



## EFFECTS OF CHARTER PARTY ARBITRATION CLAUSES UNDER THE NEW TURKISH COMMERCIAL CODE

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### **Abstract:**

*The New Turkish Commercial Code has become effective on 1 July 2012. The new Code covers bareboat charterparty, time charterparty, voyage charterparty and contracts of carriage by sea which is defined in general terms. On the other hand, Turkey is the one of the contracting State of Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958) as well as European Convention on International Commercial Arbitration, 1961. In this study, we will examine the effects of the charter party arbitration clauses under the new Turkish Commercial Code and discuss the characteristics of the clauses to be valid under Turkish Law.*

### **Keywords:**

Charter Party Arbitration Clauses, Turkish Commercial Code

### **1. Introduction**

Turkish Commercial Code *Book Five* contains provisions concerning maritime trade divided into 8 chapters. Maritime trade agreements covered in *Chapter Four* and are governed by Articles 1119-1271. This *Chapter* is composed of five sections and covers bareboat charterparty, time charterparty, voyage charterparty and contracts of carriage by sea.

#### **New Turkish Commercial Code, Book Five (Articles 931-1400)**

- Chapter 1: Ship
- Chapter 2: Shipowner and Associations of Shipowner
- Chapter 3: Captain
- Chapter 4: Maritime Trade Agreements
- Chapter 5: Maritime Accidents
- Chapter 6: Maritime Liens
- Chapter 7: Limitation of Liability and Indemnification of Damages Related to Oil Pollution
- Chapter 8: Special Provisions on Enforcement

#### **Chapter 4: Maritime Trade Agreements (Art. 1119- 1271)**

- Section One: Bareboat Charterparty
- Section Two: Time Charterparty
- Section Three: Contracts Of Affreightment
  - Voyage Charterparty
  - Carriage contracts of goods by sea
- Section four: Time bar / limitation
- Section Five: Contracts Of Passengers Carriage By Sea

## 2. Bareboat Charter Party

Bareboat charter party is a leasing of a vessel which are referred as bareboat charterparties in practice, are governed by Articles 1119-1130 of the Turkish Commercial Code. In Paragraph 1 of Article 1119 of the Turkish Commercial Code, it is stated that ;

*“ a bareboat charterparty is an agreement where the owner undertakes to entitle the charterer to use the ship for a certain period in return for a hire”*

and in Paragraph 2,

it is stated that; *“ if the crew agreements of the ship are also transferred”*

in other words, if the crew is also hired by the charterer, this shall also be considered as a bareboat charterparty. In cases where the legislation on a bareboat charterparty does not contain any relevant provisions, those provisions of the Code of Obligations that concern ordinary lease agreements shall apply to the extent possible<sup>1</sup>). Rationale of that Article also stated that this application will be relevant for registered and unregistered ships without any differentiation. However, Under Turkish Law, Regulation of the registration of boats, vessels and sea and inland waterways vehicles (*Bağlama Kütüğü Yönetmeliği*) has been in force since 2007<sup>2</sup>, so there is no ship left unregistered under Turkish regulations.

## 2. Time Charter Party

Time charterparties are agreements under which an owner/possessor transfers the commercial management of an equipped ship to a charterer for a certain period and in return for a certain price which are governed by Articles 1119-1130 of the Turkish Commercial Code.

The owner, who has the technical management of the ship, is regarded as the possessor of the ship. Therefore, the shipowner /possessor is the party that has the technical management of the ship. The charterer, on the other hand, has the commercial management of the ship and enters into a commitment to carriage of contracts.

## 3. Contracts of Affreightment

According to the Article 1138 contracts of affreightments are classified as voyage charter parties and contracts of carriage by sea ( Ulgener, Charter Parties; 2010, 26).

Voyage charterparty: The carrier agrees to accept a cargo by allocating a part of or a certain section of the ship or the entire ship.

Carriage contracts of goods by sea: The carrier agrees to accept the carriage of specific goods by sea.

## II. Charter Party Arbitration Clauses

### 1. Considerations of the Arbitration Clauses

Since maritime trade disputes are mostly of an international nature, it is a widespread practice to have recourse to arbitration for dispute resolution. Disputes arising from commercial issues such as cargo and passenger transport, cargo loss and damages, carrier's liability and charterparties are frequently referred to arbitration because the issues are handled by arbitrators who are experts in their fields and disputes are resolved in a short time. For example, The London Maritime Arbitrators Association<sup>3</sup> is one of the most well known arbitration centers for the resolution of maritime trade disputes.

<sup>1</sup> Turkish Commercial Code, Art. 1130

<sup>2</sup> Regulation of The Registration of Boats, Vessels and Sea and Inland Waterways Vehicles (*Bağlama Kütüğü Yönetmeliği*), Official Gazette dated 25 September 2014, No. 29130.<http://www.resmigazete.gov.tr/eskiler/-2014/09/20140925-4.htm>

<sup>3</sup> <http://www.lmaa.london/membership-browse.aspx?mttype=1>, 12.5.2016

Bareboat charterparties, time charterparties, voyage charterparties and carriage contracts of goods by sea which are different types of maritime trade agreements, are used in printed form in practice. Most widely used forms include the following clauses for the resolution of maritime trade disputes such as;

➤ **Bareboat Charter Party**

**Barecon 2001**

*Clause 35: Dispute Resolution*

Article 30: «This Contract shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

According to the clause in general Arbitration Act 1996 will apply also if London is chosen as the place of arbitration.

