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Correspondence
Istanbul University Faculty of Law
Istanbul University Faculty of Law, 34116, Beyazit, Fatih, Istanbul, Turkey
E-mail: hukuk_dekan@istanbul.edu.tr
"http://www.istanbul.edu.tr/" www.istanbul.edu.tr/hukuk
Tel: +90 (212) 440 01 05
Fax: +90 (212) 512 41 35
Web: http://annales.istanbul.edu.tr/
E-mail: annales@istanbul.edu.tr

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Die Natur des den Auftragsvertrag Einseitig Beendigenden Rechts und die Frage Nach Dessen Anwendung auf die Innominatverträge

The Nature of The Revocation Right the Agency Contract and the Question of its Application to the Innominate Contracts

Vekalet Sözleşmesini Tek Taraflı Sona Erdirme Hakkının Hukuki Niteliği ve İsimsiz Sözleşmelere Uygulanması Sorunu

İpek Betül Aldemir Toprak[1]

Zusammenfassung

Die Vertragsverhältnisse, in denen der Beauftragte die Vornahme der Geschäftsbesorgung oder die Erbringung von Diensten des Auftraggebers übernimmt, werden im türkischen Recht als Auftragsvertrag bezeichnet (Art. 512 TOR). Die Definition, der Umfang, die Pflichten der Parteien und die Beendigung des Auftragsvertrags sind in unserem Gesetz ausdrücklich geregelt. Im Auftragsvertrag billigt der Gesetzgeber den Parteien das Recht zu, den Vertrag ohne Grund mit einer einseitigen Erklärung zu beenden (Art. 512 TOR). Diese Bestimmung ist eine der Bestimmungen des türkischen Obligationenrechts und des Auftragsvertrags, die sehr oft in Frage gestellt wird. Im türkischen und schweizerischen Recht, in der Lehre und in Gerichtsentscheidungen gibt es viele Diskussionen über diese Bestimmung. Diese Diskussionen beziehen sich darauf, ob einseitiges Beendigungsrecht zwingender oder dispositiver Natur ist und in welcher Tragweite dieses Recht ausgeübt wird. Mit Laufe der Zeit reichen die im Gesetz geregelten Verträge nicht aus, wechselnden Bedürfnissen gerecht zu werden. Infolgedessen stellen die Parteien die Rechtsverhältnisse, die sie brauchen, im Rahmen der Vertragsfreiheit her, indem sie Innominatverträge schließen. Der Auftragsvertrag ist ein Sammelbecken für die Geschäftsbesorgungverträgen (Art. 502/2 TOR). Aus diesem Grund wird darauf hingewiesen, dass die Bestimmungen zum Auftragsverhältnis für innominate Geschäftsbesorgungsverträge gelten, soweit diese Bestimmung sich auch für ihre Natur eignet (Art. 502/2 TOR). In dieser Studie wurde bestimmt, was die Rechtsnatur des einseitigen Beendigungsrechts ist und ob es für Innominatverträge gilt.

Schlüsselwörter

Einseitiges Beendigungsrecht, der Auftragsvertrag, Innominater Vertrag, Zwingende Natur, Dispositive Natur

Abstract

In the Turkish legal system, the contractual relationship whereby the agent undertakes to conduct a particular business or provide certain services of the principal is known as an "agency contract" {Turkish Code of Obligations (TCO) art. 502}. The definition, scope, and obligations of the parties and the contract's termination are expressly regulated in our law. Under this contract, legislators have given the parties the right to revoke with a unilateral declaration of will without reason (TCO art. 512). This provision is one of the most prominent and ambiguous provisions of both the TCO and the agency contract. It has been the topic of much discussion in legal doctrine and court decisions of Turkish and Swiss law. These debates are concerned with the scope of the revocation right and whether the right is of an imperative or regulatory nature. Provisions about contracts in the codes have proven insufficient to meet the new conditions in real life over time. For this

