



THE BOSPHORUS ONLINE

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CONTENTS

1. A Letter From Us
2. Passage Regime of the Turkish Straits for the Merchant Vessels under the Montreux Convention (1936) - *Dr. Metin Uğur AYTEKİN*
3. Approach of Turkish Courts Regarding Arrest of Ships For Maritime Claims - *Duygu Yazıcı, LL.M.*
4. Trade Allowance Rate for Bulk Cargo Shortages According to Turkish Law - *Gül Alpay*
5. Legal Aspects Of Covid-19 The Russian Approach, Including Azerbaijan Law - *Elnura Oruchova*

1. A LETTER FROM US

2020 is undeniably a difficult year and continues to be unpredictable. A war in Syria, earthquakes around the world and now this this pandemic... Who knows what's next? Invasion from space ?

As most of you, we have closed the office and started to work from home; business is same, but the environment, has changed.

As mentioned in our previous correspondence we were in a kind of a re-organizing effort and especially changing our web publications. The newly launched Eurasian (the P&I Reporter), targeted to P&I clubs and published quarterly, has been warmly welcomed by the industry. The second issue is being prepared at the moment. Therefore COVID-19 could not hamper our P&I Reporter. (If anybody wants to receive the Eurasian, please let us know so we can add him/her to the list.) Our main newsletter, the Bosphorus On-Line, was to be upgraded and to be transformed in a brand new look and shape. Unfortunately, this could not be completed due to known extraordinary reasons. We have unfortunately been left without any alternative but to publish it once again in its original form. We hope to launch the new form in November this year.

In the meantime we made locally various publications and also a webinar regarding the virus' effects, force majeure clauses and the possibility to use the Bimco Clauses.

Trade is down, but it will be up again. The world is commercially entering into an unknown and "dark" period, but we trust it will be not long to recover; we are now at the most difficult moment here to help our clients as usual. and we hope to be here as well when better times will come.

Doctors and nurses are of course our heroes to remember and to appreciate their sacrifices, but we also invite you to think about the seafarer's, who are now navigating all around the world, without knowing when they will be able to see their families and hug their loved ones.

Stay safe, stay home... and hope to be able to catch up again sometime in early

future. Greetings from Istanbul...

2. PASSAGE REGIME OF THE TURKISH STRAITS FOR THE MERCHANT VESSELS UNDER THE MONTREUX CONVENTION (1936)

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The Convention Regarding The Regime of the Straits (the "Convention" or "Montreux Convention") was signed on the 24 th of July 1936 to regulate transit and navigation in the Straits of the Dardanelles, the Sea of Marmara and the Bosphorus which is referred under the general term "Straits" with a view to also safeguard, within the framework of Turkish security and of the security, in the Black Sea, of the riparian States.

Merchant Vessel

According to the Montreux Convention the term "merchant vessel" means all vessels which are not deemed as "vessels of war" which was specifically regulated under the Section II of the Montreux Convention which also beyond the concept of this paper.

Passage Regime

The Convention regulates only the transit ships which are not calling at a port in the Straits region and the main principle with respect to the passage of transit vessels is "freedom" under the Article 1. The passage regime varies from the times of peace and war. There is also a specific regime that comes into play at the time of an imminent danger of war.

a. In time of peace

According to the Article 2 of the Convention, in time of peace, merchant vessels shall enjoy complete freedom of transit and navigation in the Straits in line with the following terms;

- Passage could be effected by day and by night
- Vessel could be under any flag
- Vessel could be loaded with any kind of cargo
- No taxes or charges other than those listed by Annex I to the Convention shall be levied by the Turkish authorities on these vessels when passing in transit without calling at a port in the Straits
- Pilotage and towage shall remain optional
- Passage shall be without any formalities except as provided in Article 3

According to Article 3, it is regulated generally that all ships entering the Straits by both ends of the Straits (either by the Aegean Sea or by the Black Sea) shall stop at a sanitary station near the entrance to the Straits for the purposes of the sanitary control set by Turkish law within the framework of international sanitary regulations.

b. In time of war

ba. Turkey not being a belligerent:

Pursuant to Article 4 merchant vessels shall enjoy freedom of transit and navigation in the Straits as in times of peace subject to the provisions of Articles 2 and 3 of the Convention in line with the following conditions;

- Vessel could be under any flag
- Vessel could be loaded with any kind of cargo
- Pilotage and towage shall remain optional

bb. Turkey being a belligerent:

According to Article 5 merchant vessels not belonging to a country at war with Turkey shall enjoy freedom of transit and navigation in the Straits on condition that;

- Vessels do not in any way assist the enemy
- Vessels shall enter the Straits by (only) day
- Vessel's transit shall be effected by the route which shall in each case be indicated by the Turkish authorities

c. Imminent danger of war

If Turkey considers herself to be threatened with "imminent danger of war", the provisions of Article 2 shall nevertheless continue to be applied based on the conditions as follows;

- Vessels must enter the Straits by (only) day
- Vessels' transit must be effected by the route which shall, in each case be indicated by the Turkish authorities
- Pilotage may be made obligatory but no charge shall be levied

Having set the main provisions under the Monteux Convention regarding the passage of the merchant vessels through Straits, the passage principle is regardless of the cargo's type, meaning that merchant vessels are allowed to pass the Straits with any cargo.

