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AN OVERVIEW TO THE CIRCUMSTANCES CAUSING LEGAL LIABILITY SUSTAINED IN THE EVENT OF THE DAMAGES TO THE PASSENGER BAGGAGE DURING THE CARRIAGE BY AIR

Abstract:

The liability of the carriage by air sustained in the case of the damage of any baggage (or luggage) has already been regulated in the article 12 of Turkish Civil Aviation Code (TSHK.), the article 18 of Warsaw Convention (War.C.) and in the subsection 2, 3, 4 of the article 17 of 1999 Montreal Convention (Mon.C.). TSHK.a.121/ s.1 that regulates the liability of the carrier in the event of domestic flight is as: 'The carrier is liable for damage sustained in case of the loss of, or of damage to checked baggage on condition that the loss or damage took place during the carriage by air.' The liability indicated here, in Warsaw Convention a.18/s.1, is as: ' The carrier will be liable for the damage sustained in case of destruction, or loss of, or of damage to checked baggage; however the event causing the destruction must take place during the carriage by air', and the liability is adjudged, in Montreal Convention a.17/s.2, is as ' The carrier is liable for the damage sustained in the event of destruction, or loss, or damage of the checked baggage on condition that the event which caused the destruction, loss or damage took place on board the aircraft or during the period in which the checked baggage was in the charge of the carrier.' As understood from these regulations, the carrier is liable for the damage sustained during the period that the registered baggage is in the charge of the carrier, whether it is domestic or international flights. The conditions of the liability mentioned above will be examined in this study.

Keywords:

Legal liability of carrier; baggage carrying in aviation law; Turkish Civil Aviation Code Art.12; Montreal Convention Art.17; Warsaw Convention Art. 18

JEL Classification: K12, K33, K30

Introduction *

The liability of the carriage by air sustained in the case of the damage of any baggage (or luggage) has already been regulated in the article 12 of "Turkish Civil Aviation Code (TSHK.)", the article 18 of "Warsaw/The Hague System (War.C.)" and in the subsection 2, 3, 4 of the article 17 of "1999 Montreal Convention (Mon.C.)". TSHK.a.121/ s.1 that regulates the liability of the carrier in the event of domestic flight is as: '*The carrier is liable for damage sustained in case of the loss of, or of damage to checked baggage on condition that the loss or damage took place during the carriage by air.*'. The liability indicated here, in War.C..a.18/s.1, is as: '*The carrier will be liable for the damage sustained in case of destruction, or loss of, or of damage to checked baggage; however the event causing the destruction must take place during the carriage by air*¹', and the liability is adjudged, in Mon.C.a.17/s.2, is as '*The carrier is liable for the damage sustained in the event of destruction, or loss, or damage of the checked baggage on condition that the event which caused the destruction, loss or damage took place on board the aircraft or during the period in which the checked baggage was in the charge of the carrier.*²'.

As understood from these regulations, the carrier is liable for the damage sustained during the period that the registered baggage is in the charge of the carrier, whether it is domestic or international flight. The conditions of the liability mentioned above has been examined in this study.

1- The Act of the Carrier against the Baggage Carriage Commitment

a) In General

As stated before, the baggage carriage is a kind of sub-obtained liability that arises from the passenger carriage agreement which the carrier made with the passenger; and the passenger has the right to want his baggage to be carried together with himself. The baggage carriage commitment brings along the liability to pay attention to baggage care and maintenance and to deliver the baggage with it³. The infringement of the carrier's liability, or not to fulfill, by the carrier, the right of the passenger for the carriage of his baggage as required leads to the liability in some specific conditions. In this way, the wrong act of the carrier is considered as '***the infringement of the liability to pay attention to the care and maintenance of the baggage***' or '***the infringement of the liability to deliver the baggage***'.

b) The Infringement of the Liability to Pay Attention to the Care and the Maintenance of the Baggage by the Carrier

During the passenger carriage by civil aviation, because the registered baggage is handed in to the carrier and the baggage is in the charge of the carrier, paying

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¹ "The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air."

² "The carrier liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier."

³ Ülgen, Hüseyin: Hava Taşıma Sözleşmesi, İstanbul - Turkey 1987, p. 169.

attention to the care and the maintenance of the aforesaid baggage (or goods) is also considered as the carrier's liability.

The content of the liability of the carrier to pay attention to the care and the maintenance of the baggage is not very clear in the regulation, but since the carrier acts often as a merchant, it is stated that the carrier has to act prudently in terms of keeping the baggage safe and taking all the precautions to deliver the baggage safe and sound to where it will go⁴ "Turkish Commercial Code (TTK.)" a.18/s.2. For that reason, the infringement of the liability regarding the attention to the care and maintenance of the baggage by a prudent carrier unexpectedly will be enough to make the carrier liable for the damage of the baggage.