1 **Corresponding Author:** İpek Betül Aldemir Toprak (Res. Asst. Dr.), Ankara Yıldırım Beyazıt University, Faculty of Law, Department of Civil Law, Ankara, Turkey. E-mail: ibaldemir@ybu.edu.tr ORCID: 0000-0003-0721-3044

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reason, contractual parties have tried to meet their needs by concluding innominate contracts based on the principle of freedom of contract. The agency contract is general contracts for the management of another's affairs (TCO art. 502/2). Therefore, it is noted that the provisions of the agency contract apply to an innominate contract for the management of the affairs of another, insofar as this provision is also suitable for their nature (TCO art. 502/2). This article has attempted to determine the legal nature of the revocation right, which is the specific means for termination of an agency contract, and whether it will apply to innominate contracts.

Keywords
Revocation Right, Agency Contract, Innominate Contract, Imperative Nature, and Regulatory Nature

Öz
Hukukumuzda vekilin, vekâlet verenin bir işini görmeyi veya işlemini yapmayı üstlendiği sözleşme ilişkileri, vekâlet sözleşmesi olarak adlandırılmaktadır (TBK m. 502). Vekâlet sözleşmesinin tanımı, kapsamı, tarafların borçları ve sona ermesi kanunumuzda açıkça düzenlenmektedir. Vekâlet sözleşmesinde kanun koyucu taraflara sözleşmeyi tek taraflı irade beyanıyla sebep göstermeksizin sona erdirme hakkı tanımaktadır (TBK m. 512). Söz konusu bu hüküm, gerek Türk Borçlar Kanunu'nun gerekse de vekâlet sözleşmesinin en bilindik ve problemli hükümlerindendir. Türk ve İsviçre hukukunda, doktrinde ve mahkeme kararlarında, bu hükme ilişkin birçok tartışma bulunmaktadır. Bu tartışmalar tek taraflı sona erdirme hakkının emredici veya düzenleyici nitelikte olup olmadığına ve bu hakkın kapsamına ilişkindir. Zamanla kanunda yer alan sözleşmeler değişen ihtiyaçları karşılamakta yetersiz kalmaktadır. Bunun bir sonucu olarak da taraflar, ihtiyaç duydukları hukuki ilişkileri sözleşme özgürlüğü kapsamında isimsiz sözleşmeler yaparak sağlamaktadırlar. Vekâlet sözleşmesi torba bir iş görme sözleşmesidir (TBK m. 502/2). Bu sebeple, vekâlet sözleşmesine ilişkin hükümlerin, niteliklerine uygun düştüğü ölçüde, isimsiz iş görme sözleşmelerine de uygulanacağı ifade edilmektedir (TBK m. 502/2). Bu çalışmada ise vekâlet sözleşmesine özgü sona erme sebebi olan tek taraflı sona erdirme hakkının hukukî niteliği ve isimsiz sözleşmelere uygulanıp uygulanmayacağı belirlenmeye çalışılmıştır.

Anahtar Kelimeler
Tek Taraflı Sona Erdirme Hakkı, Vekâlet Sözleşmesi, İsimsiz Sözleşme, Emredici Nitelik, Düzenleyici Nitelik

Extended Summary

Contractual relationships in which the agent undertakes to conduct a particular business or provide certain services of the principal are known as "agency contracts" (TCO art. 502). The agency contract is a nominate contract under the Turkish Code of Obligations (TCO art. 502–504). The definition, scope, and obligations of the parties and the termination of the agency contract are expressly regulated in our law. Under this contract, the agent is obliged to conduct a certain business or provide certain services of the principal. However, the principal shall pay for the uses and expenses that the agent provides for the fulfillment of the order. If the contracting parties decide on remuneration or if there is a custom, it shall be added to the fee. When such general reasons for termination as performance or impossibility occur, the agency contract comes to an end. However, the reasons for the termination of the agency contract are not limited to these grounds. In the case of the contract section of the TCO alone, the characteristic grounds for termination of the agency contract are also regulated. Art. 512, which determines unilateral revocation right, is one of the best-known provisions of the TCO. Under this provision, the contracting parties are granted the right to terminate the agency contract at any time and without giving any reason. However, the second sentence of the provision imposes a time limit on

the contracting parties. Accordingly, the contracting party that terminates the contract at any time is obliged to compensate the other party for damages because of the termination.

