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Ship Mortgage vs. Maritime Lien What Are The Changes In Favour Of The Mortgagee Under Turkish Law?

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Abstract

The new Turkish Commercial Code (TCC), adopted on 13.1.2011 under Nr. 6102 and entered into force on 1.7.2012, contains a great number of necessary changes in maritime law, which may be considered as an extensive, long-awaited reform in this area of law. Maritime lien is one of the fields in which essential changes were made. Through this reform, the position of the mortgagee against the holder of the maritime lien has been redesigned. The subject of this paper is these changes redesigning the position of the ship mortgagee and reregulating the legal concept of maritime lien. Firstly, the basic rules of TCC regarding ship mortgage and maritime lien are summarized. After that, the changes are highlighted and their practical and concrete outcomes are studied. Lastly, it is examined whether this reform is sufficient to correspond with the recent developments in this area of law.

Keywords

Turkish Commercial Code Nr. 6102 • Maritime Law • Reform In Maritime Law • Ship Mortgage • Maritime Lien • Changes In Favour Of The Ship Mortgagee • Reregulation Of The Concept Of Maritime Lien

Özet

13.1.2011 tarihinde kabul edilen ve 1.7.2012 tarihinde yürürlüğe giren 6102 sayılı Türk Ticaret Kanunu (TTK), deniz ticareti hukukuna ilişkin çok sayıda önemli değişiklik içermektedir. Bu değişiklikler, uzun süredir ihtiyaç duyulan, kapsamlı bir reform olarak değerlendirilebilir. Esaslı değişikliklerin söz konusu olduğu alanlardan biri de gemi alacaklısı hakkıdır. Bu reform ile gemi üzerinde ipotek hakkına sahip olan kişinin gemi alacaklısı hakkı sahibi karşısındaki konumu yeniden şekillendirilmiştir.

Çalışmanın konusu, gemi üzerinde ipotek hakkına sahip olan kişinin konumunu yeniden biçimlendiren ve gemi alacaklısı hakkını yeniden düzenleyen bu değişikliklerdir. Çalışmada öncelikle 6102 sayılı TTK'nın gemi ipoteğine ve gemi alacaklısı hakkına ilişkin temel hükümleri ele alınmıştır. Daha sonra getirilen değişiklikler vurgulanmış ve bunların uygulamadaki somut sonuçları üzerinde durulmuştur. Son olarak, bu alandaki reformun güncel gelişmelerle uyum sağlanması bakımından yeterli olup olmadığı değerlendirilmeye çalışılmıştır.

Anahtar Kelimeler

6102 Sayılı Türk Ticaret Kanunu, Deniz Ticareti Hukuku, Deniz Ticareti Hukukunda Reform, Gemi İpoteği, Gemi Alacaklısı Hakkı, Gemi Üzerinde İpotek Hakkına Sahip Kişi Lehine Getirilen Yenilikler, Gemi Alacaklısı Hakkının Yeniden Düzenlenmesi.

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Introduction

Modern ships, whether bulk cargo ships, container ships, tankers or cruise ships, are high value assets, the construction or purchasing of which requiring a significant amount of liquid assets which is derived from both equity capital and debt capital in the shipping industry². Debt capital associates with bank loans³, which is the primary means of ship financing⁴. The ship mortgage is a common, preferred and therefore typical security for a loan granted for the financing of construction or purchasing of a ship⁵. Taking into consideration its role in ship financing, the importance of the value of ship mortgage as a credit tool becomes rather obvious. Germany, being aware of this importance almost 100 years ago, has enacted a statute⁶ in 1933, which is the legal basis of special banks supplying loan for ship financing secured by a mortgage on the ship. This legislative move was intended to increase the trading volume and to boost the ship financing market⁷.

In Turkey, particularly after 1980's, purchasing of ships from abroad by means of obtaining loan from foreign banks secured by a mortgage on ship became a common practice. Yet maritime lien, which is an ancient, global maritime concept having its roots in Roman law⁸, is mostly considered as diminishing the value of the ship

2 For information regarding the main groups of sources in the financial markets covering the financial needs of the shipowners, see **Stefan Otto / Thilo Scholl**, "Legal Treatment of Ship Finance Loans: Analysis of the Ship Loan Contract", HSBA Handbook on Ship Finance, 2015, pp. 56-58; **Ashhan Sevinç Kuyucu**, Gemi Finansmanı Sözleşmeleri, İstanbul 2016, pp. 7-17. For historical development of ship financing, see **Sevinç Kuyucu**, pp. 17-24. During the years of 2005-2007, a total amount of roughly 6,5 to 8 billion Euros per year was placed in new vessels in Germany. Out of this amount of funds, more than one third represented equity capital. On the other hand, approximately 5 billion Euros represented debt capital. See **Christoph Zarth**, "Ship Finance and Ship Mortgages", Recent Developments in Maritime Law, Papers Submitted to the Joint Seminars of the German and Turkish Maritime Law Associations Held in Hamburg on 25 August 2011 and in İstanbul on 6 October 2011, Turkish Maritime Law Association and German Maritime Law Association, p. 66. For effects of credit crisis and recession after 2008 on ship financing industry and for transition of the financing model, see **Otto / Scholl**, pp. 56, 57; **Sevinç Kuyucu**, pp. 23-24.

3 Bottomry, which may be deemed as the medieval alternative of the bank loan, is not a frequently preferred credit tool anymore. For information regarding the development of bottomry, see **S. Didem Algantürk**, "Türk Hukukunda ve İngiliz Hukukunda Gemi İpotekinin Tesisine İlişkin Özellikler", İstanbul Barosu Dergisi, Vol. 73 Nr. 4-5-6 1999, p. 657 et seq.

4 For the reason and for special features distinguishing ship financing contracts as a bank loan agreement from credit contracts in general, see **Sevinç Kuyucu**, pp. 5-6.

5 See **Zarth**, p. 67; **Kemal Omağ**, "Gemi İpoteki ve Sigorta Tazminatı", Prof. Dr. Turhan Esener I. İş Hukuku Uluslararası Kongresi, İstanbul 2016, p. 352 et seq.; **Sevinç Kuyucu**, p. 140. It has to be added that there is an alternative to mortgage in German law, which is described as a much more subtle and flexible instrument for security purposes, namely land charge ("Grundschuld"). However, land charge is not available for registered ships. A market practice has been developed to eliminate this disadvantage by means of an additional contract, namely "abstract promise" which leads to satisfy flexibility and efficiency needed by the financing industry. For more information on this issue, see **Zarth**, pp. 69-71.

6 Gesetz über Schiffspfandbriefbanken (14.8.1933), RGBl. 1933 I, p. 583.

7 See **Kerim Atamer**, "Gemi İpoteki Hükümlerinin Yasama Tarihiçesi, Kaynakları ve Bazı Uyum Sorunları", Prof. Dr. Rona Serozan'a Armağan, Vol. I, İstanbul 2010, pp. 261, 263.

8 **Kerim Atamer**, Gemi ve Uçak İpotekinin Hukuksal Temelleri, İstanbul 2012, pp. 14-18; **M. Barış Günay**, Türk ve Anglo-Amerikan Hukukunda Gemi Alacaklısı Hakkı, Ankara 2009, p. 33 et seq.; **M. Barış Günay**, "Türk, İngiliz ve Amerikan Hukukunda Gemi Alacaklısı Hakkının Tarihiçesi", Prof. Dr. Hüseyin Ülgen'e Armağan, Vol. I, İstanbul 2007, p. 928 et seq., p. 943; **Kerim Atamer / Duygu Damar / Feyzi Erçin / Dolunay Özbek / Burcu Çelikkapa Bilgin / Dilek Bektaşoğlu Şanlı / M. Barış Günay / Ecchan Yeşilova Aras / Cüneyt Süzel / Kübra Yetiş Şanlı**, Transport Law in Turkey, 2. edition, The Netherlands 2016, pp. 68-69; **Kerim Atamer**, "Gemi ve Yük Alacaklısı Haklarının Kullanılmasında Yargılama Usulü ve İcra", Ticaret Hukuku ve Yargıtay Kararları Sempozyumu XIV: Bildiriler – Tartışmalar, Ankara, 4-5 Nisan 1997, p. 218. For information regarding ratio legis of this concept, see **Tahir Çağa**, Deniz Ticareti Hukuku III: Gemi ve Yük Alacaklısı Hakları, Zamanasımı, Deniz Hukukunda Cebri İcra, 4. edition by Rayegân Kender, İstanbul 2005, p. 1 et seq.; **Nuray Barlas**, Gemi Alacaklısı Hakkı Veren Alacaklar ve Gemi Alacaklısı Hakkının Hukuki Niteliği, İstanbul 2000, p. 6 et seq.

mortgage as a credit tool⁹. Maritime lien is a statutory lien on the ship, arising from claims set out in legislations, taking priority over all statutory and contractual liens and charges and may be claimed against any person who is in possession of the ship. Maritime lien is neither a pledge nor a mortgage. In other words, the subject of the lien is not to be handed over to the claimant and its creation is not depending on registration. Consequently, its invisibility and absolute priority is a great danger for the mortgagee. Today's tendency grounding on this consideration is providing legal advantages to the ship mortgagee against the holder of the maritime lien in order to increase the value of ship mortgage. Reducing the number of claims secured by maritime liens may be deemed as the major advantage, however it is not the only one.

It has to be stated that the provisions of the old Turkish Commercial Code¹⁰ (old-TCC) regarding maritime liens did not correspond with this tendency. In comparison with the recent international convention on this issue, old-TCC dropped behind this evolution. Considering that this legal policy is not pure legal but has also an economical aspect in relation of ship finance, especially having regard to the fact that the loan banks of Turkish shipowners are mostly foreign banks, this inconsistency appears to be a problem. Hence, it has been pointed out that there is an urgent need for reform in this respect¹¹.

The new Turkish Commercial Code (TCC)¹², which entered into force on 1 July 2012, contains a great number of necessary changes in maritime law, which may be considered as an extensive, long-awaited reform in this area of law. Maritime lien is one of the fields in which essential changes were made. Through this reform, the position of the mortgagee against the holder of the maritime lien has been re-designed.

