

Legal Briefing

Sharing the Club's legal expertise and experience

**Cargo claims
under the Turkish
Commercial Code**

Legal Briefings Team

Jacqueline Tan

Senior Claims Executive



Jacqueline is a qualified barrister and solicitor. She handles FDD and P&I cases and is the editor of legal publications for the

Club. Jacqueline speaks Malay, French and Hokkien. She is also a member of the Club's Legal and Environmental Team working with Dr Chao Wu.

Direct +44 20 7204 2118
jacqueline.tan@thomasmiller.com

Dr Chao Wu

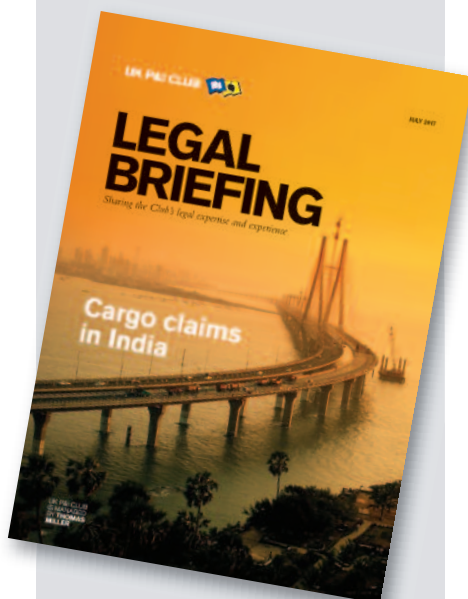
Legal Director



Chao leads the Clubs' Legal and Environmental team. She is responsible for the legal aspects of Club documentation

and cover for Members' contractual arrangements, the Club's Rules and Bye-Laws and general legal advice.

Direct +44 20 7204 2157
chao.wu@thomasmiller.com



Previous issues

Copies of previous briefings are available to download as pdfs from our website. Please visit www.ukpandi.com

Sharing expertise

The UK P&I Club has collaborated with Advocate Sertaç Sayhan, to issue this Legal Briefing on “Cargo Claims under the Turkish Commercial Code”. This is the fourth Legal Briefing in this series, providing guidance to Members on the specific issues relating to cargo claims in the jurisdictions covered. Other briefings in this series cover Cargo Claims in China, Cargo Claims in the United States, and Cargo Claims in India.

If Members have any questions on any part of the briefing, please get in touch with your usual Club contact.

Our thanks to Adv. Sertaç Sayhan, ex-Senior Partner, Hatem Law Office, and now Senior Partner of Sayhan Law Office, Büyükdere Caddesi Pekin Apt No: 5-3 Şişli / Istanbul / Turkey.



Cargo claims under the Turkish Commercial Code

The Turkish Code of Commerce (TCC) has brought in a full and unified set of rules to deal with all aspects of ship arrests and also to tackle the unique needs of the maritime transport industry.

The Turkish Code of Commerce was enacted on 14 February 2011 and entered into force on 1 July 2012. This latest legal briefing discusses the legal and administrative effect of the TCC.

Precautionary Arrests/liens on ships (application, obtaining and lifting of such arrest/liens) – Maritime liens and Maritime claims – Securities

Turkey is party to the 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules), but not to the Hague-Visby, Hamburg or Rotterdam Rules. However, the Hague-Visby Rules and parts of the Hamburg Rules have been incorporated into the Commercial Code.

The TCC regulates maritime matters as well as other areas of commercial transactions. It has radically amended the regime and procedure for ship arrests.

The TCC has brought in a full and unified set of rules to deal with all aspects of ship arrests and also to tackle the unique needs of the maritime transport industry.

Turkey was not previously party to any arrest conventions but on 25 March this year ratified the International Convention on the Arrest of Ships 1999 and the International Convention on Maritime Liens and Mortgages 1993. The provisions of these International Conventions have been incorporated verbatim into the new Turkish Commercial Code.

A precautionary measure leading to the arrest of the ship is the only



conservatory measure permitted under the TCC. Other measures such as a freezing order or similar is not applicable to maritime claims.

