

TURKISH MARITIME LAW ASSOCIATION

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23th of February, 2016

Mr. Stuart Hetherington
President,
Mr. Giorgio Berlingieri
Chairman,
Comite Maritime International

Subject: Report of Turkish Maritime Law Association on the Study Relating to Liability for Wrongful Arrest

Dear Mr. Hetherington,

Dear Mr. Berlingieri,

Please find attached Report of Turkish Maritime Law Association to the questionnaire sent via 7th of January, 2016 and 11th of February, 2016 dated e-mails of Mr. Berlingieri. The Report was drafted by the special commission consisting of Prof. Dr. Emine Yazıcıoğlu, Prof. Dr. Nuray Ekşi, Associate Prof. Dr. Ecehan Yeşilova Aras, Assistant Prof. Nil Kula Değirmenci, Assistant Prof. Dr. Bilgehan Yeşilova, Attorney Nazlı Selek and Attorney Bahar Saylan, and confirmed by the Board of Directors of Turkish Maritime Law Association.

Kind regards,

Prof. Dr. Emine YAZICIOĞLU
President of Turkish Maritime Law Association



**TURKISH MARITIME LAW ASSOCIATION
REPORT ON THE QUESTIONS FORWARDED BY CMI
RELATING TO WRONGFUL ARREST**

I. INTERNATIONAL CONVENTIONS

- a. Please advise which, if any, of the following Convention your jurisdiction is a party to and has given effect to in its jurisdiction.**
- i. Arrest Convention 1952,**
 - ii. Arrest Convention 1999,**
 - iii. Maritime Liens and Mortgages Convention 1926,**
 - iv. Maritime Liens and Mortgages Convention 1993.**

Turkey is not a contracting state of Arrest Convention 1952, Arrest Convention 1999 and Maritime Liens and Mortgages Convention 1993.

Turkey is only contracting state of Maritime Liens and Mortgages Convention 1926 through the 14th of February dated and 6469 numbered Code of Approval, published in the 22nd of February 1955 dated and 8937 numbered Official Gazette.

- b. If none of the above is made part of your national law, or in any event, what are the grounds on which a vessel can be arrested in your country?**

Under the concept of provisional measures, the “arrest” as a “freezing order” has been regulated mainly in [Debt] Enforcement and Bankruptcy Code (hereinafter will be referred to as “TEBC”) Art. 257-268 alike in Swiss SchKG Art. 271-281. Yet should be taken account of also the rules in Turkish Civil Procedure Rules (hereinafter will be referred to as “TCPR”) relating with provision measures. Although the provisions about arrest for the monetary claims are *lex specialis* according to TCPR Art. 389 *et. seq.* for the matters not covered by special rules has to be evaluated upon the general provisions as it will be for most of the questions asked below.

On 13th of January, 2011, 6102 numbered Turkish Commercial Code (hereinafter will be referred to as “TCC”), passed through Turkish Parliament. It has entered into force in 1st of July, 2012. 5th book of the new TCC with the title of “Maritime Affairs” is the primary source in Turkey, governing maritime law. In this new 5th book, the 8th chapter belongs to the “Special Rules for the Enforcement”. Still to Art. 1351 of TCC, for the matters not covered in the special chapter will be solved by the rules in TEBC. Thus for the maritime issues the enforcement matters shall be solved by applying and starting with the rules in TCC, then TEBC, lastly –*and whenever needed*- TCPR.

According to the legal groundings of the TCC, the new provisions governing maritime law have been effected especially from the updated maritime law conventions. Hence, according to the “General Explanations on 1320th to 1327th Articles of the TCC” which are placed in the legal groundings of the code, the related articles of Maritime Liens and Mortgages Convention 1993 have been considered when governing maritime liens. Besides, according to the “General Explanations on 1352nd to 1376nd Articles of the TCC” which are also placed in the legal groundings of the code, the related articles of Arrest Convention 1999 have been considered when governing enforcement of maritime liens. Therefore, irrespective of the fact that Turkey is not party to both of the conventions, the related articles of them are taken into consideration when governing maritime liens and enforcement proceedings on ships in TCC.

II. QUESTIONS RELATING TO WRONGFUL ARREST

1. To what extent is a claimant required under your national law to provide security in order to obtain an order for arrest or, subsequently, to “maintain” arrest?

