukuku Deniz Ticareti Hariç,* 1. bs., (Ankara: Seçkin Yayıncılık, 2018) s. 3

[11] Sabih Arkan, *Eşyanın Karayolu ile Uluslararası Taşınmasına İlişkin Konvansiyon (CMR) Üzerine Bir İnceleme,* (Ankara: Sorumluluk ve Sigorta Hukuku Bakımından Eşya Taşımacılığı Sempozyumu, Sigorta Hukuku Türk Derneği Yayını, 1984) s. 8-20; Arslan Kaya, *"Karayolu ile Eşya Taşımaya İlişkin Uluslararası Sözleşmenin (CMR) Uygulama Şartları ve Öngörülen Sorumluluğun Esasları (I)"* Prof. Dr. Oğuz İmregün'e Armağan, (İstanbul: Beta Basım 1998) s. 311

1.3. Development of Carriage Law Throughout History

While carriage was an occupation that could be done by everyone in ancient times, the need arising with the development of trade enabled transportation to turn into a profession that is carried out professionally over time. Such socio-economic changes have necessitated the application of special rules for the relationship between the carrier and the person requesting carriage.[12] This need for change has resulted in the formation of carriage law and its development over time. The basis of carriage law is the liability of the carrier. The liability of the carrier has been interpreted in different ways in different legal systems at different times.

In the classical period of Roman Law, carriage contracts were accepted as a contract of work (locatio conductio operis) in terms of the quality of the contract.[13] Therefore, the liability of the carrier was in the form of custodia in Roman Law.[14] Custodia was a kind of strict liability in which superior force (vis major in Roman Law) is the only situation in which the debtor is exempt from liability. It is similar to the concept of "God's Law" in modern English Law.[15]

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[12] Sabih Arkan, *Karada Yapılan Eşya Taşımalarında Taşıyıcının Sorumluluğu,* (Ankara: Banka ve Ticaret Hukuku Araştırma Enstitüsü, 1982), s. *32.*

[13] Bülent Tahiroğlu ve Belgin Erdoğmuş, *Roma Hukuku, Tarihi Giriş- Hukuk Tarihi- Genel Kavramlar- Usul Hukuku,* 10. bs (İstanbul: Der Yayınları, 2014), s. 90-92; Türkan Rado, *Roma Hukuku Dersleri Borçlar Hukuku* (İstanbul: Fakülteler Matbaası, 1978), s.139

[14] Özcan Karadeniz, *Iustinianus Zamanına Kadar Roma'da İş İlişkileri,* (Ankara: 1976), s. 185

[15] Barry Nicholas, *An Introduction to Roman Law (Clarendon Law Series)* (Oxford: Oxford University Press, 1962) s. 171

In the post-classical period of Roman law, it was adopted that the carrier would be relieved from liability if it is proven by the carrier that the damage occurs due to force majeure.[16] In the period of Justinian I, the liability of the carrier was evaluated as the care that can be expected from the carrier.[17] Although the approach of Roman Law regarding the liability of the carrier was adopted in the legal systems of European countries, over time, the heavy liability accepted in Roman Law was alleviated with new codifications.

In the codifications of European countries in the middle of the 19th century, it was accepted that the carrier would be relieved from liability if it is proven by the carrier that the damage occurs due to force majeure, the nature of the goods or an external deficiency. Furthermore, In the codifications made in the 20th century, the liability of the carrier was alleviated, and defect liability was considered instead of objective liability. The German Commercial Code (Handelsgesetzbuch), which came into force in 1900, is an example for the transition to the principle of defect liability.[18]

Due to the fact that each carriage system has its own legal problems, special provisions have been made regarding the carriage method since the 20th century. On the other hand, the increase in trade, tourism, and communication in the last century has led to the need for uniform rules and organizations that regulate these rules in order to determine the liabilities of the parties of the carriage contract in international carriages.[19] Therefore, international conventions were concluded and transferred to the domestic law

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[16] Karadeniz, s.189, Arkan, *Taşıyıcının Sorumluluğu,* s.33

[17] Karadeniz, s.178

[18] Adıgüzel, *Taşıma Hukuku,* s.6

[19] Kula s.23

of the party countries over time. It could be said that the development of carriage law in the last century is the conclusion of the mentioned special provisions in international agreements and then their application to the domestic law of the countries.[20] The CMR Convention, which is the subject of the study, is a good example of these international agreements for carriage of goods by road.

1.4. General Principles of Carriage Law

As a result of the historical development of the carriage law, some basic principles have been adopted to protect the rights of the weak party of the carriage contract and to establish the balance between the parties. The principles adopted in the carriage law can be given example as the short statute of limitations, unique proof methods, the adoption of the limited liability, and the mandatory nature of the rules.

Since carriage is a high-risk activity, the principle of limiting the carrier's liability to an upper limit has been adopted in the regulations regarding carriage law. Considering otherwise, in the case that the carrier is held liable for all damage, such situations will increase the cost of carriage and make it impossible to maintain the carriage profession. In Turkish carriage law, the principle of limitation of the carrier's liability has been adopted. In Article 882 of TCC, the upper limit of the carrier's liability is limited to 8,33 Special Drawing Rights for each kilogram of the carried goods.

In order to protect the rights of the other parties of the carriage contract against the carrier, which is the strongest side of the contract, the provisions regarding the liability of

[20] Adıgüzel, *Taşıma Hukuku,* s.7

the carrier are determined as mandatory. It is possible to say that this principle is adopted in Article 854 of TCC, which states that all contracts that alleviate or eliminate the liability of the carrier are invalid.

Carriage Law differs from other legal fields in terms of presumption, evidence and means of proof. In Turkish Carriage Law, the following can be given as examples of different presumptions and proofs in carriage law: Article 858 of TCC states that the waybill signed by both parties constitutes evidence of conclusion of carriage contract, its content and the receival of the goods by the carrier. Also, Article 874 stipulates that if the goods are not delivered within 20 days (30 days for international transports), they will be considered lost.

Carriage Law also differs from other legal fields in terms of short limitation periods. The one-year statute of limitations for all damages except death and injury of the passenger in Turkish Carriage Law is an example of a short limitation periods. (Article 855 of TCC)

1.5. Legislations in Carriage Law

The carriage of goods from one place to another is carried out by different methods depending on the quantity of goods, characteristics of goods, carriage period and destination. Such carriage methods can be seaway, road, airway, and railway. The carriage method in which two or more of the above-mentioned carriage methods are used together is called the multimodal carriage. Additionally, carriage by pipeline and inland waterway carriage, which are different from other methods in terms of the place of carriage, are also other carriage methods. Compared to other transportation methods, carriage by pipeline and inland waterway carriage are preferred in more limited areas and in the carriage of more limited goods.

Inland waterway carriage is the carriage carried out in rivers or lakes within a country. Owing to the long rivers, it is widely used in the transportation of natural gas and oil in Europe. Carriage by pipeline is defined as the transport of cargoes in the form of crude oil, natural gas, water, biofuels as a liquid in bulk to centers connected by pipes laid underground. The most economical way of carriage oil and natural gas is known as pipeline transport. Pipeline transport is the most economical way of transporting oil and natural gas.[21] Pipeline carriage is not stated in the list of carriage works in terms of TCC.

Special provisions regarding carriage law vary according to the carriage method, whether the subject of transportation is goods or passengers, and whether the carriage is international or not, and the vehicles used in carriage.[22]

Provisions regarding carriage in Turkish Law are regulated in the 4th book of TCC under the title of *"carriage works"* from Article 850 to Article 930. The 4th book, titled *"Carriage Works"*, consists of six parts: *"general provisions"*, *"carriage of goods"*, *"carriage of household goods"*, *"carriage with different types of vehicles"*, *"passenger transportation"*, *"freight forwarder"*. The general provisions in the first part contain provisions regarding the definition of carrier, the scope of the provisions, the invalidity of the provisions that eliminate or reduce the liability, and the period of limitations. These provisions are considered as general provisions of Turkish Carriage Law.[23] The general

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[21] M. Hakan Keskin, *Loistik El Kitabı,* (Ankara: Gazi Kitabevi, 2011) s.406 407

[22] Vural Seven, *Taşıma Hukuku*, (Eskişehir: Anadolu Üniversitesi Açıköğretim Fakültesi Yayını, 2011), s.5

[23] Vural Seven, *Taşıma Hukukunda Gönderilen,* (Ankara: Yetkin Yayınları, 2012), s.21

provisions are applied to carriage methods that do not have any special regulations or legal disputes that do not have any applicable special provisions. As a matter of fact, the provision in Article 852 of TCC is as follows: Special provisions regarding seaway, railway and airway carriages and postal administration are reserved.

In Turkish Carriage Law regulation, since there are no special provisions for the carriage of goods by road, general provisions will find application areas. By the reason of there are special provisions in seaway[24], airway[25], railway[26], and multimodal[27] carriages, special provisions will be applied in accordance with Article 852 of TCC, but if there is no applicable provision in special provisions, general provisions will be applied.

As we mentioned in the previous section, the developments in carriage law in the last century have been made by international agreements that brought special provisions. the CMR Convention, of which Turkey is a party, contains special provisions applicable to the international carriage of goods by road. Uniform rules concerning *"Contract of International Carriage of Goods by Rail (hereinafter referred to as CIM)"*[28], which is the

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[24] The provisions in the 5th book of TCC, titled Maritime Trade, is applied to seaway carriages. Likewise, since it is specifically stated in the rationale of Article 931 of TCC, in which the definition of a ship, that inland waterway carriages need to be subject to the provisions regarding seaway carriages; the provisions of the 5th book of TCC will also be applied to inland waterway carriages.

[25] The provisions of the Turkish Civil Aviation Act published in Official Gazette numbered 18196 dated 19.10.1983 will find application area for airway carriages.

[26] Although Law on the General Transportation of Rumeli Railways dated 18.05.1872 is an old-dated law, due to the fact that the Law is still in effect, it is a special provision for railway carriages.

[27] Articles from 902 to 905 of TCC regulate the provisions to be applied to multimodal carriages where the goods are carried by different transport vehicles using more than one carriage system.

[28] In French: *"Convention Internationale concernant le transport des Marchandises par chemin de fer"*

annex of *"Convention Concerning International Carriage by Rail (hereinafter referred to as COTIF)"*[29], regulates international carriage of goods by rail. Turkey is a state party to CIM. Turkey also adopted the last protocol of 1999 amending CIM.

The first and main international legal regulation in the field of air transport is *"Convention for the Unification of certain rules relating to international carriage by air (Warsaw Convention)."*[30] This Convention has been replaced by different protocols over time. *"Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention)"*, which was accepted by the Turkish Grand National Assembly and entered into force, is the most up-to-date international convention that has found application in terms of Turkish Law.

A good number of international agreements have been drawn up on the carriage of goods by sea. However, Turkey only became a party to *"International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature (Hague Rules)"* dated 1924. Unlike *"the CMR Convention"*, *"COTIF"* and *"Montreal Convention"* also includes regulations regarding passenger transportation. It is crucial to state that due to *"the Convention on International Multimodal Transport of Goods"* dated 1980, has not yet been accepted by thirty states, there is no special international regulation applicable to multimodal carriages.

[29] In French: *"Convention relative aux transports internationaux ferroviaires"*

[30] Sözer, s.76

2 - CMR CONVENTION

The carriage of goods from one place to another is carried out by different methods depending on the quantity of goods, characteristics of goods, carriage period and destination. The carriage of the goods within the agreed time, with less cost, damage, and loss, caused the carriage by road to be preferred more than other carriage methods in the international carriage of goods.

As we mentioned in the previous section, the developments in carriage law of the last century have been made by international conventions that brought special provisions. Such conventions have been made in order to bind the settlement of disputes to uniform rules. An example of these conventions is the CMR Convention, which Turkey is a party and brought uniform rules for the international carriage of goods by road, was prepared by the United Nations Economic Commission for Europe in 1956.[31]

The CMR Convention contains provisions regarding the liability arising from the international carriage of goods by road. In the Convention prepared by the European Economic Commission, the works of the International Institute for the Unification of Private Law, the International Road Transport Union, and the International Chamber of Commerce were used.

The states that signed the Convention are Austria, France, Luxembourg, Poland, Sweden, Switzerland, Belgium, Federal Germany, Yugoslavia, Netherlands on 19 May 1956 in Genoa. The provisions of the Convention entered into force on 2 July 1961.

[31] Arkan, *Taşıyıcının Sorumluluğu,* s. 3-8

Afterwards, many European countries became a party to the Convention[32] , and the implementation of the Convention increased. Turkey has acceded to the Convention by Law No. 3939 published in the Official Gazette dated 14.12.1993 and numbered 21788 by making a reservation on Article 47 of the Convention in 1993 and being a party to the Convention additional protocol since 1995.

As per Article 90 of the Turkish Constitution, *"the ratification of treaties concluded with foreign states, and international organizations on behalf of the Republic of Turkey shall be subject to adoption by the Grand National Assembly of Turkey by a law approving the ratification."*

The last paragraph of the 90th Article of the Turkish Constitution states that *"international agreements duly put into effect have the force of Law"*. Under the Article above in the Turkish Constitution, provisions of the CMR Convention have the force of Law in Turkish Law. the CMR Convention includes regulations about general principles of carriage under the Convention, and about Carrier's liability for damage, loss, delay, and compensation claims regarding this liability.

According to the first Article of the Convention, provisions of the Convention are applied to each goods carriage contract meeting the following conditions: carriage must

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[32] *"Countries that are party to the Convention: Afghanistan, Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iran, Ireland, Italy, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Lebanon, Lithuania, Luxembourg, Malta, Mongolia, Montenegro, Morocco, Netherlands, North Macedonia, Norway, Oman, Pakistan, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Tunisia, Turkey, Turkmenistan, Ukraine, United Kingdom of Great Britain and Northern Ireland, Uzbekistan (https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XI-B-11&chapter=11&clang=_en)",* Last Access Date: 20.06.2022.

be in vehicle for a reward, the places of departure and destination must be located in two different countries with at least one of them is a party to the Convention.

In brief, with a few exceptions, all international goods carriage contract by road that the places of departure and destination are located in two different countries which at least one of them is a party to the Convention are subject to the CMR Convention. In cases where there is no clear and applicable provision for any dispute in the Convention, the default rules of the relevant country's Law to be determined according to International Private and Procedure Law are applied.

The CMR Convention consists of eight chapters excluding additional protocols as follows: *"the scope of application of the Convention"* in the first chapter, *"the persons for whom the Carrier is responsible"* in the second chapter, *"the conclusion and performance of the transport contract"* in the third chapter, *"the liability of the Carrier"* in the fourth chapter, *"the claims and actions"* in the fifth chapter, *"the Provisions Relating to Carriage Performed by Successive Carriers"* in the sixth chapter, *"the Nullity of Stipulation to the Convention"* in the seventh chapter, and *"the final provisions"* in the last chapter.

3 - CARRIAGE CONTRACTS

3.1. In Terms of TCC

Carriage contract is not defined either in TCC or other regulations regarding carriage law. In Turkish Law, the lawmaker preferred to stipulate carriage work and obligations of parties instead of defining the contract of carriage.

As per Article 850 of TCC, the Carrier is defined as the person who undertakes the carriage of goods or passengers, or both, in the contract of carriage. The second paragraph of the Article stipulates that *"the Carrier's obligation in the contract of carriage is to take the goods to the destination and to deliver them to the consignee or to take the passenger to the destination. In exchange for that, for contracts regarding carriage of goods, the sender, and for passenger transportation contracts, the passenger is obliged to pay wages."* The elements of the carriage contract can be determined from the relevant Article. There is no consensus in the Turkish Law Doctrine on elements of carriage contract. According to an opinion similar to the articles of TCC, essential elements of carriage contract are the goods subject to carriage, the carriage fee and the agreement of the parties.[33] According to another view in doctrine, the contract of carriage consists of two elements, the commitment to carriage and the carriage fee.[34]

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[33] Turkay Özdemir, *Uluslararası Eşya Taşıma Hukuku (Ziya ve/veya Hasar Sorumluluğu,* (İstanbul: Vedat Kitapçılık, 2006), s.3; Arslan Kaya, *Taşıyıcının Gecikmeden Doğan Sorumluluğu,* Yüksek Lisans Tezi, İstanbul, 1978, s. 8

[34] Muharrem Gençtürk, *Uluslararası Eşya Taşıma Hukuku (Genel Kavramlar - Gecikmeden Doğan Sorumluluk)*, (İstanbul: Vedat Kitapçılık, 2006), s. 13; Adıgüzel, *Taşıma Hukuku,* s.26; Arkan, *Taşıyıcının Sorumluluğu,* s.10

As another view in doctrine, Atabek[35] evaluated the elements of the contract as follows: performing carriage as a profession, carriage fee, goods subject to carriage, carriage vehicle, carriage time, movement, and the change of place in the essence of the agreement.

In all opinions in doctrine, the commitment of carriage and the carriage fee have been accepted as elements of the contract of carriage. However, it is a matter of debate in doctrine whether the carrier's possession of the cargo is one of the elements of the contract of carriage. The determination of elements of carriage contract is important in terms of determining the nature of the carriage contract. In case the carrier's possession of the cargo is accepted as an element of the contract of carriage, the contract will be considered as a real contract. Otherwise, it will be considered as a consensual contract.

Contracts established by meeting of the minds by the debtor and creditor are called consensual contract.[36] Differently, in real contracts, meeting of the minds is not sufficient and the delivery of goods or the execution of work are necessary for fully and duly establishment of the contract.[37]

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[35] Atabek, s. 24-29

[36] Fikret Eren, *Borçlar Hukuku Genel Hükümler*, (Ankara: Yetkin Yayınları,, 2015), s.223

[37] Bülent Tahiroğlu, *Roma Borçlar Hukuku*, (İstanbul: Der Yayınları, 2011), s.125

In the old Turkish Commercial Code No. 6762 (hereinafter referred to as oTCC) period, there were also opinions in the doctrine that the carriage contract is in the nature of a real contract.[38]

Article 856/2 of TCC in force regulated that carriage contracts are established by consent of the parties and delivery of goods to the carrier, even if a waybill is not issued. Within the relevant Article, the discussions in the doctrine came to an end and it was generally accepted that the contract of carriage is a consensual contract. The contract of carriage is an example of synallagmatic contracts. The carrier's main performance is to provide carriage service whereas the main performance of the other party to the carriage contract is to pay the carriage fee.

