THE TERMINATION OF THE MANAGEMENT CONSULTING CONTRACT UNDER TURKISH LAW

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ABSTRACT

Globalization and industrialization has features the professionalism and the latter increased the demand for contribution from third parties outside the business, which has increased the legal visibility of the consulting process over decades. Today consulting is a huge sector in total. This study focuses on the reasons for ending management consulting agreements. In order to make the conclusion clear, first the legal aspect of the management consulting contract and the obligations of the parties are discussed, and then the reasons for the termination of the management consulting agreement are be examined without making a distinction on the general provisions or special provisions of Turkish Code of Obligations, No.6098. In this regard, performance, impossibility of performance, expiration of the

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contract period, death, incapacity or bankruptcy of the parties, cancellation contract and acquittance, rescission of contract involving dismissal and resignation are deliberated.

Keywords: *management consulting contract, termination of contract, consultant, end of contractual relationship, Turkish Code of Obligations*

ÖZ

Küreselleşme ve sanayileşme uzmanlaşmayı ön plana çıkarmış, bu da zaman içerisinde işletme dışından üçüncü kişilerin yardımına olan talebini artırmış, bu da danışmanlık işlemlerinin hukuki görünürlüğünü çoğaltmıştır. Bugün danışmanlık mesleği devasa bir sektör olmuştur. Bu çalışma, yönetim danışmanlığı sözleşmelerini sona erdiren sebeplere odaklanmaktadır. Konuyu anlaşılır kılmak için öncelikle yönetim danışmanlığı sözleşmesinin hukuki niteliği ile sözleşme taraflarının borçları/yükümlülükleri konusu üzerinde durulacak, sonrasında ise Türk Borçlar Kanunu sistematiğinde genel hüküm ya da özel hüküm ayrımına gidilmeksizin yönetim danışmanlığı sözleşmesinin sona ermesi sebepleri irdelenecektir. Bu çerçevede ifa, ifa imkânsızlığı, sözleşme süresinin dolması, bir tarafın ölümü, ehliyetini kaybetmesi ya da iflası, bozma sözleşmesi ve ibra, azil ve istifa yolu ile sözleşmenin feshi değerlendirme konusu yapılmıştır.

Anahtar Kelimeler: *yönetim danışmanlığı sözleşmesi, sözleşmenin sona ermesi, danışman, borç ilişkisinin sona ermesi, Türk Borçlar Kanunu.*

Introduction

With the development of information and communication technology, 20th century has been the peak of globalization. In this framework, global economic activities have become more frequent and complicated beside the number of global cooperation have increased. Due to the tight competition environment, players in many sectors have increased the demand for contribution from third parties outside the business, which has increased the legal visibility of the consulting process.

It might be said that consulting in the professional sense as it is today has first emerged in the 1920s. While the first generation of consultants concentrated on the production phase, in the 1930s, the second generation consultants also handled procurement, sales, releases and accounting issues. In Europe, the consulting sector has grown rapidly since the 1950s, when the business economy turned to American examples. The consulting services requested today include two different trends. The first one is the individual services, which require expertise for individual problems; and the second is a comprehensive consulting service that provides surveillance at all stages of the business activity.

The widespread use of consulting services is an appearance of the interest taken in the solutions offered for business-to-business / technical problems. Today, consulting activities are no longer the only services demanded by large firms or major countries. It appears that many smaller companies as well as state-owned enterprises, receive consulting services. The widespread use of this type of contract, of course, increases the number of disputes that stem from the contract.

If the possibilities of different combinations are aside, two basic types of consulting can be mentioned, which are management consulting and engineering consulting. Although the management consulting contract was mainly dealt with in this study, many of the issues discussed also concern other consulting contracts.

This study focuses on the reasons for ending management consulting agreements. In order to make the conclusion clear, firstly the legal aspect of the management consulting contract and the obligations of the parties will be discussed, and then the reasons for the termination of the management consulting agreement will be examined without making a distinction on the general provisions or special provisions of Turkish Code of Obligations, No.6098.

I. Management Consulting Contract in General

A. Legal Nature of the Contract

As in German law, consulting contract in Turkey is not

regulated as a separate type of contract. Therefore, in order to determine the provisions to be applied to this type of contract, it is necessary to determine what contract type under Turkish Code of Obligation[2](hereinafter referred as TCO) should be evaluated. However, it is argued that this is not so important in practice, because the parties determine many details in the contract.[3] The performance of the consultant against the consulting fee is to identify problems in the operating environment, to propose solutions and sometimes to overcome the problem by applying the solutions. In other words, the consultant's primary obligation is work or service, so it should be evaluated as a mandate contract.