The period that the carrier is liable for the care and the maintenance of the baggage is regulated in TSHK.a.121/s.2 in terms of domestic flights. The period, accordingly, consists of '*the period when the baggage or goods, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, is in the charge of the carrier*'. In this respect, it is stated that the carrier is liable for the maintenance of the baggage within the period starting from giving the baggage in the charge of the carrier (possession transfer) and ending when the baggage is in the charge of the passenger again.⁵ War.C.a.18/s.2 is likewise. Nonetheless, in Mon.C.a.17/s.2, the same circumstance is as '*...the carrier is liable only on condition that the event causing any damage to the baggage took place on board or during the period within which the checked baggage was in the charge of the carrier*'. In this way, if the event that caused any damage to the checked (registered) baggage took place during the stated period, the carrier will be liable under these conditions.

c) The Infringement of the Liability to Deliver the Baggage by the Carrier

To give an end to the carriage agreement, in terms of the baggage, in the way to carry out as required, it is a must that the carrier transfers the possession, whether immediate or mediate, to the passenger or to the authorized agent. However, to mention that the carriage agreement was given an end by transferring immediate possession of the baggage, what is required is to have a look whether there is a contract of mandate between the contracting parties. Therefore, the existence of an agreement, regarding that the liability of the carrier for the care and the maintenance of the goods will come to an end only if the baggage is stored in a depository or entrepot which is not under the provision and control of the carrier and in a way that the passenger or the agent will have the possession directly, will be the thing that gives an end to the liability, in terms of TSHK., by storing the baggage with no damage. In this case, the possession of the baggage is transferred to the passenger or the authorized agents through the transfer by order⁶. It is also possible that there has been a depository agreement between the carrier and the passenger concerning that the possession will be on the carrier for a while. In that case, the possession transfer (by default) is carried out, but when the baggage agreement is ended likewise, it is stated that the carrier will be liable for the damage of the baggage in accordance with the contract of mandate⁷. On the other hand, if the baggage is still in

⁴ See., **Ülgen**, (Sözleşme), p. 170.

⁵ **Birinci – Uzun**: Tuba, Uluslararası Hava Taşımacılığında Taşıyıcının Sorumluluğu, Ankara - Turkey 2012, p. 93; **Ülgen**, (Sözleşme), p. 170; **Sözer**, Bülent: Türk Hukukunda ve Uluslararası Hukukta Hava Yolu İle Yük Taşıma Sözleşmesi, 2nd Edition, İstanbul - Turkey 2009, p. 207.

⁶ For detailed information about the transfer of the possession, see., **Ayan**, Mehmet: Eşya Hukuku, I, Zilyetlik ve Tapu Sicili, 6th Edition, Konya - Turkey 2012, p. 70 et al..

⁷ See., **Ülgen**, (Sözleşme), p. 97 – 98, 171; See also., the aforementioned book., p. 171, index. 46ba.

the charge of the carrier, without any agreements between the contracting parties, the liability of the carrier originated from the carriage agreement will continue under its own conditions unless the immediate possession is transferred to the passenger or to the authorized agent. There appears a scope of application of TTK.a.869 in case that the carrier cannot find the addressee, in terms of baggage or goods, or that the addressee avoids receiving the baggage or goods⁸.

In brief, the carrier is liable for the damage of the baggage within the liability of baggage maintenance; however, the carrier is also liable for the loss of, or destruction of the baggage under its conditions. The events which cause failure in delivery such as loss, or damage are regulated in TSHK., Warsaw Convention and Montreal Convention as the reasons for liability (TSHK. a.121; War.C.a.18; Mon.C.a.17/s.2).

2- Damage

a) In General

In order to be liable, of a carrier, for the baggage carriage, there has to occur a damage because of the infringement of the liability regarding the attention to the care and maintenance or during the delivery of the baggage. Although the aforesaid liabilities are not carried out as required, it is not even a matter for a carrier to be liable if there occurs no damage to the baggage⁹.

Both TSHK. and the international conventions that regulate the rules of the civil aviation generally examine the liability of the carrier derived from the baggage (and goods) carriage, or in other words, the outlook of the damage, in relation to 'loss', 'damage' and 'delay'¹⁰. These concepts will be mentioned below.

⁸ TTK. as per article.869, "(1) Before the baggage is delivered to the right place, if it is clear that the carriage cannot be done appropriately for the agreement or there appear any obstacles for delivery, the carrier must be instructed by the person who has the right of disposition, as per article 868. If the right of disposition is possessed by the addressee, but cannot be reached or avoids receiving the baggage, the right of disposition will be used by the addresser according to the first sentence. Even the right of disposition depends on the submission of the carrier's receipt, in this case the submission of the carrier's receipt is not required. The carrier, when instructed for carriage, may ask for the rights stated in the third and fourth sentences of a.868/s.1 provided that the delivery obstacle is not because of the reason which has been in the risk zone of the carrier. (2) If there occurs an obstacle about carriage or delivery after the addresser, by using the right of disposition as per article 868, wants the baggage to be delivered to a third person, the addressee substitutes for the addresser and the third person substitutes for the addressee, according to the first subsection. (3) As per article 868, subsection 1 and sentence 1, if the carrier cannot get the instructions at the right time, the carrier will be liable for taking the best precautions for the benefit of the person who has the right of disposition. The carrier can save the baggage by emptying it or can consign the baggage to the account of the person who has the right of disposition, or can carry it back in accordance with the provisions stated in the first and fourth subsections of the article 868. If the carrier consigns the baggage to a third person, the carrier will only be liable for the attention to be paid on choosing the right person. If the goods are the kinds that can go off, the carrier has the right to make the goods be sold in accordance with the provisions of the article 108 of Turkish Code of Obligation on condition that to take such a precaution is really needed or otherwise the possible expenses are not in a reasonable amount comparing to the value of the goods themselves. The carrier can annihilate the goods which cannot be used in any ways. When the goods are emptied, the act of carriage will have finished. (4) The carrier asks for the compensation of expenses and an appropriate payment according to the precautions taken by the third subsection, providing that the obstacle is not because of a reason that has been in the risk zone itself".

