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INTRODUCTION

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 providing legal advice regarding local and international law,

Collection of outstanding premiums on behalf of P&I Associations, Ship Finance - Sale & Purchase, as well as assisting foreign banks and other financial institutions, covering also mortgages and disputes arising out of mortgages, 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 correspondent 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, Serving as legal advisers to Turkish Chamber of Shipping, also representing the Chamber at the Bimco Documentary Committee.

1. PREPARATIONS FOR THE SALE OF FOREIGN FLAGGED VESSELS IN TURKEY

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Turkish Commercial Code Article 1384 (bearing the title "Preparations for the sale of foreign

vessels) reads as follows:

1- Should a foreign flagged vessel is required to be sold, the bailiff informs this matter to the consulate of the flag state and demands the registry records of the vessel in order to prepare the encumbrance list of her. The claimant is also entitled to provide the approved/certified registry certificate to the bailiff's office. In such a case, encumbrance list shall be prepared in accordance with the registry certificate that had been provided firstly.

2-The auction announcement to be made as per the Execution and Bankruptcy Code article 126 shall be informed by the bailiff or the interests to the below parties concerned:

a) The relevant authority (within the country at which the vessel is registered) that should have the registry records of the vessels,

b) The registered mortgages,

c) The maritime lien claimants (provided that those should be informed to the bailiff's office)

d)The vessel's owner registered at the ships registry

or, at the interests' charge and expense, the auction should be announced at one of the newspaper which has over fifty thousand circulation over the country at which the vessel's registry is actually held.

3- The announcement regulated under subparagraph (2) above shall be made by registered letter with returned receipt, the electronic communication methods that confirm the receipt or any proper way and devices."

The abovementioned article clearly regulates the steps to be taken for the sale of the foreign flagged vessels by auction in Turkey.

The point that should be taken into consideration is sending the relevant announcement to the underlying registry in case the vessel is subject to bareboat charter.

In some cases, the mortgagees give their consent to the owners to agree on bareboat charter agreements without registering the right of mortgage at the bareboat registry.

However, in such cases, the bailiff's offices may send the announcement to the bareboat registries instead of underlying ones due to the misinformation given to the bailiffs. In these circumstances, the bareboat registries send free from encumbrance certificate without emphasizing the presence of an underlying registry.

Needless to say that this may cause the mortgagees to loose their rights over the vessels.

In one of our cases, we, Ulgener Law Office, representing a mortgagee, applied to the court demanding withdrawal of sale by auction due to the fact that the announcement of the auction had not been sent to our Clients (that has a first degree mortgage over the vessel) nor to the actual and underlying registry since the bailiff's office only applied to the bareboat registry due to the misinformation given to him by the third parties. It should be noted that the bareboat registry (as the encumbrances are not recorded at this registry) had emphasized the fact that "there are no encumbrances on the vessel". At the end of the proceeding, the court gave in favor of the Clients; therefore the auction shall be renewed.

In summary, the mortgagees should bear in mind the risks of bareboat charters; on the other hand if this is a "must" for the parties, they should insist on the registration of their mortgages at the bareboat registries as well.

2. ARBITRATION AND JURISDICTION AGREEMENTS AND TURKISH COURT'S POWER TO ARREST VESSELS IN TURKISH WATERS

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Turkish court's power to arrest vessels despite arbitration or foreign jurisdiction agreements between the parties has been a subject of controversy. This issue is expected to be offset by the new Turkish Commercial Code (TCC) which entered into force in July 2012.

Under the new TCC, Turkish courts are clearly authorized to arrest vessels for maritime claims catalogued in the article 1352 of the new TCC. Among such claims, there are claims that the parties are entitled to agree to refer the case to arbitration or to courts in another jurisdiction or claims that could be agreed to be governed and construed in accordance with another country's law other than Turkey.

In case of such an agreement, the art. 1356 of the new TCC clearly empowers Turkish Courts to issue arrest order when the vessel is anchored, moored to a buoy or a mooring block, moored or laid on the stocks in Turkey. The flag of the vessel, whether Turkish or not, does not affect the Turkish courts' power to arrest vessels. Such article is the projection of the art. 2 (sub-paragraph 3) of the International Convention on the Arrest of Ships (Geneva, 1999) on the Turkish law.

It is also possible for the parties who have commenced arbitration or filed a case in an another jurisdiction to request arrest order from Turkish courts when the vessel is anchored, moored to a buoy or a mooring block, moored or laid on the stocks in Turkey.

In order for the court to issue arrest order, the maritime claimant is not expected to provide conclusive evidence. Evidence which provide a general opinion as to the claim on the judge is deemed enough. Therefore, the main core of the dispute could still be handled by arbitrators or by courts in another jurisdiction and the parties could keep some of their evidence to themselves which they only prefer to expose once the arbitration or court jurisdiction has started.

Once the arrest order is issued and the vessel is arrested, the parties may present their plea before arbitrators or court in another jurisdiction or have the court handled the dispute pursuant to another law other than Turkish law and could present their all evidence at that time.

