ULGENER LEGAL CONSULTANTS / LAW OFFICE
Denizciler Is Merkezi, A Blok, Fahrettin Kerim Gokay Cd, Altunizade, 34662, Istanbul, Turkey
Tel : (+90) 216 474 1 555 (Pbx) - Fax : (+90) 216 474 1 516 - E-Mail : info@ulgener.com / www.ulgener.com

THE BOSPHORUS ONLINE

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

1. Activities & News

We have organized two more seminars in London with Thomas Millers' and Steamship Mutual, again like the previous seminars, regarding the new Turkish Commercial Code. We have totalled 11 abroad seminars all over Europe, (London, Arendal, Gothenborg, Bergen, Copenhagen and Pireaus) not to mention the domestic seminars we have hosted or attended.

Av.Atiye Pehlivan, who works for our law firm since it's establishment, became a partner as of May 2012. We are extremely proud with her.

We will be in Athens / Pireaus for Posidonnia during first week of June, anyone wishes to meet us, please feel free to contact.

2.Collision Outline in Context with Provisions of New Turkish Commercial Code

(Av.Esin Taneri, Associate, esin@ulgener.com)

Although Turkey is a contracting party to the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, signed in 1910, as of 16/09/1955, pursuant to Law No 3226, dated 09/05/1937, the provisions of this Convention have been set forth exactly in new Turkish Commercial Code in order to eliminate any contradiction between theory and application and to fully comply with the abovementioned Convention. For this purpose, some provisions, which have not been derived from the Convention, signed in 1910, are added to the Code and necessary changes are made in theprovisions which have been quoted incorrectly. In this context, the following are the amendments, made to the Turkish Commercial Code that we deem important:

- In Article 1286, it is stated that these provisions shall only be applicable to the damage on the ships as well as the damage to people on board (such as passengers and crew), cargo, baggage and other goods. In this situation, in case that a ship damages a facility ashore as a result of a collision, any claim which may be raised in this context, shall be subjected to Article 1062 (Ship-owners liability).

- In the 2nd Paragraph of Article 1289, a new provision is set forth indicating that the Ship-owners shall have the right to make a plea (defense) against shippers in relation to faults regarding management and navigation. Thus, an issue which is highly disputed during execution has been clarified by means of this amendment.
- In a collision caused by faults of both parties, each party is held responsible in proportion to his own fault. If one party's fault is not determined, then necessary actions shall be taken, based on the assumption that both parties are equally at fault. However, it is resolved that there will be no full succession in terms of cargo or goods damage between either parties involved in such collision (Article 1289), and that each party shall be held responsible jointly and severally in terms of deaths and personal injuries in proportion to the faults of each party in this collision (Article 1290).
- In Article 1291, a new provision is set forth in relation to pilot faults, which we believe will solve any possible contradiction during the execution, and it is decided that the Ship-owner shall be held responsible if a collision takes place as a result of the pilot's negligence while being guided by a mandatory consulting pilot or an optional pilot, and that the Ship-owner of a ship shall not be held responsible if a collision takes place as a result of the pilot's negligence while being guided by a mandatory forwarding/driving pilot.
- A special arrangement is made in relation to the determination of evidence in collision events (Article 1292). Dealing with marine issues, private courts are authorized for such proceedings. Moreover, it is resolved that each shipmaster or his representative, taking part in such collision, shall be informed in advance of this investigation and that the faults of each party shall not be calculated during this investigation. These amendments aim at avoiding multiple or different fault calculations in a collision.
- In Article 1293, a new provision is added indicating that it is not required to send a written notification after a collision. Basically, we can say that in fact there is no need for such a provision because it is a matter that should be regulated in procedural law and in fact in practice, no contradiction is raised in this context.
- In Article 1294, it is stated that no presumption shall be taken into consideration while calculating the faults of parties in a collision.

3. Amendments to the Scope of Salvage within the new Commercial Code as regards the 1989 Salvage Convention

(Aylin Yazıcı, LLB, Associate, aylin@ulgener.com)

As with national legislation all over the world, in order to keep up with necessary improvements and changes, Turkey shall be implementing a new Code in accordance with international legislation which will (among other things), make some significant modifications to its current rules on salvage operations as regards maritime law. For example, the 1989 Salvage Convention was brought out wıth the intention to remedy certain issues (such as salvage under the no-cure no-pay principle as regards pollution) by making provisions for an appropriate salvage award by taking into account the skill and efforts of the salvors in preventing or lessening damage done to the environment. When drafting the new Turkish Code (NTCC) the 1989 Convention was taken into serious account.