Article 12 of Turkish Obligations Code No. 6098[39] (hereinafter referred to as TOC) states that the validity of contracts would not depend on any form unless otherwise stipulated by law. Since there is no form requirement stipulated in Turkish Law for carriage contracts, the contract could be verbally agreed upon or be in written form. However, in case of any legal dispute, in accordance with the first paragraph of Article 200 of the Code of Civil Procedure No. 6100[40] (hereinafter referred to as CCP), matters occurring over an amount[41] must be proven with written evidence. It should be

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[38] Alihan Aydın, *CMR'ye Göre Taşıyıcının Ziya, Hasar ve Gecikmeden Doğan Sorumluluğu*, (İstanbul: Arıkan Basım, 2006), s.5; Necat Tüzün, *Kara ve Hava Taşıma Hukuku,* (Ankara: Balkanoğlu Matbaacılık, 1968), s. 19

[39] Turkish Obligations Code No. 6098 was published in the Official Gazette dated 04/02/2011 and numbered 27836.

[40] Code of Civil Procedure No. 6100 was published in te Official Gazette dated 4/2/2011 and numbered 27836

[41] This amount is 6.640,00 Turkish Liras for 2022.

emphasized that in Article 858 of TCC, it is stipulated that the waybill signed by both parties constitutes evidence of the conclusion of the carriage contract, its content, and that goods are delivered by the carrier. Since the waybill signed by both parties is in the nature of evidence, it is possible to prove the disputed issues with the waybill. However, in accordance with Article 856 of TCC, signing of the waybill by parties does not mean that the carriage contract has been established. Therefore, the waybill is a means of proof and not a constituent element of the contract.[42] According to the Article, the delivery of the cargo to the carrier is presumptive in terms of the existence of the carriage contract. The beginning of the liability of the carrier with the delivery of the cargo is important, not for the establishment of the carriage contract, but for the terms and results of the contract.[43]

Based on the definition of the carrier in TCC, the main element of the contract of carriage for the carrier is the commitment to the carriage. The liability of the carrier varies depending on whether the subject of the carriage is goods or passengers. The subject of carriage of goods is usually cargoes with monetary value. However, the garbage of no worth can also be subject to the carriage of goods. In addition, although corpses do not have monetary value, they can be subject to the carriage of goods due to moral value.

In simple terms, carriage is the transport of goods or passengers from one place to another. It is not necessary to determine the place where the subject of carriage will be carried at the time of the establishment of carriage contract. It is possible for the sender or

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[42] Murat Uslu., *CMR Hükümleri Çerçevesinde Taşıyıcının Gecikmeden Doğan Sorumluluğu,* (Ankara: Seçkin Yayıncılık, 2010), s.39, Tüzün s.20; Arkan, *Taşıyıcının Sorumluluğu,* s. 19

[43] Gönen Eriş, *Kara Taşıma Hukuku (Açıklamalı, İçtihatlı, Uygulamalı)*, (Ankara: Seçkin Yayıncılık, 1996), s. 16

a third person to determine the place where the goods or passengers will be carried while the process is in progress.[44]

Another main element in the carriage contract is carriage fee. It is not necessary to determine the carriage fee when establishing the carriage contract. Since the carriage work is a commercial activity, the carrier has the right to charge a reasonable fee according to Article 20 of TCC, even if the fee is not determined. The fee can be paid in money, or with a commodity or interest in return for money.[45]

The courtesy carriage may be defined as the vehicle operator[46] transporting a person in his vehicle or making him use his car free of charge as a courtesy or to please him.[47] Carriage contracts without charge and courtesy carriages cannot be considered within the scope of carriage contracts in TCC and the CMR Convention.

3.2. In Terms of the CMR Convention

According to Article 1 of the CMR Convention, which determines the scope of application, the most important condition for the implementation of the Convention is the existence of a contract for the carriage of goods between the parties. The Convention are applied to each goods carriage contract meeting the following conditions: carriage must

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[44] Arkan, *Taşıyıcının Sorumluluğu*, s.10

[45] a.g.e., 15.

[46] The vehicle operator is defined in Road Traffic Act Law No. 2918 as *"the person who is the owner of the vehicle or is registered in traffic registry in case of sales with retention of title clause, or the renter in case of long-term rental, the borrower in case of a gratuitous loan, the pledgee in case of vehicle pledge."*

[47] Nisim Franko, *Hatır Nakliyatı ve Hukuki Mahiyeti,* (Ankara: Bankacılık Enstitüsü, 1992), s. 19.

be in vehicle for a reward, the places of departure and destination must be located in two different countries with at least one of them is a party to the Convention.

The definition of the contract of carriage is not included in the Convention, as well as in TCC. By considering the provisions of the Convention, carriage contract can be defined as a contract which includes the sender’s commitment to pay wages for the carriage in return of the carrier’s commitment to international carriage goods by road.

On the other hand, the CMR Convention does not include any provisions on how the carriage contract is established. Based on Articles 9 and 32 of the Convention, it is possible to indicate that there is no form requirement in the establishment of carriage contract, and that the contract is established by mutual agreement of the parties.[48]

According to Article 9 of the Convention, a consignment note is accepted as prima facie evidence of the conclusion, conditions of the contract and receival of the goods by the carrier. Likewise, as per Article 32, delivery of the goods is not solely taken as a basis for determining the limitation period. In case the parties do not agree on a time limit, paragraph B of the Article determines the limitation period as the 60th day after the delivery of the goods to the carrier. In paragraph C, in all other cases, 3 months after the conclusion of the contract is determined as the limitation period. Considering the articles explained in detail above, it is possible to state that delivery of goods is not a condition for the establishment of carriage contract and CMR carriage contract is a consensual contract in terms of the CMR Convention.

[48] Uslu, s. 34, Aydın, s.6,

Article 9 of the CMR Convention states that the consignment note constitutes presumption regarding the existence of carriage contract and the conditions of delivery of goods. According to the Article, it is not obligatory to issue a consignment note for the establishment of the contract. Moreover, Article 4 of the Convention states that absence and disappearance of the consignment note will not affect the existence of the contract.

3.3. Parties of the Carriage Contract

The parties to the carriage contract are the carrier and the sender. In addition, the interests of the consignee, who is the third party to the contract, are also protected in the regulations pertaining to carriage law.[49]

Third party beneficiary contract is a contract in which an action is agreed for the benefit of a person who is not a party to the contract.[50] In case the consignee is a different real or legal person from the sender, the carriage contract turns into a contract benefit of third party when the consignee requests delivery of carried goods at the destinations.[51] In carriage contracts, it is possible that the sender and the consignee are the same legal person. For instance, if the products produced in a person's factory in one city are carried to a company in another city owned by the same person, the sender and the consignee are considered as the same person.[52]

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[49] Seven, *Gönderilen,* s.73

[50] M. Kemal Oğuzman ve M. Turgut Öz, *Borçlar Hukuku Genel Hükümler,* (İstanbul: Vedat Yayıncılık, 2012), s. 415.

[51] Seven, *Gönderilen,* s.89

[52] Adıgüzel, *Taşıma Hukuku,* s. 31

Article 13 of the Convention states that the sender, who is not a party to carriage contract, is entitled to request the second copy of the consignment note and the delivery of goods in return for the receipt after the goods arrive at their destination.

3.3.1. Carrier

Although there is no clear definition in the CMR Convention and TCC regarding the carrier, which is one of the parties to the carriage contract, in Article 850 of TCC, Carrier is defined as the person who undertakes the transportation of goods or passengers or both together in the carriage contract. Undertaking the carriage works by the carrier means that the carrier takes the passengers or goods along the carriage distance under his own supervision and liability. The carrier can carry out the carriage himself / herself or use an auxiliary or sub-carrier.

In Article 888 of TCC, the concept of main carrier is used in order to distinguish the carrier, who has undertaken the carriage work and concluded the contract, from other types of carriers such as actual carrier, sub-carrier, and successive carrier. In the relevant Article, the main carrier and the actual carrier are jointly liable for any damages.

The actual carrier is the carrier that actually carries out all or part of the carriage, to which the main carrier has transferred the carriage work.[53] The Sub-carrier is the carrier which the carriage is transferred to him / her by main carrier, and the successive carrier is the carrier that performs the same transportation method one after the other. The

[53] Arkan, *Taşıyıcının Sorumluluğu,* s. 103

successive carrier becomes a party to the same contract by taking delivery of the cargo in the part where he / she carries out the carriage. Whereas the actual carrier is always sub-carrier, the sub-carrier may not be the actual carrier. The actual carrier only exists in the case of sub-carriage or successive carriage.[54]

Article 3 of the CMR Convention states that the carrier is liable for the faults of its agents, servants, and other persons carrying out the carriage. Likewise, Article 34 regulates that successive carrier is also responsible for the entire carriage in case the carriage is carried out with more than one carrier.

The third paragraph of the 850th Article of TCC accepts carriage work as a commercial activity. In terms of the provisions of the CMR Convention, there is no distinction as to whether the carrier has the title of merchant or not.

3.3.2. Sender

The sender is the other party to the carriage contract who concludes the carriage contract and delivers the goods subject to carriage to the carrier. The sender may be a real person or a legal person. In terms of the contract of carriage, the sender's primary obligation is to pay a fee for the carrier's commitment to the carriage. In addition, the parties of a carriage contract may agree that the carriage fee will be paid by the consignee.

[54] Adıgüzel, *Taşıma Hukuku*, s. 34

The sender may be the owner of the goods subject to carriage, or he / she may conclude a carriage contract for the goods he / she does not own as in the freight forwarder contracts regulated in Article 917 of TCC.

The sender is authorized to stop the carriage, change the place to be delivered, or to request that the cargo be delivered to someone other than the one shown on the shipping note, within the scope of the right of disposal on the cargo under Article 12 of the Convention. Pursuant to the second paragraph of the Article, the sender's right of disposal on the cargo ends when the second copy of the consignment note is given to the consignee or when the consignee requests the delivery of the second copy of the consignment note and the goods after the goods reach the place determined for delivery. With the expiration of this right of the sender, the carrier is now obliged to act in accordance with the instructions of the sender.

As per paragraph 3 of Article 12 of the Convention, if the sender has a record in this direction on the consignment note, the consignee now has the right of disposal from the moment the consignment note is issued.

According to the fourth paragraph of the Convention, the sender can order the delivery of the goods to another person by using the right of disposal. However, the third party to whom the sender orders the delivery of the cargo does not have the right to order the delivery of the cargo to another person. The use of the right of disposal on the cargo by the persons who have the right is subject to certain conditions in the 5th paragraph of the 12th Article of the Convention.

3.3.3. Consignee

Carriage contract is for benefit of the consignee. The consignee is the real or legal person to whom the carried goods will be delivered at the end of carriage work.[55] Although the consignee is not a party to carriage contract, his role is vital since carriage work is completed by delivering the goods to the consignee.

The sender and the consignee may be the same real or legal person. The consignee has the authority to receive the goods at the end of carriage. At the same time, the consignee has the right of disposition on the cargo when goods arrive at the place of delivery or, in some cases, during carriage.

It is possible to change the consignee written in the transport documents or the contract during carriage, or to determine the consignee during carriage, even it is not agreed upon at the time the contract is established.

[55] Seven, *Gönderilen,,* s. 29

CHAPTER II

CARRIER'S LIABILITY, RELIEF OF CARRIER FROM LIABILITY

1 - CARRIER'S LIABILITY

1.1. General Information

Within the scope of carriage contract, the carrier is expected to take goods to the destination on time in the form that they were delivered. In terms of carriage contracts, the carrier is under the obligation to undertake the carriage, deliver the goods, take care of the goods, follow the instructions, keep the transport documents during the carriage and give the collected payments. In fact, performance of carriage work which is the primary debt of carrier and taking care of carried goods which is the secondary debt of the carrier have intertwined and become a single debt that can be called the debt of protecting the goods.[56] In case the debt of the protecting carried goods is not fulfilled by carrier, liability of carrier arises for damage and loss of goods subject to carriage.

[56] Adıgüzel, *Taşıma Hukuku,* s.46

The debt of protecting the goods commences with the transfer of the possession of goods to the carrier and ends with transfer of the possession of carried goods to the consignee at the destination.

Under the provisions of the Convention, the carrier shall not be exempted from liability in case of damage or loss of the goods due to negligence or faulty actions of the persons hired to perform the carriage or the agents or persons serving him during the carriage.[57]

Liability of the carrier in terms of the Convention is regulated in the first, third and fifth paragraphs of Article 17 of the CMR Convention.[58]

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[57] Mehmet Kahya, *Taşıyıcının Mali Sorumluluğu ve CMR Sigortaları*, (İstanbul: Sigorta Araştırma ve İnceleme Yayınları, 2007), s. 60

[58] *"Article 17*

1. The Carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery.

3. The Carrier shall not be relieved of liability by reason of the defective condition of the vehicle used by him in order to perform the carriage, or by reason of the wrongful act or neglect of the person from whom he may have hired the vehicle or of the agents or servants of the latter.

5. Where under this article the Carrier is not under any liability in respect some of the factors causing the loss, damage or delay, he shall only be liable the extent that those factors for which he is liable under this article have contributed to the loss, damage or delay."

1.2. Liability Arising from Loss

The Carrier is held liable for the delay in delivering the goods, the damage, and total or partial loss that may arise from when the goods are delivered to the carrier until they are delivered to the consignee.

In carriage law, loss stands for the goods subject to carriage in carrier's possession become totally or partially undeliverable to the consignee.[59] An example of loss is that the goods subject to carriage are destroyed due to theft, usurpation, burning, or lose their economic value due to breakage, freezing, deterioration or rusting.[60]

In the event that the entire economic value of the carried goods is lost, it is possible to claim compensation for the entire goods. For example, if a part of the carried cucumbers is damaged due to broken refrigerator, even if the remainder appears to be intact, the remaining part cannot be used owing to disease contamination, therefore it is evaluated as

[59] Burak Adıgüzel, *Karayoluyla Yapılan Taşımalarda Taşıyıcının Zıya ve Hasardan Doğan Sorumluluğu,* (Ankara: Adalet Kitabevi, 2012), s.62, Hüseyin Ülgen, *Hava Taşıma Sözleşmesi,* (İstanbul: Banka ve Ticaret Hukuku Araştırmaları Enstitüsü, 1987), s. 179, Adıgüzel, *Taşıma Hukuku,* s.143, Arkan, *Taşıyıcının Sorumluluğu,* s.47,

[60] Adıgüzel, s. 143

a total loss.[61] On the other hand, in case of seizure of the carried goods or delivery to another person other than the consignee, the existence of loss is also in question.[62]

Loss occurs when goods which will be delivered to the consignee and the goods received for carriage are completely differentiated in quality, decreased in quantity, or disappeared.[63] Therefore, it is possible to state that because of loss the actual or legal status of the property changes.

In case of the goods subject to carriage are lost, even if the location of the goods is known, it will be considered as a total loss.[64] However, if the goods cannot be delivered for a temporary period, it is not possible to say that loss occurred.[65] For example, if the carried goods are found after being lost and the transfer of possession is provided by the carrier, the loss does not occur. It should be noted that in this case, reasonable time should be considered in assessing whether there is a loss.

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[61] Arslan Kaya, "Karayolu ile Eşya Taşımaya İlişkin Uluslararası Sözleşmenin (CMR) Uygulama Şartları ve Öngörülen Sorumluluğun Esasları (II)" Prof. Dr. Hıfzı Veldet Velidedeoğlu'na Armağan, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Cilt 56, Sayı 1-4 (İstanbul, 1998) s. 246

[62] Malcolm A. Clarke, *International Carriage of Goods by Road: CMR,* 5th Edition, (London: Informa Law from Routledge, 2009) s. 190, Arkan, *Taşıyıcının Sorumluluğu,* s.50

[63] Özdemir s.95,

[64] Ziya Akıncı, *Karayolu ile Milletlerarası Eşya Taşımacılığı ve CMR,* (Ankara: Seçkin Yayıncılık, 1999) s.93

[65] Emine Yazıcıoğlu, *Hamburg Kurallarına Göre Taşıyanın Sorumluluğu. Lahey/Visby Kuralları ile Karşılaştırmalı Olarak,* (İstanbul, Beta Basım, 2000), s. 75, Arkan, Taşıyıcının Sorumluluğu, s. 48

The limits of reasonable time are determined by a special regulation in the CMR Convention. Pursuant to Article 20/1 of the Convention, if the carriage period is agreed upon by the parties, in case that the goods cannot be delivered within thirty days commencing from the expiry of this period, the goods will be deemed to have been lost; whereas if the carriage time is not agreed upon, the goods will be deemed to be lost in the case they cannot be delivered within sixty days commencing from the date of receival of the goods by the carrier. On the other hand, paragraph 2 of the same Article states that the entitled person who receives compensation for lost items, may request to be informed in written form if the items are found within one year from the date of payment. In addition, according to paragraph 3 of the relevant Article, within 30 days commencing from the date of being informed, the entitled person may request the delivery of the goods in return for payment of the compensation received and the fees shown on the consignment note. In this case, the right to demand compensation for the damage suffered due to delay in delivery of goods is reserved.[66]

The right of the person entitled to be informed in case of finding of the lost goods is an optional right as to maintain his rights on the goods after the compensation is paid. It should be noted that the person entitled can use the right if the goods are found undamaged.