⁹ Canbolat, A. Gül: Hava Taşıma Sözleşmesinde Taşıyıcının Sorumluluğu, Ankara - Turkey 2009, p. 65.

¹⁰ TSHK (a.121/s.1) has used the terms 'loss' and 'damage' for the damage of a baggage; however, in Warsaw Convention (a.18/ s.1) and within the same parallelism in Montreal Convention (a.17/ s.2), the terms 'destruction', 'loss' and 'damage' have been used to state the damage of a baggage.

b) The Outlook of Damage

aa) Loss of the Baggage

The term 'loss' is defined as 'get lost', 'to lose', 'to be lost' and 'to be of no use'¹¹. In the carriage law, this term is defined as 'the lack of the capability of the carrier to deliver the baggage to its owner'¹². In the events that the carrier is incapable of delivering the baggage to the passenger or to the authorized agent, it is possible to mention about the loss of the baggage. Even though the baggage is in the condition to be delivered to the passenger, that is, although it still displays a physical existence, if the baggage changes entirely in terms of quality as compared to the first, or loses its essence, falls in value economically, is of no use, or falls in quantity, it is the matter of the baggage to be defined as 'destroyed (perished)'. Although it is still controversial, in the doctrine, the term 'destruction' should be defined together with the term 'loss'¹³. The baggage will be considered as 'loss' in the events that it gets lost, burnt, stolen, squeezed, smashed, retained by the competent authorities and when it is impossible to take it back because it is given to another person apart from its owner¹⁴. *The US. Court of Appeals, 5th Circuit*, in the decision (provision) of **Dalton v. Delta Airlines** dated 07.04.1978, the death of the live stocks carried by air is also evaluated as the baggage loss¹⁵.

The loss of the baggage, that is the carrier's being incapable to deliver the baggage to its owner, may appear because of an actual impossibility as well as a juridical impossibility. In this respect, for example, there is no difference between the actual events such as the baggage's being confiscated when it gets lost, burnt, decayed, or squeezed and the juridical events such as the delivery of baggage to another person instead of its owner and the impossibility to take it back¹⁶.

When the baggage is not delivered temporarily, it is not considered to be lost as a rule¹⁷. For instance, the baggage which cannot be delivered because of the custom's control is not considered to be lost unless it is confiscated¹⁸. However, there has been no special regulation in TSHK. and Warsaw Convention about what is meant by the concept 'not to deliver temporarily, in other words, about the maximum limit of the temporariness'. On the contrary, the maximum time limit of goods not being delivered temporarily, in terms of carriage of goods, has been regulated particularly in TSHK.a.114/s.3 and in War.C.a.13/s.3. The period cannot be longer than seven (7) days on which the baggage should have arrived. For the carriages subjecting to TSHK and Warsaw Convention, if the baggage is not delivered within 7 days, it is

¹¹ See., TDK. Büyük Türkçe Sözlük, "zayı", <http://tdkterim.gov.tr/bts/>, (29.05.2013).

¹² **Mankiewicz**, René H.: The Liability Regime of the International Air Carrier: A Commentary on The Present Warsaw System, Quetremont, Canada 1981, p. 168; **Ülgen**, (Sözleşme), p. 179; **Kaner**, İnci D.: Hava Hukuku (Hususi Kısım), 2nd Edition, İstanbul 2004, p. 75; **Çağa / Kender**: Deniz Ticaret Hukuku, II, Navlun Sözleşmesi, 7th Edition, İstanbul 2004, p. 140; **Birinci – Uzun**, p. 96; **Canbolat**, p. 66; **Arkan**, Sabih: Karada Yapılan Eşya Taşımalarında Taşıyıcının Sorumluluğu, Banka ve Ticaret Hukuku Araştırmaları Enstitüsü, Ankara 1982, p. 105. **Sözer**, describes the aforementioned concept as 'loss'. See., **Sözer**, (Yük Taşıma), s. 208. For the explanation on that the concept 'loss' is used for the goods, so it should be defined considering the goods, not the carrier, see., **Özdemir**, p. 95, index. 17.

¹³ See., **Ruhwedel**: Der Luftbeförderungsvertrag, Frankfurt am Main 1985, p. 111; **Çağa / Kender**, p. 140; **Ülgen**, (Sözleşme), p. 178 – 179; **Kaner**, (Hava Hukuku), p. 75; **Birinci – Uzun**, p. 96; **Özdemir**, p. 95. Counterview, **Sözer**, (Yük Taşıma), p. 208 – 209.

¹⁴ For examples, see., **Ülgen**, (Sözleşme), p. 179; **Özdemir**, p. 96; **Sözer**, (Yük Taşıma), p. 208.

¹⁵ See., **Birinci – Uzun**, p. 96, dn. 385.