The subject of this paper is these changes re-designing the position of the ship mortgagee and re-regulating the legal concept of maritime lien. Firstly, the basic rules of TCC regarding ship mortgage and maritime lien are summarized. After that, the changes are highlighted and their practical and concrete outcomes are studied. Lastly, it is examined whether this reform is sufficient to correspond with the recent developments in this area of law.

9 **Tahir Çağa/Rayegan Kender**, Deniz Ticareti Hukuku I: Giriş, Gemi, Donatan, Kaptan, 16. edition, İstanbul 2010, p. 114 et seq.; **Sami Okay**, Deniz Ticareti Hukuku I, 3. edition, İstanbul 1970, p. 190; **Sami Akıncı**, Türk Hukukunda Gemi İpoteği, Banka ve Ticaret Hukuku Araştırma Enstitüsü, Ankara 1958, p. 155; **Ergon Çetingil**, 40. Yılında Türk Ticaret Kanunu Semineri Tartışmaları, 5-9 Aralık 1998, İstanbul 1998, p. 124; **Fehmi Ülgener**, "Gemi İpoteği Alacaklısının Sigortalıdır Menfaati: Tekne, Sorumluluk ve IMIC Sigortaları", Sigorta Hukuku Dergisi, Vol. 1 1999, p. 39. See also **Akıncı**, p. 237. For information regarding clauses in ship financing contracts stipulating that the debtor shall take measures in case of the rise of maritime liens, see **Sevinç Kuyucu**, p. 202 et seq.

10 Act Nr.: 6762, Date: 29.6.1956; Official Reporter (OR) Date: 9.7.1956, OR Nr.: 9353.

11 Çağa, Gemi Alacaklısı Hakkı, pp. 49-50. For further information about the provisions of old-TCC regarding maritime liens, see Çağa, Gemi Alacaklısı Hakkı, pp. 8-49; **Fahiman Tekil**, Deniz Hukuku, 6. edition, İstanbul 2001, pp. 471-482. On the other hand, it has been rightfully submitted that the limitation of shipowner's liability system in the old-TCC was not convenient for an extensive reform on this issue. Therefore, the limitation of liability system according to which the assets other than the ship, freight and their surrogates are not available to the creditor for procedure of enforcement has to be revised primarily. See **Akıncı**, pp. 157-158. For further information regarding the limitation of shipowner's liability system in the old-TCC, see Çağa / Kender, pp. 153-162.

12 Act Nr.: 6102, Date: 13.1.2011; OR Date: 14.2.2011, OR Nr.: 27846.

II. International Conventions

It is stated in the Preamble of the TCC¹³ that one of the aims of the reform is adapting to the recent international conventions in maritime law¹⁴. Considering this aim, it may be deemed as a necessity to summarize briefly¹⁵ the international conventions regulating this issue before dealing with the provisions of the TCC.

The first one is International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages made in Brussels on 10 April 1926 (BrussCon of 1926). It entered into force on 2 June 1931. The current number of the contracting states to the convention is 24.

The BrussCon of 1926 has been only partially successful in achieving its objective of furthering uniformity in this area of law. One reason of this is that the common law countries have not accepted the BrussCon of 1926. Both this fact and the US proposal to strengthen the position of the ship mortgagee¹⁶ led to a new international convention, namely International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, made in Brussels on 27 May 1967 (BrussCon of 1967). It has not entered into force yet.

Considering that the BrussCon of 1926 has not achieved a global acceptance and the BrussCon of 1967 has not entered into force, it was foreseeable that an attempt for a third international convention to be on the way. That is the International Convention on Maritime Liens and Mortgages¹⁷, which was adopted in Geneva on 6 May 1993 and entered into force on 5 September 2004. The current number of contracting states to the GeneCon is 18. Some of them are Albania, Nigeria, Russian Federation, Ukraine and as of 2014 Congo. It seems that the major maritime nations did not accept the GeneCon.

III. Sources and Scope of Application of TCC

The source of the provisions of the TCC regarding the maritime liens is the GeneCon. As explained in the general preamble of the TCC, the reason for that is, to adapt to the recent international conventions in maritime law, which is one of the aims of the reform¹⁸.

13 <http://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss96.pdf> p. 52.

14 For motives of this preference and for the method chosen, see **Samim Ünan**, "Some Aspects of Maritime Law in the New Turkish Commercial Code", Recent Developments in Maritime Law, Papers Submitted to the Joint Seminars of the German and Turkish Maritime Law Associations Held in Hamburg on 25 August 2011 and in Istanbul on 6 October 2011, Turkish Maritime Law Association and German Maritime Law Association, p. 9 et seq.

15 For elaborate information about the international conventions, see **Turgut Kalpsüz**, *Gemi Rehni*, 4. edition, Banka ve Ticaret Hukuku Araştırma Enstitüsü, Ankara 2001, pp. 47-54; **Cüneyt Süzel**, *Gemi Alacaklısı Hakkı ve Gemi İpoteki Hakkında 1993 Cenevre Sözleşmesi ve Yeni Türk Ticaret Kanunu*, İstanbul 2012, pp. 10-18.

16 **Süzel**, p. 12.

17 For information regarding the proposals during the negotiations of the GeneCon, especially for discussions about registration of maritime liens and even abolishing the concept, see **Barlas**, p. 77 et seq.

18 <http://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss96.pdf> p. 52.

But Turkey is still a party to the BrussCon of 1926¹⁹. In the preamble of the TCC, it has been pointed out that the re-regulation of the maritime liens is based on the principles of the GeneCon and therefore, Turkey has to denounce the BrussCon of 1926 when the bill becomes the law²⁰. The bill became the law and entered into force on 1 July 2012. However, Turkey has not denounced the BrussCon of 1926 yet and has not acceded to the GeneCon either²¹. The Turkish Government has sent the bill on Turkey's accession to the GeneCon to the Parliament on 13 October 2014, although nothing has happened since. It seems that the legislative intent of acceding the GeneCon and denouncing the BrussCon of 1926 came to nothing for now.

As to the provisions of the TCC on the ship mortgage, the principles are originated basically from German law, namely "Gesetz über Rechte an eingetragenen Schiffen und Schiffsbauwerken vom 15.11.1940" (GeReSch)²². However, considering that the relevant provisions of the Turkish Civil Code are coming from the Swiss Civil Code, it can be said that Swiss law has also a limited influence. Accordingly, it has been pointed out that, "Turkish ship mortgage is a German security mortgage with a flavour of Swiss real estate mortgage"²³.

Before going into detail regarding the content of the provisions of the TCC, its scope of application has to be mentioned.

According to Art. 14 of the BrussCon of 1926, the provisions of the convention shall be applied in each Contracting State in cases in which the vessel to which the claim relates flies the flag of a Contracting State. In other words, such cases are out of the scope of application of the TCC²⁴.

In cases relating to the ships flying the flags of non-contracting states, the applicable law shall be determined according to the rules of conflict of laws.

19 http://www.comitemaritime.org/Uploads/Publications/CMI_YBK_Part_III.pdf p. 477.

20 <http://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss96.pdf> p. 392.

21 For information regarding the legal situation after Turkey's accession to the GeneCon, see **Atamer**, *Gemi ve Uçak İpoteki*, pp. 110-113.

22 For general information regarding the basic features of this act, see **Zarth**, pp. 67-68.

23 **Kerim Atamer**, "New Turkish Law of Ship Mortgages and Enforcement", Recent Developments in Maritime Law, Papers Submitted to the Joint Seminars of the German and Turkish Maritime Law Associations Held in Hamburg on 25 August 2011 and in Istanbul on 6 October 2011, Turkish Maritime Law Association and German Maritime Law Association, p. 79. For further information about security mortgage (Sicherungshypothek), circulation mortgage (Verkehrshypothek) and the relation between these types and the principle of mortgage being accessory to the debt, see **Hans Wüstendörfer**, *Neuzeitliches Seehandelsrecht*, 2. Auflage, Tübingen 1950, p. 85 et seq.; **Atamer**, *Gemi İpoteki Hükümlerinin Yasama Tarihçesi*, p. 279. See also **M. Kemal Oğuzman / Özer Seliçi / Saibe Oktay-Özdemir**, *Eşya Hukuku: Zilyetlik-Tapu Sicili, Taşınmaz ve Taşınır Mülkiyeti, Kat Mülkiyeti, Sınırlı Ayni Haklar*, 19. edition, İstanbul 2016, pp. 897 Nr. 3185 et seq.; **Haluk Nami Nomer / Mehmet Serkan Ergüne**, *Eşya Hukuku: Zilyetlik, Tapu Sicili, Rehin Hakları*, 3. edition, İstanbul 2016, p. 167 Nr. 527, p. 202 Nr. 641; **Aydın Aybay / Hüseyin Hatemi**, *Eşya Hukuku*, 4. edition, İstanbul 2014, p. 271 Nr. 5 et seq. For the security mortgage character of ship mortgage in Turkish law, see also **Kalpsüz**, p. 58 et seq.; **Akıncı**, p. 19; **Atamer**, *Gemi İpoteki Hükümlerinin Yasama Tarihçesi*, p. 281. For the advantage of security mortgage character of ship mortgage in German and Turkish law in regard to its role in ship financing, see **Atamer**, *Gemi ve Uçak İpoteki*, p. 55 et seq.; **Sevinç Kuuyucu**, p. 144.

24 There are two options set out in Article 14/1 and 14/2 of the BrussCon of 1926. Accordingly, if provided for by national laws, the provisions shall be applied in any other case. The Contracting States have the right of not to apply the provisions of this Convention in favour of the nationals of a non-contracting State. Turkey has not made use of these options.

According to Art. 22 of the Turkish Code of International Private and Procedural Law²⁵, the rights in rem on the sea carriage vehicles are subject to the law of the country of origin. The country of origin of the sea carriage vehicles is the place where the rights in rem on these vehicles are registered. If there is not such a registration place, it is the port of commission. Accordingly, under Turkish law, the applicable law related to a registered ship mortgage is the law of the registration place.

