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Arbitration Agreements in Maritime Transactions

Incorporation by Reference under Turkish Law

www.shiparrested.com Seminar,
Marseille , 23rd of June, 2006
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Arbitration Agreements in Maritime Transactions: Incorporation by Reference under Turkish Law

I. Introduction

Arbitration is one of the most preferred dispute resolution mechanism in shipping. Arbitration agreements can be made as a separate agreement or can be contained in an arbitration clause. Arbitration agreements are also being increasingly made by way of reference to standard forms or other agreements such as charterparties, which contain detailed arbitration clauses. This latter form of arbitration agreements, which shall be referred to as incorporation by reference, raises certain issues of validity in most of the legal systems including Turkish law. The issue can come up in various ways: during the arbitration proceedings one of the parties may challenge the validity of the arbitration agreement; one of the parties may file an action before the courts despite an alleged arbitration agreement and the courts may have to determine the validity of the arbitration agreement and as to whether they have the jurisdiction to hear the case. Alternatively, the issue may be raised after the arbitration proceedings and during the enforcement of the arbitral award against the debtor in any relevant jurisdiction.

This paper shall first deal with the validity of arbitration clauses incorporated by reference and secondly the effect of such clauses to third parties.

II. Validity of Incorporation by Reference

a. Introduction

Validity of arbitration agreements concluded way of incorporation by reference is dealt with as a matter of form of arbitration agreements in most of the jurisdictions and in international agreements. For example Article 7 of UNCITRAL Model Law on

Commercial Arbitration[1] ("Model Law"), which deals with the form of arbitration agreements, also deals with the form of arbitration agreements concluded by way of reference to another contract having an arbitration clause (see Article 7 of the Model Law in Annex I). Similar to the Model Law, Turkish Law No: 4686 on International Arbitration, deals with the matter under form of arbitration agreements[2]. Therefore we shall first deal with the formal requirements regarding arbitration agreements in this section.

When determining the formal requirements and the validity of the arbitration agreement, the first question to be addressed is which law shall be applicable to the form and the validity of the arbitration agreement in question. This question is directly linked with the question as to whether arbitration agreements are procedural agreements or they are substantive law agreements. If it is assumed that they are procedural agreements, the validity of the arbitration agreement shall be subject to *lex fori*. If on the other hand, it is assumed that they are substantive law agreements, the validity question shall be determined according to the substantive law applicable to contract. There are differences of opinion in Turkish law in this issue. Some hold the view that arbitration agreements are procedural agreements and therefore the validity question must be determined according to *lex fori*[3]. If this view is accepted, this will lead to tremendous uncertainties as the validity question may be answered differently depending on which jurisdiction the agreement will eventually be disputed before. There are also those who hold the view that arbitration agreements are related to the substantive law and therefore the law applicable to the agreement must be applicable to the validity and form of the arbitration agreement[4].

Article 4/3 of the Turkish Law No 4686 on International Arbitration deals with the issue of law applicable to the form of arbitration agreements and provides that the arbitration agreement shall be valid if it is in accordance with the law applicable to the arbitration agreement. If the parties have not chosen an applicable law to their

[1] Adopted by UNCITRAL on 21 June 1985, the Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.
[2] Turkish Law No 4686 on International Arbitration, Turkish Official Gazette Dated 05.07.2001 No: 24453
[3] Eksi, Milletlerarası Deniz Ticareti Alanında "Incorporation" Yoluyla Yapılan Tahkim Anlasmaları, 2004, Istanbul, Beta Publishers, page: 72-81
[4] Nomer-Şanlı, Devletler Hususi Hukuku, 13rd Ed., 2005, Istanbul, Beta, page:464-465

arbitration agreement, Turkish law shall be applicable to the form and validity of the arbitration agreement. As a result if the validity of an arbitration agreement is challenged before the Turkish courts or during an arbitration proceeding conducted in accordance with Turkish law, the law applicable to the arbitration agreement shall first be looked at. If no such law is chosen by the parties, Turkish arbitration law provisions dealing with the form and validity of arbitration agreements shall be applicable to the question.