➤ **Time Charter Party**

**NYPE (New York Produce Exchange Form)**

Article 17 «Arbitration Clause» of the NYPE standard time charter party, amended in 1913, 1921, 1931 and 1946, specifies the place of arbitration as New York. This form was reviewed in 1981 and 1993, and NYPE 93 became effective.

In this form under **Article 45** «Arbitration», there are two options as for the resolution of disputes between parties:

- Arbitration in New York according to United States law
- Arbitration in London according to English law

One of these options shall be preferred by striking out the other.

➤ **Voyage Charterparties**

**Gencon 1994**

Gencon charter party was reviewed and updated in 1922, 1976 and 1994. GENCON 1922 and 1976 do not contain an arbitration clause. In GENCON 1994, however three options are provided under Clause 25 / Article 19:

- a) English law as the governing law, and London as the place of arbitration
- b) United States law as the governing law, and New York as the place of arbitration
- c) the law of a country to be agreed upon by the parties, and that country as the place of arbitration

In cases where none of the options is chosen, English law shall be the governing law and disputes shall be resolved through arbitration in London. In other words, option (a) is the default option.

➤ **Carriage Contracts of Goods by Sea**

In practice under the carriage contracts of goods by sea when a bill of lading is issued, there is no need to signing a contract of affreightment. Therefore, the clauses in the bill of lading also prove the existence of the contract of affreightment and constitutes its content.

In practice, *liner bills of lading and container bills of lading are used as printed forms. When we examine these documents we see that the place of arbitration is generally the center where the carrier is based. For example: CONLINEBILL 2000 (liner bill of lading) according to*

Article 4: Law and Jurisdiction.

*«Disputes arising out of or in connection with this Bill of Lading shall be exclusively determined by the courts and in accordance with the law of the place where the Carrier has his principal place of business, as stated on Page 1, except as provided elsewhere herein»*

## 2. The Effects of Arbitration Clauses

Turkey is the one of the contracting State of Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention,1958) as well as European Convention on International Commercial Arbitration, 1961. Considering these facts about charter parties which are defined in general terms by the Turkish Commercial Code, arbitration clauses in bills of lading and charter parties must have the following characteristics under the Turkish Law:

a. The intent of arbitration must be clear.

According to Paragraph 2 of Article 412 of the Code of Civil Procedure and Article 4 of the Code of International Arbitration<sup>4</sup>, this intent must be declared either in the form of an arbitration agreement or an arbitration clause contained in the main contract.

b. The intent of arbitration must be declared in writing.

To consider of a valid arbitration agreement, the parties' intent of arbitration must be declared in writing. According to Paragraph 3 of Article 412 of the Code of Civil Procedure and Article 4 of the Code of International Arbitration:

*«It shall be sufficient that the arbitration agreement has been recorded by the parties in the form of a written document or using a means of communication agreed upon by them, such as a letter, telegram, fax, telex, etc., or in electronic form, or that the defendant has not objected to the complaint's claim that there exists an arbitration agreement.»*

c. The parties may refer to standard terms, rules and standard contracts providing for the resolution of disputes through arbitration.

Paragraph 3 of Article 412 of the Code of Civil Procedure and Paragraph 2 of the Article 4 of Code of International Arbitration permit of referring. According to both articles:

*«an arbitration agreement shall be deemed to have been made if a reference is made to a document containing an arbitration clause in order to incorporate it into the main contract»*

This clause is known as "Incorporation Clause" in practice (Eksi; 2010, 10). In this case, although the agreement between the parties does not contain an arbitration clause, since the agreement the parties refer to *-for example GENCON 94-* contains an arbitration clause, this clause shall be deemed valid. Therefore, an arbitration agreement is established through incorporation by reference to a general terms and conditions document containing an arbitration clause.

As a result, in the event that if the bill of lading refers to the charterparty, the provisions of that charter party shall become a part of the bill of lading. In other words, the arbitration clause in the charter party shall not bind the holder of the bill of lading if the bill of lading does not refer to the charter party.

d. If the holder of the bill of lading is also one of the party of the charterparty (charterer), the arbitration clause shall bind the charterer as well.

e. If the holder of the bill of lading is a third party;

The arbitration clause in the charter party may not be directly enforced against a third party. This is because the bill of lading is the basis of the relationship between the carrier and consignee. In such a case, the arbitration clause must be stated clearly (Şanlı, 2, 774). A general reference to the charter party is not enough<sup>5</sup> (Eksi; 2010, 110).

Therefore:

- It must be stated in the bill of lading which charter party is referred to, including its name, day and date.
- The reference must be clear at the bill of lading.

