“Owners’ Responsibilities” Clause of GENCON 2022: An Assessment under the Hague / Visby Rules, GENCON 94 Charter Party and the Turkish Commercial Code(*)

GENCON 2022 “Owners’ Responsibilities” Klozu: Lahey / Visby Kuralları, GENCON 94 Çarter Partisi ve Türk Ticaret Kanunu Çerçevesinde Bir Değerlendirme

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Abstract:

The international nature of carriage of goods by sea has necessitated the establishment of uniform rules in progress of time. To address this need, standard contracts are developed by organizations engaged in maritime law. There is no obligation to use these standard forms in question, which are qualified as general terms and conditions and are drafted by international organizations operating in the field of maritime law. These standard forms are periodically updated in accordance with requirements of practice and considering the international character of maritime law and they are frequently employed by stakeholders who are reluctant to be subject to an unfamiliar legal system. Among these commonly used standard forms, the GENCON, prepared by BIMCO (“The Baltic and International Maritime Council”), holds a prominent position. GENCON charter party, containing the fundamentals of voyage charter agreements, was first introduced in 1922 and subsequently revised in response to practical needs in 1976, 1994, and most recently in 2022. With the revision in 2022, substantial alterations were made to certain clauses of GENCON 94 charter party. In this study, “Shipowner’s Responsibilities” Clause of GENCON 2022 charter party is intended to be evaluated, taking into consideration the corresponding clause of GENCON 94 and the relevant provisions of Turkish Commercial Code and the Hague - Visby Rules.

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Öz:

Deniz yolu eşya taşımacılığının uluslararası niteliği, zaman içerisinde bu alanda yeknesak kuralların oluşturulması ihtiyacını doğurmıştur. Bu ihtiyacı gidermek üzere, deniz hukuku alanında faaliyet gösteren bazı kuruluşlar tarafından uygulamada ilgililer tarafından arzu edildiği takdirde kullanılmak üzere bazı standart sözleşmeler oluşturulmaktadır. Genel işlem koşulu niteliğinde olan ve deniz ticareti hukuku alanında faaliyet gösteren uluslararası kuruluşlar tarafından kaleme alınan söz konusu standart sözleşmelerin kullanılması hususunda bir zorunluluk bulunmamaktadır. Bununla birlikte, bu standart formlar, uygulamadaki ihtiyaçlar dikkate alınarak belirli aralıklarla güncellenmekte ve deniz ticareti hukukunun uluslararası niteliği gözetildiğinde, âşina olmadıkları bir hukuk sistemine tâbi olmaktan çekinen ilgililerce sıklıkla tercih edilmektedir. Bu standart formların başında BIMCO ("The Baltic and International Maritime Council") tarafından hazırlanan GENCON çarter partisi gelmektedir. Yolculuk çarteri sözleşmelerine ilişkin esasların yer aldığı ve ilk defa 1922 yılında kullanıma sunulan bu standart çarter parti, 1976 ve 1994 ve son olarak 2022 yılında uygulamadaki ihtiyaçlar doğrultusunda revize edilmiştir. 2022 yılında yapılan revizyon ile birlikte, GENCON standart çarter partisinde, GENCON 94 formunda yer alan ve sıklıkla eleştirilen bazı klozlarda önemli sayılabilecek değişiklikler yapılmıştır. Çalışmada, GENCON 2022 çarter partisinin "Owners' Responsibilities" başlıklı klozunun, GENCON 94 çarter partisindeki ilgili kloz ve Türk Ticaret Kanunu ile Lahey / Visby Kurallarındaki ilgili düzenlemeler göz önünde bulundurulmak suretiyle değerlendirilmesi amaçlanmaktadır.

Anahtar Kelimeler:

Yolculuk Çarteri Sözleşmesi, GENCON 94, GENCON 2022, Lahey Visby Kuralları, Paramount Klozu.

I. INTRODUCTION

Due to the international nature of maritime transportation, a significant portion of the disputes in practice involve an element of foreignness. In the face of this situation, in order to prevent unfair outcomes that would arise from applying different rules to similar cases, certain measures have been taken on the international stage. Within this framework, the first method employed is the establishment of uniform rules through international agreements in the field of maritime transportation. Indeed, in today's context, some of these international agreements concerning maritime transportation are being accepted by certain states and/or certain rules from these international agreements are being incorporated into domestic law to achieve international uniformity. Another method used within maritime law to ensure uniformity at the international level involves the creation of standardized form contracts pertaining to specific matters. These standardized contracts, which hold the nature of general transactional conditions, are drafted by international organizations engaged in maritime law and are periodically updated in line with developments in practice. While there is no obligation to utilize these standardized contracts, due to the

presence of the foreign element in practice, parties unwilling to be subject to disparate legal systems often resort to these standardized forms, which provide solutions harmonious with international standards, for their legal controversy. At the forefront of standardized form contracts utilized in the practice of carriage by sea is the GENCON standard form, prepared by BIMCO. This particular form, which is periodically updated in accordance with developments in the field of maritime ransportation, was last revised in the year 2022.

Within this framework, significant amendments have been introduced, particularly in the "Shipowner's Responsibility" clause of the GENCON 94 standard form, wherein conditions that garnered criticism for excessively favoring the shipowner have been eliminated. Instead of the GENCON 94 standard form's system that implied an extensive protection to the shipowner, a system has been adopted in line with the Hague-Visby Rules, where the shipowner is held accountable not only for their own acts but also for the actions of their servants. Furthermore, in the GENCON 2022 charter party, the need to add the Paramount Clause in the charter party has been obviated due to the explicit reference made to the Hague-Visby Rules. This adjustment facilitates a parallelism between the responsibility system in the still widely accepted Hague-Visby Rules globally.

Below, the principles introduced in the "Shipowner's Responsibilities" clause of the GENCON 2022 charter party will be examined in comparison with the relevant clause of the GENCON 94 charter party, as well as the provisions of the Hague-Visby Rules and the Turkish Commercial Code, to provide an in-depth analysis.