Art. 512 of the TCO is considered a problematic regulation in the field of agency law because this provision has led to many discussions in legal doctrine and court decisions of Turkish and Swiss law. The first of these discussions concerns whether the provision is of an imperative or regulatory nature. If it is concluded that the provision is imperative, it is not possible for the parties to regulate the unilateral revocation right by contract and to condition the exercise of this right under some conditions. Conversely, if one concludes that TCO art. 512 is of a regulatory nature, the contracting parties may restrict or completely revoke the exercise of the unilateral revocation right.

The second issue that is controversial and needs to be determined concerns the scope of the unilateral revocation right. Because of economic and technological developments or changes in the purposes of contracting parties, the parties choose to conclude the various contracts that are not regulated by law. Hence, according to the principle of freedom of contract (CRT art. 48, TCO art. 26), innominate contracts may arise that are not included in our law. The agency contract is general contracts for the management of another's affairs. For this reason, it is pointed out that the provisions of the agency contract apply to innominate contracts for the management of the affairs of another, insofar as this provision is also suitable for their nature (TCO art. 502/2). The question whether art. 512 of the Turkish Code of Obligations applies only to simple agency contracts within the meaning of TCO art. 502 or to what extent it also includes innominate contracts for the management of the affairs of another must be answered.

In this article, priority shall be given to innominate contracts in general and the relationship between innominate contracts and agency contracts. Then, in order to clarify the above two questions, the idea of the appropriate legislator to regulate TCO art. 512 has to be dealt with. Subsequently, by evaluating the expression and content of the provision of TCO art. 512, the discussions about its legal nature should be examined on the basis of legal doctrine and court decisions. Eventually, the legal nature of the unilateral revocation right and the question of its application to innominate contracts is to be assessed under a separate heading. The results achieved are generally to be discussed in the final section.

Einleitung

Die Vertragsverhältnisse, in denen der Beauftragte die Vornahme der Geschäftsbesorgung oder die Erbringung von Diensten des Auftraggebers übernimmt, werden als Auftrag bezeichnet (Art. 512 TOR). Der Auftragsvertrag ist ein Nominatvertrag im türkischen Obligationenrecht (Art. 502-514 TOR). Die Definition, der Umfang, die Pflichten der Parteien und die Beendigung des Auftragsvertrags sind im Obligationenrecht ausdrücklich geregelt. Mit diesem Vertrag schuldet der Beauftragte die Vornahme der Geschäftsbesorgung oder die Erbringung der Dienste des Auftraggebers. Allerdings hat der Auftraggeber die Verwendungen und Auslagen zu bezahlen, die der Beauftragte für die Erfüllung des Auftrags besorgt. Wenn die Vertragsparteien eine Vergütung beschließen oder es einen Brauch gibt, ist sie dem Beauftragten zu bezahlen. Falls die allgemeinen Beendigungsgründe wie die Erfüllung der Leistung oder die Unmöglichkeit auftreten, erlischt das Auftragsverhältnis. Die Gründe der Beendigung des Auftragsvertrags sind doch nicht auf diese beschränkt. Allein werden bei dem Abschnitt des Auftrags des türkischen Obligationenrechts die charakteristischen Beendigungsgründe des Auftrags auch geregelt. Art. 512 des türkischen Obligationenrechts, der einseitiges Beendigungsrecht vorsieht, ist hingegen eine der Bestimmungen des türkischen Obligationenrechts, die am meisten diskutiert wird. Mit dieser Regel wird den Vertragspartien das Recht zuerkannt, das Auftragsverhältnis jederzeit und ohne irgendwelchen Grund zu beenden. Mit dem zweiten Satz der Bestimmung wird den Parteien jedoch eine zeitliche Beschränkung auferlegt. Demnach hat die Vertragspartei, die zur Unzeit den Auftragsvertrag beendet, den Schäden des Vertragsgegners, die durch das Beenden entstehen, zu ersetzen.

