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# THE BOSPHORUS ONLINE

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## 1. Salvage under Turkish Law

The term “*salvage*” is not defined in Turkish Commercial Code. (TTK) However article 1222 of TTK defines the cases under and by which circumstances one could be referring to a case of a salvage and hence a remuneration may be demanded for the same in return by the salvors.

According to Article 1222 of TTK:

*“.... if a vessel, which may be subject to perils’ of the sea’s, is out of control of her crew, and taken to safety by third parties, or upon assistance of such parties, then a salvage remuneration pursuant to this part may be claimed by those.*

*Aforesaid also goes if the salvage is between vessels owned by the same owners.*

*Amount payable as result of the foregoing, under no circumstance, can be more than the value of which are salvaged.”*

According Turkish Law, with respect to its essence, salvage remuneration is an amount owed to salvor as a result of and in return for successful salvage operation conducted upon the vessel and her cargo. As seen here, legislative authority rests its case upon the fulfillment of the condition that initial safety of vessel or her cargo are secured, and following that, a successful salvage operation is conducted in full. Therefore we can emphasize that “*no cure - no pay*” principle is valid from the aspect fo TTK.

On the other hand, if the performance of an operation is compulsory by law as a public service, then it is accepted in principal that one cannot refer to any such situation as a “*salvage*” by law.

According to Article 1225 of TTK:

*“ If there’s no agreement signed by the parties thereto (Article 1228), then the remuneration for a salvage and assistance is established by evaluating the surrounding circumstances thereto in a rightful and justified manner.*

*Reserving contents of Article 1230, in distribution of the salvage remuneration amongst the parties who took part in the operation, contents of Paragraph 1 do also applies.*

*Salvage remuneration is established in term of money. Unless unanimously adopted by the parties thereto, the said remuneration cannot be established as set upon a certain percentage of the goods or things salvaged or secured.”*

In the light of the foregoing; in cases where there is no agreement between the parties, salvage remuneration is established by evaluating the surrounding circumstances thereto in a rightful and justified manner.

One other point that must be considered regarding the remuneration is that of Article 1226 of TTK:

*“ Main aspects to be considered when establishing a remuneration for a salvage and assistance are as follows:*

*Overall result obtained, efforts and services of the persons in salvage, risks faced by the vessel and her cargo that is salvaged or its safety secured; risks and hazards the persons gone through in salving for and on behalf of both themselves and the vessels; amount of time spent, damages occurred and expenses made, liabilities encountered by those who took part in salvage operation, the value of equipment that the salvors had to endanger and, freight and passenger carriage remunerations and salvaged values –but on secondary basis- if the salvage vessel is assigned for a special purpose.*

*These paragraphs are also applicable to real persons, described under Paragraph 2 Article 1225, who has right of a share out.”*

It is necessary to implement several criterias when establishing actual cost for a salvage operation. Some of these criterias depend upon salvage operation, while some others depend upon the value salvaged and even to the degree of risk with regard the vessel to be salvaged. 2nd Paragraph of the said article describes the criteria upon which the judge bases his/her own-assessed decision as to what the actual amount of salvage remuneration may be under given circumstances. Most paramount of the said criteria is the result of the salvage operation, because the judge has first to establish whether if an existing risk had been avoided and, if applicable, how successful the operation conducted had been. TTK states that, in establishing the said remuneration, the size and intensity of the danger faced by both the vessel and its contents and/or passengers must also be considered as relevant criteria’s. However, the said criteria mainly focus on the vessel and her cargo that are salvaged.

Furthermore, Article 1224 of TTK on persons, who cannot demand a remuneration, is also to be emphasized:

*“ An entity or person, who may rendered services to a vessel against opposition of vessel’s master, cannot demand any such salvage remuneration, provided that the said opposition by the master is reasonable.”*

*And, crew members do not have the right to make an objection of that sort where the vessel is under risk.*

*In order for a salvage remuneration to become valid with regard to a vessel tugged away by a tugboat, or its cargo is safely secured or salvaged, it is necessary for extraordinary services; so extraordinary that much beyond the ways and means of fulfilling just a towing agreement, to have been rendered.”*

## **2. Turkish Open Form (“TOF”) - A closer look**

There were several groundings and incidents earlier this year, of which we have been instructed on “Anangel Dynasty” and “Ariadne” groundings and on “Genmar Star” incident (Non-TOF), which is still pending. In relation with the above article, we think that it would be helpful also to comment shortly on the Turkish Open

Form, known as TOF, which seems a trendy and controversial topic especially on insurance markets.

