

# **SHIP MORTGAGE vs. MARITIME LIEN**

**WHAT ARE THE CHANGES IN FAVOUR OF  
THE MORTGAGEE IN TURKISH LAW?**

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# I. INTERNATIONAL CONVENTIONS

- International Convention for The Unification of Certain Rules of Law Relating to Maritime Liens And Mortgages (BrussCon of 1926). In force since 1931.
- International Convention for The Unification of Certain Rules Relating to Maritime Liens and Mortgages (BrussCon of 1967). Not in force.
- International Convention on Maritime Liens and Mortgages (GeneCon of 1993). In force since 2004.

# II. SOURCE AND AIM OF THE TURKISH LEGISLATION

- Sources of the provisions on
  - Maritime lien:
    - GeneCon of 1993
    - TR is still party to the BrussCon of 1926.
  - Ship mortgage:
    - German and Swiss Law
- Aim: To adapt to the recent international conventions in maritime law

# III. SCOPE OF APPLICATION OF TCC

- Provided that BrussCon of 1926 is not applicable
- For registered ship mortgages → If the registration place is in Turkey (Art. 22 of Turkish Code of International Private and Procedural Law - TCIPP)
- For maritime liens → If judicial proceeding is instituted in Turkey (Art. 1350/3 of TCC)

# **IV. PROVISIONS OF TCC REGARDING SHIP MORTGAGE AND MARITIME LIEN**

## **A. Basic Rules on Ship Mortgage (SM)**

# Definition

- SM is
  - a right which secures a claim and grants priority over the proceeds of the forced sale.
  - the only form of creating a contractual charge on a registered ship.
  - accessory to the claim.

## Definition – 2

- Future or conditional claims or claims embodied in negotiable instruments may be secured by SM.
- If all shares in the ship are owned by one person, separate SMs on several shares are not admitted.
- If the share of each owner is not identified, SM on shares is not admitted.

# Creation

## ■ Three formal requirements:

1. Contract in writing

2. Certification of the signatures by notary public

- Contract may also be concluded at the Register

3. Registration

## Creation – 2

- Registration does not create any assumption relating the claim.
- After concluding the contract relevant persons cannot avoid registering SM.
- If the ship is purchased from abroad an entry into the flag certificate is sufficient.

# Creation – 3

- Mandatory contents of the register:
  - Name or the title of the mortgagee,
  - Amount of the claim in Turkish Lira (TL),
  - Rate of interest,
  - Rank of the mortgage.

# Creation – 4

- To create a SM for a claim
  - of which amount is variable
  - in foreign currency
  - denominated in TL and fixed in foreign currencyis possible.

# Scope of SM

- Entire ship
- Hire
- Compensation for loss of or damage to the ship
- Confiscation price of the ship
- Insurance indemnity

# Contents of the secured claim

- Principal claim
- Costs of enforcement proceedings and default interest
- Three-year interest

# Ranking of SM

- SM is registered in the rank chosen by the parties.
- Date of registration is irrelevant.
- Principle is “constant ranks”, not “sliding ranks”.
- SMs in the same rank will share pro rata.

# Time bar

Neither the mortgage nor the claim secured thereby is subject to any statutory limitation period.

# Some issues regarding procedure of enforcement

## ■ **Governing law:**

- Law of the place where the ship is subject to these remedies

## ■ **Inseparability of debt and security:**

- SM shall not be subject to proceeding of enforcement separately from the debt secured.

# Some issues regarding procedure of enforcement – 2

## ■ Foreclosure:

- Mortgagee may proceed by way of foreclosure of the mortgage
- Mortgagee is entitled to commence bankruptcy proceedings

## ■ Level of priority of SM:

- Sixth rank of eight classes is reserved for SM.