The definition of "maritime claim" as provided in the International Convention on Arrest of Ships, 1999 has now been adopted by the TCC, almost as a word for word translation. Under the TCC, a provisional or preliminary arrest may only be requested for securing one of the listed maritime claims¹.

Application for arrest

To apply for an arrest order, the general rule for ships, irrespective of their flags is that "the court at the place at which the ship has been anchored, moored to a buoy or piling, brought alongside or laid on the stocks" may award an order for

the arrest. If the ship is a non-Turkish flagged ship, the arrest order may only be awarded by this court.

In such cases, a jurisdiction or arbitration clause incorporated into the relevant contract is not taken into account and these local courts shall award the arrest order. This will not however mean the acceptance of Turkish Jurisdiction for the underlying claim.

Unless proceedings into the merits of the case have been brought before the competent court in Turkey, objections to the arrest would be handled by the same court that issued the arrest order. This court will also have jurisdiction to hear claims for compensation brought against a creditor whose claim is found to be unjustified.

¹ Loss or damage caused by the operation of the ship, loss of life or personal injury, salvage, damage or threat of damage to environment, wreck removal, any agreement relating to the use or hire of the ship, any agreement relating to the carriage of goods or passengers, loss of or damage to or in connection with goods carried on board the ship; general average; towage; pilotage; goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered; construction, reconstruction, repair, converting or equipping of the ship; port, canal, dock, harbour and other waterway dues and charges; crew wages disbursements incurred on behalf of the ship or its owners, including the loans obtained for the ship; insurance premiums; any commissions, brokerages or agency fees; any dispute as to ownership or possession of the ship; any dispute between co-owners of the ship as to the employment or earnings of the ship; a mortgage or a "hypothèque" or a charge of the same nature on the ship; any dispute arising out of a contract for the sale of the ship.



To enable an arrest order to be obtained swiftly, the requirement for supporting evidence, the timing for presenting the same and the procedures are not enforced very strictly. It suffices for the creditor to furnish evidence that its claim is one of the maritime claims listed, and that will then enable the court to form an opinion as to the monetary value of the claim.

Applicants are required to deposit a lumpsum Special Drawing Rights (SDR)10,000 counter security irrespective of the claim amount. The counter-security can be by way of a cash deposit or a Turkish Bank Guarantee. Provision of counter-security is a vital pre-condition of an arrest application. The court will not even review the application if the counter-security is not deposited. It is possible for the respondent (owners) to apply to the court to increase the counter-security. If the court accepts such application to increase the amount of the counter-security, a deadline will be set for the arresting party to supplement the counter-security. It should be noted that arrest applications for crew wages are exempted from this requirement, and no provision of security is necessary.

Upon the issuance of the arrest order, the requesting party should apply for its execution to the Bailiff's Office in the same territory as the court which has awarded the order. Otherwise the arrest will be automatically lifted. It is also stated within the TCC that the arrest will be effected immediately, even on official holidays and out-of-office hours, if necessary.

A ship can be released from arrest:

- by providing the necessary security,
- if the objection against the arrest order is accepted and the arrest order is set aside by the Court, or
- if a final Judgement dismissing the maritime claim is rendered.

The parties may freely decide on the form and the amount of security to be furnished.

Challenging an arrest

The owners may challenge the arrest order immediately upon the execution of the arrest and in any event within seven days of learning of the arrest order. The owner and other parties such as the

mortgagee and the charterer may also file objections against the arrest order. If the claimant has filed his claim on its merits before the competent court within 30 days, then any objection will have to be filed before this court, otherwise the objection will have to be filed before the court which granted the arrest order.

An objection has to be filed in writing and it can be against the jurisdiction, the security amount or the cause of the arrest. The objecting parties must disclose all the evidence they rely on for their objections. The court must commence a hearing and invite the attendance of the arresting and the objecting parties. The court generally makes its decision during such hearing. Based on the validity of the objections, the court may uphold, set aside or modify the arrest order.

An agreement between the parties to extend time is something very new under Turkish law.