We shall first consider the provisions of the Model Law dealing with the form and validity of arbitration agreements and then examine the matter under Turkish Law.

b. Formal Requirements under International Agreements

As a general rule, arbitration agreements must be made in writing. The term "agreement in writing", however, does not always require the "signature" of the parties. The formal requirements to be observed are determined in Article 7 of the Model Law. It is provided that the arbitration agreements can be concluded as a separate agreement or contained in an arbitration clause. The arbitration agreements must be made in writing. This condition can be satisfied if the agreement is contained in a document signed by the parties or in exchange of letters, telex, telegrams or other means of telecommunication which provide record of the agreement; or if the claim of existence of arbitration agreement by one party is not denied by the other party. The arbitration clauses exchanged in all means of telecommunication including electronic communication are considered as agreements made in writing under the Model Law. On the other hand the Model Law seems to require "exchanges of documents". It is not clear for example whether an arbitration clause contained in a purchase order sent by modern telecommunication means constitutes an arbitration agreement if there are no further exchanges of documents between the parties i.e. the receiving party does not confirm the document in writing[5].

The Model Law specifically deals with the issue of incorporation by reference. The relevant part of Article 7 is as follows:

[5] Eksi, page: 60-62

"*The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.*"

The provision seems to require the existence of a "contract". Moreover it is not clear when the reference would be deemed to make the referred clause part of the contract. In the case of a bill of lading, for example, it is not clear whether a simple reference to a charterparty, which contains an arbitration clause, without referring to that arbitration clause, would constitute an arbitration agreement.

c. Turkish Arbitration Law

The Turkish courts shall apply Turkish law in order to determine the validity of the arbitration agreement made by way of incorporation by reference if the parties have not chosen a law applicable to the arbitration agreement. Turkish arbitration law consists of various regulations. Civil Procedural Law; Law No 4686 on International Arbitration; European Convention on International Commercial Arbitration and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

The issue as to which of the aforesaid regulations will be applicable will depend on as to whether the dispute is of an international or domestic nature and as to whether the validity is challenged during the enforcement proceedings of an arbitral award or before such enforcement proceedings. Each of the aforesaid possibilities shall be addressed below.

Turkey is a party to the New York Convention. If the validity of the arbitration agreement is challenged during the enforcement proceedings of the arbitration award before Turkish courts and if the New York Convention is applicable (i.e the parties are from states party to the New York Convention), the Turkish courts shall apply the provisions of the New York Convention dealing with the form and validity of arbitration agreements in order to determine the validity issue. Article II of the New York Convention provides that the arbitration agreements must be in writing. The

Convention defines an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams as "agreement in writing". Turkish courts interpret this provision widely. In nearly all of the precedents related to incorporation by reference to arbitration clauses in international trade standard forms the Court of Appeal held that the references in various exchanges of faxes or letters to different versions of FOSFA, GAFTA, LCA and similar standard forms establish a valid arbitration agreement as per Article II of the New York Convention[6].

If the dispute does not fall within the scope of the New York Convention i.e. if the arbitration award is given in a state which is not party to the New York Convention, Turkish Private International Law shall be applicable to the enforcement of the award. The validity of the arbitration agreement can be raised as a defense during the enforcement proceedings according to the provisions of Turkish Private International Law. Article 45 (a) of the Law refers to arbitration agreements or arbitration clauses and provides that the arbitration agreement must be made according to either ways, but does not deal with the formal requirements of the arbitration agreement. It is purported that the arbitration agreement or arbitration clause must be made in writing. This, however, does not determine whether the agreement can be made by way of incorporation by reference. The Law is modeled after the New York Convention, but Article II/2 of the Convention is not taken into the Law. It is purported that the courts should apply Article II/2 of the Convention in such situations and hold the arbitration agreements made by way of incorporation by reference as valid[7].