Every provisional measure alike “attachment/arrest” needs to be satisfied two main prerequisites: (a) *Prima facie* evidenced main claim; for TEBC that has to be –*in principal*– unsecured and matured monetary claim (Art. 257); (b) special grounds for this kind of interlocutory/provisional decision; for TEBC the maturity of the monetary claim is self evident for the needed ground; further is not legally demanded unlike TCPR.

For the maritime cases actually the general idea written above is being followed. In Art. 1362 of TCC, the creditor, for this arrest application, has to satisfy two prerequisites, for now proved *prima facie*: (a) He should hold a maritime claim as listed strictly in Art. 1352 but nothing else and (b) the monetary amount of it –*of course* including its existence–.

The maritime claims listed in *lex fori* and stated as prerequisite for a provisional arrest are here as follows: (a) loss or damage caused by the operation of the ship; (b) loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship; (c) salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment; (d) damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this subparagraph (d); (e) costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew; (f) any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise; (g) any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise; (h) loss of or damage to or in connection with goods (including luggage) carried on board the ship; (i) general average; (j) towage; (k) pilotage; (l) goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance; (m) construction, reconstruction, repair, converting or equipping of the ship; (n) port, canal, dock, harbor and other waterway dues and charges; (o) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf; (p) disbursements incurred on behalf of the ship or its owners; (r) insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the ship-owner or demise charterer; (s) any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the ship-owner or demise charterer; (t) any dispute as to ownership or possession of the ship; (u) any dispute between co-owners of the ship as to the employment or earnings of the ship; (v) a mortgage or a “hypothèque” or a charge of the same nature on the ship and (z) any dispute arising out of a contract for the sale of the ship are stated as maritime claims. This article is parallel to article 1, paragraph 1 of Arrest Convention 1999. The list of maritime claims is provided by way of a closed list. Besides, the qualification of these claims will be determined *lex fori*.

Maritime claims may legally be secured by any other option, if possible, regulated in general rules over the debtor's asset including its ships. In this regard, if the ship would be subject of a preventive measure; it has to be declared and executed as "arrest" through the court's provisional attachment injunction [in the sense of "freezing order"] under Art. 1352/I TCC. At this point legal source of the demand as maritime claim, whether secured or not unlike TEBC Art. 257 is highly crucial since to Art. 1353/III of TCC; a ship cannot be arrested and thus subject to a "*provisional* attachment" if the arrest demand does not depend on a maritime claim stated in article 1352 of TCC. Though any claim but the maritime ones depending on a final court judgment could still be satisfied by final attachment executed on a ship. This kind of preference as a priority over ships in the *patrimuan* in the provisional enforcement field in favor of maritime claims is seen debatable upon getting into force of the new TCC. Consequently maritime claims could only be legally secured by way "arrest" depending upon a provisional injunction as a freezing order; the other claims but the maritime ones till being subject to a final court judgment should be legally secured in the provisional field by the other items of the *patrimuan* but not the ship.

For [provisional] arrest of the ship there are some conditions satisfied within the application before the court: (a) The claimant -according to Art. 1362 of TCC- should submit persuasive evidences (*prima facie* proof) that its claim is one of the maritime liens stated in article 1352 of TCC and about its monetary value accord; (b) the claimant should provide security in an amount equal to SDR 10,000 according to article 1363 of TCC. Besides these two conditions directly related with the *prov.* arrest demand written above; the court has to check and of course the creditor has to satisfy within his application the conditions of Art. 1369 of TCC about the ship –*or its sister*- over which the *prov.* arrest injunction of the court has to be executed in definite time.

In regard of the security as regulated *lex specialis* in Art. 1363, still consuming of Art. 259 of TEBC including matters not touched upon in TCC become debatable. For instance, whether the creditor holding a final court decision is exempted from furnishing security for his provisional measure demand should be solved by evaluation of the norms Art. 1351, 1363 of TCC and Art. 259 of TEBC.

In the enforcement field the creditor should meet with another kind legal security that has to satisfy for the execution of the court's provisional arrest injunction before the enforcement office. Every court's provisional arrest injunction has to be executed in 10 days starting from its declaration and this process is driven before the separate enforcement office out the side court. At this point the office applies general the rules of "arrest" as regulated Art. 78 *et seq.* of TEBC. Between those rules to Art. 95, the creditor/claimant of the *prov.* arrest injunction also has to satisfy the expenses need for protection and management of the arrested item. After 2011 and the *new* TCC with his *lex specialis* norm in Art. 1363, whether the general rule in Art. 95 of TEBC is applicable is debatable and the maritime specialists doing business in Turkey has to be ready and in fact before this debate.