We must point out that the reason of the TOF is the monopoly of salvage in various parts of Turkey, especially on the Straits of Bosphorus and Dardanelles, the Marmara Sea and also most of the Turkish Ports, granted to the state enterprise called “Coastal Safety and Salvage Association” or on short “CSSA”.

Turkish Open Form is consisting of eight clauses: (translation by CSSA)

**ARTICLE 1-** Pursuant to Article 1223 of Turkish Commerce Code, this Agreement has been held on the basis of the principle (no cure, no pay), i.e (in case of the rendered services not giving any results, no salvage or assistance remuneration can be demanded.)

*No objection can be raised against the salvage-assistance duality of the service rendered according to this Agreement.*

**ARTICLE 2-** The MASTER hereby requests the SALVOR to save the vessel, cargo and freight, sustained to a casualty and to have them ready to be delivered to him at the nearest anchorage or at .....against an award, by the condition that expenses shall be on account off, all the services shall be rendered by, and all the means shall be supplied by the SALVOR ; and the SALVOR has accepted this offer and has undertaken to do his best in salvage under the provisions of hereby issued Agreement.

*The SALVOR has an absolute option both at the beginning and till the end of the services to determine whether or not the salvage and assistance shall give a satisfactory result and whether or not the vessel and the values on board are valuable enough to meet the expenses of salvage and assistance.*

*In case the SALVOR is in the opinion that the salvage an assistance shall not give a satisfactory result or the vessel and the values on board are not worth to the expenses of salvage and assistance by taking into account the state of the vessel and her cargo, sustained to a casualty and also the other conditions, SALVOR is hereby entitled to cancel the Agreement and to abandon the business even if the salvage activities have been started.*

*In cases of cancellation of this Agreement or abandonment of the business, SALVOR cannot be in way claimed for any loss If the vessel or her cargo or freight have been partly salvaged, SALVOR shall be awarded over the salvaged values. But in no case this award can exceed the salvaged values.*

*SALVOR is fully entitled to perform the services of salvage and assistance with any one of his salvage tugs stated in this Agreement or other ones or by other vessels any means, and to change the vessel and means at any stage of the services.*

**ARTICLE 3-** The vessel sustained to a casualty is obliged to perform the manoeuvres and the operations deemed as necessary by the SALVOR and to handle the aquilment to the order the SALVOR.

*SALVOR is entitled to use the anchor, chains, equipment and installations of the vessel sustained to a casualty in salvage and assistance related services, free of any charge.*

*SALVOR may discharge the cargo, ballast, bunker, vessel equipment, etc and all other materials on board; may freely change their places; may tranships them or may jettison everything he deems it necessary under his sole opinion and cannot be subjected to a claim of Indemnity because of his such acts.*

*SALVOR has no responsibility for total loss or damages or loss of the hull, equipment, cargo and similar values of the vessel sustained to a casualty because of manoeuvring, discharging, towing and other acts and because of bad climatic conditions of any other reason, during the operations of salvage and assistance.*

*MASTER has signed this Agreement upon his acceptance of above mentioned terms.*

**ARTICLE 4-** MASTER and other seamen have no right to interfere with the salvage and assistance services in any manner; to prevent the manoeuvres or operations or to attempt to make manoeuvres or operations by their own. MASTER and other seamen shall immediately inform the master of salvage tug of all the information and data known by them about the vessel, cargo, casualty and matters.

*Furthermore, MASTER has to inform in written form the types, nature and values of the cargo and bunker on board; name of the insurance company for cargo, freight and vessel and insurance amounts, the value portions of collected and uncollected freight amounts and risky and unrisky freight.*

*In case that the services are stopped or prevented to be finished by an interfere of the MASTER; salvage-assistance shall be deemed as if it has been successfully completed and the salvage-assistance award shall be determined and paid as if the services have been fully rendered.*

**ARTICLE 5-** *At the date when the vessel salvaged or assisted and the cargo and values on board are brought to the place stated in Article 2 or taken under security in the place where they are or when the state mentioned in the last paragraph of the Article 4 occurs, the salvage-assistance liability shall be deemed as successfully completed and the vessel sustained to a casualty shall be delivered by the MASTER pursuant to the provisions of this Agreement.*