In this context, the features of service contracts, contracts of work and mandate contracts might be examined.[4] On the service contract, the worker undertakes to work within a certain or indefinite period, and the party ordering work undertakes to pay a fee. The time, dependency relation, and liability emerges as the important elements of service agreements.[5] On the other hand, in the management

[2] OJ 04.02.2011, N.27836.

[3] **ALTOP,** Atilla; Yönetim Danışmanlığı Sözleşmesi ***(Management Consulting Contracts),*** İstanbul, 2003, p.65.

[4] For more comparison with reserach&development, know-how, franchise and management contracts please see ALTOP, p.72-77.

[5] **GÜMÜŞ,** Mustafa Alper; Borçlar Hukuku Özel Hükümler (**Law of Obligations - Specific Contractual Provisions**), Volume 1, İstanbul, 2013, p.382-384; **YAVUZ,** Cevdet / ACAR, Faruk / ÖZEN, Burak; Hukuku Özel Hükümler (**Law of Obligations - Specific Contractual Provisions**), İstanbul, 2014, p.870-881; **EREN,** Fikret; Hukuku Özel Hükümler (**Law of Obligations - Specific Contractual Provisions),** Ankara, 2012, p.314-322.

consulting contract, there is not a dependency of consultants, in other words, consultants do not have to do their jobs under the instructions of the job owner personally or on an operator basis and for a period of time. The management consulting contract hence cannot be considered as a service contract.

Within the contracts of work contract, the contractor owes the manufacturing of something in return for the price. Mutual responsibility and an outcome commitment are two distinctive features of this contract.[6] A work contract could be mentioned if an action is taken to achieve results of work that create value as a success, such as the preparation of a written organization plan or the preparation of a computer software. However, in many respects the management consulting contracts in question are distinguished from the typical work contracts. For example, in the contract of work, unless the work is completed, the worker may return at any time, giving the cost of the part made or fully compensating the contractor for damage and loss. However such a unilateral right of return is not under management consulting contract without a justifiable reason.

A mandate contract is such a contract in which the performance of a job or service is carried out independently and without time limits, the risk of result is on the mandator and the fee is not requested in principle.[7] Both parties in a mandate contract have a

[6] EREN, p.581; YAVUZ/ACAR/ÖZEN, p.984-999.
[7] EREN, p.698; YAVUZ/ACAR/ÖZEN, p.1153-1154.

right to terminate the contractual relationship with a unilateral declaration. A compensation obligation arises only if the said right is used at an improper time. This is also an important point for management consulting contracts. Apart from this, even if the result is not obligatory, it is under the agent's obligation to perform well under the responsibility of care and loyalty. The agent has to act in accordance with the expertise expected from his / her profession. These features accord with management consulting contracts, unless the objectification of the results is clearly obliged.[8]

In the light of these evaluations it is possible to consider the management consultation contract as an atypical or anonymous contract.[9] Although the management consulting agreement is in conformity with the mandate contract in most parts, it is stated that it is possible to apply the provisions of contract of work for the defects of materialized results. However, it may be a different legal characterization including a mixed contract or a *sui generis* contract, taking the diversity of the acts the consultant undertakes into consideration.

[8] ALTOP, p.99-104.

[9] ALTOP argues that it is an "atypical mandate contract". See p.81. However, we argue that this evaluation is not convenient because it is not appropriate to place a typical contract name beside the 'atypical' statement instead of an atypical or anonymous contract, If it is mentioned about a contract that does not fit the legal type. This conclusion does not change in the management consulting contract though the provisions of the mandate contact are applicable considering Article 502/2 of the Turkish Code of Obligations.

B. The Obligations of the Parties

1. The Parties

The parties in the management consulting contract are the consultant who provides consulting services and the client who requests consulting services. The demand of the client emerges anywhere operational know-how requirements arise. The consulting showed up in the free market economy system, but then the public institutions started to demand. Consultancy therefore might be requested from geographies with different economic and political systems.

The environment that provides consulting services is also quite broad including individual consultants, consulting firms, research institutes, government departments and international organizations. Consulting service providers might be tax advisors, lawyers, architects, engineers, etc. who are experts in their fields. However, unlike others, for business consultants, a number of conditions are not considered, but the experience and skills of the persons are taken into account.[10] National and international organizations have been established to protect the reputation of consultants and they have set up professional guidelines for minimum

[10] ALTOP, p.39.

standards for their members.[11] The Federation of Association of Management Consultants (FEACO)[12] and the Association of Consulting Management Engineers (ACME) are two of them.

2. The Obligations of the Consultant

a. The Performance of Consultancy

The consultant's principal obligation is the act of counseling activities freely determined by the parties. The scope of the latter can be broadly grouped in general as follows[13]:

Making preliminary investigations (feasibility studies): In this framework, it is necessary to collect all information and data on the basis of the examination of the files for the specific problem posed by the customer who is requesting consultancy or negotiations with employees and so on. Subsequently, these data should be temporarily evaluated for the preparation of the first amendment proposals, and the results should be embodied in an analysis report.

