



CERTAIN LEGAL ISSUES ARISING PRACTICE IN CONTAINER TRANSPORTATION IN PRATICE

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Abstract:

In practice, a large proportion of cargo is carried by container transport. Containers are often referred to as more than one type of transport and it is important to determine that at which stage of transport the disputes have occurred. Damage to container, damage to cargo in container, container detention fees are important legal issues in terms of container transport.

In our study, some of these problems were identified in current practice and have been analysed.

Keywords:

Container Transportation and Legal Issues

1. Preamble

Containers are strong portable compartments that are designed in types and sizes designated by the International Organization for Standardization¹ are convenient for carrying with sea, land and air vehicles, can be used on a recurring basis and transferred to transport vehicles, and provided with ease of loading and discharge and a special technical mechanism². Containers have different technical structures based on their intended use. For example, break bulk, dangerous cargo, bulk cargo and refrigerated cargo containers have different structures, and different types and sizes of containers are designed according to the properties of the cargo in the international arena. The International Organization for Standardization has laid down standard container sizes of 20', 30' and 40'³.

We can list the benefits of using containers in practice as follows⁴;

- ensures safe transport, loading, discharge, transfer, maintenance of commodity by protecting it from all external and environmental factors;
- reduces cost as more than on cargo can be carried in the same container.
- is time-saving as loading and discharge can be performed more rapidly and faster, and is therefore cost-reducing.
- can be stored outdoors and therefore reduces warehouse costs.
- reduces risk of damage to cargo due to fire, sea water and rain water.
- saves up in packaging costs.

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¹ ISO- International Organization for Standardization. Please see www.iso.org for detailed information. 17.5.2016.

² Article 1 of the International Convention for Safe Containers ; Kaner, İ. : Container Transport and Legal Issues, Istanbul 1982 p.3.

³ Saygılı, M. S./ Erdal M.; "Container Types and Loading", Container Maritime and Port Management, Editor: Erdal, M., Istanbul, 2008, p. 19.-23. ; www.containerhandbuch.de, 30.5.2016.

⁴ Heggülerler, E.; Civil Liability of Those Engaged in Maritime Container Transportation, 1.B., 2011, p. 51.; www.people.hofstra.edu, 30.5.2016.

- is suitable for carrying and maintaining dangerous articles.

Container transportation also has certain drawbacks, besides its above-stated benefits. Among these drawbacks are thefts that are widely encountered due to carriage of valuable cargo in containers, danger of carrying illicit commercial goods, and requirement for high sums of technical materials in loading, discharge and stacking of containers, from a financial point of view, and need to make investments for warehouse locations, land and railway connections⁵.

In the face of these properties and its benefits, container transportation has witnessed a boom since 1960s, leading to construction of special container ships. The USA, UK, Sweden, Germany, Denmark, Japan, China are among the countries in which container transportation has witnessed rapid development⁶.

2. In terms of Container Safety Approval Plate and its Inspection

International Maritime Organization (IMO) adopted International Convention for Safe Containers⁷ in 1972 in order to ensure safety of life and property during handling, stacking and transportation of containers, to render container transportation easier, and to determine the control and inspection principles for containers, structural and operational requirements and to regulate safety and security issues in the global arena. This convention entered into force on 6 September, 1977. Although, in Turkey, Law No. 6403 on the Approval of our Accession to International Convention for Safe Containers entered into force after being published in the Official Gazette dated 31.01.2013 and numbered 28545, effective date of the convention for our country was designated by IMO as 8 August, 2014, pursuant to Convention Article VIII(2) following completion of notification procedures⁸.

As per this Convention, all containers being transported in the international waters must possess a “Safety Approval Plate” in order to be characterized as safe containers. The Safety Plate contains information as to: whether the container has passed the safety test set out in the agreement;

- when the container has been manufactured;
- the date of the next control;
- its weight, capacity.



See globalspec.com, 17.5.2016

It is important to control whether the container used before and after loading during transportation has an “approval plate”. Thus, the port authorities, container manufacturers, container owners, masters of ships carrying containers, classification societies are required to ensure that the containers are in compliance with this Convention within their own fields of activity and authorities. In this scope, the first inspections of newly manufactured containers has been

⁵ www.containerhandbuch.de, 30.5.2016.

