

The Content and Functions of the Consignment Note under the CMR

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The international transport of goods by road is governed by the Convention on International Carriage of Goods by Road (Convention relative au contrat de transport des marchandises par route) (CMR) signed in Geneva on May 19, 1956. The CMR applies to every contract for the carriage of goods in vehicles by road for profit in which the place from which the goods are taken and the place designated for delivery, as specified in the contract, are situated in different countries and at least one is a contracting party, that is, a state which has ratified the CMR. The CMR does not require that both the countries of dispatch and of destination be contracting parties; only one of these countries must be a contracting state. The Convention applies regardless of the place of residence and the nationality of the parties. The Convention also applies where the carriage is carried out by states or by governmental institutions or organizations. The CMR was ratified in Turkey by Law no. 3939 and came into force on October 31, 1995.

The CMR provides for the confirmation of a contract of carriage by means of a consignment note, although such a note is not essential to the performance of such a contract. This article describes “the content and functions of the consignment note” under the CMR. The consignment note is defined in Article 4 while the form, content and effects of it are arranged between Articles 4 and 9 of the CMR.

The Concept of Consignment Note

A consignment note is a document regarding the carriage of goods by road which declares the contract of carriage and includes the instructions given to the carrier and proves the contract of carriage. Article 4 of the CMR states that the contract of carriage shall be confirmed by the drafting of a consignment note. Notwithstanding, the absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage, which shall remain subject the provisions of this Convention.

The CMR does not require any specific form for the contract of carriage. However, Article 4 of the CMR does require the issue of a consignment note, which functions as a receipt for the goods and as evidence of the contract of carriage but has no role as a document of title.

The Format of the Consignment Note

Although no particular format of consignment note is required by the CMR, a format has been drawn up by the International Road Union with the CMR in mind. Basic requirements regarding the format of the consignment note is set out in Article 5. According to Article 5 of the CMR, the consignment note shall be made out in three (3) original copies signed by the sender and by the carrier, the signatures may be printed or replaced by the stamps of the sender and the carrier if the law of the country in which the consignment note has been made out permits, and the first copy shall be given to the sender, the second shall accompany the goods and the third shall be retained by the carrier.

It is stated in the second paragraph of Article 5 that the sender or the carrier shall have the right to require a separate consignment note be made out for

each vehicle used, or for each kind or lot of goods when the goods which are to be carried have to be loaded in different vehicles, or are of different kinds or are divided into different lots.

The consignment note may be issued in more than three (3) copies. In this case, the fourth and fifth copies are presented to the banks and insurance companies.

The absence of a signature required by Article 5.1 does not invalidate the contract of carriage, but it may make it difficult to show that the person who has not signed the consignment note is a party to the contract. However, in the absence of a note or a signature, the court will consider other evidence that the carrier received the goods stated in the note and seek to establish the relevant facts, as usual, balancing probabilities.

The Contents of the Consignment Note

The matters that must be mentioned in the consignment note are listed in Article 6. There is a distinction drawn in Article 6 between two (2) types of matters. Matters which must be included in all cases are listed in Article 6/1, while matters which must be included if applicable to the particular case are listed in Article 6/2, and matters which are optional are listed in Article 6/3.

The matters which must be included in all cases are the following:

- (a) The date of the consignment note and the place at which it is made out;
- (b) The name and address of the sender;
- (c) The name and address of the carrier;
- (d) The place and the date of taking over of the goods and the place designated for delivery;
- (e) The name and address of the consignee;
- (f) The description, regarding common use, of the nature of the goods and the method of packing, and, in the case of dangerous goods, their generally recognized description;
- (g) The number of packages and their special marks and numbers;
- (h) The gross weight of the goods or their quantity otherwise expressed;
- (i) Charges relating to the carriage (carriage charges, supplementary charges, customs duties and other charges incurred between the making of the contract and the time of delivery);
- (j) The requisite instructions for customs and other formalities;

(k) A statement that the carriage is subject, notwithstanding any clause to the contrary, to the provisions of this Convention.

The matters which must be mentioned if applicable to the particular case are as follows:

- (a) A statement that trans-shipment is not allowed;
- (b) The charges which the sender undertakes to pay;
- (c) The amount of "cash on delivery" charges;
- (d) A declaration of the value of the goods and the amount representing special interest in delivery;
- (e) The sender's instructions to the carrier regarding insurance of the goods;
- (f) The agreed time limit within which the carriage is to be carried out;
- (g) A list of the documents given to the carrier.

The parties may add any other particulars which they may deem useful to the consignment note.

Article 6/1 requires that the consignment note contain a statement that the carriage is subject, notwithstanding any clause to the contrary, to the provisions of this Convention. That statement is known as the paramount clause. It promotes the application of the provisions of the CMR, as the proper law of the contract or as the terms of the contract of carriage, in the courts of non-CMR States. If the consignment note does not contain the statement specified in Article 6/1 paragraph (k), the carrier shall be liable for all expenses, losses and damages sustained through such omission by the person entitled to dispose of the goods under Article 7/3 of the CMR.