However, this principle is not limitless and based on High Court precedents, although each case shall depend on its own circumstances, Turkey could disallow passage of a merchant vessel with a cargo provided that such cargo on board could be found harmful for Turkey and such a disallowance would not breach the Convention.

3. APPROACH OF TURKISH COURTS REGARDING ARREST OF SHIPS FOR MARITIME CLAIMS

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The Turkish Commercial Code ("TCC") adopts the concept of maritime claims provided in the International Convention on Arrest of Ships, 1999 ("Geneva Arrest Convention"). The maritime claims that are listed in the Geneva Arrest Convention are identically listed as numerous *clausus* under article 1352 of the TCC and they grant to its claimant a right to establish a precautionary attachment ("arrest") on the vessel.

According to the article 1352 of the TCC, an arrest order for the ship should be given as long as the claim is a maritime claim. Accordingly, the allegation of a maritime claim should be sufficient for the court to grant the arrest order. Likewise, as per article 1362 of the TCC, it is sufficient to obtain an arrest order if the applicant *prima facie* evidenced the existence of the maritime claim and the claim amount. Accordingly, the claim is not necessarily to be certain or indisputable.

Although it seems sufficient in light of the above information to obtain an arrest order by submitting documents evidencing a possible claim, the court may reject arrest applications when they are not satisfied with the justification of the applicant's claim. For instance, in the last months of 2019, the Maritime Court of Istanbul has rejected an arrest application of an Insurer who made compensation payment to its assured due to the damaged goods and submitted to the court the survey reports showing that 60 pieces of the 172 the galvanized steel coils carried in the vessel were rusted and nitrate tests results which were positive¹. The court held that it is not possible to give an arrest order since there are some remarks on the Bill of Lading stating that some part of the goods has got wet at the loading port before the loading.

In addition to this, the court stated that it should be evaluated during a litigation whether; the insurance policy is valid, the compensation payment was made in accordance with the policy, the notice regarding the damage to the goods made timely by the assured, the insurer is entitled to make a claim, there is a valid subrogation, the claim amount is correct etc..

Upon appeal of the applicant, the matter went before the High Court and the decision of the Maritime Court was affirmed by the High Court². The High Court stated that it is indeed not necessary to prove a claim definitely in order to obtain an arrest order, however, the court should be satisfied regarding the existence of the claim after evaluating the evidences. The High Court concluded that the evidences were not satisfactory enough to form an opinion on justification of the claim and therefore affirmed the decision of the Maritime Court.

¹ The decision of Istanbul 17. Commercial Court (Maritime Court) dated 11.29.2019, numbered 2019/163. D.İş, 2019/163 K.

² The judgment of 12. High Court of Istanbul dated 02.06.2020, numbered 2020/117 E., 2020/154 K.

4. TRADE ALLOWANCE RATE FOR BULK CARGO SHORTAGES ACCORDING TO TURKISH LAW

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The definition of "bulk cargoes" incorporates bulk cargoes in all forms including liquid and gas which are unpacked. Loading and unloading operations of these types of cargoes are carried out by various mechanical instruments. Packed or countable cargoes are defined as "non-bulk cargoes".

In accordance with Article 237 of the Turkish Customs Law the trade allowance rate in bulk cargo shortages is generally 3% of the manifested quantity. Regarding natural gas, except for those imported by pipelines, this rate shall not exceed 4%.

However according to Appendix 11 of the Turkish Customs Regulation, some cargoes have special limits. Trade allowance limits for the cargoes with special limits which are encountered are given in the table below:

HS Code	Materials	Trade Allowance Limit
2707.00	Oils etc. from high temp coal tar, sim aromatic etc.	0.5
2707.10.00.00.00	Benzol (Benzene)	0.5
2707.40.00.00.00	Naphthalene	0.5
2709.00	Crude oil from petroleum and bituminous minerals	1
2710.12	Oil (not crude) from petrol and bitum. mineral etc.	0.5
2710.12.70.00.00	Spirit type jet fuel	0.5
2710.19.21.00.00	Jet fuel	0.5
2710.19.25.00.11	Kerosene oil	0.5
2710.19.43.00.11	Diesel	0.5
2710.19.43.00.13	Marine diesel	0.5
2710.19.62.00.11	Fuel oil	0.5
2710.19.62.00.19	Marine fuel (RMK-380)	0.5
2712.10.10.00.00	Crude	0.5
2712.90.99.10.00	Paraffin	0.5

We would like to point out and remind that the trade allowance rate in bulk cargo shortages specified in the Turkish Customs Law applies to the relations between the customs and the private individuals.

