

SHIP ARREST IN TURKEY (QUESTIONS 1 TO 9)

By Zeynep Özkan*
ÖZKAN LAW OFFICE
zeynep@ozkan.av.tr
www.ozkan.av.tr

Husrev Gereade Cad. Omer Rustu Pasa Sok. No:12
34357 Tesvikiye / Istanbul
Tel: +(90 212) 327 69 40
Fax: +(90 212) 327 69 43



1. Please give an overview of ship arrest practice in your country.

As a part of preparations for EU membership, Turkey has been in the process of amending and promulgating its primary and secondary legislation. Within this framework, the long pending Turkish Commercial Code, a key element for the accession negotiations, was promulgated on 14 February 2011 and entered into force on 1 July 2012 ("New TCC"). New TCC regulates the maritime matters as well as other areas of commercial transactions and radically amended many aspects of Turkish maritime law, including arrest of ships. Until the enactment of the New TCC, there were no specific rules on ship arrest. The arrest of a ship was in general terms no different than any other conservatory measure or conservatory attachment of any other assets of a debtor. The New TCC, however, has specific provisions on the arrest of vessels and aims to bring a full and unified set of rules dealing with all aspects of arrest of ships and to tackle the special needs of the different parties in maritime transport.

2. Which International Convention applies to arrest of ships in your country?

Turkey is not a party to any of the international conventions on the arrest of ships. During the preparatory stage, the committee that has prepared the New TCC looked the arrest rules of various states such as England, Germany, US, South Africa as well as international arrest conventions. The arrest provisions of the New TCC mainly reflect the provisions of the International Convention on the Arrest of Ships 1999 even though Turkey is not a party to the aforesaid convention. In addition, relevant provisions of the International Convention on Maritime Liens and Mortgages 1993 are also reflected in the New TCC.

3. Is there any other way to arrest a ship in your jurisdiction?

The New TCC regulates the arrest of ships specifically and prohibits any other ways to arrest a ship.

4. Are there alternatives e.g. saisie conservatoire or freezing order?

From the procedural point of view, conservatory attachment leading to the arrest of the vessel is the only conservatory measure permitted under the New TCC. Other conservatory measures such as a freezing order or similar shall not be applicable with respect to a maritime claim.

5. For which types of claims can you arrest a ship?

Before the enactment of the New TCC, in principle, arrest of a ship in Turkey could take place for all types of claims regardless of whether the claim has a maritime character or is connected with the ship to be arrested or not. The New TCC, however, adopts the definition of "maritime claim" provided in the International Convention on Arrest of Ships of 1999 and restricts the arrest of ships for maritime claims enumerated in the New TCC.

6. Can you arrest a ship irrespective of her flag?

A ship can be arrested in Turkey irrespective of her flag.

7. Can you arrest a ship irrespective of the debtor?

Except for arrests in order to enforce a maritime lien, only the vessels owned by the debtor can be arrested.

8. What is position as regards sister ships and ships in associated ownership?

The New TCC specifically deals with the issue and permits the arrest of any other ship of the debtor provided that they are owned by the debtor liable for the maritime claim.

9. What is the position as regards Bareboat and Time-Chartered vessels?

Except for arrests based on a maritime lien, only the vessels owned by the debtor can be arrested. The arrest of a ship due to the debt of a charterer is not possible if such debt does not grant a maritime lien.

** **Zeynep Özkan Özeren** has a degree in both law and international relations and a post graduate degree in shipping law from University of Southampton. After working with various international consultancy firms specialized in transportation law and a local law firm in Istanbul, she founded Özkan Law Office in 2005. Her practice mainly focuses on shipping law and international trade law.
Zeynep Özkan Özeren is as a lecturer of international trade law at the Bogaziçi University, Istanbul. She is a member of Istanbul Bar Association and International Bar Association.*

SHIP ARREST IN TURKEY (QUESTIONS 10 TO 26)

By Sinan Güzel*
TCG FORA Law Office
s.guzel@foralaw.com
www.foralaw.com

Altunizade Mahallesi, Mahir İz Caddesi,
Kütük Is Merkezi, Kat 2, 34662 Üsküdar, İstanbul
Tel: +902166512322
Fax: +902166514580



10. Do your Courts require counter-security in order to arrest a ship?

Under Article 1363 of the new Turkish Commercial Code (TCC), the applicants are required to deposit lump sum SDR (Special Drawing Rights) 10,000.00 counter security irrespective of the claim amount. The counter-security can be by way of cash deposit or Turkish Bank Guarantee. Provision of the counter-security is a pre condition for the arrest application and the court will not even review the application if the counter-security is not deposited. The respondent (Owners) may apply to the court requesting the counter-security to be increased. If the court accepts such application to increase the amount of the counter-security, it will set a deadline for the arresting party to supplement the counter-security. If the additional security is not provided within such deadline, the arrest order will automatically become null and void. In the same sense, the arresting party may also request the court to decrease the counter-security.