In a nutshell, recognizing the urgent nature of arresting vessels for maritime claims, the new TCC, clearly paved the way for the parties to apply to Turkish courts for arrest orders while the vessels are in Turkey (except for the vessels passing in transit in the Turkish Straits) in cases where the parties agreed to refer the dispute to arbitration or to courts in another jurisdiction or agreed that the claims to be governed and construed in accordance with another country's law other than Turkey.

3. DETERMINING THE LAW TO BE IMPLEMENTED IN CASE OF A CLAIM IN DIRECT CONNECTION WITH THE VESSEL WHICH LOCATED IN TURKEY

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It is a matter of dispute whether a claim could be construed as a claim in direct connection with the vessel which grants the claimant a maritime lien on a foreign flag flying vessel which is located in Turkey. As a natural result of the commercial activity of a vessel, it can be located in any point

different from its registration location and it is for this reason important to determine which law will be applied in order to answer this question.

Titled "Transportation Vehicles", the art. 22 of the Law on the International Private Law and Remedial Law (entered into force on 27/11/2007) states that rights in rem on marine transportation vehicles are subject to the law of the state of the origin of such vehicle. And, the state of origin of such vehicle means the registry location of the vehicle. In case a registry location doesn't exist, the state of origin means the port of registry then.

The abovementioned art. 22 is likely to cause complex problems since when a person, i.e. a seaman, applies to the court in Turkey for their wages, or other sums due to them with respect to their employment on a vessel or to another right in rem against the vessel which registered to another country other than Turkey but located in Turkey at the time, the Turkish court has to handle the matter according to the law of the state of origin. What this means is that the Turkish judge must "know" the law of the state of origin and has to rule according to that law. Considering particularly the position of easy-flag states in global marine trade, it is very hard for a Turkish judge to determine whether a claimant whose claim is in direct connection with the vessel has maritime lien right on the vessel according to such countries or not.

The new Turkish Commercial Code aimed to bring clarity on this issue. Namely, according to the Art. 1320 (sub-paragraph 3) of Turkish Commercial Code (entered into force on 01.07.2012) states that "It will be determined according to Turkish Law whether a claim which put forward through legal procedure in Turkey gives the right of maritime lien to the claimant". It is apparent that according to this code it is ruled that the decision as to whether a maritime lien exist or not on a vessel which is registered in a foreign country which located in Turkey at the time will be made according to Turkish law.

It is also necessary to express that the art. 1320 is consistent with "International Convention on Maritime Liens and Mortgages", (1993). The art. 1320 provides the opportunity of easiest and fastest collection of the claims from the aspect of the person who has the right of maritime lien. Similarly, if there are 2 or more claimants who has maritime lien right on the same ship, the order of the rights will be made according to Turkish law, because the issue about the order of the rights regarding to the maritime liens is related with procedural law. Moreover, once such claim is accepted by the court, all procedure including the seizure of the ship, selling it through compulsory attachment, and handover of the ownership of the ship are subjected to the procedural law. Therefore, Turkish law will be implemented in the performance of such procedure in Turkey, as well.

4. FORECLOSURE OF MARITIME MORTGAGES THROUGH SEIZURE WITHOUT JUDGMENT UNDER TURKISH LAW IN TURKEY

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As is known, there are two ways of establishing mortgage on vessels. First of these is to establish a mortgage on vessel by an agreement which is executed between the parties for the purpose of securing the receivables, and the second is possible by the right of mortgage arising under the provisions of law; in other words, through a right of mortgage granted by the law to the mortgagee on the vessel based on the nature of the receivables.

1-

a) Foreclosure of Maritime Mortgages Established by a Contract

The common clauses of the Code of Enforcement and Bankruptcy (İİK) regarding the foreclosure of the mortgages (İKK, §148-150/d) and the foreclosure of the lien (İKK, §150/e-153) are applicable to

the foreclosure of the maritime mortgages established by a contract. As mortgages on the vessels, that's the buildings under construction are subject to the same clauses as the maritime mortgages are, the rules as specified herein are also applicable to the buildings (vessels under construction).

If a mortgage is established through registration under ship registry upon notarization of signatures as a result of mutual agreement between parties, and if there is no court judgment which is rendered about the receivables or the mortgage, the mortgagee shall be only entitled to take proceedings without any judgement through foreclosure.

b) Foreclosure of Maritime Mortgages Arising under Law

If a right of mortgage arising under the law is registered to the ship registry, the mortgagee shall be only entitled to take proceedings without any judgement through foreclosure.

2- Competent Enforcement Office

As per the Code of Enforcement and Bankruptcy, in case of foreign-flag vessels, the enforcement office where the vessel is arrested and for Turkish flagged vessels, debt enforcement office where the vessel is arrested or the enforcement office located in the same jurisdiction where the ship is registered shall be the competent enforcement office. As is seen, the rule of jurisdiction as set out for Turkish flag vessels is optional. Therefore, if a vessel is Turkish flagged, and in the event of arrestment of the mortgaged vessel, the mortgagee shall be entitled to start proceedings at the enforcement office within the same jurisdiction as the registry through foreclosure, notwithstanding the enforcement office where the arrestment has been applied.