The counter party can always demand the raise of the security. Besides the claimant has also right to demand to reduce the security, either. There is only one type of maritime claim that does not require providing security: claims for wages and other sums due to master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions on their behalf (*see for now* Art. 1363/II-IV).

Out of the context of the question asked above, if the claimant is a citizen of a foreign state and there are no bilateral or multilateral conventions signed between Turkey and that foreign state to exempt their citizens from providing security of foreignness in the commencement of the case in reciprocal states, the claimant should "*also*" provide a security

of foreignness calculated in respect of the amount of the claim for his claim in the case before the court solving the merit in *res judicata*.

2. **Under your national law, if the claim for which a vessel has been arrested has subsequently been rejected by the court hearing the case on its merits, would be the arrestor be liable in damages by the reason of:**
 - a. **The mere rejection of the claim?**
 - b. **Or would proof be required about the arrestor's:**
 - i. **Awareness / knowledge that his claim had no foundation, or**
 - ii. **Negligence in bringing such a claim, or**
 - iii. **Bad faith or gross negligence or, otherwise, malicious bringing of such a claim?**

TCC is not clear related with the question. The only provision, placed in TCC, article 1361, states that the court which decides on the provisional attachment is also authorized to conduct the compensation case filed against the arrestor who is found to be unjustified. The article also states that if a case has been filed on the merits of the claim, the court which will decide on the compensation case should stay its case and make the finalization of the case on the merits of the claim a prejudicial issue.

As mentioned above Article 1351 of TCC, under the title of “supplement provisions”, states that the related articles of TEBC will be applied to subjects *which are not governed in this part of the code*. According to article 259 of the code; if the claimant who demands for a provisional attachment is found to be unjustified; will be liable from “*all*” the damages suffered by the counter party and third person and will be bound to provide security.

For the question when the loss is occurred and under what circumstances the arrestor is counted liable from the unjustified arrest, since TCC and TEBC holds a legal gap then finally rule in Art. 399 of TCPR has be taken into account: Whenever (a) the arrestor's claim on the merit has no foundation and rejected as unjustified; (b) the injunction of the court has been set aside upon the objection; (c) again the injunction, this time, *ex officio* becomes set aside by *not* furnishing the needed security or *not* executed in the definite mean time, the arrestor is being accepted as liable from the loss of the debtor and besides the any third person affected negatively from the execution of the arrest injunction.

Anyhow, not only the occurrence of loss/damage but also the execution of that provisional injunction is the fundamental prerequisite of any compensation case based on unlawful arrest.

The options written in the above question in sub-section *b, i-iii* are not needed to be honored for this kind of compensation case. Any kind of fault or negligence in the sense of *culpa* is not need to be satisfied. Because the legal nature of this compensation is seen in Turkish law, in the “*equity liability*” of the arrestor. Since there is a court's injunction though based on *prima facie* proof under the execution operation rather than an illegal action of the arrestor as asked for *tort* or even in *strict liability*, the mere satisfaction of the conditions listed above is seen due and adequate for the occurrence of the liability. On the other side the questions of whether and, if yes, how the contributory negligence of the suffered party (for instance by not objecting the injunction whenever possible) could be occurred is debatable in Turkish law and has to be studied deeply.

Another specific issue for the liability is about the partly upheld claims in the final judgment. In this regard unless the difference in amount between the claim and the judgment is huge and gross then as generally accepted in the doctrine the liability of arrestor does not occur.

- 3. Under your national law, if a vessel is arrested pursuant to a decision by a court of first instance, but the arrest is subsequently repealed by an appeal court (without deciding on the merits of the claim):**
 - a. Would the arrestor be liable in damages for the consequences of the arrest, and if yes in what circumstances?**
 - b. For liability under (a), if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?**

TCC again is not clear related with the question. Referring once again to article 1351 of TCC which refers the application of TEBC to complement the enforcement related provisions of TCC, and article 265 of the code might be considered firstly.