⁶ For further information on historical background of container transportation, please see Kaner, p. 15.; Hepgülerler, p. 47 et seq.

⁷ International Convention for Safe Containers (CSC).

⁸ Implementation Directive of the Ministry of Transportation, Maritime Affairs and Communication dated 22.8.2014 and numbered 2014/27, http://imo.udhb.gov.tr/dosyam/Dokumanlar/2014_270.pdf, 17.5.2016.

carried out within maximum 5 (five) years as from the date of manufacture, and the subsequent periodical inspections within maximum 30 (thirty) months. If a container incurs any damage as a result of an accident or in case of maintenance or modification, inspections must be carried out before the expiration of these periods and certificates must be renewed⁹.

Pursuant to Article IV/1 of International Convention for Safe Containers: “For the enforcement of the provisions in Annex I, the Administration shall establish an effective procedure for the testing, inspection and approval of containers in accordance with the criteria established in the present Convention, provided however that an Administration may entrust such testing, inspection and approval to organizations duly authorized by it.” Turkish Lloyd Foundation Economic Enterprise has been authorized for this purpose. Thus, the testing, inspection and approval of containers manufactured domestically is performed by Turkish Lloyd. Open sea containers are not subject to the provisions of International Convention for Safe Containers as they are designed differently. The inspection, test and approval of open sea containers are subject to the MSC/Circ. 860 Guidelines issued by IMO¹⁰.

In view of this overall legal legislation; in case of a dispute arising with respect to a container damage, it must be principally established whether the said containers have and/or are eligible for approval plate, in other words, whether they are in conformity with the International Convention for Safe Containers. This document constitutes a presumption that the container possesses certain standards and qualities. Thus, port authorities, container manufacturers, container owners, masters of ships carrying containers, terminal operators rendering service to these ships and classification societies must satisfy all standards required to ensure compliance of each carried container with the legislation issued by IMO¹¹.

3. Applicable Provisions In Case of Containers Carried By Multimodal Transport

Multimodal transport is the transportation of goods under a single contract with minimum two different modes of transport. The carrier is liable for the entire carriage of the goods even though its transportation to the point of destination by different modes of transport. Multimodal transport is governed by articles 902 to 905 in Chapter Four of Book Four under “Freight Transport” of the Turkish Commercial Code (TCC).

If the transporter undertakes to carry the containers by minimum two modes of transport under a single transport contract, articles 850 to 893 of the TCC shall be put into practice pursuant to article 902 of the same. However, in this mode of transport, articles 903 and 904 of the TCC as well as the provisions of international conventions that must be implemented in present dispute shall rank in priority in implementation¹². If it is evident in which part of transport the event causing loss, damage or delay in delivery has occurred, the transporter’s liability, pursuant to article 903 of the TCC, shall be established according to the provisions that would govern such contract, if a separate transport contract was entered into for this part of transport, rather than the provisions of the first and second chapter, namely articles 850 to 893. In this case, it shall be subject to the provisions of CMR if the transport is carried out by land, to CIM if by railway, to Hague Convention if by sea, and to Montreal Convention if by air.

⁹ Implementation Directive of the Ministry of Transportation, Maritime Affairs and Communication dated 22.8.2014 and numbered 2014/27, http://imo.udhb.gov.tr/dosyam/Dokumanlar/2014_270.pdf, 17.5.2016.

¹⁰ Implementation Directive of the Ministry of Transportation, Maritime Affairs and Communication dated 22.8.2014 and numbered 2014/27, http://imo.udhb.gov.tr/dosyam/Dokumanlar/2014_270.pdf, 17.5.2016.

¹¹ Implementation Directive of the Ministry of Transportation, Maritime Affairs and Communication dated 22.8.2014 and numbered 2014/27, http://imo.udhb.gov.tr/dosyam/Dokumanlar/2014_270.pdf, 17.5.2016.

¹² TCC article 902 1/d “unless otherwise is stipulated in the following provisions and applicable international conventions”.