The owners should provide sufficient security to cover the claim plus interest and the cost for the release of the ship. In practice, the security is provided in the form of a Turkish Bank Guarantee. However, other forms of security may also be accepted. The parties are also free to agree a P&I Letter of Undertaking as security. Otherwise, the court will decide the form of the security which will be either a Turkish Bank Guarantee or a Cash Deposit.

If the maritime claim exceeds the value of the ship, security covering the value of the ship will suffice to obtain the ship's release. The security must cover interest and costs.

Time bars

Claims against the carrier arising out of the loss of, damage to or delay in the delivery of goods will lapse unless legal proceedings are commenced within one year. Commencing a legal action means either filing a formal claim before the competent court or issuing a payment order through the bailiffs.

This period may be extended if the parties so agree after the cause of action has arisen. An agreement between the parties to extend time is something very new under Turkish law.

An action for recourse may be brought even after the one-year period expires, provided that the proceedings are brought within 90 days of the date on which the person bringing such recourse action has settled the claim or been served with process in the action against itself.

The time bar period for General Average claims is one year, and will commence to run from either the arrival of the ship to destination, or if the maritime expedition ends earlier than the destination, from the end of the expedition – and *not* from the publication of the average adjustment. There is no time bar for the application of the adjustment.





For claims arising from passenger contracts, the time bar is ten years.

The time bar in case of a collision is two years starting from the date of the incident. Any recourse action between the owners due to the collision will be time barred one year after the settlement is effected.

Limitation of Liability

The TCC stipulates that the liability for maritime claims can be limited in accordance with the International Conventions to which Turkey is a party, the Convention on Limitation of Liability for Maritime Claims of 1976 as amended by the Protocol of 1996 (the London Convention). The liability for claims arising from oil pollution is to be limited pursuant to the Civil Liability Convention 1992.

Arbitration and Jurisdiction clauses

A jurisdiction clause or arbitration clause, provided they are expressly written, clear and comprehensible, e.g. *“all disputes arising from... shall be resolved according to the law of... and handled by... courts”* is effective in Turkey. If such a clear clause exists, then upon a jurisdiction objection being raised by one of the parties at a preliminary stage, the Turkish Court will dismiss the same. A timely objection in this case would be essential as the courts do not, on their own volition, make any examination of jurisdictions in agreements.

An arbitration clause in the charter party or recap will be binding upon the consignee if it is proven that the clause was brought to the consignee's knowledge at the time the bill of lading was delivered or endorsed to him.

Judicial Sale of Ships under Arrest

Under Turkish law, the judicial sale of a ship is made by the Bailiffs' Office. If questions are raised relating to the obtaining of a precautionary judgement or decision, the court authorised to hear the case is the Admiralty Court. In the event that there is an objection to a judicial sale, the court authorised to deal with the objection is the Enforcement Court.

The sale regime for Turkish flagged ships is related to the sale of immovable properties. Foreign flagged ships are considered as movable properties under Turkish law.

To arrest a Turkish flagged ship, the creditor will apply to the authorised enforcement offices and the relevant enforcement office will commence the enforcement procedure urgently. The only way to sell a ship free of liens and prior claims will be by public auction.

The special procedure for public auctions of foreign flagged ships is stated in article 1384 of the TCC. Upon receipt of a request for the sale of a ship registered with a foreign registry, the bailiff will notify the consulate of the state whose flag such ship flies and will request the registry entry of the ship in order that a list of obligations can be prepared. The creditor may also submit to the Bailiff's Office a certified copy of the ship's entry. In this case, the list of obligations will be prepared in accordance with whichever list is received first.

Different procedures are applicable to the arrest of a Turkish flagged ship and a foreign flagged ship.

In order to form a valid public auction which will free Turkish flagged ships from liens and prior claims, the auction should be announced in a Turkish gazette, which has a circulation exceeding 50,000. The auction should also be announced in a daily gazette on maritime affairs published worldwide. The announcement should declare that the ship will be sold free from all legal and contractual limitations, including maritime liens and mortgages.

