THE BOSPHORUS ONLINE

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1. HARDSHIP AND FORCE MAJEURE IN CONTRACTS

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Contracts generally include a "force majeure" or "hardship" clause outlining the requirements for establishing the existence of a force majeure situation or hardship that prevents or impedes a party's performance of its contractual duties.

Force majeure and hardship are frequently invoked in international trade in case of the occurrence of unforeseen events. The main difference between a force majeure event and a hardship is that the former occurs when an event makes the performance of a contract impossible or impracticable. However, in the latter the performance of the contract is still possible but there is an event or a situation that substantially economically upset the balance of the contract.

In practice, when there is a force majeure situation the party who successfully invokes force majeure will be relieved from performance of the contract, while in the hardship the party who undergoes hardship could renegotiate the contract and in some cases ask adaptation in the contract terms to the changed circumstances that created hardship for the performance of the contract.

Due to its importance in international trade the International Chamber of Commerce (ICC) also provides guidance on force majeure and hardship in contracts by creating relevant clauses. While civil law countries, including Turkey, abstain from giving a clear and/or specific definition of force majeure with a view to leave space for it to be defined under the circumstances of each case, common law countries tend to list several specific situations that will be considered as force majeure.

ICC Force Majeure Clause, on the other hand, combines the predictability of listed force majeure events with also a general force majeure formula which is intended to catch circumstances which fall outside the listed events.

In terms of ICC model Hardship Clause, it provides several options for adaptation or termination of the contract when the new circumstances cause the performance of a contract untenable.

In 2020, due to global Covid-19 outbreak, the importance of force majeure and hardship clauses were realized. In Turkey, such clauses in contracts are generally accepted. Also, according to the Turkish Obligations Act (TOA) force majeure allows the debtor to be relieved from their obligations under a contract on the condition that impossibility or impracticability of their obligations are not the results of their own actions. Also, hardship is accepted unless it occurred due to an action of the debtor. Every case occurs under its own particular circumstances so each case must be addressed specifically whether force majeure or hardship could be invoked validly.

2. COMPULSORY PILOTAGE IN THE TURKISH STRAITS

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The term "Turkish Straits" describes the Strait of Istanbul (Bosphorus), Strait of Çanakkale and the Sea of Marmara. The Montreux Convention (1936) regulates the passage regime of the Turkish Straits and grants freedom of navigation for merchant vessels in the Turkish Straits.

According to Article 2 of the Montreux Convention, pilotage service for merchant vessels through the Turkish Straits is optional. On the other hand, Article 2 of the Montreux Convention applies only to the vessels passing non-stopover (transit) through the Turkish Straits.

Following a number of serious incidents occurred in the Turkish Straits, Turkey has implemented a Traffic Separation Scheme in 1994. Turkey also introduced regulation for navigation in the Straits in 1998 with the purpose of ensuring safety of navigation, safety of life, property and marine environment in the Turkish Straits and this regulation is updated with revisions in 2019.

This issue is also regulated by the Ports Regulation and these regulations impose an obligation to have a pilot for the vessels that will make a stopover passage through the Turkish Straits. However, there is no requirement for a pilot for non-stopover vessels.

Accordingly, pilotage within the Turkish Straits is compulsory only for the vessels bound for or leaving Turkish ports, if she falls into one of the groups listed below;

1. 500 GT or over tankers, vessels and sea vehicles carrying any kinds of dangerous goods
2. Turkish flagged vessels and sea vehicles 1000 GT or over
3. Foreign flagged vessels and sea vehicles 500 GT or over
4. Foreign flagged commercial or private yachts 1000 GT or over

Pilotage services in the Turkish Straits are provided by the General Directorate of Coastal Safety on behalf of the Ministry of Transport and the above listed vessels that do not comply with this obligation are not allowed to pass through the Turkish Straits. Pilotage service is also provided to the non-stopover vessels which are not included in the groups listed above upon request and it's highly recommended for safety.

3. ARREST OF FOREIGN FLAGGED VESSELS PASSING THROUGH THE TURKISH STRAITS

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The Turkish Straits have been and continues to be one of the most important waterways in the world. The Straits allows maritime connections from the Black Sea all the way to the Aegean and Mediterranean Seas, the Atlantic Ocean via Gibraltar, and the Indian Ocean through the Suez Canal, making them crucial for the international shipping industry. With this article we aim to provide an overview of the arrest issue of foreign flagged vessels passing through the Straits and Turkey's jurisdiction.

