

ULGENER LEGAL CONSULTANTS / LAW OFFICE

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THE BOSPHORUS ONLINE

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Earlier volumes of the newsletter can be found on our website.

1. Activities

Since January things have been moving at a very fast pace. A lot of this time has been spent travelling in order to administer speeches about particular areas of the law.

For example, in early April we appeared at the Swedish club Gothenburg where we gave a presentation about various legal issues concerning the new Commercial Code, Pollution Fines and Crew Claims.

We made a similar presentation at the Skuld office in Copenhagen about related topics and, furthermore, this same presentation was repeated at the Swedish club's Piraeus office in Athens.

We plan to repeat those speeches and presentations also in London at various clubs, underwriters and law firms. In this respect parties interested are welcomed to contact us either to arrange same at their premises or to attend one of these.

Among other things, Dr. Ülgener has attended the Documentary Committee gathering at BIMCO in early June BIMCO General Meeting in Vancouver.

We have also made a presentation at Chamber of Shipping regarding the Maritime aspects of the New Commercial Code.

Another presentation has been made at Koc Group headquarters regarding the liability of the carrier regarding loss of or damage to cargo.

2. NEW FACES IN OUR OFFICE

We would like to thank our lawyers Mr Soner Akyıldız and Mr Oguz Dagdeviren who have recently left the company, for all their hard work and dedication and wish them well in their future careers.

In their place we are pleased to announce the employment of

Ms Ozge Ozyurt email - ozge@ulgener.com

A graduate of Marmara University School of Law with good English skills who deals with Dry matters and matters of litigation.

Mr Metin Ugur Aytekin email - metin@ulgener.com

Deals with litigation and wet matters, has good English skills, is a graduate of Istanbul University School of Law, has a LL.M degree and continuing his studies for the PhD degree.

Ms Aylin Yazici email – aylin@ulgener.com

A graduate of London Metropolitan University, deals with English law issues, procedural law and arbitration.

3. NEW TURKISH COMMERCIAL CODE: THE LIABILITY OF THE CARRIER IN RESPECT OF UNSEAWORTHINESS**a. The Regulation itself**

The seaworthiness issue has been dealt within the article 1141 under two sub-sections.

The sub-article (1) puts forward the obligation of the carrier to make the vessel sea, voyage and cargo worthy. According to Turkish Law the “*worthiness issue*” covers three topics:

- “*seaworthiness*” refers to the general navigation ability and safety of the vessel, also including the particulars of the intended voyage
- “*voyageworthiness*” refers to any other subject which refers to the ability for the vessel to complete the intended voyage, which would include her crew, certificates, maps and firefighting capacity, etc.
- “*cargoworthiness*” refers to the ability of the vessel to carry the particular cargo safely to its destination, therefore this covers the holds, hatch-covers, ventilation, etc.

Sub-article (2) stipulates the liability of the carrier. In line with the old code and Hague-Visby Rules and unlike Hamburg and especially Rotterdam Rules, the new regulation in respect of the seaworthiness is for the commencement of the voyage and does not require a continuing obligation for the carrier.

(1) the carrier is under the obligation to make the vessel sea, voyage and cargo worthy for any kind of contract of affreightment.

(2) The carrier is liable for the losses arising out of unsea-, unvoyage- and uncargoworthiness of the vessel, unless it can not be able to get discovered until the commencement of the voyage even the carrier acts like a prudent carrier.

b. Practical matters

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

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

- 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 it, the carrier is only liable when there is an the actual fault or privity by himself.
- Alternatively, the defendants can escape liability even when there is a seaworthiness, but which even a prudent carrier cannot discover.

4. NEW TURKISH COMMERCIAL CODE: THE LIABILITY OF THE ACTUAL CARRIER

a. Generally (Article 1191)

One of the new issues set by the new code is the liability of the actual carrier. Having its routes from the article 10 of Hamburg Rules the sub-article (1) of art.1191 provides that the liability as explained above will continue even the particular shipment of goods are made by an actual carrier.

(1) Should the carriage be let carried out totally or partially by an actual carrier, the carrier's liability in respect of the whole carriage continues without regard to whether the carrier had such right under the contract of affreightment to let such carriage or not. The carrier is liable as per the provisions of this Law for the actions and omissions of the actual carrier and its servants who act within their duty and capacity in the performance of the duty of the actual carrier to carry.

While repeating that the provisions of liability will continue to apply, sub-article (2) stipulates that in case legal action will be taken against the servants of the actual carrier, art.1187 (2) and art.1190 (2) and (3) will be applicable

(2) All of the provisions under this Law regarding the liability of the carrier are valid in respect of the liability of the actual carrier for the carriage he has personally performed. In such event where a case is launched against the men of the actual carrier, sub-article two of section 1187 and the sub-articles two and three of section 1190 shall be applied.

