

Enforcement of Turkish Ship Mortgages

1. BACKGROUND

Turkish law mortgages' enforcement in foreign jurisdictions in the context of arrest proceedings became recently subject of discussions. Some articles existing in Turkish Enforcement and Bankruptcy Code (the "TEBC") as well as in Turkish Commercial Code (the "TCC") have formed the scope of these discussions. In this memo, we will summarize these articles and relevant discussions, the amendments brought by the new Turkish Commercial Code (the new "TCC") which will enter into force on the 1st July 2012, and consequences of these amendments.

2. ENFORCEMENT OF TURKISH MORTGAGES OUTSIDE OF TURKEY AND APPLICABLE LAW

In the recent years, the issue of whether Turkish Law will be applied to the Turkish mortgages' enforcement proceedings initiated abroad was very much discussed.

Regarding this discussion, it should be first of all emphasized that it is already accepted by Turkish doctrine and established by various recent precedents of the Turkish High Court that the enforcement proceedings of Turkish ship mortgages are subject to the laws of the jurisdiction where the relevant proceedings are conducted (lex fori principle).

However, considering some objections raised in the past by the mortgagors and in order to prevent any possible discussions in the future regarding the law to be applied to the enforcement of Turkish mortgages abroad, the new TCC includes a provision clarifying this issue.

Accordingly in the new TCC, the first paragraph of article 1350 clearly stipulates that the attachment, sale and transfer of a vessel through enforcement proceedings are subject to the laws of the country where the vessel is located at the time of enforcement.

We consider that such a clear provision will prevent in the future any possible objections/claims of the mortgagors regarding the law to be applied to the enforcements of Turkish mortgages abroad.

3. DISCUSSIONS REGARDING ARTICLE 45 OF TEBC

Article 45 of TEBC stating that *“in the event that there is a receivable secured by a mortgage, the creditor should initiate first the foreclosure proceedings for enforcement of such mortgage”* is an article which created further discussions in the past regarding the enforcement of Turkish mortgages abroad.

However, whether or not this article will be applied to the enforcement proceedings conducted in a foreign jurisdiction is solely related to the issue of application of Turkish Law to such enforcement proceedings in general. As explained above, the Turkish Supreme Court of Appeal and the relevant provision of the new TCC are clearly accepting the lex fori principle, which foresees that the law of the jurisdiction where the enforcement proceedings are commenced should be the applicable law. As such, we conclude that the article 45 of TEBC is applicable to the enforcement proceedings initiated in Turkey and does not relate to the enforcement proceedings conducted abroad.

4. DELETION OF MORTGAGED SHIPS SOLD ABROAD

Another discussion came up in the last years regarding the deletion of ships from the Turkish Registry as a result of an auction sale abroad. Regarding this issue, article 1245 of the current TCC – as already amended in 2004 due to the need which arose in this respect - foresees that a ship would be deleted as a result of an auction sale in case such auction sale is announced in two separate newspapers among five newspapers having the highest circulation in Turkey through two announcements having 3 days of interval.

Considering possible complications which may be caused by this procedure, the relevant article in the new TCC (article 1350) has been re-drafted by the legislator in order to avoid any difficulties in the future that may effect the deletion of a ship from the Turkish Registry as a result of an auction sale abroad.

The new TCC stipulates that for the deletion of a ship after its auction sale, the relevant auction should be notified to the Turkish Ship Registry, to the owner of the ship and to the owner of the registered rights on the ship 30 days prior to the sale by the relevant persons (which also includes the mortgagee) OR should be announced in a Turkish newspaper having a newspaper circulation of over 50.000.

This new regulation is also in line with article 11 of United Nations' International Convention on Maritime Liens and Mortgages dated 1993 and will certainly avoid any possible complications/difficulties regarding the deletion of ships sold by auctions abroad from the Turkish Ship Registry provided of course that the requirements under Turkish Law, which are mentioned above, are fulfilled.

In parallel with the amendment of article 1245, article 866 of the TCC has been amended as well and the following paragraph has been abolished; “The acquisition and loss of ownership of a ship that is registered with the Turkish Ship Registry is subject to Turkish Laws”. The legislator, by abolishing this paragraph in article 866 aimed to pave the way to the application of the new article 1245.

4. CONCLUSION

The articles discussed above have been amended in order to reflect the recent precedents of the Turkish Supreme Court of Appeal, the needs of modern shipping as well as for the adaptation of the provisions of the UN International Convention on Maritime Liens and Mortgages dated 1993 to the Turkish Law.



As explained above, although the current provisions under Turkish Law in relation to the Turkish ship mortgage are generally in line with the standard proceedings which are in place under most of the jurisdictions, a need for some important changes in the TCC arose in the last years.

In this connection, the new TCC, with its clear wording and modernized provisions in accordance with international conventions will bring clarifications to some recent discussions and will also prevent possible misinterpretations in the future.

GUR LAW FIRM