II. GENERAL INFORMATION ABOUT GENCON STANDARD FORM AND GENCON 2022

Given the international character of maritime cargo transportation, certain organizations within the realm of maritime commercial law endeavor to establish standardized form contracts to prevent the application of disparate rules to analogous disputes. Parties, faced with disputes involving a foreign element, and unwilling to be subject to unfamiliar legal systems, frequently utilize these standardized forms in practice[1]. Among the forms commonly

[1] For explanations, see LITINA, Eva, "Maritime Arbitration: Dilemmas, Prospects, and Challenges: Lessons from Contracts for the Carriage of Goods by Sea", **Tulane Maritime Law Journal**, 2022, vol. 46, no. 3, p. 517 ff.; p. 522. See also, TETLEY, William, "Uniformity of International Private Maritime

preferred in practice, the GENCON standard contract, which governs the essentials of voyage charter contracts, holds a prominent position. As it is well known, in practice, freight contracts can be concluded in various forms. In the commonly preferred voyage charter contract, the carrier commits to allocate their vessel to the charterer for a specific voyage in return for freight to be paid on the basis of the cargo carried[2]. The GENCON standard contract includes the fundamental principles of the voyage charter contract and stands among the oldest standardized contracts created by BIMCO[3]. Originally drafted in 1922, this standard form is characterized by BIMCO as a 'flagship' contract[4]. Due to its status as the most widely used standard contract globally in the domain of dry cargo transportation by sea, the GENCON standard form carries the significance of being revised in accordance with contemporary developments. Considering this aspect, bearing in mind the evolving needs of the industry, this standard contract, initially formulated in 1922, has undergone revisions in line with practical requirements in 1976 and 1994. Most recently, a updated version of this form has been released in the year 2022.

The revision carried out in the GENCON standard contract in the year 1994[5], was undertaken with the objective of addressing certain uncertainties arising from the application of the General Strike Clause and certain other clauses included within[6]. This revision took into consideration certain judgments rendered by English courts. However, as emphasized explicitly by

Law - The Pros, Cons, and Alternatives to International Conventions - How to Adopt an International Convention", **Tulane Maritime Law Journal**, Y. 2000, Vol. 24, No. 2, p. 782 ff. and p. 788 ff.

2 ÜLGENER, Fehmi, **Çarter Sözleşmeleri: Genel Hükümler, Sefer Çarteri Sözleşmesi**, İstanbul, 2010, p. 153; ÇAĞA, Tahir / KENDER, Rayegân, **Deniz Ticareti Hukuku Sözleşmeleri II: Navlun Sözleşmeleri**, İstanbul, 2009, p. 8; COOKE, Julian / YOUNG, Timothy / ASHCROFT, Michael / TAYLOR, Andrew / KIMBALL, John D. / MARTOWSKI, David / LAMBERT, Leroy / STURLEY, Michael, **Voyage Charters**, 4th Edition, Informa Law from Routledge, 2014, p. 3 ff.; VANDEVENTER, Braden, "Analysis of Basic Provisions of Voyage and Time Charter Parties", **Tulane Law Review**, Y. 1974-1975, Vol. 49, No. 4, p. 806; ZOCK, Anthony N., "Charter Parties in Relation to Cargo", **Tulane Law Review**, Y. 1970-1971, Vol. 45, No. 4, p. 734-736; AKINCI, Sami, Deniz Hukuku: Navlun Mukaveleleri, İstanbul 1968, p. 15 vd.; OKAY, Sami, **Deniz Ticareti Hukuku C.II/1**, İstanbul 1968, p. 18-19.

3 For explanations regarding the GENCON standard form, (On-line) https://www.bimco.org/contracts-and-clauses/bimco-contracts/gencon-2022, Date of Access: 9 August 2023.

4 (On-line) https://www.bimco.org/contracts-and-clauses/bimco-contracts/gencon-2022, Date of Access: 9 August 2023.

5 About GENCON 94, see ÜLGENER, **Çarter Sözleşmeleri**, p. 160 vd.; See also, ÜLGENER, Fehmi, "GENCON 94 Çarter Partisine Genel Bir Bakış", **DHD**, Y. 1, Vol. 1, p. 23 ff; COOKE / YOUNG / ASHCROFT / TAYLOR / KIMBALL / MARTOWSKI / LAMBERT / STURLEY, p. 771.

6 (On-line) https://www.bimco.org/contracts-and-clauses/bimco-contracts/gencon-2022, Date of Access 9 August 2023.

BIMCO (Baltic and International Maritime Council), the intention behind this contemporaneous update was not a complete rewriting of the GENCON 76 standard form. Rather, the aim was to update specific provisions within the standard form as deemed necessary[7]. Nonetheless, it is noteworthy that from the year of this revision, 1994, up until the present time, the maritime industry has witnessed numerous significant developments.

In this manner, the maritime industry has grown increasingly intricate, subjecting both cargo owners and shipowners to obligations they had not previously contemplated. Consequently, the developments that have transpired over the course of the intervening 30 years have rendered a comprehensive revision of the aforementioned standard form inevitable. Faced with this situation, the parties involved opted not for a moderate revision of the GENCON 94 form, but rather chose to implement an exceedingly comprehensive alteration[8]. Pursuant to this objective, noteworthy adjustments were made to the GENCON 94 form's laytime provisions and, within this framework, to the responsibility of the shipowner concerning notice of readiness and preparations for and during loading and unloading. Below, the "shipowner's liability" clause, as modified by the GENCON 2022 standard contract, will be examined in comparison with the provisions of Turkish Commercial Code (TCC) and Hague Visby Rules[9].