Sub-article (3) sets on the issue of special agreements relieving the carrier from liability and declares that such agreements will not be deemed valid at the same time for the liability of the actual carrier.

(3) Such special agreements by which the carrier either undertakes a duty or liability which is not imposed on himself by the law or by which he waives a right imposed on himself by the law shall not be deemed valid for the actual carrier in the absence of his express and written consent; however, a special agreement of such effect keeps binding the carrier despite the absence of consent of the actual carrier.

Sub-article (4) declares that in case there are contributing neglects of the carrier and the actual carrier for a particular loss at the same time, damage or delay, their liabilities will be joint and several.

(4) The liability of the carrier and the actual carrier is joint and several where both are liable for the same damage.

Sub-article (5) states that the total amount of compensation payable by the carrier for the liabilities under this act on behalf of itself, the actual carrier and the servants can not exceed the amount to be calculated as per the article 1186.

(5) The total amount of compensation payable by the carrier, the actual carrier and their men cannot exceed the limit of liability as provided under this Act.

The last sub-article (6) of this article regulates the interrelation between the carrier and the actual carrier.

(6) *The provisions of this section do not affect the recourse relationship between the carrier and the actual carrier.*

b. Condition of non-liability (Article 1192)

Sub-article (1) of this article sets forward that if a portion of a shipment will be performed by a different party, the exception clauses of the carrier regarding this period of shipment will be valid, ie, the carrier will not be liable for the neglect of the other party, as long as the other party can be sued in Turkish Courts.

(1) Without prejudice to the provision of sub-article one of section 1191, where under a contract of affreightment it is decided that a particular phase of the carriage shall be performed by someone other than the carrier himself, a condition may be inserted into such agreement with such effect to render the carrier non-liaible for the loss of, damage to or delay in delivery of the goods at such time where the goods being carried are under the control of the actual carrier at such particular phase of the carriage; however, such agreements which either limit or remove liability are invalid where a case is not launched against the actual carrier before the Turkish courts with jurisdiction. The burden of proof to show that the loss, damage or delay in delivery occurred while the goods were under the control of the actual carrier is on the carrier.

Sub-article (2) stipulates a condition for the sub-article (1), whereas such exception of liability will only be existing in favour of the carrier, if either the other carrier can be identified from the contract or if duly informed by the carrier in vase the other carrier will be nominated at a later stage.

(2) The effectiveness of a condition which limits or eliminates liability is dependent upon the existence of the name, title and business address of the actual carrier on the contract of affreightment. If the actual carrier is not identified at the time of establishment of the contract of affreightment, the carrier shall notify the consignee of the name, title and business address of the actual carrier at such time the actual carrier is identified and by the time the goods are delivered to the actual carrier the latest. Should such notification be not made, the liability of the carrier continues.

Last sub-article (3) of the article regulates the liability of the actual (other carrier) for the particular stage, such as it will be determined as per sub-article (2) of article 1191.

(3) The actual carrier is liable for the loss of, damage to or the delay in delivery of the goods which so happen during his possession of the goods as per sub-article 2 of article 1191.

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Ulgener LC/LO, based in Istanbul, with its office right in the Shipping Center, where the most major Turkish ship holding groups have their headquarters, is a law firm dedicated mainly to shipping matters, with a wide scope including all kind of related issues, such as:

P&I matters, such as cargo claims - disputes arising from bills of lading, crew claims, pollution, liens on vessels; as well as accidents, such as collisions, salvage, wreck removal and general average matters, etc.

FD&D matters, such as disputes arising from voyage and time charterparties, i.e. forced freight & demurrage collection, liens on cargoes, etc.

H&M, war and strike clauses and cargo insurance matters, such as salvage, general average adjustment, etc, also representing underwriters and provision of legal advice regarding local and international law,

Collection of outstanding premiums on behalf of P&I Associations,

Litigation and also corporate issues regarding yachts / superyachts.

Ship Finance - Sale & Purchase, as well as advising and assisting foreign banks and other financial institutions, covering also Turkish mortgages and disputes arising out of mortgages,

Assisting owners in respect of new building contracts and relevant steps to be taken after initial stage.

Enforcement of foreign arbitration and court awards,

Advising shipowners and P&I Clubs regarding issues arising from Turkish as well as International maritime law, (legal correspondents of a P&I Club within International Pool)

Also assisting owners for protection of their interests and avoiding conflicts on drafting charterparties, bills of lading, MOA's and other documentation,

Also advising leading Turkish steel manufacturers for shipping related issues,

Legal advisers to Turkish Chamber of Shipping.

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