If the validity of the arbitration agreement is challenged by filing a lawsuit before the Turkish courts, the Turkish Courts shall apply Turkish arbitration law if the arbitration agreement does not specify the law applicable to the arbitration agreement. In this case, the applicable Turkish arbitration law depends on as to whether the dispute is of a domestic or an international nature. If the arbitration is of a domestic nature, Civil Procedural Law shall be applicable. Article 517 of the Civil Procedural Law requires that the arbitration agreement to be made in writing. Turkish jurisprudence and Court of Appeal requires the signature of the parties for the satisfaction of the condition of

[6] 19th Civil Chamber of Court of Appeal Decision Date: 08/05/1997, No: 9616/4669
[7] Eksi, page: 95-101

the “agreement in writing”. In the arbitration agreements made by way of incorporation by reference, the arbitration clause is usually contained in a standard form which is not signed by the parties. If the standard form or other type of referred document having the arbitration clause is not signed by the parties, such arbitration agreements cannot be held valid based on Article 571 of Civil Procedural Law. Similarly, such arbitration agreements shall not be valid for third parties.

In the event that the validity of the arbitration agreement is challenged by filing a lawsuit before the Turkish courts and the arbitration is of an international nature, Turkish Law No. 4686 on International Arbitration shall be applicable in the absence of a choice of applicable law to the arbitration agreement. Turkish Law No. 4686 on International Arbitration came into force in 2001 and until that date Civil Procedural Law was applicable to both disputes with a local and an international nature. As stated hereabove, the validity of arbitration agreements made by way of incorporation by reference had been very problematic. Turkish Law No. 4686 on International Arbitration has changed the legal situation to a large extent. Turkish Law No. 4686 is applicable to arbitrations with an international nature whereby the seat of arbitration is in Turkey or the Law is agreed to be the applicable law to the arbitration agreement by the parties even if the seat of arbitration is not in Turkey. The “international nature” is very widely defined in the Law so as to cover as many disputes as possible. Based on Article 4/3 and Article 5 of the International Arbitration Law, it is purported that the validity of the arbitration agreements with an international nature shall be determined in accordance with the Law even if the seat of arbitration is not in Turkey or the parties have not chosen the Law to be applicable to the arbitration agreement. Article 4/2 of the International Arbitration Law deals with the form of the arbitration agreements. According to Article 4/2, the arbitration agreement must be in writing. The term agreement in writing is defined as an agreement signed by the parties; or an agreement contained in exchange of letters, telex, telegrams or electronic communication which provide record of the agreement; or if the claim of existence of arbitration agreement by one party is not denied by the other party. Article 4/2 specifically deals with the issue of arbitration agreements made by way of incorporation by reference and provides that a valid arbitration agreement shall be deemed to be made if a document containing an arbitration clause is referred to in order to be incorporated into the main agreement. It is purported that the reference

made must be clear in order for the incorporation and the arbitration agreement to be valid.

Turkey is party to European Convention on International Commercial Arbitration, which also deals with the form and validity of arbitration agreements. Turkish courts should apply the provisions of the European Convention if the dispute is within the scope of the Convention.

III. The Effect of Arbitration Agreements to Third Parties

Arbitration agreement, in principle, binds only its parties. Determining the effect of the arbitration agreement to third parties raises certain questions. The question as to whether the bill of lading holder, insurance company, assignee of a receivable will be bound by the arbitration clause transferred along with the assignment or endorsement is still not very clear in most of the jurisdictions. As an example to this problem, we shall deal with the question as to whether the arbitration clause in the charterparty be binding on the bill of lading holder under Turkish Law.

