

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

Newsletter of Ulgener Legal Consultants – Law Office / Vol.14 – October 2012 / English Edition

CONTENTS:

1. Effects of International Conventions on New Turkish Commercial Code
2. Shipowner's Liability in the New Turkish Commercial Code
3. Liability of the Actual Carrier Under the New Turkish Commercial Code
4. Rotterdam Rules and Combined Service on Maritime Legislation
5. Developments and Vessel Arrest in Turkish Maritime Law

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

1. Effects of International Conventions on New Turkish Commercial Code

Atiye Pehlivan, LL.M.
(atiye@ulgener.com)

New Turkish Commercial Code (TTK) became effective as of 1st July 2012.

The general principles of international conventions were approved by the legalisation of new TTK. The provisions of International Convention on Maritime Liens and Mortgages (1993 Geneva Convention) were adapted for maritime liens and the provisions of the International Convention on the Arrest of Ships (1999 Geneva Convention) were adapted for the maritime claims. The adaption was done by translating the relevant articles of the mentioned conventions.

The maritime liens are listed under TTK article 1320/I in accordance with the article 4 of 1993 Geneva Convention. Besides this, general average distribution was also added as “maritime liens” to article 1320/I, pursuant to the authority provided under article 6 of the mentioned Convention.

In light of the above, maritime claims listed under article 1320/I are as follows:

- a) Claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;
- b) Claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;
- c) Claims for port, canal, and other waterway and pilotage dues;
- d) Claims based on tort, arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel;
- e) Claims based on general average distribution.

2. Shipowner's Liability in the New Turkish Commercial Code

Esin Taneri

(esin@ulgener.com)

In the new law, the system regarding the liability of the shipowner has been completely altered. This is one of the most significant reforms that the new law put into effect. The "limited liability in rem" concept that is valid in the former law and finds almost no application in the world anymore has been removed, and the responsibility on the basis of general personal property as indicated in the Code of Obligations has been made applicable in principle. However, the shipowner (and/or carrier, operator, pilot) has been given the right to request limitation of liability (Articles 1062/2, 1089/4, 1328 and cont.) according to the international conventions for the limitation of liability that the Republic of Turkey is a party to (1976 convention on limitation of liability for maritime claims– London 1976) and (1992 oil pollution liability convention– London 1996). Accordingly, in the new system, unlimited personal liability/responsibility is applicable while it is possible to assign a limitation on the amount as per the tonnage of the ship, on the basis of the conditions desired, what is requested, events giving rise to the responsibility, and the type of the ship. According to this new system established, in responsibilities other than oil contamination, the party requesting the limitation must submit its request through and before a court. This request could be in the form of a direct limitation or the establishment of a fund before the court. Furthermore, the rules of international convention have been extended in terms of their scope to cover national relations. On the other hand, there is an international fund that has already been established regarding the responsibility arising from oil pollution and as such disputes on the subject shall be directed to this fund and the fund shall be the addressee regarding the responsibility subject to the limitations.

Moreover, liability for "pilot's acts" has been added to the liability of the shipowner for the activities of the crew (Article 1062) (except the compulsory guide pilot). This arrangement, which has been put into effect as a new rule, can be applied, especially in situations where collision, wrongful act and environmental pollution are concerned. However, since the liability exception of the "Carrier" from the technical fault of the crew continues to be in effect in the new Turkish Commercial Code (Article 1180) and it has been accepted that the provisions pertaining to the liability of the Carrier are now valid for the "Actual Carrier", which is a new concept and in reality means the shipowner (Article 1191/2), the arrangement is no longer very meaningful in practice and also with regard to the charterparties. According to this provision, the liability of the shipowner (carrier) shall only be valid with respect to the acts of the guide pilot, when damage arises, for example, due to the fault of the pilot on a commercial basis regarding his/her duty of care for the cargo.

3. Liability of the Actual Carrier Under the New Turkish Commercial Code

Metin Uğur Aytekin

(metin@ulgener.com)

A contentious issue has been that of liability of the actual carrier. Hague Visby Rules and the old Turkish Commercial Code (Code Number 6762) did not take up this issue. However, Hamburg Rules (HR) was to

offset this shortcoming by its art. 10. Following in the footsteps of HR, the new Turkish Commercial Code (Code Number 6102) which entered into force in July 2012 addresses this issue, making the new liability regime coherent with HR, although Turkey is still not a party to it. This article shall give a brief overview of the main points of the actual carrier's liability pursuant to the new Commercial Code.

The New Commercial Code art. 1191 outlines the general regime of the actual carrier's liability. According to the art. 1191/paragraph (1), the carrier is responsible of the whole carriage whether or not the carriage was performed wholly or partially by an actual carrier. Likewise, the carrier's liability according to the Commercial Code continues emerging from acts or omissions of the actual carrier or its servants.