If the matters listed in Articles 6/1 and 6/2 in the consignment note are not listed, it is an irregularity of the consignment note. An irregularity of the consignment note does not affect the existence or the validity of the contract of carriage as provided for in Article 4. However, Article 7 assigns liability for the content of the consignment note to the sender. Accordingly, the sender shall be responsible for all expenses, losses and damages sustained by the carrier because of the inaccuracy or inadequacy of the particulars listed in Article 6/1, (b), (d), (e), (f), (g), (h) and (j), those listed in Article 6/2 and/or any other particulars or instructions given by the sender to enable the consignment note to be issued or to be entered therein.

If omissions cause loss, damage or delay, the sender may be liable under Article 7. Omissions may reduce the effectiveness of the note as a receipt for the goods or as a record of the contract. Court deci-

sions suggest that collateral terms may be proved and enforced even when not mentioned in the document.

Article 7/2 provides a limitation clause for the carrier related to his liability for the content of the consignment note, but does not provide such a limitation for the sender. Thus the sender is liable for all expenses, losses and damage sustained by the carrier. If the carrier drafts the consignment note in conformity with the information and instructions given by the sender, he is assumed to draft the consignment note in the name of the sender and is not liable for any such declarations included in the consignment note.

Article 7/2 supports the view that it is more appropriate that the sender rather than the carrier drafts the consignment note, though there is no explicit provision in the CMR concerning who should draft the consignment note. Through Article 7/2, it appears that as a rule the sender must draft the consignment note. However, the carrier also may draft it but in that case he/she is assumed to do so on behalf of the sender.

The Legal Character of the Consignment Note

The consignment note is neither a negotiable instrument nor a document of title. Hence the consignment note differs from both the bill of lading and the consignment note set out under the Turkish Commercial Code.

The consignment note is not a document of title in accordance with Article 1/5 of the CMR. As the duration of the carriage is short, it is generally considered unnecessary to give the consignment note the function of representing the goods.

The CMR does not specify whether consignment notes are negotiable instruments. As the rights of the consignee are arranged separately from the rights of the sender but not limited to the consignment note, the possession of the goods may be transferred without the consignment note (Article 12 of the CMR), and the absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage (Article 4 of the CMR), the consignment note appears not to be a negotiable instrument.

Thus the transfer of the consignment note does not mean the transfer of the title of the goods and the right to ask for the delivery of the goods is not bound to the consignment note.

Functions of the Consignment Note

Evidentiary Function

The consignment note shall constitute “prima facie evidence” for the existence of the carriage contract, terms and conditions of the contract and acceptance of the goods by the carrier according to Article 9 of the CMR. It is presumed that the goods and their packaging appeared to be in good condition when the carrier took them over and that the number of packages, their marks and numbers corresponded with the statements in the consignment note.

The consignment note constitutes a crucial document of evidence in terms of claims by both the sender and the carrier regarding the carriage contract and plays a facilitating role for proving such claims. This is because the consignment note has the function of proving establishment and content of the carriage contract unless it is otherwise proved. For the evidentiary function of a consignment note to take effect, a consignment note signed by the sender and the carrier must be available.

Firstly, the consignment note is used to prove that the contract of carriage has been made between the sender and the carrier within scope of the CMR and also is proof regarding the content of the contract. Secondly, a consignment note signed by both the sender and the carrier shall also be considered a receipt for the goods taken over by the carrier. Furthermore, the consignment note is used to prove that goods whose quantity, type, coding, etc is specified therein have been delivered to the carrier and were in good condition during delivery unless the carrier inserts a reservation clause in the consignment note.

The proving effect of the consignment note can be eliminated if the carrier has imposed a valid and justified reservation on the consignment note as written in Article 8. Article 8 imposes an obligation on the carrier to check the goods and enter reservations about their quantity and condition. The carrier shall check whether the goods are compliant with the records available in the CMR consignment note, and if the carrier detects missing or damaged goods, the carrier shall impose a reservation on the CMR consignment note accordingly. In the event that no reservation is imposed on the consignment note, it shall be agreed that the goods were delivered to the carrier in good condition and any damage to the goods took place after the goods were delivered to the carrier in good condition, during the period of the carrier’s liability. However the content of the justifi-

cation relating to the reservation mainly depends on whether the carrier expresses either the impossibility of inspecting the goods (reservations out of ignorance), or finding a concrete deficiency in the goods (specific reservations).

Article 8/2 gives the carrier a chance to avoid the presumption expressed in Article 9 by entering reservations in the consignment note if the carrier is unable to fulfill the obligation to check the goods. In this case, the reservation imposed on the consignment note shall be regarded as a justified reservation as long as the reason is indicated.

