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RESEARCH ARTICLE

"Inherent Vice of the Goods" Exception in the frame of "*Volcafe Ltd and Others v. Compania Sud Americana de Vapores SA*" Decision: An Assessment under Turkish-German Law*

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Abstract

The United Kingdom Supreme Court, in "Volcafe Ltd and others (Appellants) v. Compania Sud Americana De Vapores SA" case set forth an important principle related to burden of proof for the exceptions of carrier's liability counted in Art.IV/2 of the Hague Visby Rules and decided that "the carrier is under the obligation to substantiate the due diligence for the protection of the goods carried". According to Art.1182 of the Turkish Commercial Code (TCC), titled "the Circumstances that provide Presumption related to Causality and Absence of Negligence to the Carrier", "damages arise from the inherent vice or characteristics of the goods" is accepted as an exception which facilitates the exclusion of the liability of the carrier. On the other hand, the German Commercial Code (HGB §499,3) includes a provision which states explicitly that "the carrier may avail itself of the defences related to the inherent characteristics of goods only if it has taken all of the measures in respect of the use of specific equipment". This study aims to review the provisions in both Turkish and German Law related to the exception of "inherent vice of the goods" and making a remark taking into consideration of the United Kingdom Supreme Court's decision.

Keywords

Volcafe Case, İnherent Vice of the Goods, Exceptions of Carrier's Liability, Excepted Perils, Burden of Proof

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I. Introduction

The United Kingdom Supreme Court in the decision of "Volcafe Ltd and others (Appellants) v. Compania Sud Americana De Vapores SA"[1] dated 5.12.2018, ruled an important principle about the burden of proof in the presence of one of the exceptions in the Hague-Visby Rules Art.IV/2.

The judgment is about coffee beans shipped from Colombia on various vessels owned by the defendant shipowners for carriage to Bremen. Although all the walls of the containers were covered with craft papers as a precaution against condensation damages, when the containers were opened at the port of discharge, it was seen that the bags in the containers were soaked and the coffee beans were damaged because of condensation. The cargo owners alleged that condensation damage occurred because of using insufficient paper and asserted that the carriers who failed to use enough paper to cover the containers, breached their duty of care to cargo which is also ensured in HVR Art.III/2. Carriers joined issue on these claims; they asserted that condensation damage resulted from inherent vice of the coffee beans and they couldn't be held responsible relying on the exception in HVR Art.IV/2(m). In the frame of these allegations and defences, the Supreme Court held that "the carrier has the legal burden of proving that they took due care to protect the goods from damage, including due care to protect the cargo from damage arising from inherent characteristics such as its hygroscopic character".

Art.1182 of the Turkish Commercial Code (TCC) numbered 6102, contains an exception list which consists of situations that facilitate the exclusion of the carrier's liability. This list also includes the exception of "loss or damage arising from inherent vice of the goods"(TCC Art.1182/1(f)). The important point necessary to emphasize related to the Volcafe case is that, differently from HVR, TCC includes a statement about burden of proof related to this exception list. According to this, if loss or damage arises from one of the exceptions counted in this list, it is presumed that "carrier has no fault or neglect".

On the other hand, a relevant provision of the German Handelsgesetzbuch (HGB) and tendency of German legal doctrine is remarkable. The German Legislator has drawn up a special provision in §499,3 which has a similar exception list with HVR. According to this, "If the carrier, by virtue of the contract for carriage of general cargo, is under obligation to protect the goods particularly from the effects of heat, cold, variations in temperature, humidity, vibrations or similar effects, then the carrier may avail itself of the defences set out in subsection (1) first sentence number 6 *("Inherent features or characteristics of certain goods")* only if it has taken all of the measures incumbent upon it in light of the circumstances, in particular in respect of

1 *Volcafe Ltd. and others (Appellants) v. Compania Sud Americana De Vapores SA*, [2018] UKSC 61.

the choice, maintenance, and use of specific equipment". Acceptance of the German doctrine about the burden of proof related to this exception, which has existed in German Law before "Volcafe", has an important similarity with the tendency of the UKSC in "Volcafe". So it is useful to examine this principle of the German Law and the reasons in its background.

In the frame of this explanations, in this study, at first, the principles in the "Volcafe" decision related to the burden of proof will be explained; the provision of HGB §499,3 and tendency in German Law will be examined; in the end, in the direction of the "Volcafe" decision and the principles in German Law, an evaluation will be carried out about propriety of TCC Art.1182 which strengthens the carrier's hand related to burden of proof significantly, by taking into consideration today's conditions of maritime practice.