In the paragraph (2) while it is stated that all provisions with regard to the carrier's liability shall be valid also for the actual carrier with reference to the part of the carriage that was performed by it, the paragraph (2) also brings about a Himalaya-like clause by granting the right of making use of exclusion of liability events to the servant's of the actual carrier.

Pursuant to the art. 1191/paragraph (3) private agreements made by the carrier with a view to increase its liability (by waiving his rights given by this code or by undertaking additional responsibilities which are not outlined in the Code) will not be binding for the actual carrier, unless the actual carrier gives its written and express consent to such agreements.

The relation between the carrier and the actual carrier -when both of them are responsible for the same damage- is designed in the paragraph (4). Pursuant to which, both of them will be responsible jointly and severally in accordance with their shares in the act or omission that causes damage.

In the paragraph (5) it is expressly stated that the quantum of the compensation which will be demanded from a carrier, an actual carrier and its servants will not exceed the limitation of liability which is outlined by this Code.

And lastly, in the paragraph (6), the door is left cracked for compensation claims between the carrier and the actual carrier, by stating that the provisions of this article will not have any effect on the recourse relation between the carrier and the actual carrier.

Having a glance at the new regime of the liability and most notably on the actual carrier's responsibility the new Commercial Code promises to provide a level playing field for both of them and assures the third parties' right to bring a claim for their damages from the carrier or the actual carrier.

4. Rotterdam Rules and Combined Service on Maritime Legislation

Ozge Ozyurt

(ozge@ulgener.com)

Rotterdam Rules have been worked up especially for liner trade and carriage of goods by sea. Containerization of trade and transportation of cargo require relevant enforcement of law. International community makes efforts to create legal norms regulating relations in multimodal technology of contemporary transport, especially, marine transport.

The main providers of multimodal transport are Maersk, COSCO, Evergreen, CMA CGM, Hanjin, MSC, Hapag-Lloyd. As a rule, they run their services in accordance with their own terms and conditions. Such terms and clauses are taken from the existing international and national acts. Surely, such model of relations with clients is far from being perfect. Only universal international convention can meet the needs of the society.

There was an attempt to create such convention in May 24, 1980. The UN Convention on International Multimodal Transport of Goods was approved. This Convention did not come into effect up to this day and hardly ever does. The member nations, especially nations with strong shipping and other carriers of cargo considered that derogation from the existing legal provisions was too much for the benefit of freight forwarders. New type of party to transport process appears when the carriage has the multimodal character. This is a combined transport operator – (CTO). There are VO (Vessel operator), NVCTO (Non vessel combined transport operator) and NVOCC (Non vessel operating common carrier) among them.

CTO operates as a carrier assuming responsibility for shipment even if it is a freight forwarder who does not own any vessel or other vehicle. That system is known as unified system of responsibility. If CTO doesn't

assume responsibility for the whole shipment, but as a carrier of any certain type of transport for certain phase of carriage that system is called network system of responsibility. Such cases are very widespread and make about 80 % of the claims towards CTO. However, frequently no one knows when the damage occurred or the contract was breached. Such situation can be seen in container carriage. In this case the multimodal contract of carriage is valid and CTO liability is stipulated by that contract.

Nevertheless, the compromise has been made in Article 19 of the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980) according to which the network would have remained only in relation to the limit of CTO responsibility that cannot be lower than the limit stipulated by the imperative rules.

?Another attempt to settle down the relations related to international direct intermodal carriage, that is the carriage under the single transport document by various modes of transport, are Rotterdam Rules. It stands for the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea adopted in December 11, 2008. However, it is unknown whether the new Rules will be acceptable, namely, for liner operators and major associations of liner carriers. Approval of the Rules in the contemporary political and economic environment by the states participants of that Convention depends thereon.

?It looks like they will not be acceptable. The liner operators have been made the usual legal mechanisms regulating their relations with the clients by their pro-forms of the Bill of Lading. Meanwhile the Rotterdam Rules change the legal legislation for carriage by sea stipulated by the Hague-Visby Rules and Hamburg Rules. The legal statements of the Rotterdam Rules are not clearly defined.

Taking into account that the Hamburg Rules are not popular among sea carriers, the legal legislation stipulated by the Hague-Visby Rules still corresponds to the development of technologies related to the carriage by sea.

?5. Developments and Vessel Arrest in Turkish Maritime Law

Aylin Yazıcı, LLB
(aylin@ulgener.com)

A number of changes with the Turkish Commercial Code (the new TCC) have taken place. One of the main reasons for this new TCC was to ensure harmonization with various international conventions as well as making the language of the new TCC more simplified than its predecessor.