*Provided that the SALVOR may take the necessary measures and have the salvage tug wait around the vessel sustained to a casualty until the date of guarantee issued under provisions of this Agreement. Expenses made or losses arising from this act of waiting shall be taken into account in determination of the salvage award. In the determination of this award, the spent is calculated as the period from sailing of the salvage tug to returning to her original places.*

*The SALVOR reserves his right of pledge and detention on the salvaged values, pursuant to salvage-assistance provisions of the Turkish Commerce Code and this Agreement.*

*Vessel and her contents salvaged or assisted under the authorities based on such rights cannot be sailed or taken from their places, cannot be taken to some other place and cargo and other goods cannot be discharged from the vessel unless a written approval is received from the SALVOR pursuant the above given Article 2. The document showing the delivery of the requested security by the SALVOR shall be accepted as an approval.*

*MASTER is liable to submit a letter of guarantee issued by a known Bank, bearing expressions of unlimited, joint debt and joint ball and the amount, of which from and terms shall be determined by the SALVOR, covering the vessel, cargo and freight, against his debts to be paid to the SALVOR together with the interests plus salvage-assistance expenses, attorney fees, arbitrator fees and arbitration expenses immediately upon the termination of salvage-assistance services, Sum of the security doesn't in any way affect the determination of expenses and salvage-assistance award by the arbitrators in future.*

*In case the SALVOR accepts in written form separate letters of guarantee for vessel, cargo or freight instead of one letter of guarantee against all the salvaged values, the responsibility of the Owner shall be extended in spite of the letter of guarantee, and the SALVOR may follow up also the Owner with or without this letter of guarantee.*

*In case that security is not given or is not satisfactory, the SALVOR is free to use his rights of pledge and detention prevent the vessel to sail on by having a maritime lien on decision on the cargo and to apply to all the legitimate ways for the purpose of collecting his credits until the said security is given or completed. Responsibility for loss, damage or total loss of vessel and cargo in the execution of these rights are limited to the vessel, cargo and freight.*

*In case that the cargo is loaded on the vessel without any security or under deficient security, Owner of the salvaged or assisted vessel is responsible against the SALVOR together with the Master of the vessel for the liabilities stated for the cargo in this agreement.*

*If the security is collected higher than its normal level, no claim for indemnity can be brought forward to the SALVOR.*

**ARTICLE 6-** *Owner of the salvaged or assisted vessel is fully responsible to pay the salvage-assistance award, arbitration attorney fees, all the expenses and all the other financial liabilities due to be paid to the SALVOR, being a joint debtor responsible for whole of the credit together with its parts. SALVOR has the sole option*

*and is fully free to bring the suit for the collection of his credits to only owner or to the owner of the cargo together with the Shipowner or to the MASTER under these principle, cepeccing upon the principles of joint-liability and participation for cargo, freight and vessel.*

*Shipowner accepts and agrees to pay all of the salvage-assistance award and their details for vessel, cargo and freight and to be solely addressed to the suit.*

*Separate issuance of the securities doesn't affect the determination of who will be addressed to the suit.*

*All of the claims, actions and conflicts arising from this Agreement shall be solved in Istanbul by means of arbitration.*

*Two arbitrators shall be appointed for vessel, cargo and freight; one by SALVOR and the other by MASTER or Shipowner. In case that the Shipowner or MASTER fails to appoint and to inform the SALVOR of their arbitrator within a week after the date of notification of the arbitrator appointed by the SALVOR, this arbitrator shall be elected by Istanbul Commerce Court upon the application to be made by the SALVOR.*

*In case that these two arbitrators don't come to an agreement, they shall elect a third arbitrator. If they don't agree on the third arbitrator shall also be elected by Istanbul Commerce Court upon the application to be made by the SALVOR.*

*The arbitrators shall examine the conflict and make decision within 55 days after their first meeting date held in the presence of the parties, but presence of the parties is not obligatory. In case a third arbitrator is appointed, this period shall be extended by another 45 days after the date of meeting held in the presence of three arbitrators and the parties, but presence of parties is not obligatory, in this case, the arbitrators shall examine the conflict and make a decision within 45 days after their first meeting date.*

*Arbitrators are not bound to the Act of the Juridical Procedures, Parties who don't attend the survey or meeting shall not be called and a decision of absence shall not be made.*