II. An Outline of the "*Volcafe Ltd and others v. Compania Sud Americana De Vapores SA*" Decision

The lawsuit of "Volcafe Ltd. and others v. Compania Sud Americana De Vapores SA" is basically related to coffee beans which were loaded into the different ships belonging to defendant shipowners to be carried from Columbia to Bremen between January the 14th and April the 6th, 2012. Six Plaintiffs were also the holders of both of the bills of ladings and nine different packed green coffee beans which were sent to be carried to Bremen. The green coffee beans were loaded into a total of 20 "unventilated" 20-foot containers. As it is known and emphasized in the decision especially, the coffee beans absorb, stock and then spread the moisture as a consequence of the inherent vice of this kind of goods. In fact, in practice, coffee beans can be carried in ventilated or non-ventilated containers[2]. However, in 2012, when this case occurred, both ventilated and non-ventilated containers were used commonly to carry these kinds of goods, and the shippers in the current case had determined to use non-ventilated containers for coffee beans. On the other hand, it is known that using a non ventilated container is cheaper than using a ventilated one; but if a non-ventilated container is used to carry green coffee beans from a hot climate to a cold climate, coffee beans spreading the moisture is inevitable which causes the condensation on the walls and roofs of the container[3].

Because of this, it is necessary to cover all inner surfaces, especially roofs and walls

2 For a more comprehensive information about Volcafe Ltd and others v. Compania Sud Americana De Vapores SA" Case, see, *Volcafe Ltd. and others (Appellants) v. Compania Sud Americana De Vapores SA*, [2018] UKSC Para 1-4. To see full text and the legal processes of the Volcafe case see, <https://www.supremecourt.uk/cases/uksc-2016-0219.html> accessed 14 February 2023.

3 See, *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA* Para.3. For a brief outline of the decision of the High Court and Court of Appeal, see also, Sinem Ogis and Edward Kafeero, "Volcafe Case - Common Law vs.Visby Hague Rules: Is It One Versus Another?", (2020) XVII (2) YUHFD 751 ff; Sinem Ogis, "Lahey Kuralları ve Volcafe Davası Türk Hukuku Açısından Bakış", (2020) 15 (169) THD 1865 ff.

of the container, with a sorbent material like craft paper to protect the goods in the container against water damage. Dressing containers with craft paper was a common commercial method for the term this lawsuit was filed and so the carrier covered the containers subject to this case with craft paper. On the other side, the bills of lading in this case were subject to English Law and jurisdiction and also incorporated the Hague Visby Rules. The bills of lading also included LCL/FCL terms which meant carriers would be liable for the preparation of the containers and loading the coffee beans into the containers according to the terms of contract of carriage of goods by sea. When the ship arrived in Bremen, it was seen that all of the packages in a total of 18 containers were damaged because of moisture[4].

The Plaintiffs alleged basic arguments which were known and used for similar cases for years. According to this, the first allegation was related to the carriers' breach of the duty of delivering the goods in good condition as it is shown in the bill of lading. They also alleged that the carriers did not load, handle or carry properly and carefully and so they had also breached Art. III/2 of the Hague Rules, as an alternative allegation to the previous one. Except these, although some other allegations had also been presented by the Plaintiffs, the most important one says that the carriers did not use enough craft paper to protect the coffee beans from moisture. In response to this, the Defendant Carriers took objection to the Plaintiffs' allegations and asserted that the coffee beans could not tolerate the condensation occurred at the time of passing from hot climate to cold, so the moisture damage had occurred because of an inherent vice of coffee beans.

According to the Supreme Court, the main principle of the Hague Visby Rules is to limit the (liability) exceptions the carrier can be leaned and standardise the liability of carrier[5]. Except for Art. IV/1 and Art.IV/2(q) which set forth special principles of burden of proof with special aims, the Hague Visby Rules are not interested in the manner of burden of proof or distribution of burden of proof. In principle, these matters which are related to burden of proof are in the scope of international private law and are subject to procedural law which can differ in the frame of conditions of concrete judgement[6].

4 *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA* Para 3 ff.

5 See, *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA* Para.15. The same aim related to exceptions of carrier's liability has also been emphasized in German Law so many times. For related explanations in German Law, Dieter Rabe and Uwe Bahnsen, *Seehandelsrecht: Fünftes Buch des Handelsgesetzbuches mit Nebenvorschriften und Internationalen Übereinkommen*, (5th edn, Verlag C.H. Beck 2018) § 512 Rn 46, Rn 29. See also, Rolf Herber and Eva M. Harm, *Münchener Kommentar zum Handelsgesetzbuch: HGB - Band 7: Transportrecht*, (5th edn, Verlag C.H. Beck 2023) § 499 Rn 1 ff.