Passage Regime through the Turkish Straits

The passage regime through the Turkish Straits has been specially regulated in the Montreux Straits Convention ("the Convention") hence transit passage regime valid in other straits used for international navigation cannot be applied in Turkish Straits. The Montreux Straits Convention regulates the passage regime differently by distinguishing between merchant vessels and warships according to the state of war and peace (see previous Bosphorus Online). The principle of freedom of transit and navigation has been accepted, provided that it complies with the provisions of the Convention. However there is no special provision for jurisdiction of Turkey therefore the subject of arrest of foreign-flagged vessels passing through the Turkish Straits raises question marks. The issue must be analysed within the framework of national and international law.

Ship Arrest in the Turkish Straits

The absence of clear provisions on ship arrest in the Montreux Straits Convention caused different views to be put forward in the doctrine and controversial decisions in practice. In article 1367 (1) (b) of Turkish Commercial Code numbered 6102 ("TCC"), it is stated that the arrest decision on foreign flagged ships can only be implemented until the vessel leaves Turkish territorial waters. Two different passage regimes are applied in the Turkish Straits, namely, non-stopover and stopover. In the legal sense, the most important consequence of stopover or non-stopover passage is the passage regime that the vessel will be subject to. A vessel passing with a stopover is subject to Turkey's national law. Accordingly Turkish authorities can arrest such vessels. The principle of freedom of transit and navigation through the Straits which is accepted in the Montreux Straits Convention is applied exclusively to vessels making a "non-stopover passage". Therefore Turkish authorities cannot arrest such vessels, but with some exceptions…

A detailed article regarding the subject will be in the next Eurasian.

(The Eurasian is our platform for the P&I community. If you would like to receive The Eurasian, contact us at info@ulgener.com to sign up for our P&I mailing list. You can also read The Eurasian on our website; www.ulgener.com . Stay tuned for the new issue!)

4. AN OVERVIEW OF THE LIMIT OF LIABILITY IN CASES OF LOSS, DAMAGE AND DELAY IN DELIVERY

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Turkish Commercial Code ("TCC") Article 1186 regulates the limit of liability of the carrier in cases of loss, damage, delay in delivery of the goods whereas Article 1187 regulates the forfeiture of carrier's right to limit the liability.

Any damage arising from loss, damage, delay in delivery will be compensated up to the upper limit calculated according to Article 1186 of TCC. The type of the damage is not numerus clausus. Accordingly, the value of the good, loss of profit, compensation or penalty clause etc. which had to be paid can be demanded from the carrier up to the limit. However, the limitation of liability does not come into effect automatically; the carrier has to give notice that he's going to use his right to limit liability.

Pursuant to Hague/Visby Rules, first Sub-Article of Article 1186 of TCC regulates the limit of liability in terms of damage or loss of the goods. If the nature and value of the goods are declared by the shipper before shipment and inserted into the bill of lading, these declarations are taken into notice. If there is no such declaration, two calculations are made:

1) 666.67 Special Drawing Right (SDR) x packages/units
2) 2 SDR x kilo of gross weight of the goods

The greater result converted into Turkish Liras (on the day of payment) would constitute the upper limit of liability.

When the carrying equipment, such as a container or a pallet in which the goods are put, undergo loss or damage a binary assessment will be made:

If the contents of the carrying equipment have been written in the bill of lading, every unit/package stated will count as an individual package/unit in the calculation. For instance if it's indicated that there are 10 packages inside the container the limit would be 10 x 666,67 SDR. In the case of lack of such indication, the calculation would be as 1 x 666,67 SDR for the contents inside 1 container.

Since Hague/Visby Rules don't regulate the limit of liability when the delivery of the goods is delayed, 6th Sub-Article of Article 1186 of TCC is in compliance with Article 6 the Hamburg Rules. Hence, liability in case of delay in delivery of the goods is limited to 2.5 times the cost of freight. However though, this amount can't exceed the total freight that's of the whole contract.

Another aspect of the subject is carrier's loss of right to limit the liability. If the act or omissions are done wilfully, recklessly or with the awareness that damage may occur; the carrier will lose the right to limit his liability.

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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, 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.

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