

SHIP ARREST IN TURKEY (Questions 1 to 9)



Zeynep Özkan*
Özkan Law Office
Husrev Gerece Cad.
Omer Rustu Pasa Sok. No:12
34357 Tesvikiye / Istanbul
Phone: +(90 212) 327 69 40
Fax: +(90 212) 327 69 43
zeynep@ozkan.av.tr / www.ozkan.av.tr

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

Turkey is not a party to any of the international conventions on the arrest of ships and the current domestic law does not provide for specific rules on this matter. Under the current legislation, the arrest of ships as a security measure under Turkish law is in general terms no different than any conservatory measure leading to the seizure of other assets owned by a debtor or a wrongdoer and the claim in respect of which a ship may be arrested does not have to be of a maritime character.

On January 13, 2011 Turkish Parliament adopted the new Turkish Commercial Code ("New TCC"), which regulates the maritime transportation as well as other areas of commercial transactions. The New TCC will enter into effect on July 2012 and will radically amend many aspects of Turkish shipping life, including arrest of ships. As the New TCC is not in force yet, we shall answer the questions below in accordance with the existing arrest rules that are applicable in Turkey as of 2011, but shall address some important aspects of the New TCC where relevant.

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.

The New TCC, however, incorporates most of the provisions of the International Convention on Arrest of Ships, 1999.

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

The provisions of Turkish Bankruptcy and Liquidation Code and Turkish Procedural Code dealing with conservatory measures applicable to any assets apply to the arrest of ships as well. According to the aforesaid provisions, the claimant has to prove, on a probability basis, that there is a claim and a possible danger of not being able to satisfy the claim after a judgement in merits is obtained in the absence of a conservatory measure.

The New TCC, however, regulates the arrest of ships specifically.

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

All types of conservatory measures, including those applicable to ships, are governed by the provisions of Turkish Bankruptcy and Liquidation Code and Turkish Procedural Code. Under the current regulations, arrest of ships is only one form of conservatory measure and the claimant may apply to other types if conservatory measures as well.

The New Tcc, however, adopts the definition of "maritime claim" provided in the International Convention on Arrest of Ships, 1999 and restricts the arrest of ships to the "maritime claims" enumerated in the New TCC.

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

Under the current regulations, in principle, arrest of a ship in Turkey can 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, 1999 and restricts the arrest of ships for claims enumerated in the New TCC.

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

A ship can be arrested in Turkey irrespective of her flag as per the provisions of the Turkish Bankruptcy and Liquidation Code and Turkish Procedural Code and the New TCC, when it comes into force.

7. Can you arrest a ship irrespectively 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?

Under the current regulations, all of the assets of the debtor may be arrested, which may also include other ships of the debtor, and therefore there is no specific provisions in relation to sister ship arrest. As to the arrest of ships in associated ownership, only the ships owned by the same debtor may be arrested. The ships belonging to the affiliated companies of the debtor may not be arrested in principle.

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 20)



By Sinan Guzel*
FORA LAW OFFICE
s.guzel@foralaw.com
www.foralaw.com
Mesrutiyet Mah., Rumeli Cad., Zeki Bey Apt.
No:80/8, 34363, Nisantasi, Sisli, Istanbul
Tel: +90212 2310245
Fax: +90212 2310654

(Valid until July 2012)

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

The arrest of ships under Turkish law is in general terms, the relevant provisions of Enforcement and Bankruptcy Code (EBC) and Turkish Procedural Code will apply to the arrest of ships. For the normal arrest procedure Turkish Procedural Code is applicable and under TBC the Courts are entitled to ask for counter-security, under EBC (which is rarely applicable), they have to ask. Turkish Courts generally require 15 % (of the claim amount) counter-security in order to arrest a ship. Determining the amount of the counter-security is at the sole discretion of the Court. On very rare occasions the counter-security may go up to 40 %. The counter-security can be by way of cash deposit or Turkish Bank Guarantee.

