İSTANBUL UNIVERSITY PRESS

Annales de la Faculté de Droit d'Istanbul, 76: 291–310

DOI: 10.26650/annales.2025.76.0010
http://annales.istanbul.edu.tr/

Annales de la Faculté de Droit d'Istanbul

Submitted: 05.11.2024
Accepted: 20.01.2025
Published Online: 21.05.2025

RESEARCH ARTICLE

The Law Applicable to the Goodwill Indemnity Claims Arising From Exclusive Distributorship Agreement Under Turkish Private International Law

Esra Tekin*

Abstract

In Türkiye, a country characterised by the prevalence of exclusive distributors, several issues frequently arise concerning goodwill indemnity claims involving a foreign element. These issues include determining the applicable law, the international jurisdiction of Turkish courts, and the arbitrability of such claims. The fact that the Turkish Commercial Code numbered 6102 explicitly stipulates that "goodwill indemnity claims cannot be waived in advance" in a mandatory manner raises the debate as to whether this provision is an overriding mandatory rule. Whether the provision in question is an overriding mandatory rule is a critical issue in determining the applicable law. This is due to the application of overriding mandatory rules to all disputes, irrespective of the presence of a foreign element. Moreover, choice of law agreements are possible in the field of contracts where the principle of party autonomy is recognised. The aim of this article is to analyse the implications for Turkish private international law arising from the selection of a governing law that either precludes goodwill indemnity claims or permits the waiver of such claims in advance. Additionally, this article will seek to clarify how to determine the applicable law in situations where no choice of law has been made, in accordance with the Turkish Act on Private International Law and Civil Procedure of 2007 no. 5718.

Keywords

Exclusive distributors, Goodwill indemnity, Overriding mandatory rules, Party autonomy, Choice of law agreements

***Corresponding Author:** Esra Tekin (Asst. Prof. Dr.), Dicle University, Faculty of Law, Diyarbakır, Türkiye. E-mail: tekinesra@outlook.com.tr
ORCID: 0000-0003-0081-9000
To cite this article: Tekin E, "The Law Applicable To The Goodwill Indemnity Claims Arising From Exclusive Distributorship Agreement Under Turkish Private International Law", (2025) 76 Annales de la Faculté de Droit d'Istanbul 291. https://doi.org/10.26650/annales.2025.76.0010

I. Introduction

Türkiye is characterised by a significant presence of agents and exclusive distributors within its commercial landscape. To promote and market their goods or services, or to enhance their distribution within the Turkish market, foreign merchants must engage with commercial agents or exclusive distributors who, while holding significant influence in the relevant market, operate as independent business entities. According to the exclusive distributorship agreement concluded between the parties, the exclusive distributor assumes risks such as creating a customer portfolio for the goods or services of the supplier[1].

Goodwill indemnity claim, also known in practice as portfolio indemnity, is a right of claim that arises from the termination of agency, exclusive distributorship, and other similar permanent contractual relationships that confer monopoly rights. Article 122 of the Turkish Commercial Code[2] (TCC) numbered 6102, titled "Goodwill Indemnity", stipulates the conditions for goodwill indemnity in commercial agency agreements. This provision also applies to the termination of exclusive distributorship agreements and other similar permanent contractual relationships conferring monopoly rights, unless its application is contrary to the principles of equity (TCC art. 122/5). The wording of this provision generates various discussions concerning private international law. Indeed, the conditions for claiming goodwill indemnity are explicitly delineated in the text of the article. This article examines these conditions from the perspective of private international law.

The classification of the provision in the TCC concerning the goodwill indemnity claim as an overriding mandatory rule obviates the need to determine the applicable law on this matter. If the provision stipulating that the indemnity cannot be waived in advance is classified as an overriding mandatory rule, it should be applied directly, irrespective of the foreign elements involved in the dispute. Therefore, this article seeks to elucidate whether the provision in question falls within the scope of the concept of the overriding mandatory rule under Turkish law.

The legal characterisation of the goodwill indemnity claim is crucial for determining the applicable law. Hence, it is also necessary to address whether the goodwill indemnity claim falls under the law governing the contract. The principle of party autonomy recognised in substantive law is also reflected in the relations falling within the subject matter of private international law[3]. Article 24 of the Turkish Act

1 Samet Can Olgaç, *Tek Satıcılık Sözleşmesi ve Tek Satıcının Denkleştirme İstemi* (Seçkin Publishing 2021) 51-52.

2 Official Gazette (OG), dated 14.02.2011, numbered 27846.

3 Cemal Şanlı, Emre Esen, İnci Ataman-Figanmeşe, *Milletlerarası Özel Hukuk* (10th edn, Beta Publishing 2023) 324; Ergin Nomer, *Devletler Hususi Hukuku* (23rd edn, Beta Publishing 2021) 322; Gülin Güngör, *Türk Milletlerarası Özel Hukuku* (Yetkin Publishing 2021) 173; Ziya Akıncı, *Milletlerarası Özel Hukuk* (Vedat Publishing 2020) 53-53; Sibel Özel, Mustafa Erkan, Hatice Selin Pürselim, Hüseyin Akif Karaca, *Milletlerarası Özel Hukuk* (3rd edn, On İki Levha Publishing 2024) 405; Hacı Can and Ekin Tuna, *Milletlerarası Özel Hukuk* (5th edn, Adalet Publishing 2021) 450; Aysel Çelikel and Bahadır Erdem, *Milletlerarası Özel Hukuk* (16th edn, Beta Publishing 2020) 369 *et seq.*

on Private International Law and the Civil Procedure of 2007[4] (TAPIL) numbered 5718 stipulates that the applicable law in contractual debt relations may be explicitly chosen. However, in practice, this choice is usually made in favour of the supplier which is economically stronger than the exclusive distributor. In other words, the chosen law may be a law that does not allow for indemnity or a law that allows for the waiver of indemnity in advance. Public order is an exceptional method that prevents the application of foreign law in Turkish private international law. An issue this article seeks to address is the question of when public order intervention comes into play.

Even when a choice of law agreement exists between the exclusive distributor and the supplier, in the absence of such an agreement, the applicable law should be determined in accordance with the objective conflict of laws rules. In the absence of a choice of law by the parties, an explanation should be provided regarding the method by which the law applicable to goodwill indemnity claims will be determined. As the law applicable to exclusive distributorship contracts is not explicitly regulated in TAPIL, unlike the Regulation on the law applicable to contractual obligations (Rome I[5]), it will be determined based on the general provisions applicable to contracts. According to Article 4(1)(f) of the Rome I Regulation, a distribution contract shall be governed by the law of the country in which the distributor has their habitual residence. Under Turkish law, in the absence of a choice of law, the applicable law is determined based on the characteristic performance theory. This theory is also incorporated in contemporary regulations, including the Rome I Regulation and the Swiss Federal Act on Private International Law[6] (PILA) of December 18, 1987. Therefore, the applicable law in exclusive distributorship contracts will be determined by identifying the characteristic performance.

Finally, the circumstances that preclude the application of foreign law under Turkish law will be analysed. In this context, it is essential to address the overriding mandatory rules and the public order exception. In particular, it is necessary to clarify whether the provision concerning the goodwill indemnity claim, as regulated under Article 122 of the TCC, constitutes an overriding mandatory rule of Turkish law. Adopting this provision as an overriding mandatory rule would necessitate that if a law is chosen that offers greater protection to the exclusive distributor operating in Türkiye than Turkish law does, such a choice of law should be considered invalid.