6 The Supreme Court explains this exactly like this: *"…But they are not exhaustive of all matters relating to the legal responsibility of carriers for the cargo. As is well known, the background against which they were drafted was the attempt of (mainly British) shipowners inthe late 19th century to limit their legal responsibility for cargo, and the attempt of other countries, notably the United States, Canada and Australia, to impose a minimum standard of performance by law. The purpose of the Rules was to standardise the obligations of the carrier and to limit the exceptions on which he should be entitled to rely…*" See, *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA* Para15

In a similar way, the Court emphasized that the civil law principles of each country which also accepted the Hague Rules can differ, and exemplified this with the current situation in Belgium, Germany, France, Italy, Norway and Spain. In the frame of these explanations, the Court especially referred to "the Albacora" case[7]. In this case, which is related to the matter of whether the good of fish was available to carry in non-refrigerated parts of the ship or not, the Court used these expressions exactly to solve this problem: "…if an article is unfitted owing to some inherent defect or vice for the voyage which is provided for in the contract, then the carrier may escape liability when damage results from the activation of that inherent vice during the voyage." It follows that whether there is inherent defect or vice must depend on the kind of transit required by the contract. If this contract had required the refrigeration there would have been no inherent vice. But as it did not, there was inherent vice because the goods could not stand the treatment which the contract authorised or required.[8]" On the other hand, the Court also referred to the "Scrutton on Charterparties and Bills of Lading" (23rd ed (2015), Para 11.055). According to this, "By 'inherent vice' means the unfitness of the goods to withstand the ordinary incidents of the voyage, given the degree of care which the shipowner is required by the contract to exercise in relation to the goods."[9] Then the Court highlighted that "if the carrier could and should have taken precautions which would have prevented some inherent characteristic of the cargo from resulting in damage, that characteristic is not an inherent vice. Accordingly, in order to be able to rely on the exception for inherent vice, the carrier must show either that he took reasonable care of the cargo but the damage occurred nonetheless; or else, that whatever reasonable steps might have been taken to protect the cargo from damage would have failed in the face of its inherent propensities"[10]. Finally, the Court reached this conclusion, "the carrier had the legal burden of proving that he took due care to protect the goods from damage, including due care to protect the cargo from damage arising from inherent characteristics such as its hygroscopic character"[11].

III. Circumstances of Carrier's Non-Liability in Turkish Commercial Code

The Hague - Visby Rules, which set forth general principles for liability of carrier in Art. II, also include some exceptions to eliminate the liability of the carrier with Art. IV/1 and IV/2. According to Art. IV/1, "Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused

7 *Albacora SRL v Westcott & Laurence Line Ltd* [1966] UKHL J0622-2, To see full text, <https://www.i-law.com/ilaw/doc/view.htm?id=145948> accessed 24 February 2023. For explanations on this case, see also, Sarah C. Derrington, "Due Diligence, Causation and Article 4(2) of the Hague-Visby Rules" 1997 (3) International Trade and Business Law Annual 178.

8 See, *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA*, Para 35

9 See, *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA*, Para 36

10 See, *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA*, Para 37

11 See, *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA,* Para 43

by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation" and by this means, an exception is provided for carrier's liability caused by unseaworthiness of the ship at the beginning of the voyage set forth in § 1 of Article 3[12].

On the other hand, the next paragraph involves an exception list which is alleged to be implemented for liability of the carrier arising from breach of due diligence set forth in Art. III/2. Since "damages come from wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods" (Art. IV/II(m)) is also counted in this list frankly, the carrier cannot be liable for the damages which arise from inherent vice of the goods in principle[13]. In respect to the Turkish Commercial Code numbered 6102, although the Legislature in Turkey grounded on these provisions of the Hague Visby Rules, all occasions in this list were not counted as an exception to carrier's liability. In this context, the Turkish Commercial Code includes some exception provisions that relieve the carrier of the liability under the title of "Circumstances for Exoneration from Liability". According to Art.1179 of TCC, which is a general provision which sets the carrier free, the carrier would not be liable for the damages which arise from neither the neglect nor the fault of the carrier or his servants. Besides this, Art. 1180 of TCC sets forth that the carrier will be liable for only his own neglect for the damages occurred as a result of fire or navigation or in the management of the ship; Art.1181 of TCC ensures the carrier will not be liable because of the damages related to saving or attempting to save life or property at sea. The exceptions to carrier's liability are not limited to the provisions between Art. 1179-1181; except these, the carrier has also opportunity to eliminate his liability under the circumstances

