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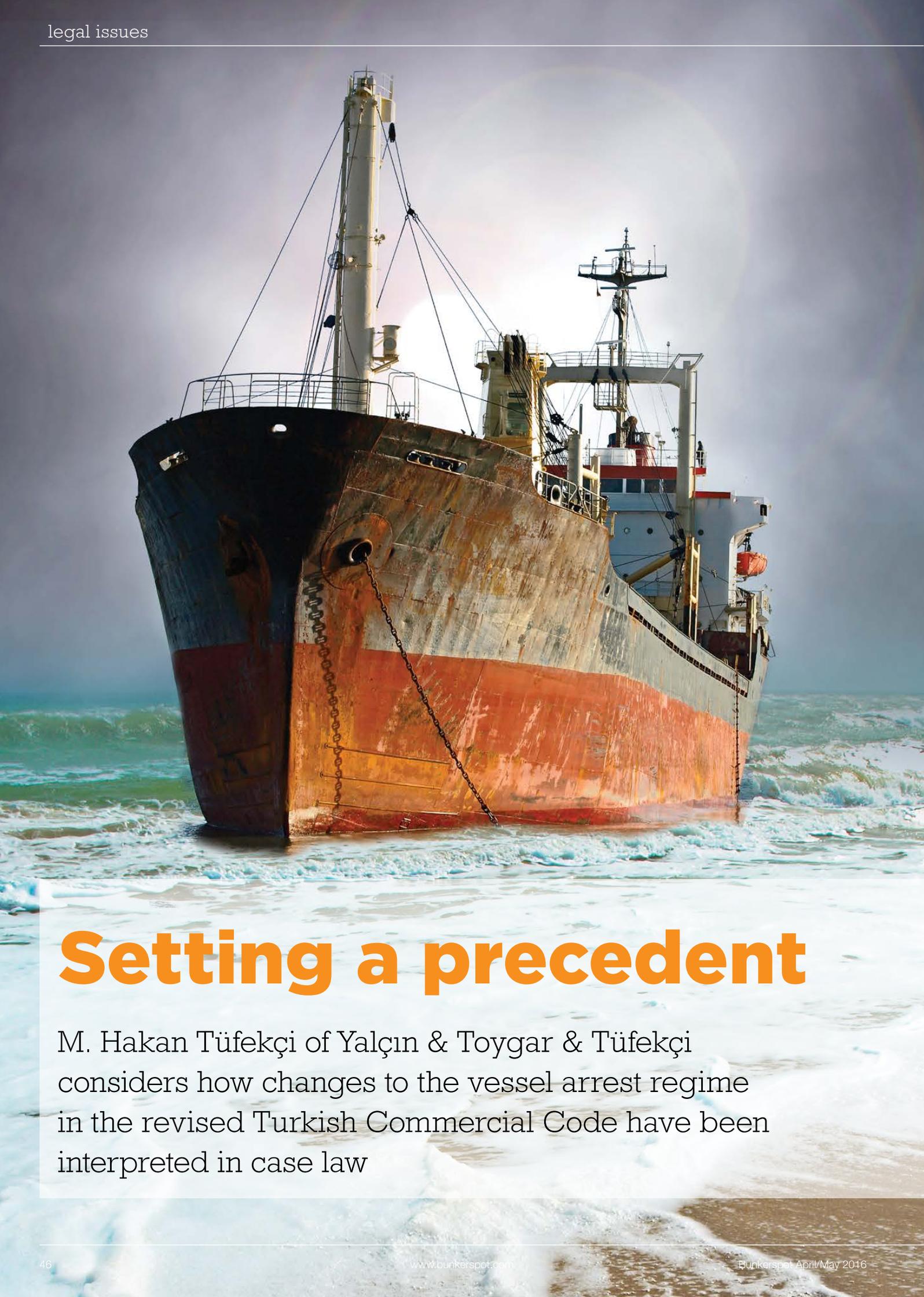
INSIDE:

METERING SYSTEMS

ALTERNATIVE FUELS

BUNKER PRICING

COUNTERPARTY DEFAULT



Setting a precedent

M. Hakan Tüfekçi of Yalçın & Toygar & Tüfekçi considers how changes to the vessel arrest regime in the revised Turkish Commercial Code have been interpreted in case law

Back in 2012, the revised Turkish Commercial Code came into effect. This introduced some significant changes to the country's ship arrest regime, which had previously been mainly governed by the terms of the Enforcement and Bankruptcy Code of Turkey. In our previous article in *Bunkerspot* (February/March 2015), we provided an overview of the new ship arrest provisions. However, it is also interesting to consider, from the practitioner as well as the academic perspective, how case law has been affected by the revised ship arrest terms.