For example; The bill of lading refers to the charter party with the statement

<sup>4</sup> Official Gazette dated 5 May 2001, No: 24453.

<sup>5</sup> However, contrary to the doctrine and previous supreme court decisions, Supreme Court of Appeals, 11<sup>th</sup> Civil Law Chamber has accepted that the holders of the bill of lading shall be bound by that arbitration clause as long as they have not removed it by striking it out, 6 May 2002, numbered 2002/216-4357.

*«all other terms, including the arbitration clause, shall be the same as in the charter party».*

is a clear reference and binds the holder of the bill of lading.

When a commercial agreement is to be signed, merchants are expected to examine all documents that have been referred to, and must know their content. Accordingly, the holder of the bill of lading is expected to examine the charter party referred to in the bill of lading. However, in practice it is questionable to what extent this principle can be exercised by holders of bill of lading or owners of cargo when the amount involved is low. Paragraph 3 of the Article 1237 of the Turkish Commercial Code contains a provision aimed to resolve that practical issue (Atamer, 11, 330-338)

*«If the voyage charter is referred to in the bill of lading, a copy of the charter party shall be submitted to the new holder during the transfer of the bill of lading. In this case, the provisions of the charter party can also be enforced against the holder of the bill of lading to the extent possible.»*

According to this new regulation, the voyage charter party should be referred to in the bill of lading and when the bill of lading is being transferred, a copy of the charter party shall be submitted to the new holder. If these requirements are met, the provisions of the charter party can be enforced against the holder of the bill of lading *«to the extent possible»*.

However it is not clear from the article, *«what the extent possible» means ?*. In our opinion: **Firstly**, the intent of arbitration must be clearly stated such as *«all other terms, including the arbitration clause, shall be the same as in the charter party»*.

**Secondly** a valid arbitration agreement must exist. This issue shall be resolved in accordance with the applicable law to the substantive validity of the arbitration agreement. According to Article VI/2(a) of the European Convention on International Commercial Arbitration and Article V/1 (a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which Turkey is a party, the law applicable to the validity of the arbitration clause shall be the law determined by the parties for this purpose, and if they have not chosen a certain country's law, it shall be the law of the country where the arbitrator's decision will be made.

**Thirdly**, details of the charter party (such as date and number) referred to in the bill of lading shall be specified. The charter party shall not restrict the implementation of the arbitration clause depending on the parties or the subject matter of the dispute. For example, statements like *“this arbitration clause shall only apply as between the carrier and the shipper”* or *“this arbitration clause shall only apply to the case of general average”* shall not be used. On the other hand *«all disputes arising from this agreement shall be referred to arbitration»* is a clear and comprehensible clause.

#### 4. Conclusion

In the face of these new provisions in Turkish law; Article 4 of the Code of International Arbitration must be considered a general article and Paragraph 3 of Article 1237 of the Turkish Commercial Code must be considered a special provision. It must be concluded that the arbitration clause may be enforced against the holder of the bill of lading to the extent possible and provided that the requirements we mentioned above have been met.

Another relevant important issue in Turkish maritime trade is now whether the arbitration clause in the bill of lading or charter parties form violates the *general terms and conditions (genel işlem şartları)* according to The Turkish Code of Obligations<sup>6</sup>. It is expected to have significant impact on commercial transactions as *«general terms and conditions»* does not have any restriction on its scope of application. That is to say, thus, provisions of the Code of Obligations on general terms and conditions principally aim to regulate general terms and conditions included in commercial agreements. In the article 25 of Turkish Code of Obligation it is regulated that *«Provisions, contrary to the rules of honesty (good faith) and against to the other party or provisions aggravating the other party's situation may not be included in general terms and conditions»*. For example, under this article, Is it a *«reason aggravating the situation of the holder of the bill of lading»* that,

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<sup>6</sup> The Code of Obligations No. 6098, entered into force on 1 July 2012.

according to the arbitration clause in the charter party so that the consignee has recourse to arbitration in England in case of a dispute arising in Istanbul in relation to a cargo which is amount of USD 20,000.

One of the recent decision of the Supreme Court of Appeals, 11<sup>th</sup> Civil Law Chamber<sup>7</sup> accepts that the jurisdiction clause in the bill of lading is subject to the general terms and conditions pursuant to Article 25 of the Code of Obligations. In this case, defendant's objection to jurisdiction was rejected by the Court of First Instance as the jurisdiction clause in the bill of lading was void as it was incompatible with *general terms and conditions* pursuant to Article 25 of the Turkish Code of Obligations.

Although the doctrine mostly accepts that the control on the general terms and conditions does not apply to agreements governed by maritime trade law, from this very recent decision we understand that the Supreme Court of Appeal is contrary of doctrine view.

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<sup>7</sup> In actual case Supreme Court of Appeal reversed the Court of First Instance's decision stating that Article 25 of the Turkish Code of Obligations can not apply to the dispute in view of its effective date. See, Supreme Court of Appeals, 11<sup>th</sup> Civil Law Chamber decision dated 23.1.2014, 2103/11349 E.