It is interesting to note that the Code itself does not actually provide a definition of the term salvage but it does in fact state the circumstances whereby a situation of salvage would be understood to have occurred and thus be eligible for remuneration.

As regards remuneration, a specific provision was included in Art. 1299(1) (a) of the new Code (entering into effect on 1 July 2012), in accordance with the 1989 Convention, to the effect that every salvor who is under a "duty to perform salvage operations" shall be entitled to the rights and remedies as per the provisions on salvage. As such, public and private salvors shall be entitled to all rights and remedies under the 1989 Salvage Convention, now incorporated into the NTCC.

Within the old Code it is stated that no award can be claimed for an operation which has not resulted in any benefit to the salvage. This is in reference to the no-cure no-pay system which is included in the new Code within Art 1304 but with some important changes. Under the Convention special compensation is to be paid as a reward for making effort to prevent or minimize damage to the environment even if no property has been saved. Now, salvors that effect a good outcome will be entitled to claim remuneration for certain situations listed within the NTCC provisions. It may be debated that to have provided a completely new section within the Code listing the various situations that will definitely allow for remuneration may have been more clear and

would have left less room for argument when such circumstances arise. This area of the new Code may be anissue in future cases as regards whether or not certain acts of salvage have been proven to be beneficial.

Another interesting point is that the New Code in Art 1306 has an explicit provision which has been included to the effect that there is no joint liability as between debtors of any payment in respect of salvage. This may prove worthwhile in that there will be less confusion as to who is to make payments and thus could be seen as one less matter to deal with in the future. Whether this provision will be the reason for further arguments or not as between relevant debtors is yet to be seen.

The provisions of the 1989 Convention as incorporated into the NTCC will becomeapplicable in cases that are governed by Turkish domestic law and thus whilst the NTCC may still have room for improvement, it shall hopefully put some light on dealing with certain issues of salvage.

4. The Moldovan Flag for Registration of the Ship

(Av.Özge ÖZYURT, Associate, ozge@ulgener.com)

Everyone who buys or builds a ship sooner or later are thinking about the registration and obtaining the right to property of vessel. Registration of yacht or another type of vessels, gives the right to navigate under the flag of the State in which the boat is registered, as well as the property right over it, which means that it must be registered in the Register of Shipping of some concrete state.

At the same time it must be remembered that from the moment of registration of the ship, in some concrete country, on board of the vessel acting law of this state, including the international principle ofextraterritoriality.

And here arises the main question, - the flag of which country is better for your vessel?

According to the international classification, all state ship registers aredivided on "open" and "national or closed"registries.

"National or closed" registries - are the State Registers of Ships in which may be registered vessels that belonging only to the residents of this country (individuals or juridical entities).

"Open" registries - are the State Registers of Ships in which may be registered vessels owned by foreign individuals or juridical entities.

Thus,- if the vessel owner is not satisfied by the flag of its country of residence for any reasons, he can choose fo his vessel any "open" flag. At such point, the procedure of choosing a specific "open" flag should be based o several major criteria, such as:

1.cost of vessel's registration under the flag;
2.cost of vessel's maintenance under the chosen flag;
3. cost of all commercial transactions fulfillment with the vessel, such as the mortgage registration, th transfer of property rights, etc.;
4.minimum requirements for the technical condition and documents of the ship; and
5.terms of execution of all necessary documents.

Besides the above principles the relationships of the chosen country with the world community should be take into account, more specifically, vessel owners should pay attention to the absence of conflicts of this country wit other states in whose ports their vessel would most likely enter. Usually, we must pay attention to small countrie that have the status of neutrality or the countries that in general don't have access to the sea.

Flags (State Ship Registers) of countries in the international maritime practice corresponding to all of the criteri discussed above, are called “flags of convenience”. Based on the above principles and taking into the account tha

- all vessels owned by individuals or legal entities, whether resident or non-resident can be registered in Republic of Moldova;
- all owners and charterers of vessels registered in Moldova are exempt of tax payments and customs duty;
- there are no restrictions on registration of sea, river and sea-river vesselsof all ages and types;

- favorable tariffs for the registration of ships;
- favorable tariffs for vessels on port calling costs at Black Sea Region
- Quick registration procedure; and the neutral status of Moldova.