In this feature, therefore, we have selected two Supreme Court judgments on different aspects of ship arrest, as well as one local court judgment which is in relation to an OW Bunker/ING N.V. claim against a shipowner/vessel. This latter case was appealed, but, at the time of writing, a Supreme Court judgment has yet to be handed down.

Case 1 – The forced sale of a foreign flag vessel by such flag State judicial authorities when she was physically in Turkey and under arrest

This case related to a Lithuanian-flagged vessel, *MV GLOBAL 1*, where she was arrested in Turkey by a global bunker trader because of the non-payment of an outstanding invoice for bunkers delivered. We were involved in this case on behalf of the bunker trader and made the arrest on 10 October 2014 when the vessel was in the Port of Izmir. At the time of the arrest, we and our client were not aware of the fact that the shipowners were under bankruptcy proceedings in Lithuania.

It transpired that on 30 September 2014, the vessel had been subject to an involuntary sale by the bankruptcy administrator of her shipowning company in Klaipeda, Lithuania, whereafter a bill of sale had been issued on 2 October 2014.

On 6 October 2014, a property purchase and sale agreement was signed and accordingly, on the same day, a protocol of delivery and acceptance was signed between the bankruptcy administrator and the buyer of the vessel. In fact, in the records of the Turkish port authorities, her name appeared *MV GLOBAL 1*, and the owner named was one to which our client had sold the bunkers.

Upon receipt of instructions on 8 October 2014, we applied to the Izmir courts on 9 October 2014 to make the arrest and the commercial court checked the vessel status with Izmir port and granted the arrest on 10 October 2014, with the reasoning, after receipt

of information from the port, that the debtor to the bunker trader was the shipowner as per Article 1369 of the TCC¹ and the claim was a maritime claim as per Article 1352 of the TCC².

The new owner (the purchaser of *MV GLOBAL 1* from the bankruptcy administrator) challenged such arrest order on the basis that it had no debt to the bunker trader as it had acquired the ownership of the vessel before the arrest, as the bill of sale was issued on 2 October and the protocol of delivery and acceptance was signed on 6 October, whereas the arrest was effected on 10 October, subsequent to the change of ownership.

The local Izmir commercial court opted to favour the buyer's argument and lifted the arrest as the buyer was not the debtor to the bunker trader.

We, on behalf of the bunker trader, appealed the court judgment and argued that in the face of Article 1350 of TCC, any forced sale in Lithuania had no effect at all for the ownership change of the vessel, when the vessel was physically in Turkey and therefore the ownership was still with the ex-owners.

We further argued that Lithuania is a signatory to the International Convention on Maritime Liens and Mortgages 1993 and these convention provisions had not been complied with during the forced sale proceedings in Klaipeda.

The 11th Civil Chamber of the Supreme Court overruled the local commercial court judgment and ruled that:

'The request is regarding rejection to the arrest on the foreign-flag vessel and removal of arrest. The local commercial court decided acceptance of objection on the grounds that the ownership has been transferred to the Buyers as a result of the forced sale of ship in Lithuania and debtor was not the owner of ship at the time of arrest. On the other hand, it is regulated under the Article 1350 of Turkish Commercial Code No:6102 that: results of the forced sale of ship and all transactions and disposals including arrests or attachment of vessel, forced sale of vessel and transfer of ownership is subject to law of the country where at the time of transactions and disposals of vessel were made. It is understood within the scope of the file and the letters of Izmir Harbour Master's Office that the vessel which requested to be imposed the arrest on it during the auction and delivery of vessel to Buyers in Lithuania is in Izmir; it is not accepted that the sale which has been made by Lithuanian authorities is valid according to Turkish Law and ownership has been transferred to Buyers.'

'In other words and in summary, the 11th Civil Chamber of the Supreme Court decided that any enforcement proceedings (such as an auction/forced sale, etc.) shall be made by Turkish judicial authorities only when the vessel is physically in Turkey at such a material time, otherwise all transactions, even change of ownership due to enforcement proceedings overseas, shall be invalid under Turkish law.

2. Transfer of ownership of a vessel and significance of the time of arrest

This case related to a Turkish flag vessel, *MV H K* (such letters are an abbreviation of the vessel), where an arrest order was granted in favour of a global bunker trader due to an unpaid balance. We were involved in this case on behalf of the bunker trader and effected the arrest by means of a block on her registry for a third party sale as she was not physically in Turkey on 6 August 2014.

