

## **ULGENER LEGAL CONSULTANTS / LAW OFFICE**

Denizciler Is Merkezi, A Blok, Fahrettin Kerim Gökay Cd, Altunizade, 81190, Istanbul, Turkey

Tel : (+90) 216 474 1 555 ( Pbx) - Fax : (+90) 216 474 1 516 - E-Mail : [info@ulgener.com](mailto:info@ulgener.com)

---

# **THE BOSPHORUS ONLINE**

Newsletter of Ulgener Legal Consultants – Law Office / Vol.1 – Feb 2005 / English Edition

---

### **CONTENTS:**

1. Introduction
  2. Maritime liens on vessels according Turkish Law
  3. Amendment of Turkish Commercial Code: Public sale of the ship outside Turkey / Faith of encumbrances registered in Turkey and deletion of registry
- 

### **1. 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.

---

### **2. Maritime liens on vessels according Turkish Law**

### **a. Nature of maritime liens**

Turkey is the part of the *International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, Brussels, 1926*. Entry into force for Turkey is 4.1.1956.

The term "*lien*" as used in Turkish Maritime law differs from its use in English law, where it provides a special right allowing the claimant to sell the vessel by a public sale through a special procedure.

Such procedure includes also the arrest of the vessel, usually followed by provision of security by the owners to release her, under such circumstances the subject of the legal proceeding will be shifted from the vessel to the security; it is important to emphasize that Turkish Courts are only accepting first class guarantees issued by local banks, therefore a Club letter of undertaking do not have any effect during court proceedings in Turkey.

### **b. The scope of the maritime liens**

The scope of the maritime lien includes the following categories:

- The vessel: The prime scope is the vessel which caused the creation of the lien, but not any other vessel under the same ownership or management. The holder of the lien can make use of this right against the subsequent owners or the holders in possession of that vessel as well. There is only one exception to this rule, if the vessel is state owned and was not employed for making profit, (for example a naval vessel) than the subject will be not the vessel herself, rather it is the value of the vessel at the completion of the voyage.
- The freight: The second scope of the maritime lien is the freight, earned (but not received) on the particular voyage during which the maritime lien was created. The voyage means any kind of employment of the vessel in maritime trade, which started after refit of the vessel or in compliance with a charterparty or after the discharging of a cargo.

### **c. Procedure for creation / recognition of maritime liens**

In recent years, there has been discussions about the procedure for the maritime liens. According the Court of Appeals' well established ruling, following steps have to be taken:

The holder of the maritime lien / claimant has to apply to the court with a demand of the arrest of the vessel. Arrest decision and execution of such decision are separate steps, to enable the execution the claimant has to provide security. (as explained above, again by a first class Turkish Bank, which should be unconditional and without limitation of time), the amount of which is to be determined by the court. (which is usually between %15-%20 of the claim)

The holder of the maritime lien / claimant has to launch a courtcase within 10 days, (as per the regulations of the Turkish Procedure Code -HUMK-) which commences from the date of the decision for arrest with the demand of the creation / recognition of lien. During such case merits of the matter are to be discussed in detail.

If the award will be in favour of the claimant, it is to be enforced by serving it to the Court Bailiff's Office. There are specific time periods and official notifications (newspaper advertisement) for starting the procedure of public auction.

### **d. List of maritime liens**

Claims allowing a right of lien on the vessel, as listed in Section 1235 of the TTK, are as follows:

1. If a vessel will be sold by public sale, related expenses, such as costs for watch and keep her, excluding those made for the sale itself; (which are to be deducted at first instance from the funds received by the public auction)
2. Port dues and especially expenses for buoys, lighthouse, quarantine;
3. Claims of the crewmembers arising from the contract of employment;
4. Claims and expenses arising from pilot facilities and salvage operations;
5. Contributions for the vessel regarding general average;
6. Claims of outstanding funds in respect of contracts for credit done by the master of the vessel, in places other than the port of registry in cases of special need; also including all unpaid material

- delivered to the vessel in case of need for repairing the vessel or for completing a voyage;
7. Claims regarding loss of or damage to cargo and all claims arising from (total or partial) the non-performance of the contracts of affreightment;
  8. Claims arising out of (total or partial) non-performance of the contracts either done by the master (Article 948 / 1-1) or by the owner (Article 948 / 1-2);
  9. Claims arising from the negligence of the crewmembers. (Article 947, 948 / 1-3) ,
  10. Claims arising from the Social Security Commitments of the owner. (Social Security Premiums, etc.)

