

## 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](mailto:info@ulgener.com)/[www.ulgener.com](http://www.ulgener.com)

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# THE BOSPHORUS ONLINE

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

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We have renovated our office, have regrouped & refitted ourselves and are now fully prepared for the new year. Next task is to have an overhaul and facelift to our new website.

As busy as previous years, we have spend 2013 working on diversified fields of maritime law, such as admiralty law and carriage of goods by the sea, as well as ship sale and purchase. It was a year where most of our clients were trying to cope with the ongoing rather difficult days of the World shipping market.

There were also happy news during 2013, our partner Mrs.Atiye Pehlivan became a mother, she has a handsome baby boy, his name is Kerem :) We wish him a lucky and healthy life !

We, as Ulgener team, take this opportunity to wish all of you a merry Christmas and a happy, healthy and prosperous 2014 !

Sincerely Yours

Prof.Dr.M.Fehmi Ülgener

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## **1. Important Court Decision for Salvages made in Turkish Monopoly Area**

***Dr.M.Fehmi Ulgener, Partner***

[Fehmi@ulgener.com](mailto:Fehmi@ulgener.com)

MV XYZ is a reefer container vessel and was sailing at Marmara Sea in a partially loaded state, where she has temporarily lost steering due to engine breakdown. She started drifting towards to shore, where tugboats of the Coastal safety interfered and took her to a safe anchorage, where repairs were conducted. Coastal Safety declared that the matter is a salvage and they have deserved remuneration. Upon instruction from the headquarters, master of tug boat presented TOF (Turkish Open Form) to the master of MV XYZ for signing. Re our appointment as lawyers acting on behalf of the H&M underwriters for the matter, we have advised the owners and the master, not to sign the TOF, since based on the circumstances the demand of salvage remuneration would be concluded in a fashion against the interests of the vessel. As a consequence of the rejection of TOF, vessel and her cargo was arrested by the salvors.

A considerable effort was spend to collect cargo documents and cargo valuation, (cargo inside containers) and to determine value of the "salved property" (vessel, cargo inside containers, empty containers, bunkers), which was considered by the salvors USD 32.933.850, (vessel USD 18 M, Cargo USD 14.5 M, remaining for bunkers)

Eventually a bank letter of guarantee (USD 9.5 M) has been provided to enable release the vessel and her cargo.

All efforts thenafter to reach an amicable settlement was proved to be fruitless, with a result of a demand of salvage remuneration amounted as USD 2.800.000, which was representing a ratio of % 8.5 of the salved property. This demand has not been accepted by the vessel and cargo interests.

Consequently, salvors have launched their case against the vessel and her owners, with the legal argument that they have performed a salvage operation, as a consequence of which vessel and cargo has been put in full safety and as per the rules of Turkish Commercial Code, they have the right of demanding salvage remuneration.

As defence, it has been put forward that based on the principles of the law of admiralty, both domestically and internationally, the demand made of the claimants has to be rejected or to be considered on a significantly lower scale. According the award, which was in line with our arguments has been appealed by the salvors, but has been approved by the Court of appeal (which indicates that the award has been finalized):

*"The vessel was pulled by S?nd?ren 4 and was made drop anchor Sevketiye 8:59 am. The ship had to be considered facing a peril, for her, her cargo and against third parties, since the electrical system broke down and generators stopped working, which prevents dropping anchor and also since the rudder came out of control since consequently the main and the second engine developed failure. Considering that there are two sharp turns in Dardanelles and submarine cables with currents under the sea as well as the intense sea traffic, the vessel is deemed to be a "vessel not under command" starting from the moment the engine developed fault at 1:20 am on June 6th 2007. The value of the salvaged property is USD 32.933.850 and*

according to the expert report 2.5 % of such value (USD 823,346.25) could be demanded from the vessel and cargo interests as remuneration for salvage services. Pursuant to the relevant articles of the Turkish Commercial Code, a salvage fee could be determined by the court up to the 2.5 % of the salvaged property considering the size of the danger for the ship and for the environment and the time duration the vessel remained as a "vessel not under control" (about 7-8 hours)."

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## 2. Indefinite and partial claims as per Turkish Law

**Atiye Pehlivan, LLM, Partner**

[Atiye@ulgener.com](mailto:Atiye@ulgener.com)

Basic principles and rules as to the procedural mechanism of the cases, including but not limited to the commercial ones, are handled as per a specific code in Turkey. The last code in that regard is the New Turkish Procedural Code numbered 6100 (hereinafter to be called as "HMK") which came into effect as of 1<sup>st</sup> October, 2011 and brought numbers of different rules to the Turkish litigation mechanism and practice.