12 For comprehensive explanations about exceptions to carrier's liability in Hague Visby Rules see also, Marel Katsivela, "Overview of Ocean Carrier Liability Exceptions under the Rotterdam Rules and the Hague-Hague/Visby Rules" (2010) 40(2) Revue Generale de Droit 413 ff; Derrington (n5)175 ff.; Guenter H. Treitel and Francis M.B. Reynolds, *Carver on Bills of Lading*, (3rd edn, Sweet & Maxwell 2011) Para. 9-206, 704. The Author says that "while Art. II of the Hague Visby Rules sets forth main principles of the carrier's liability, Art. IV is about the defending possibilities; because of this in Art. IV/1, defending causes for liability of the carrier arise from the unseaworthiness of the ship at the beginning of the voyage are given place; the seperate exception list in Art. IV/2 is related to carrier's duty of care; in other words while Art. IV/1 ensures the exceptions for liability caused by unseaworthiness at the beginnging of the voyage, Art. IV/II sets forth the exceptions of carrier's liability for duty of care". Explanation in similar way, see also, Derrington (n5) 176. For explanations about exceptions to liability of the carrier in Hague - Visby Rules, see also, Hans Gramm, Das neue Deutsche Seefrachtrecht nach den Haager Regeln (Gesetz vom 10 August 1937 - RGBl. I Seite 891), (1st edn, Verlag von E.S. Mittler & Sohn 1938) 124 ff; Heinz Prüssmann and Dieter Rabe, *Seehandelsrecht: Fünftes Buch des Handelsgesetzbuches mit Nebenvorschriften und Internationalen Übereinkommen*, (4th edn, Verlag C.H. Beck 2000) §608, Rn.1; Rabe and Bahnsen (n3) §499, Rn.2; Steward C. Boyd, Andrew S. Burrows and David Foxton, *Scrutton on Charterparties and Bills of Lading*, (20th edn, Sweet&Maxwell 1996) 443. This view also accepted in German Law before the Maritime Law Reform in 25.04.2013, and this was justified with the aim to limit the exceptions for carrier's liability ("*Zweck der eingeschränkten Verschuldenszurechnung"*) in Hague - Visby Rules which also constitutes the ground of the related provision in HGB and as a consequence of this aim it was alleged that these exceptions had to be interpreted in a restricted manner. *(BGH (Urt. V. 28.6.1971 – II ZR 66/69) B*GHZ 56, 300 ("Neuwied"), Rabe and Bahnsen (n3) § 512, Rn.46, Rn.29. See also, Hans Wüstendörfer, *Neuzeitliches Seehandelsrecht*, (2th edn, Verlag Paul Siebeck, 1950) 274.

13 For more detailed information about this exception see, Boyd, Burrows and Foxton (n10) 445; Treitel and Reynolds (n7) 716; Gramm (n 8) 130 ff; Prüssmann and Rabe (n 9) §608 Rn 17; Rabe and Bahnsen (n3) §499 Rn 56 ff; Katsivela (n6) 453 ff.

of Art. 1220 titled "Reasonable Deviation" and Art. 1186 which sets the carrier free "if the nature of value thereof has been knowingly misstated by the shipper in the bill of lading". On the other side, other exceptions named in Art.IV/II of the Hague Visby Rules are given place in Art. 1182 of TCC under the title of "Circumstances that provide the carrier presumption for faultlessness and existence of causal relation" as the reasons that make the burden of proof easier to eliminate the carrier's liability[14]. These reasons, named "circumstances for probable non-liability of the carrier" by doctrine, as it can be understood from the title, do not provide the carrier a "non-liability" directly; existence of one of these circumstances just provides to the carrier easiness for burden of proof to exonerate their liability. The Turkish Legislator counted these reasons in 8 different paragraphs, as "Perils, dangers and accidents of the sea or other navigable waters; "act of war, act of public enemies; arrest or restraint of princes, rulers or people, or seizure under legal process or quarantine restrictions; strikes or lockouts or another stoppage or restraint of labour; riots and civil commotions; act or omission of the shipper or owner of the goods, his agent or representative; wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods; insufficiency of packing; insufficiency or inadequacy of marks". As the Legislator stated frankly with this provision, "if the damage occurs because of one the reasons counted in this list, it will be accepted that the carrier and his servant-agents have no neglect or fault and if it is possible that the damage is caused by one of these reasons under the circumstances of the concrete case, it will be accepted the damage has been caused by this reason" (Art. 1182/1,3, TCC). At that rate, if one of these reasons is proved in a concrete case, it cannot be possible for the carrier to eliminate their liability directly unlike Art. IV/2 of the Hague Visby Rules; on the contrary, a presumption of absence of negligence and another presumption of existence of causation between damage and the exception listed in article will occur[15].