Preparing a solution proposal or plan: It is necessary to work on the analysis made to present the best solution proposal or alternative for the problem the operator is facing.

Implementation of the solution proposal: It may be demanded

[11] As a rule, professional directives are only legally binding if they are used in individual contracts. However, it might is significant for the interpretation of contracts because membership of an organization may guarantee his/her qualification.

[12] For the background of the foundation please see http://www.feaco.org/aboutfeaco/history.

[13] ALTOP, p.86-90.

to determine the new workflow, to train the personnel, to determine and implement mandatory organizational measures, and to undertake administrative tasks on the client's behalf within the context of the consulting.

b. Other Responsibilities

Management consultants also have other responsibilities when dealing with counseling. These responsibilities are primarily related to the effectiveness of the consulting activity and the respect of the rights of the person receiving the consulting service.

First of all, loyalty is a characteristic obligation of every contract of employment.[14] This is also dominant in business consulting contracts, because of close working and personal confidence during the consulting period.[15] The loyalty obligation does not prevent the consultant from taking the job elsewhere because knowledge and experience accumulation is inherent in consulting.[16] However, at the same time, it may be decided not to provide consultancy to competing enterprises in the same sector, unless approval is obtained from the customer.[17] Apart from this, it is argued that employees of the

[14] In the doctrine, the obligation to act in the interest of the assignor, informing the attorney-related relationship, presenting advice, promptly notifying the client about any conflicts of interest, was also considered as part of the loyalty obligation. See YAVUZ/ACAR/ÖZEN, p.1205.
[15] ALTOP, p.91.
[16] ALTOP, p.94.
[17] According to Article 37/e of the Attorneyship Law, which has a special provision in this framework, a lawyer has to refuse the work proposed to him if he is a lawyer of the other party on the same dispute or a judge to a party.

consultancy firm and the firm taking the consultancy service are unable to hire each other's employees without the consent of the other party, otherwise it will be incompatible with the obligation of loyalty.[18]

In order to get the desired benefit from the consultancy, the consultant is obliged to keep the confidential information about the operation, so the information that is given to him and the information he has learned during the consulting activity ca not be transferred to a third person without the customer's permission. This obligation is also often stated in writing in the contracts because of its importance. Some writers evaluate the obligation of confidentiality under loyalty obligation.[19]

Another duty of the consultant is the obligation to act diligently, otherwise he/she will be liable to compensate. However, the damage must be proved by the customer and it is hard to prove.[20] Unlike an architect or an engineer, the correctness of the actions of a business consultant cannot be controlled in accordance with the rules of predetermined techniques, which makes it determined considering the concrete situation.[21]

Finally, it should be noted that the parties agree on some

[18] ALTOP, p.94.
[19] EREN, 725-726; YAVUZ/ACAR/ÖZEN, p.1205.
[20] YAVUZ/ACAR/ÖZEN, p.1195.
[21] ALTOP argues that compensation is determined considering a) Minimum level of education and professional knowledge that the management consultant should have; b) the requirements of a concrete contractual relationship; c) personal abilities and characteristics that the counselor should be known or known to the client seeking counseling. See p.97-98.

secondary obligations. For example, in long-term consulting contracts, it is mostly envisaged that the consultant will periodically or on demand inform the client about the progress of the work. Again, in know-how, consultancy institutions are obliged to provide training and to undertake special training programs or to work with selected personnel of the client to provide transfer of know-how.

3. The Obligation of the Client

a. Price

The main performance of the client company who requests consultancy is to pay the fee.[22] First of all, the agreed fee is paid on the consulting contract. Otherwise, according to the legal nature of the concrete contract, the remuneration is determined within the framework of legal provisions. It is accepted that the price is agreed impliedly in accordance with the conditions. If the client claims that the consultant will perform the action without charge, he/she must prove it. In case there is an official charge rates for the wage it is determined within the rates, otherwise the usual agreed wage is paid. If there is no such thing, the court determines.

Different methods have been developed for calculating the wage. In the first method, it is determined considering the number of

[22] As is known, the wage is not a mandatory component of the mandate contract in the Turkish Code of Obligations. It is considered among elements that vary according to whether mandate is compulsory or not. See YAVUZ/ACAR/ÖZEN, p.1165-1168.

people employed and the time spent, in which the work done is in the forefront. Secondly, the fixed (lump-sum) method of payment is the determination of the cost results as a total cost independent of the time spent. It is heavily used in the industrial and construction sectors, i.e. areas where the value of the object related to the consultancy activity can be fully determined. Another method is to determine the cost of a given project by adding a surplus value for profit and risk on the expenditure made for a specific project where the scope of the undertakings cannot be fully determined at the beginning.[23]

Regardless of which method is used, it is necessary to take into account the imperative provisions of the national laws. This is because the contrary provision of national law may be invalid such as anti-moral determinations or provisions constituting lesion beyond moiety. It may also not be possible to set a remuneration, in which some parts of the assets will belong to the other party, as in the case of Art.164/3 of Attorneyship Law.