A. Owners' Responsibilities Clause of GENCON 2022

1. In General

The shipowner's liability is set forth in Clause 2 of GENCON 22. As per the initial paragraph of the said clause, "the Owners shall exercise due diligence to provide a Vessel that shall: at the commencement of loading Cargo at each loading port or place under this Charter Party be properly manned, equipped

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7 See, (On-line) https://www.bimco.org/contracts-and-clauses/bimco-contracts/gencon-2022, Date of Access: 9 August 2023.

8 For explanations see, (On-line) https://www.bimco.org/contracts-and-clauses/bimco-contracts/gencon-2022, Date of Access: 9 August 2023.

9 At this juncture, as previously stated, although there have been certain modifications in subsequent versions of the GENCON 1922 standard charter party over the passage of time, in comparison to the 2022 revision, these alterations are emphasized to be of a more minor nature. On the other hand, the almost obsolete GENCON 1922 charter party, which is hardly used in practice anymore, is not even available on the website of BIMCO, the organization that prepares these standard forms. Therefore, in this study, the GENCON 2022 charter party has been solely compared with the provisions of the GENCON 1994 charter party.

and supplied for its loading and have holds, refrigerating and cool chambers and all other parts of the Vessel in which such Cargo is to be carried fit and safe for its reception, carriage and preservation". Continuing along the same provision, a fundamental principle is introduced that the carrier must also provide the ship "seaworthy and properly manned, equipped and supplied" at the commencement of each cargo-carrying voyage. Thus, it is discerned from the stipulated provision that the shipowner's responsibility, under Clauses 2(a) and (i) of GENCON 22 standard charter party is essentially delineated in connection with the obligation to provide sea- and cargoworthiness of the ship[10]. Another noteworthy aspect to be emphasized by the aforementioned regulation is that the limit of the shipowner's obligation is established as the "commencement of the voyage." Indeed, such conclusion can be derived from the expressions "at the commencement of each Cargo-carrying voyage" and "at the commencement of loading" within the provision[11].

In the second paragraph of Clause 2 concerning the shipowner's liability in the GENCON 22 standard form, following the regulation of the shipowner's obligation to maintain the vessel in a sea-and carcoworthy condition at the commencement of the voyage, the provision subsequently addresses the shipowner's duty of due diligence to the cargo. Indeed, in accordance with Para. 2(a)(ii), "the Owners shall, from the time when it is loaded to the time when it is discharged, properly and carefully carry, keep and care for the Cargo." Accordingly, the carrier is subject not only to the obligation of ensuring the vessel's seaworthiness at the commencement of the voyage but also to the separate duty of exercising due diligence towards the cargo throughout the period from loading to discharge.

An important amendment incorporated within Clause 2 of GENCON 22 regarding the shipowner's liability is the reference to the Hague-Visby Rules[12]. According to this provision, "The Owners shall be entitled to rely on all rights, defenses, immunities, time bars, and limitations of liability that are available in any event to a 'Carrier' under the Hague-Visby Rules. Furthermore, unless the loss, damage, delay, or failure in performance in question has been caused by a breach of subclause (a)(i) above, the Owners shall also be entitled to rely on all

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10 For further explanations, WEALE, John, "An Introduction to GENCON 2022", **Lloyd's Shipping&Trade Law,** Y. 2022, Vol. 22, No. 10, p. 1 ff; ÜLGENER, Fehmi, "GENCON 22 İlk İzlenimler", **PRU-DHD**, Y. 2022, Vol. 1, No. 2, p. 346 ff.

11 For further explanations regarding to this issue, see, ÜLGENER, **GENCON 22**, p. 347.

12 For detailed information see also, WEALE, p. 1-2; ÜLGENER, **GENCON 22**, p. 347.

other rights, defenses, immunities, time bars, and limitations of liability that are available to a 'Carrier' under the Hague-Visby Rules." Within the framework of this provision, due to the reference to the Hague-Visby Rules, it is important to highlight that similar to the Hague-Visby regime, exceptional regulations pertaining to the carrier's liability shall not be applicable in the context of a breach of the obligation to provide the vessel in a sea-andcarcoworthy condition at the commencement of the voyage[13].

2. Comparison with Owner's Responsibilities Clause of GENCON 94

The principles regarding the liability of the shipowner are set forth in Clause 2 of GENCON 94[14]. Indeed, according to the this provision, "The owners are to be responsible for loss of or damage to the goods or for delay in the delivery of the goods only in case the loss, damage, or delay has been caused by a personal want of due diligence on the part of the owners or their manager to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped, and supplied, or by the personal act or default of the owners or their manager. And the owners are not responsible for loss, damage, or delay arising from any other cause whatsoever, even from the neglect or default of the master or crew or some other person employed by the owners on board or ashore for whose acts they would, but for this clause, be responsible, or from unseaworthiness of the vessel on loading or the commencement of the voyage or at any time whatsoever."[15] In this regulation as well, similar to the provision in

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[13] The provision in HVR Art.III outlines the carrier's obligations, while the provision in Art.IV addresses the carrier's defenses; therefore, in Art.IV/1, the available defenses that the carrier can raise regarding liability arising from initial unseaworthiness are stipulated; Art.IV/2 and Art.III/2 regulate the defenses concerning the carrier's breach of due diligence obligations as established in Art.III/II, and this provision directly relates to the initial unseaworthiness in Art.III/1; this differential listing in the provision can be justified in this manner.

See, TREITEL, Guenter H. / REYNOLDS, Francis M. B., **Carver on Bills of Lading**, 3rd edn, Sweet & Maxwell, 2011, p. 704. Similarly, the explanation in the same direciton, see also, BOYD, Steward C./ BURROWS, Andrew S./ Foxton, David, **Scrutton on Charterparties and Bills of Lading,** 20th edn, Sweet&Maxwell, 1996, p. 443; DERRINGTON, Sarah C., "Due Diligence, Causation and Article 4(2) of the Hague-Visby Rules", **International Trade and Business Law Annual,** Y. 1997, Vol. 3, p. 176 ff. See also, ÜLGENER, **Fehmi, Sorumsuzluk Halleri**, İstanbul, 1991, p. 91.

