

Circular No.: 2-17-22-08**Re: Cargo shortage/overlanding claims in Turkish jurisdiction**

After several approaches from the Assureds on different issues regarding the shortage/overlanding cases in Turkey, INGOSSTRAKH wishes to summarize the current situation and draw Owner's attention to the number of practical recommendations, which can allow Shipowners to minimize loss resulting from such incidents.

This Circular is prepared under the assistance of Ingosstrakh's P&I correspondent in Turkey – Messrs. GUR Law Firm.

Due to the nature of bulk cargoes, it is not always possible to determine the exact quantity of the cargo because different measurement methods, taking different variables while calculating and sometimes a simple calculation error may result in unwanted outcomes.

Foreseeing the risks, acting prudent and taking preventive measurements are key when protecting the vessel interests in order to prevent the possible consequences.

There are two aspects of the cargo claims in the Turkish Jurisdiction; the problems with the cargo interests and the problems with the customs authorities.

- **Problems with the Cargo Interests**

When we look at the cargo shortage claims that are raised by the cargo receivers; as the price of the cargo is usually calculated by B/L quantity, buyers/receivers are looking to have the full B/L figure in their warehouse in exchange of the amount that they have paid. Therefore, when a difference between figures is in question for the discharged cargo at the shore scale –sometimes even with the draft surveys- receivers tend to hold the vessel accountable for the shortage and ask for compensation from vessel interests.

As a precautionary measure in order to minimize 'virtual losses' that may arise due to the measurement methods (shore scale vs. draft survey) and measurement variables (shore scale calibration differences) is to add clauses such as "cargo quantity as per draft survey" or similar into the charter parties. It should also be noted that draft surveys are always a better option as they provide more consistent results compared to shore scale figures, and should be considered as a preventative measure in order to eliminate virtual losses.

It is important to note that in situations where the receivers are not the charterers, it could be beneficial to incorporate the charter-party terms to the B/L by making a reference to the charter-party in order to prevent the receivers who could possibly claim that they are not bound the 'draft survey' clause.

Therefore, as per art. 1237 of the Turkish Commercial Code ("TCC"), incorporated charter-party terms can be applicable against the holder of the B/L provided that the copy of the charter-party is also given to the holder during the endorsement of the B/L. Accordingly, in order to get the full performance from the incorporations on the B/L, it is advisable to have the charter-parties submitted to the receivers during endorsements.

Regardless of the charter-party terms, in cases where the alleged cargo shortage claims are taken to court by the cargo receivers, draft survey results are deemed as strong evidence by the Turkish courts.

Another preventive measure to be taken against groundless cargo shortage claims is sealing of the holds after loading. Sealing and unsealing reports issued by respected survey companies are fruitful before courts to indicate that the vessel interests are not responsible for the alleged loss. Even though the approach of the courts may vary, there are precedent cases where the courts have rejected receivers' shortage claims by pointing out the cargo receivers should

prove vessel interests negligence for shortage since the holds were kept sealed during the voyage. Although the sealing-unsealing procedure may seem as a loss of time and as an extra expense, it surely pays off in disputed situations and it is highly advisable to consider sealing as preventative measure when trading with unknown or problematic parties.

The rate of wastage is also another factor that should be evaluated when shortage claims are in subject. Wastage is deemed as 'the loss caused by the nature of the commodity' as per art. 1182 of TCC where the carrier/owner cannot be held responsible for the losses within wastage limits. However, the limits of wastage are not defined within the Turkish legislation. Therefore, for disputes where the wastage is in question, pursuant to the precedents of the Court of Appeal, courts ask to various Chambers of Commerce in order to be informed about the wastage rates for the subject cargo. Unfortunately, it is not possible to say that there is a consensus on the wastage rates and even on the same types of cargo, the courts lack of consistency in practice. When looking at the precedents, there are cases where one court had accepted 3% as wastage and another court had accepted 0.3% as wastage on coal cargo.

At this point it is necessary to emphasize that TCC is prepared in conformity with the International Convention on the Arrest of the Ships, Geneva, 1999. In this respect cargo shortages are evaluated as 'loss or damage caused by the operation of the vessel' under art. 1352 of TCC and thus shortage claims provide a maritime claim for the vessel to be arrested. Therefore, consequences of cargo shortages are not only limited to the compensation claims, but the risk of arrest is also included.

Of course, it should always be remembered that each receiver is different and the approach is the key factor when defining the course of the situation. Some receivers may not overlook to %5 discrepancy and some may threaten to arrest the vessel even at a %0.5 discrepancy between B/L figure and draft survey results. With the serious risks that may be imposed by the receivers, in a situation where there is a potential cargo shortage, the most prudent way to handle the situation will be getting assistance from a local correspondent for services including but not limited to the appointment of a surveyor and negotiating with the receivers.

- **Problems with the Customs Authorities**

When dealing with the Customs Authorities, agents act as a key player since they are to officially submit a declaration/statement that is called the "Summary Statement" informing the customs authorities about the type and the quantity of the cargo that is to be discharged.