We and our clients, however, were not aware of the fact that the vessel was about to be scrapped in Pakistan.

We, upon receipt of instructions from our bunker trader client, made arrest applications on 31 July 2014, however, due to a long public holiday in Turkey at that time, the 51st Istanbul Commercial Court granted the arrest order late on 5 August 2014 and such an order was effected early in the morning on 6 August 2014.

The shipowners objected to such an arrest order on the basis that they had no title on the vessel at the time of the arrest order as a memorandum of agreement for the sale of the vessel was signed between the scrap yard and the owners on 20 July 2014, where the bill of sale was issued on 31 July 2014 (on the same day of our arrest application) and physical delivery to the scrap yard took place on 5 August 2014.

The shipowners argued that since the title/ownership of the vessel had been transferred to the scrap yard on the 5 August 2014, the arrest granted by the court was an incorrect judgment as Article 1369/1-a specifically states that:

'Article 1369-(1) Arrest is permissible of any vessel in respect of which a maritime claim is asserted if:

a) *the person who owned the vessel at the time when the maritime claim arose is liable for the claim and is owner of the vessel when the arrest is effected.'*

We, in our answers, claimed that the date of effect of the arrest shall be considered as the date of application and supported our view with academic works as well as indirect case law. The Istanbul 51st Istanbul Commercial

Court ruled in our favour and stated that since the arrest application had been made on 31 July 2014, this date should have been considered as the date of effect of the arrest. Since the debtors were the owners of the vessel on the date of application, the arrest based on the maritime lien was deemed lawful. The owners appealed the judgment and the 11th Civil Chamber of the Supreme Court subsequently acknowledged the reasoning of the Istanbul 51st Commercial Court.

3. OW Bunker/ING Bank N.V. claims

We have seen that ING Bank N.V. is now in pursuit of arresting vessels in relation to receivables due to the OW Bunker group of companies' receivables. We are involved in such cases, however no final local court judgment has yet been given these particular cases. We do, however, also monitor other OW Bunker/ING Bank N.V. cases and have come across one case in which the Trabzon Commercial Court made a judgement.

This case relates to an arrest of ING Bank N.V., as the assignee of the OW Bunker group of companies, against the owners of the *MV A* (such letter is an abbreviation of the vessel), where the vessel was arrested due to the debt to OW Bunker.

In fact, in the bunker supply chain, the shipowners had paid the physical supplier but not OW Bunker, whereafter ING Bank N.V. (as the assignee of OW Bunker) claimed that it is the contractual party for the supplied bunkers and therefore had the maritime claim for the bunker supply, and as such payment to the physical supplier is irrelevant to ING claim.

The owners did challenge that the physical supplier of the bunkers did arrest the vessel for the same supply in Piraeus, and they had paid the physical suppliers and therefore had no obligation to pay OW Bunker (accordingly ING Bank N.V.).

Trabzon Commercial Court did not go into details of the arguments made by the parties but simply stated that since the nature of the maritime claim had been paid up (the reasoning did not make any reference if such physical supplier had the right to receive such payment from the shipowners) accordingly ING had no right to make the arrest and the arrest was lifted.

This judgment was appealed and is still pending before the Supreme Court.

1 ARTICLE 1369 - (1) Arrest is permissible of any vessel in respect of which a maritime claim is asserted if: a) the person who owned the vessel at the time when the maritime claim arose is liable for the claim and

is owner of the vessel when the arrest is effected, b) the person who was the charterer of the vessel at the time when the maritime claim arose is liable for the claim and is owner of the vessel when the arrest is effected, c) the claim is secured with a maritime pledge, maritime mortgage or a charge of the same nature on the vessel, d) the claim relates to the ownership or possession of the vessel; or e) the claim gives rise to a maritime lien right pursuant to article 1320.

(2) Arrest is permissible of any vessel apart from those enumerated in paragraph one if the vessel when the arrest is effected belongs to the person who is liable for the maritime claim and who was, when the claim arose: a) The owner of the vessel in respect of which the maritime claim arose, or b) The demise charterer, time charterer or voyage charterer of that vessel.

(3) In disputes over the ownership or possession of the vessel, an arrest decision may only be rendered in respect of the vessel that is the subject of this dispute.

2 ARTICLE 1352- (1) 'Maritime Claim' means a claim arising out of one or more of the following: (I) Goods, materials, provisions, bunkers, equipment including containers supplied or services rendered to the ship for its operation, management, preservation or maintenance.

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