[14] ÜLGENER, **Çarter Sözleşmeleri**, p. 266 ff.; ÜLGENER, **GENCON 94 Çarter Partisine Genel Bir Bakış**, p. 23 ff.

[15] The Owners' Responsibilities Clause of GENCON 76 stipulates exactly that, "Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or daly has been caused by the improper or negligent stowage of the goods (unless stowage performed by shippers/charterers or their stevedores or servants) or by personal want of due diligence on the part of the Owners or their manager to make the vessel in all respects seaworthy and to secure that sge is properly manned, equipped and supplied or by the personal act or default of the Owners or their Manager." Accordingly, it can be observed that there is no significant or fundamental difference between

GENCON 22, it can be observed that the shipowner is held responsible not only for deficiencies existing at the commencement of the voyage but also for deficiencies arising during the course of the journey. However, a key distinction that should be highlighted regarding this clause, unlike the corresponding provision in GENCON 22, is that here the shipowner is held accountable solely for their own or their appointed manager's acts and omissions[16]. Accordingly, as expressly stated within this provision, the shipowner cannot be held liable for damages arising from the negligence of the captain or any other crew.

Within the framework of these explanations, undoubtedly, it appears plausible to assert that the most significant innovation introduced by GENCON 22 is the liability of the shipowner for the acts of the agents and servants. In this manner, it is discernible that the liability in GENCON 94, which confines the shipowner's liability solely to their own and the appointed manager's actions, has been notably expanded in GENCON 22. In practice, when one considers that the damages giving rise to the shipowner's liability often result more from the acts of the agents and servants and other individuals contributing their efforts to the performance of the charter party, rather than from the personal negligence of the shipowner, this amendment, at first glance, could be characterized as a profound alteration due to the apparent broadening of the shipowner's sphere of responsibility. However, despite the theoretical soundness of this explanation, it is evident that the provision which has been heavily criticized for excessively shielding the shipowner has been modified in practice. Another crucial point to emphasize here is that within the Hague-Visby system, where the carrier's liability is mandatorily regulated, any clauses altering these provisions to the detriment of the cargo interest would be considered invalid[17]. Considering that numerous countries have acceded to the 1924 Brussels Convention, in other words, Hague-Visby Rules, or have incorporated these rules into their domestic legal systems, it becomes apparent that this provision in GENCON 94 would often prove invalid in practice. Therefore, even though the alteration in GENCON 22 might theoretically be characterized as a profound change, it should be underscored that the provision in GENCON 94 is, due to the aforementioned reasons, inherently unenforceable[18].

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the Owners' Responsibilities clauses in GENCON 76 and GENCON 94. In the same vein, see also, ÜLGENER, **Çarter Sözleşmeleri**, p. 270.

16 ÜLGENER, **GENCON 22**, p. 348; WEALE, p. 1; ZOCK, p. 739.

17 ÜLGENER, **Çarter Sözleşmeleri**, p. 267.

18 ÜLGENER, **Çarter Sözleşmeleri**, p. 348-349.

Another significant innovation introduced by GENCON 22 regarding the shipowner's liability clause is the provision stipulating that, within the second paragraph of the shipowner's liability clause, the carrier shall benefit from the rights, defenses, and limits of liability accorded by the Hague-Visby Rules. In the GENCON 94 standard form, only the fundamental principle of the shipowner's liability for damage incurred to the cargo was addressed, with no further provisions outlined. During this period, however, in practice, in order to fulfill the requirements of the shipowner's P&I coverage, a Paramount clause incorporating the Hague-Visby Rules was commonly added to charter parties[19].

Therefore, it can be argued that due to the explicit provision envisaged in GENCON 22 Clause 2, the necessity for incorporating the Hague-Visby Rules into the charter party has now been eliminated[20].

III. LIABILITY REGIME FOR VOYAGE CHARTER CONTRACTS UNDER HAGUE / VISBY RULES AND TURKISH LAW

A. Hague / Visby Rules

During the mid-19th century, maritime transportation witnessed a swift development, with significant technological advancements of the era enabling the carriage of substantial cargo over long distances. As maritime transportation became more prevalent, the number of disputes and the amounts of damages subject to dispute also increased. Consequently, the formulation of uniform

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19 For further explanations, see, ÜLGENER, **Çarter Sözleşmeleri**, p. 266 ff; WEALE, p. 1; SELVIG, Erling, "The Paramount Clause", **American Journal of Comparative Law**, Y. 1961, Vol. 10, No. 3, p. 210; See also, FISHER, Robert B. Jr. "The Warranty of Seaworthiness in Charter Parties: Legal Methods of Amelioration", **Maritime Lawyer**, Y. 1975, Vol. 1, p. 21 ff.

See also, BIGGS, Helena "The GENCON 2022 Charterparty", (On-line) https://www.gard.no/web/articles?documentId=34463223, Date of Access: 7 August 2023: Indeed, the Author also addresses a similar issue. As accurately articulated by the Author, "Although the intention was presumably to meet the requirements of the shipowner's P&I cover by ensuring that the terms of the charterparty were no less favourable than the Hague-Visby Rules, importing the regime significantly reduced the practical benefit of Clause 2".

20 For further information regarding the Paramount Clause, see also, COOKE / YOUNG / ASHCROFT / TAYLOR / KIMBALL / MARTOWSKI / LAMBERT / STURLEY, p. 261 ff; VANDEVENTER, p. 817; LITINA, p. 524; SELVIG, p. 205 ff.; Fischer, p. 21 ff.