Even if the consulting fee is decided on a foreign currency, this must be clearly indicated if the payment is to be made in that currency. Otherwise, a Turkish Lira equivalent at the date of payment can be executed according to Art.99 of Turkish Code of Obligations. In practice, payment is made in pieces, not in one go, which varies according to the sector in the manner in which the fee is set.

[23] Consulting Success, "How Consultants Get Paid?" Available at https://www.consultingsuccess.com/how-consultants-get-paid (Last accessed on 23 September 2018)

b. Other Obligations

Apart from the wage, the doctrine mentions the obligation to cooperate, keep secrets and take delivery in terms of receiving counseling services.[24] In this respect, the party requesting consultancy is obliged to communicate to the consultant the information (business documents, balance sheets) requested by the consultant within the scope of the obligation to cooperate. Failure of the consultant to perform his/her duties as required due to the fact that the customer does not give him the necessary information does not prevent him from receiving the consulting fee. In addition, the client must cooperate in the field, equipment, transport, visa, residence permit and similar procedures necessary for the consultant to perform his / her duties. Within the framework of the obligation to keep confidentiality, the client needs to keep confidential the information and documents about the know-how disclosed by the consultation.

II. Termination of the Contracts and Its Results

As stated, mandate contract provisions are also applicable in the management consulting agreements to a certain extend considering Art. 502/2 TCO.[25] So, the provisions of Art.512-514 TCO,

[24] ALTOP, p.124-128. The author claims that if the materialization of the work results are obliged, the provisions of default for work contracts should be applied.

[25] "Provisions relating to the mandate shall also apply to other contracts of work (work, service and etc) not regulated in this Law to the extent that they fall in accordance with their qualifications"

which regulate the end of the mandate contract, cannot be ignored in terms of the management consulting contract. Besides, the general provisions of the contract should also be considered. However, not all of the reasons to terminate contracts in general comply with the management consulting contract. For example, the combination of the creditor and debtor titles, renewal and cancellation of contract *ex tunc* are either reasonably inconvenient or unlikely to be used in practice for management consulting contracts. Below, the reasons for termination of the management consulting agreements are examined as a whole, without distinction as to the general provisions or according to the provisions pertaining to the mandate contracts.

A. Performance

The usual reason for the end of contracts is performance or fulfillment.[26] In terms of the general use of the concept, performance does not put an end to the debt relationship, rather the individual debts included in that relationship. Because debt in broad sense refers to the creditor-debtor relationship and generally includes more than one

[26] The legal nature of the performance is controversial in the doctrine. It is possible to talk about three main ideas. In an opinion, the performance is a contract, because the debtor offers the creditor a performance, and the contract is completed with the acceptance of the creditor. According to the second view, it is a material act that ends the debt. Since fulfillment is not a legal transaction, no legal action is necessary; the important point is that the result aimed in the debt relationship is materially realized. The other view accepts the act as a matter of fact depending on the nature of the act. Murat İNCEOĞLU, " The Legal Nature of Performance and the Problematic of Whether the Debtor's Appropriate Act Constitutes Performance" Ankara University Facult of Law Journal, V.54, N.4, 2006, Ankara, p.149 ff.

act.[27] But if the obligatio consists of a single act, it ends in narrow sense with the performance. In addition, the fulfillment of all the actions in a debt relationship also ends the relationship at all because the relationship remains substanceless.[28]

As was stated above, the obligation of the consultant is not result-based in principle. Therefore, if the act determined by the contract is performed with the necessary attention and dedication, it will be regarded as having fulfilled the obligation. As a rule, even if an outcome which is contrary to what is expected is not a corrupt. In case the consultant has more than one outstanding obligation and that some of them are performed, the obligatio relationship continues. In other words, it is necessary to look at the content of the contract to confirm the termination of contract.