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

In theory there is no difference. In practice, it is easier to obtain an arrest order for a maritime lien.

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

Turkey is a signatory to Brussels Convention on the Unification of Certain Rules Relating to Maritime Liens and Mortgages. However, under Turkish Practice Maritime Liens are mainly dealt by Article 1235 of Turkish Commercial Code of which a free translation is as follows:

Article 1235: "The following claims give "maritime lien rights" to the creditors:

1. Where the vessel is sold by writ of execution, the expenses that have been incurred after the vessel has entered the final port and the expenses that are incurred for watchkeeping and safeguarding the vessel but which are not considered to be bailiff's expenses.
2. Port dues, buoy, lighthouse, quarantine and port expenses.
3. Crew claims arising under contracts for services and employment.
4. Pilotage fees, and fees and expenses of salvage, assistance, ransom and costs of objection against confiscation.
5. The general average contributions owed by the vessel.
6. Claims for respondentia and claims that have arisen from services rendered and supplies provided to the master, for the maintenance of the vessel or the completion of the voyage in the event of necessity, when the vessel is not in her port of registry.
7. Claims for non-delivery or delivery in a damaged condition of cargo or luggage (mentioned in the 2nd paragraph of Article 1128) and claims for the return of the pre-paid freight due to the non-compliance or partial compliance with the contract of carriage.
8. Claims that have arisen from the legal acts carried out by the master, not as a private individual, but based on his legal authority as the master of the vessel and claims arising from the non-compliance with a contract concluded by the owner and to be performed by the master.
9. Claims arising from the fault / neglect of a member of crew, even if he is the whole or part owner of the vessel.
10. All credits that can be claimed by the Social Security Department from the owners in accordance with Insurance laws relating to labour activities. This provision excludes the amounts personally owed by the owner to the Social Security Department under the Insurance and Labour Laws."

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

All documents in support of the claim need to be translated to Turkish. The application can be filed

after the completion of the translation and it is possible to obtain the arrest order within the same or 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 POA to the court. The POA has to be notarised and apostilled (or attested by the Turkish Consulate) However, in urgent situations, it is possible to make the application with a fax copy of a POA signed by the arresting party with undertaking to provide the notarised and apostilled POA within the quickest possible time. We also need to provide all documents in support of the claim.

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 are required before filing the application.

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

Turkish Courts generally accept jurisdiction over the substantive claim provided the claim is of maritime lien nature and the substantive claim is filed with a request of recognition of the maritime lien over the vessel.

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

Under Turkish Procedural Code, the legal action on the merits has to be taken within ten days after obtaining the arrest order. If there is a provisional attachment obtained under EBC the main enforcement proceedings have to be commenced within seven days. Otherwise, the arrest order will become null and void.

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

If the arrest is wrongful, the arresting party will be liable for all loss and damages suffered by the defendant. This can be raised by the defendant during the legal proceedings on merits by way of counter-claim or in a separate court case. The loss and damages arising out of the wrongful arrest may be satisfied from the counter-security if sufficient (if not enforcement proceedings have to be initiated against the arresting party)

19. 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. Some research is carried out into recent case law to see if there has been material change in the courts' attitude on this subject in recent times. That is, 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.

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

Under Turkish Law, it is under the Court's sole discretion to have ship sold *pendente lite* provided;

1. The ship causes danger for herself or third parties or environment,
 2. Cost of maintaining the ship is excessive i.e. higher than the value of the ship.
- For the first possibility, in practice, the Courts prefer to appoint trustee crew on board. For latter, in very rare occasions the court decide to have the ship sold *pendente lite*. There is no certainty regarding the time for this issue.

** Sinan Guzel has 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 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. He has set up Fora Law Office, which became one of the leading Maritime Law Offices in Turkey within a short period, in September 2008 with his colleagues. Beyond ship arrest, Sinan has considerable experience in maritime related litigations and Marine Casualties. He is fluent in English.*