Arrest applications for crew wages are exempted from providing counter-security. No objection in this regard can be listened by the court.

11. Is there any difference in respect to arresting a ship for a maritime claim and a maritime lien?

If the claim grants a right of maritime lien under Turkish Law, the theory that the maritime lien attaches upon the vessel applies and the vessel can be arrested even if the Ownership has been changed. There is no difference with regard to the applicable procedure.

12. Does your country recognise maritime liens? Under which International Convention, if any?

The primary sources of the TCC as to the arrest regime and the maritime liens are two significant conventions which are International Convention on Maritime Liens and Mortgages (Geneva 6 May 1993) and International Convention on Arrest of Ships (Geneva 12 March 1999). Relevant Part of Article 1320 of TCC which is very identical to Article 4 of the Geneva 1993 Convention is as follows: "Each of the following claims against the owner, demise charterer, manager or operator of the vessel grants a right of maritime lien to its claimant on the vessel:

- (a) Claims for wages and other sums due to the crew members in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;
- (b) Claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;
- (c) Claims for reward for the salvage of the vessel;
- (d) Claims for port, canal, and other waterway dues and pilotage dues;
- (e) Claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.
- (f) The general average contribution credit claims"

13. What lapse of time is required in order to arrest a ship from the moment the file arrives to your law firm?

The court will attend the arrest application as a matter of priority. Once the application is filed and it is confirmed by the Harbour Master that the vessel is within the jurisdiction, it is possible to obtain the arrest order the next working day of the application.

14. Do you need to provide a POA or any other documents of the claim to the Court?

We need to provide a valid POA to the court. The POA has to be notarised and apostilled (or attested by the Turkish Consulate). In practice, the courts generally find it sufficient that the executed POA is

sent electronically in the first instance. The original POA has to be provided at a later stage. The documents in support of the claim also have to be provided with proper translations.

15. What original documents are required, what documents can be filed electronically, what documents require notarisation and/or apostille, and when are they needed?

It is possible to obtain the arrest order with fax or electronic copies of the documents in support of the claim. Only the POA requires notarisation and apostille. However, should the counter party files an objection against the arrest order, there may be a requirement for submission of the originals of the major supporting documents depending on the nature of the objection. All the documents with translations are required prior to filing the application.

16. Will your Courts accept jurisdiction over the substantive claim once a vessel has been arrested?

Under Article 1359 of TCC, the Turkish Court granting the arrest order has jurisdiction over the substantive claim provided that there is no jurisdiction agreement between the Arresting Party and the Respondents.

17. What is the procedure to release a ship from arrest?

A ship can be released from arrest either;

17.1. By provision of security,

17.2. Or if the objection against the arrest order is accepted and the arrest order is set aside by the Court

17.3. Or if a final Judgement dismissing the maritime claim is rendered.

The court should send a written notice to the Enforcement Office which has executed the arrest order that the arrest has been lifted and that Enforcement Office should send orders to the relevant authorities such as the Harbor Master, Coast Guard and the Customs Authorities. Upon receipt of the release order such authorities have to complete the formalities for releasing the ship promptly.

18. What type of security needs to be placed for the release?

The Owners should provide sufficient security covering the claim, interest and costs thereof for the release. In practice, the security is provided in the form of Turkish Bank Guarantee. However, other forms of security by means of cash deposit, mortgage on real estate may also be accepted. The parties are also free to agree for the production of 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 Cash Deposit. Beyond the Owner, the time charterer, manager or the mortgagee is also allowed to provide security for releasing the vessel. If so, the court will ensure that the final title issued against the person liable is also enforceable against the security provided. If the maritime claim exceeds the value of the ship, security covering the value of the ship will be sufficient for the release.