IV. A Review in the frame of Para. 499 of German Commercial Code (HGB)

Under German Law, before the Maritime Law Reform in 2013, for the damages arisen from inherent vice of the goods, there was a similar regime with Art. 1182 of

14 About these occasions which provide to the carrier easiness to eliminate his liability and called as "presumptive non-liability occasions", see also, Kübra Yetiş Şamlı, *6102 sayılı Türk Ticaret Kanunu'na Göre Taşıyanın Zıya, Hasar ve Geç Teslimden Sorumluluğu,* (1st edn. On İki Levha 2013) 220 ff; for comprehensive information about excepted perils in old TCC numbered 6762, see also, Tahir Çağa and Rayegân Kender, *Deniz Ticareti Hukuku – II: Navlun Sözleşmeleri,* (9th edn, On İki Levha 2009) 160 ff; Sami Okay, *Deniz Ticareti Hukuku II: Navlun Mukaveleleri* (1st edn. 1968) 207 ff.; Sami Akıncı, *Deniz Hukuku: Navlun Mukaveleleri*, (1st edn. İstanbul Üniversitesi Hukuk Fakültesi Yayınları 1968) 443 ff; Fehmi Ülgener, *Taşıyanın Sorumsuzluk Halleri*, (1st edn. Der 1991) 95 ff. For comprehensive explanations and assessments about Turkish Law, see also, Pınar Akan, D*eniz Taşımacılığında Taşıyanın Yüke Özen Yükümlülüğünün İhlalinden Doğan Sorumluluğu* (1st edn. 2007); Hakan Karan, "*The Carrier's Liability For Breach of The Contract of Carriage of Goods by Sea Under Turkish Law*" (2002) 33 J. Mar. L. & Com. 91 ff**;** Vural Seven, *Taşıyanın Yüke Özen Borcunun İhlalinden (Yük Zıya ve Hasarından) Doğan Sorumluluğu* (1st edn. 2003)

15 For detailed explanations on consequences of presumptive non-liability circumstances in Art. 1182, TCC, see also, Ülgener (n16) 95; Yetiş Şamlı (n12) 220 ff.

Turkish Commercial Code. Although it has not been mentioned in the preambles of neither the Turkish Commercial Code numbered 6102 nor the old Turkish Commercial Code numbered 6762, in this provision of Handelsgesetzbuch (a.F. §608) which also constituted the source of the related provisions in both the current and the old Turkish Commercial Code, there was an exception list in which also "the inherent vice of the goods" was also counted, under the title of "Assumed - Non-liability of the carrier (*Vermutete Nichthaftung des Verfrachters*)"[16]. This article ensured that if the damage arises from one of these circumstances, the carrier would not be liable, and if it is possible the damage is caused by one of these reasons, it is assumed that the damage occurred by this reason (HGB §608 Abs.2 (a.F.). On the other hand, similar with the related provision in the Turkish Commercial Code, HGB §608 (a.F.) also set forth that if the negligence of the carrier is proven, it could not be possible for the carrier to eliminate their liability based on this article.

On the other hand, it is important to highlight that in the course of the time, developments of sea transport have prevented loss or damage of goods arisen from inherent vice by using a cargoworthy container or taking some measures for loading the goods. The Legislator in Germany took this situation into consideration and set forth a special provision for "the damages arisen from inherent vice of the goods" which also constitutes an exception for carrier's liability in HGB. According to HGB § 499 titled "Particular grounds for exclusion of liability", "Inherent features or characteristics of certain goods that make them particularly susceptible to damage, particularly through breakage, rust, internal spoiling, drying, leakage, or normal wastage in bulk or weight" are counted as exceptions to carrier's liability; however in the next paragraph of the same article, there is another principle which states that "The first sentence[17] shall not apply if the goods were carried by a ship that was not seaworthy or not cargoworthy.[18]" On the other hand, HGB §499, Abs.3 also includes an important provision which ensures that "If the carrier, by virtue of the contract for carriage of general cargo, is under obligation to protect the goods particularly from the effects of heat, cold, variations in temperature, humidity, vibrations or similar effects, then the carrier may avail itself of the defences set out in subsection (1) first sentence number 6 only if it has taken all of the measures incumbent upon it in light of the circumstances, in particular in respect to the choice, maintenance, and use of specific equipment, and only if it has complied with any special instructions

16 For more comprehensive information about HGB §608 (a.F.) and especially about consequences of the existence of the circumstances in this list, see also, Gramm (n8) 123 ff.; Prüssmann and Rabe (n9) §608, Rn 1 ff.; Wüstendörfer (n11) 275 ff.; Yazıcıoğlu, Emine, *Kender – Çetingil Deniz Ticareti Hukuku*, (17th edn, Filiz Kitabevi 2022) 401 ff.; Hans Jürgen Puttfarken, *Seehandelsrecht*, (1st edn, Verlag Recht und Wirtschaft 1997) 64 ff.; Andreas Hoffmann, *Die Haftung des Verfrachters nach deutschem Seefrachtrecht*, (1st edn, Neuwied 1996) 46 ff.

17 The first sentence states that "If damage has occurred which, given the circumstances, might have been due to one of the risks set out in subsection (1) first sentence, then the presumption shall be that the corresponding damages have in fact been caused by this risk."