4. The Carrier's Liability upon Receipt of Cargo in Terms of the Types of Container Transportation

In terms of the types of container transportation, it is crucial to establish the receipt time of cargo by the maritime transporter in respect of the beginning of maritime transporter's liability. It is widely seen that in the event of claims for container damage or claims for damage to cargo carried in the container, the action is filed with the maritime transporter with the allegation that the maritime transporter is directly liable for the claim. However, this claim of animosity may not always be true. Because, principally, it must be established which transporter was responsible when the damage occurred according to the type of container transportation. In container transportation, the cargo is picked up from a predetermined location and carried to a port, or picked up from a port and carried to a predetermined warehouse or workplace on land. In this respect, container transportation is carried out by means of either door-to-door transport, point-to-point transport and port-to-port transport. In terms of maritime transporter, delivery is the pickup of container with full load for carriage by sea. Thus;

- in door-to-door transport; if the container full of load has been previously picked up from the seller's warehouse and carried by land or railway or air, delivery to maritime transporter occurs at the port.
- in point-to-point transport; the container full of load is picked up from a predetermined location and, after carriage by sea, is delivered to a specific location on land where the container is opened and the cargo is distributed.
- in port-to-port transport; the container full of load is picked up at the port and shipped from this port to an overseas port.

In all of the above-mentioned three types of transport, delivery to maritime transporter occurs by pickup of the cargo at the port for carriage by sea. Unless the maritime transporter further undertakes that it is also liable for previous transports, no liability arises on the part of the maritime transporter in relation to the damage incurred by the cargo during these transports.

5. The Effect on Maritime Transporter's Liability of the Bill of lading Clauses in Container Transportation

In container transportation, in order to establish the transporter's liability, the following information must be identified:

- the owner of the container,
- where and by whom the cargo is loaded into the containers,
- whether the transporter knows the details of the cargo in the container,
- who witnessed the closing and sealing of the container,
- whether the container was opened during carriage,
- at which stage the damage has occurred.

In order to identify these issues, the bill of lading used in transport must be examined. For example, as per FIO/FIOS clause on the bill of lading, although it is decided that the transporter has no liability arising from loading, stacking and discharging, from these processes, the shipper shall be liable for loading and the consignee shall be liable for discharging, the Supreme Court of Appeals agrees that the shipmaster is required to pay due care to proper conduct of the above-mentioned procedures; that, essentially, loading and stacking are obligations carried out by the shipmaster representing the ship-owner; that the shipmaster must supervise stacking process even if the loading is entrusted to other parties under a contract, and must conduct an inspection in terms of balance and safety of the ship; that the shipmaster has the preeminent obligation of supervision to ensure the seaworthiness of the ship, and where FIOS clause is in place, to supervise whether the stowing process is carried out as required; that FIO/FIOS

clause may not remove the mandatory provisions of - new TCC art.1178); and that if the shipmaster fails to fulfil his duty of supervision as a prudent master, carrier shall be liable in respect of the damage that occurs¹³.

During the stowing of the container on the board, the shipmaster holds liability pursuant to article 1090 of the TCC and, as the shipmaster represents the carrier, the carrier holds liability arising from stowing. In container transportation, containers are generally sealed after stowing the cargo in them and delivered to maritime transporter. On the bill of lading, “sealed” clause is placed after specifying the container number and properties of commodities in the container. This clause constitutes the presumption that the container is sealed and accepted. However, this clause is not sufficient. Thus, FCL/FCL (full container load), “shippers load stow and count” clauses are also noted on the bills of lading. In this case, stowing on container is performed by the shipper and the containers are delivered to the transporter in sealed state. It is the shipper’s responsibility to stow the cargo in a container that is fit for the container’s properties and conditions of the journey and pack it in proper conditions. In case of negligence of the shipper during all these activities, it is impossible for the shipmaster to find it out. In this case, the shipmaster’s obligation of supervision is not applicable and carrier shall not be liable for placement, stowing and loading of the cargo in the container under the article 1090 of the TCC. For example, if it is found out that the damage to the cargo in the container arises from the fact that the commodities were not properly stowed in the container and/or were not fixed to prevent its sliding movement, the carrier may not be held responsible from this stage.

In case the container is stowed by the carrier, the bill of lading shall not have FCL/FCL (Full Container Load) and “shippers load stow and count” clauses. However, if the cargo is packed or packaged, the bill of lading shall note “unknown content” clause and the liability of the carrier shall consider for the number of packages.