Article 8/3 extends the scope of the presumption to the contents of the packages. It can be said that the scope of the prima facie arranged under Article 9/2 of the CMR can be expanded within the framework of the liability in relation to the inspection specified under Article 8/1-b as “external condition of the goods and packing thereof.” The term “condition” regarding the goods in such an arrangement refers to facts that can be easily discovered as a consequence of the careful inspection to be carried out externally or by means of an appropriate instrument by an average carrier.

Nonfulfillment of the obligation imposed on the carrier by Article 8/1 does not give rise to liability for breach of the contract of carriage, but it affects the burden of proof in cases of loss or damage. However, the carrier may nonetheless be liable for failure to remedy defects that would have been observed if the carrier had made the checks recommended by Article 8, liable not for breach of Article 8 but for breach of the basic duty of the carrier under Article 17.

Formative Effect of the Consignment Note

In some provisions of the CMR, as detailed below, the consignment note is assumed to have formative effect.

Article 12

The sender has the right to dispose of the goods, in accordance with Article 12/1 and Article 12/2, until the second copy of the consignment note has been given to the consignee by the carrier or the goods have arrived at the destination and the consignee has required delivery of the goods in accordance with Article 13. Thus the right of disposal is linked to the possession of the consignment note. The production of the note proves a person’s right of disposal; the

note is not, however, a negotiable instrument or a document of title. Failure by the carrier to issue a consignment note would deprive the sender not only of the right of disposal but also of any right to stop carriage or change delivery instructions.

Effect of the Consignment Note on Raising the Limits on Liability of the Carrier in Case of Loss of or Damage to the Goods

The limits on liability in case of loss of or damage to the goods imposed by Article 23 may be raised by contract in two cases, as regulated by Articles 24 and 26, and only if both parties agree. The first case, regulated by Article 24, is that of a declaration by the sender that the value of the particular cargo exceeds the limit which would otherwise apply. The value is the actual value of the goods fixed in accordance with Article 23/2. The contract related to the increase of the limit of liability must be declared in the consignment note in order to be valid. The consignment note has founder effect to the increase of the limit of liability because the related declaration is protective and cautionary for the carrier. Thus the party who alleges that there is no contract related to the increase of the limit of liability in spite of the declaration in the consignment note has the burden of proof.

Article 24 is a special reservation to Article 4, which provides that “the absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage” thus the limit of the liability of the carrier can not be increased due to the lack of a consignment note or a declaration in the consignment note. Article 24 is not applicable for the loss of or damage to the goods caused by delay.

The second case in which the limit of liability may be raised, regulated by Article 26, is that of a declaration by the sender that he has a special interest in the arrival of the goods in accordance with the contract. If the sender declares a special interest of this kind, there can be a claim for consequential loss. This is a loss of a kind for which the carrier would not otherwise be liable, such as a loss of value at the destination, a case not contemplated by either Article 23 or Article 24. According to Article 26 the sender may, against payment of a surcharge to be agreed upon, fix the amount of a special interest in delivery in the case of loss or damage or of the agreed time limit being exceeded, by entering such amount in the consignment note and if a declaration of a special interest in delivery has been made, compensation for the additional loss or damage proved

may be claimed, up to the total amount of the interest declared, independently of the compensation provided for in Articles 23, 24 and 25.

Effect of the Consignment Note on Raising the Limits on Liability of the Carrier in Case of a Delay in Delivery of the Goods

The limits on liability in case of delay imposed by Article 23 may be raised by contract in two (2) cases, and only if both parties agree. The first case, where the consignment note has founder effect as regulated by Article 26, is that of a declaration by the sender that he has a special interest in the arrival of the goods in accordance with the contract. However, in case of a delay the function of Article 26 is different from its function in case of loss of or damage to the goods. In case of delay, the limit of the liability of the carrier may be raised to the value declared in the consignment note.

Effect of the Consignment Note on Successive Carriage

The CMR provides in Article 34 that, if the carriage by road is governed by a single contract but performed by successive road carriers, as far as successive carriage is concerned and as the general view in continental Europe there is a single consignment note. In this case, each carrier shall be responsible for the performance of the whole operation, the second and successive carrier(s) becoming a party to the contract of carriage under the terms of the con-

signment note by reason of their acceptance of the goods and consignment note.

Article 34 requires the consignment note to enable that the successive carriers know that the carriage is subject to the CMR and their situation, the condition of the goods, the content of the consignment note and any reservations entered in the consignment note. The consignment note is essential and required for the successive carriers to know the terms of the carriage since by acceptance of the goods and the consignment note, each will become a party to the contract of carriage under the terms of the consignment note.

Conclusion

This outline shows that the consignment note has a very important role in the CMR especially in its evidentiary function regarding liability of the parties and guarding the interests of the parties of a contract of carriage. In fact, the parties to a contract of carriage for international transport may not comprehend the importance and the necessity of a consignment note conforming with the terms of the CMR.

The conclusion arising from this study is that it is very important to draft a proper consignment note regarding international transport by road in order to have successful and problem-free transportation and to preclude undesirable results for both the sender and the carrier.