As to the maritime liens, Art. 1350/3 TCC states that, if judicial proceeding regarding the claim is instituted in Turkey, the question whether or not the claim is secured by a maritime lien on the ship shall be determined by Turkish law²⁶.

IV. Basic Rules on Ship Mortgage

1. Definition of the ship mortgage

Despite the fact that ship is a movable property in respect of civil law, the only form of creating a contractual charge on a registered ship is the ship mortgage (Art. 1014/1 TCC)²⁷. The reason for that is, dead pledge is not advantageous for neither of the parties, considering the debtor would not be able to operate the ship on one hand and the creditor would bear the costs of the maintenance of the ship on the other hand²⁸. Therefore, ship mortgage responds the needs of the parties in ship financing²⁹. As a consequence of that, it is definite for the mortgagee that, there is no other charge on the ship except the registered ship mortgages and the maritime liens³⁰.

Article 1014 TCC describes the ship mortgage as a right created to secure a claim which entitles the mortgagee to satisfy its claim with priority over the proceeds of the forced sale. It has to be emphasized that the ship mortgage is accessory to the claim (Art. 1014/2 TCC)³¹. As a consequence of that, the assignment of the claim entails the simultaneous passing of the mortgage on to the assignee (Art. 1038/1 TCC). The

25 Act Nr.: 5718, Date: 27.11.2007; OR Date: 12.12.2007, OR Nr.: 26728.

26 For considerations on the application of this provision, see **Süzel**, p. 169 et seq. For discussions regarding the most favourable applicable law to maritime liens, see **Süzel**, p. 162 et seq.; **Günay**, Gemi Alacaklısı Hakkı, p. 174 et seq.

27 For information about Roman law background and middle age period development of dead pledge and mortgage, see **Atamer**, Gemi İpoteki Hükümlerinin Yasama Tarihiçesi, pp. 250-253; **Atamer**, Gemi ve Uçak İpoteki, pp. 7-19. For information about historical evolution of German and Turkish regulations regarding the ship mortgage, see **Atamer**, Gemi İpoteki Hükümlerinin Yasama Tarihiçesi, pp. 253-278; **Atamer**, Gemi ve Uçak İpoteki, pp. 29-83, pp. 89-107.

28 See **Wüstendörfer**, p. 83; **Çağa / Kender**, p. 113 et seq.; **Rayegân Kender / Ergon Çetingil / Emine Yazıcıoğlu**, Deniz Ticareti Hukuku I: Temel Bilgiler, 14. edition, İstanbul 2014, p. 78 et seq.; **Akıncı**, p. 6 et seq.; **Okay**, p. 189; **Adil İzveren / Nisim Franko / Ahmet Çalk**, Deniz Ticaret Hukuku, Banka ve Ticaret Hukuku Araştırma Enstitüsü Yayın No. 294, Ankara 1994, p. 73; **Kalpşüz**, p. 40; **Omağ**, p. 356; **Bülent Sözer**, Deniz Ticareti Hukuku I: Giriş, Gemi, Donatan ve Navlun Sözleşmeleri, 3. edition, İstanbul 2014, p. 120; **M. Murat İncoğlu**, "Gemi İpotekinde Alacaklının Alacak Muaccel Olmadan Önceki Hakları (TTK m. 909-910)", Prof. Dr. Tahir Çağa'nın Anısına Armağan, İstanbul 2000, p. 261.

29 See **Sevinç Kuyucu**, p. 141.

30 **Atamer**, Gemi ve Uçak İpoteki, p. 283.

31 The source of this provision is §8 I GeReSch which was not adopted to the former TCC. See **Akıncı**, p. 36. About the principle of mortgage being accessory to debt, see **Oğuzman / Seliçi / Oktay-Özdemir**, p. 962 Nr. 3401 et seq.; **Nomer / Ergüne**, p. 203 Nr. 644 et seq.; **Aybay / Hatemi**, p. 271 Nr. 4.

validity of such an assignment is subject to the rules on creating the ship mortgage (Art. 1038/3 TCC).

It is clarified in Art. 1014/1 TCC that future or conditional claims³² or claims embodied in negotiable instruments may also be secured by a ship mortgage.

But when it comes to the ship mortgage on the share of a ship, there are two restrictions. Firstly, where all shares in the ship are owned by one person, separate mortgages on several shares are not admitted (Art. 1014/4 TCC). Secondly, where the share of each owner is not identified, mortgage on shares is not admitted (Art. 1014/3 TCC). As different from its source on this matter, namely § 8 III GeReSch, the former TCC did not contain a restriction for cases where all shares in the ship are owned by one person³³. Nevertheless, it has been pointed out that the same conclusion has to be applied³⁴. Considering that the former TCC refers only to “shares of a ship” (Art. 897 old-TCC) and having regard to the technical meaning of it, which is an “identified share”³⁵, and especially in the light of Art. 688/3 and Art. 702/3 and Art. 857/3 TCivCo, the same conclusion is also to be applied for the second restriction. Anyhow, the preference of stating these restrictions expressly may be seen as rightful³⁶. However, it has to be noted that, mortgage on share is rarely accepted by finance institutions in practice because of the problems related with the judicial sale of such a share³⁷.

2. Creation of the ship mortgage

As to the creation of the ship mortgage, there are three formal requirements. First of all, the owner of the ship and the creditor have to conclude a contract in writing (Art. 1015/2 TCC). But if the claim is embodied in a negotiable instrument issued to a bearer, a declaration of the shipowner is sufficient (Art. 1015/6 TCC).

Secondly, the signatures of the parties must be certified by a notary public³⁸ (Art. 1015/2 TCC). It ought to be noted that under the new law, the mortgage deed may also be concluded at the register (Art. 1015/2 TCC). If so, the certification of the signatures by the notary public is not required. It has been suggested that the role of the register officer regarding the conclusion of the mortgage deed ought to be

32 The opportunity given by law that future or conditional claims or variable claims may also be secured by a mortgage may be seen peculiar considering the principle of mortgage being accessory to the claim. See **Bülent Davran**, *Rehin Hukuku Dersleri*, İstanbul 1972, p. 23. See also **İzveren / Franko / Çalık**, p. 91; **Okay**, p. 197; **Wüstendörfer**, p. 103; **Kalpsüz**, p. 57.

33 For information about legislative history of old-TCC on this matter, see **Atamer**, *Gemi ve Uçak İpoteği*, pp. 223-227.

34 **Akıncı**, p. 80; **Okay**, p. 194 et seq.; **Kalpsüz**, p. 88; **Ergon A. Çetingil / Rayegan Kender / A. Samim Ünan / Emine Yazıcıoğlu**, “TTK Tasarısı’nın ‘Deniz Ticareti’ Başlıklı 5. Kitabında Yer Alan Hükümler Hakkında”, *Türk Ticaret Kanunu Tasarısı Hakkında Değerlendirmeler*, *Deniz Hukuku Dergisi Özel Sayı*, Ocak 2006, p. 62.

35 **Okay**, p. 195; **Kalpsüz**, p. 88; **Akıncı**, p. 81.

36 For critics about the provisions regarding these restrictions, see **Çetingil / Kender / Ünan / Yazıcıoğlu**, p. 61 et seq. For an alteration proposal, see **Atamer**, *Gemi ve Uçak İpoteği*, p. 228.

37 **Atamer / Damar et al.**, *Transport Law*, p. 82; **Atamer**, *Gemi ve Uçak İpoteği*, p. 318.

38 In German law, the validity of the mortgage deed is not subject to any formal requirement (§3 II GeReSch, to which referred by §8 II GeReSch). But in English law, the situation is different. For English law, see **Algantürk**, p. 660 et seq.

clarified by stating expressly that the signatures of the written contract may also be certified by the register officer³⁹. It has to be added that the regulation is interpreted in this way as suggested⁴⁰.

Finally, the ship mortgage must be registered⁴¹ at the National Ship Register or at the Turkish International Ship Register⁴², whichever is the register of the ship in question (Art. 1015/1 TCC).

Regarding to registration of the mortgage, it is worth to mention that, according to Art. 1014/2 TCC, only the claim itself is determinant for the ship mortgage. What here meant is not crystal clear. However, it has been suggested⁴³ in accordance with the German sources, that it means the registration of a ship mortgage does not create any assumption relating the claim secured thereby.

Another issue which has to be pointed out in relation with the registration of the mortgage is the regulation of Art. 1015/3 TCC, which is criticized as an exception to the fundamental rule of “registration requirement” for the creation of the ship mortgage⁴⁴. Accordingly, in cases where the contract is concluded pursuant to the requirements mentioned, or an approval of registration to the creditor or a letter of application to the Register is given by the owner according to the provisions of the Ship Register Regulation (ShiReRe)⁴⁵, the relevant persons cannot avoid registering the ship mortgage. It is not crystal clear who the “relevant persons” are. The parties of the ship mortgage deed as well as the officers of the register may be considered as the relevant persons⁴⁶.

It has to be mentioned that, there is a similar regulation in GeReSch. Pursuant to § 8 II GeReSch, § 3 II GeReSch (regarding the transition of the ownership of inland water ships) shall also be applied to creation of the ship mortgage. Accordingly, before the registration, the mortgage deed is binding only in cases where the declaration is documented by court

39 Çetingil / Kender / Ünan / Yazıcıoğlu, p. 62 et seq. According to Sözer, this regulation has to be understood in that way. In other words, the role of the register is limited to the certification of the signatures. The mortgage deed does not need to be drew up by register officer.

40 Sözer, p. 124 fn (11). According to Sözer, the role of the register officer is not to draw up the mortgage deed, but merely to certificate the signatures on it.

41 This regulation is in accordance with its German source, namely, pursuant to § 3 II GeReSch (to which, referred by § 8 II GeReSch), the registration of the mortgage is necessary for creation of the mortgage. In English law, on the other hand, the situation is different. For English law, see *Algantürk*, p. 664 et. seq.