4 OG, dated 12.12.2007, numbered 26728.

5 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6.

6 Article 117 of the PILA stipulates that, in the absence of a choice of law, contracts are governed by the law of the state with which they have the closest connection. This connection is also presumed to be the habitual residence of the party obligated to perform the characteristic obligation. See art. 117 of PILA, <https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/fr>, accessed March 2, 2024.

II. Goodwill Indemnity Claims Resulting From Exclusive Distributorship Agreements Under Turkish Law

A. In General

The right of the exclusive distributor to demand goodwill indemnity has been regulated for the first time under art. 122/5 of the TCC[7]. This provision regarding the right of the agent to goodwill indemnity shall also be applicable to exclusive distributorship and other similar contractual relationships granting exclusivity rights, and it is stated that the exclusive distributor may demand goodwill indemnity due to the termination of the exclusive distributorship agreement. Although the origin of art. 122 of the TCC regulating the goodwill indemnity claim of commercial agent is § 89b of the German Commercial Code (*Handelsgesetzbuch*, HGB), art. 122/5 of the TCC is a provision that has no equivalent in the origin and is unique to Turkish law. However, it is possible to benefit from the German law and the opinions in the doctrine with respect to the other paragraphs of the provision. In order for the exclusive distributor to claim goodwill indemnity, the exclusive distributorship agreement must first be terminated. From this point of view, it would not be wrong to say that the prerequisite for a goodwill indemnity claim is the termination of the exclusive distribution agreement. The underlying idea is that the financial benefits to be obtained by the exclusive distributor in a period when the exclusive distributorship agreement has not yet expired are based on the exclusive distributorship agreement that is still in force. Apart from this prerequisite, the right to claim the goodwill indemnity of the exclusive distributor depends on the cumulative existence of the three conditions stipulated under art. 122/1 of the TCC. The first of these conditions is that the principal continues to obtain significant benefits after the termination of the contractual relationship through new customers found by the exclusive distributor. As it is seen, the fulfilment of this condition depends on the fact that the benefit obtained from the principal is of a significant nature. In other words, the principal is not required to pay a goodwill indemnity to the exclusive distributor for the benefits that are not of a significant nature obtained by the principal after the termination of the exclusive distributorship agreement. For this condition to be fulfilled, it is not sufficient for the principal to obtain significant benefits after the termination of the exclusive distribution agreement. These benefits must also arise from new and continuous customers found by the exclusive distributor. In such a case, the burden of proof is on the exclusive distributor to prove that the benefits obtained by the principal arise from the new customers acquired by the exclusive distributor. In other

7 In essence, it is not foreign to Turkish law and was accepted by the doctrine and judicial decisions during the time of the abrogated TCC No. 6762, citing art. 134/II as a ground, Yaşar Karayalçın, *Ticaret Hukuku, I. Giriş-Ticarî İşletme* (3rd edn, Ankara 1968) 534-535; Sabih Arkan, *Ticarî İşletme Hukuku* (12th edn, BTHAE 2008) 215-216; Arslan Kaya and others, *Ticari İşletme Hukuk* (6th edn, Vedat Publishing 2019) 878. For the opposite view that art. 134/II of the abrogated TCC cannot be the ground for the goodwill indemnity of commercial agent, see also Özge Ayan, *Acentenin Denkleştirme Talep Etme Hakkı* (Seçkin Publishing 2008) 121.

words, the exclusive distributor cannot claim compensation for the benefits obtained by the principal after the termination of the exclusive distributorship agreement for the customers that the exclusive distributor did not bring to the principal.

Another condition for the exclusive distributor to claim goodwill indemnity is that, as a result of the termination of the contractual relationship, the exclusive distributor loses the right to claim goodwill indemnity for the transactions conducted or to be conducted in a short period of time with the customers brought to the principal by the exclusive distributor. In other words, if the exclusive distributor would not have been entitled to demand remuneration due to the transactions conducted by the principal even if the exclusive distributorship contract had continued, the sole distributor would not be able to demand goodwill indemnity.

The basis of the exclusive distributor's claim for goodwill indemnity is the fact that the customers acquired as a result of the exclusive distributorship activities carried out continuously with the principal continue to bring benefits to the principal even after the termination of the exclusive distributorship agreement, while the exclusive distributor cannot be paid any payment since the exclusive distributorship agreement has expired. Therefore, the idea of equity lies at the heart of the claim. It should also be noted that equity is not only one of the conditions for the exclusive distributor to claim goodwill indemnity, but it is also an issue that should be taken into consideration in the calculation of the amount of goodwill indemnity[8].

Apart from these prerequisites and three conditions, art. 122/3 of the TCC should also be taken into consideration for the exclusive distributor to be able to claim goodwill indemnity after the termination of the exclusive distributorship agreement. If the exclusive distribution contract is terminated under one of the circumstances specified in art. 122/3 of the TCC, the exclusive distributor shall not be entitled to claim goodwill indemnity. In cases where the contract is terminated by the exclusive distributor without any act of the principal justifying the termination, or by the principal due to the fault of the exclusive distributor, the exclusive distributor cannot claim goodwill indemnity.

B. Is Art. 122 of the TCC an Overriding Mandatory Rule of Turkish Law?

Overriding mandatory rules constrain the principle of party autonomy and can result in the circumvention of the law chosen by the parties[9]. According to article 6 of TAPIL,

8 Arslan Kaya, *Türk Ticaret Kanunu Şerhi, Acentelik* (2nd edn, Beta Publishing 2016), 261; Mustafa İsmail Kaya, *Acentelik Hukuku* (Adalet Publishing 2014) 355. Extraordinary discounts granted to exclusive distributors when purchasing the product subject to the contract, other financial support such as premiums, and the attraction power of the trade mark may prevent the establishment of a provision in favour of exclusive distributors or may be seen as a reason for a reduction in the calculation of the good will indemnity amount, Koray Demir, 'Tek Satıcının Denkleştirme Talebi' in Prof. Dr. Sabih Arkan'a Armağan (Oniki Levha Publishing 2019) 414-415.

9 Mustafa Erkan 'Möhuk madde 31 Bağlamında Türk Hukukunda Doğrudan Uygulanan Kurallara Bakış' (2011) 15(2) *Gazi*

when foreign law is applicable, any case falling within the scope of Turkish law's overriding mandatory rules, based on the regulatory purpose and scope of application, will be governed by those rules. The article does not provide a definition of the overriding mandatory rules. However, the Rome I Regulation, which is mandatorily applicable in European Union member states, establishes the general framework for these rules[10]. According to Art.9 of the Rome I Regulation, overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

Overriding mandatory rules are those enacted to achieve the economic, financial, social, and political objectives of the state[11]. They are applicable to all legal transactions and relations within their scope, regardless of the specific legal context. Although overriding mandatory rules may seem predominantly associated with public law, certain provisions related to private law are also directly applicable. Overriding mandatory rules are compulsory provisions that extend their influence to private law relationships and are primarily oriented towards serving the public interest[12]. Overriding mandatory rules may consequently originate from government policies, including those related to economic, agricultural, customs, or foreign exchange matters, as well as social policies designed to protect parties involved in transactions such as rental agreements, services, and consumer interests[13]. It would be incorrect to categorise every provision that protects the public interest as an overriding mandatory rule[14]. In this context, the purpose of the provision, its scope of application, and the intention behind its application are crucial factors. In Turkish law, examples of overriding mandatory rules include exchange control regulations, restrictions on foreign trade, rules governing the protection of cultural property, import and export regulations, and labour restrictions[15].