Likewise, Article 874 of TCC also includes a similar provision regarding appearance of lost goods in one year commencing from the date of receival of compensation by the entitled person. However, unlike the CMR Convention, there is no written application requirement in accordance with TCC. Similar to the Convention, TCC stipulated the return of the compensation received and the expenses incurred in order for usage of this right granted to the person entitled. Additionally, according to the last

[66] Aydın, s. 51, Arkan, *Taşıyıcının Sorumluluğu,* s. 49

paragraph of Article 874, in the case goods are found after the payment of compensation, the carrier will be free to dispose the goods if the entitled person does not request to be informed or delivery of the goods subsequent to being informed. In the event that the carrier uses the right with the intention of embezzling the goods, the person entitled will be able to use the right to demand the goods even if he / she did not request information.[67]

It is important to distinguish between total loss and partial loss. Because the amount of compensation that can be claimed and the provisions of limitation period which can be applied to legal disputes vary. As we explained in detail in the previous section, according to Article 32 of the CMR Convention, the limitation period commences from the delivery date in cases of partial loss, damage, or delay; and in cases of total loss, it commences 30 days following the end of the agreed time limit, and 60 days following the delivery date if the time limit is not agreed. Furthermore, the amount of compensation which could be claimed under Articles 23 and 25 of the Convention and the calculation method also differ in cases of total loss and partial loss.

Partial loss of goods stands for delivery of the goods by the carrier to the agreed place and the arranged person, reduced in quantity, weight, or volume.[68] In case of carriage of goods with economic value that can only be measured in units such as weight, volume, units, there may be partial loss. For example, if ten of the twenty computers with the same specs given to the carrier are delivered to the person entitled, there is a partial loss. However, it will be considered as total loss if some parts of the goods that create economic value with the presence of all parts such as antique dinnerware and stamp collection cannot

[67] a.g.e., s. 326

[68] Akıncı, *Eşya Taşımacılığı ve CMR,* s. 93

be delivered.[69] As it is obvious in the example of stamp collection and antique dinnerware, since the loss of some parts will render the functions of the item as non-functional, total loss occurs even though the loss is partial. In cases which the goods delivered part of the goods given to the carrier continue to have economic value on their own, there will be partial loss.[70]

Total loss occurs when none of the goods given to the carrier for carriage are delivered, including packaging.[71] In addition, an opinion in doctrine considered the situation in which only the package of the goods was delivered as a partial loss by accepting the package as a part of the goods.[72] The delivery of only package will not ensure the proper use of the goods and also only package does not have economic value. Hence, we believe that delivery of the only package should be considered as total loss.

The case of loss of carried goods is not defined in TCC. However, in the preamble of Article 875 of TCC which regulates carrier's liability arising from loss and damage, loss is defined as "becoming unusable due to damage or vanish of the carried goods".

Partial loss and total loss are differentiated in TCC, similar to the CMR Convention. Article 23 of the Convention, which regulates the amount of compensation to be paid and the upper limits of liability in case of complete or total loss of goods, and

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[69] Kaya, *Sorumluluğun Esasları (II),* s. 247

[70] Atabek, s. 188

[71] Arslan Kaya, *Sorumluluğun Esasları (II)*, s. 246

[72] Sabih Arkan, Demiryolu İşletmesinin Eşya Taşımalarından Doğan Sorumluluğu, (Ankara: Sorumluluk ve Sigorta Hukuku Bakımından İkinci Taşımacılık Sempozyumu, Sigorta Hukuku Türk Derneği Yayını, 1985) s. 47

Articles 880 and 882 of TCC contain similar provisions. It is possible to evaluate that the regulations regarding full and total loss in the CMR Convention and TCC are in line with one another.

The fourth paragraph of Article 23 of the Convention states that *"…the carriage charges, Customs duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss and in proportion to the loss sustained in case of partial loss, but no further damage shall be payable…"* It is debatable whether customs duty is covered by other charges.

1.3. Presumption of Loss

In Article 874 of TCC, presumption of loss is adopted depending on the delay in delivery time in carriage of goods. Pursuant to relevant Article, if the goods are not delivered within twenty days following the carriage period in domestic transportation and within thirty days following the transportation period in international transportations, the carried goods are deemed to be lost. These periods commence from end of carriage period in case if the carriage period is agreed upon by the parties; provided that parties do not agree on the carriage period, then the period will commence from the last day of the reasonable period in accordance with Article 873.

In line with the above, provisions in CMR are similar to TCC. As per the Article 20/1 of the Convention, the goods will be regarded as lost in the cases which carriage period is agreed upon by the parties and the goods could not be delivered within thirty days commencing from the expiry of the period; and in the cases which carriage period is not determined, and the goods could not be delivered within sixty days commencing from the date of receival of goods by carrier.

1.4. Liability Arising from Damage

Damage refers to any material deterioration which occurs during carriage, causing decrease in the value of the goods. In other words, damage is the failure to deliver goods in the form, quantity, and condition in which they were received.[73] Rusting, dirtying, breaking, worsening of smell, freezing of the goods can be given as examples of damage. The decrease in the market value of the goods during transportation without a deterioration in the material property of goods cannot be considered as damage.[74]

Damage is the decrease in the value of the transported goods as a result of physical deterioration, both inside and outside.[75] Damage is not only the visible deficiencies, but also the changes that occur in the structure of goods during carriage, which narrows the sales opportunity of the goods. Such type of damage is generally seen in the carriage of goods that need to be transported by vehicles with a certain heating and cooling system. In transportations that require refrigerated vehicles, rotting, premature ripening, loss of freshness odor and taste of food products due to inability to adjust the temperature required for the carried goods causes damage as it will reduce the economic value of the goods.[76]

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[73] Arkan, Taşıyıcının Sorumluluğu, s. 51, Yazıcıoğlu, s. 76, Atabek, s.189

[74] Arkan, *Taşıyıcının Sorumluluğu,* s.51, Adıgüzel, *Taşıma Hukuku,* s. 146

[75] Clarke, s. 193

[76] Kaya, *Sorumluluğun Esasları (II)*, s. 246,

Damage may occur fully or partially in goods. For instance, if ten computers out of twenty computers are damaged, but the damaged computers still have economic value, there is partial damage. However, if the damaged computers become unusable, there will be partial loss.[77] Provisions regarding total damage and partial damage are included in Article 25 of the CMR Convention. Also, in case of occurrence of damage to a part of the goods which constitute an integrity, since the undamaged part will also lose value, the resulting damage is total damage.[78] However, in cases which damage is reparable, it is not possible to accept that the goods have suffered total damage. In this case, the expenses incurred to restore the damaged part may be claimed.[79]

The case of damage to the carried goods is not defined in TCC. However, in the preamble of Article 875 of TCC which regulates carrier's liability arising from damage and loss, damage is defined as "the damage to the goods while preserving their existence". Based on this definition, it is possible to say that the damage definitions in the CMR Convention and TCC are compatible with one another. In the same way, partial damage and total damage differentiation is made in TCC, similar to the Convention.

1.5. Liability Arising from Delay

Another situation that creates the liability of the carrier is delay. Delay simply means that the transport work is not completed in the required time. In order for the liability of carrier due to delay, carriage time must exceed, and the goods must be delivered late as a result of such expiry. The duration of the carriage may be determined by the

[77] Özdemir, s.102

[78] a.y.; Arkan, *Taşıyıcının Sorumluluğu,* s. 51

[79] Kaya, *Sorumluluğun Esasları (II)*; s. 246, Aydın, s. 55

parties in the contract. The agreed carriage period may be extended by the parties during transportation.[80] If a waybill is issued in accordance with paragraph 1 of Article 857 of TCC, the carriage time agreed upon by the parties must be specified in the waybill. Even if the carriage period not specified in the waybill, agreed carriage period is binding for the parties. In case of legal dispute on carriage period, the period must be proven by the claimant.

In the event that the carriage time is not agreed upon by the parties, the reasonable period in which the prudent carrier can carry out the carriage is taken into consideration pursuant to Article 873 of TCC. Reasonable carriage time is calculated according to quantity of carried goods, the driving hours allowed, type of vehicle, carriage conditions on the route, and other factors related to the legal disputes.[81]

In the case that the carrier cannot deliver the carried goods to the consignee on time, the carrier is liable for the delay. Paragraph 3 of Article 875 of TCC states that even if no damage occurs, in case of late delivery of the goods, a reduction should be made from the carriage fee, considering the delay time. However, the same Article of relevant Code states that if the carrier proves that he / she has performed all the care that could be expected from him, he / she will be freed from the reduction in fee.

It should be emphasized that if the delay in the carriage period also causes damage to the carried goods, compensation for the damage should be requested instead of a reduction in the carriage fee.

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[80] Hakan Karan, Karayolunda Uluslararası Eşya Taşıma Sözleşmesi Hakkında Konvansiyon CMR Şerhi, (Ankara: Seçkin Yayıncılık, 2011), s.521

[81] Gençtürk, s. 129

The liability of the carrier for delay is included in Article 17 of the CMR Convention, along with liability arising from loss and damage. Although the official Turkish translation of the Convention does not include liability arising from delay, it is thought that this situation is caused by a translation error.[82] Pursuant to Article 19 of the Convention, the carrier's liability arising from delay is in question if the carriage period exceeds, if the person entitled suffers damage due to late delivery and there is a causal connection between the damage and the delay.

The delay does not occur only if the delivery time is exceeded. Although the carriage period is not exceeded, additional costs incurred as a result of late receival of the goods by carrier, or late loading or unloading of cargo, may be compensated in accordance with the relevant domestic law.[83]

In accordance with the CMR Convention, it is possible to decide on the carriage period by the parties. If the carriage time is agreed upon by the parties, the carriage time should be written in the consignment note according to Article 6 of the Convention. In disputes regarding the carriage time, if a carriage time is not included in the consignment note, the burden of proof of the agreed carriage period is on the sender.

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[82] Abuzer Kendigelen ve Alihan Aydın, "*Karayolu ile Uluslararası Eşya Taşıma Sözleşmesine İlişkin Antlaşma (CMR)-Resmi Çeviriye İlişkin Sorunlar ve Bir Serbest Çeviri Denemesi"* Prof. Dr. Ömer Teoman'a 55. Yaş Günü Armağanı, (İstanbul: Beta Basım, 2002), s. 496; Uslu, s. 35

[83] Özlem Karaman Coşgun, *"Kara ve Deniz Yolu ile Yapılan Eşya Taşımalarında Taşıyanın Gecikmeden Doğan Sorumluluğu"* Prof. Dr. Fahiman Tekil'in Anısına Armağan, (İstanbul: Beta Yayınevi, 2003), s. 506; Kaya, *Sorumluluğun Esasları (II),* s. 249

In the event that the carriage time is not agreed upon by the parties, the reasonable period in which the prudent carrier can carry out the carriage is taken into consideration pursuant to Article 19 of the CMR Convention. However, there is no regulation on how to calculate the reasonable time. As explained in detail above, similar to TCC, quantity of carried goods, driving hours allowed, type of vehicle, carriage conditions on the route are taken into account in the calculation of the reasonable period.

It is debated in the doctrine whether the factors arise during the carriage and may prevent the performance of the carriage should be taken into account in the determination of reasonable period. The dominant opinion in doctrine is that only the conditions at the beginning of the carriage should be taken into account in order to determine the reasonable time. In the carriages that the carriage time is agreed upon by the parties, in case of delay, the reasons of released from liability could be claimed. Likewise, if the carriage period is not determined by the parties, the factors which may arise during the carriage should not be considered in the calculation of the reasonable time.[84] We believe that these factors should be evaluated within the scope of exemption from liability.

The CMR Convention requires the occurrence of the damage in order for the liability of carrier due to delay. The damage arising from delay is the decrease in the assets of the person entitled or disappearance of profits due to delay.[85] The liability of the consignee against third parties arising from the contracts concluded by relying on the timely delivery of the goods, the decrease in the market value of the carried goods, the

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[84] Gençtürk, s. 129; Aydın, s. 103

[85] İrem Berksoy, "CMR Kapsamında Taşıyıcının Ziya, Hasar ve Gecikmeden Doğan Sorumluluğu", *Legal Mali Hukuk Dergisi*, Y.3, S. 28 (İstanbul 2007), s. 765

payment of higher wages to the employees, the change in tax conditions, can be given as examples of the damage arising from late delivery.[86]

In doctrine, the provisions to be applied in case of damage or loss due to delay in the carried goods or delay in delivery due to damage or loss are controversial. One view argues that both types of liability should apply to the same legal dispute in case of damage or loss of goods due to delay. According to this view, if delay is caused by damage, the carrier should be held responsible for the damage or loss as well as the damage caused by the delay.[87] Moreover, it is not regulated that the damage caused by the delay in the CMR Convention which will be applied except only in the case of damage or loss of the goods.

According to the other view, in which we also agree with, it argued that the carrier is liable in accordance with the provisions of the damage and loss provisions in case of both loss or damage due to delay and delay in delivery due to damage or loss. In the provisions of the CMR Convention on the liability of carrier for loss and damage, there is no limitation in terms of the cause of damage. Therefore, it is possible to say that these provisions are applicable to damages caused by delay. On the other hand, it will not be fair to accept that the damage caused by delay can also be claimed, since the loss is in question if the carried goods cannot be delivered.[88]

It should be noted that, the liability of the carrier arising from the delay is in question if there is a causal link between the damage and the delay pursuant to the CMR Convention. In the case the damage is not caused by the delay, special provisions

[86] Arkan, *Taşıyıcının Sorumluluğu,* s. 66; Gençtürk, s. 158; Aydın, s. 105.

[87] Aydın, s. 108

[88] a.g.e., s. 107; Gençtürk, s. 160

regarding the cause of the loss or damage are applied instead of the provisions regarding the delay.

1.6. Legal Nature of the Carrier's Liability

There are different opinions in doctrine regarding the legal nature of carrier's liability regulated in Article 17 of the Convention. The first point of view is that liability of carrier has a character of defect liability, in which the burden of proof is reversed.[89] It argues that there is a presumption of fault under the CMR Convention, and unlike the fault liability, the liability is aggravated by the duty of care. According to this view, it is presumed that the carrier is at fault, but the carrier will be able to avoid liability not by proving his faultlessness, but by proving that he / she has conducted highest care and assert the situations regulated in Article 17 of the Convention.

The second opinion, in which we also agree with, is that it has nature of mitigated strict liability based on the second paragraph of Article 17.[90] Pursuant to the provision, the carrier will be released from liability in some cases regulated in the relevant Article. One of such cases is incidents that the carrier cannot avoid and prevent its consequences which the second opinion in doctrine rely on.[91]

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[89] Aydın, s.36; Akıncı, *Eşya Taşımacılığı ve CMR,* s. 87; Özdemir, s. 126

[90] Arkan, *Taşıyıcının Sorumluluğu,* s. 44, Adıgüzel, *Taşıma Hukuku,* s. 157, Clarke, s. 185

[91] Kübra Yetiş Şamlı, Uluslararası Kara, Hava ve Deniz Yoluyla Eşya Taşımalarında Taşıyıcının / Taşıyanın Sınırlı Sorumluluktan Yararlanma Hakkının Kaybı (İstanbul: On İki Levha Yayıncılık, 2008), s.16

Incidents that the carrier cannot avoid and prevent its consequences have a wider scope than force major. Force majeure can be defined as an extraordinary event that occurs outside the activity of the debtor and causes the breach of the debt in an inevitable and absolute way and cannot be foreseen and resisted.[92] Force major is an external event or element that absolutely prevents the fulfillment of the debt. Unlike force major, incidents that the carrier cannot avoid and prevent its consequences do not necessarily have to come from external factors; It may arise from reasons originating from the carrier.[93] It is also considered which the incidents that the carrier cannot avoid do not need to be unpredictable and irresistible.[94] Therefore, it is possible to conclude that the expression *"circumstances which the carrier could not avoid and the consequences of which he was unable to prevent"* in the CMR Convention does not stand for force majeure.

The carrier must take all possible precautions to avoid liability by asserting the case of incidents that the carrier cannot avoid and prevent its consequences. Taking all precautions is more comprehensive than the diligence required by the prudent trader. As stated in Article 876 of TCC, which is expressed in the CMR Convention, is that the damage or loss occurs despite the carrier's highest care.

The carrier does not need to prove that he / she is faultless to relieve liability. The carrier only must solely prove that the damage occurred due to the reasons set forth in paragraphs 2 and 4 of Article 17 of the Convention. Therefore, it is possible to say that mitigated strict liability is adopted in terms of the CMR Convention, since the expression

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[92] S. Sulhi Tekinay ve Sermet Akman, *Borçlar Hukuku Genel Hükümler*, (İstanbul: Filiz Kitabevi, 1993), s. 100; Eren, s. 582.

[93] Özdemir, s. 273

[94] Kaya, *Sorumluluğun Esasları (I)*, s. 324

of incidents that the carrier cannot avoid and prevent its consequences have a broader scope than force majeure.

The liability of the carrier arising from damage and loss, along with the liability arising from delay, is included in Article 875 of TCC. In line with the CMR Convention, the principle of strict liability is also adopted in TCC.

In Article 876 of TCC, it is regulated that the carrier will be relieved from liability for damages caused by reasons which the carrier cannot avoid and prevent its consequences despite performing the highest care. The provision is in parallel with the regulation in the second paragraph of Article 17 of the CMR Convention. In addition, the provision in the third paragraph of the same Article of the Convention which states a vehicle malfunction does not constitute a reason to avoid liability is similarly regulated in Article 877 of TCC.

Based on the above-mentioned information, it is possible to say that the carrier's liability in TCC, such as the CMR Convention, is in the nature of mitigated strict liability. Likewise, the 11th Civil Chamber of the Supreme Court of Appeals of Turkey supported the strict liability view by stating that "the carrier must prove that he / she is not at fault" regarding a dispute arising from carriage under the CMR Convention in its decision dated 20.04.2000 (Merits No. 2000/2114, Decision No. 2000/3241).[95]

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[95] Engin Erdil, *Açıklamalı İçtihatlı Karayolu ile Uluslararası Eşya Taşıma Hukuku,* (İstanbul: Vedat Yayıncılık, 2007) s.209

2 - CONDITIONS RELIEVING THE CARRIER'S LIABILITY

2.1. General Information

In Article 17 of CMR Convention, the cases that cause liability of the carrier are regulated along with the situations in which the carrier is released from liability. The liability of carrier in terms of the Convention is regulated in the second and fourth paragraphs of Article 17 of the Convention.[96]

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[96] *"Article 17*

2. The Carrier shall, however, be relieved of liability if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the Carrier, by inherent vice of the goods or through circumstances which the Carrier could not avoid and the consequences of which he was unable to prevent.