Art. 512 TOR gilt als eine problematische Bestimmung im Auftragsrecht, zumal diese Bestimmung sowohl im türkischen Recht als auch im schweizerischen Recht, in der Literatur und in den Gerichtsentscheidungen zu vielen Diskussion führt. Ob diese Bestimmung zwingender oder dispositiver Natur ist, ist die erste dieser Diskussionen. Wenn man zu dem Schluss gelangt, dass Art. 512 TOR zwingender Natur ist, so steht es den Vertragsparteien nicht zu, im Vertrag eine abweichende Regelung zu bestimmen, sei es das Recht aufzuheben oder es an manchen Bedingungen zu binden. Falls man umgekehrt zu dem Ergebnis kommt, dass Art. 512 TOR dispositiver Natur ist, können die Vertragsparteien die Ausübung des einseitigen Beendigungsrechts einschränken oder vollständig aufheben.

Das zweite streitige Thema, die hier auch untersucht werden sollte, ist die Tragweite des einseitigen Beendigungsrechts. Denn die Parteien schlagen den Weg ein, wegen der wirtschaftlichen und technologischen Entwicklungen oder der Änderung des Vertragszwecks die im Gesetz nicht geregelten verschiedenen Verträge abzuschließen. Die nicht im Gesetz geregelten Innominatverträge treten als das Ergebnis des Prinzips der Vertragsfreiheit (Art. 48 TGG, Art. 26 TOR) auf. Der im Gesetz geregelten

Auftragsvertrag ist ein Sammelbecken für Geschäftsbesorgungsverträge. Aus diesem Grund wird darauf hingewiesen, dass die Bestimmungen zum Auftrag für innominate Geschäftsbesorgungsverträge gelten, soweit diese Bestimmung sich auch für ihre Natur eignet (Art. 502 Abs. 2 TOR). Die Frage, ob die Bestimmung des Art. 512 nur für einfachen Auftrag im Sinne von Art. 502 gilt oder inwiefern sie auch innominate Geschäftsbesorgungsverträge einschließt, ist zu beantworten.

In der vorliegenden Arbeit sollen vorrangig auf die Innominatverträge im Allgemeinen und das Verhältnis zwischen den Innominatverträgen und dem Auftragsverhältnis eingegangen werden. Um die oben genannten beiden Fragen eine Antwort zu suchen, soll der Gedanke des Gesetzgebers, Art. 512 TOR zu regeln, behandelt werden. Danach sollen durch Bewertung des Ausdrucks und Inhalts der Bestimmung des Art. 512 TOR die Diskussionen über ihre Rechtsnatur unter Hinweis auf den Meinungsstand in der Lehre und Rechtsprechung untersucht werden. Schließlich wird auf die zwei Punkte, unzwar auf die Rechtsnatur des einseitigen Beendigungsrechts und auf die Frage der Anwendung dieses Rechtes auf die Innominatverträge eingegangen.

I. INNOMINATVERTRÄGE IM ALLGEMEINEN UND DAS VERHÄLTNIS ZWISCHEN DEM AUFTRAGSVERTRAG UND INNOMINATVERTRAG

Einige Vertragsarten sind in unserem Recht im Teil der besonderen Schuldverhältnisse des türkischen Obligationenrechts geregelt, während sich manche in den verabschiedeten besonderen Gesetzen befinden. Diese Verträge, die im türkischen Obligationenrecht oder anderen Sondergesetzen geregelt wurden, gelten als *Nominatverträge (benannte Verträge)*[1]. Die Verträge, die im Gesetz nur namentlich erwähnt wurden, sind des ungeachtet nicht Nominatverträge. Damit ein Vertrag als Nominatvertrag angenommen werden kann, müssen auch die Hauptleistungspflichten, die daraus zu leiten sind, und essentialia negotii im Gesetzt geregelt sein[2]. Außerdem sind die Verträge auch Nominatverträge, in denen Hauptleistungspflichten in den schriftlichen Quellen außer Gesetz vorkommen. Im Laufe der Zeit können die im