When applying the overriding mandatory rules of Turkish law as *lex fori*, no distinction is made regarding whether the dispute involves a foreign element. In other words, these rules are directly applicable even if the dispute involves a foreign element. The question of whether regulations concerning goodwill indemnity

Üniversitesi Hukuk Fakültesi Dergisi 82.

10 Giesela Rühl 'Commercial Agents, Minimum Harmonisation and Overriding Mandatory Provisions in the European Union: *Unamar*' (2016) 53 *Common Market Law Review* 209.

11 Hatice Özdemir Kocasakal, *Doğrudan Uygulanan Kurallar ve Sözleşmeler Üzerindeki Etkileri* (Galatasaray Üniversitesi Yayınları 2001) 13.

12 Nomer (n 3) 187.

13 Vahit Doğan, *Milletlerarası Özel Hukuk* (8th edn, Savaş Publishing 2022) 279.

14 Doğa Elçin 'Karşılaştırmalı Hukuk Işığında Türk Hukukunda Sözleşmeyle İrtibatlı Üçüncü Devletin Doğrudan Uygulanan Kuralları' in *Prof. Dr. Ata Sakmar'a Armağan* (Beta Publishing 2011) 338.

15 Özdemir Kocasakal (n 11) 118.

claims arising from the termination of exclusive distributorship contracts constitute overriding mandatory rules has been a subject of debate in both European Union law and Turkish law. It is therefore necessary to clarify whether TCC Article 122, which governs goodwill indemnity claims, and articles 17-19 of Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents no. 86/653[16] (Directive), which served as the model for this article, qualify as overriding mandatory rules[17].

In the relationship between the exclusive distributor and the supplier, it is evident that the exclusive distributor holds a comparatively weaker position relative to the supplier. Exclusive distributors, in fact, assume greater risks that enhance the significance of the contract, such as increasing market share and expanding the customer base by broadening the distribution of goods, services, or brands within their area of operation[18].This raises the question of whether the private law provisions designed to protect the weaker party are overriding mandatory provisions[19]. Under Turkish law, the protection of the weaker party in the context of conflict of laws is ensured either by instituting an objective conflict of laws rule that favours the weaker party or by imposing limitations on party autonomy[20]. Therefore, even in labour and consumer contracts, the choice of the applicable law is allowed, without prejudice to the minimum protection provided by the mandatory provisions of the law of the employee's habitual place of work and the law of the consumer's habitual residence. It is evident that the exclusive distributor occupies a weaker position relative to the supplier. However, unlike employees and consumers, the exclusive distributor is typically classified as a merchant[21] in practice. Under art. 18/2 of the TCC, all

16 Council Directive 86/653/EEC of December 18, 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L 382.

17 The European Court of Justice (ECJ)'s decision in *Ingmar GB Ltd* v. *Eaton Leonard Technologies Inc*. (C-381/98, 9 November 2000) affirms that parties cannot evade the application of Articles 17-19 of the Directive concerning the right to a goodwill indemnity claim by opting for the law of a non-EU country. According to the ECJ, the objective of articles 17 through 19 of the Directive is to safeguard the freedom of establishment and the conduct of undistorted competition for all commercial agents operating inside the internal market. For detailed information about the judgement see Hendrikus L E Verhagen 'The Tension Between Party Autonomy and European Union Law: Some Observations on Ingmar GB Ltd V. Eaton Leonard Technologies Inc.' (2002) 51(1) *International and Comparative Law Quarterly* 138 *et seq*. However, in the case of *United Antwerp Maritime Agencies (Unamar) NV* v. *Navigation Maritime Bulgare* (C-184/12, 17 October 2013), the ECJ permitted the circumvention of the relevant provisions of the Directive through the application of overriding mandatory rules of Member State law (lex fori) that offer broader protection to the agent or exclusive distributor. In other words, the provisions of the lex fori, which provide broader protection in favour of the agent, are attributed "superior mandatory force" vis-à-vis the Directive. For detailed information about the *Unamar* judgement see. A. İpek Sarıöz Büyükalp 'Denkleştirme Talebinin Hukuki Niteliği ve Kanunlar İhtilafı Hukuku Bağlamında Değerlendirilmesi' (2019) 21(2) *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi* 559 *et seq.* Rühl (n 10) 211 *et seq.* It is likely that national courts will interpret the *Unamar* ruling as a "carte blanche" to apply forum law rather than the selected or generally applicable law. Rühl (n 10) 224.

18 Duygu Ercan 'Türkiye'de Faaliyet Gösteren Acente veya Tek Satıcıların Taraf Oldukları Yabancı Unsurlu Sözleşmelerde Yer Alan Yetki veya Tahkim Şartına Rağmen Açacakları Davaların Türk Mahkemelerinde Görülüp Görülemeyeceği Meselesi' (2020) 40(2) *Public and Private International Law Bulletin* 1627.

19 Rühl (n 10) 216; Laura Maria van Bochove 'Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law' (2014) *Erasmus Law Review* 148 *et seq.*

20 TAPIL contains such provisions on the law applicable to labour and consumer contracts (Art. 26 and Art. 27).

21 According to Art. 12 of the TCC*, the person who operates a commercial enterprise, albeit partially, in his own name is called a merchant.*

merchants must conduct their commercial activities with the prudence expected of a diligent businessperson. Therefore, we contend that it is not appropriate to adopt Article 122 of the TCC as an overriding mandatory rule on the basis of 'protection of the weaker party,' as this would unjustifiably undermine party autonomy. Furthermore, if this provision were to be adopted as an overriding mandatory rule, it would preclude the application of the chosen law, even if that law provides stronger protection to the agent or exclusive distributor than Turkish law[22].

While it has been contended that the provision in question is designed to protect agents and exclusive distributors within the domestic market and to foster a favourable competitive environment, thereby serving the interests of the state[23], we maintain that this provision does not constitute an overriding mandatory rule. It is evident that the provision in question offers protection to the exclusive distributor with the aim of establishing a favourable competitive environment[24]. However, this alone is insufficient to classify the provision as an overriding mandatory rule. Indeed, Article 122 of the TCC does not universally guarantee a goodwill indemnity claim. Such a claim is recognised only in cases where the agent loses the right to seek payment from the principal and is considered within the framework of equity. Article 122 of the TCC, after enumerating the conditions, employs the phrase "the agent may request appropriate compensation from the principal." Given that the provision uses the phrase "may request" rather than the definitive language, it means that the provision does not qualify as an overriding mandatory rule in line with the regulation's intended purpose[25]. Moreover, Article 122 of the TCC stipulates that the goodwill indemnity claim applicable to agency relationships also extends to the termination of exclusive distributorships and other similar permanent contractual arrangements granting monopoly rights, unless such an application would be inequitable. The purpose of Article 122 of the TCC is to ensure equitable treatment for the exclusive distributor, who may otherwise be inadequately compensated for their efforts and contributions to the supplier, within the context of the contractual provisions and the specifics of the individual case[26].Thus, although the provision in question promotes