One of the main objectives of the TCC is to bring the requirements for arresting vessels in Turkey in accordance with the International Convention on the Arrest of Ships 1999 (the Arrest Convention). Previously, arresting a vessel in Turkey had been quite difficult and the new TCC now includes a list of 'maritime claims' for which a vessel may now be arrested. In such cases, counter security provided in the form of a bank guarantee or cash is often required by the Turkish court.

Previously, it had been at sole discretion of the court as to what amount of counter security should be deposited, though it usually varied between 15% - 40% of the amount of the claim. Sometimes, as regards the amount to be deposited, a much higher percentage would even be considered in order to protect any third parties' losses in relation to situations of wrongful arrest. However, the new TCC requires that a fixed counter security of 10,000 -SDR be provided regardless of what the claim amount may be. The amount of counter security may also be increased or even decreased, depending on the application of the parties. This provides leeway to assign such an amount as would best benefit the circumstances.

Unfortunately it is likely that delays in lifting an arrest shall continue. The new TCC still requires the local court where the vessel was arrested to issue a release order which can often delay the whole process.

The TCC offers harmonisation with international markets and more importantly, with EU regulations. An act or code is never perfect but it is hoped that the new Turkish Commercial Code shall at least be better equipped to deal with the maritime issues that today's commercial world presents. Furthermore, the adoption and implementation of new provisions takes time and cannot be expected to provide overnight miracles. It is

hoped that these revised provisions shall stay in effect for at least the next 50 years. The long time period provided for transition in relation to these changes allowed those active in commerce to make any necessary preparations thus, most if not all, necessary modifications should have been completed during the adjustment period.

Index of Articles of Past Issues

Vol.1

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

Vol.2

1. The new Turkish Commercial Code
 - a. Introduction
 - b. Highlights
2. News from the community-Launching of first Kamsarmax of Yasa

Vol.3

1. Salvage Under Turkish Law
2. Turkish Open Form ("TOF") - A closer look
3. Crew claims according Turkish Labour Law
4. Ince&Co – Ulgener Shipping Law Seminar
5. Our website
6. Latest status of the Draft TTK
7. News from the community

Vol.4

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

Vol.5

1. Present Status of the draft Turkish Commercial Code
2. Cargo issues: The burden of proof
3. Laytime issues: Hindrances effecting loading / discharging
4. Turkon Line – Our new exclusive clients
5. Ereğli Shipping – Our new exclusive clients

Vol.6

1. Turkish Shipbuilding – The differences between present and future system
2. Cargo issues: The burden of proof in relation with the argument of unseaworthiness
3. Laytime issues: Demurrage under Turkish Law

Vol.7

1. Piracy: Yasa Neslihan, A Hijacking with a happy ending
2. Pollution: Case Report in respect of cancellation of a fine imposed by the officials
3. Yachting – New tax regulation
4. Our new exclusive clients – Zer AS (Koc Group)
5. Our new exclusive clients - Beks Shipping

Vol.8

1. Turkish Open Form (TOF) at the Old Library, Lloyds
2. Rotterdam Rules and Turkish Commercial Code / Turkish Draft Commercial Code

3. Oguz Dagdeviren (Mr.), Our new blood

Vol.9

1. Turkey, Becoming A Party To 1996 Protocol (LLMC)
2. Ulgener – Maersk Seminar On Rotterdam Rules
3. Turkish Crew Repelling the Pirates, but how ?

Vol.10

1. NTCC: Auction abroad - deletion from Turkish registry
2. NTCC: Carriers' liability - the new regime
3. NTCC: Time charters
4. NTCC: Counter security for arresting ships
5. NTCC: Club Letter of undertakings
6. NTCC: Cancellation of charter - compensation of losses
7. NTCC: IMAC - the amended formation
8. NTCC: General Average
9. NTCC: Pollution

Vol.11

1. Activities
2. New faces in our office
3. NTCC: The liability of the Carrier in Respect of Unseaworthiness
4. NTCC: The Liability of the Actual Carrier

Vol.12

1. Activities
2. New Turkish Commercial Code: The liability of the Carrier in Respect of Unseaworthiness
3. New Regulation of Third party Compulsory Insurance

Vol.13

1. Activities & News
2. Collision Outline in Context with Provisions of New Turkish Commercial Code
3. Amendments to the Scope of Salvage within the new Commercial Code as regards the 1989 Salvage Convention
4. The Moldovan Flag for Registration of the Ship
5. Limitation of Liability by way of a contract or a contract term

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,??Legaladvisers to Turkish Chamber of Shipping.

????????????????????

Want to be REMOVED from future mailings? Please click the [link](#)