Once the discharge is completed, the Authorities compare the declared quantity of cargo with the shore weighbridge figures in order to investigate if there is a cargo shortage or an overlanding problem. Even though in practice this usually is the only officially used and recognized method that the Customs prefer, during the application for the cargo import formalities, the Agent can request to determine the quantity of the discharged cargo in accordance with the draft survey figures. It is important to note that for the countable cargoes, the vessel must discharge the exact pieces of cargo as declared in the statement and the quantities as in the cargo documents.

Art. 237/4 of Customs Code provides that 'Discrepancies between the summary statement and the actual discharged amount up to %3 in bulk cargoes will not be subject to an investigation'. In other words, if the discharged cargo quantity is %3 more or less than the declared amount, the customs authorities initiate an investigation for the discrepancy.

Some cargoes such as derivatives of crude oil (e.g. "Paraffin", "Toluene", "Benzol", "Fuel Naphtha", "Solvent Naphtha", "Diesel Oil": 0,5%, "Fuel Oil": 0,4%, "Crude Oil from petroleum and bituminous minerals": 1%) have special limits determined as per their assigned codes within the "Harmonized System" developed by the World Custom Organization (WCO).

In practice, when a discrepancy more than %3 is question (Please kindly be informed that customs authorities usually consider the shore scale figure for the discharged cargo quantity), customs authorities issue a notification declaring that an investigation is commenced for the discrepancy. The notification is firstly served to the party who have submitted the summary statement to the customs authorities which is the agent in general practice.

From the day that the notice is served the Authorities will grant a 3-month period to seek an explanation from the Owners/their agent to clarify the cause of the shortage/overlanding. If an extension to the 3-month period is needed, an additional 3 months can be given by the Customs. Before the expiry of the second 3 months, and additional one (1) month can be requested. However, the granting of the extension periods are within the discretion of the Custom Authorities and the Authorities may ask for a satisfactory explanation and supporting documents for the cause of the extension may be asked for.

Article 237/7 of the Customs Law states that the fine is imposed on the person who has filed the “Summary Statement”, which is the local agent. However please kindly note that this does not mean that the Owners/Carriers are not liable for the fines and the reason for this practice is only to secure the state. Of course, the fine paid by the agents are generally followed by a recourse action to be filed against Owners/ Carriers. In practice the agents demand a LOU in order to secure their position.

In order to cancel the imposed fine, an explanation letter obtained from the load port which indicates and justifies the reasonable cause of the shortage/overlanding of the cargo should be submitted. The letter must confirm the corrected figures in accordance with the figures at the discharge port and should be certified by the Chamber of Commerce or in case of absence of the same by the Harbor Master. The Turkish Consulate or the Embassy must legalize the letter. Absence of a submission or non-acceptance of this document will result with a fine in relation to the shortage or the excessiveness of the landed cargo above the allowance limit.

An official letter could also be obtained from the port authorities in case a shortage is the matter at a port the vessel discharged her cargo whereas an excess is found for the continuity of the same cargo discharged at the next port where overlanding occurred in order to present same to the Customs authorities at the port where the shortage is the matter to justify the deficiency.

When calculating the fine amount;

- For the excess, only the quantity exceeding the specified trade allowance limit by the law shall be taken into consideration.
- For the shortage; Customs tax+ VAT+ Special Consumption Tax which are generally equal to the import taxes.

If the fine is paid within 30 days from the notification date without an objection, then a 25% early payment discount will be applied. The party whom the fine is imposed to has the right to apply to the Customs Conciliation Commission within 15 days from the fine notification date with an amicable settlement request. The commission must grant their decision within 30 days from the application date and invite the applicant for a settlement meeting where they tend to generally discount above 25 %. However, the fined party has the right to file an official objection to the “Customs Trade Directorate” within 15 days from the date of notification. If the objection is rejected then the fined party has the right to file before the Administrative Court within 60 days from the date of rejection.

In the light of the mentioned, when taking into consideration that it will be much harder, even sometimes impossible, to solve the problems which may arise due to wrong documentation at the discharge port, acting prudent and assuring that B/L indicates the correct cargo quantity can protect vessel interests from facing serious consequences. As a precautionary measure, before the documentation are to be signed at the loading port, the quantity of the cargo should be checked carefully. In practice, even though surveys do not seem to be recognized by the Customs authorities, for the purpose of double checking the quantity figures and for possible future negotiations with the cargo interests, joint initial& final draft survey and tally survey could be carried out at the discharge port together with monitoring the shore weighbridge scale figures. When concerning liquid cargo, all measurements during loading/discharging should be closely monitored/conducted at the vessels and at the shore tanks (if possible) by a trusted surveyor on behalf of the owners to ensure correct measurements.

It is also important that the Masters of the vessel to monitor the “Boil-Off” ratio and keep the consumption of the vessel within the limit of %6 of the total B/Ls figure when LNG cargo discharges are the subject at Turkish Ports in order to avoid exorbitant fine enforcements and cargo shortages.

Having in mind the serious consequences of the cargo shortage/ claims, even in doubted situations immediately getting in contact with Ingosstrakh to be involved to the matter with local P&I Correspondents will be essential for handling of the matter in the most professional and effective manner.