

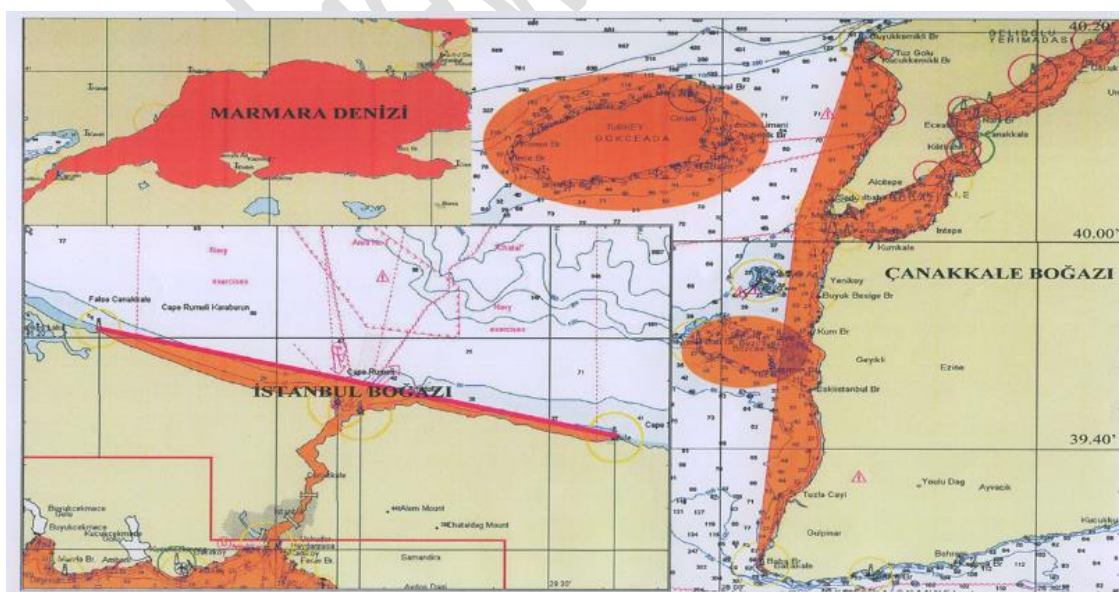
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Salvage Claims In The Turkish Straits And 'Turks 2015'

The Turkish Straits, consisting of the Istanbul and Çanakkale Straits and the Marmara Sea connecting the Black Sea to the Mediterranean Sea, are considered one of the most strategically significant waterways of the world.

In the 1930s, the average number of vessels passing through the Bosphorus each day was only 17 but today, depending on the prevailing market conditions in shipping and international trade, there are some 50,000 vessels passing through the Straits annually; that is about 130 vessels every day. These do not include local traffic, consisting of ferries, supply vessels, fishing boats and yachts – including these amounts to several thousand ship movements in and around the Bosphorus.

Because of the busy traffic with a considerable number of tankers carrying dangerous cargo in the Turkish Straits there are always considerable concerns for the safety of the public and the environment. Major incidents such as the “Nassia” collision with the “Shipbroker” and the “Independent” collision with the “Evriali” which sadly also involved the loss of many crewmembers, proved that the risks do exist. Geographic and navigational challenges as well as the physical characteristics of the Turkish Straits with strong currents and sharp turns make passages a challenging task in terms of navigational safety.



The Directorate General of the Coastal Safety

Turkey considers the safety of the Turkish Straits of the utmost importance and has stipulated that all salvage operations must be undertaken by the state-owned Directorate General of the Coastal Safety, (Kiyi Emniyeti Genel Mudurlugu in Turkish). The Directorate General of Coastal Safety covers the areas set out in the above chart.

As indicated in the chart the Directorate not only covers the Turkish Straits but also areas around the islands of Gokceada and Bozcaada in the Aegean Sea and the coastal areas around the entrances of the Dardanelles and the Bosphorus. In addition to salvage services the Directorate General of the Coastal Safety provides:

- Search and Rescue
- Pilotage in the Turkish Straits
- Turkish Straits Vessel Traffic Services (TSVTS)
- Aids to Navigation (Lighthouses, Buoys etc.)
- Marine Communication
- Marine oil spill response during salvage operations or in case of emergency.

Salvage in the Bosphorus and the Dardanelles used to be associated with the Turkish Open Form (TOF) standard form of salvage agreement although its use was almost exclusively limited to salvage operations in the Turkish Straits and adjacent areas covered by the Directorate General of Coastal. However, TOF was abandoned some years ago following a landmark decision by the Turkish Supreme Court where our firm represented SC Sara (the Owners of the SC Sara vs. Kiyi Emniyeti Genel Mudurlugu) where the validity of the provisions of TOF was challenged. The main argument was in respect of the arbitration clause of TOF where only the Directorate General of Coastal Safety had the power to initiate arbitration proceedings and considering the usually excessive securities put up in favour of the Directorate General of Coastal Safety, Owners and Underwriters were left with little alternative but to settle the salvage claims.

