THE BOSPHORUS ONLINE

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CONTENTS

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 Comittee.

1. EARLY FORCED SALE

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Conditions of "early forced sale" are set forth within article 1386 of Turkish Commercial Code ("TTK"). The relevant article reads as follows:

(1) should the owner of a Turkish or a foreign flagged vessel is also the debtor of the maritime claim, early forced sale could be demanded by the owner as well.

(2) should the vessel's value is decreasing rapidly or the maintenance of her becomes very costly or especially the maritime lien claimants occur or the number of these increases then the Bailiff or the claimant may apply to the execution court for the early forced sale of a Turkish or a foreign flagged vessel which is subject to a provisional or permanent attachment. The execution court shall obtain the thoughts of the concerned parties that could be realized from the file and give his award afterwards. This award shall be appealable. The court should evaluate this kind of application on a preferential basis. Application to the court of appeal shall cease the court's decision concerning the execution of the early forced sale.

(3) Should the vessel or her cargo causes danger against the humans, the properties or the environment then the bailiff or the Harbor Master may apply to the Execution Court for the early forced sale of a Turkish or a foreign flagged vessel that is subject to a provisional or permanent attachment. Rules stated under paragraph 2 above shall be applicable for this application as well. However the application to the court of appeal shall not cease the court's decision concerning the execution of the early forced sale.

(4) Bailiff's Office shall deposit the sale price to a deposit account to be determined by the execution court for the purpose of accumulate of the price in a quarterly basis to be operated till the apportionment of the price of the vessel.

According to a latest decision of an execution court of Istanbul, the early forced sale demand of a claimant was rejected due to the fact that this demand was brought before execution court after the attachment had already become permanent and the usual sale had already been demanded.

2. THE CHARTERER'S AND THE SHIPPER'S STATEMENTS AS TO THE CARGO AND PROTECTION OF THE CARRIER AGAINST INCORRECT AND INADEQUATE INFORMATION

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Under Turkish law charterer and shipper are obliged to give correct and adequate information about cargo to carrier. Both charterer and shipper are deemed responsible for their incorrect or inadequate statements against carrier. In the event that charterer and/or shipper breach this rule, the carrier, who suffers loss by relying upon the representation, will be entitled to recover the damage.

It is charterer's and shipper's obligation to inform carrier about the condition of the cargo according to Turkish Commercial Code (TCC) art. 1145 which reads as follows;

"The charterer and shipper have to provide the carrier correct and adequate information about the cargo. Any of them who fail to do so is liable for the damage of the carrier".

The reasoned explanations of this article also exhibits the main purpose of the article: "In order to protect the carrier who has no (physical) information about or opportunity to detect/examine the cargo whatsoever until when they take the cargo in their possession, it is found convenient to provide a guarantee responsibility in relation to all statements regarding the cargo in accordance with the Hague Convention of 1924."

With this article it is recognized that providing the carrier correct and adequate information as to the cargo is of crucial importance for the safety at sea during the voyage, for proper stowage and for loading and discharging operations to be completed properly. In addition to these, correct and adequate information is also important to issue bill of lading correctly. Information about the cargo also includes information as to the signs of the cargo in order to separate the different cargo from one another. Moreover, it is important to determine the amount of freight, as well.

On the other hand, charterer and shipper are not responsible for the damage of other related parties unless charterer and shipper have fault. The term "other parties" entails shipowner who is not the carrier, other cargo interests whose cargo is loaded on board, passengers, master and other seamen.

Recognizing the importance of the correct and adequate information as to the cargo, TCC art. 1145 provides the carrier protection against the charterer's and shipper's incorrect and inadequate statements who are naturally expected to be in access to necessary information about the cargo. Moreover, parties to the contract are not free to alter this rule. Failing to provide correct and adequate information will cause them to recover the carrier's damages as a result of their failure whether they are at fault or not.

3. DIFFERENCE BETWEEN A COMPANY WITH FOREIGN CAPITAL AND A COMPANY FROM FOREIGN ORIGIN

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In Turkey, according to the new Turkish Commercial Code (TCC) which entered into force in July 2012, companies which registered to a trade registry in Turkey are going to be deemed as a company from Turkish origin regardless of the nationality of the investor's nationality. In practice, there are times when a company which is established by a foreign investor assumed to be a foreign company and this could give rise to faulty assessments as to the investor. Pursuant to Turkish law, the nationality or origin is determined according to the place where the company is established. Therefore, in the case that a company is established in a foreign country, it will be construed as a foreign company even if its all capital is paid by Turkish nationalities. And, a company which is established in Turkey with the capital paid by foreigners will be deemed as a Turkish company with the title of "a company with foreign capital".

Another important point to mention regarding the subject is that under Turkish law there is no obligation to have a Turkish citizen shareholder in Capital Companies, this means that according to the Turkish legal system, companies which are established with 100% foreign capital are completely valid. Moreover, the new TCC opened the frontier for foreign investing groups or individuals to launch joint stock and/or limited companies by only themselves without the need for another shareholder. It is apparent that the reason for this new regulation is to attract as much as foreign investor to Turkey.

As a last word, we would like to mention about the main act regarding the foreign investments which is titled as "Direct Foreign Investments Code" (Code number: 4875). The article 2 of such Code which is titled as "the definitions" clearly deems the act of bringing capital from another country and establishing a company in Turkey with such capital, as a "direct foreign investment". The mentioned "establishment" does not make the company "foreign", but rather the fact that the company is established with foreign capital provides such company many privileges with the Direct Foreign Investments Code. Considering all these together with the structural simplicity and convenience provided by the new TCC, one may construe Turkey as preferable to establish a company with foreign capital.