As a rule, the debtor must perform his/her obligation in personal in the context of Art. 506 TCO. As a matter of fact, the main purpose of consulting is to make use of the consultant's personal and organizational knowledge and experience. The work of consultant can be performed by another one exceptionally. These exceptions are

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[27] **ANTALYA,** Gökhan; Borçlar Hukuku Genel Hükümler(**Law of Obligations – General Provisions**) Vol.1, İstanbul, 2015, p.10; **NOMER,** Haluk; Borçlar Hukuku Genel Hükümler(**Law of Obligations – General Provisions**), İstanbul, 2012, p.7; **OĞUZMAN,** Kemal/ **ÖZ,** Turgut; Borçlar Hukuku Genel Hükümler(**Law of Obligations – General Provisions**), İstanbul, 2012, p.3; TEKİNAY, Selahattin / AKMAN, Servet/ BURCUOĞLU, Haluk/ ALTOP, Atilla; Borçlar Hukuku Genel Hükümler(**Law of Obligations – General Provisions**), İstanbul, 1993, p.5-6.

[28] **AKINCI,** Şahin; Vekâlet Sözleşmesinin Sona Ermesi (**The Termination of Mandate Contracts**), Konya, 2004, p.37.

expressed in the law as 'cases where the agent is authorized or the situation is compulsory or customized'.

In order for a contract to end, it is imperative to be performed in the right place and right time in principle. Otherwise, it will not be performed as expected and responsibility will arise. For the place and time of fulfillment, it is first necessary to look at the agreements of the parties. If there is no consensus on this, the performance must be made according to Art. 89 TCO.[29] Where there is no agreement between the parties, at the time of performance, each debt is due at the time of birth and can be requested immediately.[30]

B. Impossibility of Performance

One of the general causes to end the debt is impossibility (Art.136 TCO). However, should be noted that the impossibility considered here is the impossibility that emerges after the agreement because, in the course of the establishment of the contract, this act is not valid in accordance with Article 27 TCO. In this situation, which is also referred to as impossibility in the beginning, the objective impossibility is sought for absolute nullification, that is to say, is

[29] One argues that if there is no provision in the contract, the nature of the work should be examined to determine the place of performance. But if it is not possible to determine the place of performance according to the nature of the work, then Art.89 applies. AKINCI, p.43; SEROZAN, Rona; İfa, İfa Engelleri, Haksız Zenginleşme (**Performance, Performance Obstacles, Unjust Enrichment**), İstanbul, 2016, p.36-37.

[30] SEROZAN, p.9; OĞUZMAN/ÖZ, p.248.

impossible for everybody.[31] If the obligation can be fulfilled by third parties, impossibility will not be objective in principle. However, in contracts where the person of the debtor is vital, it will be necessary to consider this as an objective impossibility.

In the context of the TCO, the impossibility must happen within the reasons the debtor cannot be held responsible for it to end the debt. Otherwise, compensation shall be the issue under Art.112 TCO.

C. The Expiration of the Contract

In the case of management consulting contracts, if the parties decide on a certain period of contract, the contract ends as a rule. Whether the actions born out of the contract are complete and fulfilled as required does not matter for the said termination.[32] This period can be determined as a certain date or the moment of realization of an event as it is in other continuous obligatio relations.[33] If the start date is not clearly set, the day on which the contract is established is accepted as the start date of the benefit.[34]

In practice, either party to the management consulting contracts may be granted a right to extend the contract for a period of time. If the parties agree on this, the contract shall be terminated only if the party to which the contract is entitled does not request to extend

[31] OĞUZMAN/ÖZ, p.76-78; TEKİNAY/AKMAN/BURCUOĞLU/ALTOP, p.404, NOMER, p.59.
[32] ALTOP, p.177.
[33] AKINCI, p.48.
[34] ALTOP, p.178.

the contract within the prescribed period of time.[35] There is no provision in the TCO for the extension of the contract by keeping silent after the expiration of the contract, as in the case of a rent or service contract, in the case of a termination clause. So there is no implied renewal for management consulting contracts.

D. The Death, Incapacity or Bankruptcy of the Parties

Another mandate contract provision that can be applied to management consulting agreements is Art.513 of TCO. According the first paragraph of the article, "*Unless otherwise understood from the contract or from its nature, the contract is automatically terminated by the death, losing his/her capacity and going bankrupt of the agent or the client. This provision shall also apply at the end of legal entity if one of the parties is a legal entity.*" In that case management consulting contracts are terminated in case of one party's death, becoming incapable and going bankrupt.

It is stated that relationship based on the mutual trust of the parties and that the rights and obligations of these associations are tightly attached to the person create the above mentioned provision's ground[36] because the client chooses a trustworthy agent and the agent has to act personally as a rule. In case of the death of the client, the inherent occupation and benefits of the contract shall disappear, and

[35] ALTOP, p.178.
[36] YAVUZ/ACAR/ÖZEN, p.1221; AKINCI, p.70; **TANDOĞAN**, Haluk; Borçlar Hukuku Özel Borç İlişkileri (**Law of Obligations – Specific Obligation Relations**), Ankara, 1989, p.646.

in the case of death of the agent it is impossible to perform personally. That one of the parties is decided to be absent or terminating the legal entity has the abovementioned results.[37]

As a rule, the death directly terminates the contract, but the parties can decide the mandate to continue after the death.[38] Apart from this, it is accepted that a mandate contract can be concluded for it to be effective after the death.[39] However, in practice, it can be stated that if the management consulting contracts are mostly concluded between legal entities, the importance of discussions about the end of consulting by death decreases.

