

THE BOSPHORUS ONLINE

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INTRODUCTION

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 providing legal advice regarding local and international law,

Collection of outstanding premiums on behalf of P&I Associations, Ship Finance - Sale & Purchase, as well as assisting foreign banks and other financial institutions, covering also mortgages and disputes arising out of mortgages, 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 correspondent 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, Serving as legal advisers to Turkish Chamber of Shipping, also representing the Chamber at the Bimco Documentary Committee.

1. AN OVERVIEW ON THE DIRECT CLAIM AGAINST THIRD PARTY LIABILITY INSURERS (P&I) UNDER TURKISH LAW

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As mentioned in our previous newsletters, new Turkish Commercial Code (TCC) came into force on 1st July, 2012.

Article 1478 (bearing the title "Right for Direct Action") of TCC states that a claimant may directly bring a court action against the liability insurer provided that the claim is served within the time limit applicable for the insurance contract.

Needless to say that the abovementioned article also refers to the P&I Clubs as they are third party insurers.

It is very important for the P&I Clubs to determine the defences to be served, should there be a direct action against them in Turkey:

1- first of all it should be argued that the Club rules and principles are subject to English Law and the above mentioned article is not applicable for these kinds of matters and claims.

2-secondly it could be emphasized that TCC is enabling the parties (the insurers and the insured) to eliminate the third party's right to act against the Clubs due to the presence of TCC article 1486. Article 1486 regulates some provisions (on numerus clausus basis) that the parties cannot agree on otherwise; this article is a mandatory regulation. TCC article 1478 is not regulated within article 1486, therefore it could be said that the insurer and the insured may agree on an elimination of the third party's right to bring a direct action against the insurers.

Contrary to the abovementioned defences, it is needless to say that the third parties may argue some other assertions, however these will be evaluated by the courts on a claim basis and the applicability of the above mentioned provisions/defences shall be determined by Court of Appeal.

Finally, we would like to point out that the P&I Clubs should take part in these proceedings and should be represented in order to explain their status in these cases and their rules; otherwise the court orders shall be given in their absence.

2. USING EQUASIS RECORDS ON THE OWNERSHIP OF THE VESSELS AS EVIDENCE AT TURKISH COURTS - A COURT DECISION

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Vessel arrest is often requested under a time pressure. The applicant has to prove the connection between its claim and the subject matter vessel. The correct party who will be liable is also important as the application is made against them. In its urgent nature, courts could be too strict about the evidence to acknowledge such connection and designate the ownership of the vessel. One recent court decision has, on the other hand, proved that equasis records could be used as evidence with a view to determine the ownership of the vessel. In this article such court decision is going to be briefly presented.

According to the Istanbul Maritime Court:

"ABC has supplied bunker to the vessel MV DEF and have gone unpaid. The terms and conditions for the sale of marine bunker fuels provide for payment to be made within 30 days of delivery and establish Greek law and jurisdiction of the Piraeus courts.

ABC applied to the Turkish Court to have the vessel arrested under the Turkish Commercial Code (TCC).

Pursuant to the article 1363, the claimant has deposited SDR¹ 10,000 as a security and therefore the precondition for the court to assess the matter has been satisfied.

According to the assessment of the court it is acknowledged that the claim that is being demanded to be secured (by arrest order) is a maritime claim under the article 1352 of the TCC and it gives the claimant maritime claimant right and therefore the court has jurisdiction to hear the application.

Pursuant to the article 1355 of the TCC, arrest orders on foreign flag flying vessels could be delivered by the courts in whose jurisdiction such vessels anchored, moored to a buoy or a mooring block, moored or laid on the stocks. Having the information from the Coastal Safety and the Harbor Master that the vessel has moored to Haydarpasa Port (Istanbul) and as of the application date she was at such port. As the vessel is within this court's jurisdiction, this court is the competent court.

Having examined the evidence, it is understood that USD 295,000 worth of the bunker has been supplied to the subject matter vessel. Although the invoice was issued to the name of the master/owner/manager/operator, according to the equasis record that was served by the claimant the subject matter vessel had been under the ownership of GHI Shipping since the 4th of 2013. As per the article 1369 of TCC, provided that the party against which arrest order is asked is liable for the incurrence of the debt and at the same time it is still the owner of the vessel, the arrest on the vessel is possible."