In practice, parties often amend standard form contracts by adding clauses subsequently. In this regard, see ÜLGENER, **Çarter Sözleşmeleri**, p. 156: As the Author also notes, the use of a standard contract without amendments in practice is quite rare. Also see, HETHERINGTON, Stuart, "Fixing or Unfixing a Charter Party", **MLAANZ Journal**, Y. 1991, Vol. 8, No. 1, p. 13; BIGGS, Helena, "The GENCON 2022 Charterparty", (On-line) https://www.gard.no/web/articles?documentId=34463223, Date of Access: 7 August 2023.

rules governing the carrier's liability in carriages by sea became inevitable[21]. In order to address this need[22], after a series of meetings and ultimately through a conference convened in Brussels, the Hague Rules were adopted in 1924 under the title "International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading" albeit with minor modifications[23]. As certain technical advancements emerged over time, since the Hague Rules became insufficient to meet the evolving needs of pracitce[24], a series of conferences and endeavors ensued. Consequently, the "Protocol to Amend the Brussels Convention of 25.08.1924 on the Unification of Certain Rules Relating to Bills of Lading"[25] was adopted[26] by a conference convened[27] under the auspices of the

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21 For detailed information, see, DUNLOP, C. R., "The Hague Rules, 1921", **Journal of Comparative Legislation and International Law**, Y. 1922, Vol. 4, No. Parts 1 and 4, p. 27; MANDELBAUM, Samuel Robert, "Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods under the Hague, COGSA, Visby and Hamburg Conventions", **Transportation Law Journal,** Y. 1996, Vol. 23, No. 3, p. 471 ff; YANCEY, Benjamin W., "Carriage of Goods: Hague, Cogsa, Visby, and Hamburg", **Tulane Law Review**, Y. 1982-1983, Vol. 57, No. 5, p. 1241; STURLEY, Michael F., "The History of COGSA and the Hague Rules", **Journal of Maritime Law and Commerce,** Y. 1991, Vol. 22, No. 1, p. 5 ff.; see also MOORE, John C., "The Hamburg Rules", **Journal of Maritime Law and Commerce**, Vol. 10, no. 1, October 1978, p. 1.

22 RADISCH, Hans Joachim, **Die Beschränkung der Verfrachterhaftung beim Überseetransport von Containern: Eine rechtsgleichende Untersuchung unter besonderer Berücksichtigung des anglo-amerikanischen Rechts,** Hamburg, 1986, p. 13; O'HARE, C. W. "Allocating Shipment Risks and the Uncitral Convention", **Monash University Law Review**, Y. 1977, Vol. 4, no. 2, p. 122.

23 "The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading," signed at Brussels on August 25, 1924; entered into force on June 2, 1931. The said International Convention was ratified by Turkey through Law No. 6469 dated February 14, 1955, and was published in the Official Gazette No. 8937 dated February 22, 1955. The Convention came into effect for Turkey on January 4, 1956. For more information about the Convention, see, YANCEY, p. 1242 ff; MANDELBAUM, p. 477; REYNOLDS, Francis, "The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules", **Australian and New Zealand Maritime Law Journal**, 7, p. 16 ff.; RADISCH, p. 13 ff; O'HARE, C. C., "The Hague Rules Revised: Operational aspects", **Melbourne University Law Review**, 10(4), p. 531 ff; DUNLOP, p. 27 ff.; STURLEY, p. 20 ff; CYRIL, James, F., "Carriage of Goods by Sea--The Hague Rules", **University of Pennsylvania Law Review and American Law Register,** Y. 1925-1926, Vol. 74, No. 7, p. 677-678; ÇAĞA / KENDER, p. 129 vd.; AKINCI, p. 72 vd.; OKAY, p. 154 vd.

24 WERTH, Douglas A., "The Hamburg Rules Revisited - A Look at U.S. Options," **Journal of Maritime Law and Commerce**, Y. 1991, Vol. 22, No. 1, p. 62; MANDELBAUM, p. 480; STURLEY, p. 57; MOORE, p. 3-4.

25 Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25th August 1924, Brussels, 23 February 1968, Entry into force: 23 June 1977. Turkey has not ratified the said Protocol. For the list of states that have signed the Protocol, see (On-line), https://diplomatie.belgium.be/sites/default/files/downloads/I-4b.pdf, Date of Access: 3 July 2023.

26 RADISCH, p. 17; see also, YAZICIOĞLU, Emine, **Hamburg Kuralları**, İstanbul, 2000, p. 3; For detailed explanations see also, DEGURSE, John L. Jr., "The Container Clause in Article 4(5) of the 1968 Protocol to the Hague Rules", **Journal of Maritime Law and Commerce**, Y. 1970, Vol. 2, No. 1, p. 131 ff.; MOORE, p. 4; WERTH, p. 62-63; YANCEY, p. 1246 ff; O'HARE, **The Hague Rules Revised**, p. 532 ff; O'HARE, **Allocating Shipment Risks**, p. 125.

Belgian Government from 19 to 23 February 1968. Known as the Hague-Visby Rules, this Protocol preserved the liability system established by the Hague Rules, just incorporated a set of adjustments necessitated by practical requirements (HVR Art.1/5(c))[28].

It should be particularly emphasized that the International Convention of 1924 has been ratified by numerous countries[29], including Turkey, while certain states not party to the Convention have incorporated its provisions, known as the Hague Rules, into their domestic legal systems[30]. Therefore, in comparison to other international regulations concerning maritime cargo transportation, it is noteworthy that this international framework has achieved substantial participation. Consequently, examining the provisions regarding the carrier's liability within this international framework holds significance.

The Hague Rules shall be applied "ex proprio vigore" to contracts of maritime carriage of goods by sea while a bill of lading or a similar document is issued (HR Art.1(b)). Accordingly, the carrier shall be held responsible for, except for exceptional provisions, not only the loading, stowage, transportation, preservation, care, and discharge of the goods (HR Art.2; Art.3/2), but also for exercising due diligence to have the vessel in a sea-and cargoworthy condition at the commencement of the voyage (HR Art.3/1). Furthermore, under these Rules, the carrier is generally liable for "faulty" acts of themselves and their agents; it is explicitly stipulated that the carrier shall not be held accountable for situations arising from the characteristics of the cargo, or in cases where the cause is attributable to the shipper and/or the consignor, except for cases where the carrier or their agents cause the loss or damage[31] (HR Art.4).