As for the sale of foreign flagged ships; it is obligatory for the announcement to be made in accordance with Article 126 of the Bankruptcy and Enforcement Code and the announcement is to be made to:

- a) the authority responsible for keeping the entry of the ship in the state where the ship is registered,
- b) registered contractual mortgagees,
- c) statutory lien right holders provided that they are notified to the Bailiff's Office,
- d) the registered owner of the ship, or published in a newspaper with a circulation exceeding 50,000 and has a nationwide circulation within the country in which the ship's entry is actually kept, provided that the related costs are met by the interested parties.

The written notification mentioned above will be made by registered post or electronic means of communications confirming the delivery of the notification to the recipient or by other suitable means.

Otherwise, the new owner who buys a Turkish ship through a public auction may subsequently be faced with lien based claims and arrests of the ship in Turkey.

Even if there is no cargo shortage claim from the receivers, customs and the tax authorities may still levy a fine by serving a customs fine notification.

If a short discharge of cargo is officially determined, and despite the fact that there is no cargo shortage claim from the receivers, customs and the tax authorities may still levy a fine by serving a customs fine notification, which will initially be for an unknown amount. There may be a way to avoid paying this fine, either in whole or in part, depending upon the interpretation or position customs adopt. A statement from the load port agents to the effect that the ship was shortloaded by a quantity equivalent or near to the shortloaded quantity, signed by the agents at the load port and legalised by the local chamber of commerce and the Turkish Consulate at the load port/country, also known as a Short Shipment Certificate, may be produced upon request.

Usually, as a result of shortage, customs will serve a notice on the local agent. The notice will briefly state that the relevant cargo is short delivered and the agents are granted three months from the date of the notice to explain the reason for the shortage, or to present a Short Shipment Certificate.

On the expiry of this period, a fine is inevitable. The reason for the fine is to compensate the government for its loss of customs tax, due to the shortage. The agents, the owners, the ship and the master are jointly and severally responsible for the customs fine. As the imposition of the customs fine is under public law, the authorities, in practice, collect it from the agents, by force of law, regardless of the fact that the agents were acting on behalf of owners or charterers.

Shore figures or customs' outturn weighbridge figures prevail over all other figures. It is therefore extremely difficult to defend a customs fine.

Customs accept a cargo shortage allowance rate of 3% for solid cargo, and of 0.5% to 1.0 % for liquid or petroleum products.

A customs fine is initially an administrative, not a legal, pursuit. When a customs shortage fine is served on the agents, if it is not opposed and is paid within 15 days, the agents will benefit from a 25% discount.

According to the regulations and to recent developments, in addition to the administrative fines levied and collected, there will also be additional charges under two titles; (1) Loss of VAT, and (2) Loss of Special Consuming Tax (SCT). The apparent justification for these charges is that the cargo shortage has deprived the government of these taxes.

Regarding these fines, if the party liable for the fine applies to the tax administration within 30 days of notification and state that they will pay their taxes and related charges and they provide the type of guarantee stipulated in Law No. 6183 (cash or security which can be encashed upon the first demand of the authority); then there will be advantages of discounts to receive from the authorities.

Customs accept a cargo shortage allowance rate of 3% for solid cargo, and of 0.5% to 1.0 % for liquid or petroleum products.

If the fine is not paid within the specified time limit or if a claim is filed against the fine, the party on whom the fine is imposed will not thereafter be able to take advantage of this provision.

The taxpayers can apply to the commission of conciliation within 30 days

of notification of the tax or fine notice and demand conciliation. If no conciliation can be reached before the assessment, it will not be open to the taxpayers to demand conciliation thereafter.

If an objection to the charges and the fine is to be made, a court action must be brought before the tax court at the place of discharge. In this case the steps to be followed are as follows. As the charges and fines are usually imposed on the local agent, the objection must be filed by the agent.

The court will not decide to defer the settlement against the security but if the party is right in its objection, it will be possible to recover the sum paid back from the government. The tax office does not accept any security for the fine but will accept either a cash payment in full or cash instalments may be agreed. However, in order to avoid paying the applicable interest, the charges may provisionally be paid in full whilst attempts are continued to oppose them. ■

