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1. Turkish Shipbuilding – The differences between present and future system

(written by Atiye Istanbullu, LLM, atiye@ulgener.com)

On December the 8th, 1999, the Ministry of Justice has assigned a committee to prepare a draft proposal for new Turkish Commercial Code (TTK), which was reviewed by general public in due course. A second draft proposal prepared by the Committee in line with the initial views and recommendations made was then submitted to relevant chambers and institutions concerned and, further views, comments and recommendations made by the said bodies and institutions were also ascertained in further detail. Some of the comments and recommendations regarding the Draft Proposal (DP) extended by us in representation of Istanbul Maritime Chamber of Commerce and Association of Shipbuilders (GÝSBÝR) were also taken into consideration and added to the DP. Eventually, preparation work on final DP for new TTK was completed by the Commission and submitted to Prime Ministry on June 22, 2005 and to the Turkish Parliament (TBMM) on November 9, 2005 respectively. Final draft proposal, submitted for the attention of TBMM Committee Chairmanship of Ministry of Justice, was then sent to the TBMM Subcommittee of Ministry of Justice. Although it is uncertain exactly when the final DP may become effective as the new TTK, it seems that the likely date is the last quarter of 2008.

Shipbuilder’s Right of Lien, which arises in connection with the legal jurisdiction, is now regulated accordingly in DP under the Articles 986, 1013 and 1393 respectively.

Under the Article 986 of DP, the ship under constrcution (constructing) may only be registered with the “Registry of Ships Under Construction” provided that one of the following four conditions were fulfilled:

- Upon a request of the Owner[1]-[2]-[3];
- Upon establishing of a ship lien on the ship under construction;
- Upon establishing of a precautionary or executive sequestration order on the ship under construction;
- Upon the request of the shipbuilder for an undertaking / annotation be placed with the Registry in order to secure the shipbuilder’s right of a request for the establishment of a ship lien[4].

Under ‘Shipbuilder’s Right of Lien”; stated in the Article 1013 of the DP; it is regulated that “In order to secure the monies due or payable to the shipbuilder arising from or in connection with the construction and

maintenance of the ship, the shipbuilder has the right to demand for the establishment of a lien on the constructing or the ship; a right that the shipbuilder cannot waive beforehand". On the other hand, it is further regulated under the same article that "an annotation may be placed with the record of the Registry of Ships Under Construction or the Ship Registry in order to secure the shipbuilder's right of a request for the establishment of a ship lien".

Again, the second sentence of the third paragraph of the same article regulates that "if the construction or maintenance of the ship is yet to be completed, then a security lien may be required to be establish for the portion of the cost that covers the jobs already completed, and for the expenses which do not fall into the scope of cost. As is seen, the Sentence 2 of Paragraph 3 of Article 1013, clearly regulates that a security lien may legally be required for the portion of the cost that covers the jobs already completed, and for the expenses which do not fall into the scope of cost, provided that the construction or maintenance works are yet to be completed. Since the said article makes provisions for a request of a security lien for the sections or portions of the jobs that are already completed, the same can be understood as to make it impossible to request of a security lien for sections or portions which are yet to be completed.

On the other hand, it is stipulated under DP Art. 1389[5] that a list / schedule showing the sequence of the claimants (Schedule), covering all of the claimants, be drafted in accordance with the provisions provided under the Articles from 1390 to 1397, in case of selling of the ship through foreclosure and when the price had from such a sale is insufficient to cover all of the payments due to the creditors listed in the schedule showing the sequence of the claimants [6].

DP Art. 1393[7] regulates that if the ship is under the possession of a shipyard at the time sale by foreclosure, then the claim of the shipbuilder which is secured by a lien in accordance with the Article 1013 of DP, should be recorded in the fourth line of the Schedule[8]-[9]. On the other hand, Article 1393 involves another right of the shipbuilder called as 'right of retention'. Said article states that the right of a request for retention which is defined in referral to Article 950 of Turkish Civil Law, implies to all of the ships under the possession of the shipbuilder and having not been registered at the Turkish Ship Registry.