18 For explanations about HGB §499, see, Rabe and Bahnsen (n3) §499, Rn 7 ff; Hartmut Oetker and Marian Paschke, *Handelsgesetzbuch Kommentar*, (7th edn, C.H. Beck Verlag 2021) § 499 Rn. 1 ff; Herber and Harm (n4) § 499 Rn 1 ff.

that may have been issued." In this context, if a carrier demands to benefit from the advantage of non-liability provided by HGB 499 Abs.1(6) it is not enough to prove that the damage occurred from inherent vice of the goods, the carrier must also prove they have taken all of the measures to choose, maintanance and usage of the equipment like containers they provide. Besides this, the carrier must prove that they have implemented all of the instructions given by the shipper related to the goods and the usage of the equipments[19].

V. Legal Assessment and Conclusion

Damage of the goods, especially if the goods are loaded into containers, sometimes can arise from inherent vice of the goods[20]. As it is expressed above comprehensively, taking this into consideration, "inherent vice of the goods" is counted in the list in Art. 1182 of TCC as an exception that provides to the carrier easiness to prove his non-liability.

At this point, it is important to emphasize that it is usually possible to prevent the damages risen from inherent vice of the goods by using a cargoworthy container

19 Oetker and Paschke (n20) § 499 Rn 9; Herber and Harm (n4) § 499 Rn 59 ff. For similar explanations, see also, Hoffmann (n19) 46, 47.
For a different decision given by a German Court (before the Maritime Law Reform) in which the inherent vice of the goods has been accepted as an exception for carrier's liability and which ensures if the shipper did not control the containers provided by the carrier and because of this could not detect the unseaworthiness of the container, the carrier would not be liable because of the loss or damage: *OLG Hamburg, Urteil vom 26.11.1987 (6 U 158/87 (Vorinstanz: LG Hamburg - 25 O 22/87): "... the lawsuit must be refused because in the frame of the Plaintiff's own declaration the carrier can not be liable based upon the exception in HGB 608 Abs.1 Nr.5, Abs.2 (a.F.). Plaintiff alleges that according to the 6th page of the brochure presented by the Defendant, the container which has ventilating slits on it is not suitable for carriage of the garlic inarguably. If it is accepted that this allegation is true, it means that the damage of the goods arised from the negligence of the shipper. The shipper is under the obligation of controlling the containers provided him by the carrier. If as the Plaintiff said, the container used to carry the goods is not suitable to carry the garlic because of its inherent quality (high water content), the shipper did not have to use these uncargoworthy containers and had to refuse them.*…On the other hand, in the frame of the Plaintiff's explanations, it is not possible to see existence of the carrier's contributory negligence. The Defendant provided the container which had ventilating slits by force of his obligation he undertook with the agreement. At this point, the Plaintiff could not prove the carrier why had to know this type of container was not suitable for the garlic….." (*"...Dessen Aufgabe ist es und nämlich gerade, die ihm zur Verfügung gestellten Container auf ihre Eignung zu prüfen. war - wie die Kl. behauptet- der zur Verfügung gestellte Containertyp Aufgrund der besonderen Eigenart der Ware (hoher Wassergehalt) für die Beförderung nicht geeignet, so hätte der Befracter diese Ware nicht in den Containern verstauen dürfen, sondern hätte die Container als ungeeignet zurückweisen müssen. Da der Befrachter über die Erforderliche Warenkunde verfügen muss, um die Eignung des zur Verfügung gestellten Containertyps für die Beförderung seiner Ware eurteilen können, trifft diesen ein Verschulden, wenn er die Knoblauchladung in den Containern zur Verschiffung gebracht hat. Dagegen läßt sich ein Mitverschulden des Verfracters hinscihtlich der Gestelltung der Container dem Klagervortrag nicht entnehmen. Die Bekl. hat entsprechend der von ihr übernommenen Nebenpflicht dem Befrachter übliche Container mit Ventilationsöffnungen zur Verfügung gestellt. Weshalb sie als Verfrachter hätte wissen müssen, dass dieser Containertyp für den Transport von Knoblauch ungeeignet war, hat die insoweit ebenfalls Darlegungs- und Beweispflichtige Kl. jedoch nicht dargetan…*")
The provisions in HGB §608 (a.F.) Abs.1 Nr.5 and Abs.2 set forth that the carrier will not be liable in principle if the loss or damage arises from the act or negligence of the shipper's servants and agents. For full text of this decision see, *OLG Hamburg, Urteil vom 26.11.1987 (6 U 158/87 (Vorinstanz: LG Hamburg - 25 O 22/87),* Transportrecht (1988) 238-239.
In this case, the German High Court accepted that the shipper must control the containers before he receives them or at least just before loading them, as a special form of the duty of acting like a prudent Merchant and in the concrete case the act of the shipper who did not controlled the container provided by carriers was accepted as a prominent cause of the damage and did not approved "inherent vice of the goods" in the frame of HGB §608 (a.F.) as a reason that provides to carrier easiness to prove his non-liability. In this context it must be emphasized that before leaning to the exception of "inherent vice of the goods", it must also examined whether there is a negligence attributable to the shipper or not.