A management consulting contract is directly terminated when one party loses his/her capacity to act, for instance the necessary authorization or licences to perform management consultancy is canceled. In the event a party falls into a limited capacity whether the mandate ends will be determined within the general provisions, which depends on whether the legal representative shall allow or deny the continuation of the consultancy.[40] If the legal representative does not give the necessary approval, the consulting contract will also end.

Unless otherwise stated or implied by the nature of the contract, with the bankruptcy of one of the parties, the management consulting agreement shall be terminated. Bankruptcy essentially

[37] YAVUZ/ACAR/ÖZEN, p.1221.
[38] YAVUZ/ACAR/ÖZEN, p.1223; AKINCI, 71.
[39] AKINCI, p.71.
[40] YAVUZ/ACAR/ÖZEN, p.1222; ALTOP, p.178.

does not remove one's rights and the capacity to act, but with the opening of the bankruptcy, the power of appointment on the goods and rights is restricted.[41] The insolvent person cannot make a transaction on goods until they are sold. However, the insolvent was not prevented from doing promissory transactions. In this case, the mandate contract would not end but the dispositive transactions made could be deemed invalid to the extent that it negatively affected the bankruptcy table if Art.513 TCO does not exist.[42]

It is argued that if the subject matter of mandate is an act on a material outcome such a contract continues despite the bankruptcy of the client because the performance of the work liability does not have a negative effect on the bankruptcy desk.[43] On the other hand, a mandate contract, which deals with legal proceedings, must be terminated by the client's bankruptcy because it is not possible for the legal agent to do something that the client cannot do on his own.[44] In a management consultancy contract, the parties might agree on contracts in which a debt of legal transactions as well as material acts are incurred, in case the act of consultant is deemed to be the determination and providing solution offers for managerial problems. It will then be necessary to look at the content of the contract to assess

[41] **ASLAN,** Ramazan/ **YILMAZ,** Ejder /**TAŞPINAR AYVAZ**, Sema; İcra ve İflas Hukuku (**Execution and Bankruptcy Law**), Ankara, 2016, p.476 ff.; **ALTAY**, Sümer; Türk İflas Hukuku (**Turkish Bankruptcy Law**) – Vol.1, İstanbul, 2004, p.649 ff.
[42] AKINCI, p.80.
[43] TANDOĞAN, p.471-472; AKINCI, p.81.
[44] TANDOĞAN, p.472; AKINCI, p.82.

whether the contracting party will automatically terminate if the contracting party goes bankrupt.

Similarly it is stated that the bankruptcy of the agent, who is obliged to see a material business, will not end the mandate contract.[45] Since that an agent incurred a debt to perform a material act is not related with assets, bankruptcy should not affect the contract due to the nature of the business.[46] In this case, if the trust of the client is disturbed, the way of discharge can already be applied.

In the case of contracts for the execution of legal transaction, one argues[47] that if there is a power of attorney that gives the authority of direct representation the bankruptcy of the agent ends the contract, whereas another author argues[48] it is not necessary for the contracting party to automatically terminate the contract due to the bankruptcy of the agent because the actions taken by the agent affect its own assets. In fact if the client is not immediately dismissed, it means that he/she does not find the situation contrary to his/her own interests. It is then necessary to accept that the contract continues in accordance with the nature of the job. However, it is inevitable to accept the termination of the contract if the bankruptcy of the agent prevents him from fulfilling his obligations arising from the contract. Within the framework of the above-mentioned explanations, the bankruptcy of

[45] TANDOĞAN, p.475; AKINCI, p.83.
[46] TANDOĞAN, p.475; AKINCI, p.83.
[47] TANDOĞAN, p.475.
[48] AKINCI, p.84-85.

the consulting firm, in terms of management consulting contracts should not automatically terminate the contract as a rule.

As a matter of fact, the profit of the bankrupted company doing its jobs is also to bankruptcy table creditors' benefit. However, the contract may be terminated if the bankruptcy and consulting firm is deprived of certain possibilities and cannot perform the consultancy activity in this framework. For example, if the relation of consulting firm with some information technology companies is interrupted, it may be determined that the contract has been terminated by considering the difficulty of transferring the necessary know-how. In such a case, the consulting firm already has the right to unilaterally terminate the contract by dismissal/discharge.