¹⁶ **Ülgen**, (Sözleşme), p. 179; **Birinci – Uzun**, p. 96; **Özdemir**, p. 96.

¹⁷ **Birinci – Uzun**, p. 96; **Ülgen**, (Sözleşme), p. 179; **Özdemir**, p. 96.

¹⁸ **Özdemir**, p. 96.

considered to be lost¹⁹. In Montreal Convention, the maximum limit is also accepted exactly the same for the carriage of goods (cargo), but the limit is especially stated as '21' (twenty-one) days for the carriage of baggage. It is, in Mon.C.a.17/s.3, as the following: "...if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage ²⁰". That's why, for the carriages subjecting to Montreal Convention, the expiration of the time limit will lead the baggage to be supposed as lost. Such an event, in the doctrine, is named 'loss presumption'²¹. Yet, there has been no clear regulation that explains what should be done when the baggage (or goods) is found, which is supposed to be lost.

'Complete loss' appears only when the baggage is completely unsuitable for delivery, or, namely, when the carrier is absolutely incapable of delivering the aforesaid baggage. In the event of 'complete loss', the compensation is calculated by taking the whole baggage into consideration. If the baggage carried by air is partially lost, in terms of being fungible, here it is called as '*partial loss*'. In this case, the baggage (or its fungible content) is exposed to decrease partially in respect of volume, weight or quantity. In order to mention about the partial loss, there has to be the existence of baggage of whose parts have still economical value and can still be delivered to the passenger. To specify the amount of compensation in such a case, the value of the lost, damaged or destroyed parts of a baggage is taken into consideration. Nevertheless, if the part, not lost (the rest of the baggage), has no economical value on its own without the part which is lost, or the delivery of the rest of the baggage is of no use anymore, it will be again a matter of complete loss²².

Since there is nothing clear about the amount of the compensation concerning the pecuniary (economic) damage flowing from the loss of the baggage in TSHK and the conventions, it is stated that the amount will be decided by the court ruling the case by its own law (*Lex Fori*)²³. The matter whether the non-pecuniary damage is also asked for or not is controversial; yet, it is possible to see the decisions in which the Supreme Court allows non-pecuniary compensation in the case of the loss of the baggage.

bb) Damage of the Baggage

For carriage law, the concept 'damage' is generally defined as any material worsening that occurs in the goods (baggage or its content) and causes its value to fall down²⁴. On the other hand, in order to mention about 'damage', there are some other statements concerning that the material worsening which causes the value of the goods (baggage or its content) to fall down should not be in such a quality that changes its principal qualification; otherwise, there exists a complete or partial loss

¹⁹ Ülgen, (Sözleşme), p. 179.

²⁰ "...if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage."

²¹ Özdemir, p. 95 et al.; Birinci – Uzun, p. 97; Franks, M. R., Airline Liability for Loss, Damage or Delay of Passenger Baggage, Fordham Journal of Corporate and Financial Law, Vol. 12, 2007, p.749.

²² For details on complete and partial loss, see., Özdemir, p. 99 – 101; Clarke, (Air), p. 111 et al.

²³ Dempsey / Milde, p. 183; Kirman, p. 82; Birinci – Uzun, p. 97.

²⁴ Clarke, Malcolm A.: Contracts of Carriage by Air, London 2002, p. 112; Ülgen, (Sözleşme), p. 181; Özdemir, p. 101; Sözer, (Yük Taşıma), p. 210; Arkan, (Karada Yapılan Eşya Taşımaları), p. 51; Çağa / Kender, p. 140; Birinci – Uzun, p. 98; Canbolat, p. 68.

according to the concrete event²⁵. It is also stated that there occurs again ‘loss’, not damage, providing that the required expenses, needed to repair the damage or to attach an economical value, are extremely excessive²⁶.

It is possible that the goods are damaged completely or partially. In accordance with this statement, if the damage which took place in any part of the goods (baggage or its content) decreases the economical value of the steady part of the baggage, it is to say ‘complete damage’; however, if the steady part preserves independently its economical value, it is to say ‘partial damage’²⁷. For instance, the broken glass of a watch, carried in the baggage, will decrease the value of the watch economically even only when its glass has been damaged but other functions are still in good condition, and will be an example for ‘complete damage’; nonetheless, only one of the clothes in the baggage is torn or stained, it is accepted as ‘partial damage’ in terms of the content of the baggage in whole. Yet, in order to determine whether the baggage is damaged ‘completely’ or ‘partially’, it must be taken into consideration that if the damaged baggage is separable, fungible or it constitutes a unity of goods more than one, or it has a relationship like ‘integral part-insertion’ with one another; it must also be considered while determining about the ‘loss’ of the baggage as well²⁸. For example, if one of the costumes, prepared for the players who are on a tour and will rehearse their play in a few hours, is damaged in an irrecoverable way (loss), and will make the other costumes non-functional accordingly (be of no use), it will be determined by the regulations that there has occurred ‘complete damage’ or ‘loss’ according to the concrete event²⁹.

It is also possible that ‘loss’ or ‘damage’ takes place at the same time. In the first example above, within the assumption that the watch and the costumes are in the same baggage, the watch is considered as having ‘complete damage’, and the costumes as having ‘loss’ because it is impossible to repair the torn costume or it requires excessive amount, or it loses its economical value completely. In such a case, the liability regulations regarding ‘loss’ for the lost baggage, and ‘damage’ for the damaged one will be implemented as well³⁰.