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27 YAZICIOĞLU, p. 3; O'HARE, **Allocating Shipment Risks**, p. 125; WERTH, p. 62; MOORE, p. 3-4.

28 For further information about Hague Visby Rules, see SPARKS, Arthur / COPPER, Frans, **Lloyd's Practical Shipping Guides, Steel: Carriege by Sea**, 5th edn., Informa Law from Routhledge, 2009, p. 173 ff; MANDELBAUM, p. 481 ff; DEGURSE, p. 131 ff; COOKE / YOUNG / ASHCROFT / TAYLOR / KIMBALL / MARTOWSKI / LAMBERT / STURLEY, p. 1001.

29 In this regard, see, (On-line) https://comitemaritime.org/publications-documents/status-of-conventions/, Access date: 30 June 2023. See also, RADISCH, p. 14; STURLEY, p. 56; SPARKS / COPPER, p. 174; COOKE / YOUNG / ASHCROFT / TAYLOR / KIMBALL / MARTOWSKI / LAMBERT / STURLEY, p. 997.

30 RADISCH, p. 14; COOKE / YOUNG / ASHCROFT / TAYLOR / KIMBALL / MARTOWSKI / LAMBERT / STURLEY, p. 997; SPARKS / COPPER, p. 173; JAMES, p. 678; MANDELBAUM, p. 477.

31 For further explanations, see, DUNLOP, p. 27 ff; JAMES, p. 678; O'HARE, **Allocating Shipment Risks**, p. 131 ff; O'HARE, **The Hague Rules Revised**, p. 545 ff; For detailed information pertaining to provisions in Hague Visby Rules, see also STURLEY, p. 23 ff.; NEGUS, Raymond E., "Hague Rules, 1921", **Law Quarterly Review**, Y. 1922, Vol. 38, no. 3, p. 317 ff.

When viewed from this perspective, it appears possible to assert that the scope of the group of individuals for whose acts the carrier is responsible, as regulated in HVR Art.4, has been significantly expanded compared to that in the GENCON 94 standard form (where the carrier is held responsible only for their own acts and those of the ship manager appointed by themselves)[32]. Considering that a substantial portion of the tasks necessary for the performance of the charter party are carried out through carriers' "agents" on behalf of the them, foreseeing that the carrier shall not be accountable for the acts of these individuals, including ship crew members, implies that, unlike these individuals, shipowners, who are economically much more powerful, might not be held liable in many instances. Therefore, in legal doctrine, there is no doubt that the "shipowner's responsibility" clause within the GENCON 94 charter party, often criticized for excessively shielding the carrier, is neither accurate nor compatible with both the Hague-Visby Rules and the regulations in Turkish law. From this perspective, it can be argued that the provision in GENCON 22, which outlines that the shipowner's liability extends beyond personal responsibility to encompass the acts of their agents, is sound and compatible with the liability framework in the Turkish Commercial Code.

Another crucial aspect to be highlighted concerning the Hague-Visby Rules within the scope of our study is that the provisions pertaining to the carrier's liability, as included herein, are mandatorily regulated. Indeed, according to HVR Art.3/8, "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect. A benefit of insurance in favor of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability." Consequently, it should be especially emphasized that the provision in GENCON 94, which stipulates that the carrier shall only be accountable for personal fault and that of the appointed manager, while exempting ship crew members from liability, would be invalid in cases where there exists a paramount clause referencing the Hague-Visby Rules[33].

[32] ÜLGENER, **Çarter Sözleşmeleri**, p. 266 ff.

[33] ÜLGENER, **Çarter Sözleşmeleri**, p. 272 ff.

B. Turkish Commercial Code

In drafting the provisions on "carrier's liability" within the framework of Turkish Commercial Code numbered 6102, the Hague / Visby Rules have primarily been taken into account. These principles derived from the Hague / Visby Rules have been supplemented with certain provisions from the Hamburg Rules. In this manner, a liability system has been embraced through the identification of specific grounds of liability. Within this system, two fundamental grounds of liability have been stipulated, namely, the "liability to exercise due diligence to the cargo" and the duty to "have the vessel in a sea- and cargoworthy condition at the commencement of the voyage"[34]. Indeed, in accordance with Article 1178 of the Turkish Commercial Code (TCC), the Carrier is held responsible for demonstrating the care and diligence of a prudent carrier, especially in the performance of the carriage contract, including the loading, stowing, handling, transportation, protection, custody and discharge of the goods. Furthermore, the provision also stipulates that the Carrier shall be liable for damages arising from the loss, damage, or delay in delivery of the goods, provided that such loss, damage, or delay occurred while the goods were under the control of the Carrier. In addition to the carrier's responsibility arising from the obligation to exercise due diligence on the cargo, similar to the provisions of the Hague-Visby Rules, the Turkish Commercial Code also designates the obligation to have the vessel in a sea and cargoworthy condition as a separate ground of liability. According to Article 1141/1 of the Turkish

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[34] However, the liability grounds stipulated in the Turkish Commercial Code No. 6102 are not limited to the aforementioned two fundamental cases of liability, as the Code also includes provisions regarding certain other liability grounds such as "unauthorized loading or transshipment onto another ship (TCC Art.1150)," "unauthorized carriage on deck (TCC Art.1151)," and "departure from the route without justifiable cause (TCC Art.1220)." For detailed explanations, YAZICIOĞLU, Emine, **Kender-Çetingil Deniz Ticareti Hukuku**, 16th edn, Filiz, 2020, p. 389. In this context, it is necessary to emphasize that the scope of the term "shipowner" used in the GENCON standard charter party is broad enough to encompass the party that falls within its purview. In this regard, see ÜLGENER, **Çarter Sözleşmeleri**, p. 166: Indeed, the Author also notes the broad scope of the term "owner" used in charter contracts, highlighting its capacity to encompass multiple meanings, and consequently, he/she prefers to use the term "carrier" instead, which can carry more precise connotations.