This said article governs the objection procedure against the decisions of provisional attachment. According to the article; the debtor may apply to the court of first instance in 7 days beginning from the application of the attachment/notification of the attachment document, to reject the decision of provisional attachment in terms of; (a) the grounding reasons of the provisional attachment, (b) authority of the court and (c) security. Even the third persons whose benefits have been violated may apply to the court in 7 days beginning from their knowledge from the provisional attachment, to reject the provisional attachment decision in terms of; the grounding reasons of the provisional attachment and security. The court holds an investigation through the pointed reasons and accepts or ignores the demand. The objector should submit all the documents which are attributed in the petition. The court should call the both sides and listen them. If both of the sides do not attend, the court may decide through the documents submitted in the file. The court's decision could be appealed before *Court of Cassation* until July, in 2016 and then *Court of Appeal* within their establishments after July, 2016. Anyhow, the appeal process does not stop the execution of provisional attachment.

Thus, in Turkish law the arrest decision may only be appealed after the finalization of the objection procedure driven by the court of first instance. Following to that objection procedure, if one of the parties has appealed the decision, the decision appellate body will be certain. If court's injunction is set aside by the appellate body it will also cause liability of the arrestor according not to TCC or TEBC since having legal gaps but to Art. 399/I of TCPR as said above. In other words, if the arrestor is found to be unjustified through this decision of the court of first instance over objection or the appellate body, it will arise all the consequences of a wrongful arrest governed in article 259 of TEBC. Referring once again to that article, proof of negligence, bad faith or gross negligence on part of the arrestor is not required.

- 4. If the arrest claim was not against the owner of the ship and could not be enforced against that ship under the law of the state where the vessel was arrested:**
 - a. Would, under your national law, the arrestor be liable in damages?**
 - b. For liability under (a), if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?**

Not only the owner but other persons may be affected from the arrest of the ship. Other persons such as time charterer (as having the commercial management of the ship), cargo interest, port authority, manager or mortgagee may also be allowed to provide security. Referring once again to article 1351 of TCC which refers the application of CEE to complement the enforcement related provisions of TCC, article 259 of the code might be considered. According to article 259 of CEE, in times when the claimant who demands for a

provisional attachment founds to be unjustified; will be liable from all the damages suffered by the counter party and as well as third person. The rejection of the claim is sufficient in order to hold the arrestor liable in damages suffered by the third persons and neither in TCC nor in CEE proof of negligence, bad faith or gross negligence on part of the arrestor is required.

5. If the amount of the arrest claim was grossly exaggerated:

- a. Would, under your national law, the arrestor be liable in damages to the owner of the ship for any of the following losses caused by reason of the grossly exaggerated claim:**
 - i. For the extra cost of the security required,**
 - ii. For losses incurred by the owner of the ship by reason of the delay caused by the greater time required to procure the security, or**
 - iii. For losses incurred as a result of the owner being unable to provide the excessive security?**
- b. For liability under (a), if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?**

Nor TTC neither CEE specially governs the effects of grossly exaggerated arrest claims. Referring once again to article 1351 of TCC which refers the application of CEE to complement the enforcement related provisions of TCC, article 259 of the code might be considered. Article 259 of CEE deals only with the liability of the arrestor through all the damages suffered by the counter party and third person.

Although the said norm does not specifically determine the sorts of damage, by using the word of “*all*” the doctrine evaluates the context of damages as both the “direct” and “indirect” ones including the losses related with credit note among the banks of the suffered party or its customer mass.

In this regard, if the owner of the ship or third person suffers; extra cost of the security required, losses incurred by reason of delay caused by the greater time required to procure the security and losses incurred as a result of being unable to provide excessive security, because of the grossly exaggerated claim, he/she can demand these as sorts of his/her damage claim.

6. If the person allegedly liable for the arrest is largely solvent and it is possible to enforce judgments or arbitration awards against him, e.g. he owns ships (not under separate corporate veils), which call regularly at ports where enforcement can take place:

- a. Can the arrest be considered wrongful as a result, so as to attribute liability to him under your national law?**
- b. For liability under (a), if any, would proof of negligence, bad faith or gross negligence on part of the arrestor be required?**

The arrestor would not be liable. Turkish law does not interpret the concept of “wrongful arrest” in such way. The request should be based on; the existence of a maritime claim stated in article 1352 of TCC, the submission of persuasive evidences that the claim is one of the maritime liens stated in article 1352 of TCC and about its monetary value and providing security in an amount equal to SDR 10,000, regardless from the solvency of the allegedly person liable. The maturity of the monetary credit is so valid ground for the prov. attachment demand. For the unmatured credits the creditor has to satisfy some other condition

listed in Art. 257 of TEBC. The legal and economic status of the counter party/debtor is irrelevant

As a result, the case will not be considered as “wrongful” in such situation.