22 Ayoğlu argues that art. 122 of the TCC should be recognised as an overriding mandatory rule under art. 6 of the TAPIL when the law chosen by the parties offers less protection to agents or exclusive distributors operating in Türkiye compared to the Turkish law, particularly concerning goodwill indemnity claims. However, if the law chosen by the parties provides greater protection to the agent or exclusive distributor than that afforded by Turkish law, this choice of law should be upheld as valid. See Tolga Ayoğlu 'Dağıtım Sözleşmelerine Uygulanmak Üzere Yabancı Bir Hukuk Sisteminin Seçilmesinin Denkleştirme Talebi Bakımından Etkisi' (2017) 151-152(12) *Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi* 24. The aforementioned opinion cannot be endorsed because overriding mandatory rules must be applied irrespective of considerations of substantive justice. Thus, if Article 122 of the TCC is recognised as an overriding mandatory rule, Turkish courts should apply this provision to goodwill indemnity claims made by an agent or exclusive distributor operating in Türkiye.

23 For opinions characterising this provision as an overriding mandatory rule, see Ayoğlu (n 22) 19-20; Cemile Demir Gökyayla, 'Milletlerarası Özel Hukukta Dağıtım Sözleşmelerine Uygulanacak Hukuk' in Sibel Özel and Mustafa Erkan (eds), *Milletlerarası Özel Hukukta Sözleşmesel Meseleler (Uluslararası Konferans 11 Ekim 2018)* (On İki Levha Publishing 2018) 65.

24 Ömür Karaağaç, *Milletlerarası Nitelikli Franchise Sözleşmelerine Uygulanacak Hukuk* (Lykeidon Publishing 2022) 316.

25 Sarıöz Büyükalp (n 17) 566.

26 Karaağaç (n 24) 317.

a favourable competitive environment, it is primarily focused on the interests of the parties involved rather than the state interest and provides only minimal protection to the exclusive distributor[27]. For these reasons, we conclude that Article 122 of the TCC concerning goodwill indemnity claims does not constitute an overriding mandatory rule under Turkish law. Indeed, judicial decisions corroborate this perspective.

In the judgement rendered by the 11th Civil Chamber of the Turkish Court of Cassation on October 24, 2023[28], the case concerning a claim for goodwill indemnity, predicated on the allegation of unjust termination of an exclusive distributorship agreement, was reversed due to the failure to ascertain and elucidate the provisions of English law, which had been designated as the applicable law in the dispute. In another case[29] involving a claim for goodwill indemnity following the termination of an exclusive distributorship agreement, the 11th Civil Chamber of the Turkish Court of Cassation addressed the contract's applicable law provision, which stated in Section 19 that "this contract shall be interpreted in accordance with the laws of England and shall be governed by the laws of England." Citing Article 24/1 of TAPIL, which stipulates that contractual obligations are governed by the law explicitly chosen by the parties, the court determined that the court of first instance had failed to apply the chosen law to the dispute, warranting a reversal of the judgement in favour of the plaintiff. In certain rulings[30], it has been underscored that the validity of the choice of law or jurisdiction agreement is affirmed on the basis that the merchant is required to act as a prudent businessperson in accordance with Article 18/2 of the TCC. Therefore, If Article 122 of the TCC were characterised as an overriding mandatory rule, the parties would be unable to choose the applicable law. Consequently, these decisions do not address whether the relevant provision constitutes an overriding mandatory rule; instead, party autonomy is acknowledged.

However, in certain rulings[31], when the validity of the jurisdiction agreement is contested, the reasoning is grounded in the determination of the applicable law. It is essential to highlight that although the overriding mandatory rule is a concept within the framework of applicable law[32], it functions independently of the exclusive jurisdiction of Turkish courts[33].

27 Sarıöz Büyükalp (n 17) 567.

28 Decision No: 2023/6125, For the full text of the judgement see. <https://legalbank.net/arama/mahkeme-kararlari>, accessed June 14 2024.

29 Decision No: 2016/3183, Date: 22.03.2016, Full text of the judgement see <www.lexpera.com.tr>, accessed June 17, 2024.

30 Decision No: 2017/2162, Date: 19.06.2017 İstanbul Regional Court of Appeal, see < www.lexpera.com.tr>, accessed June 17, 2024.

31 Decision No: 2021/265 11.2.2021, Istanbul Regional Court of Appeal, <www.lexpera.com.tr>, accessed June 20, 2024.

32 The derogation from imperative norms through choice-of-law clauses should be distinguished from that affected by forum selection clauses and should not be treated equivalently. See Jürgen Basedow, 'Exclusive Choice-of-Court Agreements As a Derogation From Imperative Norms' in Patrik Lindskoug, Ulf Maunsbach, Göran Millqvist, Per Samuelsson, and Hans-Heinrich Vogel (eds), *Essays in Honour of Michael Bogdan* (Juristförlaget i Lund 2013) Max Planck Private Law Research Paper No. 14/1, 30.

33 For the view that the request for goodwill indemnity constitutes an overriding mandatory rule and should be adjudicated within the exclusive jurisdiction of Turkish courts, see. Ali Önal 'Yabancı Unsurlu Tek Satıcılık Sözleşmelerinden Doğan

III. The Law Applicable to Contracts Under Turkish Law

A. In General

Under Turkish law, the law governing the obligations arising from contracts with a foreign element is regulated under Articles 24 to 29 of the TAPIL. While Article 24 of TAPIL provides a general conflict of laws rule for determining the applicable law to contracts, the subsequent articles establish specific conflict of laws rules for particular types of contracts[34]. However, exclusive distributorship agreements are not regulated by a special conflict of laws rule. Consequently, as the law applicable to claims arising from the termination of an exclusive distributorship agreement is not specifically addressed in TAPIL, it is governed by Article 24 of TAPIL. This provision, grounded in the principle of party autonomy, allows the parties to explicitly select the law governing the contract. In the absence of a choice of law by the parties, the law governing the contractual obligation shall be determined in accordance with the objective conflict of laws rule established in Article 24(4) of TAPIL.

The law agreed by choice of law, or in the absence of such choice, the law determined in accordance with Article 24(4) TAPIL, shall govern the contractual obligation as a whole. In other words, as a requirement of the principle of unity of contract, this law will provide solutions on issues such as the conclusion of the contract and the substantive validity of the contract, its performance, interpretation, non-performance, termination, the reasons for its termination, the provisions and consequences of its termination (such as compensation claims, penalty clause, interest for default) and the periods of limitation and prescription to which it is subject[35]. The goodwill indemnity that may be claimed following the termination of an exclusive distributorship agreement, provided that the conditions outlined in Article 122 of the TCC are met, should also be considered within the scope of the law governing the contract[36].

Denkleştirme (Portföy) Tazminatı Davalarında Milletlerarası Yetkili Mahkeme Sorunu' (2024) 1(1) *Doğu Akdeniz Üniversitesi Hukuk Fakültesi Dergisi* 16. However, this view cannot be endorsed. If the exclusive distribution activities conducted in Türkiye are adjudicated in Turkish courts and Turkish law is applied as an overriding mandatory rule, it could adversely affect Turkish trade. This situation may lead foreign firms to abstain from offering their goods and services in Türkiye. As a matter of fact, the interests to be considered in disputes with a foreign element are different from the interests considered in domestic substantive law. Similarly, the interests-underlying the rules determining the international jurisdiction of Turkish courts are different from those of the conflict of laws rules. Furthermore, this acceptance may place the exclusive distributor, who is intended to be protected, in a more disadvantageous position. This is because enforcing such decisions in the supplier's country of origin may prove challenging.

