

Liability of the Carrier under the CMR Convention

by Sedat Utku Dicleli

The CMR Convention¹ is a multilateral treaty, which is implemented under the governance and supervision of the United Nations setting forth the rights and liabilities of the sender, carrier and consignee in relation to the damages, losses and delays incurred during the international carriage of goods. Main scope of the CMR is to standardize the conditions governing the treaty for the international carriage of goods by road, particularly with respect to the documents (form and proof of the carrier's receipt) used for such carriage and the carrier's liability. The CMR covers the carriage of goods by road when such carriage is performed between two or more countries one of which is a signatory of the CMR Convention.

Looking over the CMR Convention from Turkey's Aspect

Although surrounded by sea on three sides, road transport is currently the major method of good and passenger transportation in Turkey. In accordance with the latest data provided by the Prime Ministry Investment Support and Promotion Agency of the Republic of Turkey, 95% of passengers and 90% of the goods are conveyed via highway transport and as regards to the international trade, road transport follows the maritime transport with a share of 40,3% for exports and 22,9% for imports.

Turkey has ratified the CMR and its additional protocol via enacting the Law No. 3939 on December 7, 1993 which has the force of law in Turkish Legislation in line with Article 90 of the Constitution of the Republic of Turkey

Matter of Conflict of Laws

Although CMR is a multilateral treaty which intends substantially to introduce uniform provisions, it does not regulate the international transport of goods in all aspects. In such circumstances it is essential to determine the national law, which will be applied to the

contract with regard to the issues that are not regulated under the CMR. Furthermore, the CMR does not comprise any general provision(s) regarding the conflict of laws, except for some individual subjects. For instance as per Article 16.5 of the CMR, "the procedure in the case of a sale shall be determined by the law or custom of the place where the goods are situated." Besides that Article 28.1 of the CMR indicates "the national law" as the applicable law in some cases, but the national laws, which will be applied, is not specified in this Article. The approach adopted by the Turkish Law on this subject is, the obligatory relationships arising from the contracts are subject to the law chosen expressly by the parties. In cases where the parties did not include a choice-of-law agreement in their contract, their contractual relationship is governed by the law which is most closely connected with the contract. (Article 24.1 & 24.4 of the Law No. 5718) On the other hand such freedom of contract shall not be construed in a way that would enable the parties to include an arrangement that leads to elimination of the provisions regarding the conflict of laws under the CMR. Moreover as per Article 41 of the CMR, any stipulation included by the parties in carriage contracts in contravention of the provisions of the Treaty, shall

1 Convention on the Contract for the International Carriage of Goods by Road, which was made by the United

2 Promulgated in the Official Gazette dated December 14, 1993 and numbered 21788.

3 Turkey is a contracting party to the CMR since August 2, 1959.

4 Turkish International Private and Procedural Law, No. 5718. Promulgated in the Official Gazette dated December 12, 2007 and numbered 26728.

be deemed as null and void. But the nullity of such a stipulation shall not affect the other provisions of the contract. In cases where the parties do not determine the applicable law in the contract, that shall be determined in accordance with the binding rules. As far as the implementation of such rules under the Turkish Law is concerned, Article 29 of the Law No. 5718 states that, the contracts with respect to the carriage of goods shall be subject to the law determined by the parties. In cases where the parties did not include a choice-of-law agreement in their contract; if the country, in which the main workplace of the carrier is located, is the same with the one, in which the goods are loaded/unloaded, or the main workplace of the sender is located, during the conclusion of the contract, then the said country shall be assumed as having the closest connection with the contract and the contract shall be governed by the laws thereof. Article 5 of the Law No. 5718, imposes a restriction to the choice of the applicable law that, if the relevant provision of such law, either chosen as per Article 24.1 or implied as per Article 29.1 of the Law No. 5718, is expressly inconsistent with the Turkish public policy, then it shall not be applied; in cases of necessity Turkish Law will be applied.

Liability of the Carrier

Introduction

It would not be wrong to say that the Carrier's Liability is the core issue in the implementation of the carriage contracts under the CMR. Carrier's liability has recently come into the view by virtue of the domestic turbulences disrupting the performance of road transport especially in most of the Middle Eastern countries which have uncertain and unstable environment arising from the lack of security and inter-governmental/social paradoxes.

Carrier's Liability under the CMR is twofold;

- (i) Liability arising from the loss and damages incurred to the goods, and
- (ii) Liability arising from the delays in deliveries.