5. Limitation of Liability by way of a contract or a contract term

(Av.Atiye Pehlivan, Partner, atiye@ulgener.com)

The parties, who may include a provision during the writing up and agreeing of the contract as regards such debt, may, similarly, agree on this said matter after signing.

But after liability has occurred the agreement to be made between the parties in order to remove or reduce the debtors responsibility to reimburse, shall not be an agreement constituting non-liability, but shall incorporate a release from the debt or a compromise or settlement of the matter and this type of agreement (as regards the release of the debtor or the settlement of the matter) is not just for negligence alone but may be used for all types of offences.

The first type (limitation of liability) shall be evaluated herein below:

According to Turkish Code of Obligations (hereinafter referred to as "BK") Article 99:

"All conditions that release the debtor from liability resulting from fraud or gross negligence, shall be null and void. In case of negligence, if the claimant is working for the debtor when the debtor offers the condition which includes the acquittal of liability or if the liabilityarises from a privileged occupation (monopologized association of government) provided by the government; the judge, in exercising his discretion, shall deem the condition null and void".

The parties may limit the liability of the debtor by way of an agreement. This is referred to as an "agreement of non-liability". As per BK article 99/2, it is accepted that provisions may be included within the contract to limit the debtors liability, if he is found to be *negligent; but* exceptions of this rule are defined herein below.

But in any case, contracts where the liability is limited in relation to debtor's *gross negligence or wilful misconduct* shall be considered unlawful. When such a provision is found to exist within a contract, the whole of the contract terms shall not be considered null and void, only the provision in question shall be nullified as per BK article 20/2.

Most provisions that are included in contracts are often not for the non-liability of situations regarding *gross negligence*, but are for the purpose of not holding the debtor liable in any way or form. In such an event, this type of provision removes liability for *negligence* only and shall have no impact on matters ofgross negligence.

Contracts which refer not only to the removal of liability for wilful misconduct or gross negligence, but also to limitation of reimbursement shall be considered invalid as per BK article 99/1.

BK regulates two exceptions as regards the validity of non-liability in case of debtor's *negligence* In such circumstances, non-liability agreement as regards the debtor's negligence may be considered invalid and void by the court as per BK article 99/ 2. These circumstances and exceptions are as follows:

1. when the claimant accepts that the debtor is not liable for negligence whilst working for thedebtor, then the judge may consider the agreement to this non-liability of the debtor void. In fact, the law seeks to ensure that the claimant was not pressured into agreeing to limit the liability of the debtor. Therefore the judge would investigate whether or not such pressure was imposed upon the claimant during the execution of the contract as regards the limiting of the debtors liability for negligence. If it appears that the claimant came to such an agreement due to threat of losing his work, then the judge shall render such agreement also void.

2. If the liability came about as a result of debt due to privileged occupation provided by the government, then the judge, again, shall not consider the agreement to non-liability for negligence valid.The reason for this exception is, the customers shall be in a situation where they would be unable to reject the terms and conditions offered by the privileged association supported by the government as a result of pressure. Thissituation may be

abused by the debtor. The judge, in keeping this in mind, may consider the agreement to limitation of liability void. The law may make void any and all agreements limiting liability resulting from abuse arisingfrom this monopolized occupation/exclusive association of the government.

In summary, the parties should consider the above mentioned issues during the negotiations of a contract in order not to avoid a defence as regards the invalidity of such a clause in a possible dispute.

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ULGENER LEGAL CONSULTANTS / LAW OFFICE

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 provision of legal advice regarding local and international law,

Collection of outstanding premiums on behalf of P&I Associations,

Litigation and also corporate issues regarding yachts / superyachts.

Ship Finance - Sale & Purchase, as well as advising and assisting foreign banks and other financial institutions, covering also Turkish mortgages and disputes arising out of mortgages,

Assisting owners in respect of new building contracts and relevant steps to be taken after initial stage.

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 correspondents 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,

Legal advisers to Turkish Chamber of Shipping.