Regarding the question of “*which comes first*”, if there are more than one lien on a vessel, there are some specific rules:

- The lien standing on the top of the list (Art.1235/1) have an absolute priority.
- The lien standing at the end of the list (Art.1235/10) has the least priority.
- The liens between 2 and 9, if they are in relation to different voyages, the claims arising during latter voyages will have priority over former claims, i.e. calendarwise newer lien will rank first. If those liens are in relation to a single voyage, the list also represents the degree of priority of those claims, i.e. art.1235/2 has a priority on art.1235/3, this over art.1235/4, etc.

#### **e.The faith of outstanding premiums and calls**

Similar to other jurisdictions and other international conventions, unpaid premiums and calls of P&I clubs and H&M underwriters do not constitute a maritime lien on the vessel according Turkish Law.

On the other hand, in consideration of providing a counter security by means of a bank guarantee, it is possible to arrest (which is considered as a precautionary measure) the vessel, but only if the vessel is registered for the same owners.

There is a tendency by the Turkish Courts to place a caveat to the registry of the Turkish flag vessels, rather to issue an arrest order. Caveat is also a precautionary measure with the purpose of hindering the sale of the vessel and at the same time avoiding the creation of some further rights, such as a mortgage on the vessel. Therefore with a caveat on his vessel, the owners will be not in a position to sale her or get a loan from a bank.

Arrest / caveat decision should be followed by a court case within 10 days also under this matter as well.

---

### **3. Amendment of Turkish Commercial Code: Public sale of the ship outside Turkey / Faith of encumbrances registered in Turkey and deletion of registry**

One of the leading sources of finance for the shipping industry is loans obtained from international banks secured by a mortgage registered on the vessel. Therefore construction of rules regarding mortgages placed on vessels in the Turkish domestic legal system has a vital effect on the international credibility of Turkish flag registered tonnage.

In recent years, Turkish practice has witnessed a series of legal debate's questioning the reliability of the construction of rules in respect of Turkish flagged vessel mortgages, especially central to such debate are the articles of 851 and 1245 (of the Turkish Commercial Code), from which arose false interpretations regarding the validity of encumbrances on such ships sold abroad in public sales where an foreign adjudicated default had occurred. The reason for that was the unclear construction of the named articles, although according to a true legal interpretation they were in line with the international practice. The need of a straightforward and unambiguous construction for these articles was necessary to preserve the credibility of the Turkish flag lead to the amendment of these articles in the Turkish Commercial Code. (entered into force on 28.4.2004)

Previously, Article 1245 was understood to provide that all encumbrances on a Turkish flagged vessel would be lifted in a case where such vessel was be subject to forced public sale (auction) in Turkey. This construction was in compliance with the general rule, that as a result of the public sale, the new owner will receive the title of the ship without encumbrances. However, the pervious wording led some to believe or argue that clean title to the vessel was not purchased by the new owner where the process and auction

occurred outside of Turkey. This school of thought or argument went on to claim that the vessel, though already sold, could not be deleted from the Turkish registry.

It should be emphasized that according a true legal interpretation, such result should not have been reached under the original Article since the article was only relevant for proceedings effected in Turkey thereby leaving the results of proceedings abroad to the legal systems where the public auction had been made. Therefore, if according such law encumbrances are to be lifted as a consequence of forced public sale, than those registered in Turkey should be cancelled and the ship is to be deleted from Turkish registry.

The amended wording of article 1245 is stipulating that:

- If the ship has been sold by forced public sale (auction) in Turkey all encumbrances will be lifted
- Such encumbrances are also to be lifted, if the ship has been sold outside Turkey by public sale, provided that such proceedings has been advertised twice in two leading Turkish newspapers, out of the

five highest selling.

To support the new clear-cut meaning of article 1245, article 851 has been also amended to include the phrase “*if the vessel will be sold by public auction outside Turkey*” into the wording which read before the amendment as follows: “*If the ship has been sank without the possibility of salvage or she became unrepairable or lost the right to carry the Turkish flag, she is to be deleted from Turkish registry.*”

As the result of such amendments, false interpretation or deviation from the true construction of the law should now cease, therefore preserving and confirming the international credibility of Turkish flag for vessels.