Arrest of Ships: New Principles under Turkish Law

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ABSTRACT

On 1 July 2012, the new Turkish Commercial Code (TCC) entered into force. The TCC included a large scale reform of maritime law. Thereby, the provisions of the most recent international conventions have been incorporated verbatim into the TCC. As for the arrest of ships, the provisions of the International Convention on Arrest of Ships, 1999, Geneva (1999 Geneva Arrest Convention) were incorporated. This article aims to introduce the new basic principles of arrest of ships, whereby a comparison is made from time to time with the previous principles of Turkish law and the principles of the 1999 Geneva Arrest Convention.

I. INTRODUCTION

The arrest of ships has always been an issue for shipping and trade. The interests of the ship owners, operators, cargo owners and crew members conflict with the interests of the creditors. On one hand, the creditors may need to obtain security by way of arrest; on the other hand, those with a beneficial interest in the ship are prejudiced by way of (unlawful) arrests. Moreover, ships move and call at various ports of the world and become subject to different laws. Therefore, there is indeed a common benefit in harmonising the rules of arrest. The common law and civil law jurisdictions had, however, significant differences in their respective approach to arrest of ships.

With the purpose of merging the two systems and having uniform rules, first the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, 1952 (1952 Brussels Arrest Convention) was signed in Brussels, on 10 May 1952. Many states are party to this Convention.1

In time, some provisions of the 1952 Brussels Arrest Convention were criticised as being outdated and needing amendment. There also appeared conflicting applications within the signatory states. The International Convention on Maritime Liens and Mortgages was signed in Geneva in 1993 and added further nuance. It granted ‘maritime lien’ status to certain claims which might fall out of the scope of the ‘arrest’ as defined in the 1952 Brussels Arrest Convention. Subsequently, another Convention, the 1999 Geneva Arrest Convention, was signed on 12 March 1999. This convention was the result of a diplomatic conference attended by the representatives of ninety-three states together with the representatives of nineteen inter-governmental and non-governmental organisations. The Convention was ultimately designed to address the issues arising from the application of the 1952 Brussels Arrest Convention and aimed at creating a better balance between those with beneficial

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1 For the signatory states to this Convention, please see: <https://treaties.un.org/pages/showDetails.aspx?objid=08000002801338ba>.
The 1999 Geneva Arrest Convention came ultimately into force on 14 September 2011. Turkey on the other hand has neither been a party to the 1952 Brussels nor the 1999 Geneva Arrest Convention. On 1 July 2012, a new TCC entered into force. The TCC included a large scale reform of maritime law. As for arrest, the 1999 Geneva Arrest Convention provisions were incorporated verbatim into the TCC.

II. DEFINITION OF ‘ARREST’

In general terms, arrest is a pre-judgement remedy to obtain security for a claim. Under the 1999 Geneva Arrest Convention, an arrest is given to secure a maritime claim and is defined as the detention of a ship by a judicial process. It does not include the seizure of a ship in execution or satisfaction of a judgment. The TCC follows the same approach.

III. PRINCIPLES OF ‘LEX FORI’

In line with the provisions of the 1999 Geneva Arrest Convention, the TCC accepted the principle of lex fori (law of the forum) in respect of the arrest procedure and enforcement. Accordingly, the arrest, foreclosure, judicial enforcement of sale, list of priorities, distribution of proceeds and passing of title are all governed by the law of the place where the ship is.

IV. COMPETENCY

The Commercial Court Chambers, which are given exclusive authority for maritime disputes, will be competent to hear the arrest applications. Where there is no such court, the Civil Court, designed to hear maritime disputes, will be competent. The arbitration tribunals, on the other hand, are not granted competency to grant arrest orders.

V. JURISDICTION

Before the enactment of the TCC, Turkish courts granted conflicting orders in respect of the arrest of ships passing in transit through the straits of the Bosphorus and the Dardanelles.

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3 As of today, the UN records that Albania, Algeria, Benin, Congo, Estonia, Latvia, Liberia, Spain and Syrian Arab Republic acceded and Bulgaria, Ecuador ratified the Convention, whereas Denmark, Finland, Norway and Pakistan signed the Convention, please see: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-8&chapter=12&lang=en>.

4 The legislative preparations for Turkey's accession to the 1999 Geneva Arrest Convention are underway.

5 For an in depth review please see K. Atamer, *Türk Ticaret Kanunu Tasarısına göre Deniz Hukukunda Cebri İcra*, (İstanbul: Arıkan, Basım 2006).

6 Art 1(2) of the 1999 Geneva Arrest Convention.

7 Turkish law recognizes another remedy: an interlocutory provisions injunction (*ibtiyati tedbir*). The Code of Enforcement and Bankruptcy (CEB) as amended in 2003 by the Act no. 4949 clarified that the arrest is available for pecuniary claims and the injunction is to secure all other types of claims, such as personal or in rem rights.