42 For information about the constitution of Turkish International Ship Register, see *Zehra Şeker Ögüz*, “Üzerinde İpotek Tesis Edilmiş Gemilerin Türk Gemi Sicilinden Terkin Edilerek Türk Uluslararası Gemi Siciline Kaydedilmesi Sorunu”, *Deniz Hukuku Dergisi*, Vol. 4 Nr. 3-4, pp. 83-84; *Kender / Çetingil / Yazıcıoğlu*, p. 65 et seq. For information about Turkish International Ship Register in relation with the ship mortgage, see *Kalpsüz*, pp. 43-46. For detailed information regarding the problems which may occur in respect of ships encumbered with mortgage in course of deletion from National Ship Register and registration to Turkish International Ship Register, see *Şeker Ögüz*, *İpotekli Geminin TUGS'a Kaydedilmesi Sorunu*, pp. 88-90.

43 *Atamer*, *Ship Mortgage and Enforcement*, p. 79. See also *Atamer*, *Gemi ve Uçak İpotegi*, p. 168 et seq.

44 *Atamer*, *Gemi İpotegi Hükümlerinin Yasama Tarihiçesi*, pp. 289-290. For further critics, see also Çetingil / Kender / Ünan / Yazıcıoğlu, p. 63, Sözer, p. 124 et seq.

45 Date of Cabinet Decision: 31.12.1956, Nr: 4/8520; OR Date: 4.2.1957, OR Nr : 9526.

46 For consequences of these two possibilities, see *Atamer*, *Gemi ve Uçak İpotegi*, pp. 245-246.

or by a notary public, or where the declaration is made in the presence of the court, or where the declaration is submitted to the court, or where the owner gives a permission of registration to the creditor according to the provisions of the Ship Register Regulation. The Turkish legislator found this regulation objectionable⁴⁷ and did not adapt to the old-TCC. Furthermore, unlike their German source, according to both former and current TCC, aforesaid formal requirements have to be fulfilled for the validity of the mortgage deed. In the light of this regulation and non-regulation of old-TCC, it has been argued that, if not registered, the mortgage deed is not valid even as a preliminary agreement considering Art. 29/2 of Code of Obligations⁴⁸. On the other hand, according to an opposite view, considering the mortgage deed being an act of disposal, it is not possible in Turkish law to make a preliminary agreement regarding to the creation of ship mortgage⁴⁹. According to Art. 21 and 25 ShiReRe, the owner has to give approval or letter of application for registration after concluding the mortgage deed pursuant to the formal requirements provided for in TCC. Otherwise, the creditor may claim in court for a decision of registration and the decision of the court shall replace the approval or letter of application⁵⁰.

If Art. 1015/3 TCC is considered in the light of these explanations, it will be seen that, its effect is to skip the step of claiming in court for a decision of registration and replace it with the decision of register officers. To bring an action against such a decision is, for sure, possible. In this way, it may be said that the function of Art. 1015/3 TCC is to reverse the procedure in comparison to the old-TCC. In other words, not the result but the way to reach at it has been changed by the new law.

As to the creation of the ship mortgage, it has to be mentioned that, in cases where the ship is purchased from abroad and is not registered yet, an entry into the flag certificate is sufficient⁵¹. Upon registration of the ship in Turkey, the ship mortgage will be transferred to the register ex-officio (Art. 1015/5 TCC).

When it comes to the mandatory contents of the register, Turkish law is in conformity with Art. 1 of the GeneCon. According to Art. 1016 TCC, the register must include the name or the title of the mortgagee, the amount of the claim in Turkish Lira⁵² (TL), the rate of interest and the rank of the mortgage.

47 Okay, p. 198; Kalpsüz, p. 67.

48 Okay, p. 198 et seq. On this issue, see Oğuzman / Seliçi / Oktay-Özdemir, p. 912 Nr. 3232a.

49 Kalpsüz, p. 67 fn. (108), p. 69. Akıncı has also pointed out that the formal requirements provided for in TCC are related to the act of disposal. According to him, the promissory transaction is not subject to any formal requirement. See Akıncı, pp. 59-60. For an opposite view, see Sözer, p. 123-124. For the view that due to the notarization requirement there is no room for application of preliminary agreement, see Atamer, Gemi İpoteği Hükümlerinin Yasama Tarihiçesi, p. 289. On the other hand, a contract term which sets forth that credit is to be provided in exchange of concluding a mortgage contract is valid and breach of that must be subject to a sanction. It has to be emphasized that this breach of contract constitutes a default of the creditor. See Atamer, Gemi ve Uçak İpoteği, p. 238.

50 Yargıtay 11. HD. 8.12.1987, 1987/6007, 1987/6843. See <http://www.kazanci.com/kho2/ibb/giris.htm>.

51 For the need underlying behind this solution and for critic of this provision, see Akıncı, pp. 213-214. For historical background of this provision, see Atamer, Gemi İpoteği Hükümlerinin Yasama Tarihiçesi, pp. 291-292.

52 If it is a non-pecuniary claim, the equivalent of such claim in Turkish Lira has to be registered. For information regarding mortgage securing non-pecuniary claims in Turkish law, see Atamer, Gemi ve Uçak İpoteği, pp. 169-171.

Speaking of the amount of the claim, it has to be clarified that to create a ship mortgage for a claim of which amount is variable, is admitted (Art. 1016/3 TCC).

Moreover, according to Art. 1016/4 TCC, to create a ship mortgage for claims in foreign currencies is possible providing that the relevant foreign currency is admitted by the Treasury. According to Art. 851/1 of the Turkish Civil Code (TCivCo), this kind of mortgage is only admitted if it is established in favour of the credit institutions. But the above-mentioned provision of the TCC regarding the ship mortgage does not contain such a restriction. Therefore, claims in foreign currencies may be secured by a ship mortgage, even if it is not created in favour of a credit institution.

Finally, it has to be pointed out that to fix a TL-denominated claim in a foreign currency is also possible (Art. 1016/2 TCC).

3. Scope of the ship mortgage

Regarding the subject of the security, Art. 1020/1 TCC refers to the relevant provisions of the Turkish Civil Code⁵³. Accordingly, ship mortgage encumbers the entire ship including all its appurtenances and accessories (Art. 862/1 TCivCo). However, accessories not being owned by the shipowner are excluded (Art. 862/3 TCivCo)⁵⁴. Examples for that are cargo, leased containers or time charterer's fuel⁵⁵. The mortgage attaches also to hire payable under a bareboat charter to the shipowner which accrued between the date on which foreclosure proceedings are commenced or the date on which the debtor is declared bankrupt and the date of judicial sale of the ship (Art. 863(1) TCivCo).

Apart from these general rules of Turkish Civil Code, there are some explicit provisions of TCC on this matter. Firstly, as different from the former law⁵⁶, according to Art. 1020/4 TCC the ship mortgage attaches to compensation payable by third parties to the shipowner for loss of or damage to the ship. Equally, ship mortgage attaches to confiscation price of the ship⁵⁷. Secondly, Art. 1022/1 TCC explicitly states that in cases where the owner's interest⁵⁸ in items which are subject to the ship mortgage, are

53 For elaborate information regarding the scope of the mortgage in respect of Turkish Civil Code, see **Oğuzman / Seliçi / Oktay-Özdemir**, p. 938 Nr. 3321 et seq.; **Nomer / Ergüne**, p. 167 Nr. 528 et seq.; **Aybay / Hatemi**, p. 277 Nr. 31 et seq.

54 For detailed information, see **Akıncı**, p. 84 et seq.; **Sözer**, pp. 133-138.

55 **Atamer / Damar et al.**, Transport Law, p. 82.

56 Akıncı criticized the position of former law in this regard and suggested that compensation payable by third parties to the shipowner for loss of or damage to the ship has to be included. See **Akıncı**, pp. 94, 239 et seq.

57 Akıncı criticized the position of former law in this regard too and suggested that confiscation price of the ship has also to be included. See **Akıncı**, pp. 95, 240.

58 Beside the owner's interest, the interest of mortgagee's regarding the security may be insured too. Co-existence of these two insurance contracts does not mean that there is a double insurance, since the insured interests are not the same. See **Omağ**, p. 360; **Emine Yazıcıoğlu**, Tekne Sigortası Sözleşmesi, İstanbul 2003, p. 91. For an opposite view, see **Ülgener**, "p. 37. For information about "Institute Mortgagees Interest Clauses-Hulls", see **Ülgener**, p. 45 et seq. For information about the provisions of TCC regarding multiple insurance, see **Zehra Şeker Ögüz / Ashhan Sevinç Kuyucu**, Yeni Türk Ticaret Kanununda Sigorta Hukuku, İstanbul 2011, pp. 94-97; **Kerim Atamer**, "Yeni Türk Ticaret Kanunu Uyarınca Zarar Sigortalarına Giriş", Batider Vol. XXVII Nr. 1 2011, pp. 68-70.

insured, the ship mortgage covers the insurance indemnity too⁵⁹. The principal example for insurance contracts covered by this provision is the Hull & Machinery insurance⁶⁰. Considering that the purpose of a Hull & Machinery insurance is to protect the shipowner's investment in the vessel, it is logical and legitimate to extend this protection to the mortgagee to whom the object of the investment serves as security⁶¹. In German law, it is argued that P&I insurance is also attached to the ship mortgage⁶². It has to be emphasized that under Turkish law, indemnities payable under liability insurances are not available to the mortgagee⁶³. Anyhow, apart from these discussions based upon the wording and aim of the related statutory provisions such as Art. 1022/1 TCC and § 32 I GeReSch, the international ship financing markets have developed contractual clauses, namely "loss payable clauses", giving the mortgagee access to the insurance contracts taken for the vessel, most frequently including also the P&I insurance⁶⁴.