CMR has regulated carrier's liability under Section IV and in Articles 17 to 29. There is no provision or need to refer to the relevant provisions of the national law, to make it applicable along with the CMR as far as these two liabilities are concerned. Besides the above said two types of liabilities, CMR also regulates some other specific circumstances requiring the carrier's liability. Since such circumstances have been

regulated specifically and the said provisions of the CMR have the characteristics of "special provisions", which the parties cannot agree otherwise as per Article 41 of the CMR, it is not possible to apply the provisions of national laws regarding such liabilities alongside the CMR.

Carrier's Liability Arising from the Loss and Damage

There are different approaches regarding the legal nature of the liability arising from loss and damage in the legal doctrine. Before going into details of such approaches, it would be helpful to review the liability mechanism introduced by the new Turkish Commercial Code ("TCC"), No. 6102. Pursuant to Article 875.2 of the TCC, in case the loss or damage is occurred due to the sender's and the consignee's actions or due to a special defect of the good, to what extent the said facts have affected the compensation liability shall be taken into consideration. As per Article 875.3 of the TCC, even if no damages occur in case of delay in delivery, the carriage charge shall be reduced in proportion to the length of such delay; unless the carrier proves that he has exercised the utmost care. According to the TCC, relieve of the liability depends on the care and diligence of the carrier. As per Article 876 of the TCC, the carrier shall be relieved of the liability, providing that the loss, damage and delay in delivery occurred due to the reasons, consequences of which cannot be avoided and prevented by him although he has already exercised the utmost care and diligence. These explanations indicate that the new TCC has abrogated the distinction between the liabilities arising from loss and damage and has introduced common principles and procedures for both liabilities, and thus the legal nature of such liabilities has been converted into a "mitigated strict liability". Within this framework, the circumstances enabling the carrier being relieved of liability have been separated into two groups as the "general and special circumstances". The special circumstances, which are set forth under Article 878 of the TCC, can be asserted by the carrier only in the cases of loss, damage and delay, for which the carrier is not further required to prove the causal connection between the said circumstance and the loss/damage/delay. Considering from this point of view, provisions of the new TCC regarding the carriage of goods have become compatible with the CMR's approach in respect thereof.

As per Article 17 of the CMR, the carrier shall not be relieved from liability by proving himself being free of negligence/ fault, thus such liability is not recognized as an ordinary fault liability. Besides that the CMR

does not make reference to a strict liability which requires proving presence of the force majeure. In order to be relieved from liability the carrier shall prove that the loss/damage has been incurred; i) due to the special risks set out under Article 17.4 of the CMR and the presence of such a risk or ii) due to the causes set out under Article 17.2 of the CMR. As per Article 17.1 of the CMR, the carrier shall be held responsible for total or partial loss of the goods and for damages thereto incurred between the time of taking over and delivery, as well as for any delay in delivery. However the carrier may also be held responsible for the loss and damages even if such damage has not been incurred in that period of time. In other words it will be reasonable for holding the carrier responsible for loss or damage incurred after the delivery, where the proximate cause has occurred within the liability period.

Taking Over & Delivery of the Goods

The carrier is held responsible for the losses and damages incurred between the time of taking the goods over and delivery. The terms of taking over and delivery need to be initially examined carefully.

Scope of the taking over is not specified under the CMR. In accordance with the doctrinal approach, taking over is actual or constructive possession of the goods by the carrier for the purposes of carriage. Since the taking over is a bilateral legal transaction, the carrier shall have the intention of taking over to fulfill his contractual obligations as well as the sender shall intend to have the goods carried. Accordingly, a delivery of possession can be assumed as "taking over" provided that the said intentions coexist mutually. On the other hand, if goods, which have been stored to be carried on a future date, in the carrier's warehouse, is loaded onto the vehicle and the carriage is started without being instructed by the sender, this action shall not be considered as a taking over in terms of transportation law. In some cases, taking over may not materialize concurrently with the loading of goods. In order to prevent any dispute which may arise from such a case, the performance of loading and stowing works and liabilities related thereto shall be determined separately as they have been al-

ready regarded separately under Article 17.4.c of the CMR. As per Article 863 of the TCC, which is in line with the general principles accepted by the CMR, unless otherwise understood from the mutual agreement, commercial practices or the circumstances of the case, the Sender shall be liable for loading and unloading, stowing and fastening the goods in conformity with the carriage security.