In respect of the disputes between the private individuals/companies regarding trade allowance rate, it will be the courts who will decide which rate is appropriate for that particular cargo by consulting to the experts and chambers. Although, the rates specified in the Customs Law would not be binding for the Commercial Courts, it can be surely used as supporting evidence by the parties.

5.LEGAL ASPECTS OF COVID-19 THE RUSSIAN APPROACH, INCLUDING AZERBAIJAN LAW

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On 30 January 2020, the World Health Organization declared the novel coronavirus disease 2019 (COVID-19) outbreak a "Public Health Emergency of International Concern" (PHEIC). Besides the sad human part, the virus also caused major disruptions for commercial life. The difficulties suffered by parties of contracts have once again brought the "force majeure" issue to the forefront of the legal agenda all over the world. For companies that are considering issuing a force majeure notice, or those anticipating that their contractual counterparties may do so, we provide an overview of how courts in the **Russia and Azerbaijan** approach force majeure and what steps companies should take in considering their options.

Russian Federation Interpretation and Practice

According to clause 3 of Art. 401 of the RF Civil Code Force majeure occurs where there are extraordinary and unavoidable circumstances. Circumstances recognized in practice as force majeure include acts of God, natural disasters, as well as governmental decisions.

The impact of force majeure on contractual performance may not be clear cut. This can be the case, for example, in the event that a specific component required for the assembly of equipment cannot be supplied due to extraordinary and unavoidable circumstances, such as the closure of the borders or special measures introduced by foreign states. In addition, because of the dynamic and nonlinear character of force majeure circumstances, and the effects thereof, each special measure can become a force-majeure event, either alone or in combination with other measures.

In order to be released from liability, the party must show that its inability to perform an obligation results directly (as opposed to indirectly) from the force majeure event.

The conclusive determination of the relevant circumstance as a force majeure event is carried out by the court. Evidence from the Russian CCI or other evidence of the occurrence of force majeure so provided by the parties will not carry any predetermined weight with the court. Such evidence is subject to evaluation by the court on a case-by-case basis, along with other evidence which takes into account the wider circumstances of the specific case.

The defaulting party retains the obligation to prove the legal grounds for its release from liability under the relevant contract, as well as the obligation to provide evidence that it complied with the procedure for notifying the contract counterparty of the occurrence of force majeure, in accordance with any relevant provisions of the contract, and took reasonable measures to mitigate its effects. In addition to the relevant contractual provisions, the defaulting party is obliged to be guided by the general provisions of Russian law on the performance of obligations in good faith, the mutual assistance of the parties to achieve the objective of the obligation and the provision of all relevant information to each other party.

Azerbaijan Republic Interpretation and Practice

Significant changes in circumstances may result in the amendment or termination of the contract. For this, the change of conditions should be so unpredictable that the parties could not foresee it, and if they could have foreseen it, they would not have concluded the contract or concluded it on different terms. Unlike force majeure, this principle may be applied in accordance with Article 422 of the Civil Code, regardless of whether this is specifically specified in the contract. Evidence should not only be more difficult than force majeure, but should also cover unusual events. Thus, at the time the contract is concluded, the parties must have taken into account that conditions will not change to such an extent. With similar justification, it could be possible to estimate different types of virus outbreaks, as well as the influenza viruses (symptoms, seasonality, etc.), in any case. In the present case, the novel coronavirus cannot be considered a significant change in conditions. If the outbreak lasts for a few months (especially during the non-typical summer months) and spread excessively this situation can be considered a significant change in the conditions.

In this respect, specific clauses relating to Force Majeure must be analysed. However in cases where Force Majeure is not provided in the contract, a party may still rely on the provisions of the Civil Code of the Republic of Azerbaijan and request exemption from the liability. According to the general rule, a person shall only be liable for failure to perform an obligation if this is caused by his/her fault. Thus, if a party proves that the failure to perform the obligation is caused not by his/her fault but by an independent and unforeseen event, (s)he must not be liable for damages, penalties or other liabilities.

Conclusion

To determine whether the coronavirus rises to the level of a force majeure event, parties must look to **contract language**. Consider two potential force majeure triggers:

The coronavirus itself - Does the contract specifically reference "disease," "epidemic", "pandemic," or "quarantine"? If not, the force majeure clause may capture this under "Acts of God," or by general phrases such as "other circumstances beyond the parties' control."

Government action (e.g., mandated quarantines and business closures). Force majeure clause may capture this under "Acts of Government," or by general phrases such as "other circumstances beyond the parties' control."

Finally, businesses should also bear in mind the consequences of invoking a 'force majeure' clause. Depending on the actual wording, some 'force majeure' clauses only suspend performance of the affected party's obligations to perform for so long as the relevant event subsists with an extension of time to perform, whereas others may provide for variation of terms or termination of contract.



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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 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, 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.

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