1 Fikret Eren "İsimsiz Sözleşmelere İlişkin Bazı Sorunlar", (2008), Prof. Dr. Turgut Akıntürk'e Armağan, 85-111, 85; Erden Kuntalp *Karışık Muhtevalı Akit (Karma Sözleşmeler)*, (2013), 3; Claire Huguenin/ Tina Purtschert *Vertragsverhältnisse Teil 1: Innominatkontrakte, Kauf, Tausch, Schenkung, Miete, Leihe Art. 184 - 318 OR, CHK - Handkommentar zum Schweizer Privatrecht*, (Hrsg. Markus Müller-Chen, Claire Huguenin), (3. Aufl., 2016), Vorb 184 ff, in Innominatkontrakte AT, Rn. 2; Mustafa Alper Gümüş *Borçlar Hukuku Özel Hükümler, Cilt I*, (3. Bası, 2013), (C. I), 4; Saibe Oktay "İsimsiz Sözleşmelerin Geçerliliği, Yorumu ve Boşlukların Tamamlanması", (1996), İÜHFM, C. LV, 263-296, 265; Gökhan Antalya *Borçlar Hukuku Genel Hükümler C. V/1, 1, Temel Kavramlar, Sözleşmeden Doğan Borç İlişkileri,* (Genişletilmiş 2. Baskı, 2019), 276.

2 Huguenin/ Purtschert-CHK OR, Vorb 184 ff, in Innominatkontrakte AT, Rn. 2; Kuntalp, 4; Huguenin, Claire *Obligationenrecht - Allgemeiner und Besonderer Teil*, (2012), § 45 Rn. 3664, 3666; Gümüş, C. I, 4; Fikret Eren *Borçlar Hukuku Özel Hükümler*, (2019), (Özel Hükümler), 948; Marc Amstutz/ Ariane Morin *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR, Einl. vor Art. 184 ff*, (Hrsg. Heinrich Honsell, Nedim Peter Vogt, Wolfgang Wiegand), (6. Aufl., 2015), Einl. vor Art. 184 ff, Rn. 5; Ayşe Arat "İsimsiz Sözleşmelerin Tamamlanması", (2006) EÜHFD, C. I, Sa. 2, 239-249, 241; Eren, 86; Oktay, 264; Michael Martinek *Moderne Vertragstypen Bd. I: Leasing und Factoring*, (1991), 20.

Gesetz geregelten Vertragsarten jedoch nicht ausreichen, um mit der Zeit wechselnden Bedürfnissen gerecht zu werden, was unterschiedliche Rechtsverhältnisse aufdeckt. Diese Verträge, die als Folge des Bedarfs in der Gesellschaft auftreten, nicht im Gesetz geregelt sind, gelten sie als *Innominatverträge (unbenannte Verträge)*[3]. Die Vertragsparteien können im Sinne des Prinzips der Vertragsfreiheit (Art. 48 TGG, Art. 26 TOR) Innominatverträge zu dem von ihnen gewünschten Umstand und Inhalt abschließen[4].