4. DIRECT APPLICATION RIGHT OF THE THIRD PERSONS TO P&I CLUBS

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There must either be an open provision in the law or a clear arrangement in the agreement, signed between the insurer and insured to enable the third persons, who suffered, apply directly to the Insurer of the person who caused the damages. There weren't any provisions in former Turkish Commercial Code, which regulated direct application rights of the third persons, who had suffered because of wrongful acts, related to their liability insurances. But, Supreme Court has brought an agreement, so direct litigation right could also be accepted in liability insurances by benefiting from arrangements in other various insurance branches. In order to prevent this confusion, the legislator has brought a new arrangement with article no 1478 in the new code.

In accordance with this article; "The injured party can demand the compensation of the part of his/her damages up to the insurance amount directly from the insurer under the condition that it will remain within period of limitation, valid for insurance agreement.

But, there are also opinions that the opposite can also be resolved with the agreement, signed between the insurer and insured, as a result of interpreting this aforesaid provision together with other provisions related to the insurance. Since article no 1478 hasn't been considered as a mandatory article amongst the other provisions in the Code and the discussions regarding to this matter haven't been cleared yet, this issue will be clarified with the court and supreme court orders, which we will confront in future.

But, it is hereby emphasized that the aforesaid provision won't have any effect from the point of agreements, made with foreign P&I Clubs and the arrangement will be applied only to those, which are subject to the Turkish Law, regardless whatever the direction of the court or supreme court orders are.

5. ADOPTION AND EXEQUATUR IN TURKISH LAW

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Under normal conditions, it is not possible in actual Turkish law for the ruling of a foreign court to be effective and valid. This situation emerges as a result of states' perception of sovereignty. In Turkish law, for a writ of tribunal to have execution ability, the ruling must be made by Turkish courts. But, as a result of the need for foreign court rulings to be able to lead results in another country, the adoption and exequatur institution has emerged.

It is possible to determine whether the foreign court ruling is adoption or exequatur based on the nature of the ruling. In general, the court rulings have the ability of execution and the effect of res judicata. But not every court decision has the ability of execution. For this reason, the exequatur is available for declaratory rulings and constitutive rulings from the aspects of adoption and performance rulings.

A point which is confused in practice is the situation of exposure of a foreign court ruling to complete adoption or exequatur. But, despite this situation, both it is possible for a court ruling to contain both of adoption and exequatur. This is because the court rulings can have both of the declaratory and execution characteristics.

In Turkish law, there are pre-conditions and principal conditions of adoption and exequatur. From the aspect of **pre-conditions,** there must be a foreign court ruling to constitute the subject of adoption or exequatur. As a second pre-condition, that foreign court ruling must be related with a civil law suit. So, the court ruling to be subjected to adoption or exequatur must not be related with the administrative, criminal or tax suits. Again, another point which is confused in practice is that, no matter if the court ruling is related with administrative, criminal or tax suit, that ruling may be subjected to adoption or exequatur if it is related with the domain of private law. The final pre-condition is that the foreign court ruling must be finalized.

From the aspects of **principal conditions**, the condition of reciprocity as an exemption is sought for only the exequatur. Another principal condition is that, from the aspect of conflict related with the foreign court ruling to be subjected to adoption or exequatur, the Turkish courts must not have exclusive authority. The most important among the principal conditions is the situation of being not contrary to public order. So, it is required for the foreign court rulings to not be contrary to Turkish public order. Since the situation of being contrary to Turkish public order is open for interpretation and for wide discretionary authority of Turkish courts, it is possible to face with difficulties in adoption or exequatur procedures. The point to be understood from this is that, in case that the court passing the judgment haven't invited the defendant legally or the defendant haven't been represented, or the ruling has been made illegally in absence of the defendant, the compliance with these rights is investigated upon the objection of the defendant.

The result emerging from both of the preconditions and principal conditions is that Turkish court cannot control the legality of the rulings of foreign courts. This is named prohibition of revision.

Finally, considering the procedure of adoption and exequatur, since the adoption and exequatur are different lawsuits, and the exequatur suit must always be commenced independently. The exequatur suit is subjected to the petty session method. For this reason, from the aspect of commencing the suits during the judiciary recess, the times are keeping counting in Turkish law. The court charged in adoption and exequatur suits is clearly determined in International Code of Private Law's Article 51 as the court of first instance. The term "Court of First Instance" means "Civil Court of First Instance". It cannot be thought that commercial courts of first instance would be charged. This is because the adoption and exequatur are not the issues requiring any specialty.

In cases where the adoption suit cannot be commences as independent suits, the court of the region where the main case is pended is the court authorized for the adoption. But, when the adoption and exequatur suits are commenced as independent lawsuits, it may be requested from the court of region of Turkey where the defendant resides, or one of the courts of Ankara or Istanbul or Izmir if the defendant has no residential address within the borders of Turkey.

Finally, the adoption and exequatur of the rulings of foreign courts are regulated in International

Code of Private Law. In addition to that, Turkey has agreements with many countries where there is no principle of reciprocity. Adoption and exequatur can be executed through both of International Code of Private Law and collective agreements. Unless it is not contrary to forms and conditions mentioned in the code explained above, it is possible for a ruling of a foreign court to obtain execution ability.

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