As different from the former law⁶⁵, the freight is, out of the scope of the ship mortgage. As explained in the preamble, the reason for that is the freight being a claim arising from the contract of carriage, not from the operation of the ship⁶⁶. Although this choice is in harmony with GeneCon, the reason for that as expressed in the preamble is arguable, considering that contracts of carriage are directly connected with the operation of the ship. Consequently, if the mortgage is intended to cover the freight, an explicit agreement is required. The position in respect of the time charter hire is uncertain. Therefore an explicit agreement is necessary as well⁶⁷. Old-TCC differed from its source in this sense, for in German law, freight is out of scope of the

59 TCC includes very detailed rules regarding the relationship between the insurer and the mortgagee most of which are strengthening the position of the mortgagee in comparison with the insured (Art. 1024-1029 TCC). There are also regulations specifying the issue that in which cases the insurance indemnity is to be paid to the insured (Art. 1022/3, 1023 TCC). These provisions have been hardly changed. For elaborate informations about them, see **Kalpsüz**, pp. 103-120; **Akıncı**, pp. 100-110; **Omağ**, pp. 361-363, 364; Ülgener, pp. 40-45; **Kender / Çetingil / Yazıcıoğlu**, p. 82 et seq.; **Sözer**, pp. 140-146. For information about reflections of these regulations on ship financing, see **Sevinç Kuyucu**, pp. 173-193. For detailed information regarding provisions in relation to ship mortgage covering the insurance indemnity both in German and Turkish law, see **Atamer**, *Gemi ve Uçak İpotegi*, pp. 322-386.

TCC includes a provision which generally states that if the owner's interest over a property charged with a restricted real right is insured, the right of the restricted real right's holder shall extend to the insurance indemnity too (Art. 1456 TCC). The rules stipulated in Art. 1456 TCC regarding the relationship between the insurer and the restricted real right's holder don't overlap completely with above mentioned rules regarding the relationship between the insurer and the mortgagee. They may be qualified rather as a summary. For information about this general rule regarding insurance indemnity being a surrogate for the rights of restricted real right's holder, see **Şeker Ögüz / Sevinç Kuyucu**, pp. 82-83; **Atamer**, *Zarar Sigortaları*, pp. 61.

60 For detailed information regarding the creation of the Hull & Machinery insurance contract, see **Yazıcıoğlu**, pp. 31-52. For elements of interest and risk in the Hull & Machinery insurance contract, see **Yazıcıoğlu**, pp. 76-81, 91-101; 122 et seq. See also **Omağ**, pp. 358-360. For general information about provisions of TCC in relation to interest and risk elements in property insurance contracts, see **Şeker Ögüz / Sevinç Kuyucu**, pp. 10, 77-80; **Atamer**, *Zarar Sigortaları*, pp. 47-57, pp. 62-64.

61 **Zarth**, p. 72.

62 **Zarth**, p. 73.

63 **Atamer / Damar et al.**, *Transport Law*, p. 84; **Atamer**, *Gemi ve Uçak İpotegi*, pp. 335-336.

64 See **Zarth**, p. 73.

65 For former law see, **Akıncı**, pp. 90-91; Çağa / **Kender**, p. 118 et seq.; **Okay**, p. 202 et seq.; İzveren / Franko / Çalık, p. 81; **Kalpsüz**, pp. 93-95.

66 <https://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss96.pdf> p. 331. For critics regarding this rationale, see **Atamer**, *Gemi İpotegi Hükümlerinin Yasama Tarihçesi*, p. 310; **Atamer**, *Gemi ve Uçak İpotegi*, p. 315.

67 See **Atamer**, *Ship Mortgage and Enforcement*, p. 80; **Atamer / Damar et al.**, *Transport Law*, p. 83.

ship mortgage since the real credit of ship mortgage is based on the capital assets of the owner, not on the circulating operational incomes and drawing the line precisely is seen as fit for purpose⁶⁸.

4. Contents of the secured claim

Regarding the contents of the secured claim, Art. 1018/1 TCC refers to the relevant provisions (Art. 875/1, 876) of the Turkish Civil Code⁶⁹.

According to Art. 875 TCivCo, the mortgage secures the principal claim, the costs of enforcement proceedings and default interest and three-year interest which is due and payable as at the date on which foreclosure of the mortgage has been requested or bankruptcy proceedings have been initiated and interest running as of the same date⁷⁰.

According to Art. 876 TCivCo, if a creditor incurs expenses necessary for the maintenance of the property, in particular by paying insurance premiums owed by the owner, such expenses are secured by a charge over the property. This charge does not require to be registered and takes the same precedence of the mortgage.

5. Ranking of the ship mortgage

As to the ranking, Art. 1017 TCC, once again, refers to the provisions of the Turkish Civil Code relating to the ranking of mortgages on real estate. Accordingly, the priority between several mortgages will be determined by their rank. Each mortgage is registered in the rank, which is chosen by the parties. The date of registration is irrelevant. The shipowner is entitled to reserve free ranks for subsequent registrations provided that the maximal amount secured under such free rank is registered (Art. 870 TCivCo).

If a mortgage is deleted, the subsequent mortgages will not automatically move up (Art. 871/1 TCivCo). In other words, Turkish law follows the principle of the constant ranks instead of the sliding ranks⁷¹. But the parties may agree otherwise. For real estate mortgage, it has been pointed out that, in practice the exception has become the rule because of both the sliding ranks agreements and the statutory exception to the rule of constant ranks in foreclosure procedure (Art. 872 TCivCo)⁷².

A sliding ranks agreement is only valid if the form requirement is fulfilled. For the validity against third persons, the registration of the agreement is necessary (Art. 871/3 TCivCo).

68 **Wüstendörfer**, p. 90.

69 For information regarding to the content of the mortgage in general, see **Oğuzman / Selici / Oktay-Özdemir**, p. 951 Nr. 3360 et seq.; **Nomer / Ergüne**, p. 176 Nr. 553 et seq.

70 For further information, see **Atamer**, Gemi ve Uçak İpoteği, pp. 302-307; **Omağ**, p. 357; **Sözer**, pp. 146-147.

71 For further information about these principles and for the advantages of “constant ranks” principle see **Davran**, pp. 35-36. See also **Kalpşüz**, p. 129 et seq.; **Akıncı**, pp. 143-148; **Oğuzman / Selici / Oktay-Özdemir**, p. 922 Nr. 3260 et seq.; **Nomer / Ergüne**, p. 196 Nr. 622 et seq.; **Aybay / Hatemi**, p. 275 Nr. 22 et seq. For German law, see **Wüstendörfer**, p. 91.

72 See **Davran**, p. 37, 38.

It has to be mentioned that it is not prohibited to make a conditional sliding ranks agreement or an agreement depending on fulfillment of another performance. An example for the first case is an agreement under which a subsequent mortgage will move up only if the owner does not create instantly another mortgage in place of the deleted one. An example of the second case is a sliding rank agreement depending on postponement of the debt or on reduction of rate of interest⁷³.

In cases where several mortgages have been created within the same rank, they will share pro rata⁷⁴ (Art. 874/2 TCivCo). Creating priorities within a rank is only possible if the consent of all the creditors that are entered in the same rank is registered⁷⁵.

6. Assignment of Ship Mortgage

It is stipulated in Art. 1038/1 TCC that if the claim secured by the ship mortgage is assigned to another person, the ship mortgage shall be assigned with the claim automatically. The assignment of the ship mortgage or of the claim separately and independently is not possible (Art. 1038/2 TCC). Accordingly, the former and current creditors have to conclude a written contract regarding the transfer of the claim and the assignment has to be registered at the ship register (Art. 1038/3 TCC).

The only exception to this rule is regulated in Art. 1038/4 TCC in relation to the maximal mortgage, namely, the claim may be assigned according to the general rules of Code of Obligations regarding the assignment of claim and if so, maximal mortgage shall not be transferred with the claim⁷⁶. On the other hand, if the claim is assigned according to Art. 1038/3 TCC instead of following the procedure of the general rules, the mortgage shall be assigned with the claim automatically⁷⁷. In other words, to reserve the mortgage and to transfer the claim separately is not possible in scope of application of Art. 1038/3 TCC.

7. Time bar of the claim

According to the general rule stipulated in Art. 984/1 TCC, claims arising from registered real rights, including registered oppositions (Art. 984/2 TCC) are not subject to any statutory limitation period over the course of registration. Accrued deeds which should be fulfilled on a specific time and claims with regard to payment of a compensation are excepted. The registration of the ship mortgage prevents the running of prescription of the claim (Art. 984/3 TCC). Accordingly, neither the ship

⁷³ See **Davran**, p. 37.

⁷⁴ For information regarding the use, validity and problems of contract terms creating grades in a rank, see **Atamer**, *Gemi ve Uçak İpotegi*, pp. 287-289.

⁷⁵ **Atamer / Damar et al.**, *Transport Law*, p. 88.

⁷⁶ For the reason of this exception see **Kalpsüz**, p. 163; **Atamer**, *Gemi ve Uçak İpotegi*, p. 462.

⁷⁷ **Akinci**, p. 164. For information about consequences of the transfer in both cases in relation to the features of maximal mortgage, see *ibid.*

mortgage nor the claim secured thereby is subject to any statutory limitation period in Turkish law. Art. 1048/2 TCC sets forth that in case of deletion of a registered ship mortgage, whether wrongfully or not, the prescription period of the claim secured thereby commences to run again. Hereunder, it has to be pointed out that the prescription of the claim is to be suspended, not to be interrupted in case of registration of a mortgage⁷⁸.

8. Procedure of enforcement and list of priorities

The procedure of enforcement is an important and comprehensive subject on its own. Here, only some provisions which are relevant to the topic of this paper and which are worth to mention in this context are pointed out.

According to Art. 1350/1 TCC, the issues relating to the procedure of enforcement, such as arrest, foreclosure and judicial sale are governed by the law of the place where the ship is subject to these remedies. This rule is in accordance with Art. 2 of the GeneCon.

Another rule worth to mention here, is that, the ship mortgage and maritime lien shall not be subject to proceeding or enforcement separately from the claim secured (Art. 1377/1 TCC). In other words, they are accessory to the claim. This rule is provided in order to bring an end to the long term –wrong- practice relating the court decisions establishing liens⁷⁹ and therefore qualified as being “fundamental”⁸⁰.

According to Art. 1381 TCC, irrespective of the flag, or registration of the ship, the mortgagee may proceed by way of foreclosure of the mortgage.