*Arbitration period may be extended by approval of the parties or by a decree of Court.*

*In case separate securities are given for the vessel, cargo and freight, arbitrators shall separately state the values and proportions of the salvaged values in their decisions.*

*Arbitrators shall be paid an arbitration fee over the amount stated in their decisions. The fee equals 10% of the decided salvage-assistance award if the conflict is solved two arbitrators and 12% of the said award if the conflict is solved by three arbitrators. Fee determined over this proportion shall be paid by the Defendant and shall be equally divided among the arbitrators.*

*Arbitrators shall apply an interest over the amount of salvage-assistance award beginning from the date of completion of the salvage-assistance, over the rate of rediscount interests prescribed by the Turkish Republic Central Bank for the short term credits.*

**ARTICLE 7-** *If the vessel saves herself by her own means until the SALVOR comes to the casualty place, SALVOR gains the right to receive a reasonable remuneration for his expenses and losses.*

*If the vessel sustained to a casualty in or out of monopoly borders is salvaged or assisted by the third person or vessels, the vessel agrees to pay a full salvage-assistance award to SALVOR.*

**ARTICLE 8-** *Salvage-assistance award and attorney fees and arbitration fees, their interests and arbitration expenses prescribed by the arbitrators shall be paid to the SALVOR within 7 days after the date of notification of the arbitration decision to the MASTER, Shipowner or their representatives. Otherwise, SALVOR is entitled to collect all his credits from the securities or vessel or uncollected freight or cargo.*

We know that CSSA is presently working on a new version of TOF, but our opinion is that little will be changed by means of general principles and main essence of the agreement. Amendments will be implemented for the purpose of avoiding misunderstandings and to achieve a balanced wording.

## Some important clues

- Almost all cases are being amicably settled before the stage of provision of salvage guarantees. (especially because of high expenses for arbitration)
- Correct timing to commence negotiations would be right after successful result.
- One has to bear in mind that the negotiation is consisting of two chapters, first is the one for determining the salvaged values and the last is the chapter for fixing the salvage price. A well prepared attendance is imperative for such meetings.

### 3. Crew claims according Turkish Labour Law

There is a dedicated code of maritime labour (Deniz İş Kanunu), which is regulating the social rights, conditions of employment, working hours, cancellation of the contract (except the master, whose rights are regulated in Turkish Commercial Code between articles 1005-1015) and related topics of the seafarers (including master, officers, crewmembers and any other person onboard) for those who are employed with a contract in a Turkish flagged vessel greater than 100 gt. Same code is also applicable to foreign crewmembers, only when there is reciprocity between Turkey and the state of the crewmembers.

Turkish seafarers to be employed in Turkish flagged vessels are subject to Turkish Social Security system.

In the case of death or injury of a crewmember, usually there will be two claims against the owners of the vessel;

- the first one will be made by the injured crewmember / or by the next of kin of the death crewmember. According the well settled court of appeal decisions, straight protocols followed by payments, even with notarized are not fully accepted by Turkish Legal system and leave the owners exposed to some future risk, which means that after receiving compensation the crew member or his/her next of kin can still sue the shipowning company based on the legal ground that he / she was forced / misleadingly guided by the opponents to negotiate a figure which he / she would not accepted normally. Therefore, to be on the safe side, it is wise to launch a symbolic case against the shipowning company (with a special wording on the submission for the case), after the finalization of negotiations, (usually based on a report prepared by an actuary) to sign a protocol, than and finally to appear at the court and declare in front of the judge that both parties have reached an irrevocable agreement and that the claimants are waiving all their rights (including the right to appeal) arising out of this accident. Actual payment will be made only after the completion of the hearing in such fashion.
- the other claim is to be launched as a court case by the state owned / managed social security company. (SSK) It is important to mention that the future payment to SSK (which can be calculated by the actuary) can be deducted from the compensation to be paid (as described above) to the crewmember or to the next of kin.