In the context of the provision found in HGB §485 concerning the obligation to provide the vessel in a seaworthy condition, it is established that the duty of diligence regarding seaworthiness of the vessel for the cargo lies with the carrier. It is clarified that this provision does not impose an obligation on the shipowner in this regard; rather, it underscores that the fundamental duty arising from the freight contract pertains to the carrier, regardless of whether the vessel used for transport is owned by the carrier or not. For more details, PÖTSCHKE, Jan Erik, "HGB§485", **Münchener Kommentar zum HGB: Band 7, Transportsrecht- viertes Buch, Handelsgeschäfte**, Eds. Karsten Schmidt and Rolf Herber, 5th Aufl. 2023, HGB §485 para. 1. Similarly, see GRAMM, Hans, **Das neue Deutsche Seefrachtrecht nach den Haager Regeln (Gesetz vom 10 August 1937 - RGBI. I Seite 891)**, Verlag von E.S. Mittler & Sohn, 1938, p. 93.

Commercial Code, which encompasses general provisions of the contract of affreightment, the carrier is obligated to ensure that the vessel is in a seaworthy and cargo-worthy condition in all types of contracts of affreightment. The provision further states that the carrier shall be liable for damages arising from the unseaworthiness and uncargoworthiness of the ship for the cargo. However, a diligent Carrier can eliminate this liability by proving that due care and diligence were exercised, and any deficiency in seaworthiness was not discoverable until the commencement of the voyage (TCC Art.1141/2).

On the other hand, the liability for the acts of the Carrier's servants and agents is also specifically addressed in the Turkish Commercial Code numbered 6102. Accordingly, the carrier is not liable for damage arising from causes not attributable to negligence of their servants and agents. The scope of "servants of the carrier" in terms of being held responsible for the carrier's acts is defined quite broadly compared to the provisions of the Hague/Visby Rules. Indeed, according to Article 1179/2 of the TCC, the term "servants and agents of the carrier" encompasses the crew of the vessel used in carriage, individuals employed in the carrier's carriage operation or authorized by the carrier to act on their behalf, and other individuals utilized in the performance of the carriage contract, even if they do not work in the carrier's carriage operation. In accordance with this provision, among the individuals for whom the carrier is liable for their acts, the category of "other individuals utilized in the performance of the carriage contract, even if they do not work in the carrier's carriage operation" is also mentioned. In this manner, apart from the crew members and individuals employed in the carrier's carriage operation, as well as those authorized by the carrier to act on their behalf, auxiliaries who are not directly part of the carrier's carriage operation but are employed in the execution of the carriage contract are also considered as servant of the carrier. As a significant consequence of considering these individuals as the servants of the carrier, the carrier will be held liable for faulty acts occurring during the performance of the carriage contract pursuant to an independent contractual relationship between the carrier and these individuals, which operates as a contract for services.

Another noteworthy aspect within the context of the carrier's liability under Turkish Commercial Code nummbered 6102 is the imperative nature of provisions of the carrier's liability. According to Article 1243/1 of the Turkish Commercial Code, all clauses and conditions that directly or indirectly eliminate or restrict the obligations and liabilities arising from these provisions

regarding the carrier's liability, as set forth in the Turkish Commercial Code, are invalid. In line with this provision, contractual clauses that alter the provisions of "Article 1141 regarding the carrier's responsibility for the vessel's unseaworthiness at the commencement of the journey", "Article 1178 concerning the violation of the duty to take care of the goods", and "Article 1179 regarding the liability for the actions of the carrier's servants and agents in favor of the carrier" will be considered invalid.

Accordingly, there is no doubt that this provision in GENCON 94, which stipulates that the carrier shall only be liable for personal fault and the fault of the their manager, and exempts the carrier from liability for the acts of the crew, will be deemed invalid in cases where Turkish Law is applicable as the governing law. Therefore, the clause in GENCON 22, which establishes the carrier's liability not only for personal fault but also for the actions of their servants, and aligns with the principles of the Hague-Visby system, can be considered consistent and appropriate in accordance with the provisions of the TCC that primarily embrace liability system of the Hague-Visby Rules.

IV. GENERAL ASSESSMENT

Due to the international nature of carriages by sea, in order to prevent the application of different rules to similar disputes, standard form contracts are being developed by organizations operating in the field of maritime law. Parties reluctant to be subject to unfamiliar legal systems in disputes includes an element of foreignness often opt to use these standard forms in practice. The GENCON charter party authored by BIMCO, is among the most commonly used standard contracts in practice. is prominent among them. As the provisions contained in this standard form, which establish the fundamental principles of voyage charter contracts, have become inadequate over time due to developments in maritime industry, the updated version of this standard form was released in the year 2022.

The GENCON 22 standard form has introduced several significant innovations concerning voyage charter party agreements. However, one of the most significant changes between the GENCON 22 and GENCON 94 forms has been made in Clause 2 regarding the owner's liability. In this context, the liability clause of the shipowner has departed from the system in GENCON 94 that limits the shipowner's liability to damages arising from personal negligence. As known, the GENCON 94 standard form adopted a system where the shipowner was liable only for damages arising from their own and the

manager appointed by them, while excluding liability for the acts of the captain and other crew members.