Pursuant to Art. 45/1 of the Turkish Code of Enforcement and Bankruptcy (TCEB), other means of enforcement are not available to the mortgagee⁸¹. But this general rule had been amended by Art. 1378 TCC in relation to the ship mortgage. Accordingly, the ship mortgagee is entitled to commence bankruptcy proceedings. This is an important remedy considering that it has been proposed 19 years ago. Namely, it has been argued that arrestment and bankruptcy proceedings must be available to the mortgagee in able to increase the value of the ship mortgage as a credit tool⁸².

It has to be highlighted here, provided that both the mortgage and the claim secured by mortgage are determined in a court decision, or a document having the same value or in the *official* mortgage deed, in other words, mortgage deed concluded at the register, the

78 See **Atamer**, Gemi ve Uçak İpoteği, p. 269 et seq.

79 Ünán, p. 13. For elaborate information regarding this practice, see **Atamer**, Gemi ve Yük Alacaklısı Hakları, pp. 224-228. For critics in relation to this practice, see **Atamer**, Gemi ve Yük Alacaklısı Hakları, pp. 231-239.

80 See Ünán, p. 12.

81 For information in relation to the problems arising from the regulations of TCEB, see **Atamer**, Ship Mortgage and Enforcement, p. 81.

82 Çetingil in 40. Yılında Türk Ticaret Kanunu Semineri Tartışmaları, p. 124.

mortgagee will be entitled to serve an enforcement order (Art. 1377/2 TCC). Accordingly, the enforcement proceeding with judgment shall be available for the mortgagee⁸³. On the other hand, a mortgage deed certified by the notary public is not covered by Art. 38 TCEB, for not being *issued* by notary, but only *certified*. Since it has not been mentioned in Art. 1377/2 TCC either, such a contract is not a ground for an enforcement order. Consequently, concluding the mortgage deed at register is more favourable for the mortgagee.

As to the level of priority of ship mortgages against other claims, there are eight classes of priorities and the sixth rank in the list of priorities is reserved to ship mortgages and other rights in rem (Art. 1395/1 TCC).

V. Basic Rules on Maritime Lien

1. Claims secured by a maritime lien

Maritime lien is a lien on the ship, whether registered or not, securing claims set out in Art. 1320/1 TCC, taking priority over all statutory and contractual liens and charges.

According to Art. 1320/1 TCC, the following claims⁸⁴ against the owner, demise charterer, manager or operator⁸⁵ of the ship shall be secured by a maritime lien on the ship:

- 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, including costs of repatriation and social insurance contributions payable on their behalf;
- 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 ship⁸⁶;
- Claims for reward for the salvage of the ship (with the exception of the claim of the special compensation payable under Art. 14 of the International Convention on Salvage of 1989⁸⁷)
- 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;
- and, finally, claims for general average distributions.

⁸³ For the former situation according to the old- TCC see **Kalpşüz**, p. 144 et seq.

⁸⁴ For elaborate information about these claims, see **Süzel**, p. 207 et seq.

⁸⁵ For detailed information in relation to the debtors of the claim secured by maritime lien, see **Süzel**, pp. 178-191.

⁸⁶ In cases where the passenger claims damages from the carrier as the opposite party of the carriage of passengers contract who is time or voyage charterer, but not demise charterer, the claim shall not be secured by a maritime lien, since time or voyage charterer is not mentioned as one of the debtors. Anyhow, through Art. 1257 TCC, the shipowner as the actual carrier shall be liable and the claim against him shall be secured by a maritime lien according to Art. 1320 TCC. See **Süzel**, pp. 182-184.

⁸⁷ For the reason of this exception see Çetingil / Kender / Ünan / Yazıcıoğlu, p. 252. See also **Atamer / Damar et al.**, Transport Law, p. 71.

It has to be indicated that, as to the exceptions regulated in Art. 4/2 of the GeneCon regarding (1) the damage in connection with the carriage of oil or other hazardous or noxious substances by sea, for which, compensation is payable to the claimants pursuant to international conventions or national law providing for strict liability and compulsory insurance, or other means of securing the claims and (2) the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste, the situation is the same in Turkish law. No maritime lien shall attach to a ship to secure claims as set out in Art. 1320/1 (b) and (c) TCC, if they arise out of, or result from these exceptions stated.

As a matter of fact, a general exclusion clause might have been drafted to the effect that a maritime lien will not arise in cases where the claim is covered under compulsory liability insurance combined with the right to apply directly to the insurer, which is the case according to TCC for claims for loss of life or personal injury and claims in tort. However, for the purpose of maintaining strict conformity with the GeneCon, such a provision was not included in TCC⁸⁸.

It has to be mentioned that both the expression and the enumeration of the first 5 claims are identical with the regulation of the GeneCon⁸⁹. In this respect, TCC is in an unexceptional harmony with the GeneCon unlike the German Commercial Code (§ 596 GCC)⁹⁰ as amended by the Reform Act of 2013 (Gesetz zur Reform des Seehandelsrechts vom 20.4.2013– BGBl. I S. 831) which entered into force on 25.4.2013. The German legislator made a deliberate decision to structure the concept of maritime liens by taking BrussCon of 1967 as model considering “the relatively limited impact of the international conventions on this issue” and concluded that “adapting the German law on maritime liens to GeneCon is premature”⁹¹. When it comes to international conventions regulating issues regarding conflict of interests of various parties, there are many examples of the fact that being the most recent one does not necessarily mean being also the most effective and preferred one. Therefore, this choice of the German legislator may be evaluated as a diligent move. But from another point of view, it may also be criticized as a conservative decision. Indeed, the strategy of German Government regarding the reform has been described as “walking the German way on its own” and criticized as “counter-productive” to the aim of increasing the international acceptance

88 **Atamer / Damar et al.** Transport Law, p. 71. See also **Atamer**, Gemi ve Uçak İpotegi, p. 292 et seq.

89 For information regarding the regulations of BrussCon of 1926, BrussCon of 1967 and GeneCon on claims secured by a maritime lien, see **Pınar Akan**, Deniz Hukuku'nda Geminin Enkaz Haline Gelmesinin Hukuki Niteliği ve Sonuçları, İstanbul 2005, pp. 38-43.

90 For general information about the grounds, preparatory works, legislative process, structure and systematic of the Reform Act see **Beate Czerwenka**, Das Gesetz zur Reform des Seehandelsrechts, Köln 2014, Nr. A 1-82 pp. 15-32.; **Carsten Grau**, “Highlights of the German Government’s Draft Legislation on Maritime Law”, Recent Developments in Maritime Law, Papers Submitted to the Joint Seminars of the German and Turkish Maritime Law Associations Held in Hamburg on 25 August 2011 and in İstanbul on 6 October 2011, Turkish Maritime Law Association and German Maritime Law Association, pp. 60-61.

91 **Czerwenka**, Nr. A 94-95 pp. 35-36.

of German law⁹². In conclusion, the regulations of GCC on maritime liens remained substantially untouched by the reform⁹³. Consequently, in German law, the following claims against the owner, demise charterer, manager or operator of the ship shall be secured by a maritime lien on the ship⁹⁴:

- Claims for wages due to the master and other members of the ship's complement
- Claims for ship, voyage and port dues and pilotage dues
- Claims in respect of loss of life or personal injury and claims arising out of physical loss or damage, both occurring in connection with the operation of the ship, except the claims arising out of physical loss or damage based or may be based on a contract
- Claims for reward for the salvage of the ship, claims of the special compensation and salvage costs, claims against the owner of the ship and the creditor of the freight for general average distributions, claims for costs of removal of wrecks
- Claims of the bearer of social insurance including unemployment insurance against the owner of the ship.

2. Scope of the maritime lien

According to Art. 1321 TCC, the maritime lien encumbers the entire ship, except the accessories owned by a person other than the owner of the ship. The shipowner's claim for compensation for loss of or damage to the ship is also specified. As different from the former law⁹⁵, the freight is out of the scope of the maritime lien. This change is in accordance with the GeneCon and in line with the system of limitation of shipowner's liability⁹⁶.

Insofar, the content of the maritime lien⁹⁷ is the same as the content of the ship mortgage. But from this point on, there are three differences. Firstly, the confiscation price of the ship is not mentioned here. Secondly, the compensation payable to the owner of the ship under an insurance contract is explicitly excluded⁹⁸. Lastly, the general

92 **Grau**, p. 64.

93 **Czerwenka**, Nr. A 160 p. 51.

94 For further information see **Czerwenka**, Nr. B § 596 1-10 pp. 323-326.

95 For former law, see **Çağa**, *Gemi Alacaklısı Hakkı*, p. 14 et seq.; **Barlas**, p. 13 et seq.

96 See **Süzel**, p. 194.

97 For a comparison regarding the content of the maritime lien between English, American and Turkish law, see **Günay**, *Gemi Alacaklısı Hakkı*, p. 53.

98 The situation was slightly different in the former law. Compensation payable to the owner of the ship under an insurance contract was not explicitly excluded in the old-TCC but not mentioned as in the scope of maritime liens either. Therefore, it has been accepted that it is not in the content of the maritime lien. See: **Çağa**, *Gemi Alacaklısı Hakkı*, p. 22; **Tekil**, p. 472. **Tekil** argues that insurance indemnity should be included in the scope of maritime lien provided that ship mortgage shall take priority over maritime lien in respect to insurance indemnity. For opposite view see: **Çağa**, *Gemi Alacaklısı Hakkı*, p. 22. It has been suggested that, the wording of Art. 1321/2 TCC ought to be restricted to insurance indemnities paid for hull damages and herewith payments of the insurer in respect of liability assurances ought to be in the scope of maritime liens. See **Çetینگil / Kender / Ünan / Yazıcıoğlu**, p. 253 et seq.

average contributions shall substitute for the lost or damaged items which are subject to the maritime lien. German law is parallel to Turkish law in this manner, namely, § 598 GCC regulates the scope of the maritime lien the same as Art. 1321 TCC.

3. Contents of the secured claim

According to Art. 1322 TCC, the maritime lien equally secures the principal claim, interest thereon and the cost of the enforcement proceedings.