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and taking some other special measures while loading the containers. Because of this, the German Legislature, taking this into consideration, has ensured a special provision for the damages caused by inherent vice of the goods. As it is stated above, the circumstances counted in the list of Art.1182 TCC and provide easiness to carrier to prove his non-liability, basically refer to the situations where the carrier has no negligence and in a similar way, both the Hague Visby Rules and German Commercial Code, accepting the damages related to inherent vice as a cirumstance of "non-liability" grounds for this reason. However, in the course of time, some important developments have made it possible to reduce or prevent the damages related to inherent vice of the goods by means of some trivial precautions. Especially for the goods sensitive to heat exchanges or sensitive to moisture, damages can be prevented substantially by using ventilated or heat – controlled containers. On the other hand, to protect this kind of goods, it is known that in practice using different equipment in containers to prevent the damages related to moisture or heat changes has become almost a tradition nowadays. In the frame of these developments, the regulation of the German Commercial Code which provides that unless the carrier proves he has taken all necessary precautions to prevent the damage, inherent vice of the goods does not constitute a reason to remove the carrier's liability, can be assessed as such a reasonable and accommodated provision with current developments. At this point, it must be emphasized especially that in the Volcafe decision of the United Kingdom Supreme Court has also accepted a very similar consequence with the principle in HGB §499, Abs.1(6). This decision, which differs from the main principles for the burden of proof of the Hague Visby Rules, and differs from the views alleged by doctrine up to this decision, states that if the carrier demands to eliminate their liability in the presence of a damage arisen from the inherent vice of the goods or in the presence of other exceptions counted in Art. IV/2 of the Hague Visby Rules, they must also prove they have no negligence[21].

In respect to Turkish law, in our opinion, although it does not contain an explicit provision, there is no hesitatation about that the carrier who undertakes the carriage of the goods which are needed to be carried under special conditions, (for example, in special containers or using special equipments), will be under the obligation to provide a sea-and cargoworthy container and the carrier also must provide other suitable equipments or take other necessary precautions in containers necessary to protect the goods. In this context, if the carriage of the goods under special conditions has become a tradition in practice and if it is possible to prevent the damage by taking some precautions, the carrier cannot allege non-liability with reference to Art. 1182/1(f) which ensures the carrier will have easiness to prove because of the damages arisen from inherent vice of the goods. Especially, if the agreement between carrier and shipper or tradition in practice required some special precautions to be taken

21 See, *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA* Para 43.

by the carrier, it must especially be highlighted that under this impression, where the damage of the goods can be prevented by the carrier taking these precautions, the main reason causes the damage will be a breach of the carrier's duty of care (to provide a sea-and cargoworthy equipment); not the inherent vice of the goods. In other words, it can also be said that if a prospective loss or damage related to inherent vice of the goods is possible to be prevented with the precautions taken by carrier, it is not exactly true to mention a loss or damage "directly" arisen from inherent vice of the goods. As it is frankly understood from the next paragraph of Art. 1182, which ensures "if it is proven that the damage caused by a reason that is in charge of the carrier, the carrier cannot eliminate their liability", this article does not aim to set the carrier free of liability "directly" or "unconditionally". On the other hand, although it is probable to be understood from the letter of the Art. 1182 that the carrier can eliminate their liability based upon "presumptions about non-negligence and existence of the causation" on the ground that "inherent vice of the goods" directly and unconditionally, since here the letter and spirit of the provision are not compatible, the last paragraph of Art.1182 must be accepted, which states "if it is possible that the damage is caused by one of these reasons while the circumstances of the concrete case are taken into consideration, it will be accepted the damage has arisen for this reason" cannot be possible to be implemented where the damage related to an inherent vice of the goods is possible to be prevented with the precautions taken by the carrier.

A counter acception, which confirms the carrier can utilize the presumption of non-negligence and existence of causation, cannot comply with the main aim of this provision. In this context, it must especially be taken into consideration that Art. 1182 based upon the Hague Visby Rules Art. IV/2 which was written on a term there were no so many kinds of precautions to prevent the loss or damage for the goods which have a special character. In the frame of these explanations, this provision based upon substantially the Hague Visby Rules Art. IV/2 which was written in a period that carriage by sea was not as developed as today, and there were not so many precautions to prevent the damages related to inherent vice of the goods, must be implemented just for the "damages of inherent vice which cannot be prevented despite of the precautions taken by the carrier[22]. In this context, although the Turkish

