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CONTENTS:
1. Competency of courts, interpretation of arbitration & jurisdiction clauses and securities of foreign claimants
2. Enforcement and recognition of foreign court and arbitration awards in Turkey
3. Cargo issues: An introduction to Carrier’s Liability and Bills of Lading according Turkish Law
4. Laytime issues: Notice of Readiness according Turkish Law
5. Turkish International Ship Registry TUGS

1. Competency of courts, interpretation of arbitration & jurisdiction clauses and securities of foreign claimants

The so-called *“Code for Rules Regarding International Procedure” (“MÖHUK”)* governs the competency of Turkish Courts as well as enforcement of the foreign court or arbitration awards and recognition of the foreign court awards.

According MÖHUK art.27, the international competency of a Turkish Court will be determined by the domestic rules in respect the competency. On the other hand the parties of a contract can agree to bring their disputes to a foreign state court, provided that the competency is not falling within the scope of compulsory competence and not in violation with the principle of public order. There are specific areas in Turkish Law, on which there is a compulsory competence of Turkish Courts, but none of them are maritime related. In 1998, the Supreme Court agreed that parties may authorise a court in a foreign jurisdiction, (by a jurisdiction agreement or a clause) except in cases involving public order and exclusive power. Therefore this order seems to be well settled presently.

There is a broad interpretation of the validity of foreign arbitration clauses for bill of lading holders under Turkish law. Therefore a Turkish Court will declare itself as not competent, if the bill of lading contains a clause such as *“all other conditions, including arbitration clause, as per charterparty”* There has been a recent tendency towards a narrower interpretation, in strict compliance with the relevant law to which the parties are subject.

As per the article 32, the foreign claimants launching their cases or joining to cases launched already are subject to provide security for legal expenses and possible losses on the opponents, the amount of such security will be assessed by the court. On the other hand there are some bileteral agreements (for example with United Kingdom) between the states for avoidance of security, therefore if the foreigner is a citizen of such state, he may be exempted from security.

2. Enforcement and recognition of foreign court and arbitration awards in Turkey

a. Enforcing foreign court awards in Turkey

According the art.34 of MÖHUK, a foreign court award can be enforced in Turkey, only if the award is final according to the laws of the foreign state and also dependent on a decision to be given by a competent Turkish Court, which is to be determined as per the residence of the party against whom the award is to be enforced. (art.35) If this party has no residence within Turkey, this case can be launched at a court located in Istanbul, Ankara or Ýzmir.

Articles of 35 and 36 are setting the standards for the application for enforcing of a foreign court award, which is to be made by presenting a submission to the competent court. It should contain the details of the parties as well as the legal representatives, the details of the award, such as the state, court, and the file number, as well as the approved text and the translated text and an official document which is showing that the award has been finalized as per the foreign jurisdiction and the related translated text.

For the enforcement decision, following conditions have to be met: (art.38)

1. There should be a bilateral agreement between Turkey and the issuing state of the award or a regulation or a practice based on reciprocity which enables the Turkish Court awards to be enforced in same state.

2. The award should not fall within the scope of compulsory competence of Turkish Courts.

3. The award should not be expressly against public order.

4. The award should not be objected by the party, against whom the enforcement is requested, on the grounds that he has not been notified of the proceeding or represented during the proceeding or if the award has been issued in default on his absence,

5. The award, regarding personal rights, should not be objected by a Turkish Citizen, against whom the enforcement is requested, on the grounds that the competent jurisdiction has not been used as per Turkish rules in respect of conflict of laws.

According art.39, the opponent party can make objections against the request for the enforcement only as per the above mentioned points or that the award is fully or partly enforced or there is a reason which avoids the enforcement. (This means that the opponent party can not discuss the material points, such as his blame or amount of claim)

After receiving and evaluating the necessary documents and hearing the objections of the opponent party as well as the responses by the applying party, the court can decide either for a full or part enforcement of the foreign court award or it may refuse the request of the enforcement. (art.40)

The foreign court awards to be enforced in Turkey are executed in the same manner as Turkish Court awards. (art.42)

The decision of enforcement or refusing the enforcement is subject to appeal as per general rules of law. Appeal will stop the execution.

b.Recognition of foreign court awards

As per the art.42 of MÖHUK, for recognition of a foreign court award as an absolute evidence or as a final award, same conditions for enforcement as explained above have to be fulfilled, with the exception of art.38 (1) and (2).

c.Enforcing foreign arbitration awards in Turkey

MÖHUK art.43 determines that finalized and executable foreign arbitration awards can be enforced. The application for enforcement can be made to the court which is agreed by the parties, if there is no such agreement, the application will be made to the court at the place of residence against whom the enforcement

is requested. If there is no residence, then the court of the place, where the goods subject to the execution of the award are, will be competent.