4. Legal nature and characteristics of maritime lien

Maritime lien is a statutory lien⁹⁹, which, as a concept, is shaped by three characteristics. First of all it has to be emphasized that maritime lien is accessory to the claim¹⁰⁰. Consequently and as mentioned before, both the ship mortgage and maritime lien shall not be subject to proceeding or enforcement separately from the claim secured (Art. 1377/1 TCC). Accordingly, Art. 1325 TCC states that, the assignment of, or subrogation to a claim secured by a maritime lien entails the simultaneous assignment of, or subrogation to such a maritime lien. Hereunder, the holder of the maritime lien is always the claimant. This rule is in accordance with the regulation in Art. 10/1 of the GeneCon.

Another basic feature of the maritime lien is that, it may be claimed against any person who is in possession of the ship (Art. 1321 of the TCC). In other words, it follows the ship, not the debtor¹⁰¹.

The last characteristic is the hallmark of the maritime lien. That is, the maritime lien arising from the claims set out in Art. 1320 (a) to (e) shall take priority over all statutory and contractual liens and charges, whether registered or not.

There are two exceptions to that rule. Firstly, the maritime liens arising from the general average contributions shall rank after the all statutory and contractual liens and charges, whether registered or not. Secondly, according to Art. 1323/3 TCC, 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 maritime lien¹⁰².

99 See Çağa, *Gemi Alacaklısı Hakkı*, p. 4; *Barlas*, p. 125 et seq. For detailed information about other views and the critics thereon regarding the legal nature of the maritime lien, see Çağa, *Gemi Alacaklısı Hakkı*, p. 2 et seq.; *Barlas*, p. 82 et seq.

100 See *Süzel*, p. 155.

101 For information regarding this feature, see Çağa, *Gemi Alacaklısı Hakkı*, p. 6; *Barlas*, p. 9 et seq. The "Personification Theory", which had been put forward in American law, may be the logic behind this characteristic. For information about this theory which is no longer valid but had been partially effective in the evolution of maritime liens in American law, see *Günay*, *Tarihçe*, p. 932 et seq.; *Günay*, *Gemi Alacaklısı Hakkı*, p. 37 et seq.

102 It has been rightfully pointed out that this regulation is vital considering the problems which occur especially in Turkey in connection with wrecks of ships and removal of them. See *Akan*, p. 36. For detailed information regarding this issue and for the question whether maritime lien ceases or not if the ship becomes a wreck, see *Akan*, pp. 34-38.

It ought to be emphasized that, both these exceptions are in accordance with the relevant regulations in Art. 6/1 (c) and Art. 12/3 of the GeneCon.

5. Ranking of maritime liens

As to the ranking of the maritime liens, there are two principles. According to Art. 1324/1 TCC, the maritime liens shall rank in the order listed in Art. 1320 TCC. But there are two exceptions to this principle. First one is the maritime lien arising from the general average distributions, mentioned shortly before. It shall rank as the very last one, after all other liens and charges, whether statutory or contractual, registered or not (Art. 1323/2 TCC). In German law, maritime liens securing claims for contribution in general average take priority over all other maritime liens which have attached to the vessel prior to the time when the operations giving rise to the said liens were performed (§ 603 II GCC)¹⁰³. Consequently, they take priority over ship mortgages too. In that sense, the mortgagee has a more advantageous position in Turkish law in comparison with the German law.

The second exception is the maritime lien securing a claim for reward for the salvage of the ship. This exception is in accordance with the regulation in Art. 5/2 of the GeneCon. Hereunder, the maritime liens arising from said claims shall take priority over all other maritime liens which have attached to the ship prior to the time when the operations giving rise to the said liens were performed (Art. 1324/2 TCC).

The second principle is that, the maritime liens shall rank *pari passu* as between themselves (Art. 1324/3 TCC). But there is an exception to this principle too. Namely, the maritime liens securing claims for reward for the salvage. They shall rank in the inverse order of the time, when the claims secured thereby accrued (Art. 1324/2 TCC). In other words, the “last in time, first in line” principle applies. Such claims shall be deemed to have accrued on the date on which salvage operation was terminated (Art. 1324/2 TCC).

6. Extinction of maritime lien by lapse of time

Considering its invisibility and its negative effect on ship finance, it is understandable why maritime lien is subject to a preemption period unlike other liens regulated in Turkish Civil Code¹⁰⁴.

When it comes to the extinction of maritime liens by lapse of time, again, there is the rule and its exception. According to Art. 1326 TCC, the principle is that, the maritime liens shall be extinguished after a period of one year unless, prior to the expiry of such period, the ship has been arrested, such arrest leading to a forced sale. As is seen, the legal concept of this period is preemption, not prescription.

¹⁰³For further information regarding to ranking of maritime liens in German law, see **Czerwenka**, B § 603, Nr. 1-6 pp. 332-333, § 604 Nr. 1-6 p. 334.

¹⁰⁴For information about the rationale of the regulation, see **Süzel**, p. 292 et seq.

This provision significantly aggravates the situation of the lienholder by forcing him to claim his right in one year and only by way of arrest of the ship. But on the other hand, herewith it is assured that maritime liens securing claims older than one year are only valid if they have been made visible by arresting the ship¹⁰⁵. By this way, the disadvantage of lack of publicity of maritime lien shall be eliminated.

With respect to maritime liens securing the claims of the crew for wages and other sums, this one-year period shall commence upon the claimant's discharge from the ship. With respect to other maritime liens, the one-year period shall commence when the claims secured thereby arise.

The exception regarding the maritime liens securing the claim of general average contributions regulated in Art. 1326 TCC is in accordance with the regulation in Art. 6/1 (b) of the GeneCon. Accordingly, the said maritime lien shall be extinguished after a period of 6 months, commencing on the date on which the ship arrived at the port of destination, and if this place could not be reached, at the port where the voyage ceased, unless, prior to the expiry of such period, the ship has been arrested, such arrest leading to a forced sale. In the event of a sale to a bona fide purchaser of the ship, the said maritime lien shall be extinguished 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. If both of the periods have commenced to run, the said maritime lien shall be extinguished after the period which expires first.

It is explicitly stated in Art. 1326/3 TCC¹⁰⁶ that the time period shall not be subject to suspension or interruption. However, the time shall not run during the period that the arrest of the ship is not permitted by law (Art. 1326/3 TCC).

According to Art. 1327 TCC, the personal claims are subject to a limitation period of the same duration unless provided otherwise in the respective law.

German law also contains an extinction period¹⁰⁷ in § 600 I GCC. But Art. 1326/2 TCC has no equivalent in § 600 GCC, hence the international sources of both provisions are not identical.

7. Procedure of enforcement and list of priorities

According to Art. 1380 TCC, the holder of the maritime lien may enforce its lien by foreclosing, irrespective of the flag or registration of the ship.

However, the lienholder may choose to take other routes too. Such that, according to Art. 1378 TCC, the lienholder may also commence the bankruptcy proceedings.

¹⁰⁵ See **Czerwenka**, B § 600 Nr. 5 p. 330.

¹⁰⁶ For the rationale of the parallel regulation of GeneCon, see **Süzel**, p. 303 et seq.

¹⁰⁷ For the legal nature of this time period, see **Czerwenka**, B § 600 Nr. 3 p. 329.

Moreover, seizure or bill of exchange proceedings are available to the lienholder too (Art. 1379 TCC). But if the holder of the maritime lien chooses one of these last two ways, it shall be deemed that the lienholder has waived the maritime lien.

As to the class of maritime liens in the list of priorities, the third rank is dedicated to the maritime liens except the one arising from the general average distributions (Art. 1392 TCC). This additional maritime lien is covered under the sixth rank but after all of the registered ship mortgages (Art. 1323/2 and Art. 1395 TCC).

VI. Changes in favour of the mortgagee

After summarizing the main features of ship mortgage and maritime lien in Turkish law, now we can highlight the changes in favour of the mortgagee, which is the core of this paper.

1. One of the most important changes in favour of the mortgagee is that, the number of maritime liens has been significantly reduced in comparison with the former¹⁰⁸ TCC. Accordingly, far less claims will get ahead of the mortgagee. The lacking of claims arising from contract of carriage of goods may be deemed as crucial.
 2. As mentioned before, maritime liens are subject to Turkish law if proceedings are brought in Turkey (Art. 1320/3 TCC). This provision is vital. Because in that way, the maritime liens which might arise under a foreign law will not be recognised by Turkish courts¹⁰⁹.
 3. Claims arising from the ship mortgage are recognised as maritime claims (Art. 1352/1 (v) TCC) with the result that they are protected by the right to arrest the ship. It is an exception to the general rule of Art. 257/1 TCEB, that arrest is exclusive to the claims that are not secured by a lien. In former law, this exception was granted solely to the holder of maritime lien¹¹⁰.
- Furthermore, Art. 1378 TCC states that, not only the holder of the maritime lien but also the ship mortgagee is entitled to commence bankruptcy proceedings. Former TCC granted this remedy solely to the holder of the maritime lien¹¹¹.
4. Insurance indemnity is explicitly excluded from the scope of maritime lien.
 5. The shipowner's claim for compensation for loss of or damage to the ship and confiscation price of the ship are included in the scope of the mortgage (Art. 1020/4 TCC).

¹⁰⁸For information regarding former law, see Çağa, *Gemi Alacaklısı Hakkı*, p. 26 et seq.; Barlas, p. 28 et seq.; Günay, *Gemi Alacaklısı Hakkı*, p. 107 et seq.

¹⁰⁹See Atamer, *Gemi ve Uçak İpoteki*, p. 293.

¹¹⁰For critic regarding the exception in the former TCC (Art. 1242 old-TCC) not covering the mortgagee, see Akıncı, p. 140; Kalpsüz, p. 151.

¹¹¹For critic of missing out the mortgage in this exception (Art. 1242 old-TCC), see Akıncı, pp. 140-141.