7. Are the other circumstances in which, under your national law, an arrestor can be held liable in damages for the arrest of a ship?

With the reference of article 1351 of TCC, article 259 of TEBC is the only article dealing with the liability of the arrestor through all the damages suffered by the counter party and third person.

8. Does your national law provide for a penalty or other sanction to be levied upon the arrestor, separate and distinct from ant damages, if he is held liable from arrest?

As mentioned above with the reference of article 1351 of TCC, article 259 of TEBC will be applied when dealing with the liability of arrestor through all damages suffered by the counter party and third person, through the courts which decide on the provisional attachment.

Besides these articles governing compensation of liability of the arrestor, there are *no* provisions governing a penalty or other sanction which will be levied upon the arrestor.

9. Would a court in your country, seized with a claim for damages for the arrest of a ship in another country, apply the law of the country of arrest (*lex forum arresti*) in that regard, or would it apply its own substantive national law (*lex fori*), or would it apply the substantive law applicable pursuant to the general international private rules of its country?

First of all, the Turkish court should investigate whether there is a “foreign element” in the case. Unless there is a foreign element in the case; then the merit will be solved directly by the Turkish domestic substantive/material law rules such as Art 259 of TEBC and Art. 399 of TCPR by the cooperation provision of Art. 1351 of TCC.

If the case includes any kind of foreign element, then the Code of Private International Law and International Civil Procedure Law (hereinafter will be referred to as “CPIL”) is going to be applied; so that the court has to find the related foreign substantive law by using its conflict of law rules regulated in CPIL.

In this regard, CPIL, within its Art. 1/II, makes an arrangement and gives priority to international conventions that Turkey is a contracting state of it. Otherwise the related conflict of law norm will be applied in order to find the substantive law. At this point as a private international law issues, the question according to which law the qualification of the conflicted issue is going to be made occurs and the general answer to that is *lex fori* even for the substantive matters alike all procedural matters.

For instance, as a general rule stated in Art. 22/I of CPIL, all rights *in rem* on ships are governed by the law of the place where the ship is registered. On the other hand, in terms of “maritime liens” TCC has accepted a special conflict of laws rule in Art. 1320/III, alike in Art. 3/I, *e*, of the Arrest Convention 1999, and whether any claim has the status of “maritime lien” is going to be determined under Turkish law before the Turkish judge as *lex fori*.

Furthermore, according to Art. 1350 of TCC, under the title of “applicable law” including the provisional or executive attachment of a ship, all the results of the forced sale of a ship and all other transactions and actions related with general execution are abided to the law of the country where the ship exists when these transactions and actions are held.

Therefore, Turkish courts are authorized to arrest a foreign-flagged ship and apply their own national law (*lex fori*) for the execution matters if the ship exists in Turkey when these transactions and actions are held. For instance, the courts having jurisdiction in *ratione loci* to rule provisional attachment of foreign-flagged-ships are determined in Art. 1355 of TCC.

Besides these codes, bilateral and multilateral international conventions that Turkey is a contracting state of such as the Convention of the Taking Evidence Abroad in Civil or Commercial Matters should be applied for the other procedural matters.

Thus by virtue of the said principles written above; if the conflict which is brought in front of the Turkish court, for example arises from an agreement relating to the use or hire of the ship, the qualification of the agreement and searching whether it is a hire agreement or not, should be made through Turkish law. After the determination that; this is a hire agreement in terms of Turkish law and thus one of the maritime claims placed in article 1352 of TCC and other conditions to apply provisional attachment on the ship, mentioned above, is met, the ship may be arrested by Turkish courts. However, “the merits of the case” will still depend on the conflict of laws issue.

In due to the answer of the question asked above, it’s understood that although the loss suffered was occurred abroad by an unlawful arrest of a ship; the legal status of the compensation claim seized by a Turkish court is waiting for an answer. Actually this is a matter qualification under the principles of international private law.