Art.44 sets forward the manner of the application for enforcing a foreign arbitration award: The party, asking the enforcement of an award should apply to the court with a submission, there should be some attachments such as the agreement of arbitration, (a contract if there is a clause of arbitration inserted, such as a charterparty or a bill of lading) finalized and executable original and an approved copy of the arbitration award, the translations of those documents set above. During the proceeding the court will apply the above mentioned articles of 38.a, 39, 40 ve 41.

The court can refuse an application for the enforcement because of the following reasons: (art.45)

1. If there is no arbitration agreement or the main agreement contains no arbitration clause.

2. If the arbitration award is against the public order

3. If the dispute can not be handled by arbitration as per Turkish Law.

4. If one of the parties was not represented (defended) properly as per the procedural rules during the arbitration proceeding and consequently rejected the proceeding.

5. If the party, against whom the enforcement is requested, have not been notified from the proceeding or not given the opportunity to defend himself or prove his claim.

6. If the arbitration agreement or clause is not valid as per the choice of law made by the parties or as per the laws of the place where the arbitration award is published.

7. If the procedure for the nomination of arbitrators or the application of the procedural rules by the arbitrators is not valid as per the choice of law made by the parties or as per the laws of the place where the arbitration award is published.

8.If the arbitration award is covering an issue which is not within the scope of the arbitration agreement or clause or falls partly outside of same scope. (In that case only the part within the scope can be enforced)

9. If the arbitration award is not final or executable or cancelled as per the rules of the governing law or as per the rules of the place where the award has been published.

The burden of proof for the above mentioned sub-articles (4), (5), (6), (7), (8) and (9) falls to the party against whom is the award requested to be enforced.

3. Cargo issues: An introduction to Carrier's Liability and Bills of Lading according Turkish Law

a.System of Turkish Law regarding carrier's liability

Hague Rules have been imported into the Turkish Commercial Code with some differences. Carrier's liability under the TTK are grouped under two headings:

- Liability arising from loss or damage to cargo because of lack of diligence
- Liability stemming from losses resulting from unseaworthiness at the beginning of the voyage

Losses resulting from other causes, and particularly damages for delay (economic damages) and losses caused by complete or partial non-performance of the contract of carriage, are subject to the general provisions of the Code of Obligations. (TBK)

b.Effect of the bill of lading

As per TTK.art.1100/1 which is parallel to Hague Rules III.3, after receiving the cargo the carrier or the master or agent of the carrier shall, on demand of the shipper, issue a bill of lading including among other things: (almost same wording has been used in TTK as in Hague Rules)

1. The leading marks necessary for identification of the cargo as the same are furnished in writing by the shipper before the loading of such cargo starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

2. Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.

3. The apparent order and condition of the goods.

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the cargo actually received, or which he has had no reasonable means of checking.

According TTK.art.1100 / 2 and in line with Hague Rules, the carrier have a facility as to insert a remark into the bill of lading, if the conditions during loading prevents the confirmation of the details regarding cargo. On the other hand a remark, without any ground is not sufficient, there should be also a fair explanation for those conditions, preventing the observation of the loading operation.

Otherwise as per TTK. art.1110/2, (Hague Rules III.4) all information placed in the bill of lading regarding cargo are creating a prima facie evidence against the carrier, according which it will be considered that the cargo was delivered to the vessel in a sound condition / in the quantity and quality as stated in the bill of lading. As in Hague Rules, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.

4. Laytime issues: Notice of Readiness according Turkish Law

Similar to the provisions of English Law, the vessel is to be technically and pyhsically ready for loading or discharging and the owners have to tender a valid notice of readiness to let to commence the laytime.

According TK.art.1030/2, the laytime will commence the next working day after the tender of the notice of readiness. If such notice is given on a holiday, the tender date will be considered as the next working day. (for example tender date is a Sunday, the notice is to be considered as tendered on Monday, the laytime starts on Tuesday)

For loading the notice is to be given to the charterers, and if known also to the shippers, (TK.art.1030) and for discharging it should be tendered to the receivers. (TK.art.1052)

According English law, the validity of a notice of readines is to be determined as per the construction of the charterparty. For the charterparties with a port nomination, (“port charterparties”) the owners may tender the notice at the moment the vessel gets the ‘arrived ship” status, (an be ready in every aspect for the relevant operations) (except of the WIPON clause) on the other hand the parties have included a berth within a port, (“berth charterparties”) this would mean for the owners to tender the notice of readiness not before berthing the vessel. (an be ready in every aspect for the relevant operations) (except of the WIBON clause)

There are two stages for tendering the notice of readiness according Turkish law, which are differing from each other by means of wide and narrow interpretation:

1. Notice of readiness to be interpreted as wide: (stage 1) As per Turkish Maritime law, when the vessel will arrive to the port, the owners may tender the notice, even the vessel is not in a position to berth after the lapse of freetime (under a charterparty which not includes a WIBON or a similar clause), therefore a notice of readiness may be tendered even there is no available berth at the moment or even the cranes are not ready for

the relevant oepartions.