# **IV. PROVISIONS OF TCC REGARDING SHIP MORTGAGE AND MARITIME LIEN**

## **B. Basic Rules on Maritime Lien (ML)**

# Claims secured by a ML

- Claims for 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
- 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 ship
- Claims for reward for the salvage of the ship

# Claims secured by a ML – 2

- Claims for port, canal, and other waterway dues, quarantine and pilotage dues
- Claims based on tort, arising out of physical loss or damage, caused by the operation of the ship, other than loss of or damage to cargo, containers and passengers' effects carried on the ship
- Claims for general average distributions

# Claims secured by a ML – 3

- No ML shall attach to a ship to secure claims arising out of or resulting from these exceptions:
  - Damage in connection with the carriage of oil or other hazardous substances by sea
  - Radioactive properties

# Scope of ML

- Ship
- Compensation for loss of or damage to the ship
- General average contributions for lost or damaged items

# Contents of secured claim

- Principal claim
- Interest
- Cost of the enforcement proceedings

# Characteristics of ML

- The holder of the maritime lien is always the claimant.
- ML follows the ship, not the debtor.
- ML takes priority over all statutory and contractual liens and charges except that
  - ML arising from general average contributions shall rank after the all liens and charges,

## Characteristics of ML – 2

- In the event of the removal of a stranded or sunken ship by a public authority in the interest of safe navigation or the protection of the marine environment, the costs of such removal shall be paid out before all other claims secured by a ML.

# Ranking of ML

■ **Rule:** MLs rank in the order listed

■ **Exceptions:**

- ML arising from general average distributions:  
Last one
- ML securing a claim for reward for the salvage of the ship: Takes priority over all MLs arising before the salvage operations

# Ranking of ML- 2

- **Rule:** MLs rank pari passu as between themselves
- **Exception:** ML securing claims for reward for salvage: “last in time first in line”

# Extinction of ML by lapse of time

- **Rule:** ML shall be extinguished after a period of one year unless, prior to the expiry of such period, the ship has been arrested with the result of a forced sale.

## Extinction of ML by lapse of time – 2

- **Exception:** ML securing claims for general average distributions shall be extinguished after a period of 6 months
  - commencing on the date on which the ship arrived at the port of destination (or at the port where the voyage ceased)
  - unless, prior to the expiry of such period, the ship has been arrested with the result of a forced sale.

# Extinction of ML by lapse of time – 3

- In the event of a sale to a bona fide purchaser of the ship
  - at the end of a period of 60 days
  - commencing on the date on which the ship is registered under the purchaser's name in accordance with the law of the registration place.
- Whichever expires first.

# Procedure of enforcement

Holder of ML

- may enforce its lien by foreclosing
- may commence bankruptcy proceedings
- may commence seizure or bill of exchange proceedings.
- Choice of last two ways means waiving ML.

# Procedure of enforcement – 2

- Third rank in the list of priorities is dedicated to the ML.
- Additional ML securing claims for general average distributions is covered under the sixth rank.

# **IV. PROVISIONS OF TCC REGARDING SHIP MORTGAGE AND MARITIME LIEN**

## **C. Changes in Favour of the Mortgagee**

1. Far less claims will get ahead of mortgagee.
2. ML is subject to Turkish law if proceedings are brought in Turkey.
3. Claims arising from SM are recognised as maritime claims.
4. Insurance indemnity is out of the scope of ML.
5. Compensation for loss of or damage to the ship and confiscation price of the ship are included in the scope of SM.

6. SM covers insurance indemnity regarding all the “items” included in the SM.
7. ML arising from claims for general average distributions are behind SM.
8. ML shall be extinguished after a period of one year.

9. An important remedy for protection of SM
- Problem: security is not in danger but there is a concern about danger
  - Solution: arrest, independent custodian, one month time-limit to take necessary precautions
  - If precautions are insufficient: One month time-limit to commence foreclosure proceedings

# CONCLUSION

## Turkish law

- is in harmony with GeneCon of 1993,
- corresponds with today's tendency of strengthening the position of ship mortgagee.

# THANK YOU

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