[1] DP, also in consideration of the shipbuilder's right of a request for a lien, regulates the possibility of owner of shipyard and the owner of structure as being two different entities under Paragraph 1 of Article 987, Sentence 1 of Paragraph 1 of Article 990 and, (a) and (c) of Paragraph 1 of Article 992. Consequently, according to DP, the owner of the structure is the one that places the order. On the other hand, it is stated that the agreements, where the shipbuilder would be granted the title to the ship under construction (constructing), can be valid and binding, provided that such a right is legalized by the registration of the said ownership right of the shipbuilder. Upon registration the said right becomes available for the third parties.

[2] According to TSR, upon the request of the owner, ships built at Turkish shipyards for foreign states or foreign entities (TSR Art. 935, Pr. 2 b (c) and also the other ships under construction (TSR Art. 986, Pr. 1) may be registered with the 'Registry of Ships Under Construction' regardless of their gross tonnages.

[3] Ship Building Contracts, according to Turkish law, are attributed as "construction contracts" without the sale characteristics, unlike the English law. For this reason, "the entity that places an order for a ship" cannot be named as "**a Purchaser or a Buyer**" in Turkish law.

[4] Wording of the original Article 986 included in the DP, which was submitted to chambers and institutions prior to Final DP, was read as follows: "A ship under construction may only be registered with the Registry of Ships Under Construction if a ship lien upon the actual ship being constructed is established or, if the same is subject to precautionary or executive sequestration procedures". As is seen, it was regulated that a ship lien must first be established or, the ship must first become subject to a precautionary or executive sequestration process. In that sense, as it was recommended to the Committee by the Association of Shipbuilders (GÝSBÝR) in writing that "Right of request of the shipbuilder for an undertaking / annotation be placed with the Registry in order to secure the shipbuilder's right of a request for the establishment of a ship lien"; a right which provided for the shipbuilder by both this DP and Article 84 of Ship Registration Regulation, should also be implemented as requisite to enable the registration of the ship with Registrar was included in full context in the Final Draft Proposal. Accordingly, provisions for the registration of a ship under construction with the "Registry of Ships Under Construction" were not limited with the foregoing two provisions, and by the inclusion of expression "in the case of need that an undertaking / annotation should be recorded at the registry in order to secure the shipbuilder's right of a request for the establishment of a ship lien" in the proposal, the possibility of issuance of an undertaking to secure the shipbuilder's right of a request for a ship lien be established was regulated in a clear manner without any doubt or hesitation.

[5] According to Article 1389 of DP, if the price, which is had from the sale of a Turkish or foreign flag ship through foreclosure, is insufficient to cover all of the payments due to the claimants, then a list / schedule showing the sequence of the claimants shall be drafted.

[6] In DP, issues regarding rights in rem and foreclosure are based on the provisions of 'International Convension on Maritime Liens and Mortgages' signed in Geneva on May 6, 1993, and 'International Convention on Arrest of Ships' also made in Geneva on March 12, 1999.

[7] Wording of the Article 1393 of DP which regulates the fourth line of the Schedule reads as follows: "if the ship was already under the possession of a shipyard during its sale by foreclosure procedure, then all receivables due to the shipbuilder, which are either secured by liens

established pursuant to the provisions of Article 1013 or the right of retention established pursuant to the provisions of Article 950 of Civic Law, are recorded in the fourth line of the Schedule".

[8] Said rule was cited from the Paragraph 4 of Article 12 of 'International Convension on Maritime Liens and Mortgages' dated 1993.

[9] If a claim should be demanded by the shipbuilder at any time after the shipbuilder's possession of the vessel was already terminated and if the claim was registered in accordance with the TSR Art.1013, then any such claim shall be recorded in the sixth line which regulates the sequence of maritime debts secured by liens (TSR Art. 1395) and, in the seventh line which regulates the order of maritime debts that are covered under the provisions of TSR Art.1390 and Art.1395 if the said registration is not made (TSR m. 1396).