According Turkish Labour Law and practice, and recent Court of Appeal decisions (21st Division) in situations where there is a personal injury or death of a crewmember even without an attributable fault or negligence to the master and / or the owner, the shipowners liability is still continuing. As per the interpretation of the court of appeal there is a risk liability for the owner, but on the other hand this liability can not be considered a liability regarding result, i.e. any accident resulting with a death or injury of a crewmember will not end with the liability of the owner, in different words there is no liability for the owner if there is no proximity between the accident and the employment of the crewmember on board the vessel. The Court of Appeal sets three exceptions regarding causation. If the causation is (to be interpreted in a narrow sense)

- between the accident and a force majeure or
- between the accident and a negligence of a third party or
- between the accident and the negligence of the death / injured

there will be no proximity between the accident and the employment on board the vessel, therefore there will be no liability for the owner. Otherwise any other accident, (including illness) with or without the fault / negligence of the shipowner onboard the ship (defined by the recent court of appeal decision as “space of work”) can be considered as a cause of liability.

Apart from the above mentioned exceptions, the owner will be liable with or without any attributable negligence. The only difference is, that if there is fault / negligence, the owners liability is 100%, and if there is no fault / negligence on the part of the owner, his liability will be between 70% and 80% depending on the situation. (defined by the court of appeal as a discount of fairness) Therefore the amount calculated by the actuarian will be subject to a deduction, if there is no fault / negligence on the part of the master / owner. It is important to repeat that illness occurred onboard usually raises liability of the owners.

#### **4. INCE & CO - ULGENER Shipping Law Seminar**

A **Shipping Law Seminar** was held on 9th November jointly by the international law firm **Ince & Co** and **Ulgener Legal Consultants/Law Office** in DTO/Turkish Chamber of Shipping’s Assembly Saloon. The opening speech was made by DTO Chairman, Metin Kalkavan.

**Faz Peermohamed** and **Chris Beesley** from Ince & Co London office, **Clemens Hillmer** from Hamburg office and Prof.Dr. **Fehmi Ulgener** from Ulgener LC/LO made speeches during the seminar. First topic (presented by Mr.Peermohamed) of the seminar was “Legal Implications of a Maritime Crisis”. Hillmer gave detailed information regarding to German Shipping Finance and the KG model. Hillmer also mentioned about TURKON and YARDIMCI as companies which have applied KG model successfully.

Prof. Ulgener explained the studies regarding Draft Turkish Commercial Code which is executed on behalf of DTO and mentioned some of the significant changes made on the draft and the effects of DTO commission, such as deletion of Turkish vessels when sold by auction abroad, Status of IMAC/Istanbul Maritime and Admiralty Court, time charters, and other issues on which DTO commission have concentrated.

#### **5.Our website**

We are pleased to inform that our website (www.ulgener.com <http://www.ulgener.com>) will be operational within a very short time. All recipients will be advised as soon as the website (including the photo archive of ships) will be ready.

#### **6.Latest status of the draft TTK**

With reference to earlier issues, the new Turkish Commercial Code (presently still a draft) is now at the subcommission at Turkish parliament and being evaluated. A new application has been made by the Turkish Chamber of Shipping basing on our advice / report on January 2006. Our sources indicates that the draft will not come into force earlier than January 2007.

#### **7.News from the community**

Istanbul based Kaptanoglu Group bought in april Yasa’s handymax YASA ILHAN for USD 28 M. The new name is ALARA K. (2001 Tsuneishi built, DWT 52.413, LOA 190) At least lawyers dealing with the vessel has not been changed !!! (sale from one client to another)

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

**P&I matters,**

cargo claims - disputes arising from bills of lading, crew claims, pollution, liens on vessels; accidents, such as collisions, salvage and wreck removal, etc.

**FD&D matters,**

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

**H&M,**

salvage, general average adjustment etc; war and strike clauses and cargo insurance matters, also representing underwriters and providing legal advice regarding local and international law.

**Ship Finance - Sale & Purchase,**

assisting foreign banks and other financial institutions, covering also mortgages and disputes arising out of mortgages.

Contracts of **Shipbuilding & Repair** and disputes arising out of such contracts.

Collection of **outstanding premiums** on behalf of P&I Associations.

Enforcement of **foreign arbitration** and **court awards** (marine / non-marine).

Advising shipowners and P&I Clubs regarding issues arising from Turkish as well as International maritime & commercial law.

**Legal correspondents** of a P&I Club within the International Pool.

Assisting foreign companies to establish local branches, entering into partnerships with Turkish companies, privatisation of ports & other facilities, etc.

Contracts for and disputes arising out of **carriage by road** (CMR / local law) and **aviation**.

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 the **Turkish Chamber of Shipping** and representing the Chamber at the **Bimco Documentary Committee**.

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