4. Subject to article 18, paragraphs 2 to 5, the Carrier shall be relieved of liability when the loss or damage arises from the special risks inherent in one more of the following circumstances:

a) Use of open unsheeted vehicles, when their use has been expressly agreed and specified in the consignment note;

b) The lack of, or defective condition of packing in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed;

c) Handling, loading, stowage or unloading of the goods by the sender, the consignee or person acting on behalf of the sender or the consignee;

d) The nature of certain kinds of goods which particularly exposes them to total or partial loss or to damage, especially through breakage, rust, decay, desiccation, leakage, normal wastage, or the action of moth or vermin;

e) Insufficiency or inadequacy of marks or numbers on the packages;

f) The carriage of livestock."

The second paragraph of the Article is regarding general cases of nonliability, whereas the fourth paragraph is regarding special cases of nonliability. While general cases of nonliability can be claimed in cases of damage, loss, and delay; Special cases of nonliability could only be claimed in case of loss and damage of the carried goods.[97]

General cases of nonliability and special cases of nonliability differ in the way of proof. If the carrier is based on general cases of nonliability, it is necessary to prove the existence of nonliability case and damage due to the nonliability case or the causal link between delay and the nonliability case. If the carrier is based on special cases of nonliability, it only needs to prove the existence of the nonliability case. However, he / she should be emphasized that it is possible to prove otherwise by the claimant. Unlike the CMR Convention, according to TCC in case of delay, special nonliability cases can be asserted by the carrier.[98]

Some of the special cases of nonliability shows similarity with some of the general cases of nonliability. Therefore, it is possible for the carrier to rely on both general and special nonliability in one case. However, special cases of nonliability provide ease of proof.

[97] Aydın, s. 56; Gençtürk, s. 162

[98] a.g.e., s. 163

The occurrence of special cases of nonliability is unavoidable. Since it is not possible for the carrier to dispose on the cases of special nonliability cases, if the carrier fulfills its obligation of duty of care, it creates a presumption in favor of the carrier.[99]

2.2. General Cases of Nonliability

A. Unpreventable Consequences of Unavoidable Incidents

Article 17 of the CMR Convention regulates the carrier will be relieved of liability if the loss, damage, or delay occurs due to an event that the carrier cannot avoid and prevent its consequences. In the evaluation of case of this nonliability situation, it is considered whether the carrier performs the highest care and the nature of the incident.

The carrier is obliged to perform the highest level of care, which is a heavier obligation than the care expected from the prudent carrier.[100] The scope of the highest level of care is to perform all the care and attention that can be expected in economic terms.[101] Performing highest level of care can be explained as an average level of attention skills and agility with experience in the standards of a prudent carrier. In addition, within the scope of this obligation, the carrier is also expected to determine a second route and, take security measures to prevent damage to the goods and to avoid delays.[102] The carrier's duty of acting with the highest level of care should be evaluated according to the

[99] Karan, s. 337

[100] Arkan, Taşıyıcının Sorumluluğu, s. 44; Aydın, s. 70

[101] Kaya, *Sorumluluğun Esasları (II),* s. 254

[102] Adıgüzel, *Taşıma Hukuku,* s. 158

circumstances of the concrete case. Evaluation criteria can be exemplified as the possibility of delay, the applicability of the measures to be taken to the concrete event, and the use of necessary information and technology.[103]

The concept of incidents that the carrier cannot avoid and prevent its consequences are not clear and varies according to the conditions of the concrete case. For example, the excess of usurpation and robbery of transport vehicles in a country should be known by the carrier and precautions should be taken by the carrier in this regard. Therefore, it should be accepted that a prudent carrier should take the necessary precautions for carriage to the country. However, despite the carrier's full care during carriage, the usurpation of carried goods as a result of an unexpected armed attack should be considered as an unavoidable event.

In terms of English Law, the Supreme Court held the carrier liable for the case that two truck drivers realized the vehicle was missing when they returned from lunch after locking and parking the vehicle in Milan by activating the alarm. According to the decision, the Court did not find the precautions taken by the carrier sufficient. Since the carrier did not show the care expected from a prudent carrier, the incident was not accepted as an unavoidable incident by the court and the carrier held liable.[104]

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[103] Aydın, s.71

[104] Michael Galley Footwear Ltd. v. Iaboni (1982) 2 All England Reports s.200-207.

B. Inherent Vice of the Goods

Article 17 of the CMR Convention regulates that the carrier will be relieved of liability if the loss, damage, or delay occurs due to inherent vice of the goods. Inherent vice of the goods means that the damage and loss that occurs during carriage due to the defects existing in the goods itself or the deterioration in the condition of the carried goods. The defect must be present inherent of the goods.[105] Glassware broken during carriage due to a manufacturing defect is an example of this nonliability case.

It should be emphasized that, in the event that the non-defective glassware is broken during carriage, the special nonliability case which is the nature of certain kinds of goods in the 4th paragraph of Article 17 of the Convention can be claimed; If the glassware with a manufacturing defect is broken during carriage, the general nonliability case which is the inherent vice of the goods in the 2nd paragraph of the same Article can be claimed.[106]

Likewise, situations where the damage can be prevented by the protection of the carried goods cannot be evaluated within the scope of inherent vice of the goods. In other words, if the goods at risk of corrosion are not carried in a protected way, inherent vice of the goods will not occur in the damage that will occur, but bad packaging may be in question. Similarly, perishable items such as foodstuffs are not carried in a suitable refrigerated vehicle, the liability of the carrier occurs; whereas the carrier is not liable if

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[105] Akıncı, *Eşya Taşımacılığı ve CMR,* s.100

[106] Özdemir, s. 218

there is a disease present in the goods carried before the goods are delivered to the carrier.[107]

C. The Instructions and Wrongful Act or Neglect of the Claimant

Pursuant to the second paragraph of Article 17 of the CMR Convention, the carrier is relieved from liability for damage caused by the wrongful act or neglect of the claimant. In order for the carrier to relief of liability, it is sufficient to prove that the claimant's act or negligence caused loss or damage. The claimant can be sender or consignee. The carrier also has the right to claim the wrongful act and neglect of the consignee’s or the sender's agent and auxiliary.

Other than the claimant's active or passive behavior, the reasons arising from the sender's negligence or intention, such as not reporting the properties of the goods subject to carriage, and under-reporting, are also within the scope of the nonliability case.[108] Examples of wrongful acts and negligence of the claimant are failure to properly load and unload, not preparing customs information, not giving information about the goods, inadequate packaging.[109]

Wrongful act or neglect of the claimant is frequently encountered during the packaging, loading, stacking, and unloading processes of goods.[110] Since the provisions

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[107] Adıgüzel, *Taşıma Hukuku,* s. 168

[108] Adıgüzel, *Taşıma Hukuku,* s. 164

[109] Kaya, *Sorumluluğun Esasları (II),* s. 252

[110] Akıncı, *Eşya Taşımacılığı ve CMR,* s.97

regarding special cases of nonliability regulated in paragraph 4 of the same Article related to these processes, the case of nonliability should be asserted considering the cause of the damage.

In the same Article of the Convention, apart from a wrongful act or neglect of the claimant, the instructions given by the claimant are also regulated as a case of nonliability. In this case of nonliability, the claimant can be sender or consignee, provided that he / she has the authority to issue instructions.[111]

The instruction expressed in relevant Article of the Convention is not limited to the situations specified in Article 12 of the Convention; but all are instructions and declarations given to the carrier from the start to the end of carriage work.[112] It should be noted that this case of nonliability will not be applied in the event that the carrier misinforms the claimant.

The carrier is not obligated to follow the instructions that unlawful or obviously will cause delay. In the event that the carrier is given an instruction that is unlawful or will cause delay, he / she must notify the claimant of this situation. If the claimant still demands the execution of such instruction, the carrier will be relieved from liability.[113] In order for the carrier to relief of liability, it is sufficient to prove that the claimant's instruction caused loss or damage on the goods. It is irrelevant and not considered whether the claimant is at fault or not.

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[111] a.g.e., s.98

[112] a.g.e., s.99

[113] a.y.

D. Evaluation of General Cases of Nonliability in Terms of TCC

According to the first paragraph of Article 876 of TCC, it is stated that the carrier will be relieved of liability arising from the delay, loss or damage, due to incidents that the carrier cannot avoid and prevent its consequences despite showing highest care. As we have explained in detail before, in accordance with this provision, incidents do not need to be caused by an external effect, but it is required to show higher care than the liability of care in Article 20 of TCC.

The expression of highest care is that damage, loss, and delay occurring in the carried goods despite the care expected from a prudent carrier. The criterion of the prudent carrier will be evaluated by the judge's comment. In the criterion of care expected from the carrier, the criteria for CMR application and the characteristics of the concrete case are evaluated.

According to the relevant Article of the Convention, if the damage is caused by the behavior of sender or consignee or inherent vice of the carried goods, the effect of these cases shall be considered in determining the occurrence and scope of the compensation debt. The effect of the claimant behaviors in determining the compensation means joint effect or common cause. Additionally, if the claimant's behavior is effective in the occurrence of the damage, the damage will be allocated between the parties. The behavior of the sender's or the consignee's assistants which caused damage to the goods, is also within the scope of the claimant's behavior. It should be emphasized that, similar to the application of the provision of the Convention, the carrier should not effect the instructions given by the claimant and causing damage.

Similar to the relevant provision of the Convention, the inherent vice of the carried goods is that it is the deficiency due to reasons arising from production and the deficiency found in the goods before carriage. In the event that the damage of carried goods is caused by the inherent vice of the goods, the carrier will be relieved of liability.

Unlike the Convention, general cases of nonliability are regulated in separate articles of TCC. However, special cases of nonliability are directly quoted within the Convention.

2.3. Special Cases of Nonliability

A. Use of Open Unsheeted Vehicles

According to subparagraph (a) of paragraph 4 of Article 17 of the Convention, it is possible to carry the goods with an open unsheeted vehicle, provided that the parties expressly agree upon, and it is stated in the consignment note. Unlike the CMR Convention, in accordance with TCC, it is not obligatory to include an annotation in the consignment note for open unsheeted vehicle. However, since the carrier is under the burden of proof in this matter, the existence of a written agreement is important.[114]

Contrary to the Convention, in accordance with Article 878 of TCC, in cases of commercial practice, it is possible to carry out the carriage with an open unsheeted vehicle.

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[114] Adıgüzel, Taşıma Hukuku, s.170

Open unsheeted vehicle stands for a vehicle that is not covered by sheet.[115] Vehicles with open sides, even if the top is covered, are also considered as open unsheeted vehicles.[116] According to another view, the vehicle cannot be considered as an open vehicle if the four sides of the section where the goods are closed where the goods are loaded.[117]

In order for the carrier to relief of liability, the carrier must prove that an unsheeted open vehicle is used with the acceptance of sender during the carriage.[118] If the carrier proves that the damage was caused by carriage with an open unsheeted vehicle, he / she will be relieved of liability. However, if there is a commercial practice, the sender or the consignee must prove that he / she did not accept the carriage with the open vehicle in a carriage under TCC. Commercial practice will be determined according to the commercial customs specific to a region or trade branch in accordance with the first paragraph of Article 2 of TCC.

In carriages of goods with an open unsheeted vehicle, damage and partial loss may occur. The carried goods falling from the vehicle, can be an example for partial loss; whereas the carried goods getting wet in the rain can be an example for damage.[119]

Since paragraph 3 of Article 18 of the Convention constitutes an exception, complete loss is not in question in the carriage with open unsheeted vehicles. The Article

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[115] Kaya, *Sorumluluğun Esasları (II),* s. 256

[116] Aydın, s. 72

[117] Karan, s. 337

[118] Akıncı, *Eşya Taşımacılığı ve CMR,* s.107

[119] Adıgüzel, Taşıma Hukuku, s.170

of the Convention prevents a comprehensive interpretation of this special case of nonliability. The Article stipulates that “This presumption shall not apply in the circumstances set out in Article 17, paragraph 4 (a), if there has been an abnormal shortage, or a loss of any package.” Basically, it will be determined whether the carrier can be released from the liability according to how much of the cargo is lost during carriage by open unsheeted vehicle. Therefore, while fourth paragraph of Article 17 of the Convention constitutes a presumption in favor of the carrier, third paragraph of Article 18 of the Convention constitutes a presumption in favor of the sender. In this way, the presumption of nonliability of the carrier may be confuted. A similar regulation with Article 18/3 of the CMR Convention is found in the second paragraph of Article 878 of TCC. It is stated in TCC that special cases of nonliability do not constitute a presumption in case of extraordinary damage and loss.

Unlike the Convention, it is stated in the 3rd paragraph of Article 878 of TCC that if the loss, damage, or delay is caused by the carrier's failure to comply with the sender's specific instructions regarding the carriage of goods, the carrier cannot be relieved of liability by asserting carriage is fulfilled by open sheeted vehicle. In the aforementioned Article of relevant Code, different from the instructions regarding general liability, the specific instructions regarding carriage by open unsheeted vehicle are expressed. The specific instruction should be concrete and understandable. Proceeding to carry despite weather condition, packing the goods in a specific way can be given as examples of concrete instructions regarding carriage by open unsheeted vehicle.[120] It should also be noted that failure to comply with the carrier's specific instructions is not regulated as an exemption from liability under the CMR Convention.[121]

[120] a.g.e, s.171

[121] Mertol Can, *CMR ve Alman Ticaret Kanunu Hükümleri ile Mukayeseli Olarak Türk Taşıma Hukukunun Genel Esasları,* (Ankara: İmaj Yayıncılık, 2017), s.93

As a general rule, pursuant to Article 868 of TCC, if the given instruction is inconvenient for the carrier's operation or it brings with a threat of damage to the cargoes of other senders and consignees, it should be noted that the carrier is not obliged to fulfill the instructions. In addition, the carrier is not obliged to comply with specific instructions that is not possible to fulfill, which will endanger the safety of the carriage work or other cargoes.[122]

B. The Lack or Defective Condition of Packing

In subparagraph (b) of paragraph 4 of Article 17 of the Convention, the carrier is exempted from liability in case the carried goods are damaged due to the lack of packaging or incomplete packaging. Likewise, the case of carrier’s nonliability due to insufficient or incomplete packaging is regulated in the first paragraph of Article 878 of TCC. Relevant case of nonliability will find application in goods which need to be packaged due to their nature. Therefore, it is not possible to assert this nonliability case for goods which can be carried without packaging.[123]

Pursuant to Article 862 of TCC, the sender is required to deliver the goods to the carrier by packing them sufficiently to avoid damages during carriage. Parties may decide that the goods will be packed by the carrier, or the goods will be carried without

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[122] Adıgüzel, *Taşıma Hukuku,* s.171

[123] Aydın, s. 78

packing.[124] Likewise, Article 10 of the Convention holds the sender liable if the goods are damaged due to insufficient or incomplete packaging.

In order for the carrier to be relieved of liability due to lack or incomplete packaging, it is necessary to include the visible packaging deficiencies on the consignment note while receiving the goods. Otherwise, a presumption will be constituted regarding sufficient packaging in favor of the sender and the sender will lose his right to claim compensation.[125] The sufficiency of packaging is determined by considering the quality of the goods carried, the length of the road, weather conditions, and road conditions.[126]

On contrary with the carrier's claim that the damage was caused by insufficient packaging, the sender may claim that the carrier is liable by proving that the goods can be carried undamaged in its current packaging and that there is no causal link between the damage and packaging.[127]

C. Handling, Loading, Stowage or Unloading of the Goods by the Claimant

In subparagraph (c) of paragraph 4 of Article 17 of the Convention, the carrier is exempt from liability for damages that occur during the handling, loading, stowage or unloading of the goods by the sender, the consignee or the person acting on their behalf. Likewise, this special case of nonliability is regulated in the first paragraph of Article 878

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[124] a.g.e., s.76

[125] a.g.e., s.77

[126] Akıncı, *Eşya Taşımacılığı ve CMR,* s.108

[127] Kaya, *Sorumluluğun Esasları (II),* s. 257

of TCC. Unlike the CMR Convention, this special case of nonliability can also be asserted in case of damages caused by delay as well as damages and loss in accordance with TCC.

In this special case of nonliability, the carrier does not need to prove that the damage occurred at the processes specified in the aforementioned Article of the Convention but must only show that the damage was caused by these situations.[128] It is not sought whether the sender, the consignee and person acting on their behalf are at fault. In cases which the carrier shows the damage is caused by the special cases of nonliability stated in Article 878 of TCC and paragraph 2 of Article 18 of the Convention, the presumptive evidence principle regarding liability of the claimant unless otherwise proven, is a valid principle for such case of nonliability as well. The claimant must prove that his actions were duly performed.[129]

Both the damages that occurring during handling, loading, stowage or unloading processes, and the damages that show effect during carriage despite of occurring in said processes are within the scope of this nonliability.[130] In addition, the carrier may claim this special nonliability case not only if handling, loading, stowage, or unloading are made incorrectly but also if they could not be completed.[131] However, if the handling, loading, stowage or unloading is done once by the sender or the consignee and the carrier has to

[128] Akıncı, *Eşya Taşımacılığı ve CMR,* s.109

[129] a.g.e., s. 111

[130] Aydın, s.80

[131] Adıgüzel, *Taşıma Hukuku,* s.173

reload or unload the goods during carriage, he / she cannot assert such special cases of nonliability.[132]

In addition, it is necessary to accept that the carrier has an obligation to check the cargoes during the execution of the handling, loading, stowage or unloading processes. Checking whether the loading affects the vehicle's stability can be given as example of the control obligation. However, this obligation is not a detailed investigation obligation such as whether these processes will cause damage to the carried goods.[133] In case of breach of such obligations, the carrier and the claimant will be jointly liable for the damage, pursuant to paragraph 5 of Article 17 of the Convention.[134]

Likewise, in the decision of the Supreme Court Assembly of Civil Chambers dated 13.05.2015, the carrier's violation of its obligation to control obvious loading or unloading deficiencies was found to be defective. According to the decision, stowing and loading of the goods subject to the case does not require special or technical knowledge. In addition, as it can be clearly seen from the photographs in the file, that the loading was made incorrectly can be seen with the naked eye, and the determination of this situation does not require expertise or research. Since the defendant carrier has to act prudently, the court ruled that the defendant carrier has violated its duty of supervision in terms of loading and stowage and that the carrier must be deemed to be at fault. (Merits No. 2013/2206, Decision No. 2015/1324)

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[132] Aydın, s. 83; Arkan, *Taşıyıcının Sorumluluğu,* s. 121

[133] Arkan, *Taşıyıcının Sorumluluğu,* s. 124; Aydın, s. 85

[134] a.y.