Another point to be stated is the regulation a.128 in TSHK. According to this article, *‘the acceptance of the baggage by the authorized person entitled to delivery without any objection will display a presumption that the baggage is delivered in a good condition and in accordance with the carriage document (s.1). In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest within seven days (s.2/sentence1).’* If not so, it is not possible to sue against the carrier about the damage liability except the fraudulent behavior (TSHK.a.128/s.4) The maximum notice period for international carriages subjecting to Warsaw Convention has been stated for three days. In War.C.a.26/s.2, sentence 1, this is as *‘In the case of damage, the person entitled to*

²⁵ Kaner, (Hava Hukuku), p. 75.

²⁶ See., Özdemir, p. 102, index. 52.

²⁷ Ülgen, (Sözleşme), p. 181; Birinci – Uzun, p. 98; Özdemir, 102; Sözer, (Yük Taşıma), p. 210; Canbolat, p. 68.

²⁸ For details on the mentioned concepts, see., Ayan, (Eşya I), p. 17 et al.; Oğuzman / Seliçi / Oktay – Özdemir: Eşya Hukuku, 15. Baskı, İstanbul 2012, p. 11 et al.. For research on the decision *China Airlines Ltd. v. Phillips Hong Kong Ltd.*, dated 25 June 2002, given by Singapore Supreme Court, see., Ünal, Canan, Uluslararası Hava Taşımasına İlişkin Karar İncelemesi, İBD., V. 82, No. 3, 2008, p. 1407 et al..

²⁹ For information on the fact that if the partial damage occurred in the goods makes them impossible to be used appropriate for the main purpose, it is to mention about loss, not damage, see., Birinci – Uzun, p. 99; Sözer, (Yük Taşıma), p. 210.

³⁰ Özdemir, p. 103.

delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within three days from the date of receipt in the case of luggage..."³¹. Because how the complain should be made (the form of the complain) is not clear in the legislation, it does not subject to the regulation.

As well as 'loss', in TSHK and other conventions, there has been no clear statements about how to calculate the compensation on economic damage in the case of the damage of the baggage. That's why it is stated that the amount of the compensation will be determined by the court ruling the case (*Lex Fori*)³². Accordingly, the amount of damage concerning the compensation suits in Turkey will be determined by TTK provisions (regulations) (TTK.a.880)³³. Whether to ask for non-pecuniary damage has already been controversial.

cc) Delay of the Baggage

As stated before, the concept 'delay' is, in short, defined as the overpass of the carriage period (time)³⁴. Thus, due to the overpass of the carriage time, 'delay' will be a matter if the baggage cannot be delivered on time³⁵. It is possible that the contracting parties have already agreed on when the baggage should be delivered, that is the carriage period. In such a case, during the determination and the reassignment of the delay, the regulations in the agreement of passenger carriage will be considered accordingly³⁶. On condition that there is not an appointed period by the parties, the carriage period will include the reasonable time expected from a prudent carrier in the framework of the cases and conditions of a concrete event (TTK.a.2)³⁷. For that reason, 'delay' appears when the carriage period is not appointed by the contracting parties and when the baggage cannot be delivered in the reasonable time expected from a prudent carrier in the framework of the cases and conditions of a concrete event.

The carrier has been liable for the damage caused by delay in the carriage by air. The case, for domestic flights, is stated in TSHK, in the article 122 as '*The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or luggage*'. The same case is, in Mon.C.a.19, sentence 1, is also as '*The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo*'³⁸. The same liability is regulated by War.C.a.19, 20, for the carriage to the countries, or from the countries, which are in favor of Warsaw Convention, but not 1999 Montreal Convention. For Warsaw Convention, '*The carrier is liable for damage*

³¹ "*In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within three days from the date of receipt in the case of luggage...*".

³² **Dempsey / Milde**: International Air Carrier Liability – The Montreal Convention of 1999, McGill University Centre for Research in Air & Space Law, Montreal 2005, p. 183; **Kirman**, Ahmet: Hava Yolu İle Yapılan Uluslararası Yolcu Taşımalarında Taşıyıcının Sorumluluğu, Ankara 1990, p. 82; **Birinci – Uzun**, p. 99.

³³ **Birinci – Uzun**, p. 99; **Ülgen**, (Sözleşme), p. 181.

³⁴ **Gençtürk**, Muharrem: Uluslararası Eşya Taşıma Hukuku – Genel Kavramlar – Gecikmeden Doğan Sorumluluk, İstanbul 2006, p. 123. **Sözer** defines the concept 'delay' as the carrier's carrying out the liability stated in the carriage agreement in a later period than it is required to be. See., **Sözer**, (Yük Taşıma), p. 211. For a similar definition, see., **Sorgucu, Ayhan**: Hava ve Uzay Hukuku – Air & Space Law, Ankara 2012, p. 46.

³⁵ **Mankiewicz**, p. 186; **Giemulla / Schmid / Müller – Rostin / Dettling – Ott**: Rod: Montreal Convention, Alpen aan den Rijn 2006, p. 3- Artc. 19.; **Ülgen**, (Sözleşme), p.182; **Kirman**, p. 96; **Kaner**, (Hava Hukuku), p. 83; **Birinci – Uzun**, p. 103; **Canbolat**, p. 71.