In container shipping, loading starts with the installation of the container to the crane for shipping it on board and loading is handled by the stevedores. If the container is damaged during this stage, the carrier’s liability should not be considered under articles 1178 and 1179 of the TCC. As the stevedores engaged in loading and discharging are not crew or carrier’s men, the liability should be considered under article 116 of the Code of Obligations¹⁴ which regulates the liability of associates¹⁵.

6. Container Detention Charges and Liability

As owner of the container will use the container for other transports, it requests the consignee to empty and return the container within a certain period of time. A period of time allowed for the consignee to return the container empty is generally agreed as “free time” and if these periods are exceeded, the consignee is requested to effect the payments that have been agreed.

Free time is the period from the day of release of the full containers from the ship up to the day of discharge of the goods from the containers. After this period, carrier is paid detention charges.

In practice, “container demurrage” derived from the term “demurrage” which is paid upon delay in ships. The container demurrage is essentially the “detention fee of the container”. Thus, in many disputes, the question of “from which stage the detention fee claimed by the carrier arises” creates confusion.

The container may be owned by the shipper or may have been leased by the shipper (lessee- lessor/ contractual relationship) or may be owned by the carrier or may have been leased by the carrier. The entitled party of the

¹³ Y. 11. H. D., 10.02.2004, 2003/6236E., 2004/1043K.; Y.11. H.D. , 10.10.2006, 2005/6756 E., 2006/10079 K.; Y. 11. H.D. 29.12.2014, 2014/9903 E. 2014/20435 K.

¹⁴ Turkish Code of Obligation Article 116 : “Even if the obligor commits the performance or the use of rights related to obligation to the associates such as people living together with him or his workers in accordance with the law, he shall be liable to compensate the damages caused by them during the performance of the business. The liability for acts of associates may be lifted fully or partially by agreements in advance. If a service that requires specialization a profession or an art can only be performed by the permission of law or competent authority, the agreements on exclusion of obligor’s liability for acts of associates in advance are definitely void. ” Özel, Ç.: Turkish Code of Obligations, Ankara 2014, p. 161.

¹⁵ Kaner, p. 68.

container detention fee should be considered based on these options. If the container is supplied by the carrier; there must have been agreement between the carrier and the debtor in order to the carrier can be entitle to ask for detention fee due to return of the container to the carrier after the agreed “free time”. The related arrangement may be incorporated in the bill of lading or in the freight contract between the parties. However, in cases whereby the parties have not entered into an agreement in this regard, port-to-port transports shall be governed by articles 1174 and 1176 of the TCC.

As a matter of fact, the container is considered as general cargo¹⁶ in the sense of article 1138/2 of the TCC. In this case, the cargo must be picked up without delay upon the shipmaster’s notice. Therefore, the consignee must receive the container without delay as from the receipt of notice and discharge the container and return the container to the carrier. If the consignee violates of this obligation, for example if the consignee refrains from receiving the cargo or fails to notify whether he is ready to take delivery of the cargo upon written notice or he cannot be found, the carrier is required to deposit the cargo at the expense and risk of the consignee pursuant to article 107 of the Turkish Obligation Code¹⁷. Where the characteristics of the cargo is not proper to deposit of or the cargo is perishable or maintenance, protection or deposit of the cargo is significantly expensive, the carrier may sell the cargo with the consent of the judge and deposit the sale proceeds on condition to notify the consignee in advance pursuant to article 108 of the Turkish Obligation Code¹⁸.

On the other side, pursuant to article 1207 of the TCC, if the consignee does not use his right to take possession of the cargo, the shipper shall be liable for payment of the freight and other claims (such as demurrage) which arise under contract of affreightment. The consignee shall be liable for the container detention fee only if the consignee receives the cargo. In this case the shipper shall be released from this obligation¹⁹. The consignee must acquire direct or indirect possession of the cargo. For example, if the consignee’s authorized representative has received the mate’s receipt or/and filed legal applications for the customs data and documents on behalf of consignee, then it means that the cargo is received by the consignee.