D. Nature of the Goods

Pursuant to subparagraph (d) of paragraph 4 of Article 17 of the Convention, in case of loss or damage in goods due to reasons arising from nature of the carried goods such as *breakage, rust, decay, desiccation, leakage, normal wastage,* etc., the carrier will be released from liability. Likewise, this special case of nonliability is regulated in the first paragraph of Article 878 of TCC. The reasons stated in the Article are not limited in number, and this special case of nonliability can also be claimed for other reasons arising from the nature of the goods.[135]

The case of the goods causing damage due to their nature and the case of inherent vice of the goods, which is regulated in Article 17/2 of the CMR Convention and Article 875/2 of TCC are different from each other. In fact, inherent vice of the goods is caused by manufacturing defect and pre-transportation deficiencies.[136] However, the damage caused by the nature of the goods is the result of natural characteristic of the carried goods and such damages can always occur. Distinguishing between these two cases of nonliability, it is considered whether extra protection measures have been taken for the carriage of the goods.[137]

If the carrier proves that the goods are damaged due to their natural characteristic, he / she will be relieved of liability. However, pursuant to the fourth paragraph of Article

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[135] Adıgüzel, *Taşıma Hukuku,* s. 174

[136] a.y.

[137] Aydın, s.87; Kaya, *Sorumluluğun Esasları (II),* s. 259

18 of the Convention, the carrier remains liable if the sender or consignee proves that the damage was not caused by this reason.

In addition, paragraph 4 of the same Article limits the carrier's ability to claim the special case of nonliability regarding nature of the goods, in carriages with refrigerated vehicles. In other words, the carrier will not be able to claim such special case of irresponsibility unless he / she proves that he / she showed the care expected from him and fulfilled the instructions given to him. A similar regulation is also included in the fourth paragraph of Article 878 of TCC. According to TCC, if the carrier is under a special obligation to protect the goods against heat, cold, temperature changes, humidity, vibrations, or similar effects pursuant to carriage contract, the carrier could only claim the nonliability situation arising from the nature of goods in the case he / she has taken all the precautions in his power for the selection, maintenance and usage of the necessary equipment and has complied with the specific instructions.

In this case of nonliability, it is necessary to examine the wastage situation particularly. In the related TCC provision, such is expressed as *"the natural quality of the goods that causes them to be easily damaged through ordinary wastage"*. Wastage is the decrease in the carried goods due to natural causes such as drying, evaporation and spillage. In case of wastage of the carried goods, the change must not be caused by an external effect.[138] Therefore, if the goods are wasted due to other reasons such as poor packaging, damage during loading or unloading, apart from its natural characteristic, the case of wastage is not in question.[139] According to the general acceptance of the practice, waste of 3% for liquid goods and 2% for solids is considered reasonable. In case of

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[138] Hacı Kara, *Rotterdam Kurallarına Göre Taşıyanın Zıya, Hasar Veya Gecikmeden Kaynaklanan Zararlardan Sorumluluğu,* 2.bs (İstanbul: Legal Yayınları, 2018), s.205

[139] Adıgüzel, *Taşıma Hukuku,* s.177

wastage above these rates, the carrier will not be able to claim special nonliability case regarding the natural characteristic of the carried goods.[140]

E. Insufficiency or Inadequacy of Marks or Numbers on the Packages

In subparagraph (e) of paragraph 4 of Article 17 of the Convention, the carrier is exempt from liability for losses and damages due to insufficiency or inadequacy of marks or numbers on the packages. Likewise, this special case of nonliability is regulated in the first paragraph of Article 878 of TCC.

Although there is no clear provision in the Convention that the process of marking and numbering of the carried goods must be done by the sender, it can be understood from paragraphs b and e of the Article 17.[141] Unlike the CMR Convention, TCC clearly regulates that this process will be done by the sender in the Article 878.

In order for the carrier to claim the special case of nonliability, the marking and numbering process must not be carried out by himself. In addition, in this special case of nonliability, it is sufficient to carry out the marking and numbering process incorrectly in order to avoid the liability of the carrier. It is not examined whether the sender is at fault or not. However, there must be a causal link between the sign and numbering process and the damage to the carried goods.[142]

[140] a.y.

[141] a.y., Özdemir, s.255

[142] a.g.e., s.256; Adıgüzel, *Taşıma Hukuku,* s.178

The concept of insufficient marking covers the cases of incorrect, insufficient marking and no marking. Giving wrong information, specifying the wrong place of delivery, inconsistent marking with the documents or illegible markings can be given as examples.[143] Marking and numbering are important to avoid mixing cargoes belonging to more than one sender. With the marking, it is ensured that the cargoes are distinguished from each other, and possible damages are prevented.[144]

According to the first paragraph of Article 8 of the Convention, the carrier is liable of checking the correctness of the number of packages and the markings and numbers on the cargo in the consignment note. In case of breach of the obligation, it will be presumed that the markings and numbers on the cargo are in line with the information on the consignment note pursuant to Article 9 of the Convention.[145] Likewise, paragraph 2 of Article 858 states that the consignment note signed by both parties creates a presumption that the goods and their packaging are in good external appearance at the time of delivery of the goods to the carrier and that the number, markings, and numbers of the packages carried complies with the consignment note.

However, the presumption is not applied in terms of the special case of nonliability regarding inadequate marking. The mentioned special case of nonliability is claimed in cases where the cargoes are delivered to the wrong person due to the incorrect or

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[143] A. Alber Yüce, "Karayolu Taşımalarında Taşıyıcının Zıya, Hasar ve Gecikmeden Doğan Sorumluluktan Kurtulmasında Özel Sebepler", *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi* c. 25, S.1 Sayı 1, (İstanbul 2019), s. 379

[144] Karan, s. 345

[145] Kaya, *Sorumluluğun Esasları (II)*, s. 260; Özdemir, s. 256

inadequate markings and numbers on cargoes or in cases where the loading is done incorrectly for the same reason. Within the scope of the special case of nonliability regarding inadequate marking, the carrier is only obliged to check the outward appearance of the goods when receiving them. The control obligation does not require in-depth examination. It is a simple check of the number and markings on the goods with the statements in the consignment note.[146] The carrier shall prove that the faults causing the damage are included in the consignment note or contract.

In addition, the carrier may claim the special case of nonliability due to inadequate marking, as well as the general case of nonliability in the second paragraph of Article 17 of the Convention and the second paragraph of Article 858 of TCC.[147]

F. The Carriage of Livestock

In subparagraph (f) of paragraph 4 of Article 17 of the Convention, the carrier is exempt from liability for losses and damages in the carriages of livestock. Likewise, this special case of nonliability is regulated in the first paragraph of Article 878 of TCC.

Carriage of livestock carries holds risks such as injury to the carried animals due to sudden braking or damage due to lack of air and thirst.[148] Since carriages of livestock is more risky than other cargoes, the provision of the Convention made it possible for the

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[146] Adıgüzel, *Taşıma Hukuku,* s. 178; Aydın, s. 91

[147] Akıncı, *Eşya Taşımacılığı ve CMR,* s. 113

[148] Sabih Arkan, *Demiryoluyla Yapılan Uluslararası Eşya Taşımaları,* (Ankara: Banka ve Ticaret Hukuku Araştırma Enstitüsü, 1987), s. 116

carrier to be relieved of liability in this kind of carriages. The carrier must prove that he / she took all the measures expected from him / her, the damage has occurred despite acting in accordance with the instructions and the damage was caused by the carriage of live animals to relieve of liability. In this case, it is possible for the carrier to claim liability by proving that the damage was not caused by the carriage of livestock, pursuant to paragraph 2 of Article 18 of the Convention.[149]

[149] Aydın, s.93; Kaya, *Sorumluluğun Esasları (II)*, s. 260

CHAPTER III

CARRIER'S LIABILITY INSURANCE UNDER CMR CONVENTION

1 - CMR INSURANCES

1.1 General Information About CMR Insurances

CMR Insurance is a kind of insurance which covers the legal liability of the carrier engaged in the international carriage by road arising from the damage and loss that may occur in the goods during carriage, within limits and limited to the conditions determined in the policy pursuant to the provisions of the CMR Convention.[150] In this kind of insurance, the insured is the carrier; whereas the insured interest is the legal/financial liability of the carrier, and the insurance provides assurance solely in the international carriages of goods by road in vehicle for reward. Insurance is a contract in which the risk is transferred from the insured party to the insurer. The carrier's liability insurance, briefly

[150] Kahya, s. 28

called CMR insurance, is a kind of insurance in which the risks of the carrier's liability under the Convention are transferred to the insurer.

The liability of the carrier, which is a party to a contract of carriage subject to CMR Convention, is as both the insured and the insurant is covered with this type of insurance. The subject of CMR Insurance is indemnified damages arising from the liability of the carrier under the Convention.

CMR Insurances do not provide coverage for every risk causing carrier's liability. To determine the risks in the scope of CMR insurance, the special conditions of CMR insurance policy should be examined. In terms of the scope of the coverage, the amount of liability determined according to the CMR Convention, and the limits of this liability are considered in the policy. CMR Insurance contracts cannot cover any other liability of the carrier except for the liabilities specified in the CMR Convention, though it is possible for parties to conclude an agreement to cover a part of the liabilities in the Convention and exclude some of them.[151]

It should be noted that, according to Article 41 of the CMR Convention, any special conditions that violate the Convention's provisions are void. However, the invalidity of a special condition does not affect the validity of other special conditions. According to the second paragraph of the same Article, the conditions that narrow the insurance indemnity conditions against the carrier or change the burden of proof are null and void.

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[151] Tuğba Çiftçi, "CMR Sigortasında Himaye", (Yayınlanmamış Yüksek Lisans Tezi, Ataürk Üniversitesi, 2009), s.16

1.2 Provisions Applicable to CMR Insurance Contract

While determining the law to be applied to CMR Insurance, the conflict of laws rules in the CMR Convention must be applied first. However, rules regarding conflict of laws are not regulated for each dispute. Therefore, these rules apply only to matters regulated in the Convention. The referred law is the law to be applied by the judge limited to relevant subject. For example, in Article 16/5 of the Convention, stipulates that *"The procedure in the case of sale shall be determined by the law or custom of the place where the goods are situated."* In accordance with this Article, the law of the place where the goods are located shall apply, limited to the disputes regarding the sale.

When the provisions of the CMR Convention are insufficient to resolve the dispute, national law must be applied. However, since the Convention is an international convention, determining the national law to be applied in cases where there is a foreign element in disputes arising from the provisions of the CMR Convention also poses a separate problem. In this case, the applicable law must be determined according to the conflict of laws rules of the country where the proceedings are held. In terms of Turkish Law, the conflict of laws rules is included in the International Private and Civil Procedure Code No. 5718.

The Law to be applied in legal transactions regarding private Law with a foreign element, international jurisdiction of Turkish courts, recognition, and enforcement of foreign judgments are specified in the first Article of International Private and Civil Procedure Law No. 5718. Although the relevant Article regulates application area of the Law, it does not include the definition of foreign elements. However, the lawmaker exemplified foreign elements with expressions such as National Law, Law of the Country where the goods are located, Law of Habitual Residence, Law of the Country where the tortious act was committed.[152]

Unlike the International Private and Procedure Law, and for the first time in Turkish Law, the foreign element was defined in the International Arbitration Law No. 4686.[153] According to the second Article of the Law, the existence of any of the following situations indicates that the dispute has a foreign element, and arbitration is considered as international.[154]

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[152] Ersin Erdoğan, "Medeni Usul Hukukunda Yabancılık Unsuru ve Sonuçları", (Doktora Tezi, İhsan Doğramacı Bilkent Üniversitesi, 2015), s.9

[153] Ziya Akıncı, *Milletlerarası Tahkim,* (İstanbul: Vedat Kitapçılık, 2013), s. 60

[154] *"Article 2 Foreign Element*

1. where the parties to the arbitration agreement have their domiciles or habitual residences or places of business in different States.

2. where one of the following is situated outside the State in which the parties have their domiciles or habitual residences or places of business.

a. the place of arbitration, which is determined in, or pursuant to, the arbitration agreement; [or]

b. a place where a substantial part of the obligations arising from the underlying contract is performed or a place where the dispute has the closest connection.

3. where a shareholder of the company which is a party to the underlying contract that constitutes the basis for the arbitration agreement has brought foreign capital [into Turkey] in accordance with the laws concerning the encouragement of foreign capital or where a loan and/or guarantee agreement needs to be signed for the execution of the underlying contract.

4. where, in accordance with the underlying contract or with the underlying legal relationship, the movement of capital or of goods shall be made from one country to another."

The foreign element is defined in the Turkish Doctrine as the element that makes any legal event or relationship related to at least one or more legal system, apart from the legal system of the state to which the judge is a member.[155]

As can be seen from the definition, it is sufficient for the legal event or legal relationship to become somehow connected with the foreign legal system for the existence of the element of foreignness. The cases listed below can be given as examples of foreign elements in terms of Law No. 5718:

- in terms of contracts, the subject, place or place of performance of the contract is in a foreign country or one of the parties to the contract is foreign,
- in terms of marriage, one of the spouses is a foreign national or the marriage takes place in a foreign country,
- in terms of international procedural law, recognition, and enforcement of foreign judgments,
- in terms of torts, the wrongful act takes place in a foreign country, etc.[156]

Based on the examples, it can be said that foreign elements arise in two ways, in terms of person or place. When the foreign element in CMR Insurance contracts is examined, it can be said that there is a foreign element in the examples below:

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155 Cemal Şanlı, Emre Esen, İnci Ataman Figanmeşe, *Milletlerarası Özel Hukuk,* 6.bs. (İstanbul: Vedat Kitapçılık, 2018), s.5

156 Aysel Çelikel ve B. Bahadır Erdem, *Milletlerarası Özel Hukuk,* 8. bs. (İstanbul: Beta Yayınevi, 2009), s.9

- In terms of CMR insurance contract, the contract is concluded in a foreign country, the carrier's performance of premium payment in a foreign country, the insurer's performance of insurance indemnity payment in a foreign country, the parties of the insurance contract agree on the application of a foreign law to the contract,
- In terms of carrier, the carrier is foreign, the carrier has a residence or domicile in a foreign country,
- In terms of insurer, the insurance company is a foreign or operates in a foreign country,
- In terms of risk, the event giving rise to liability under the CMR Convention takes place in a foreign country, etc.[157]

The presence or absence of a foreign element in a CMR insurance contract is important in terms of the provisions to be applied to the contract.

The provisions to be applied to CMR insurance can be listed as follows: According to Turkish Law, the provisions to be applied when a dispute arises regarding a CMR insurance contract containing a foreign element for Turkish Law, respectively; The provisions of CMR insurance contract (general and special conditions), the provisions of the CMR Convention, default rules of the country’s Law which is to be determined by International Private and Civil Procedure Law No. 5718. Thus, for example, if the determined Law is Turkish Law, Code of Obligations No. 6098, Turkish Commercial Code No. 6102, Turkish Civil Code No. 4721, Insurance Law No. 5684 will be applied to the dispute.

[157] Çiftçi, s.19

In Turkish law, the Code of Obligations in terms of complementary provisions when there is no provision in the commercial law pursuant to Article 1294 of the commercial law, the Turkish Commercial Code in terms of having provisions regarding insurance contracts in Article 850 and later, the Turkish Civil Code in terms of the implementation of the customary law, the Insurance Law No. 5684 in terms of having special provisions regarding insurance and arbitration in insurance will find application area.

There is no general condition approved by the Undersecretariat of Treasury pursuant to Article 11 of the Insurance Law No. 5684 for CMR Insurances, which provides unity of practice by insurance companies.[158] In practice, there are general and special conditions determined by the parties of insurance contract[159].

For the disputes arising from CMR Insurance contracts, which does not include a foreign element for Turkish Law, respectively; The provisions of CMR insurance contract (general and special conditions), the provisions of the CMR Convention are applied.

As explained above, it is important to determine the national law to be applied. The law to be applied to disputes involving foreign element in Turkish law is determined

158 Hacı Kara, "Taşıma İşleri Organizatörü'nün Karayolu Taşımacılığındaki Rolü ve CMR Sigorta Sözleşmesi" İstanbul Medeniyet Üniversitesi Hukuk Fakültesi Dergisi, C. 6, S. 10, s. 42

159 Example of the scope of CMR insurance general conditions prepared by the parties: http://www.aktiv.com.tr/cmr-sigortasi-genel-sartlari Last Access Date: 24.01.2022

according to Law No. 5718. The provisions regarding CMR Insurance contract, which is a private law contractual relationship, are included in Article 24 of this law.

Article 24 of the Law No. 5718 stipulates that the debt relations arising from contracts are subject to the law explicitly chosen by the parties. The second paragraph of the same Article states that the parties can decide that the chosen law will be applied to the whole or a part of the contract. And the third paragraph states that the choice of law can always be made or changed by the parties and that the choice of law after the conclusion of the contract is valid retrospectively without prejudice to the rights of third parties. According to the fourth paragraph[160], in the case parties do not determine any law, the most connected law to the contract will be applied to the dispute.