³⁶ **Kaner**, (Hava Hukuku), p. 83; **Ülgen**, (Sözleşme), p. 182.

³⁷ **Mankiewicz**, p. 186; **Gençtürk**, p. 123; **Birinci – Uzun**, p. 104.

³⁸ "*The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.*".

*occasioned by delay in the carriage by air of passengers, luggage or goods*³⁹ (War.C.a.19).

As understood from the provisions (regulations), in order to make the carrier be liable for delay of the baggage, the baggage must be damaged occasioned by delay besides the overpass of the carriage period. The damage may be a property damage caused by the decrease of the goods in market or stock market, the increase in customs duty, reneging on a contract signed by the third person because of not undertaking the agreement regarding any goods in the baggage, or having paid to the storage owner to stock the baggage (or cargo) more than required. These kinds of property damages are the ones in which the passenger's property debit increases or the passenger is deprived of the profit. It is also controversial whether 'loss' or 'damage' of the baggage or its content, in other words, the economic damage of the baggage itself occasioned by delay will be qualified (defined) as 'damage' by 'delay'⁴⁰. Another point of view is that the damage by delay is composed by other destructions apart from 'loss' or 'damage', and the compensation liability which flows from 'loss' or 'damage' will be subjected to the provisions of TSHK.a.121 (or War.C.a.18; Mon.C.a.17/s.2)⁴¹. Another different view is that if there happens any 'loss' or 'damage' due to delay, the rights will start to compete, and accordingly, the provisions regarding loss/damage or the ones regarding delay will preferably be implemented⁴². The last view on this case is that any damage occasioned by delay will be defined as 'damage by delay'. For that reason, the destruction of the baggage (cargo) caused by loss or damage is also included in the term 'damage by delay' providing that it is because of the delay itself⁴³.

It will be right, in accordance with the first view, to define 'damage by delay' as 'any property damage occasioned by not delivering the baggage on time, apart from loss or damage'. In TSHK, Warsaw and Montreal Conventions, the provisions about 'loss/damage', and on 'damage due to delay' are regulated separately. Here, it seems impossible that the rights will compete. That's because the regulations on 'loss/damage' and on 'damage due to delay' come with different debts and liabilities. Indeed, the liability of the carrier for 'loss' or 'damage' derives from acting against the care and maintenance of any goods and continues until the baggage is delivered to the passenger. From this point of view, the overpass of the carriage period has no much importance; the liability of the carrier still goes on for 'loss' or 'damage' of the baggage which is in the charge of the carrier, even in the event of 'delay'. 'Delay' comes out with the carrier's acting against the rule to deliver the baggage on time, and this has nothing to do with the liability of care and maintenance of the baggage. For that reason, the acceptance that property damages occasioned by delay, and loss or damages that make the goods decrease in value economically, even it is because of delay, should be subjected to different regulations seems more suitable in this way⁴⁴.

Another condition that makes the carrier liable for damages occasioned by delay is that the damage must occur because of delay, that is there must be a direct casual

³⁹ "The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods."

⁴⁰ Kaner, (Hava Hukuku), p. 84.

⁴¹ Ülgen, (Sözleşme), p. 185; Sözer, (Yük Taşıma), p. 214.

⁴² Özdemir, Atalay, Bagaj ve Yükün Kaybı, Hasarı ve Gecikmeden Doğan Zararlar Nedeniyle Hava Taşıyıcısının Sorumluluğu, Ankara 1992, p. 72.

⁴³ Kaner, (Hava Hukuku), p. 84.

⁴⁴ See., Birinci – Uzun, p. 111; Ülgen, (Sözleşme), p. 185; Sözer, (Yük Taşıma), p. 214.

connection between the overpass of the carriage period and the damage. In order to prove that the casual connection belongs to the passenger; and in the cases where the passenger cannot prove the connection between the period and damage, the carrier will not be liable anymore ⁴⁵.

In order to consider the carrier liable, it is also necessary that the passenger should complain within the period stated in TSHK.a.128. According to the article 128 in TSHK, '*The acceptance of the passenger baggage by the person entitled to delivery without any objection constitutes a presumption about that the baggage has been delivered in a good condition and suitably for the carriage document (s.1). In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of damage, and at the latest within seven days. In the case of delay, the complain must be made after the delivery of the baggage at the latest within twenty-one days (s.2).*' If the person entitled to delivery does not care about these periods, he cannot sue against the carrier, except for the fraudulent act of the carrier (TSHK.a.128/s.4). According to the international carriage subjecting to Warsaw Convention, the person entitled to delivery must complain to the carrier after the delivery of the baggage at the latest within fourteen days (Warsaw Convention.a.26/s.2)

Both TSHK., and Warsaw and Montreal Convention do not include such a discrimination of registered-non registered baggage while they are regulating the liability of the carrier sustained in the event of delay, contrary to the regulations about the loss or damage of the baggage. Thus, it is also stated in the doctrine that the carrier is liable also for the damages sustained in the event of delay of the non-registered hand baggage ⁴⁶ (TSHK.a.122; War.C.a.19; Mon.C.a.19).