22 These precautions become essential especially for container carriages. Taking into consideration this, a handbook which refers to all of the precautions needed to be taken in container carriages to prevent the damages caused by inherent quality of the goods has been drawn up in Germany. This book called *Container Handbuch (CHB)* and drawn by GDV (*German Gesamtverband der Versicherer*) has given place to thousands of different measures for each type of the goods. On the other side, if the inherent quality of the goods necessitates special precautions to be taken and if the goods are loaded into the container by the shipper, this time shipper must take some precautions just before the loading into the container. For example, packed seed corns and grain can be carried in standard containers. However to carry these kind of goods in standard containers, some precautions must be taken before loading into containers. While some of these precautions aim to make containers sea or cargoworthy, some other part of these precautions are related to the protection of the goods directly. For instance seeds corn or grain are advised to be loaded into dry bulk containers after a pre-drying process. Except this, to prevent the loss or damage for these kind of goods, contingence of the goods with the container door must be prevented with 4 rectangle bars. (CHB Para. 17.2.)

Commercial Code does not contain an explicit provision like HGB §499[23], "inherent vice of the goods" must not be accepted as a reason to create the presumtions of non-negligence and existence of the causation "directly" to eliminate the carrier's liability, in a similar way with the United Kingdom Supreme Court's tendency in the Volcafe case[24]. As a second point to be highlighted, it must be accepted that it is not possible to mention "a damage caused by inherent vice of the goods" in the meaning of Art.1182, if it is possible the damage can be prevented with the precautions taken by the carrier.

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So indeed, especially at container carriages loss or damage is usually in relation with the inherent quality of the goods and it is also so important to emphasize that these damages can be prevented by the additional precautions. Another example for this is semi-luxury goods like cocoa or coffee. It is known that these types of goods must be processed after the harvest and then must be storen in dry conditions or preferably must be loaded as soon as possible. Because, especially under tropical climate conditions (for example especially in rainy seasons) during a long-store term the water vapor is emitted by the goods and this causes moisture damages easily (CHB Para.17.6). In the frame of these explanations, it is so crucial to determine the damage caused by uncargoworthiness of the container; inherent vice of the goods or especially for FCL container carriages at which lthe goods are loaded into container by shipper, insufficiency of the packages or negligence of the shipper's servants at the time of stowage.

23 The German Legislator has also ensured such a reasonable exception to the non-liability regulation set forth in HGB §499, Abs.1. According to HGB §499,Abs.2 S.2, "The first sentence shall not apply if the goods were carried by a ship that was not seaworthy or not cargoworthy." Although before the Maritime Law Reform in 2013, old German Commercial Act did not contain such a provision, German Courts usually decided that the exception related to "inherent vice of the goods" could not be implemented if the ship is unseaworthy or uncargoworthy. For a German Federal Court decision which the Court decided that if instead of defective hatch cover, another defective hatch cover is used, the ship will be admitted "uncargoworthy" for the rice which is known as moisture sensitive. For the full text of the decision see, BGH, Urteil vom 8. 12. 1975 - II ZR 64/74 (Köln), † Angemessene Berücksichtigung der Interessen der künftigen Vertragspartner in AGB, Neue Juristiche Wochenschrift 1976, Heft 15, s.672: *("...Ein Schiff ist auch dann von Anfang an für die Beförderung von nässeempfindlichen Gütern ladungsuntüchtig, wenn der Schiffer anstelle fehlender Lukendeckel eine andere, jedoch unzureichende Lukenabdeckung vornimmt...").* For detailed explanations on HGB §499 Abs. 2, see also, Oetker and Paschke (n20) § 499 Rn 8; Herber and Harm (n4) §499 Rn 7; Rabe and Bahnsen (n3) §499 Rn 14.
On the other hand, as regards to the Hague Visby Rules, if the container or another equipment provided by carrier to prevent the damages of the goods is unseaworthy, it must also take into consideration that carrier may be liable under the conditions of Art. III/1 of the Rules (which ensures carrier is liable for the damages arise from unseaworthiness of the ship at the beginnging of the voyage). This also means, since the exceptions included inherent vice of the goods listed in Art. IV/2 which are just implemented for the breach of the due diligence ensured in Art. III/2, can not be alleged as an exception to carrier liability under Art. III/1 HVR. For the brief explanations of the scope of application of the exceptions in Art. IV/2 see also, fn.12.

24 Akan, 98 ff. For a assessment see also, Ogis Kafeero (n1) 755 ff: The Authors emphasizes in the correct way that :"if carrier does a proper recording of which steps he followed or what he did to take care of the goods, the negligence could be easily disapproved. Contrary to the literature opinion, the Volcafe case does not bring a challenging task for a carrier". For another explanations on Volcafe case, see also, Ogis (n2) 1867: In this context, the Author alleges that Art. III/2 of the Hague Visby Rules already ensures that the carrier has a "general" obligation of care to the goods and because of this decision held in Volcafe case did not aggravate the carrier's situation, it has just made a change on practical consequences.

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