Pursuant to this Article of law, the most related law to the contract is determined according to the habitual residence or place of residence in different situations of the characteristic performance debtor. Although there is no definition of the characteristic debtor in the law, it is defined as the performance that gives the contract its legal character and marks it in Turkish Doctrine.[161] Based on this definition, it can be said that the characteristic performance in insurance contracts is the obligation of the insurer to pay insurance indemnify. However, as stated in the last sentence of the law, it must be

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[160] *"Article 24-(4) If the parties have not explicitly designated any law, the relation arising from the contract will be governed by the most connected law to the contract. This law is accepted to be the law of the habitual residence (at the moment of the conclusion of contract) of the debtor of the characteristic performance; the law of the workplace or (in absence of a workplace) the law of the residence of the abovementioned debtor in case the contract is concluded as a result of commercial and professional activities; in case that the debtor has multiple workplaces, the law of the workplace which is the most tightly related to the contract. Nevertheless, considering the state of all affairs if there is a law more tightly related to the contract, that particular law shall govern."*

[161] Şanlı, s.283.

considered that if there is a law more closely related to the contract according to all the circumstances of the case, the contract will be subject to this law.

In a case heard in Turkish courts, the judge will conclude the dispute according to the rules of national law to be determined according to Law No. 5718. It must be emphasized that, according to the second Article of the same law, if the provisions of foreign law regarding the dispute cannot be determined, Turkish law will be applied to the dispute.

1.3 Conditions of Application of the CMR Convention

The Carrier’s liability can be covered by CMR insurance, only in carriages that the CMR Convention is applied. However, some conditions are necessary for the application of the Convention. According to Article 1 of the Convention, certain conditions are necessary for a carriage contract to be evaluated under the Convention. These conditions are as follows: the existence of goods carriage contract in exchange for money, carriage by road in certain vehicles, the places where the goods are received, and where they are to be delivered are located in two different countries that at least one of them is a party to the Convention.

A. Existence of a Carriage Contract for Reward

Article 1/1 of the CMR Convention states that the Convention shall apply to *“every contract for the carriage of goods by road in vehicles for reward,”* irrespective of the place of residence and the nationality of the parties. As stated in this provision, the existence of a contract of carriage for reward is necessary for the application of the Convention.

Within the scope of the CMR Convention, the contract of carriage must be in return for a reward. Hence, also possible to provide an interest other than money, which can measure in cash, in return for carriage. However, it is necessary to provide equivalence between the interest and the carriage activity.[162]

B. The Subject of the Carriage Must Be Goods

In order for a contract of carriage to be considered within the scope of the CMR Convention, the thing being carried must be goods. In Article 3 of Road Transport Code No. 4925, Goods are defined as any animate or inanimate object other than a human being that can be transported. There is no definition of goods in the Convention. However, it is regulated in paragraph 4 of Article 1 of the Convention that the carriage subjects that are not considered as goods are the carriages as international postal, funeral, furniture.

In the doctrine of Turkish Carriage Law, the concept of goods is defined as living or inanimate objects that have tangible property, can be touched, controlled, taken from one place to another, or brought back to the same place.[163]

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[162] Özdemir, s.21; Aydın, s.9

[163] İsmail Doğanay, *Türk Ticaret Kanunu Şerhi,* C.2 (İstanbul: Beta Basım Yayın, 2004), s. 2214; Karan, s.23; Atabek, s. 26

It is not necessary for the goods to be the subject of the contract of carriage to exist at the time the contract is concluded; the goods to be manufactured in a later period may also be the subject of the contract of carriage within the scope of the CMR Convention. In this case, carriages with no economic value or low economic value, such as garbage, old goods, can also be evaluated within the scope of the Convention.[164]

C. Carriage Must Be In-Vehicle by Road

The second paragraph of Article 1 of the CMR Convention referred to Article 4 of the Road Traffic and Road Signs and Signals Agreements and Conventions regarding the scope of the concept of vehicle.[165] Motor vehicle, articulated vehicle, semi-trailer, trailer fall under the concept of "vehicle" under the CMR Convention.

Provisions of the CMR Convention cover only carriage by road. The concept of "road" is not defined in the Convention. Therefore, it is possible to refer to definitions in other laws. The concept of road is defined as *"any way open to the public for the circulation of vehicles"* in Article 4 of the Road Traffic and Road Signs and Signals Agreements and Conventions. In terms of Turkish Law, the definition of the road is included in Article 3 of Road Traffic Act No. 2918. According to the definition: *"The*

[164] Kaya, *Sorumluluğun Esasları (I)*, s. 333, Aydın, s. 11

[165] *"Motor vehicle means any self-propelled vehicle normally used for the transport of persons or goods upon a road, other than vehicles running on rails or connected to electric conductors. Any state bound by annex 1 shall exclude from this definition cycles fitted with an auxiliary engine of the type described in that annex; Articulated vehicle means any motor vehicle with a trailer having no front axle and so attached that part of the trailer is superimposed upon the motor vehicle, and a substantial part of the weight of the trailer and of its load is borne by the motor vehicle. Such a trailer shall be called a semi-trailer; Trailer means any vehicle designed to be drawn by a motor vehicle;"*

road is any areas, strip of land, and bridges open to the public for traffic." Besides, Article 2 states that provisions of the Law may also be applied in some areas other than the road.[166]

Under the aforementioned Article of law, all roads used by the public are within the definition of road. It is not important whether the vehicle traffic on the road is allowed by the public administration or not, it is sufficient to use it for this purpose. It should also be noted that there is no difference between the road surface being asphalt, concrete, stone, or soil. In this respect, village, forest, mountain, connecting fields, and plateau roads are also included in the scope of the road.

In addition to these, in accordance with Article 104 of Law No. 2918, galleries, parking lots, repair shops, and similar places, in other words, places that carry out professional activities related to motor vehicles, racetracks by Article 105, places where state vehicles are located due to duty as per Article 106, was also considered as a road. These places specified in the relevant law Articles are also subject to the provisions of the law.

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[166] *"The second article of the Law No. 2918 stipulates that the provisions of the Law are also applied in:*

a) Those that are open to the public from the areas outside the road, and places used for road vehicle traffic in parks, gardens, parking lots, garages, passenger and goods terminals, service, and fuel stations,

b) On the access-controlled roads and on the public sections of the roads that are paid for, and of public service vehicles on sea, lake and rivers connecting a certain road, in parts reserved for road vehicles

Although it is not included in the definition of road, places open to the use of general traffic are considered as road."

Moreover, in Turkish Law, the Supreme Court has given a decision to expand the scope of the road. In the decision of the 17th Civil Chamber of the Supreme Court (Merits No 2016/8717, Decision No 2019/4077) dated 03/04/2019, It was emphasized that the traffic accident does not necessarily have to occur on the road. However, if it occurs in an area that is a place connected with the road, it will be considered as it happened on the road. In the decision of the Supreme Court, decided that the damage caused by a traffic accident in the field is covered by traffic insurance. The Supreme Court justified its decision that the field has a connection with the road and therefore the place where the accident occurred is from the places considered as roads.

Article 2 of the CMR Convention has expanded the scope of the Convention by reserving the provision of Article 14 on the carriage barrier. Pursuant to the Article 2, it is stated that the provisions of the Convention will also apply to the carriages made without unloading the cargo by sea, rail, river, canal, or air in a part of the carriage except the cases included in Article 14.

However, the 11th Civil Chamber of the Supreme Court of Appeals of Turkey has adopted a different view one of its decisions. According to the decision, the commodity belonging to the plaintiff was loaded on the defendant's road vehicle and the transport vehicle was transported by the ship belonging to the non-litigation company before the cargo was unloaded. As a result of the transportation made in this way, the transported commodity was lost. Since the defendant's act or omission was not detected at the outbreak of the fire and the commodity was formed during the transportation on the ship, the liability of the defendant road carrier must be determined by accepting it as if a contract of carriage by sea was concluded. (Merits No. 2014/18962, Decision No. 2015/13905).

In terms of English Law, the Supreme Court ruled that the provisions of the Convention shall not apply in case of damage to the goods while the trailer is loaded onto the ship at the canal crossing. According to the decision, since the beginning of the loading phase of the trailer loaded with goods is a sea transportation process according to the Hague Rules, the Hague Rules will find an application area.[167]

D. Carriage Must Take Place Between Two Different Countries

According to the first Article of the CMR Convention, another condition for application of the Convention is that the place where the goods subject to carriage is received and the place where they will be delivered must be in different countries. In terms of fulfilling this condition, the citizenships, and places of residence of the parties to the contract of carriage have no effect.

It is necessary for the implementation of the Convention not only that the place where the goods subject to transport is received and the place to be delivered are in different countries, but also that at least one of these countries is a party to the CMR Convention. Since one of the parties to the contract of carriage is sufficient to be a party to the Convention, it is not a condition for the implementation of the contract whether the other country is a party or not. We should also emphasize that, according to the third paragraph of the first Article of the CMR Convention; The provisions of the Convention are also applied in cases where a transport falling within the scope of application is carried out by the state or public institutions or organizations.

[167] Thermo Engineers Ltd and Anhydro A/S v. Ferrymasters Ltd, [1981] 1 Lloyd's Rep. 200.

1.4. Parties of CMR Insurance Contract

1.4.1. Insurer

Since CMR insurance contract is a type of insurance contract, one of the parties to the contract is the insurer. The insurer is the person who undertakes to bear the risk during the term of the contract in return for the premium within the scope of the provisions of the insurance contract.[168]

The conditions required to carry out insurance activities are regulated in the Insurance Law No. 5684. In accordance with the law, only insurance companies established as joint stock companies or cooperative companies can carry out insurance activities in Turkey.[169]

In addition, it is possible for foreign insurance companies or reinsurance companies to operate in Turkey by opening branches. Pursuant to the first Article of cabinet decree regarding international activities in the insurance sector, it is obligatory that the paid-in capital allocated to Turkey by the companies that will open branches should not be less than the amount determined for insurance companies and reinsurance

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[168] Şaban Kayıhan ve Ömer Bağcı, *Türk Özel Sigorta Hukuku Dersleri,* 3. Bs. (Kocaeli: Umuttepe Yayınları, 2018), s.135

[169] Işıl Ulaş, *Uygulamalı Zarar Sigortaları Hukuku,* 8. Bs. (Ankara: Turhan Kitabevi, 2012), s. 14

companies established in Turkey, and that they must not be prohibited from insurance activity in the countries in which they operate.[170]

1.4.2. The Carrier

A. In the Position of Insurant

The insurant is the person who has concluded the insurance contract with the insurer, is the other party of the insurance contract and is under the obligation to pay premiums.[171] The insurant can be a real person or a legal person. Rights and liabilities arising from the insurance contract belong to the insurant. In any case, while the debts belong to the insured, it is possible to transfer the rights to third parties. In simple terms, the insurant can insure the interests of a third party as well as its own interests.

In CMR insurances, it is the carrier who concludes the insurance contract and is in the position of the insurant. The carrier must carry out carriage work under a contract of carriage to which the provisions of the Convention apply.

[170] Sigortacılık Sektöründeki Uluslararası Faaliyetlere İlişkin Karar (BKK. 2007/12467-06.07.2007, RG. 03.08.2007/26602)

[171] Tamer Bozkurt, Sigorta Hukuku, 9. Bs. (İstanbul: On İki Levha Yayıncılık, 2016), s. 23

B. In the Position of Insured

The insured is the person whose interests are secured by the insurance contract. In insurance contracts, insurant and insured are often the same person. For example, a person who insures the house he / she owns, has the title of the insurant since he / she has concluded the insurance contract and he / she has a title of the insured since he / she is the beneficiary.[172]

The insured and the insurant can be different persons as well as the same persons. In this case, the insurance contract is in the form of a contract for the benefit of the third party. In such insurance contracts, the debts arising from the insurance contract are under the liability of the insurant. However, in case of materialization of the risk, the insured has the right to demand compensation.

The carrier has a title of both the insured and the insured under the insurance contract. In carriages by road, carriage is usually carried out by sub-carrier, auxiliary carrier, or successive carrier. In Article 3 of the CMR Convention and Article 879 of TCC, it is regulated that the carrier is liable for the act of these persons. Also, in the case carriage is carried out by the carrier's assistants, the carrier still has the title of both the insured and the insurant. Likewise, in the definition of carrier in Article 850 of TCC, it is stipulated to undertake the carriage work in return for a fee. However, the condition of carrying out the carriage by himself is not sought.

[172] Ali Bozer, Sigorta Hukuku Genel Hükümler-Bazı Sigorta Türleri, (Ankara: Seçkin Yayıncılık, 2004), s.29;

1.5. The Principle of Interest

1.5.1. General Information

The principle of interest in insurance law is expressed in Article 1401 of TCC. According to this Article of the law, a person who does not have a monetary interest in the materialization of the risk cannot take out insurance.

Insurance interest is any kind of legal relationship that is included possibility of material damage due to a dangerous event stipulated in the insurance contract between a person and his/her assets.[173] Based on the definition, it can be said that the concept of interest is relevant for loss insurances.[174] Likewise, Article 1401 of TCC also indicates that interest is in question for loss insurances. In the definition in the Article of the law, the element of interest is mentioned only in terms of loss insurances. For example, if a house is insured, the insured is not the house itself, but an economic interest on the house. In this example, the interest may be the economic interest of the pledgee or the owner of the house.[175] Likewise, Articles 1401 and 1453 of TCC stipulate that the subject of insurance is not the property but the interest on the property.

The determination of the subject of insurance as the interest on the property instead of the property, guarantees the owner and other persons who have a monetary interest on

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[173] İsmet Sayhan, *Sigorta Sözleşmelerinin Konusu,* (Ankara: Yetkin Yayınları, 2001), s.41; Bozkurt, s.41

[174] Sayhan, s. 41

[175] Ernst Hirsch, Deniz Ticareti ve Sigorta Hukuku, (Ankara, 1945), s. 177.

the property. Therefore, the owner, renter, beneficial owner, or pledgee will be able to insure their interest on the property.[176]

It is possible to establish an insurance contract on only a part of a property or only a part of a right related to that property. Likewise, it is possible to establish an insurance contract for beneficiaries, limited to the part they have an interest in.[177] This situation is called “partial benefit”. Joint ownership can be given as an example of partial interest.[178] If the owner of partial interest in a property has insured more than the part that belongs to him, the excess part of the insurance is considered to be made in favor of the persons who have the same interest as the insurant, pursuant to TCC 1455. It should be emphasized that the interest may also be related to the liabilities as well as active assets.

1.5.2 Insurable Interest

Insurance Interest can simply be defined as the possibility of incurring loss. However, it is not possible to insure every possibility of loss. Insurable interest is the interest that can be subject to an insurance contract. For an interest to be insured, it must have economic value, be legally valid, and have a current or future interest.

[176] a.g.e., s.88

[177] Ulaş, s..44

[178] Sayhan, s.94

In order for an interest to be insured, it must first have a monetary value. The insurance interest can be a tangible asset such as a house, a car, or it can also be other monetary values such as compensation for damage to a third party, loss of profit.[179]

In addition to the economic value, the insured interest must be legitimate and not contrary to the law and morality.[180] For example, it is not possible to insure a contraband against damages during carriage.[181]

Besides legality and economic value, the insurable interest must exist at the time the contract is concluded. This interest must exist at the time of the conclusion of the contract and the parties must have agreed on the nature of the interest.[182]

Article 1408 of TCC stipulates that the insurance contract is invalid if the insured interest is not available at the time the insurance contract is made. The same Article of the law states that if the existing interest at the time of the contract is concluded, the contract will be invalid as soon as the interest eliminates.

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179 Mustafa Çeker, *6102 Sayılı Türk Ticaret Kanunu'na Göre Sigorta Hukuku,* 13.bs (Adana: Karahan Kitabevi, 2016), s.64

180 Bozer, s.30; Sayhan, s. 86

181 Çeker, s.64

182 Hirsch, s. 178.

In Article 1408, which regulates the absence of insurance interest, there is no distinction whether the absence of interest is known by the parties. However, this issue is related to the regulation of Article 1458. In the case insurance interest is eliminated due to materialization of risk and the parties had known that materialization of the risk, Article 1458 of TCC will find application. Unlike Article 1408, there is a distinction whether the materialization of risk is known by parties in Article 1458.

According to the first paragraph of Article 1458 of TCC, the contract is invalid if it is known by the insured at the time of conclusion of the contract that the risk has occurred or the possibility of its materialization has eliminated, provided that the insurer and the insured are aware of the insurance contract. Pursuant to the same Article of the law, in the case the insurant or the insured knows but is not known by the insurer that the risk has occurred, or the possibility of its materialization has eliminated, the insurer is entitled to the entire premium to be paid, not bound by the contract.

1.5.3. Insurable Interest in Terms of CMR Insurances

Article 1453 of TCC stipulates that person who have an interest in the materialization of the risk can secure this interest with property insurance. The concept of property insurance in the Article of the law is the insurance of the carried goods, which is the subject of the contract of carriage under the CMR Convention within the scope of risk in terms of CMR insurance. Dangerous incident occurring in the carried goods creates an insurable interest. Since there is an economic link between the carrier of the contract of carriage and the goods carried which is interest of CMR insurance contract, there is an insurable interest in the carrier's transfer of its liability that may arise from the contract of carriage under the CMR Convention to the insurer.

Since there is an economic link between the carrier of the carriage contract and the goods carried which is the element of interest of CMR insurance contract, there is an insurable interest in the transfer of carrier's liability that may arise from the carriage contract to the insurer. Moreover, in liability insurances, the interest is the transfer of the liability of the insured to the insurer.[183]

When the provisions of TCC regarding the lack of interest are applied to CMR insurances by analogy, the absence of an element of insurable interest, both when the contract is established and during the contract, will render the insurance contract null and void.

1.6. CMR Insurances from the Perspective of Turkish Insurance Law

It is possible to classify the insurance from different angles. According to TCC, Insurances are divided into two types as loss insurances and personal insurances in the sixth book of TCC, which regulates insurance law. Loss insurances are regulated in Articles from 1453 to 1486 and Personal insurances are regulated in Articles from 1487 to 1520 of TCC. There are two types of loss insurance as property insurance and liability insurance, whereas personal insurances are divided as life insurance, accident insurance and health insurance.