Delivery of the goods is, in principle assumed as materialized at the completion of carriage, a bilateral legal transaction as is the taking over, in which the carrier transfers the possession of goods to the consignee in line with the intention conformity provided by and between the sender and the carrier. Accordingly having delivered the goods to the place designated in carriage contract shall not be solely enough for the completion of delivery and also the consignee is required to accept the goods through participating in such transaction. In order to mention a valid delivery, an examination shall be made to determine whether the goods have been delivered to the right person and the place designated in the contract. In principle the right person shall be the one who is indicated as the consignee in carriage contract and his name and address are written on the consignment note as well. Likewise loading in taking over the goods, the liability of unloading will be discussed as for the delivery. If unloading is accepted to be under the carrier's responsibility, it shall not be deemed complete unless the goods are unloaded from the vehicle because the unloading will be one of the conditions thereof. If unloading is accepted to be under the consignee's responsibility, then the delivery shall be deemed complete on condition that the consignee is provided with the disposal of the goods which are still unloaded. As it is stated above, liability related provisions of Article 863 of the TCC shall be also apply to the unloading. On the other hand CMR does not include any exclusive provisions as to determine the party liable for unloading. In accordance with the general principles which is so accepted by the CMR, the carriage agreement shall be taken into consideration at first which will be followed by the commercial practices or the circumstances of the case and if there are no provisions, the consignee shall be held responsible for unloading.

⁵ Promulgated in the Official Gazette dated February 14, 2011 and numbered 27846 and has entered into effect as of July 1, 2012.

⁶ It should be noted that in some exceptional circumstances delivery may be materialized before arriving at the "delivery place" specified in the contract or be materialized by returning the goods to the sender. Owing to the fact that the sender has the right to instruct the carrier to stop the carriage and to change the place of delivery pursuant to Article 12.1 of the CMR, the delivery may be deemed as materialized even before the carriage is completed.

⁷ Having been provided with the possession of goods by the employees of both the carrier and the consignee will be sufficient for the delivery to be deemed as materialized.

The CMR does not include any provision as to whether the carrier will be able to relieve of liability or not by delivering the goods to the customs. In parallel with the abovementioned explanations, the carriage contract shall be the primary reference herein as well. If the mutual contract cannot clarify the matter as is required, then the commercial practices or the circumstances of the case shall be taken into consideration. Delivery can be deemed as completed when the goods are reached at the customs, having all required transactions done so as to enable the consignee to have them taken over.

Circumstances Preventing Taking Over & Delivery of the Goods

Prevention of delivery is another core issue which refers to the circumstances preventing delivery of the goods after their arrival at the designated place of delivery, despite the carrier intends to deliver them. Articles 15 and 16 of the CMR indicate the procedures to be followed by the carrier in case of the delivery preventions. There are two procedures may be followed by the Carrier that being at his own discretion; i) ask for the sender for his instructions (Art. 15.1 of the CMR), or ii) exercise the right of unloading directly, without asking for the sender's instructions (Art. 16.2 of the CMR). If the carrier exercises the right to unload the goods, the carriage will be deemed as completed; and the carrier will be relieved of the liability set out under Article 17 of the CMR. Despite the fact that such an unloading is not assumed as a due delivery -technically- since the consignee is not participated therein, it shall be legally effectual just like a valid delivery. After the goods have been unloaded, the carrier's liability –either as to the period in which the goods are used to be under his possession or the reasonable care expected from him in the choice of the third party in case the delivery is being made to a third party- shall be subject to the applicable national law, not the CMR. Besides that, the carrier shall be entitled to sell the goods on condition that the requirements are duly met which are set out under Article 16.3 of the CMR.

Preventions may arise during the performance of carriage and the procedures to be followed with respect thereto are regulated under Articles 14 and 16 of the CMR. There are two groups of carriage preventions that are set out under Article 14 of the CMR which

may arise before the goods have been arrived the designated place for delivery; i) Circumstances may preclude the performance of carriage in terms of the conditions stated in consignment note or may preclude the carriage in the near future. In such cases, the carrier will be able to follow one of two procedures indicated for the delivery preventions above. ii) Nevertheless, if circumstances are such as to allow the carriage performed under conditions differing from those stated in the consignment note, the carriage shall not exercise the right of unloading goods directly.