*1 Special Drawing Right

3. THE TERMS OF RECLAMATION BECAUSE OF FAILURE TO PAY ACCORDING TO SUBJECT OF SALES AGREEMENT

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According to Turkish Code of Obligations Art.232; Buyer has an obligation to pay in accordance with the terms of the contract and to accept the object provided it is offered to him by the seller a contractually agreed. Art. 235 of same Code states that where the property is to be delivered against advance payment of the price in full or in installments and the buyer is in default on such payment, the seller is entitled to withdraw from the contract without further formality. However if he intends to exercise this right he must notify the buyer immediately. In Art.236 of same Code it's stated if buyer fails to discharge his payment obligation he has a liability to recover seller's damage. As there is no restriction against seller's damage in this article, buyer will be responsible for demurrage and custom charges that is payed by seller in buyer's port because of buyer's default.

According to Turkish Commercial Code Art. 18 notifications and notices to default or to terminate and to avoid of contract between merchants hold by public notary or registered mail or telegraph and electric signature through electronic mail system. For this reason notices without electric signature are not valid conflict under Turkish Law.

Finally if object is delivered to buyer according to Turkish Code Of Obligation Art. 236 seller has right to demand the return of object only if he has expressly reserved the right to do so. In this case seller's only right is to apply legal solution for sales price.

4. MARITIME CLAIMS AND MARITIME LIENS UNDER TURKISH LAW

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The new Turkish Commercial Code (TCC), which was entered into force on July 1, 2012, adopts the concept of "maritime claim" provided in the International Convention on Arrest of Ships, 1999 and has made some significant changes concerning "maritime liens".

As maritime liens and maritime claims grant different privileges and rights to its claimants, it is crucial to determine the nature of each claim.

Maritime claims grant to its claimants a right to establish a precautionary attachment (i.e. arrest) on the vessel. However, this right comes to an end in case of a change in the ownership of the vessel.

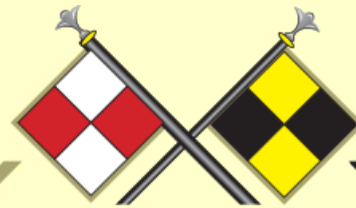
Maritime claims are defined and listed in article 1352 of the New Commercial Code briefly as follows:

- a)** loss or damage caused by the operation of the ship
- b)** loss of life or personal injury
- c)** salvage
- d)** damage or threat of damage caused by the ship to environment.
- e)** wreck removal
- f)** any agreement relating to the use or hire of the ship
- g)** any agreement relating to the carriage of goods or passengers
- h)** loss of or damage to or in connection with goods (including luggage) carried on board the ship
- i)** general average
- j)** towage
- k)** pilotage
- l)** goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered
- m)** construction, reconstruction, repair, converting or equipping of the ship
- n)** quarantine fees, port, canal, dock, harbour and other waterway dues and charges
- o)** crew wages and payments, including costs of repatriation and social insurance contributions payable on their behalf
- p)** disbursements incurred on behalf of the ship or its owners, including the loans obtained for the vessel
- q)** insurance premiums
- r)** any commissions, brokerages or agency fees
- s)** any dispute as to ownership or possession of the ship
- t)** any dispute between co-owners of the ship as to the employment or earnings of the ship
- u)** a mortgage or a "hypothèque" or a charge of the same nature on the ship
- v)** any dispute arising out of a contract for the sale of the ship any dispute arising out of a contract for the sale of the ship

Another significant difference between maritime claims and maritime liens is from the point of priority. The maritime liens have preceded all kind of rights and claims, including those registered in the Ship Registry with a mortgage. In addition to this, the other debts and mortgages have not been considered as privileged even if they became due earlier than a maritime lien.

In accordance with the article 1320 of the New Commercial Code; each of the following claims against the owner, demise charterer, manager or operator of the vessel grants a right of maritime lien to its claimant:

- a)** Claims for wages and other sums due to the crew members in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf
- b)** Claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel
- c)** Salvage payment
- d)** Port, canal, and other waterway dues, quarantine fees and pilotage dues
- e)** Claims, based on tort and arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' belongings carried on the vessel.
- f)** Claims for general average contributions



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