19. Does security need to cover interest and costs?

Yes. The security must cover interest and costs.

20. Are P&I LOUs accepted as sufficient to lift the arrest?

P&I LOUs can only be accepted as sufficient to lift the arrest if the parties agree. Otherwise, the court will not accept a P&I LOU for lifting the arrest.

21. How long does it take to release the ship?

If acceptable security is provided or the arrest order is set aside by the court upon an objection against the arrest order or by a final judgement dismissing the maritime claim, the ship can be released within a couple of hours.

22. Is there a procedure to contest the arrest?

The Owners may challenge the arrest order immediately upon execution of the arrest and in any event within 7 days after learning the arrest order. This period commences on the date when the objecting party receives the information about the arrest. The time will in any event start from the day of

execution of the arrest. The Owner and all other parties like mortgagee, charterer may also file objections against the arrest order. If the claimant has filed its substantive claims, before the competent court, objections have to be filed before such court; otherwise the objection has to be filed before the court which has granted the arrest order. The objection has to be filed in writing and can be against the jurisdiction as to place, the security and the cause of the arrest. The objecting parties must enclose all evidence they rely on for their objections. The court must open a hearing and invite the arresting and the objecting parties. The court generally makes its decision during such hearing. The court is limited with the reasons set out by the objecting party. Based on the validity of the objections, the court may uphold, set aside or modify the arrest order.

23. What period of time will be granted by the Courts in order for the claimants to take legal action on the merits?

Under Article 1376 of TCC, the legal action on the merits has to be taken within one month after obtaining the arrest order by filing a case before the Competent Court or by initiating enforcement proceedings before the Enforcement Offices. Otherwise, the arrest order will become null and void.

24. Do the Courts of your country acknowledge wrongful arrest?

Under Turkish Law no particular provisions have been set out in respect of the wrongful arrest of the ships. The Respondents may at any stage claim that the arrest is wrongful and unjustified. If the arrest is found wrongful, the applicant is liable against the Respondents and the third parties for any and all damages arising from or in connection with the arrest. The mere dismissal of the substantive proceedings (proceedings on merits) is sufficient to invoke liability against the arresting party for a wrongful arrest. Thus, it simply has to be established that the claim, for which the arrest was granted, is rejected in full. However, if the claim was partly upheld, the liability would not arise. The court granting the arrest order has the jurisdiction for the claims arising out of wrongful arrests.

The losses and damages arising out the wrongful arrest may be satisfied from the counter-security deposited by the Arresting Party if the amount of the same is sufficient (if not, enforcement proceedings have to be initiated against the Arresting Party)

25. Do the Courts of your country acknowledge the piercing and lifting of the corporate veil?

The task of piercing the corporate veil under Turkish law is extremely difficult. Before the corporate veil can be lifted the following facts must exist:

- (a) The persons vested with authority to represent and bind both companies are the same;
- (b) Both companies have the same shareholders and board of directors/managers;
- (c) Transfer of the shares of the relevant company to a third party with the intention of escaping its liabilities i.e. bad faith.

26. Is it possible to have a ship sold pendente lite; if so how long does it take?

Under Article 1386 of TCC, it is possible to have a ship sold pendent lite if:

The value of the ship reduces substantially and cost of maintaining the ship is excessive, the ship or her cargo causes danger for the safeties of human being, properties and environment. The decision for the sale pendente lite can only be taken by the Enforcement Court upon application of either the Enforcement Office, Harbour Master Claimants or the Owners. There is no certainty regarding the time for this issue; however it may take a couple of months.

**Sinan Guzel graduated from Ankara University, Faculty of Law, in 1999. During his education he worked in various Law Firms to familiarize with general practice of Turkish Law. After his graduation, he joined a foreign Marine Consultancy firm in Istanbul and started to work with a British Solicitor. He was qualified as a Turkish Lawyer and admitted to the Istanbul Bar in 2000. After his qualification, he continued to work with the foreign marine consultancy firm for 8 years where he was actively involved in all kinds of Maritime Law related matters locally and internationally and has built up extensive experience. He set up Fora Law Office with his colleagues in September 2008, which became one of the leading Maritime Law Offices in Turkey within a short period. Beyond ship arrest, Sinan has considerable experience in maritime related litigations, and Marine Casualties. He is fluent in English.*