Preventions of carriage and delivery, which may arise either before or after the goods reach at the designated place of delivery, are commonly regulated under Article 869 of the new TCC. In such cases the carrier shall ask for instructions from the person entitled to dispose of the goods in accordance with the provisions of Article 868 of the TCC. As a matter of fact, provisions of the said Articles of the new TCC have corresponded to the content introduced by Articles 12 (Right of disposition on goods), 14 (Prevention of carriage), 15 (Prevention of delivery) and 16 (Recovery of expenses, unloading & holding, compulsory sale) of the CMR.

Presumption of Loss of the Goods

Unlike Article 875 of the TCC, which regulates the carrier's liabilities in cases of loss or damage and delay in delivery, CMR covers total and partial loss separately; however neither of such terms was defined in the CMR's context. Therefore such distinction shall be determined in accordance with national laws of the contracting states. According to the transportation law, loss is a change occurred in the actual or legal status of the goods, which prevents the carrier delivering them to the person who has the right of disposal. Although temporary delays in delivery are not assumed to be loss of goods, as per Article 20 of the CMR, the fact that goods have not been delivered within thirty days following the expiry of the agreed time limit, or, if there is no agreed time limit, within sixty days from the time when the carrier took over the goods, this shall be conclusive evidence of the loss of the goods. The sender/consignee is also provided with alternative rights of compensation by such Article. In this context separation of total/partial

⁸ It should be noted that the preventions mentioned herein do refer to the circumstances preventing delivery of the goods which arise after the carrier arrives at the designated place and they should not be get involved with the preventions included in the Article 14 of the CMR which arise before getting arrived at the designated place of delivery.

⁹ Article 880.3 of the TCC is almost identical with Article 23.2 of the CMR except for the reference prices.

loss becomes important in order to determine; i) beginning of the limitation period and, ii) the amount of the compensation to be paid.

According to the transportation law, damage is any kind of material deterioration incurred onto the goods that leads to the depreciation. Article 25 of the CMR sets forth different procedures for the indemnification of total and partial damages, as such in case of loss. In some cases it may be hard to distinguish the state of damage from the state of loss. In principle, total loss may be associated to the cases in which no part of the good is delivered to the sender/consignee, apart from that having the goods delivered to the sender/consignee, under any condition whatsoever, only constitutes damage.

Circumstances Relieving the Carrier of the Liability

Article 17 of the CMR provides both general and special circumstances that may relieve the carrier of the abovementioned liabilities. Article 17.2 of the CMR sets forth the general circumstances which may enable the carrier to be relieved of the 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 defect in the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent. As regards to the special circumstances/risks, which are set forth under Article 17.4 of the CMR, 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: i) use of open sheeted vehicles, when their use has been expressly agreed and specified in the consignment note; ii) the lack of, or defective condition of packing in the case of goods which, by their nature, are liable to wastage or to damage when not packed or when not properly packed; iii) handling, loading, stowage or unloading of the goods by the sender, the consignee or person acting on behalf of the sender or the consignee; iv) the nature of certain kinds of goods which particularly expose 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; v) insufficiency or inadequacy of marks or numbers on the packages; vi) the carriage of livestock.

There are two main differences between the circumstances enabling the carrier being relieved of liability:

i) General circumstances may not only relieve the carrier of liability arising from loss and damage, but also relieve him of liability arising from delay in delivery, whereas the special circumstances indicate the situations which may increase the loss and damage risk during the performance of the carriage; ii) As per the Article 18 of the CMR, the carrier, who aims to be relieved of liability by relying on a general circumstance, shall prove not only the presence of such circumstance, but also the causal relation between such circumstance and loss/damage, whereas the carrier, who relies on a special circumstance, shall be relieved of liability by proving that loss/damage could be attributed to one or more of the special risks referred to in Article 17.4 of the CMR. But the claimant shall be entitled to prove that loss/damage was not, in fact, attributable either as a whole or in part to one of these risks.

On the other hand, Article 17.3 of the CMR introduces a negative condition to prevent release from liability, which states that the carrier shall not be relieved from liability by reason of the defective condition of the vehicle used by him to perform carriage, or by reason of the wrongful act or neglect of the person acting on behalf of the carrier or agents or servants of the latter.