6. If the owner's interest over the ship is insured, the ship mortgage covers the insurance indemnity too. It was, and still is so. However, this rule has been slightly changed. While specifying the scope of the ship mortgage regarding the insurance indemnity, it has been mentioned not only the insurance regarding the "ship", but all the "items" included in the ship mortgage (Art. 1022/1 TCC)¹¹².
7. As to the ranking, maritime lien arising from claim for general average distribution has fallen behind the ship mortgage (Art. 1323/2 TCC). According to the former TCC, the third rank was dedicated to this maritime lien.
8. It is stated explicitly, that maritime liens shall be extinguished after a period of one year (Art. 1326/1 TCC). According to the former law, this one-year period was a time limitation.
9. There is an important remedy granted to the ship mortgagee for the protection of the mortgage, in cases where the claim secured by mortgage has not yet fallen due¹¹³. This provision is not new, but some important changes have been made thereto.

According to Art. 1030/1 TCC, if the security provided by the mortgage was put in danger as a result of the deterioration of the ship or its equipment¹¹⁴, the mortgagee is granted the right to set a reasonable time limit for the owner to remove the danger.

It has to be mentioned that, the decrease of the value of the ship alone¹¹⁵ is not enough. The security provided by the mortgage should be put in danger as a result of the decrease. In other words, if the current value of the ship covers the claim secured by the ship mortgage, it can not be argued that the security is put in danger¹¹⁶. Furthermore, the decrease of the value as the result of the normal use of the ship is not covered here¹¹⁷. On the other hand, in cases where according to current circumstances the future proceeds of the forced sale will not cover the claim secured by the ship mortgage as the date of creation of the mortgage, it means that the security is put in danger¹¹⁸.

There is no formal requirement for setting the time limit. It shall be evaluated in each case whether the time limit set by the mortgagee is appropriate and sufficient to remove the danger in question.

¹¹² Despite the above mentioned difference between the regulations of the former and current TCC, this conclusion has been argued regarding the old-TCC. See **Kalpsüz**, p. 101; **Akıncı**, p. 99.

¹¹³ This kind of remedies have their historical roots in Corpus Juris Civilis. See İncoğlu, p. 262. See for the information about the origin of these provisions in Turkish law: *Ibid*.

¹¹⁴ The word "equipment" here has to be understood as the "appurtenance" as in line with its German source. See **Atamer**, *Gemi ve Uçak İpotegi*, pp. 416-420.

¹¹⁵ Examples for acts or omissions decreasing the value of the ship, see İzveren / Franko / Çalık, p. 83; **Okay**, p. 205; **Wüstendörfer**, p. 93; **Kalpsüz**, p. 136.

¹¹⁶ See **Kalpsüz**, p. 137; **Akıncı**, p. 124; İncoğlu, p. 263.

¹¹⁷ **Akıncı**, p. 124; **Kalpsüz**, p. 137; İncoğlu, p. 263 et seq. See for the situations covered by this provision: İncoğlu, p. 263 et seq.

¹¹⁸ **Kalpsüz**, p. 135.

Removing the danger means re-establishing the situation of the ship and its equipment as of the date of creation of the mortgage¹¹⁹. Giving another guarantee to the mortgagee securing his rights, such as another mortgage on a ship or on a real estate, or a pledge on a movable may also be deemed as removing the danger¹²⁰. Despite Art. 1030 TCC does not explicitly refer to such an option, there is not an explicit restriction either. But whatever the new guarantee is, it should be as reliable as the ship mortgage¹²¹. Unlike the real estate mortgage (Art. 866/1 TCivCo), the choice between the restitution and the new guarantee is not left to the mortgagee. But in cases where the restitution is not in favour of the mortgagee, for example because the repair works will be completed after the due date, the mortgagee should have the right of requesting another guarantee instead of restitution¹²².

If the shipowner fails to remove the danger within this time limit, the mortgagee will be entitled to commence the foreclosure proceedings immediately.

In cases where the security is not yet put in danger, but there is a concern about the deterioration of the ship or its equipment or about the mortgagee's rights being imperilled otherwise, both of which are entailing the security being put in danger¹²³, the mortgagee should appeal to the court for precautionary measures to be taken.

The former TCC leaves the choice of appropriate precautions at the discretion of the court. This preference created conflict of opinions in the practice whether the court is authorized to arrest the ship¹²⁴. However, Art. 1030/2 TCC explicitly states them as follows:

- The court will order to arrest of the ship
- If necessary, the court may assign an independent custodian for the ship
- The court will grant the owner one-month time limit to take necessary precautions.

If the precautions have not been taken in that time or if they were insufficient, the court will grant the mortgagee of one-month time limit to commence the foreclosure proceedings (Art. 1030/2 TCC).

It is irrelevant whether the concern has occurred as a consequence of the owner's way of operation of the ship¹²⁵, or as a consequence of owner's non-performance

119 Akıncı, p. 127; Kalpsüz, p. 138.

120 Akıncı, p. 127; İnceoğlu, p. 269.

121 İnceoğlu, p. 269.

122 İnceoğlu, p. 269.

123 See for the situations covered by this provision: Wüstendörfer, p. 94; Akıncı, p. 125; İnceoğlu, p. 266.

124 See the preamble of Art. 1030 in <http://www2.tbmm.gov.tr/d22/1/1-1138.pdf> p. 293. See also Atamer, Gemi ve Uçak İpoteki, p. 430.

125 For examples, see Çağa / Kender, p. 124; İzveren / Franko / Çalık, p. 83.

of precautions against third parties' actions (Art. 1030/2 TCC). But if the reason for concern about danger is third parties' action¹²⁶, the only remedy granted to the mortgagee is the demand for prevention of this action (Art. 1031 TCC).

For a more comprehensive protection for the mortgagee in cases where there is a concern about danger, parties may agree in the mortgage deed that the ship mortgage shall fall due immediately¹²⁷.

As mentioned before, the cases where the concern is not about the physical deterioration of the ship or its equipment, but about mortgagee's rights to be put in danger otherwise, are explicitly included by Art. 1030/2 TCC. This situation was also explicitly included by the former TCC (Art. 909). That (was and still) is an important difference between the (old- and the current) TCC and its source on this matter, namely §39 II GeReSch¹²⁸. Some examples for that are raising the risk of embargo by carrying contraband in the ship or raising the risk of arising maritime liens having priority over the ship mortgage by hiring the ship to a financially weak party¹²⁹.

Whether the owner is negligent or not, does not make any difference in respect of rights granted to the mortgagee by Art. 1030 TCC. It has to be mentioned that this is peculiar to the ship mortgage. In real estate mortgage, the mortgagee is protected in this manner only in cases where the owner is negligent (Art. 865, 866, 867 TCivCo)¹³⁰.

In process of putting the security in danger, in other words, during the course of danger being continuing it has been suggested that both of the ways are open to the mortgagee. Clearly speaking, the mortgagee is entitled to rely upon Art. 1030/1 and/ or 1030/2 TCC¹³¹.

The deterioration of the fixtures in scope of the mortgage or removing them from the ship against the requirements of ordinary run of business¹³² are explicitly included in respect of remedies granted to the mortgagee (Art. 1030/3 TCC).

10. As mentioned before, in cases where the ship mortgage contract was concluded at the register, the mortgagee will be entitled to serve an enforcement order (Art. 1377/2 TCC). Accordingly, the enforcement proceeding with judgment shall be

126 For examples, see Wüstendörfer, p. 94; Çağa / Kender, p. 125; İzveren / Franko / Çalık, p. 84.

127 Çağa / Kender, p. 125.

128 For the reason of this supplementation in the old-TCC, see: Official Report of Commission of Justice p. 400 et seq. See also Çetingil in 40. Yılında Türk Ticaret Kanunu Semineri Tartışmaları, p. 124; Akıncı, p. 126; Atamer, Gemi ve Uçak İpoteki, p. 427 et seq. For German law, see Wüstendörfer, p. 93 et seq.

129 See Official Report of Commission of Justice p. 400. For other examples, see Kalpsüz, p. 136.

130 See Davran, pp. 19-21; Akıncı, pp. 121-122, 124; İnceoğlu, p. 267; Oğuzman / Selici / Oktay-Özdemir, p. 947 Nr. 3345 et seq.; Nomer / Ergüne, p. 174 Nr. 549 et seq.

131 İnceoğlu, p. 273 et seq.

132 For examples of removing the fixtures from the ship against the requirements of an ordinary run of business, see Atamer, Gemi ve Uçak İpoteki, p. 434.

available for the mortgagee. The situation was different in relation to the old-TCC, for old-TCC does not contain an analogous regulation. In this respect, only if the mortgage deed containing an acknowledgement of debt has been issued by a notary public as stated in Art. 38 TCEB, the enforcement proceeding with judgment was available for the mortgagee¹³³.

VII. Conclusion

At the beginning of this paper, I quoted from the preamble of the TCC that one of the aims of the reform is adapting to the recent international conventions in maritime law. At the end of the paper, I want to return to that point and ask whether the regulation of the TCC regarding ship mortgages and –especially- maritime liens are fit to this purpose.

In my opinion, the provisions of the TCC on this issue are considerably in accordance with the principles laid down by the GeneCon. I can say that, Turkish legislator is deemed to succeed in achieving its objective of bringing the rules on maritime liens and ship mortgages into harmony with the GeneCon.

However, there are some minor differences between the provisions of the TCC and their sources¹³⁴. I just want to remark one of them as an example. According to Art. 1350 TCC in respect of the notice of forced sale of a Turkish flagged ship abroad, the press announcement is not an additional way unlike the regulation in Art. 11/3 of the GeneCon. If the forced sale is announced by press, there is no need for any other notice. That applies to forced sale of a foreign flagged ship in Turkey as well (Art. 1384/2 TCC).

Apart from these minor differences and in conclusion, I can say that Turkish law is in harmony with the recent international convention on this issue and corresponds with today's tendency of strengthening the position of the ship mortgagee. Yet more, it is submitted that ship mortgages have never been better protected under Turkish law¹³⁵.

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¹³³For former situation regarding proceeding with and without judgement and "special" proceeding with judgement (Art. 149 TCEB), see **Kalpsüz**, pp. 144-150.

¹³⁴For the list of differences, see Süznel, p. 369 et seq.

¹³⁵**Atamer**, Ship Mortgage and Enforcement, p. 93.

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