According to Turkish law, bill of lading is a document of title. According to Turkish Commercial Code, all of the rights and obligations arising from the bill of lading are transferred to the endorsee by the endorsement of the bill of lading and the bill of lading is the main contract between the carrier and the bill of lading holder. Based on the aforesaid provisions of the Turkish Commercial Code, The Court of Appeal accepts that arbitration clause in a bill of lading shall be valid and binding on the rightful holder and endorsee of the bill of lading[8]. If the endorsee of the bill of lading does not wish to be bound by the arbitration clause, the clause must be deleted and if not, the arbitration clause shall be binding on the endorsees of the bill of lading. Arbitration clauses, however, are not generally contained in bills of lading, but are contained in charterparties. Charterparties are generally the standard forms containing the arbitration clause and the bills of lading incorporate the arbitration clauses therein by reference. The following questions commonly arise in those situations:

[8] 11th Civil Chamber of Court of Appeal Decision No: 1197/9447E 1998/1704K

a. The Charterparty referred to may not be clear

As stated above, Article 4/2 specifically deals with the issue of arbitration agreements made by way of incorporation by reference and provides that a valid arbitration agreement shall be deemed to be made if a document containing an arbitration clause is referred to in order to be incorporated into the main agreement. It is purported that the reference made must be clear in order for the incorporation and the arbitration agreement to be valid.

One of the frequently confronted problems is whether it would be sufficient to refer to a charterparty or should the details of the charterparty such as the date of the charterparty be indicated. Turkish courts require a clear reference to the charterparty intended to be incorporated. In an expert report evaluating the validity of an arbitration agreement in a bill of lading, the court appointed expert was of the view that there were no valid arbitration agreement because the date of the charterparty referred to in the bill of lading had not been indicated[9].

b. General reference vs particular reference to the charterparty

Another frequently confronted question is as to whether a general reference to the charterparty would be sufficient or the arbitration clause in the charteparty must be specifically referred to in order to have a valid incorporation of an arbitration clause to the bill of lading. It is purported that a clause in a bill of lading stating "*all other terms including the arbitration clause shall be as per charterparty*" shall amount to a valid arbitration agreement and shall be binding on an endorsee of the bill of lading. The Court of Appeal is of the same view.

The clause may not explicitly refer to the existence of an arbitration clause in the charterparty. The reference may be like "*all other terms as per charterparty".* The Court of Appeal generally holds such clauses as valid[10]. Nevertheless, there is strong

[9] Kadıkoy 1st Court of First Instance File No: 2001/550
[10] 11th Civil Chamber of Court of Appeal Decision No: 1994/11-765E K.39; 11th Civil Chamber of Court of Appeal 216E K.4357

opinion against such Court of Appeal decisions. It is purported that the bill of lading holder/endorsee can only be bound by an arbitration clause in the charterparty if the existence of such arbitration clause is clear and known by the endorsee at the time of the endorsement. Clauses that are of an exceptional nature such as arbitration clauses must be explicitly referred to in order for them to be validly incorporated in the bill of lading and binding on the bill of lading holder[11].

IV. Concluding Remarks

Similar to international agreements, Turkish Law considers the validity of arbitration agreements made by incorporation by reference as a matter related to the form of the arbitration agreement. In nearly all jurisdictions, the arbitration agreements must be in writing. Up until the enactment of the Law No: 4686 on International Arbitration, arbitration agreements made by incorporation by reference were not deemed to satisfy this formal requirement as the agreements in writing were limited to those that were signed by the parties. The Law No: 4686, which apply only to disputes with an international element, changed this legal position and in cases where it is applicable, arbitration agreements made by way of incorporation by reference are held to be valid. The position is the same according to the Turkish courts application of the New York Convention. In cases where Turkish Civil Code is applicable, however, such arbitration agreements shall not be valid. As for incorporation of arbitration clauses in the charterparties to bill of ladings by way of reference, the reference must be very clear and the bill of lading holder should be in s position to be aware of the existence of the arbitration clause in the charterparty in order for them to be valid.

[11] Eksi, page: 110-117