



# THE BOSPHORUS ONLINE

Newsletter of Ulgener Legal Consultants / Law Office

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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.

## NEWS FROM ULGENER LC/LO



At last ! "Charter Agreements Vol.2 / Time Charters" has been published in September 2016. The book has been written by Prof. Ulgener, and it is covering all aspects of Time Charters, including but not limited to description and misdescription of the vessel, Owners and Charterers obligations, safe berths and ports, delivery and re-delivery of the vessel, payment of the freight, antitechnicality clause, off-hire clause, liability of the Owners, including cargo damage and also non or poor performance of the charter, etc.

The book made his public debut during a gathering at Chamber of Shipping on 20th of October.

The first volume "Charter Agreements Vol.1 / Introduction / Voyage Charters" is for the time being in drydock for special survey and due to re-published during first quarter of 2017.

### 1. FREIGHT FORWARDING AS PER TURKISH COMMERCIAL CODE (TCC)

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German Commercial Code has been adopted as the model code for freight forwarding by TCC.

TCC refers a new terminology the 'commissioner' for the freight forwarder; the rights and obligations of the 'commissioner' are regulated under the articles TCC 917 to 930.

The most interesting provision is article 926 which enables the commissioner the right to undertake the carriage. It means that it is not necessary for the parties to make an agreement in that regard; in other words the commissioner has the right to carry the goods as per the nature of TCC itself. The commissioner is not obliged to announce his right to carry the goods to the shipper, the FIATA bill of lading issued by the commissioner directly presents his intention clearly due to the fact that the definition of the freight forwarder reads as follows:

*"freight forwarder means ... who ... assumes liability for the performance of the ... contract as carrier."*

In this circumstance, the commissioner is entitled to demand its commission fee and the freight as well; however should the commissioner is responsible for the carriage of the goods, his liability shall be determined as per the provisions of the 'carriage' instead of the articles relating to 'freight forwarding'.

According article 920 commissioner's fees become due upon the delivery of the goods to the carrier and he is entitled to put lien on the goods for all the claims as per the freight forwarding agreement.

Finally, all claims under freight forwarding agreements are subject to one year time bar as per article 930.

## **2. SHIP ARREST FOR CLAIMS ARISING OUT OF SHIP SALE AND PURCHASE AGREEMENTS AND A COURT DECISION**

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Under the Turkish Commercial Act (TCA) art. 1352/(y) any dispute arising out of a ship sale and purchase contract is considered as a maritime claim and it entitles the claimant to have the vessel arrested. There has been a recent court decision that Ulgener LC/LO obtained in Izmir that covers the most of the Clients' losses who approached the Owners (the Sellers) as Buyers. The decision of the court yields insights into the way of the application and interpretation of the TCA art. 1352/(y) which was enacted in 2012. It is an important decision since there have still not so many court precedents to apply the new set of rules in the right manner and this decision is going to be briefly addressed in this article.

The Buyers, requested the Sellers to return the down payment and to compensate them on account of their failure to deliver the vessel under the Sale Agreement despite they performed their all obligations under the contract, including depositing a down payment. The compensation request entailed the following;

- a. The down payment
- b. The profit loss which accrued as they had been deprived of fulfilling a voyage charter party which had been signed with the incentive that the vessel would be delivered on the designated place and time
- c. The price difference to buy a similar quality vessel whose prices went up in the market

Upon the Sellers' rejection to compensate the Buyers, the Buyers filed an arrest application on the vessel which was in Izmir at the time. The Izmir court granted arrest on the vessel for the claims explained in the paragraphs (a) and (b). Firstly, the court construed the request for the return of the down payment as a maritime claim and included this in the arrest security. They also construed the profit loss as a maritime claim and granted arrest security for this. The basis to accept this was profit loss was considered by the court as an "expectation loss". However the court rejected to provide arrest for the price difference claim under the paragraph (c) as it is considered as a "reliance loss".

This decision of the court is a candidate to become a substantial precedent for how it differentiated claims as expectation and reliance losses, granting arrest for the former while leaving the latter out of the arrest security. As a result it will be utilized as an important court precedent while applying the TCA art. 1352 by other courts as well.

## **3. THE NEW APPEAL PROCEDURE IN TURKEY**

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Pursuant to the former appeal procedure in Turkey, appeals from the decisions of the first instance courts were made to the Court of Appeal where the files coming from the first instance courts were examined then the decisions were either upheld or quashed and sent to the relevant first instance Court. On July 20, 2016 the Regional Courts of Justice began hearing appeals, creating a three-tier system consisting of Regional Courts and the Court of Appeal. Thus the previous appeal system has been abrogated. Therefore it is very important to be aware of the new system and new appellate rules that entered into force on July 20, 2016. Law No: 5235 provided for a new appeal procedure and Article 36 of the code states the duties of the Regional Court of Justice. According to this new procedure, the Regional Courts of Justice will have the authority to examine files coming from the First Instance Courts in terms of form and substance. Regional Courts of Appeal may either uphold or quash the decision of the First Instance Courts. If the

Court quashes the decision, it will retry the case itself instead of sending the case file to the relevant First Instance Court.

With this new procedure, the Court of Appeal will operate as an appellate court, rather than acting as a secondary court since the most of the appeals will be reviewed and finalized by the Regional Court of Justice, whereas few cases will be subject to further review of the Court of Appeal. Pursuant to Article 361 and 362 of the Code No: 6100, the decisions that are appealable are limited. Therefore, it is expected that the new appellate system would reduce the Court of Appeal's workload and increase the quality of appellate decisions by providing that the case files are examined by the expert judges of the Regional Court of Justice at first. This system has been much needed to increase the judicial quality in Turkey.

It is probable that this three-tier system might lengthen the proceedings therefore, lead to an increase of the litigation cost and it will probably take time for the new procedure to settle and function properly. Despite all, we believe that this new structural development will increase the judicial quality and bring effectiveness to the court system in Turkey.

#### 4. APPLICATION OF LLMC IN TURKEY

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As it is known, Turkish Commercial Code (TCC), which was entered into force on July 1, 2012 have adopted the Convention on Limitation of Liability for Maritime Claims of 1976 (the "LLMC") as amended by the 1996 Protocol. Accordingly, we knew that it will henceforth be possible to limit liability pursuant to the provisions of the Convention. However, there have been no specific provisions in TCC regarding the application of the Convention and the proceeding. Therefore, how will the limitation applied and how a fund can be established was a question mark.

However, after the TCC is entered into force, we had the chance to see the application of the LLMC provisions on several occasion. As per the article 1348 of the TCC, the limitation proceedings are heard before the Court at the place of the Registry for Turkish flag vessels and the Istanbul (central) Courts in respect of non-Turkish vessels. From the court's point of view, there is no distinction between claiming limitation and constitution of a limitation fund as far as the procedure is concerned. In addition to this, the constitution of a fund should be pursued by launching a case on the grounds of the Turkish Code of Civil Procedure and cannot be heard on documents only basis, i.e. one or couple of hearings should be held regarding the matter to understand the particulars of the case and evaluate it.

In conclusion, the liability of the Owners can be limited in accordance with the Convention on Limitation of Liability for Maritime Claims dated 1976 and the Protocol dated 02.05.1996 (1924 Limitation Convention will be no more applied) and the Owners will be entitled to constitute a limitation fund in Turkey.



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