Innominatverträge unterliegen verschiedenen Einstufungen wie gemischter Vertrag, sui generis Vertrag (Vertrag eigener Art) und zusammengesetzter Vertrag (Vertragsverbindunger- Vertragskoppelunger Vertrag)[5]. *Gemischte Verträge* sind Nominatverträge, deren Hauptleistungspflichten im Gesetz bestimmt sind, nochmals in einer nicht gesetzlich vorgeschriebenen Weise zusammengeführt werden[6]. Gemischte Verträge unterteilen sich je nach Art und Weise der Erbringung der Leistung durch die Vertragsparteien im doppeltypischen Vertrag (Zwittervertrag), Kombinationsvertrag (Zwillingsvertrag) und Vertrag mit Typenverschmelzung[7]. *Sui generis Verträge* können als die Verträge bezeichnet werden, die die Bestandteile der gesetzlich geregelten Nominatverträge weder teilweise noch vollständig enthalten[8]. *Zusammengesetzter Vertrag* setzt den Zusammenschluss zweier oder mehrere Verträge in einer nicht gesetzlich vorgeschriebenen Weise unter Erhaltung ihrer

3 Amstutz/ Morin-BSK OR I, Einl. vor Art. 184 ff, Rn. 5; Michael Kikinis *Kurzkommentar OR Art. 1-529, Art. 184-191* (Hrsg. Heinrich Honsell), (2008), Einl. vor Art. 184 ff. Rn. 2; Kuntalp, 3; Eren, Özel Hükümler, 947; Huguenin, § 45 Rn. 3663; Huguenin/ Purtschert-CHK OR, Vorb 184 ff, in Innominatkontrakte AT, Rn. 2; Eren, 86; Herbert Schönle *Zürcher Kommentar Bd./Nr. V/2a, Kauf und Schenkung, Erste Lieferung, Art. 184-191 OR Kommentar zum Schweizerischen Zivilgesetzbuch, Obligationenrecht, Kommentar zur 1. und 2. Abteilung (Art. 1-529 OR), Vorbemerkungen zur Zweiten Abteilung (Art. 184-551)*, (Hrsg. Peter Gauch), (Dritte, völlig neu bearbeitete Aufl., 1993), Vorb Art. 184-551, Rn. 26; Cevdet, Yavuz *Borçlar Hukuku Dersleri, Özel Hükümler*, (Yenilenmiş 15. Baskı, 2018), 13; Arat, 241; İpek Yücer Aktürk *İsimsiz Sözleşme Genel Teorisi ve Uzaktan Öğretim Sözleşmesi*, (2016), 34; Martinek, 4; Antalya, 277; M. Kemal Oğuzman/ M. Turgut Öz *Borçlar Hukuku Genel Hükümler, C. I*, (Güncellenip Genişletilmiş, 17. Bası, 2019), 50; Murat Aydoğdu / Nalan Kahveci *Türk Borçlar Hukuku Özel Borç İlişkileri (Sözleşmeler Hukuku)*, (Gözden Geçirilmiş, Yenilenmiş ve Dipnotlu 4. Bası, 2019), 22.

4 Oktay, 267-268; Eren, 88; Kuntalp, 6; Yücer Aktürk, 33; Arat, 242; Eren, Özel Hükümler, 951; Haluk Tandoğan *Borçlar Hukuku Özel Borç İlişkileri, C. I/1*, (Tümü Yeniden İşlenmiş ve Genişletilmiş Beşinci Basım'dan Altıncı Tıpkı Basım, 2008), (C. I/1), 12; Martinek, 18-19; Antalya, 276.

5 Eren, 91; Huguenin, § 45 Rn. 3672; Arat, 243; Kuntalp, 13; Kikinis-KUKO OR, Einl. vor Art. 184 ff. Rn. 3; Oktay, 272; Schönle-ZK OR, Vorb Art. 184-551, Rn. 34-44; Yücer Aktürk, 42; Eren, Özel Hükümler, 952; Antalya, 277; Yavuz, 13-16; Tandoğan, C. I/1, 12.