3- The Event's Which Cause Damage Taking Place on Board the Aircraft

a) In General

The provisions of TSHK.a.120; War.C.a.17; Mon.C.a.17, which regulate the liability resulting from the physical damages of a passenger due to the civil aviation, require that **an accident** causing a damage must occur within the context of liability conditions; on the contrary, the provisions which regulate the damages of a baggage, TSHK.a.121/s.1; War.C.a.18; Mon.C.a.17/s.2, require **an event** that causes damage. In other words, for liability, it is required that there must be 'an accident' for the physical damages of the passenger, and 'an event' for the damages of the baggage; that's why, it seems appropriate to examine the nuance between the concepts 'accident' and 'event/occurrence'. In fact, it is not possible for these two concepts to be understood in a similar way, especially for the non-pecuniary compensation demands. The concept 'accident' had been examined in detail before; and the concept 'event' causing a damage and the difference between 'event' and 'accident' will be mentioned in the following.

⁴⁵ Kaner, (Hava Hukuku), p. 85; Gençtürk, p. 161 – 162; Birinci – Uzun, p. 111.

⁴⁶ See., Ülgen,(Sözleşme), p. 185; Canbolat, p. 73.

b) The Event Which Causes Damage

It is required, in TSHK.a.121, besides the other conditions, there must be ‘an event’ that causes damage to consider the carrier as liable for the baggage damages. It is the same for War.C.a.18 and Mon.C.a.17/s.2⁴⁷.

The concept ‘event’ is generally defined as ‘*any changes that occur apart from a person*’⁴⁸. In this regard, when comparing it to the concept ‘accident’, the term ‘event’ has a wider scope and includes all the phenomena causing damage⁴⁹. Therefore, the quality of the event that causes baggage damage does not have an importance on the liability. Different from the concept ‘accident’, the ‘event’ does not have to result from the structural risks of aeronautics⁵⁰; every phenomenon causing damage can be evaluated in the concept ‘event’ as long as there is a casual connection between the damage and event⁵¹.

c) When the Event Took Place during the Carriage by Air

Another condition to regard the carrier as liable for the damage is that ‘the event must take place during the carriage by air’. In other words, the potential liability of the carrier is limited to the damages deriving from the events which have happened or will happen at a specific time. It is not possible for the carrier to be liable for any damages which have happened other than during periods specified before. However, what matters here is the period of time when ‘the event’ happened, and the period of time when ‘the damage’ happened actually is not considered while setting up or ruling out the liability⁵². For example, during the carriage by air, in the event that an animal is exposed to a viral shedding by another animal but gets ill outside the aerodrome, it is still clear that the damage took place during the carriage by air; it does not annihilate the liability that the damage appeared afterwards⁵³.

The period of time called ‘carriage by air’ and is important to state the liability for baggage is regulated in TSHK.a.121/ s.2 within the concept of domestic flights.

⁴⁷ Although the distinction between the physical damages of the passenger, in Warsaw Convention a.17., and the baggage damages, in Warsaw Convention a.18., are regulated in these provisions, Guatemala City Protocol dated 1971 removed the distinction by giving the name ‘event’ to both of these damages. See, **Ülgen**, (Sözleşme), s. 174, index. 49. Yet, the mentioned Protocol lost its importance and could not go in effect because of Montreal Protocol numbered 1, 2, 3, and 4, which is made four years after Guatemala Protocol. See., **Çöğen**, Selçuk: *Varşova ve Montreal Konvansiyonları Çerçevesinde Havayolu Taşıyıcılarının Sınırlı Sorumluluğu, Uygulamada Karşılaşılan Sorunlar*, Fatih Üniversitesi Hukuk Fakültesi Hava Taşıma Hukuku Sempozyumu (Editor **Çeliktaş**, İlyas), İstanbul 2012, p. 118.

⁴⁸ See., **Ayan**, Mehmet: *Medeni Hukuka Giriş*, 5. Baskı, Konya 2011, p. 113.

⁴⁹ **Mankiewicz**, p. 147; **Schleicher / Reymann / Abraham**: *Das Recht der Luftfahrt, Kommentar und Quellensammlung, Erster Band: Allgemeiner Einleitung und Internationales Luftrecht, Dritte Auflage*, Köln – Berlin, 1960, p. 347; **Ülgen**, (Sözleşme), p. 174; **Sözer**, (Yük Taşıma), p. 204; **Birinci – Uzun**, p. 92; **Canbolat**, p. 69. ‘*US. Supreme Court, 9th Circuit*’, in a decision, has agreed that the word ‘accident’ originated from French version of Warsaw Convention means ‘unusual’, ‘unexpected’, or ‘unintended’ and that such events must flow from the phenomenon that takes place apart from the passenger; and it has also stated that the concept ‘accident’ in Warsaw Convention a.17. has a narrow meaning comparing to the concept ‘event’ in the article 18. The aforementioned decision **Saks v. Air France**, dated 1985, has also stated that the carrier is liable for being hearing impaired of a passenger due to pressure altitude variation. For decision, see., **Nutt**, Kathryn M.: *Air France v. Saks: An Accidental Interpretation of the Warsaw Convention*, American University Journal of International Law & Social Policy, Vol. 1, 1986, p. 195 et al..