8 Under the Turkish Arbitration Act no 4686 dated 21 June 2001, arbitral tribunals are granted the power to order arrests and injunctions. In the parliamentary reasons of the TCC, it was explained that the powers granted under the International Arbitration Act are overruled.
The regime of the Turkish Straits is governed by the 1936 Montreux Convention. The 1936 Montreux Convention provides in Art. 2 of its English version that ‘in time of peace, merchant vessels shall enjoy complete freedom of transit and navigation’.

In view of the 1936 Montreux Convention, the regime for the Turkish Straits is ‘an innocent passage’ regime. The 1936 Montreux Convention is on the other hand silent as to the jurisdiction of the Turkish Republic whereas the 1936 Montreux Convention preparations reveal that Turkish government had reserved the right of exercising jurisdiction.

On the other hand, Turkey is not a party to the 1958 Geneva Convention on the High Seas and the United Nations Convention on the Law of the Sea of 1982 (UNCLOS). Therefore, there may be doubts as to what extent the concept of the right of innocent passage applies and whether the principle of arrest immunity provided by these conventions would apply for ships innocently passing through Turkish territorial waters. There are views to the effect that the rules contained in these conventions are of customary character and Turkey, in principle, follows the customary rules of the law of the sea as codified or developed by the UNCLOS. Having said this, even where the rules as to the arrest immunity provided in these Conventions are accepted as customary rules, whether or not Turkey is persistently objecting against these rules would arise as another primary question. If so, Turkey may argue that such rules are not applicable for Turkish straits.

In the course of preparations of the TCC, the jurisdiction for the arrest of foreign ships has been among the hotly disputed issues. Having reviewed the issue from the point of law of the sea, private international law and maritime law, the drafting committee adopted the general principle that a Turkish court will have jurisdiction over the arrest of a foreign ship whenever that ship has come to a complete halt within the jurisdiction of that court. By way of example, a ship’s dropping anchor, mooring, berthing and dry-docking have been listed as facts comprising a ship’s coming to a complete halt for within the jurisdiction.

The same jurisdiction rule shall also apply for the arrest of ships registered in Turkey. Additionally, the court at the place of registration has been granted jurisdiction to grant arrest orders on ships registered in Turkey.

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9 Convention Regarding the Regime of the Straits, done at Montreux on 20 July 1936.
10 Meray S.L & O. Olcay, Montreux Boğazlar Konferansı, Tutanaklar, Belgeler 1976 (Montreux Straits Conference, Records and Documents), 164 et seq.
12 See D.Bektaşoğlu, Do Commercial Vessels Enjoy Arrest Immunity whilst Passing the Turkish Straits, Maritime Law Journal Year: 5, no: 1-4- (İstanbul: Beta Basım 2002), 199 et seq.
13 S. Toluner, Boğazlardan Geçiş ve Türkiye’nin Yetkileri, Milletlerarası Hukuk açısından Türkiye’nin Bazı Dış Politika Sorunları (İstanbul: Beta, 2000), 312 et seq; R. Kender & E. Çetingil, Deniz Ticareti Hukuku (İstanbul: XII Levha, 2009), 238.
16 K. Atamer, Türk Ticaret Kanunu Tasarısına göre Deniz Hukukunda Cebri İcra, (İstanbul: Arikan, 2006), 264 et seq.
17 Art. 1354(i) TCC.
VI. ARREST AFTER COMMENCEMENT OF PROCEEDINGS

Arrest after the commencement of proceedings on the merits is permitted. Where there are proceedings on the merits pending before an arbitral tribunal in Turkey or abroad or where there is an action pending before a foreign court, still, the Turkish courts shall have jurisdiction to grant arrest orders.18

VII. ARREST FOR MARITIME CLAIMS

The TCC provides that a ship can be arrested only for a maritime claim and for no other claim.19 The TCC, in accordance with the 1999 Geneva Arrest Convention, lists the categories defined as maritime claims.20 Where the claim qualifies as a maritime claim, the right of arrest is granted. The list is a closed list. The list includes claims arising from:

(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;
(e) Costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship services rendered to the ship for its operation, management, preservation or maintenance, 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;

18 Art. 1357(2) TCC.
19 Art. 1353(3) TCC. Under the previous law, there was no distinction as to maritime and non-maritime claims.
20 Art. 1352(1) TCC.
(m) Construction, reconstruction, repair, converting or equipping of the ship;
(n) Port, canal, dock, harbour 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, including loans taken for the ship, incurred on behalf of the ship
or its owners;
(q) Insurance premiums, including mutual insurance calls, in respect of the ship,
payable by or on behalf of the ship-owner or demise charterer;
(r) Any commissions, brokerages or agency fees payable in respect of the ship by or on
behalf of the ship-owner or demise charterer;
(s) Any dispute as to ownership or possession of the ship;
(t) Any dispute between co-owners of the ship as to the employment or earnings of
the ship;
(u) A mortgage or a ‘hypothèque’ or a charge of the same nature on the ship; and
(v) Any dispute arising out of a contract for the sale of the ship.