6 vgl. für die Bezeichnung Eren, Özel Hükümler, 953; Amstutz/ Morin-BSK OR I, Einl. vor Art. 184 ff, Rn. 9; Kuntalp, 15-16; Gümüş, C. I, 9; Huguenin, § 45 Rn. 3684; Yücer Aktürk, 42; Eren, 91; Huguenin/ Purtschert-CHK OR, Vorb 184 ff, in Innominatkontrakte AT, Rn. 16; Yavuz, 14; Kikinis-KUKO OR, Einl. vor Art. 184 ff. Rn. 3; Tandoğan, C. I/1, 69; Oğuzman/ Öz, C. I, 48; Schönle-ZK OR, Vorb Art. 184-551, Rn. 36; Arat, 243; Theo Guhl *Das Schweizerische Obligationenrecht mit Einschluß des Handels-, Wechsel- und Versicherungsvertragsrechtes*, (Neunte Aufl., 2000), 334; Oktay, 273-274; Antalya, 278; Aydoğdu/ Kahveci, 37.

7 Eren, 92; Huguenin/ Purtschert-CHK OR, Vorb 184 ff, in Innominatkontrakte AT, Rn. 18-23; Martinek, 20; Amstutz/ Morin-BSK OR I, Einl. vor Art. 184 ff, Rn. 10; Oktay, 274; Kikinis-KUKO OR, Einl. vor Art. 184 ff. Rn. 3; Eren, Özel Hükümler, 954; Huguenin, § 45 Rn. 3687-3689; Yücer Aktürk, 48. vgl. für andere Unterscheidungen Tandoğan, C. I/1, 69-73; Yavuz, 14-15; Gümüş, C. I, 7-8; Arat, 243-244; Antalya, 278-279; Schönle-ZK OR, Vorb Art. 184-551, Rn. 37.

8 Martinek, 20-21; Huguenin, § 45 Rn. 3690; Kuntalp, 14; Huguenin/ Purtschert-CHK OR, Vorb 184 ff, in Innominatkontrakte AT, Rn. 24; Gümüş, C. I, 9; Amstutz/ Morin-BSK OR I, Einl. vor Art. 184 ff, Rn. 11; Yavuz, 15; Kikinis-KUKO OR, Einl. vor Art. 184 ff. Rn. 3; Oktay, 275; Tandoğan, C. I/1, 13; Eren, Özel Hükümler, 963; Eren, 99; Schönle-ZK OR, Vorb Art. 184-551, Rn. 34; Arat, 243; Oğuzman/ Öz, C. I, 48; Yücer Aktürk, 51; Antalya, 279; Aydoğdu/ Kahveci, 23.

Unabhängigkeit voraus[9]. Allerdings artikulieren einige Autoren[10] zusammengesetzte Verträge nicht als Innominatverträge.

Der Auftragsvertrag ist ein Nominatvertrag, dessen Hauptleistungspflichten und essentialia negotii in türkischem Obligationenrecht einen Platz einnehmen. Außerdem ist er einer der Verträge, die vom römischen Recht bis zur Gegenwart abgeschlossen wurden und sich auch im schweizerischen und türkischen Recht fortwirken. Der Auftrag ist im römischen Recht doch basierend auf die sozialen Beziehungen wie Freundschaft und Nachbarschaft entstanden[11]. Dann wird der Auftrag vielmehr mit den Verträgen wie dem Rechtsanwaltsvertrag und Ärztevertrag erwähnt, in denen das Vertrauensverhältnis zwischen deren Parteien eine besondere Rolle spielt. Heutzutage vertreiben soziale, wirtschaftliche und technologische Entwicklungen die Auftragsverhältnisse aus seiner klassischen-üblichen Erscheinung. Infolge dieser Entwicklungen gehen neue Auftragsverhältnisse oder mehrere Innominatverträge hervor, welche die Bestandteile in Bezug auf den Auftrag innehaben. Die wirtschaftlichen, technologischen und sozialen Bedürfnisse führten im Bildungs-, Planungs-, Management- und Beratungsbereich u.a. zur Notwendigkeit von Gemischten und sui generis Verträgen, die aus den Bestandteilen des Auftrags bestehen oder Einflüsse auf das Auftraggebersvermögen enthalten. In diesem Sinne fällt die Erbringung einer Leistung oder die Verrichtung einer anderen Tätigkeit in den Anwendungsbereich des Auftrags. Beispielsweise sind die Bezahlung des Beauftragten für den Auftraggeber, die Beratung, die Anwaltschaft oder andere Vertretungstätigkeiten in diesem Bereich. Die Bank-, Versicherungsgeschäfte oder Treuhandverhältnis werden wieder in das Auftragsverhältnis mit einbezogen. Der Pflegevertrag, d.h. die Arzt-, Zahnarzt- und Veterinärvetrag; der Notar-, Experten-, Architekten-, Ingenieur- und Liegenschaftsverwaltungsvertrag; der Unterrichts- oder Transportsvertrag sind in diesem Umfang[12]. Die Bestimmungen zum Auftrag des türkischen Obligationenrechts (Art. 502-514 TOR) finden auf die Verträge mit gemischter Natur durch die analoge Rechtsanwendung und Kreationstheorie unter Berücksichtigung der Merkmale des Einzelfalls Anwendung[13]. Auf die sui generis Verträge hingegen sind vornehmlich