In period oTCC, a distinction was made between marine insurances and land insurances. Marine insurance insures ships and cargo against possible risks at sea. On the other hand, land insurance is a type of insurance that covers all risks outside the scope of

[183] Sayhan, s.92

marine insurances.[184] Although CMR insurances are evaluated within the scope of land insurances according to oTCC, the distinction between land insurances and marine insurances has been abandoned in TCC in force.

Although the CMR Convention is only applied to international carriage by road, the provisions of the Convention can be applied in the case a part of the carriage is carried out by sea or air. It is possible to cover the liability of carrier with CMR insurance in case the provisions of the Convention are applied to this type of carriage in which more than one carriage method is used together. However, it is not possible to cover the carrier's liability arising from a carriage for which the CMR Convention does not apply, with CMR Insurance.

In Doctrine, *Kender* has classified private insurances according to meeting the needs and the subject of the risk.[185] According to the distinction of meeting the needs, insurances are divided into two as compensation insurance (loss insurance) and fixed sum insurance.

In case of compensation for the damage caused by the risk covered by the insurance contract, compensation insurance is in question.[186] In compensation insurances, the materialization of the risk is not sufficient for the insurer's obligation to pay compensation. At the same time, the insured interest must be damaged due to the risk. In compensation insurance, it is essential to compensate the actual loss that occurs as a result

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[184] Kayıhan ve Bağcı, s. 48

[185] Rayegan Kender, *Türkiye'de Hususi Sigorta Hukuku,* 14.bs. (İstanbul: On İki Levha Yayıncılık, 2015), s. 208

[186] Bozkurt, s.7; Çeker, s. 18

of the materialization of the insured risk. For example, in fire insurances, the person who insures his/her property against the risk of fire can claim as much as the actual damage occurred in the property.[187] Compensation insurance can be divided into active and passive insurances.[188] Active insurance is the insurance of the interests included in the active assets of the insured. Examples of active insurances are property insurance, credit insurance and profit insurance.[189]

Property insurance covers all risks to the interest on the value of all kinds of tangible assets that have monetary value. Earthquake, fire, motor, transportation, agriculture, machinery breakdown, construction, theft, and glass breakage insurances are in the scope of property insurances.[190]

Credit insurance is a type of insurance that provides coverage against the risk that the insurer's right to claim will legally disappear or decrease in cash.[191]

In profit insurances, the earnings expectations that cannot be obtained due to the materialization of the insured risk are covered. The expected profit interest is usually insured together with the properties. For example, it is possible to secure the expected

[187] Kayıhan ve Bağcı, s.49

[188] Kender, s.208

[189] Kemal Şenocak, *Mesleki Sorumluluk Sigortası,* (Ankara: Turhan Kitabevi, 2000), s.60

[190] Kayıhan ve Bağcı, s. 49

[191] Şenocak, s. 61

reasonable profit together with the carried goods against carriage risks by adding a relevant provision to the contract.[192]

Passive insurance is the insurance that covers the liabilities that may occur to the assets of the insured. In this type of insurance, the loss of the insured as a result of the occurrence of certain liabilities in his/her assets is insured. Examples of passive insurances are insurance against legal debts, insurance against contractual debts, and insurance against essential expenses. Provisions on passive insurance are regulated in Articles from 1473 to 1486 of TCC under heading liability insurances.

The most common type of insurance against legal debts is Motor Vehicles Compulsory Third Party Liability Insurance. Motor Vehicles Compulsory Third Party Liability Insurance, also known as traffic insurance, insures the damages caused by the insurer to third parties. Special provisions regarding traffic insurance are regulated in Articles from 91 to 101 of Road Traffic Act No 2918. Professional liability insurance for lawyers and doctors, can be given as an example to facultative insurances against legal debts. In addition, the insurance of loss that may be caused to the company by the faults of the members of the board of directors of joint stock companies, regulated in Article 361 of TCC, is an example of facultative insurance against legal debts.[193]

Contractual debts may also be the subject of an insurance contract as well as legal debts. The most common example of insurance against contractual debts is the reinsurance contract. Since reinsurance guarantees the debts of the insurer arising from the insurance

[192] Şenocak, s.62

[193] Kayıhan ve Bağcı, s. 54

contract, it is in the nature of passive insurance.[194] It should be emphasized that in the reinsurance contract, the insured interest is not re-insured, and the debt that the insurer has undertaken against the policyholders is insured.[195]

Insurance against essential expenses is the case of insuring the value necessary for the recovery of a good. For example, if the house becomes unusable as a result of a fire in an insured house, there is real damage equal to the value of the house at the time of the fire. However, this amount may not be worth a house equivalent to the house. The difference in value between the amount required to supply the new house and the value of the burned house are examples of essential expenses.[196]

According to the distinction of meeting the needs, the other type of insurance is fixed sum insurance. When the risk occurs, the insurer is liable for paying the actual damage in compensation insurances whereas the insurer liable for paying the determined amount in fixed sum insurances. Life insurance, accident insurance can be given as an example to fixed sum insurances.

According to the distinction of subject of risk, insurances are divided into two as insurance of assets and insurance of immaterial right.[197] In insurances of asset, the subject of insurance is the rights that can be measured in money. Insurances of asset and loss insurances express the same type of insurance. In insurances of immaterial right, the

[194] Samim Ünan, *Türk Ticaret Kanunu Şerhi,* 6. Kitap, C.1, (İstanbul: On İki Levha Yayıncılık, 2016), s.45

[195] a.y.

[196] Kayıhan ve Bağcı, s.54

[197] a.g.e., s.64

subject of insurance is real persons.[198] Insurances of immaterial right and fixed sum insurances express the same type of insurance.

Insurances that secure the compensations that persons may be liable to pay due to the damage to third parties arising from their actions are liability insurances. the CMR Convention includes provisions on the international carriage of goods by road. Since CMR insurances guarantees the liability of the carrier arising from the Convention, CMR insurances can be considered as a liability insurance. Liability insurances are regulated in Articles from 1473 to 1486 within the scope of loss insurances in TCC. The subject and scope of liability insurances is regulated in the Article 1473 of TCC.[199]

Pursuant to the Article of the Law, the insurer of CMR Insurance is under the obligation to pay the insurance indemnity in the case materialization of the risk unless otherwise agreed in the general or special condition of the insurance contract concluded with the carrier.

Article 3 of the CMR Convention, states that the carrier is liable for the faults of its agents, servants, and other persons carrying out the carriage. If the second paragraph

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[198] a.y.

[199] *"Subject and Scope of the Contract*

Article 1473 – (1) Under a liability insurance contract, the insurer shall pay to the victim compensation up to the amount stipulated in the insurance contract, for the liability of the insured due to an event that occurred, unless otherwise agreed, during the contract period, even if the loss materialized after that period.

(2) If the insurance is taken out for the liability related to the enterprise of the insured, this insurance shall cover, unless otherwise agreed, the liability of the representatives, administrators, auditors and also the employees of the insured. In that case, the insurance shall be deemed taken out in favor of those persons."

of Article 1473 is applied to CMR insurances by analogy, it is possible to conclude that the damages caused by the workers employed by the carrier are also covered by CMR insurance. It could be said that the CMR Convention is in line with Article 3 of TCC and can be applied together in damages caused by the negligence of the carrier's assistants and employees.

Pursuant to Article 1475 of TCC, in liability insurance, incidents requiring the liability of the insurer must be reported to the insurer within ten days. Upon this notification or pursuant to the right of direct action specified in Article 1478 of TCC, the insurance indemnity is paid in cash if there is no contract for the same compensation pursuant to Article 1427 of TCC.

Pursuant to Article 1482 of TCC, the liability of the insurer to indemnify the loss becomes time-barred in ten years from the event that is the subject of the insurance.

The provisions to be applied to liability insurances are specified in Article 1485 of TCC. Besides the general provisions, Articles 1454 and 1458, the first paragraph of Article 1466 and Article 1471 will also be applied to liability insurances. Insurance for benefit of third person in Article 1454, retroactive insurance in Article 1458, and co-insurance in Article 1466 is regulated.

Co-insurance is the assurance of the same benefit by more than one insurer for the same period against the same risk. In this way, when more than one insurance is made at the same time, co-insurance is in question.[200] Pursuant to Article 1466, *"all the co-*

[200] Bozer, s. 67

insurance contracts is deemed valid only up to the value of the insured interest. In such a case, each insurer is liable in the proportion that its insured sum bears to the total of the insurance sums."

Second paragraph of Article 1466 of TCC, regulates the situation for which the insurers are jointly liable. In such a case, *"the insured shall not have the right to claim more than its loss and each of the insurers shall be liable up to the sum it has to pay according to its contract."* In the same Article, it is stated that the right of recourse of the effected payment insurer against other insurers is in proportion to the amounts that the insurers must pay to the insured according to the provisions of the contract.

Insurance for benefit of third person aims to protect a person other than the insurant. In this type of insurance, the insurant establishes the insurance contract on his own behalf, but only for the account of someone else, that provides insurance coverage for the risks that the insurer and another person may encounter.[201] Pursuant to paragraph 2 of Article 1454 of TCC, if the name of the third party is mentioned, in case of hesitation, it is accepted that the policyholder acts on behalf of himself / herself, not as the representative of the third party, but in favor of the third party.

Retroactive insurance is an insurance that insurance coverage is provided from a date prior to the conclusion of the contract. According to the first paragraph of Article 1458 of TCC, the contract is invalid if it is known by the insured at the time of conclusion of the contract that the risk has occurred or the possibility of its materialization has eliminated, provided that the insurer and the insured are aware of the insurance contract.

[201] Samim Ünan, *Türk Ticaret Kanunu Şerhi,* 6. Kitap, C.2, (İstanbul: On İki Levha Yayıncılık, 2016), s.25

It is possible to apply special provisions regarding retroactive insurance, insurance in favor of third parties and co-insurance to CMR Insurances, along with the general provisions regarding liability insurance since there is no regulation in the CMR Convention on these issues.

Liability insurance is divided into compulsory liability insurance and optional liability insurance. Compulsory liability insurance is a type of insurance that is required to be concluded with the aim of protecting third parties due to public order. Motor Vehicles Compulsory Third Party Liability Insurance, also known as traffic insurance, is an example of this type of liability insurances.

On the other hand, optional liability insurance, is the type of insurance in which the insured is completely free to conclude the insurance contract and the decrease that may occur in the assets of the insured is covered. The conclusion of CMR insurance contract is not compulsory. Therefore, it is possible to say that there is optional liability insurance. However, since European countries do not accept vehicles that do not have CMR insurance, carriers usually take out a policy. This situation has transformed CMR Insurance into compulsory liability insurance in practice.

2 - PROTECTION IN CMR INSURANCES

2.1. General Information

Insurance agreement is a synallagmatic contract which is described under Article 1401 of TCC.[202] In the light of relevant Article of TCC, insurance protection can be defined as compensation of damage arising from materialization of risks merely stated in insurance agreement. As per the relevant Article, the insurant is obliged to bargain to pay premium to the insurer, whereas the insurer undertakes to provide insurance protection to the insurant.

Obligation of the insurer to provide insurance protection is stationary before the insured risk occurs and becomes dynamic when the risk occurs.[203] This debt is in the form of carrying the risk in the stationary period when the risk does not materialize. In this period, the insurer has no obligation to act. However, the insurer undertakes to bear the risk. The insurer's obligation to pay the insurance compensation arises, when the risk occurs.[204]

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[202] *"Article 1401- (1) An insurance contract means a contract under which the insurer promises, in exchange for a premium, to indemnify a loss caused by the materialization of the risk having the consequence of harming the interest, measurable by money, of the concerned person or to effect payment or to fulfill other performances based on the lifetime or upon the occurrence of certain events in the course of the lifetime of one or several persons."*

[203] Kender, s. 292

[204] Kayıhan ve Bağcı, s. 191

According to Article 1409 of TCC, which regulates the scope of insurance, the insurer is liable for the damage or cost arising from the materialization of the risk stipulated in the contract. Hence the risks are determined by both sides of the contract, burden of proof regarding one or more of the risks are out of the scope belongs to the insurer pursuant to the second paragraph of Article 1409 of TCC.

In a contract, the obligations of the parties arising from the contract commence with the conclusion of the contract. According to the first Article of TOC, the contract is established by the parties' declaration of their will mutually and in accordance with each other. Based on the Articles of this law, it is possible to say that the insurance protection debt in CMR insurance arises at the moment that the contract is concluded.

It should be noted that the moment that the debt arises is not the same as the moment that the liability arises. The first paragraph of Article 1421 of TCC states that the liability of the insurer commences on the date the first premium or installment is paid. The exception to this provision is land and marine insurance. Pursuant to the Article, in land and marine insurances, the liability of the insurer will commence with the conclusion of the contract.

Although CMR insurance covers the carrier’s liability arising from the carriage of goods in a vehicle by road, the exception applied to land and marine insurances does not apply to CMR insurances, since it is in nature of liability insurance. Therefore, it could be said that the liability of the insurer in CMR insurance commence on the date the premium or the first installment is paid.[205]

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[205] Çiftçi, s.43

2.2. Protection in Liability Insurances

Protection in liability insurances is covering of the damages arising from the liability of the insurant which is protected under the insurance contract, by the insurer.

In liability insurances, the onus of protecting assets of the insurant shifts to the insurer, thus the insurer enters into obligation of bearing the risks stated in the insurance contracts. In such contracts, the liability for compensation of the insurer is solely the actual damage and defense costs of the insurant.

Within the scope of possibility for materialization of risks, the insurant is required to make a payment for rightful claims and defend the insurant against wrongful claims. In this regard, rightful claims arise from determination of rightfulness of such claims by court decision, arbitration award, peace agreement or debt acknowledgement of insurant by the approval of the insurer. In case of rightful claims, the insurer is released from liability by either paying back the compensation amount to the injured party by actions of insurant, or directly paying to the claimant.

The obligation of defending the insurant against wrongful claims commences from when the insurer surmises that the claims of third party is wrongful by evaluating the liability. Such obligation solely consists of the compensation claims against the insurant within the frame of legal relations secured by the contract. In this scope, lawsuits and execution proceedings initiated against the insurant are included within the liability.

Legal protection in liability insurances is stipulated in Article 1474 of TCC as follows: *"When a claim is raised against the insured, reasonable expenses related to the claim shall be covered by the insurer, but there must be a provision in the insurance contract for expenses exceeding the insurance amount."*

2.3. Protection in CMR Insurances

CMR insurances cover the damages that result in liability of the carrier pursuant to the CMR Convention.[206]Therefore, situations for which the carrier is liable within the scope of the Convention should be considered first. The liability of the carrier is regulated in general terms in the paragraph 1 of Article 17 of the Convention. In the 2nd and 4th paragraphs of the same Article, the situations in which the carrier will be relieved of liability are clearly regulated. In a carriage in the scope of the Convention and CMR Insurance contract, the insurer's protection debt will be in question if the incident that causes the liability of the carrier is determined as a risk in CMR Insurance contract.

Since there is no general condition approved by the authorized institution regulating CMR insurances, the will of the parties is decisive of the scope and subject of CMR insurance contract. The parties can determine the risks within the scope of CMR insurance contract and the period to be insured against these risks. It should be emphasized that the issues to be determined by the parties must not contradict the mandatory provisions of the Convention and liability insurances.[207]

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[207] Arslan Kaya, "CMR Sigortası", *Prof. Dr. Ergon A. Çetingil ve Prof. Dr. Rayegân Kender'e 50. Birlikte Çalışma Yılı Armağanı,* 2007, s. 815

2.4. Protected Risk

A risk can be defined as a possible future loss or other unsuitable situation and event that creates a need.[208] The risk may arise from natural conditions as well as from socio-economic conditions. However, events that are impossible to occur cannot be accepted as risks. The risk may arise from natural conditions as well as from socio-economic conditions. However, events that are impossible to occur cannot be accepted as risks. Likewise, natural events that are certain to occur cannot be insured. For example, death cannot be insured because the risk of death is certain to occur. In life insurance, the possibility of this event occurring within the insurance contract is insured, not the risk of death. In order for an incident to be considered a risk, its occurrence must not depend on human will, but on coincidence.

The place, time and amount of the risk covered by the insurance contract must also be determined. It is not possible for the insurer to cover the risks that cannot be clearly determined in the contract.

In the CMR Convention, provisions regarding the carrier’s liability are regulated in different articles. Insurance coverage will be in question in case of the incidents in the Convention giving rise to the carrier's liability are determined as risks in CMR insurance contract.

[208] Tekin Memiş, *Yangın Sigortalarında Riziko,* (Ankara: Seçkin Yayıncılık, 2001), s.21

The risks covered in CMR Insurance are determined by the Convention's provisions regarding carrier's liability. Examples of these risks are the complete or partial loss of carried goods, the damage to carried goods, the exceeding the carriage period, damages arising from the faults of the carrier's agents, servants, and other persons carrying out the carriage. Since these risks were examined in detail in the second chapter of our study, they will not be re-examined in this chapter. Other risks that can be determined as risks in CMR insurance contract will be examined below.

According to the third paragraph of Article 17 of the CMR Convention, *''The carrier shall not be relieved of liability by reason of the defective condition of the vehicle.''* Likewise, Article 877 of TCC states that *''The carrier cannot avoid liability based on the fault of the carriage vehicle, the fault of the persons who rented the vehicle, their representatives, or employees.''* Pursuant to relevant articles the carrier cannot avoid liability by alleging a malfunction in the vehicle used to carry the cargo.

The other case that arises the liability of carrier in the Convention is that the carrier delivers the carried goods without collecting the price. The case is regulated in Article 21 of the Convention.[209]

Another case that arises the carrier's liability in the Convention is that *''the carrier shall be liable for the consequences arising from the loss or incorrect use of the documents specified in and accompanying the consignment note or deposited with the carrier.''*

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[209] *''Article 21- Should the goods have been delivered to the consignee without collection of the cash on delivery charge which should have been collected by the carrier under the terms of the contract of carriage, the carrier shall be liable to the sender for compensation not exceeding the amount of such charge without prejudice to his right of action against the consignee.''*

However, the compensation which the carrier will liable cannot exceed the compensation amount in case of loss of the goods.