2. Notice of readiness to be interpreted as narrow: (stage 2) The second stage begins after the lapse of the freetime, during which the conditions for already tendered notice of readiness will be interpreted in a strict manner, which means that those conditions has to be fulfilled completely, i.e. the vessel has to be berthed and should be ready in every respect to let to commence loading and or discharging operations, otherwise the notice, which was tendered at stage 1 will become valid, and it is to be re-tendered.

A clause, which frequently can be seen in the charterparties and to be studied in this respect is the "WIBON" clause ("whether in berth or not"), according which the owners are entitled to tender notice of readiness and to let to commence the laytime without berthing of the vessel. Bearing in mind that the vessel would not be able to berth because of bad weather, or because there is no available berth, the effects of the clause has to be determined whether it is valid for all hindrances or not. According Turkish Law, "WIBON" and similar clauses are considered as valid only for unavailable berths in the absence of specific wording, therefore (similar to English Law) such clauses do not considered to be valid for all reasons.

5. Turkish International Ship Registry TUGS

There is a special section in the Turkish Commercial Code *("TTK")* explains which vessels are entitled to fly the Turkish flag and at the same time to be registered in the Turkish National Ship Registry *("TMGS")* , and the requirements attaching to those entitlements, including the terms and conditions required of an owner, and incor-poration of companies and share majorities.

The rights to fly the flag are dealt with in individual provisions.

Also covered are the requirements on vessels flying foreign flags to use the Turkish flag on a temporary basis, particularly important for bare-boat charters.

It is important to draw attention on the point that after many years of extensive research & discussion by the authorities the new Turkish International Ship Register became operational from July 2000. The code having been enacted by the Turkish Parliament in December 1999, with the related bye-laws being introduced by the above mentioned Ministry in June 2000. This *"International Registry"* has been created in response to the benefits provided by the various *"Flags of convenience"*, introduced to maintain and/or attract vessels to the state flag and to act as a deterrent to the national owners from registering their vessels with one of the many convenient flags. The main purpose of the new Turkish International Ship Register (*"TUGS"*) is therefore to provide Turkish owners (and any other owner with an interest in registering his vessel(s) in *"TUGS"*) with a greater ability to compete internationally via the financial benefits of a second, yet still recognised, national flag.

During the preparation stages, the Norwegian International Ship Register *("NIS")* was used as a model, although *"TUGS"* ultimately has many differences from *"NIS"*. For example, as mentioned in section 2 below, the owners of vessels registered in *"TUGS"* maintain their right of Turkish cabotage, (provided they are in compliance with the rules of the Turkish Commercial Code) whereas vessels registered in the *"NIS"* cannot carry goods or passengers between Norwegian Ports. Any of the following vessels can be registered in TUGS: ["*TUGS"* Act Art.4 (with no age limitation)]

1. Those registered before the enactment of "TUGS" with the Turkish National Registry *("TMGS");*

2. Vessels built in Turkey;

3. Imported vessels with a deadweight capacity exceeding 3.000 dwt. (300 gt for passenger vessels and special purpose vessels, e.g. tugs, drilling ships, fishing vessels.)

4. Commercial vessels as well as fishing vessels;

5. Commercially employed pleasure craft, i.e. any vessel solely used for tourism & leisure purposes, with a capacity of no more than 36 persons, registered both with a tour company and as a *"tourist yacht"* in the

tonnage certificate;

may be registered (Art.2) and thus fly the Turkish flag. (Art.7.1), provided that; (Art.5) such vessels are owned by Turkish citizens or by foreigners who are resident or have established a company in Turkey. NB - There is no minimum time limit for the consideration of Turkish residency; (In accordance with Art.823 of the TTK every Turkish owner already has the right to fly the national flag. Vessels registered in TUGS also have the privilege of cabotage; in other words, these vessels can carry goods or passenger between Turkish Ports. However, vessels registered in TUGS by owners who are not Turkish nationals and by foreign companies resident in Turkey are not so entitled.)

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