It has been stated that the mandate contract can be decided by the contract not to end by bankruptcy or incapacity as in death.[49] In this case, the bankruptcy desk or legal representative, who takes the place of the insolvent or incompetent party, may exercise his right of discharge or resignation. However, it is possible to find opinions that rejected the latter result.[50] In terms of the management consulting contract, there is no risk for the agreement's continuity after the bankruptcy. The party that thinks that the other party cannot fulfill the contractual obligations because of restriction with the bankruptcy, may always apply to the remedy or resignation, and the bankruptcy of

[49] YAVUZ/ACAR/ÖZEN, p.1223.
[50] AKINCI, p.82.

the other party consists a justifiable reason.

Finally Art.513/2 TCO is worth underlining. According to the Article, *if the termination of the mandate endanger the interests of the client, the agent or his/her successors or their legal representatives are obliged to continue to perform the mandate until the client or his/her successors or their legal representatives can do the works by themselves*. Although death, incompetence or bankruptcy therefore discontinues, contractual obligations may have to be fulfilled for a while according to the conditions of the concrete case. However, it should be noted that the non-binding nature of consulting practice makes it difficult to mention such a necessity. On the other hand, if a certain period of time has passed since the implementation of the management consultation agreement and a small amount of time remains for final report, the fulfillment of the contractual acts required by Article 513/2 may appear as a debt and liability for the parties for a certain period of time.

E. Cancellation Contract and Acquittance

The cancellation contract is a new agreement between the parties to end the contractual relationship between them.[51] Parties are giving up their receivables and debts by means of a cancellation contract. In this context, it is a dispositive transaction.[52] The

[51] **EREN**, Fikret; Borçlar Hukuku Genel Hükümler (**Law of Obligations- General Provisions**), Ankara, 2017, p.284.
[52] Ibid.

cancellation contract is not an institution organized in the TCO but it is accepted that such a contract can be made within the framework of the notion of party autonomy.[53] Within the framework of the provisions on the mandate contract, the parties can always terminate the contract by a unilateral declaration in management consulting contracts, but this does not constitute an obstacle to the acceptance of a cancellation contract.[54]

Cancellation contracts in principle lead to retroactive results.[55] The parties wish to move to the situation before the contract is completed.[56] Therefore, the parties must return the executed acts. However, since the agent is obliged to work on some tasks, there is no such thing as a return of the fulfilled actions. In that case, it will be necessary to recognize that cancellation agreements in the management consultation contracts will be effective for the future. The consultant in this framework does not refund part of the wage corresponding to the performance of the work at that time.

An agreement on acquittance regarding a debt between the creditor and the debtor in order to partially or completely remove it is another way to end the consulting contracts. (Art.132 TCO) The distinction between an acquittance agreement and a cancellation agreement is that the former terminated contract in narrower sense.[57]

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[53] Ibid.
[54] For the same approach, see AKINCI, p.36.
[55] EREN, p.1285.
[56] AKINCI, p.36.
[57] AKINCI, p.47.

However, if the obligatio relationship consists of a single debt, then the contract will also be terminated.

F. Rescission of the Contract

The concepts of return and rescission of the contract generally mean that a valid contractual party terminates the contractual relation with a unilateral declaration.[58] Although the term of rescission has not been fully rooted yet in Turkish law, it is often used to express the right to terminate contracts with an *ex nunc* effect. In that case, in the management consulting contracts, one party will be able to terminate the contract by a formative declaration with respect to the general provisions and the discharge and resignation provision of mandate contracts.

1. Discharge and Resignation

Discharge and resignation that ends the contractual relation is the most common ways to terminate the mandate contracts.[59] Discharge is to end the mandate relation by a unilateral declaration of intention of the client, which is necessary to reach the other, whereas the intention of resignation is given by the agent himself/herself.[60] Regarding regulation is as follows: "*The agent or the client can always end the contract unilaterally. However, the party ending the*

[58] OĞUZMAN/ÖZ, p.381; NOMER, p.279-281.
[59] AKINCI, p.35.
[60] YAVUZ/ACAR/ÖZEN, p.1220. In this regard, the right to take the contract intent back was seen a disruptive formative right. EREN, p.708.

contract in an improper time obliges to compensate the other party's damages from it." The first sentence of this judgment is accepted as an imperative provision.[61] Both the agent and the client hence cannot give up enjoying their rights at any time.[62]

Resignation and dismissal have *ex nunc* consequences.[63] That's why the actions to not be fulfilled after taking the contractual intent back cannot be recovered whereas those who have been executed may be requested to return with an unjust enrichment claim.[64]

One author has not seen the use of rescission with regard to the right of resignation and discharge given to the parties by the Law, as accurate.[65] It is argued as the rationale that the rescission removes the permanent contractual relation, and that the contract is terminated with the passing of a certain period of time after the use of this right whereas the agents does not need to wait or have certain reasons to terminate the contract.

