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THE BOSPHORUS ONLINE

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Earlier volumes of the newsletter can be found on our website.

1. Present Status of the draft Turkish Commercial Code

With reference is to earlier articles of Bosphorus Online, the draft commercial code has been passed finally through the subcommittee (of Turkish national general assembly) with some minor changes in april. The final step is approval by the Turkish national general assembly. However, since early general elections are due on 22nd of July 2007, this job will be performed by the new elected mp's and we do not expect that this will be done anytime this year. Therefore the present commercial code seems to preserve its validity for some time, at least to the first quarter of next year.

2. Cargo issues: The burden of proof

According TTK, the claimant has to prove the following items:

a. The right to sue: That the claimant is the bill of lading holder or the cargo underwriter suing the carrier based on the right of subrogation. (TTK.art.1301, art.1361)
b. The right to be sued: That the opponent party is the carrier or to be considered as a carrier because of the *"Identity of Carrier"* Clause.
c. The condition of the cargo at the time of loading: That the cargo has been delivered to the vessel in sound condition. The bill of lading with a *"clean on board"* remark will be enough for proving that issue as a prima facie evidence. (reference to b.2. above) This evidence can be reversed by the carrier by producing positive evidences that at the time the cargo has been shipped / delivered to the vessel, it was actually damaged.
d. The condition of the cargo at the time of / or before discharging: That the cargo is in a damaged condition. For this purpose a court ordered expertise or a joint survey with the attendence of both parties needed.
e. The amount of claim: That the damage regarding the cargo has been in a certain amount. This can be proved usually with an invoice showing the sound market value of the cargo.

After that, in order to escape from the liability, the carrier has to prove that the damage was occurred because of an exception to his liability. Articles 1062/2 and 1063 are the equivalent of Hague Rules IV.2, but with some differences:

- The first two provisions of Article IV.2 of the Hague Rules are covered by article 1062/2 of the TTK under the heading of *"absolute non-liability"*, the difference is that the carrier will be relieved from liability, provided that he can prove the causation, ie that the loss have been caused by the act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship, or fire, unless caused by the actual fault or privity of the carrier. In other words, according to the principle of absolute non-liability, the existence of cases specified therein completely relieves the carrier from liability.There is a special phrase included in this article concluding that any act, neglect or default by the above mentioned parties for cargo handling purposes *("commercial fault")* will be not considered as an exception to the liability of the carrier. The article further says that when in doubt whether the act, neglect or default is in the navigation or management of the ship or in the cargo handling, the latter will prevail. The result of the commercial fault, like wrongful loading, discharging, stowage (provided that there is no FIOST clause in the bill of lading) and handling of the cargo is the liability of the carrier.

-Whereas the remaining paragraphs except (q) are governed by article 1063 of the TTK under *"potential cases of non-liability"*, where proving of the causation only evidences a prima facie exception of liability, which can be avoided by the bill of lading holder by proving that the causation is between loss of or damage to cargo and unseaworthiness of the ship or any other cause, for which the carrier or his servants or the crew of the vessel is liable. (for example, as above explained commercial fault by the servant or the crew) Therefore, unlike the Hague Rules, according to article 1063, bill of lading holders are able to hold the carrier liable if they can prove that the reason for the loss or damage to the goods was the unseaworthiness of the vessel, or that the carrier had breached its duty to act diligently.

-There is no equivalent rule to Hague Rules IV.2.q., *("Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.")* which means that it will be not possible to add any other exception to the liability of the carrier. (similar to the principle of *"numerus clausus"*)

3. Laytime issues: Hindrances effecting loading / discharging

The effect of the hindrances (such as bad weather, strikes, etc) during the loading and discharging operations is to be tested in two stages by application of two principles:

- Stage 1: Negligence by one of the parties: (Principle of negligence) The risk for hindrances affecting loading and discharging operations is at first instance at the party who has caused it with his and his servants negligence. This would mean that if the operations were delayed by the owners or his servants' negligence, the calculation of laytime continues and if vice versa, if by charterers or his servants' negligence the calculation interrupts. Therefore there is no significant difference between Turkish and English Law.

- Stage 2: Hindrances arising beyond the control of the parties: (although parties can determine different solutions)

English Law: According English law the risk for the hindrances effecting the loading / discharging operations is to be determined in respect of the construction of the charterparty:

- Fixed laytime: If the charterparty contains a specific or calculable laytime, this would mean that the charterers have undertaken to complete the loading and / or discharging operation within the stipulated laytime, disruption of those operations would be considered as a breach of the contract, causing laytime to commence and to be calculated without interruption of laytime, which would end with demurrage.

- Unfixed laytime: If the charterparty contains no specific or calculable laytime, (FAC, CQD,etc) this would mean that the charterers are under the obligation to finish the related operations in a reasonable time, but disruption of those services are to be considered as a breach of the contract by the owners, causing laytime to interrupt, which would mean that no or less demurrage.

Turkish Law: The system for the above subject is totally different in Turkish Law, according which the effects of the hindrances are to be determined as per the principle of operational areas:

-All hindrances related to the vessel (for example strike by the crew, poor performance of ships crane's or derrick's) are to be considered within the operational area of the owners, causing interruption of laytime. (TK.art.1036/2)

-All hindrances related to the cargo (for example because a strike by the railroad workers, cargo is delayed to reach the loading port, or loading / discharging is delayed due to poor performance of the shore crane's) are to be considered within the operational area of the charterers, which results in running of the laytime without interruption. (TK.art.1036/1)

-All hindrances which are to be considered within the operational areas of both parties, (for example delay of loading / discharging because of bad weather, ice or a general strike) laytime stops to run till the end of such hindrance, but at the same charterers wil;l be under the obligation to pay the owners an amount equal to the stipulated demurrage at the charterparty. (TK.art.1036/3)

It should be emphasized that none of the above regulations are compulsory, which would mean that parties can agree on different schemes at the charterparty.

"FIOST" and similar clauses are examples in respect of such schemes, since with the insertion of those clauses the parties are changing the operational areas of each other, for example according "gross terms" charterers are bound to bring the cargo for loading alongside the vessel, therefore all hindrances occured during this are to be considered within the charterers operational area. By insertion of "FIOST" the charterers are also undertaking loading and stowage operations, which would mean that those are also to be considered within their area of operation.

5. Turkon Line – Our new exclusive clients

We are proud to announce that Turkon Line (www.turkonholding.com) and Ulgener Legal Consultants/Law Office have entered into an exclusive agreement effective from January 2007. The subject of the agreement is provision of legal services on a continuing basis. Turkon Line is one of the remarkable shipping companies of Turkish maritime community mainly specialized in container transportation between the States / Europe and Turkey. Its chairman is Mr.Metin Kalkavan, who also chairs the Turkish Chamber of Shipping.

6. Eregli Shipping – Our new exclusive clients

We are also proud to announce that Eregli Shipping (www.escbulk.com) and Ulgener Legal Consultants/Law Office have entered into an exclusive agreement effective from April 2007. The subject of the agreement is provision of legal services on a continuing basis. Eregli Shipping is a multipartner company which operates presently a capesize bulker with two other capsize newbuildings on order.