VIII. PRECONDITION RELATING TO THE MARITIME CLAIM

According to the TCC, the allegation of a maritime claim is sufficient for the court to
grant the arrest order. The court will seek whether the applicant prima facie evidenced the
existence of the maritime claim and the claim amount. The claim is not necessarily to be
certain or incontestable.

Where a claim has not yet fallen due, the creditor would be entitled to arrest only if it can
be shown that either the debtor has no domicile or that the debtor is fraudulently disposing of
its assets to escape his liabilities or he is about to disappear or has already done so.

IX. EXERCISE OF RIGHT OF ARREST

The TCC follows the approach of the 1999 Geneva Arrest Convention in respect of the
exercise of the right of arrest, with slight variations.

1. Arrest of a ship in respect of a maritime claim will be exercisable if:

   (a) The person who owned the ship is liable for the maritime claim and is the owner
       of the ship when the arrest is effected. Where for instance, the owner (not the
time charterer or the manager) is contractually liable for the bunkers supplied to
the ship, the bunker supplier can proceed with the arrest of the ship, which is still
owned by that ship owner, at the time of the arrest. In other words, the debtor

21  According to the previous law, a mortgagee was obliged to proceed first with the foreclosure of the
mortgage and was not in principle permitted to arrest the mortgaged ship. According to the new law, this
prohibition has been set aside and the mortgagee is now entitled to arrest the ship to obtain security.

22  Art. 1362(i) TCC.

23  Art. 257 CEB.

24  Art. 1369 TCC.

25  The translation of this article in the TCC is not perfectly identical with the wording of the 1999
Geneva Arrest Convention. For a correct translation, please see K.Atamer & C. Suzel, Teni Deniz Ticaret
Hukuku’nun Kaynakları (İstanbul: XII Levha, 2013) 735.
should be the owner of the ship which will be arrested;
(b) The person who demise chartered the ship at the time when the maritime claim arose should be the owner of the ship to be arrested. This is one of the deviations from the position in the 1999 Geneva Arrest Convention. Article 1 (b) of the Convention sets out (additionally) that the ship can be arrested even when the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is the demise charterer when the arrest is effected. This has not been added into the TCC. The TCC drafters have stated the view that under Turkish law, a ship owned by a third person cannot be sold for the debts of a demise charterer. Hence there is no point in allowing the arrest of a ship owned by a third person for the debts of a demise charterer, as permitted by Art. 3(3) of the Convention;26
(c) The claim is based upon a mortgage or a ‘hypothèque’ or a charge of the same nature on the ship;
(d) The claim relates to the ownership or possession of the ship; or
(e) The claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is granted or arises under the law of the State where the arrest is applied for.

2. Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose:
(a) Owner of the ship in respect of which the maritime claim arose; or
(b) Demise charterer, time charterer or voyage charterer of that ship.

3. In respect of the disputes in relation to the ownership or possession of a ship, only the vessel being subject of this dispute can be arrested.

**X. APPLICATION FOR THE ARREST**

The applicant applying for the arrest of a ship must file a written arrest application to the Court which has jurisdiction. To that application, the documents supporting the maritime claim must be attached. The documents in foreign language must be translated.

The TCC requires the applicant to provide a counter security.27 The court processes the application only after the security is deposited. The amount of the security is fixed to be SDR 10,000.28 Upon the application of the parties, the court can decide on upward and downward

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26 Art. 3(3) of the 1999 Geneva Arrest Convention provides that ‘Notwithstanding the provisions of paragraphs 1 and 2 of this article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship’; we note that, in some other EU jurisdictions applying the provisions of Art. 3(4) of the 1952 Brussels Arrest Convention, a ship may be arrested in respect of a claim against demise and time charterers. See, for example, in relation to Italy *Lady Haya Ltd v. Sete Yacht Management SA* (2008) Dir Mar 979; in relation to France *United Arab Shipping Co v. Blohm Voss* ("The Trident Beauty"), (1991) DMF 726; and in relation to The Netherlands *Arrondissementsrechtbank of Rotterdam 29 January 1994 - 'The Micoperi 7000'*, (1997) Hoge Raad 12 September 1997, 1997 Schip en Schade 123.

27 The exception, as referred in Art. 1363 (3) is as follows: crew members claiming wages and other sums are not required to provide counter security.