34 These include, respectively, contracts concerning immovable property, consumer contracts, employment contracts, contracts related to intellectual property rights, and contracts on the carriage of goods.

35 Bilgin Tiryakioğlu, *Taşınır Mallara İlişkin Milletlerarası Unsurlu Satım Akitlerine Uygulanacak Hukuk* (Ankara Üniversitesi Hukuk Fakültesi Yayınları 1996) 44; Duygu Ercan, *Denkleştirme Taleplerinden Doğan Uyuşmazlıklarda Uygulanacak Hukuk ve Türk Mahkemelerinin Milletlerarası Yetkisi* (On İki Levha Publishing 2021) 70.

36 However, according to Ayoğlu, this request should not be considered within the scope of Article 24(1) of the TAPIL. The term "contractual obligation" is employed in the text of TAPIL. However, goodwill indemnity arises from *ex lege* under the Turkish Commercial Code. See Ayoğlu (n 22) 14 *et seq.* See that the contract is the source of the goodwill indemnity claim Sarıöz Büyükalp (n 17) 564 *et seq.*

The law governing the validity of provisions related to the waiver of the goodwill indemnity claim in the exclusive distributorship agreement shall be determined in accordance with Article 32 of TAPIL[37]. Accordingly, the existence and substantive validity of a contractual relationship or any of its provisions are governed by the law applicable to the contract, which will be enforced provided the contract is deemed valid.

B. Choice o Law

It is both a theoretical and practical necessity to subject contracts involving foreign elements to a specific legal system[38]. Beyond establishing the general legal framework and legitimacy of the contract, the chosen law also addresses issues that are not explicitly regulated within the contract. The option to select the applicable law in contracts involving foreign elements further enhances legal certainty and predictability. The capacity of parties to anticipate the applicable law before the emergence of a dispute serves both their interests and assists judicial authorities in managing potential future disputes. Therefore, Article 24 of the TAPIL allows the parties to determine the law applicable to the dispute[39].

According to Article 24(1) of the TAPIL, "The law explicitly chosen by the parties shall govern the contractual obligation relations. A designation that can be clearly inferred from the contract's provisions or is understood from the state of affairs is also valid." When the parties have designated the law of a state to govern their obligations through a choice-of-law clause, the selected law shall be applied in its entirety, including both its mandatory and supplementary provisions[40].

Although the doctrine notes the difficulty of providing a clear example of a choice of law that does not explicitly constitute a choice of law but can be unequivocally understood, it is suggested that such a scenario may be identified when the mutual claims and defences presented in the parties' pleadings and reply pleadings are based on the law of a single country[41].

It is important to note that, in accordance with Article 24 of TAPIL, a choice-of-law must be made with the explicit authorisation of the parties concerning a specific state's law. In this context, the selection of various rules and codes developed by specialised official bodies such as UNIDROIT and UNCITRAL, or by international professional

37 Ercan (n 35) 70-71.

38 Şanlı, Esen, Ataman-Figanmeşe (n 3) 323.

39 The Rome I Regulation and the Swiss Federal Act on Private International Law of 18 December 1987 (PILA), as contemporary instruments of private international law, both permit the parties to select the governing law. According to Art. 3 of The Rome I Regulation "A contract shall be governed by the law chosen by the parties." Under Art. 116 of the PILA, "Le contrat est régi par le droit choisi par les parties."

40 Verhagen (n 17) 135.

41 Şanlı, Esen, Ataman-Figanmeşe (n 3) 325.

organisations such as FIDIC, as well as international commercial customary law (*lex mercatoria*) or Islamic law, does not technically constitute a choice of law[42]. However, the parties may turn these provisions into contractual provisions. In fact, this pertains to the incorporation of any document or text into the contract, thereby rendering it a provision or integral part of the contractual agreement[43]. As incorporation does not constitute a choice of law, these rules are applicable only insofar as they align with the mandatory provisions of the law governing the contract[44].

C. In the Absence of Choice of Law

1. The Law Governing a Contract as Determined by the Presumptions of the Law Most Closely Connected to the Contract

Under Article 24(4) of TAPIL, in the absence of an explicit choice of law by the parties, the law most closely connected to the contract shall govern the contractual obligation. The same provision further includes certain mandatory presumptions to guide the determination of the law most closely connected to the contract[45]. Depending on whether the contract was made during professional or commercial operations, these presumptions change[46]. Consequently, under this provision, the law most closely connected to the contract is that of the country in which the obligor of the characteristic performance has their place of business at the time the contract is concluded, provided that the contract is formed within the context of commercial and professional activities. If the obligor of the characteristic performance does not possess a place of business, the law of such party's domicile shall apply. In cases where such party has multiple places of business, the law of the place of business that is most closely related to the contract in question shall be deemed the governing law. For contracts not formed within the context of commercial and professional activities, the law most closely connected to the contract is that of the habitual residence of the obligor of the characteristic performance at the time the contract is concluded. Nevertheless, regardless of whether the contract is established within the context of commercial or professional activities, if, based on all the circumstances, a law is identified as being more closely related to the contract, that law shall govern the contractual obligation.

42 Nomer (n 3) 309.

43 Berk Demirkol *Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun'un 24. Maddesi Çerçevesinde Sözleşmeye Uygulanacak Hukuk* (2nd edn, Vedat Publishing 2014) 72-73; Cemile Demir Gökyayla *Milletlerarası Özel Hukukta Tek Satıcılık Sözleşmeleri* (2nd edn, Vedat Publishing 2013) 292; Aslı Bayata Canyaş *AB ve Türk Hukuku Uyarınca Sözleşmeye Uygulanacak Hukuka İlişkin Genel Kural* (Adalet Publishing 2012) 26; Nuray Ekşi 'Kanunlar İhtilâfı Alanında "Incorporation" (2000) 19-20 (1-2) *Public and Private International Law Bulletin* 263.

44 Ekşi (n 43) 276; Zeynep Derya Tarman '5718 Sayılı Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun (MÖHUK) Uyarınca Yabancılık Unsuru Taşıyan Akdi Borç İlişkilerinde Hukuk Seçimi' 2010 26(1) *Banking and Commercial Law Journal (Batider)* 147.

45 Şanlı, Esen, Ataman-Figanmeşe (n 3) 345.

46 Emre Esen and Melis Avşar, *Private International Law in Türkiye* (Istanbul University Press 2024) 142.

Thus, to determine the applicable law in the absence of a choice of law, it is essential to clarify the concepts of characteristic performance and contracts formed within the context of commercial or professional activities.

a. Determination of the Characteristic Performance Obligor in Exclusive Distributorship Contracts

In the absence of a choice of law, TAPIL establishes the applicable law based on the criterion of the law most closely related to the contractual obligation. The concept of characteristic performance is frequently used in presumptions regarding the determination of the most closely connected law. Therefore, the determination of the most closely connected law requires clarification of the concept in question.