The “SC Sara” and the death of TOF

The incident leading to the Supreme Court ruling on TOF happened in November 2007 when, in heavy weather, the SC Sara, a crude oil tanker of 57,346 gross tons that was in anchored position off Bozcaada Island without cargo on board, asked for tug assistance for towage since it was reported the weather would shortly deteriorate. However, two tug boats owned by the Directorate General of Coastal Safety informed the master of SC Sara that a towage service was not available and that the tugs would be able to give salvage services on the condition that a TOF was first signed. The master refused to sign the TOF and hence the tugs did not proceed. Later the weather conditions worsened and later that night the master again asked for tug assistance. By this time the vessel was in some danger and the master had no other choice but to sign the TOF.

Despite the fact that the TOF was signed, no service could be carried out by the tugs at the time as they were unable to operate in the current weather conditions. Consequently, the SC Sara ran aground. When

the weather improved the tugs were able to attend and delivered service to the vessel lasting just over an hour. Shortly after the services were completed, lawyers acting for the Directorate General of Coastal Safety applied to the Court for an arrest order against the vessel for USD 13 million.

Since the TOF applied and the Directorate General of Coastal Safety had received a bank guarantee for USD 13 million the Directorate General of Coastal Safety claimed a salvage reward of around USD 5 million. Owners commenced proceedings before the Specialized Maritime Court of Istanbul, to determine the salvage remuneration and to claim for damages allegedly caused by the tugs during the operation. The Specialized Maritime Court of Istanbul, acceding to the objection raised by the Directorate General of Coastal Safety, dismissed the action on the grounds of the mandatory arbitration clause in the TOF:

*“Where an amicable settlement cannot be reached between the parties the dispute related with the determination of the salvage award arising from the salvage service rendered to the property salvaged then the dispute shall **if demanded by the SALVOR** be resolved by reference to arbitration in Istanbul within the legal period.”*

Owners appealed to the Turkish Supreme Court and the ruling of the Specialized Maritime Court of Istanbul was successfully challenged. The Supreme Court unanimously set aside the ruling of the Specialized Maritime Court of Istanbul, holding that the arbitration clause was invalid on the following grounds;

1. The arbitration clause was incompatible with the principles of access to legal remedies ensured by the Turkish Constitution as well as Art. 6 of the European Convention on Human Rights since the clause granted the right to commence arbitration exclusively to the Salvors. The Supreme Court stated that the local court’s ruling on dismissal of the claim on the grounds of jurisdiction, citing an allegedly valid arbitration clause, automatically deprived the shipowner from pursuing a remedy since the salvors had not commenced arbitration.
2. The arbitration clause, by granting the right to commence arbitration solely to one party and so depriving the other party of the power to commence legal proceeding by any means, was regarded as an asymmetric (unilateral) arbitration clause and as such was held to be null and void in accordance with contemporary jurisprudence.

The Supreme Court, by holding the arbitration clause to be entirely invalid, did not examine in detail the provisions relating to arbitrators’ fees as a percentage of the award given but the practical result was that TOF lost its most powerful provision, the arbitration clause.

Revised salvage agreement - Turks 2015

The Turkish Commercial Code, which came into force on 1 July 2012, substantially codified the provisions of the International Convention on Salvage of 1989 and Turkey also became a party to the 1989 Salvage Convention with full effect as of 29 May 2013. Accordingly, the Salvage Convention, 1989 is directly applicable to all salvage cases in Turkey with a foreign element.

The Directorate General of Coastal Safety amended the arbitration clause in the new Turks 2015 to

comply with the Supreme Court ruling by granting all parties concerned the right to commence arbitration. However, another controversial part of the original arbitration clause was retained, where arbitrators are entitled to receive 12% of each award that would be equally distributed between them.

Another issue for shipowners under Turks 2015 is that once they sign Turks 2015, shipowners have to provide security for all salvaged properties on board, assuming liability for all property on board. It is not just the security: under Clause 7 of Turks 2015 “the shipowner agrees to pay the salvage remuneration and the associated expenses relating to the vessel, bunkers, cargo and the freight in full and also agrees that the relevant claim can be directed to himself alone. The fact that securities are provided separately shall not in any way affect or direct to the parties.”

Therefore, our recommendation is that, if possible, shipowners should try to avoid to enter Turks 2015 until it is revised in terms of payment, security, liabilities and also the dispute resolution clause.

Current Practice in Salvage Claims in the Turkish Straits

The Directorate General of Coastal Safety has traditionally claimed 8-12 per cent of salvaged values as a reward with salvage security amounting to some 15-20 per cent of salvaged values. Although there was a salvage claim of the Directorate General of Coastal Safety in a major case in 2018 where the claim amount was exceptionally high as the 50 per cent, the recent trend indicates lower settlements are possible at around 5-6 per cent.

Conclusion

The Turkish Commercial Code which came into force on 1 July 2012 substantially codifies the provisions of the International Convention on Salvage of 1989 that Turkey has been a party to since May, 2013 and Turkey now applies contemporary principles of salvage law. The SC Sara decision from the Turkish Supreme Court led to the Turks 2015 salvage agreement. Although far from perfect in its current incarnation, future revisions to Turks 2015 may make it a preferable form of salvage agreement.

Source of Information: The Gard P&I Club