It is not always possible to determine precisely whether the carrier or the sender/consignee is liable for damages incurred during the performance of the carriage; therefore in such a case liability shall be divided in line with the Article 17.5 of the CMR. Division of liability shall only be implemented when there is more than one reason that leads to the same damage. Since the CMR does not contain any provision as to which principles will be taken into consideration in division of liability, the judges are provided with broad authorities rather than referring to the national law in this respect.

In case any loss/damage is incurred onto the goods within the liability period stated under Article 17 of the CMR, the carrier shall be obliged to indemnify such damage unless he proves the circumstances that may relieve him of the liability. In common with all other international treaties, CMR has limited the compensation amount to be paid. Principles, which are described in detail below, regarding the compensation to be paid by the carrier in case of loss and/or damage, are regulated in Articles 23 to 29 of the CMR.

Carrier's Liability Arising from the Delay in Delivery

As well as the liabilities arising from loss and damage, the carrier's liability arising from delay in delivery has been considered as a defect liability having an aggravated duty of care thus the carrier, who fails to deliver the goods on time, can only appeal in the circumstances set forth under Article 17.2 of the CMR in order to be relieved of liability, otherwise the circumstances set forth under Article 17.5 of the CMR are solely associated to the special risks which cause loss and damage.

It should be noted that the delay mentioned herein is indicating the one which occur after goods are taken over by the carrier. Delays apart from that (e.g. delays in taking over) shall not be considered under such scope and be subject to the applicable national law. Any disputes which may arise, where the parties agree on a time-limit for delivery and the carrier does not comply with such duration or where the carrier fails to take over the goods, shall too be settled in accordance with the national law.

As mentioned above, Article 17.1 of the CMR contains a provision holding the carrier liable for delays in delivery which is exclusively defined under Article 19 of the CMR. As per Article 19 of the CMR; delay in delivery shall be said to occur when the goods are not delivered within the agreed time limit or when, failing an agreed time limit, the actual duration of the carriage having regard to the circumstances of the case, and in particular, in the case of partial loads, the time required for making up a complete load in the normal way, exceeds the time it would be reasonable to allow a diligent carrier. As it can be understood from the content of such Article, the CMR avoid determining a specific carriage/delivery period due to the changeable road and geographical conditions of the contracting states. In other words, the contracting parties are free to agree a time-limit which shall be suitable to be examined whether it is valid or not according to the general provisions. In case the parties do not determine a time-limit for the delivery, then it shall be determined in accordance with the principle "the actual duration of the carriage which may reasonably be expected from a diligent carrier" set forth under Article 19 of the CMR.

In cases of delays in delivery, the damages for which the carrier may be held liable are deemed as consequential damages to the property. In cases where the delay in delivery causes loss and/or damage or vice

versa, the carrier's liability shall be assessed within the scope of the liability arising from loss and damages. Accordingly, the assessment of carrier's liability and the compensation to be paid in such cases shall be subject to the provisions of Article 23.1-4 of the CMR. In cases of loss and damage to goods the only available compensation is pecuniary; however in cases of delay in delivery consequential damages are also available.

Value to be taken as a Basis for Calculating the Compensation

As per Articles 23.1 of the CMR and 880.1 of the TCC, the compensation for which the carrier is liable in cases of total or partial loss of goods shall be calculated by reference to the value of the goods at the place and time of which they were accepted for carriage. As per Article 23.2 of the CMR, the value of the goods shall be fixed according to the commodity exchange price or, if there is no such price, according to the current market price or, if there is no commodity exchange price or current market price, by reference to normal value of goods of the same kind and quality.

Maximum Limit of the Compensation

The compensation to be paid by the carrier in cases of loss, damage and delay in delivery has been limited by both Articles 23.3 of the CMR and 882.1 of the TCC; this compensation shall not, however, exceed 8,33 units of account per kilogram of gross weight short. As per Article 23.5 of the CMR, in 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. Besides that, the carrier's liability arising from exceeding the time-limit agreed, has been limited to three times of the carriage charge under Article 882.3 of the TCC.

Forfeiture of the Carrier's Right to Limit Liability

As per Articles 29 of the CMR and 886 of the TCC, if the damage was caused by the carrier's or by his agents' or servants' or by any other persons', whose services he makes use for the performance of the carriage, willful misconduct or by such default on his part as is considered as equivalent to willful misconduct, he shall not be entitled to avail himself of the provisions set out under the "Liability of the Carrier" (Chapter IV of the CMR) which exclude or limit his liability or which shift the burden of proof.