28 Under the previous law, the amount of the security was not fixed and it was at the discretion of the court, generally decided to be between 15%-40% of the claim amount. Where the claim amount is high, that became an unfair burden for the arresting party.
adjustments on the amount of the security.29

The court must attend the arrest application with priority. It will be at the discretion of the court to hold a hearing or not. Most of the applications are heard ex parte. Where the Court dismisses the application, there is the right for appeal to a higher court.

Where the court grants the arrest order, the order must be taken within three business days to the enforcement office within the district of the court or at the place where the ship has come to halt.30 It is provided with the TCC that the arrest can also be enforced during holidays or non-working hours.31 The order will be served on the master of the ship or on the owner, operator or to the agent of the ship and the order will be enforced by way of prohibition of its departure. For this purpose, the arrest order will be notified to the coast guard, police department customs authority and the harbour master.

The enforcement office must also notify the arrest to the registry of the ship in Turkey. For foreign ships, that notification must be made to the respective consulate.

The TCC sets out a new rule in respect of the ships which have sailed before the enforcement of the arrest order. Where the ship to be arrested is flying the Turkish flag, a warning will be served on the ship-owner to the effect that security must be provided to secure the maritime claim within ten days or alternatively, the ship must be made available for the enforcement of the arrest order during its next voyage.32

XI. SCOPE OF ARREST

The TCC provides that the arrest of a ship extends to the earnings of the ship and the indemnities payable under hull and machinery insurance policies.33

XII. OBJECTIONS TO THE ARREST ORDER

All parties involved in the operation of the ship will have the right to object against the arrest order within seven days starting from the date of receipt of the information of the arrest.34 The parties involved in the operation of the ship are not been limited by law. As such, together with the ship-owner, a charterer, demise charterer or a mortgagee will be entitled to do so.

The parties are also entitled to object in order to request changes to the order, including the amount of the security provided.

Upon objection, the court will fix a hearing to hear the parties. The court may then uphold, set aside or modify the arrest order. Where the objection or the request for the amendment is dismissed by the court, the respective party is entitled to appeal.35

29 Art. 1363(1) TCC.
30 Art. 1364 (1) TCC.
31 Art. 1365 (2) TCC.
32 In breach thereof, the remedies set out in the Turkish Penal Code will apply.
33 Art. 1368 (1) TCC.
34 The date when the ship-owner or a demise charterer will be deemed to have the information regarding the arrest will be the date when the master is served on the arrest order.
35 By virtue of the Amendment dated 2003 to the CEB.
XIII. SUBSEQUENT ARREST

The TCC adopted the approach of the 1999 Geneva Arrest Convention regarding rearrest and multiple arrest. Accordingly:

1. Where a ship has already been arrested and released or security in respect of that ship has already been provided to secure a maritime claim, that ship cannot thereafter be rearrested or arrested in respect of the same maritime claim unless:
   (a) The nature or amount of the security in respect of that ship already provided in respect of the same claim is inadequate, on condition that aggregate amount of security may not exceed the value of the ship;
   (b) The person who has already provided the security is not, or is unlikely to be able to fulfil some or all of that person's obligations; or
   (c) The ship arrested or the security previously provided was released either (i) upon the application or with the consent of the claimant acting on reasonable grounds, or (ii) because the claimant could not by taking reasonable steps prevent the release.

2. Any other ship which would otherwise be subject to arrest in respect of the same maritime claim cannot be arrested unless;
   (a) The nature or amount of the security already provided in respect of the same claim is inadequate; or
   (b) The provisions of paragraph 1 (b) or (c) of this article are applicable.

XIV. WRONGFUL ARREST

The TCC provides no particular provision for wrongful arrest. Accordingly general rules will apply.

Where the arrest is found wrongful, the applicant will be liable vis-à-vis the owner and other involved parties, such as those with beneficial interests in the ship's cargo or mortgagees. The applicant's negligence is not required for the liability to arise. The dismissal of proceedings on the merit pursuant to an arrest will be sufficient to demonstrate liability. Where there is partial acceptance of the claim in the course of the proceedings on its merits, the arrest will not be deemed unlawful unless the applicant acted in bad faith.

XV. PROCEEDINGS ON THE MERITS

In order to maintain the arrest, the applicant must commence the legal proceedings on a claim's merits within one month as of the date of the enforcement of the arrest.

XVI. CONCLUSION

Turkish law on ship arrest is now identical with the rules of the 1999 Geneva Arrest Convention. The drafters of the TCC have also given consideration to the problems and conflicting court practices of the past and to the remedy thereof. Several original provisions, particularly in respect of the enforcement of maritime claims and ship mortgagees have also been introduced within the TCC. Ultimately, Turkey is now a convenient jurisdiction for arrest, foreclosure of mortgages and enforcement.

36 Art. 1375 (1), (2) TCC.
37 Art. 1376 (1) TCC and Art. 264 (1) CEB.