In practice, considering that the carrier often carries out many necessary operations for the performance of the contract of affreighment through their servants and agents, the liability system of GENCON 94 were critized for making it nearly impossible to hold the carrier liable for cargo damages. However, this clause, criticized for excessively protecting the shipowner, was also in contradiction with the mandatory provisions of the Hague-Visby Rules, which had been accepted by many states or incorporated into their domestic laws. The application of this clause, often invalidated due to its non-compliance with mandatory provisions, was not feasible and provided the shipowner with only a "theoretical" protection. Therefore, in disputes where the Hague-Visby Rules were applicable or the Turkish Law were determined as the governing law, this provision was not applied, and instead, the relevant mandatory rules were enforced.

From this perspective, it is beyond doubt that in the Hague-Visby system and in cases governed by Turkish Law, this provision that is directly invalid due to its non-compliance with mandatory provisions has been abandoned in GENCON 22, which includes a more accurate and realistic clause instead of this. On the other hand, in terms of the carrier's duty of due diligence, attention should be drawn to the fact that in GENCON 22 standard form, two fundamental time frames are ensured, namely "at the commencement of each cargo loading" and "at the commencement of each cargo-carrying voyage.[35]" The time frame within which the carrier is obliged to ensure the seaworthiness of the vessel is expressed as "before and at the beginning of the voyage" in the HVR. In this regard, it should be noted that in the GENCON 22 standard form, the time frame for the carrier to exercise due diligence in ensuring the vessel's seaworthiness is narrower compared to the Hague-Visby Rules[36].

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[35] See also, ÜLGENER, **GENCON 22**, p. 347: The Author examplifies this situation as follows: "The vessel has loaded bagged cement from Port A to one hold and soybean meal to another hold from Port B. In this example, it is not necessary for both holds of the vessel to be seaworthy for loading at Port A. However, if the vessel has suffered a malfunction between Ports A and B, and departs from Port B without rectifying this malfunction, subsequently, concerning the damages that may arise in this manner, the cargo loaded at Port A is seaworthy, while the cargo loaded at Port B is unseaworthy."

[36] For further explanations, see, ÜLGENER, **Çarter Sözleşmeleri,** p. 271: The Author evaluates this issue within the related clause of GENCON 94 and states that the requirement of seaworthiness sought in the TTK, Hague, and Hague-Visby regimes pertains not to the entire voyage but only to the commencement of the voyage. In GENCON 94, however, the carrier is obligated to ensure the vessel's seaworthiness both at the commencement of the voyage and until the delivery of the cargo to the consignee. For explanations

Another significant innovation in the GENCON 22 standard form, Clause 2, is the reference made to the Hague-Visby Rules within the clause of shipowner's liability. Through the provision in the second paragraph of this clause, the shipowner is enabled to benefit from the limitations of rights, defenses, and liabilities stipulated in the Hague-Visby Rules concerning the liability arising from loss, damage, or delayed delivery of the goods. As it is known, GENCON 94 does not contain such a provision. Therefore, shipowners aiming to fulfill P&I coverage requirements used to add a Paramount clause to the contract, explicitly incorporating the Hague-Visby Rules. With the inclusion of this explicit reference in GENCON 22, the necessity for adding a Paramount clause has been eliminated. Considering the liability systems of the Hague-Visby Rules and Turkish Law, it appears that with this addition, the liability regime in GENCON 22 has become largely compatible with the Hague-Visby Rules and Turkish maritime law.

In light of these explanations, when evaluated within this framework, the shipowner's liability clause in GENCON 22, along with the elimination of the need for a paramount clause and the abandonment of the principle of "liability solely for personal fault of the carrier" due to its frequent impracticability in light of mandatory provisions[37], should be regarded as highly positive developments[38]. Similarly, aside from aligning GENCON 22 provisions with the liability system of Turkish Law, it should be noted that the inclusion of provisions parallel to the widely accepted Hague-Visby Rules in the GENCON standard form should also be regarded as an innovation that ensures the unhesitant utilization of the GENCON form in practice.

Within the framework of these explanations, when considering the changes in Clause 2, it is realised that the new form, unlike GENCON 94, envisages the carrier's liability for the actions of its servants and agents. Due to this, it might be perceived as unfavorable to the carrier and therefore, in practice, particularly

about the time period for which the carrier is under an obligation to exercise due diligence to ensure the seaworthiness of the ship see also, MERİÇ, Gülfer Kuyucu, "Lahey, Lahey - Visby ve Hamburg Kuralları ile Karşılaştırmalı Olarak Rotterdam Kuralları Bakımından Taşıyanın Sorumlu Tutulduğu Süre", **DEHUKAMDER**, Y. 2018, Vol. 1, No. 1, p. 71 ff.

37 See also, ÜLGENER, **Çarter Sözleşmeleri**, p. 266-267.

38 In this regard, see Ülgener, **GENCON 22,** p. 345-346: The author states, "In GENCON 22, the essence of the GENCON charterparty as being 'aimed at small and medium-sized shipowners; easily and frequently usable, hence not overly complex' seems to have been overlooked, resulting in a document that doesn't differ significantly from a time charterparty's detailed and intricate structure. It is noted that despite potential difficulties in the practical application of this charterparty for entities outside of large and corporate shipowners, the new form still introduces significant rules in various aspects."

by larger and stronger shipping companies, it might not be preferred. However, as previously mentioned, it is known that in practice, the clause in GENCON 94 stating that the carrier shall not be responsible for the acts of the master, crew and other servants is invalid due to its non-compliance with the mandatory provisions of the Hague-Visby Rules. Consequently, it cannot be said that due to this change, GENCON 2022 has become more unfavorable to the carrier after the revision, and it will not be preferred by strong shipping companies in practice. On the other hand, another crucial point to emphasize is that in GENCON 2022 charter party, significant changes have been made not only in the Owners' responsibilities clause but also in other clauses such as laytime provisions. In light of the explanations above, even though the new Owners' Responsibilities clause may appear to introduce a regulation against the carrier compared to the previous forms, considering the aforementioned practical situation, it seems to us that determining whether GENCON 2022 will be preferred or not in practice cannot be definitively assessed solely by examining this clause.

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