The consignee shall be liable for the container detention fee arising from events occurring in the consignee’s field of activity. For example, the delay occurs due to legal procedures in the terms of the properties of the cargo at the port of arrival is excluded from the carrier’s field of liability. As the cargo considered under the carrier’s control until the time of delivery of the cargo to the mandatory authorities, his liability shall continue until such time.

The conditions related to container detention fee must be mainly printed on the bill of lading. The consignee must have knowledge of the applicable tariff. However, in practice, it is generally seen that neither the bill of lading nor its attachment contains container demurrage/detention tariff. In case of disputes, the calculation is made as a result of examination of the correspondence between the parties and the precedents tariffs. The invoices issued in the name of the debtor are not sufficient alone to prove the claims for container detention fees. The legal basis underlying the claim must be principally analysed. Thus, in order to calculate delay fee for each container, the date of delivery of the containers to the consignee and the date of discharge and return of the container must be proven separately for each container. For example, “arrival notice” indicates arrival to the port of discharge and “delivery-receipt documents” which indicate return of containers are the documents which can prove the claim.

7. Obligation to Inspect and Notify of Damages to Containers and Cargo in Containers

¹⁶ A box which has various kinds of things inside.

Şeker, Ö.; “The Supreme Court of Appeal’s Practice that Consignee’s Liability For The Demurrage Fee (Container Detention Fee) Despite Non-Receipt of the Cargo”, Istanbul University Faculty of Law Periodical (İÜHFİM), V. LXVI, P. 337-342, 2008, www.journals.istanbul.edu.tr, 27.5.2016.

¹⁷ Özel, p. 154

¹⁸ Özel, p. 155

¹⁹ Şeker, Ö.; “The Supreme Court of Appeal’s Practice that Consignee’s Liability For The Demurrage Fee (Container Detention Fee) Despite Non-Receipt of the Cargo”, Istanbul University Faculty of Law Periodical (İÜHFİM), V. LXVI, P. 337-342, 2008, www.journals.istanbul.edu.tr, 27.5.2016.

Pursuant to article 1184 of the TCC, before receipt of the cargo by the consignee, the carrier, shipmaster or the consignee may have the state and condition of cargo examined in order to determine the size, amount or weight by the court or other competent authorities or by the authorized specialists for this purpose and pursuant to article 1185 of the TCC, damage and loss must be notified within maximum three days to be consecutively calculated as from the date of delivery of the cargo to the consignee.

In practice, in container transportation, cargo damages notification is served earliest after the opening of the containers at the warehouse of the consignee and examination of experts appointed by the insurance company. This procedure generally takes more than three days. In this case, it is assumed that the consignee has failed to fulfil its obligations of examination and notification pursuant to article 1184, 1185/1 of the TCC and the carrier has delivered the cargo to the consignee as stated on the waybill and if there is any damage, the damage has occurred from a reason for which the carrier is not responsible. In this case, for example, the damage is considered to have occurred,

- at the port waiting queue,
- during loading of containers to the truck,
- during land transport,
- during discharge from the truck
- at the consignee's warehouse.

These presumptions must be rebutted by the plaintiff/consignee.

When evaluating the reasons for the container damage and/or cargo damage in the container, it will also be useful to make a final evaluation on the two important cases that we have encountered in practice. Firstly; if in-container loading and unloading is conducted at customs bonded areas at the port, despite the requirement to conduct in-container stacking and unloading activities directly via specialists, it is generally seen in practice that customs brokers are present during these stacking and unloading activities. In this case, duty of care to the cargo is not generally performed duly and the period of notifications cannot be fulfilled on time due to inability to determine damage to cargo in a timely manner.

Secondly; container cargo may occasionally wait for a long time at open sea ports. At this time, containers may seriously get wet due to air and sea conditions. Thus, before concluding that the carrier is liable for the damage as a result of the silver nitrate test conducted in the container, it must be determined how long the container has waited at the port and under what conditions. In fact, due to invisible holes in the containers, rain water and sea water might have penetrated into the containers. In such cases, the leakage may only be determined by an inspection of the containers such as soaking the containers into a special pool²⁰.

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²⁰ Özgen, H. : “Container Repair and Maintenance Operations”, *Container Sea and Port Management* (Editor Erdal M.), İstanbul 2008, p. 280 et seq.

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