Characteristic performance is not defined and is determined according to the contract categories[47]. The performance that realises the economic purpose of the contract, which is the reason for the conclusion of the contract and against which money is paid, as a rule, is the characteristic performance[48]. Characteristic performance indicates the distinguishing aspect of the contract from other contracts and is the performance of the person who performs the act that constitutes the name of the contract[49].

In contracts that impose an obligation on one party, the characteristic performance is easy to determine[50]. However, it is stated that in contracts imposing obligations on two parties, the characteristic performance is often the counter-performance other than the payment of money; because in these contracts, the act of payment of money does not characterise the contract and does not give its name to the contract[51]. In this context, for example, in sales contracts, the seller is the characteristic performance obligor. In contracts such as loan agreements where both performances are payments of money, the characteristic performance is the performance of the party that assumes the most risk[52].

In *sui generis* contracts such as exclusive distributorship, the determination of the characteristic performance will not be easy. An exclusive distributor pays a fee for the goods purchased from the supplier. Unlike sales contracts, the performance in exchange for money is not considered as characteristic performance in exclusive distributorship contracts. In the case of sui generis contracts, it is more appropriate to focus on the criteria

47 Fügen Sargın 'Karakteristik Edim Teorisine Eleştirel Bir Yaklaşım' (2001) 50(2) *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 46.

48 Sibel Özel 'Sözleşmesel İlişkide MÖHUK m. 24/II'de Öngörülen Objektif Bağlama Kuralının Mukayeseli Hukuk Açısından Değerlendirilmesi' (2002) 22(2) *Public and Private International Law Bulletin* 582.

49 Özel, Erkan, Pürselim, Karaca (n 3) 428-429; Demirkol (n 43) 251.

50 Adolf F. Schnitzer 'Les Contrats Internationaux en Droit International Privé Suisse' 123 *Recueil des Cours* (1968) 562.

51 Özel, Erkan, Pürselim, Karaca (n 3) 429; Çelikel and Erdem (n 3) 384 *et seq;* Şanlı, Esen, Ataman-Figanmeşe (n 3) 347.

52 Özel (n 48) 595.

of which party has undertaken the more risky performance and which performance gives the contract its social and economic weight[53]. In the exclusive distributorship contract, the exclusive distributor has other obligations other than the obligation to pay money. The exclusive distributor undertakes various obligations such as increasing the release of the goods subject to the contract in the contract area, preparing the market where the goods will be distributed, stocking, advertising and after-sales service[54].As a matter of fact, what gives its name to the exclusive distributorship contract is that the exclusive distributor sells the goods subject to the contract to third parties in the contract area only by themselves[55]. The development of the market and the formulation of a marketing strategy are central to the exclusive distributorship contract. The obligation to enhance or upgrade the product version constitutes the primary performance responsibility of the exclusive distributor, and this obligation is essential in defining the distinctive nature of the contract[56].The exclusive distributor is obligated to ensure the availability of the supplier's products within the designated market area, to maximise the sale of these products and to procure them exclusively from the supplier. The exclusive distributor assumes the risks associated with these activities as well as the costs incurred to promote and enhance sales. The sales relationship in this context arises as a necessity and outcome of fulfilling the demands of customers acquired through version enhancement efforts. It remains secondary to the primary activity of version enhancement itself. For these reasons, the performance of the exclusive distributor constitutes the defining feature of exclusive distributorship agreements. Therefore, the characteristic performance obligor is the exclusive distributor[57].

b. Contracts Formed due to Commercial or Professional Activities

The language of Article 24(4) of the TAPIL suggests a different outcome regarding the connecting factors for contracts entered into the context of commercial or professional activities. Therefore, it is essential to clarify the interpretation of contracts formed in accordance with commercial or professional activities under Turkish law. While determining whether a transaction is a commercial transaction or not, the provisions of Art. 3 and Art. 19 of the TCC should be evaluated together. Under Art. 3 of the TCC, all transactions and acts concerning a commercial enterprise and the matters regulated in this Code shall constitute commercial transactions. Since the exclusive distributorship agreement is not regulated under the TCC, whether a commercial transaction is in question should be determined according to whether the transaction concerns a

53 Mario Giuliano 'La Loi Applicable aux Contrats: Problèmes Choisis' 158 *Recueil des Cours* (1977) 237; Ercan (n 35) 88 *et seq*; Gülören Tekinalp *Milletlerarası Özel Hukuk, Bağlama ve Usul Hukuku Kuralları* (13th edn, Vedat Publishing 2020) 313.

54 Ercan (n 35) 89.

55 Demir Gökyayla (n 43) 380.

56 Demir Gökyayla (n 43) 380.

57 Tekinalp (n 53) 313; Demirkol (n 41) 384; Demir Gökyayla (n 41) 391-392; Cemil Güner, *Milletlerarası Unsurlu Acente İlişkisine Uygulanacak Hukuk* (Adalet Publishing 2014) 168.

commercial enterprise or not. From this point of view, if the exclusive distributor is a legal entity merchant, it shall be presumed that the transaction concerns its business (Art. 19/1 TCC). If the exclusive distributor is not a legal entity, the obligation shall be deemed ordinary and not commercial if the exclusive distributor clearly notifies the other party at the time of the transaction that it is not related to its commercial business, or if the situation is not favourable for the business to be deemed commercial.

The interpretation of the concept of an exclusive distributor's place of business, which serves as a connecting factor, will be determined in accordance with Turkish law. A place of business is defined as a location where business activities are conducted in an actual, regular, and continuous manner, and where independent decision-making is feasible[58].For natural persons, the place of business refers to the location where the centre of their commercial activities is situated; for legal entities, it is generally the location of the headquarters[59].

2. Exception Clause

Article 24(4) of the TAPIL designates the law of the country "most closely connected" to the contract as the applicable law in the absence of an explicit choice of law. The legislature relied on presumptions to indicate the law most closely connected to the matter at hand. However, if a law exists that has a closer connection to the contract than the presumptive laws, this more closely connected law must be applied in accordance with Article 24(4) of the TAPIL. As the judge is not free to determine the most closely connected law and is constrained by presumptions, the exception for the "more closely connected law" functions to ensure fairness in the specific case[60]. In other words, the law determined by the judge based on presumptions may not necessarily represent the "most closely connected law" in practical terms. Therefore, considering the specific circumstances of the case, it is always possible that a law more closely connected than the one determined by these presumptions may exist. Therefore, the more closely connected law takes precedence and overrides the presumption if the habitual residence or place of business of the party responsible for the characteristic performance, which serves as a presumption for determining the most closely connected law, does not satisfy that presumption[61]. In this regard, the exception rule functions as a corrective mechanism for determining the most closely connected law[62]. This is a natural consequence of developing a general conflict of laws rule applicable to all types of contracts[63].

58 Özel, Erkan, Pürselim, Karaca (n 3) 433.

59 Demir Gökyayla (n 43) 375.

60 Şanlı, Esen, Ataman-Figanmeşe (n 3) 351; Tekinalp (n 53) 290.

61 Özel, Erkan, Pürselim, Karaca (n 3) 436.

62 Paul Lagarde 'Le Principe de Proximité dans le Droit International Privé Contemporain' 196 *Recueil des Cours* (1986) 97; Özel, Erkan, Pürselim, Karaca (n 3) 436.