According to paragraph 3 of Article 7 of the Convention, *"if the consignment note is not included in the statement specified in paragraph 1 (k) of Article 6, the carrier will be liable for expenses, loss, and damage due to such omission."*

In accordance with the Article 10 of the Convention, whereas the sender is liable for damages arising from inadequate packaging, the carrier will be liable instead of the consignee if the conditions occur as follows: the fault is clearly visible in the acceptance of cargo, the carrier is aware of inadequate packaging, and no reservation made regarding the packaging.

Under the first paragraph of Article 8 of the CMR Convention, the carrier must check *"the accuracy of the statements in the consignment note as to the number of packages and their marks and numbers, and the apparent condition of the goods and their packaging."* If carrier does not have the necessary means to fulfill the control obligation, he/she should write his reservation on the transport document with the justification. Likewise, the carrier should state the reasons for the reservation regarding the apparent condition of the goods and packaging.

In case of *"an obstacle to carriage and delivery, the carrier may immediately unload the cargo for the account of the person who has the right of disposal"*, pursuant to Article 15 of the Convention. With unloading, the carriage work is deemed to have ended. However, after this stage, the carrier either protects the unloaded goods or delivers them to a third person. Therefore, it is the carrier's liability to act carefully in the selection of the third person.

The third paragraph of Article 16 of the CMR Convention states that *"the carrier may sell the goods, without awaiting instructions from the person entitled to dispose of them, if the goods are perishable or their condition warrants such a course, or when the storage expenses would be out of proportion to the value of the goods."* The carrier, which carries the goods that may deteriorate due to their nature, does not sell the goods about to deteriorate and if it waits for instructions, he / she will be liable for the damage caused by his / her negligence.

2.5. Limitation of Risk in CMR Insurance

The risks coverage could be limited in various ways. Considering the carrier's liability as a risk in the CMR insurances is not in line with the liability system in the CMR Convention. The carrier is faced with many dangers both as a person and because of carrier title, and insurance cannot cover many economically unpredictable dangers. For this reason, the risks covered by CMR insurance come into existence with the limitations arising from the nature of CMR insurance and the will of the parties.

The first risk limitation is the limitation of liability insurance to a certain time period and a certain place, and the second risk limitation is the limitations realized through the exception provisions in the general conditions, which serve to exclude some of the situations covered by the insurance.

The risk could be limited in terms of subject, time and place in the first risk limitation, whereas in the second risk limitation the determined risks could be excluded from the insurance coverage.

It is not possible to include situations that are not covered by the Convention in CMR insurance. However, even within the scope of the Convention, it is possible for the parties to exclude certain carriage issues in the contract and arrange them as a risk exception in this way. For example, the parties may not include carriage of sensitive goods within the scope of the insurance cover with CMR insurance contract. Therefore, in case of materialization of risks excluded by the parties, liability of the insurer will not arise even if the carrier’s liability pursuant to the Convention arises.

2.5.1. Limitation of Risk in terms of Subject

The subject of the contract in CMR insurance is the carrier’s liability under the CMR Convention. Therefore, every incident that gives rise to liability of the carrier cannot be the subject of CMR insurance contract. It is possible for the parties to partially limit the liability of the carrier arising from the Convention and decide that only certain liability cases will be included in the coverage.

The parties to the insurance contract can also limit the liability of the carrier arising from the Convention and decide that only certain liability cases will be included in the coverage.

There are limits to the freedom of contract of the parties. For example, the insurer's decision to indemnify the insurer even for the damages arising from deliberately realizing the event subject to liability in violation of Article 1477 of TCC is contrary to the first paragraph of Article 1429 and Article 1452 of TCC.

2.5.2. Limitation of Risk in terms of Time Period

In CMR Insurances, the protection commences with the date the premium is paid. While the insurer is liable for the risks incurred on the date the premium is paid, it is possible for the parties to determine otherwise. However, the timeline in which the insurer will be liable for the materialization of the risk may also begin in a period before the forming of the contract of insurance. Types of time periods in insurance contracts could be listed as follows: formal time, material time and technical time. [210] It is possible to add retroactive insurance to these types of periods.

The formal period is the period that continues from conclusion of the contract of insurance till expiration, upon proposal of the insured and acceptance of the insurer thereupon. The contract of insurance is subject to a certain period; ends with the expiration of this period. In loss insurances, the contract of insurance is usually signed for a period of one year.[211]

The material insurance period (also known as insurance liability period) means the period for which the insurer is liable. The reason for the difference between material insurance period and formal insurance period may be that the premium is paid after the insurance contract is concluded. In the case the first installment or the premium is paid at

[210] Kender, s. 232

[211] a.y.

the same time with conclusion of the contract, the material insurance period and formal insurance period are the same. Moreover, Article 1421 of TCC states that if there is no contract to the contrary, the insurer's liability will begin with the payment of the first installment or the premium. In practice, the insurance period in insurance policies is usually issued to commence at 12 pm. In this way, it is easier to determine the time when materialization of the risk in terms of loss insurance.[212]

For instance, in a fire insurance contract that insurance period is determined as 01.01.2022-2023 and the premium is paid on 01.03.2022, the insurance period covers twelve months, and the liability period covers ten months.[213]

The technical period is the period during which the insurant's premium debt continues. The period begins on the starting date determined in the contract and continues.[214] Technical period also expires if the insurant has fulfilled all the premium debts within the formal or material period of the insurance contract. Although the contract is terminated due to the realization of the risk or the expiration of the form of the insurance, if the premium payment obligation of the insurant is still not fulfilled, the insurance contract technically continues.

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[212] a.g.e., 233

[213] Haydar Arseven, *Sigorta Hukuku, Ana Prensipler, Genel Hükümler,* 2. Bs. (İstanbul: Beta Yayınları, 1991), s. 98

[214] Kender, s. 233

2.5.3. Limitation of Risk in terms of Place

Limitation of the risk in terms of place may be mandatory or optional. An example of the mandatory limitation in terms of place in CMR insurance is carriage by road. Moreover, carriages in which a part of the carriage is carried out by seaway or airway without unloading the carried goods are also under the CMR Convention. Since the Convention finds application in these carriages, materialization of the risk at sea or in the air will not have an effect on the CMR insurance and the insurer will be liable for compensation. However, CMR Convention shall not be applied if the damages occurred during the carriage at sea and in air are caused by the reason of carriage method, *"not the acts or omissions of the road carrier."* Therefore, this kind of damage is excluded from the CMR Insurance coverage.

It is possible for the parties to limit the scope of the CMR insurance to carriages to certain destinations. It is an example of an optional limitation. In the case, a risk occurs in carriage made outside of the places agreed in the contract, the damage is excluded from the CMR Insurance coverage.

2.6. Materialization of Risk

There are various opinions about the realization of the risk in liability insurances. The main ones of these views are the behavior leading to liability view, the damage phenomenon view, the claim view, the combination view, the common insurance event view, etc.

According to the view of behavior leading to liability, behavior that is the cause of damage in terms of liability law constitutes risk. According to the damage phenomenon view, the risk occurs at the moment when the damage occurs. According to the claim view, the risk occurs when a claim is made against the insured by the damaged persons.

In terms of CMR insurance, the existence of damage arising from the liability of the carrier pursuant to the CMR Convention is required for risk to occur. In accordance with Article 1446 of TCC, the notification obligation commences from the date the insurant becomes aware of the materialization of the risk agreed in insurance contract. In terms of liability insurance, if a third-party file a lawsuit against the insured, it commences from the date the insured learns about the case upon notification. In liability insurances for the compensation of damages to the third party by the insurer, it starts from the date when the insured learns that the court decision has become final or if the insured has paid money to the third party without a lawsuit.

2.7. Indemnification of Risk

From Article 23 to 29 of the CMR Convention contains provisions regarding the calculation of the indemnification arising from damage loss and delay, the limits of compensation and situations that exceed the limits.

It is possible to say that cash compensation is adopted in the CMR Convention pertaining carrier’s liability, especially since the upper limit of compensation is regulated in the form of cash compensation and the monetary value of the goods is mentioned in the provisions of the Convention. Therefore, the same indemnity method cannot be applied to compensation of the carrier's liability caused by the Convention.[215]

In CMR insurances, the indemnity liability of the insurer is the compensation for the actual loss up to the policy limits. In order to determine the insurance indemnity, the price that the carrier is obliged to pay due to its liability must be determined. In liability insurances, it is not possible for the insurer to cover all the damage that occurs when materialization of the risk without limitation. In the contrary case, it will not be possible in terms of insurance technique, and it will constitute a situation of catching bargain against the insurer, which is party to insurance contract.[216]

There are differences between concepts of limitation of protection and limitation of risk. The risks borne by the insurer are limited in risk limitation whereas the amount that the insurer is liable to pay after materialization of risk is limited in protection of limit.

Insurance value is the value of the interest in the insurance contract. Sum insured is the highest amount that insurer can be liable to pay when the risk occurs. Sum insured is indicated on the insurance policy. The prohibition of unjust enrichment in insurance law is ensured by the principle that the insurance value is equal to the sum insured. The application of this principle in terms of liability insurance differs, since the risk that the insured is liable, and the amount of damage may be caused by the risk cannot be determined before the damage occurs. Therefore, in liability insurances, the sum insured shown in the policy is a limit amount determined by the free will of the insurer and the insurant. This amount in the liability insurance policy is the maximum amount of

[215] Aydın, s. 111

[216] Erdil, s. 329

compensation for which the insurer is liable. As the insurance value is uncertain, cases of under insurance or over insurance are not seen for liability insurances.

The CMR Convention contains provisions that limit the amount of compensation payable for the carrier's liability. The second paragraph of Article 25 of the CMR Convention states that compensation amount for which liability of the carrier cannot exceed the amount to be paid for all the cargoes in case of total loss; cannot exceed the amount to be paid for the reduced part in case of partial loss.

Likewise, paragraph 3 of Article 23 of the CMR Convention stipulates that the compensation cannot exceed *"25 francs per kilogram of gross weight short. Franc means the gold franc weighing 10/31 of a gramme and being of millesimal fineness 900."* Also, *"In the case of delay if the claimant proves that damage has resulted therefrom the carrier shall pay compensation for such damage not exceeding the carriage charges."* in accordance with paragraph 5 of the same Article.

Since the insurer is liable for the damage caused by the liability of the carrier up to insurance amount, limitation of the carrier's liability pursuant to provisions of the Convention also limits compensation amount to be paid by the insurer.

2.8. Subrogation and Recourse

Subrogation occurs in legal relations with three parties. The situation of subrogation is encountered when third party performs the debt instead of actual debtor. The debt relationship ends when the third party fulfills the debt instead of the original debtor. However, in cases expressly stipulated in the law, the third party's performance of the debt makes an end of the external legal relationship, whereas the debt continues against the actual debtor in the internal relationship. The transfer of this type of right to claim which is arising from the law is called subrogation.

Pursuant to Article 127 of TOC which regulates subrogation, the third party who performed the debt, has the right of subrogation in the following cases: in case of *"rescuing something pledged for someone else's debt and has ownership or another real right on that thing, or in the case the creditor is informed by the debtor that the third party who performed the debt, will be succeeded the creditor."*

Additionally, the aforementioned article reserved the provisions of the law regarding other subrogation cases. The special provision regarding subrogation in insurance law is included in article 1472 of TCC.[217]

When risk occurs, the insurant may request the insurer to compensate for the damage under the insurance contract. The other option is to request compensation for the damage from the persons liable for the resulting damage under the provisions of the wrongful act.[218]

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217 *"Article 1472 – (1) The insurer shall legally succeed the insured upon payment of the insurance indemnity. If the insured has the right to sue third parties liable for the loss occurred, this right shall pass on to the insurer up to the amount it has paid. If legal action or enforcement proceedings had already been initiated against the parties liable, the insurer may continue these proceedings as per the rule of subrogation without the Court's or defendant's consent provided that it proves the payment effected to the insured."*

218 M. Kemal Omağ, *Türk Hukukunda Sigortacının Kanuni Halefiyeti,* (İstanbul: Vedat Kitapçılık, 2011), s.3

2.8.1. Conditions of Subrogation

A. Existence of Valid Insurance Contract

In order for the insurer to recourse to the persons who is liable of damage, the compensation to be paid to the injured person must be paid in accordance with an obligation arising from the legally valid insurance contract. Therefore, it is not possible for the insurer, who has paid for the risks incurred after the expiry of the insurance contract, to recourse to this payment.[219] In addition, the payment must be in proportion to the damage caused by the risk covered.[220]

B. Payment of Insurance Compensation

Another condition for insurer to succeed the rights of insured is the payment of the insurance indemnity. If insurer does not cover loss of the insured, it is not possible to succeed the insured. Payment can be made to the insured or his / her authorized representative. Payments made by insurer to insured out of the policy coverage do not provide insurer with the right of subrogation. This type of payment, called ex gratia, is payments made to look nice to the customer or to establish good relations in the future.[221]

[219] Ulaş, s.227

[220] Bozkurt, s.176

[221] Ulaş, s. 229

C. The Right of the Insurant to Sue

Another condition for the insurer to have the right of subrogation is that the insured has the right of action against those liable for the resulting damage. Concept of third parties was included in article 1301 of oTCC, created a debate regarding scope of recourse right. With the entry into force of TCC, debates in doctrine ended, as the concept of the persons who is liable for damages was introduced instead of third parties.

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2.8.2. In Terms of CMR Insurances

Subrogation is regulated as a special provision for liability insurance in Article 1481 of TCC.[222] Since CMR insurances are in the nature of liability insurance, it is possible to apply the provisions of TCC regarding subrogation in liability insurances to the CMR insurance contract. The CMR insurer could be a successor to the insurant. In CMR insurance, the insurant is the carrier. However, the carrier is also liable for the behavior of the carriage assistants and subsequent carriers. Since there are third parties who may be liable for damage other than carrier subrogation may be in question.[223]

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[222] *"Article 1481-(1) The insurer shall legally succeed the insured upon payment of the insurance indemnity. If the insured has the right to sue third parties for the loss he sustained, this right shall pass on to the insurer up to the amount it has paid.*

(2) If legal action or enforcement proceedings had already been initiated against the parties liable, the insurer may continue these proceedings as per the rule of subrogation without the Court's or defendant's consent provided that it proves the payment effected to the insured.

(3) The insured or the victim shall be liable as against the insurer if it were in breach of the rights that have passed on to the insurer as per paragraph (1)"

[223] Çiftçi, s. 145

CONCLUSION

Carriage activities have been vital for humanity throughout history. The improvement in carriage shows parallelism with the improvement of technology and commerce. Such developments provided improvements in commerce and communication between people, whereas the improvements in commerce and surplus production provided the application of new carriage methods. As the economic and social systems changed and the need for carriage work increased, such work began to be made by people who acquired carriage as a profession. Especially, after World War II, commercial activities did not remain restricted within country borders but gained international qualification. The improvements in international commerce and increase in carriage via road necessitated uniform regulations regarding carriage law between the countries which carriage is made.

The CMR Convention is an international convention containing uniform rules regarding carriage of goods, and CMR insurance is a type of insurance in which a protection is provided for the carrier’s liability. Such liability is solely limited within the liability under CMR.

Turkey accepted to become a party to the CMR Convention and the Additional Protocol with Law No. 3939, published in Official Gazette No. 21788, dated 14.12.1993, where the Convention text is published in Official Gazette dated 04.01.1995. Therefore, it is possible to state that the Convention has the force of law in accordance with the last paragraph of Article 90 of Turkish Constitution and is applicable to carriage contracts under the Convention. In cases which the provisions of the Convention and TCC conflicts, CMR will be applicable since the Convention has more specific provisions than provisions of TCC.

If a dispute arises from a CMR insurance contract including foreign element according to Turkish Law, the provisions applicable are respectively; CMR insurance contract, the CMR Convention and for the disputes cannot be resolved with the provisions of CMR insurance contract and the CMR Convention, the default rules of the country's Law which is to be found out by International Private and Civil Procedure Law No. 5718. For the disputes arising from CMR Insurance contracts, which does not include a foreign element according to Turkish Law, respectively; The provisions of CMR insurance contract and the CMR Convention shall be applied.

CMR insurance contracts are concluded by declaring of mutual and compatible consent between the insurant and the insurer. One party to the contract is the insurance company as the insurer and the other party is the carrier. In CMR Insurances, the insurance interest is the possible damage which may cause carrier's liability. CMR insurance is a liability insurance which covers the damages arising from a carriage contract under the CMR Convention. Such damages cause decrease in the assets of carrier.

In terms of CMR insurances, the main obligation of the insurant is to pay premium, whereas the main obligation of the insurer is to provide insurance protection. The insurance protection is the compensation of damages arising from the CMR Convention. According to the first paragraph of Article 1421 of TCC, the liability of the insurer commences from the date which the first premium or installment is paid.

The insurance risk is the incidents which causes carrier's liability in a carriage under the CMR Convention. The liability of carrier is included in different articles of the Convention. The carrier is liable for damage, delay, and loss as per the 17th Article. Liability of carrier arising from other situations is also regulated with relevant Articles of the Convention. For these situations to be considered as a risk in terms of CMR insurances, the situations must cause a damage that may result in decrease in the carrier's assets. In CMR insurances, the risk could be limited as subject, person, time, and place.

Since countries party to the CMR Convention are high in number and application of the provisions of the CMR Convention is possible to the countries which are not a party, the Convention carries great importance in carriage of goods by road internationally. In Turkish Law, there is no general condition approved by the authorized institution pursuant to the 11th Article of the Insurance Law No. 5684 for CMR Insurances, which provides unity of practice by insurance companies. We are in the view that a general condition for CMR insurance is needed considering the commonality and importance in practice of the CMR Convention.

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