⁵⁰ **Birinci – Uzun**, p. 93; **Özdemir**, (Atalay), p. 59 – 60.

⁵¹ **Ülgen**, (Sözleşme), p. 174 – 175.

⁵² **Sözer**, (Yük Taşıma), p. 215; **Ülgen**, (Sözleşme), p. 175.

⁵³ For approaches, see., **Ülgen**, (Sözleşme), p. 175, dn. 52. See also., **Kaner**, İnci D.: *1929 Tarihli Varşova Konvansiyonu’nda Taşıyıcının Yolcu, Yük ve Bagaj Taşımacılığından Doğan Sorumluluğu, Sorumluluk ve Sigorta Hukuku Bakımından II. Eşya Taşımacılığı Sempozyumu (24 – 25 Ocak 1985, İstanbul), Ankara 1985 (II.Sempozyum)*, p. 198.

According to the regulation, the carriage by air includes *'the period when the baggage or goods are in the charge of the carrier whether in an aerodrome, or on board an aircraft, or outside an aerodrome'*. The period of time, in terms of international carriage, is regulated according to the provisions of War.C.a.18/ s.2 and for contracting countries Mon.C.a.17/ s.2. The period of time in War.C.a.18/ s.2 is as *"...the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever."*⁵⁴. In Mon.C.a.17/s.2, it is stated as *"The carrier liable... only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier."*⁵⁵.

As it is seen, the domestic carriages subjecting to TSHK. and the international carriages, between the contracting countries, subjecting to Warsaw Convention show parallelism with the period when the carrier is liable for the baggage damage. Therefore, the carrier is liable for the damage during the period when the baggage is in the charge of the carrier, whether in an aerodrome or on board an aircraft, or in the case of a landing outside an aerodrome. As stated before, the liability of the carrier, when the baggage is in charge, starts with the transfer of the possession to the carrier and continues until it ends⁵⁶. In this respect, the carrier will not be liable for the damages after the possession of the baggage is not in the charge of the carrier any longer⁵⁷. The provisions of 1999 Montreal Convention, Warsaw Convention (and the provisions created in a similar parallel in TSHK.) do not state such a location (place) expression that says *'on board an aircraft, or in the case of a landing outside an aerodrome, in any place whatsoever'*, and makes the carrier liable for the damage when the baggage is on board an aircraft or during the time it is in the charge of the carrier (a.17/s.2).

According to TSHK.a.121/s.3, sentence1, the period of carriage by air does not include the carriage outside the aerodrome carried out on land, water or inland waters. Nevertheless, if the aforesaid carriages are carried out for freight, delivery or transfer, in order to discharge the agreement of carriage by air, any damage is accepted to happen during the carriage by air until otherwise specified (TSHK.a.121/s.3,sentence2). War.C.a.18/s.3 has also agreed on the same principles. On the contrary, according to Montreal Convention, because there is nothing called for a spatial condition, the carrier is liable for the damage if the baggage is still in the charge of the carrier, no matter where the event takes place.

4- Casual Connection

Another condition to regard the carrier liable for destruction occasioned by loss, damage or delay is that, in terms of loss and damage, there must be a casual connection between the damage and the event which takes place during the carriage by air, and in terms of delay, between the damage and overpass of the period. In case of the contractual liability, the casual connection is required between the infringement of the agreement and damage. That is, if the carrier acts against the

⁵⁴ "...the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever."

⁵⁵ "The carrier liable... only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier."

⁵⁶ Birinci – Uzun, p. 93.

⁵⁷ Sözer, (Yük Taşıma), p. 215.

commitment (of the agreement), the carrier will be liable for damages under certain conditions⁵⁸. That's because the body of the damage, by itself, is not enough for being liable⁵⁹ and a casual connection is necessary in any circumstances whether the liability of the carrier is based on defect or not⁶⁰. The liability of proving of the existence of a casual connection is in the charge of the passenger⁶¹.

Conclusion

Within the context of both domestic (Turkey) and international carriages, the carrier is liable for damages of a registered (checked) baggage during the period it has been in the charge of the carrier. The conditions of this liability is stated, in relevant conventions and TSHK., as 'the act of the carrier against the commitment of the baggage carriage', 'damage' and 'the event occurring during the carriage by air'.

Accordingly, the act of the carrier against the commitment of the baggage carriage may appear in a way such as 'the infringement of the liability to care about the maintenance of the baggage', or 'the infringement of the liability to deliver the baggage'. Within this framework, what is meant by the term 'damage' is the loss, destruction or delay of the baggage. The carrier will also liable juridically for the event which may show itself as 'loss', 'damage' or 'delay' of the baggage if the event mentioned above takes place in an aerodrome, on board an aircraft, or in the case of a landing outside an aerodrome and on condition that the baggage is still in the charge of the carrier.

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⁵⁸ Mankiewicz, p. 90.

⁵⁹ Kırman, p. 89, 90; Gençtürk, p. 161; Birinci – Uzun, p. 111; Canbolat, p. 71.

⁶⁰ Canbolat, p. 70.

⁶¹ Kırman, p. 91; Gençtürk, p. 161 – 162; Birinci – Uzun, p. 111.

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