63 Özel, Erkan, Pürselim, Karaca (n 3) 436.

In determining the more closely connected law, various factors and conditions may be considered, including the place of contract formation, the place of conclusion of the contract, the location of the parties' places of business, their habitual residences, the language of the contract, and the jurisdiction clause[64]. However, these contractual connecting factors must be concentrated in a jurisdiction distinct from the one identified by the presumptions[65]. In assessing whether this concentration has occurred, the common contacts of the parties are more significant than their non-common contacts[66]. For instance, the performance of an exclusive distributor typically constitutes a characteristic performance. However, if a significant portion of the contract is executed in the country of the provider and both parties are nationals of that country, the law of that jurisdiction may be regarded as more closely connected[67].

Given that the exclusive distributorship contract establishes a continuous obligation, it is possible for the place of business or residence of the exclusive distributor, who is the debtor for the characteristic performance, to change over time following the conclusion of the contract. In fact, in determining the applicable law in the absence of a choice of law, the TAPIL has utilised the points of contact existing at the time of the contract's conclusion as a foundational basis. If the place of business changes shortly after the conclusion of the contract, the place of business at the time of the conclusion of the contract may no longer be relevant to the contract[68]. In such a case, the law of the new place of business, which is evidently more closely connected to the contract, may be applied under the exception rule[69]. However, the rationale for incorporating presumptions in the determination of the most closely connected law is to ensure predictability and legal certainty[70]. For this reason, the exception rule should be interpreted restrictively[71]. The purpose of the exception rule is not to supplant the primary presumptions but to mitigate the drawbacks that may arise from their application[72]. If the exclusive distributor changes its place of business after the conclusion of the contract without the other party's knowledge, the exception rule cannot be applied due to the principle of foreseeability[73]. In brief, as derived from the wording of the TAPIL, the exception rule should be considered when a law that is more closely related to the contract exists, based on all relevant circumstances of the case. However, in long-term contracts, where adherence to the law of the place

64 Güner (n 57) 201.

65 Gülin Güngör, *Temel Milletlerarası Özel Hukuk Metinlerinin Sözleşmeden Doğan Borç İlişkilerine Uygulanacak Hukuk Konusundaki Yakınlık Yaklaşımı* (Yetkin Publishing 2007) 238.

66 Özel, Erkan, Pürselim, Karaca (n 3) 437.

67 Demir Gökyayla (n 43) 386-387.

68 Demirkol (n 43) 334.

69 Demir Gökyayla (n 43) 369.

70 Özel, Erkan, Pürselim, Karaca (n 3) 439.

71 Özel, Erkan, Pürselim, Karaca (n 3) 439.

72 Demirkol (n 43) 327-329.

73 Ercan (n 35) 97-99.

of business at the time of the conclusion of the contract does not promote equity in the specific case, the exception provision should be applied to establish a reasonable balance between the interests of the parties and the principle of foreseeability.

IV. The Intervention of Turkish Public Policy in Cases Where the Applicable Foreign Law Does Not Permit Claims for Goodwill Indemnity or Recognise the Validity of a Prior Waiver

Article 5 of the TAPIL states that if a foreign law provision used in a particular litigation is expressly against Turkish public policy, it will not be applied; instead, Turkish law will be applied if it is judged necessary. In its decision dated February 10, 2012, the General Assembly of the Turkish Court of Cassation[74] characterised a violation of public policy as follows: "... it may be understood as a breach of private law principles grounded in the principle of good faith, as well as legal principles reflecting the shared moral values and notions of justice embraced by civilised societies. This includes considerations such as the society's level of civilisation, its political and economic system, human rights and freedoms, the foundational values of Turkish law, the general Turkish conception of morality and ethics, the underlying concept of justice in Turkish laws, the general policies guiding Turkish legislation, the fundamental rights and freedoms enshrined in the Constitution and the common principles recognised in the international arena." This judgement has framed the vague concept of public order.

It is important to emphasise that, when assessing the violation of public order in cases involving foreign elements, the specific connection between the legal relationship, the parties, and the relevant country plays a significant role in the determination[75]. Consequently, a choice of law stipulating that an exclusive distributor operating in Türkiye must waive its right to goodwill indemnity in advance may be deemed contrary to Turkish public order when the specific circumstances of the case are taken into consideration. As previously noted, the exclusive distributor, as the party responsible for the characteristic performance, assumes the risk associated with the version. The exclusion of goodwill indemnity for the exclusive distributor, who is in a weaker position relative to the supplier, may contravene the principles of good faith and result in a violation of the Turkish public order. However, it should be noted that it is clearly understood from the wording of Article 5 of TAPIL that public order intervention is exceptional. Within the framework of Article 5 of TAPIL, when assessing the circumstances of the specific case and the legal relationship, factors such as the long-term nature of the contract between the parties, the fact that the supplier entered the Turkish market for the first time with this exclusive distributor,

74 Turkish Court of Cassation of Appeals General Assembly Decision No: 2012/1, Date: 10.02.2012.

75 Şanlı, Esen, Ataman-Figanmeşe (n 3) 88.

the exclusive distributor's role in achieving a certain market share for the brand, the economic balance between the parties, and the provisions of the contract, may be considered[76]. When considering all these factors, if it is determined that the supplier aimed to deprive the exclusive distributor of goodwill indemnity in violation of the principle of good faith, an intervention based on public order may be warranted.

V. Conclusion

Türkiye's commercial landscape is marked by the prominent presence of agents and exclusive distributors. As a result, Turkish courts frequently handle goodwill indemnity claims involving foreign elements. Article 122 of the TCC establishes the conditions under which goodwill indemnity is applicable to agency. The wording of this provision has prompted extensive discussions regarding its implications within the realm of private international law. If the provision prohibiting the advance waiver of indemnity is classified as an overriding mandatory rule, it should be applied directly, regardless of any foreign elements present in the dispute. Although it has been argued that the provision in question is intended to protect exclusive distributors within the domestic market and promote a competitive environment, thereby serving the interests of the state, we contend that this provision does not qualify as an overriding mandatory rule. Therefore, we contend that it is not appropriate to adopt Article 122 of the TCC as an overriding mandatory rule on the basis of 'protection of the weaker party,' as this would unjustifiably undermine party autonomy. Furthermore, if this provision were to be adopted as an overriding mandatory rule, it would preclude the application of the chosen law, even if that law provides stronger protection to the agent or exclusive distributor than Turkish law. Accordingly, this study examines the applicable law governing disputes arising from exclusive distributorship contracts within the framework of Article 24 of the TAPIL. It is important to highlight that in cases where a clear violation of Turkish public order occurs, the provisions of Article 5 of TAPIL will be applicable.

Peer-review: Externally peer-reviewed.
Conflict of Interest: The author has no conflict of interest to declare.
Financial Disclosure: The author declared that this study has received no financial support.

Bibliography

Akıncı Z, *Milletlerarası Özel Hukuk* (Vedat Publishing 2020).

Arkan S, *Ticarî İşletme Hukuku* (12th edn, BTHAE, 2008).

Esen E and Avşar M, *Private International Law in Türkiye* (Istanbul University Press 2024).

Ayan Ö, *Acentenin Denkleştirme Talep Etme Hakkı* (Seçkin Publishing 2008).