The use of the right to resign and discharge, which is described as a disruptive formative right, has not been bound by any

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[61] YAVUZ/ACAR/ÖZEN, p.1220.

[62] This has also been subjected to some decisions of the Court of Cassation of Turkey. In one of them it is stated that "*The agents in all mandate forms can always dismiss, and the deputy may always resign from the deputies. This is the legal right of the agent and the client. These rights cannot be renounced in advance. The agent must be paid in proportion to the labor they spend in discharge and resignation. Negotiations and penal clauses involving the adverse are invalid*. 3.Circle of Civil Disputes, The Number of Case:1997/11339. Accessed in www.kazanci.com. Last accessed in August 6,2018.

[63] TANDOĞAN, p.620-621.

[64] SEROZAN, p.131-132.

[65] AKINCI, p.57.

circumstance. It should then be possible to end the contract at any time without any obligation to justify it. That the parties are given such a wide mandate in this respect is based on the fact that the mandate is directly related with the personality of the debtor and the contract is based on a special trust relationship.[66] However, in accordance with Article 512c, the party that ends the contract in an improper time is obliged to compensate. The latter damage is called in the group of negative damages.[67]

The above-mentioned provision also suits the interest of the parties in terms of the management consulting contract because trust relationship and professional ethics, which are important for consulting service, makes the return of the mandate compulsory if the assignment cannot be performed.[68] In addition, the interest regarding the wage and follow-up contracts enforce the management consultant not to discharge whereas that the client waits for the final consultant makes him/her to be bound to the contract in practice. In other words, the parties do not have an interest in dismissal or resignation unnecessarily.[69]

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[66] TANDOĞAN, p.420. Since it is no longer possible for the author to say that all kinds of proxy contracts are based on a special trust, the contract can not be terminated by resignation or resignation has been put forward without justifiable reasons in some kinds of mandate contracts, according to him. AKINCI denies this idea. See p.61.

[67] YAVUZ/ACAR/ÖZEN, p.1220; TANDOĞAN, p.623.

[68] ALTOP, p.181.

[69] ALTOP, p.181.

2. Breach of the Contract

In the framework of the general provisions of the TCO, some optional rights were granted to the creditor in case of default of the debtor. In this case, the creditor may demand performance and delay compensation as well as terminate the contract and demand the damages that the contractor has suffered due to the end of the contract before the agreed. (Art.126 TCO) So the client in case the management consultant does not perform his/her obligation with the care and free from defect, and the agent in case the client breaches the obligation to pay fee, should be able to terminate the contract based on the default of the debtor.

III. Conclusion

The management consulting contract having a wide a range of applications is an unnamed contract. The provisions regarding mandate contracts shall be applied to a certain extent in respect of Article 502/2 TCO. Therefore, the provisions of Art.512 to 514 TCO should be taken into account for the termination of the management consulting agreements. The latter, however, do not constitute an obstacle to the termination of the management consulting agreement under the general provisions. But, in general, some of the reasons for the end of the debt or contract may not be appropriate due to the nature of the contract, or almost impossible to be practiced.

The most common reasons for termination of management

consulting contracts is, as examined, completion of performance, subsequent failure of the performance, expiration of contract period, death, incapacity or bankruptcy of one of the parties, cancellation contract or unilateral declaration for the termination. There is no doubt that the terms and consequences of the termination will vary depending on the reason. Especially the termination of the contract according to the general provisions or according to the provisions of the mandate may have different legal consequences.

The basic end for all contracts is performance of parties. Besides, impossibility of performance that emerges after the agreement, the expiration of contract duration, cancellation contract and acquittance should be considered all contracts including consulting management contract. On the other hand, death, incapacity and bankruptcy of the parties are significant and specific reasons to end the consulting management contract in regard to mandate contract provisions in TCO. Finally rescission of contract by way of discharge and resignation is fully in compatible with the nature of consulting management agreements.

The consequences of ending are also briefly mentioned in the section of the reasons of ending. However according to the provision of Art.514 TCO, 'The client or his heirs are responsible for the work the agent has done before he/she has learned that the contract has ended.' This provision is related with the termination of the contract by the unilateral will of the parties, the death, the incapacity or the

bankruptcy. In case of non-authorized representation of the legal proceedings, provisions of agency without authority and *negotiorum gestio* should apply about legal actions made after the end of the mandate authority in principle. However with the above-mentioned legal provision, in order the termination to be able to produce the said result, it is expected from the agent to learn this. But in management consulting contracts, it is generally obliged to perform a material act, not a legal transaction.

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