3- Request for Enforcement Proceedings

The enforcement proceedings without judgement regarding the foreclosure of the maritime mortgage shall be started upon submitting a request for enforcement proceedings as per the IKK, §58. In the relevant request, the details of the mortgagee, the mortgagor, and the vessel owner where the vessel owner is another person than the mortgagor shall be provided, and the details of the receivables and the maritime mortgage shall also be provided. A copy of the mortgage agreement shall also be submitted along with the request for enforcement proceedings.

4- Payment Order

The Bailiff who has received the payment order shall send to the debtor the payment order issued in accordance with the Regulation on IKK, §31. This payment order shall also state that the time granted for the debtor to pay the debt is 30 days, and the period of objection is 7 days.

The payment order shall also be served to the mortgagor and to the owner where the owner is different from the mortgagor. For the maritime mortgages on the vessels registered in Turkish registry, the notifications shall be made to the registered addresses in accordance with the IKK, §148/a. However, the notifications to be made to the vessel owner for the foreclosure of the maritime mortgage on a foreign-flag vessel can also be made to the master of the vessel in accordance with TTK (Turkish Commercial Code), §1104.

As per the IKK, §150/c, for the vessels registered under Turkish Registry, the Enforcement office is obliged to notify that the proceedings for the foreclosure of the maritime mortgage has been started to the ship registry office. Following the receipt of this notification, the ship registry office is obliged to register such information in the registry.

5- Objections

Mortgagor and, if another person, the vessel owner may object to the debt within 7 days. However, there is no right to object to the maritime mortgage granted to the mortgagor and, if another person, the vessel owner. Although the mortgage agreement does not serve as a copy of judgement or a final document, there is the rule of non-objection to the mortgage since the signatures on the mortgage agreement have been notarized. If the debtor or the vessel owner seeks to have the mortgage revoked, they are obliged to bring a lawsuit, and deposit the securities as set forth in the IKK, §150 c.3.

6- Rights of the Mortgagee

a) If no Objection is raised to Debt

In case of failure to raise objection to the debt within 7 days, the debt shall be finalized. In such case, if the vessel has been previously arrested, then that arrestment shall be finalized. If the vessel has not been previously arrested, then the mortgagee shall have a definite right to arrest the vessel.

b) If an Objection is Raised to Debt

In case of an objection raised to debt, the mortgagee shall be entitled to request from the enforcement court to lift the objection and from the general court to revoke the objection.

5. THE EFFECTS OF EASY-FLAG COUNTRIES ON MARINE SECURITY

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One of the methods of demonstrating the nationalities of the ships is the flag they carry. The ships are subject to the nationality of the countries of which flag they have the permission to carry. On the other hand, those countries have also the authority to determine the presence of the provisions for those ships to be recorded in registry in their countries and the right to display their flag. If a ship gets the permission for registration in a country and for displaying their flag, then this state becomes the flag state of that ship. And the flag state has the authority to specify the technical properties of ships under its authority and the administrative conditions.

Rather than carrying the flags of their own countries, majority of the merchant ships prefer to register in registration of other countries. But, when considering the past, almost all of the merchant ships, due to the effects of both of nationalism and the anti-globalism, have carried the flags of their own countries until the World War II. But after the end of WW II, through the globalization movement which USA has initiated and the enlargement of global market, the ship owners have started to prefer register their ships into registration of other countries offering higher mobility and particularly the tax advantages.

The total tonnage of ships registered in 5 biggest states of registry (Panama, Liberia, Greece, Bahamas, and Marshall Islands) constitutes the 43% of total tonnage of world's fleet. The ones having the majority of world's tonnage among those 5 flag states are Panama and Liberia. Such that; Panama constitutes the 22.6% of world's total tonnage, while Liberia constitutes 10.5%.

Because of basic and non-deterrent legal regulations, these easy-flag countries draw attention of ship owners in registration issue. The easy-flag is on agenda of entire world, particularly the developed countries. Within this context, we can list the general reasons of easy-flag preference as follows; i) Conditions about the ship and cruise, ii) Provisions and obligations about the seamen, iii) Tax, fee, and registration fees, iv) Social insurance payments, v) Others.

As IMO stated, the obligation of flag state to ensure the security of life and property on sea includes protecting the seamen from terrorism on the sea. Also, according to the Article 1 of Open Seas Convention, these states have the obligation to take certain measurements in order to ensure the security of those ships carrying the flags of their countries. Within the scope of the rules IMO specified, the responsibility of ensuring the security of life and protection in seas belongs to the flag state. Because the easy-flag states have deficient legal regulations in terms of Marine Penal Code, and due to deficient marine police forces, many of the rights are lost. For this reason, while ship owners profit from these facilities on one hand, it leads to seamen working in their ships to carry excessive risks on the other hand.

As a result; even though it has many economic advantages, easy-flag practice is a practice having negativities and problems from the aspect of security of life and properties on the seas. In case that comprehensive legal regulations are implemented by responsible countries in terms of marine penal proceedings, it would be possible to better protect the seamen.



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