76 Ercan (n 35) 136-137.

Ayoğlu T, 'Dağıtım Sözleşmelerine Uygulanmak Üzere Yabancı Bir Hukuk Sisteminin Seçilmesinin Denkleştirme Talebi Bakımından Etkisi' (2017) 151-152(12) *Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi.*

Basedow J, 'Exclusive Choice-of-Court Agreements As a Derogation From Imperative Norms' in Patrik Lindskoug, Ulf Maunsbach, Göran Millqvist, Per Samuelsson, and Hans-Heinrich Vogel (eds), *Essays in Honour of Michael Bogdan* (Juristförlaget i Lund 2013) Max Planck Private Law Research Paper No. 14/1.

Bayata Canyaş A, *AB ve Türk Hukuku Uyarınca Sözleşmeye Uygulanacak Hukuka İlişkin Genel Kural* (Adalet Publishing 2012).

Can H and Tuna E, *Milletlerarası Özel Hukuk* (5th edn, Adalet Publishing 2021).

Çelikel A and Erdem B, *Milletlerarası Özel Hukuk* (16th edn, Beta Publishing 2020).

Demir Gökyayla C, 'Milletlerarası Özel Hukukta Dağıtım Sözleşmelerine Uygulanacak Hukuk' in Sibel Özel and Mustafa Erkan (eds), *Milletlerarası Özel Hukukta Sözleşmesel Meseleler Uluslararası Konferans* (Oniki Levha Publishing 11 Ekim 2018).

Demir Gökyayla C, *Milletlerarası Özel Hukukta Tek Satıcılık Sözleşmeleri* (2nd edn, Vedat Publishing 2013).

Demir K, 'Tek Satıcının Denkleştirme Talebi' in *Prof. Dr. Sabih Arkan'a Armağan* (Oniki Levha Publishing 2019).

Demirkol B, *Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun'un 24. Maddesi Çerçevesinde Sözleşmeye Uygulanacak Hukuk* (2nd edn, Vedat Publishing 2014).

Doğan V, *Milletlerarası Özel Hukuk* (8th edn, Savaş Publishing 2022).

Ekşi N, 'Kanunlar İhtilâfı Alanında "Incorporation" (2000) 19-20(1-2) *Public and Private International Law Bulletin.*

Elçin D, 'Karşılaştırmalı Hukuk Işığında Türk Hukukunda Sözleşmeyle İrtibatlı Üçüncü Devletin Doğrudan Uygulanan Kuralları' in *Prof. Dr Ata Sakmar'a Armağan* (Beta Publishing 2011)

Ercan D, 'Türkiye'de Faaliyet Gösteren Acente veya Tek Satıcıların Taraf Oldukları Yabancı Unsurlu Sözleşmelerde Yer Alan Yetki veya Tahkim Şartına Rağmen Açacakları Davaların Türk Mahkemelerinde Görülüp Görülemeyeceği Meselesi' (2020) 40(2) *Public and Private International Law Bulletin.*

Erkan M, 'Möhuk madde 31 Bağlamında Türk Hukukunda Doğrudan Uygulanan Kurallara Bakış' (2011) 15(2) *Gazi Üniversitesi Hukuk Fakültesi Dergisi*.

Giuliano M, 'La Loi Applicable aux Contrats: Problèmes Choisis' 158 *Recueil des Cours* (1977).

Güner C, *Milletlerarası Unsurlu Acente İlişkisine Uygulanacak Hukuk* (Adalet Publishing 2014).

Güngör G, *Temel Milletlerarası Özel Hukuk Metinlerinin Sözleşmeden Doğan Borç İlişkilerine Uygulanacak Hukuk Konusundaki Yakınlık Yaklaşımı* (Yetkin Publishing 2007).

Güngör G, *Türk Milletlerarası Özel Hukuku* (Yetkin Publishing 2021).

Karaağaç Ö, *Milletlerarası Nitelikli Franchise Sözleşmelerine Uygulanacak Hukuk* (Lykeidon Publishing 2022).

Karayalçın Y, *Ticaret Hukuku, I. Giriş-Ticarî İşletme* (3rd edn, Ankara 1968).

Kaya A and others, *Ticari İşletme Hukuku* (6th edn, Vedat Publishing 2019).

Kaya A, *Türk Ticaret Kanunu Şerhi, Acentelik* (2nd edn, Beta Publishing 2016).

Kaya M İ, *Acentelik Hukuku* (Adalet Publishing 2014).

Lagarde P, 'Le Principe de Proximité dans le Droit International Privé Contemporain' 196 *Recueil des Cours* (1986).

Nomer E, *Devletler Hususi Hukuku* (23th edn, Beta Publishing 2021).

Olgaç S C, *Tek Satıcılık Sözleşmesi ve Tek Satıcının Denkleştirme İstemi* (Seçkin Publishing 2021).

Önal A, 'Yabancı Unsurlu Tek Satıcılık Sözleşmelerinden Doğan Denkleştirme (Portföy) Tazminatı Davalarında Milletlerarası Yetkili Mahkeme Sorunu' (2024) 1(1) *Doğu Akdeniz Üniversitesi Hukuk Fakültesi Dergisi.*

Özdemir Kocasakal H, *Doğrudan Uygulanan Kurallar ve Sözleşmeler Üzerindeki Etkileri* (Galatasaray Üniversitesi Yayınları 2001).

Özel S, Erkan M, Pürselim HS, Karaca HA, *Milletlerarası Özel Hukuk* (3rd edn, On İki Levha Publishing 2024).

Özel S, 'Sözleşmesel İlişkide MÖHUK m. 24/II'de Öngörülen Objektif Bağlama Kuralının Mukayeseli Hukuk Açısından Değerlendirilmesi' (2002) 22(2) *Public and Private International Law Bulletin.*

Rühl G, 'Commercial Agents, Minimum Harmonization and Overriding Mandatory Provisions in the European Union: *Unamar*' (2016) 53 *Common Market Law Review.*

Sargın F, 'Karakteristik Edim Teorisine Eleştirel Bir Yaklaşım' (2001) 50(2) *Ankara Üniversitesi Hukuk Fakültesi Dergisi.*

Sarıöz Büyükalp Aİ, 'Denkleştirme Talebinin Hukuki Niteliği ve Kanunlar İhtilafı Hukuku Bağlamında Değerlendirilmesi' (2019) 21(2) *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi.*

Schnitzer, A F, 'Les Contrats Internationaux en Droit International Privé Suisse' 123 *Recueil des Cours* (1968).

Şanlı C, Esen E, Ataman-Figanmeşe İ, *Milletlerarası Özel Hukuk* (10th edn, Beta Publishing 2023).

Tarman ZD, '5718 Sayılı Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun (MÖHUK) Uyarınca Yabancılık Unsuru Taşıyan Akdi Borç İlişkilerinde Hukuk Seçimi' 2010 26(1) *Banking and Commercial Law Journal (Batider).*

Tekinalp G, *Milletlerarası Özel Hukuk, Bağlama ve Usul Hukuku Kuralları* (13th edn, Vedat Publishing 2020).

van Bochove L M, 'Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law' (2014) *Erasmus Law Review.*

Verhagen H L E, 'The Tension Between Party Autonomy and European Union Law: Some Observations on Ingmar GB Ltd V. Eaton Leonard Technologies Inc.' (2002) 51(1) *International and Comparative Law Quarterly.*