One of these new rules is the "*indefinite claim cases*" (*belirsiz alacak davasi*), regulated under article 107 of HMK. Article 107 provides the possibility of filing cases with indefinite monetary claims:

According to the mentioned article, should a claimant can not determine its claim amount or should this determination is considered as impossible as of the date of launching the case, the claimant may file its case with a symbolic amount. However, in case the claim amount could be determined during the trial or could be calculated as per the info given by the opponent party, the claimant shall be entitled to increase this symbolic amount to the real figure during the trial. One important benefit of this new type of case is related to the "time bar" issue. Although a clear rule as to this issue is not regulated under HMK; in doctrine, it is argued and thought that indefinite claim cases cut off the time bar for the whole claim amount (for the symbolic amount and for the remaining amount, as well), provided that the aforementioned conditions (set forth under article 107) are met while filing these kinds of cases before courts.

The other type of the cases is "*partial cases*" which is regulated under article 109. Only the divisible claims could be subject to these kinds of cases. On the other hand, in case the claim amount is definite and indisputable between the claimant and the defendant the partial cases could not be launched and naturally the claim amount could not be divided.

It should be born in mind that, partial cases do only cut off the time bar for the part that is launched at the beginning of filing the case, but do not cut off the time bar for the remaining amount. The time bar is deemed to be cut off once the remaining amount is claimed and once the relevant duties and dues are paid for that purpose during the trial process.

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## 3. Procedure and Stages of Commercial Cases in Turkish Practice

**Duygu Yazici, Assc.Lawyer**

[Duygu@ulgener.com](mailto:Duygu@ulgener.com)

### **First Stage- Submissions**

- Exchange of first set of submissions

To begin a lawsuit in commercial court, the claimant files a submission to the court and serves a copy of the submission on the defendant. This submission ("**submission of case**") describes the claim, explains how the defendant caused the claim and asks the court to order a relief. A claimant may seek compensation and also may ask the court to order security. This and all submissions of the parties are always sent to the counter party by the court. However the parties may choose to visit the court and receive the submission of the counter party by themselves.

The defendant shall reply within two weeks beginning on the receipt date of the submission. This reply of the defendant ("**submission of reply**") consists of defences and replies of the defendant against the claim. The defendant shall serve their evidences with this submission. An additional time may be asked the court if it is impossible or very difficult to prepare a reply submission within two weeks. However, the additional time may not exceed one month.

- Exchange of second set of submissions

The claimant has two weeks to reply ("**reply to defendants's submission**") to the defendant's submission after the receipt date. Therewith, the defendant has one more opportunity to make their defences and comments ("**submission of 2nd reply**"). Both parties shall also lodge their evidences with these submissions and they both shall lodge these submissions within two weeks beginning on the receipt date of the counter party's submission. The stage of the submissions finishes after the defendant lodges the submission of 2.reply.

### **Second Stage- Preliminary Examination ("Ön Inceleme")**

At preliminary examination stage, the court examines the "first objections" which are defined and listed within HMK (such as jurisdiction) and "case condition" which are set forth within HMK for launching a case (such as "legal benefit"). In order to complete the preliminary examination stage, the court determines a date for "preliminary examination hearing". During the hearing, the court listens the parties if it is found necessary, determines the issues which parties do agree and do not agree on and invite the parties to give a try to settle. In case that the parties could not settle and the court decides that every condition is fulfilled and there is no valid first objection, the court determines a hearing date, gives parties two weeks to lodge their last evidences and documents.

### **Third Stage- Trial**

At this stage, the court evaluates the matter of dispute by examining the evidences and the submissions of the parties. The court usually appoints experts in order to evaluate the file. The tribunal of experts shall write a report which clarifies the matter of dispute. Once the expert report is provided to the parties, the parties shall have the right to raise their objections and

comments within two weeks after the receipt. The parties may demand from the court to ask an addendum which will be prepared by the current tribunal of experts or to determine a new tribunal of experts. If the court considers the first report as insufficient based on the objection of the parties, it may decide to ask an addendum or determine a new tribunal of experts. Likewise, both parties shall make their objections or comments to the addendum or to the report of the new tribunal of experts within two weeks beginning on the date of receipt.

#### **Fourth Stage- Appeal**

As of today, the decisions of the Commercial Courts could be appealed by the parties within 15 days beginning on the receipt date of the decision. At this stage, the evaluation and examination of the case is made by the Court of Appeal. Unless one of the parties demand for a hearing in his submission, the evaluation of the parties' objections is made by examining the submissions and evidences, without hearing the parties. In case that the parties consider the decision of the Court of Appeal as unjust, they shall have the right to apply to the same circle of the Court of Appeal for the revision of that decision within 15 days beginning on the receipt date. In that case, the same circle of the Court of Appeal evaluates the objections by examining the submissions and evidences, without a hearing. In conclusion, applying for the revision of the decision is the last legal remedy which parties may apply.

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#### **4. Fresh power and mind to Ulgener Team**

We are pleased to announce that Ms.Duygu Yazici have joined our team as a lawyer effective as of 1.1.2014. We wish her a successful and prosperous career. We are sure that she has a lot to offer to the Ulgener team.

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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.

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