2. Cargo issues: The burden of proof in relation with the argument of unseaworthiness

According Turkish Law, the burden of proof for a cargo claim based on unseaworthiness is as follows:

a. Normally both parties will present their evidences during the dedicated stage, the defendants (the owners of the vessel) will submit all kind of evidences which are showing the seaworthiness of the vessel at the commencement of voyage. Class certificates, safe manning certificates, hold inspections, etc are all serving this purpose. With those documents the defendants will create a prima facie evidence that the vessel was seaworthy.

b. The claimants' duty is to challenge this, in other words they have to prove the unseaworthiness, their loss or damage and the causation between.

c. Later on the defendants have several possibilities to escape from liability, even there is an established unseaworthiness of the vessel, they have to show that the causation is resting with another issue rather than the unseaworthiness;

c.1. To prove that the cause of the loss or damage was something which the carrier cannot be liable. For example wrongful stowage when loading, in this dispute there are some technical expert reports showing that the cause was inherent vice of the cargo, improper ventilation, faulty stowage, handling the cargo negligently during the voyage, all showing that the cause was not the unseaworthiness, to remind you the carrier is only liable when there is an the actual fault or privity by himself.

c.2. Alternatively, the defendants can escape liability even when there is a seaworthiness, but which even a prudent carrier cannot discover.

3. Laytime issues: Demurrage under Turkish Law

a.legal nature of demurrage

There is an important difference between Turkish and English Law regarding the legal nature of demurrage. Regarding Turkish law, demurrage is a payable amount in consideration of an extended stay of the vessel beyond laytime, in different words charterer has a contractual right to let the vessel keep at the port, but unlike laytime, he has to pay an incentive to do so. As a consequence of this, charterer can make use the period for laytime as well as demurrage in a way he wishes, the owners also can not urge charterers to finish their obligations in respect of loading or discharging within the period of laytime. Therefore demurrage is not a compensation, it is rather a hire according Turkish law. On the other hand as per English Law, if the loading or discharging operations can not be completed within laytime, this will be considered as breach of contract, whereby the owners will be entitled to claim demurrage as liquidated damages.

b.Commencement of demurrage

Another difference between Turkish and English Law lies for the commencement if the period for demurrage. While as per English law there is no formality for this, according the principles of Turkish Maritime Law, there are two options for commencement of the period called as "demurrage":

- If, according the charterparty, the period of the laytime is fixed or can be determined by way of calculation of the amount of cargo and the stipulated daily loading / discharging rates, than there is no need to send a notification to the charterers, i.e. the period for demurrage commences automatically. (TK.art.1032/1 for

loading and TK.art.1054/1 for discharging)

- If, according the charterparty, the period of laytime is not fixed at all and there is a stipulation of demurrage, than in order to let this period to be commenced, the owners needs to send a notification, which should also include the date and time of the end of laytime. (TK.art.1032/2 for loading and TK.art.1054/2 for discharging)

c.Duration of demurrage

The fact that payment of demurrage is against the right to keep the vessel at the port beyond laytime, needs the duration of demurrage to be determined and to be limited, since otherwise the charterers would be able to keep the vessel for unlimited days at the port, which cause the owners financial losses in a rising market. According the articles of TTK 1031/2 (for loading operations) and of TK.1053/2 (for discharging operations) and as per the interpretation of the Turkish court of appeal, (Y.11.HD, 30.1.1987, E.114, K.399) which the owners can not be asked to keep the vessel at the port longer than:

- (Fixed period for demurrage) Laytime and the period of demurrage, if determined at the charterparty (for example Gencon 76, which is 10 days) or

- (Unfixed period for demurrage) Laytime and a further period of 1/2 laytime for demurrage

This period can also be interpreted as “Compulsory port time” since at the same time it represents the period for the owners to keep the vessel at the port for loading and / or discharging operations. After this period lapses the owners are not in an obligation to wait the charterers further. While this would mean that

- at the loading port, the vessel can start her voyage with the amount of cargo already loaded (or if no cargo has been delivered at all, the owners are not bound with the charter itself, which would put them in a position to ask the freight as per the rules of TTK, where applicable, which is to be explained in later chapters) or

- at the discharging port to unload the cargo to a safe warehouse (which is to be explained in later chapters)

d. ”Once on demurrage, always on demurrage”

The applicability of the principle called as “once on demurrage, always on demurrage” represents another important difference between those legal systems. While in English Law that principle is applicable even where there is no express reference in charterparty, it is not the same in Turkish Law. The rules of TTK in respect of hindrances for stopping loading or discharging operations (such as weather conditions) are showing no difference between laytime and time on demurrage, therefore in cases where there is no express provision about the said principle, the calculation of time for demurrage will stop during such hindrance.

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