9 Amstutz/ Morin-BSK OR I, Einl. vor Art. 184 ff, Rn. 12; Tandoğan, C. I/1, 75-76; Kikinis-KUKO OR, Einl. vor Art. 184 ff. Rn. 3; Eren, 100; Gümüş, C. I, 5-6; Kuntalp, 165-166; Huguenin, § 45 Rn. 3676; Eren, Özel Hükümler, 965-966; Guhl, 334; Arat, 244; Schönle-ZK OR, Vorb Art. 184-551, Rn. 44; Yavuz, 13-14; Oktay, 275; Oğuzman/ Öz, C. I, 50; Antalya, 277; Aydoğdu/ Kahveci, 40.

10 Eren, Özel Hükümler, 952; Eren, 91; Yücer Aktürk, 41-42.

11 vgl. umfassende Informationen zur historischen Entwicklung des Auftragsvertrag Suat Sarı *Vekâlet Sözleşmesinin Tek Taraflı Olarak Sona Erdirilmesi*, (2004), 65.

12 Eren, Özel Hükümler, 716; Rolf H. Weber *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR, Art. 394-406* (Hrsg. Heinrich Honsell, Nedim Peter Vogt, Wolfgang Wiegand), (6. Aufl., 2015), (BSK OR), Art. 394, Rn. 7, 9; Rolf H. Weber *Kurzkommentar OR Art. 1-529, Art. 394-406* (Hrsg. Heinrich Honsell), (2008), (KUKO OR), Art. 394 Rn. 4; Georg Gautschi *Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Bd. VI: Obligationenrecht, 2. Abteilung: Die einzelnen Vertragsverhältnisse*, *4. Teilband: Der einfache Auftrag*, (1971), Art. 394, Rn. 7-42.

13 vgl. für umfassende Informationen über das für gemischte Verträge geltende Recht Tandoğan, C. I/1, 73 vd.; Martinek, 22 ff.; Eren, 96 vd.; Schönle-ZK OR, Vorb Art. 184-551, Rn. 48 ff.; Eren, Özel Hükümler, 959 vd.; Amstutz/ Morin-BSK OR I, Einl. vor Art. 184 ff, Rn. 17 ff.; Huguenin/ Purtschert-CHK OR, Vorb 184 ff, in Innominatkontrakte AT, Rn. 27 ff.; Yücer Aktürk, 105 vd.; Tiftik, 109 vd.; Kuntalp, 237 vd.; Aydoğdu/ Kahveci, 39.

die von Vertragsparteien beschlossenen Bestimmungen anzuwenden. Wenn die Vertragsparteien keine diesbezügliche Vereinbarung getroffen haben, werden die Bestimmung des türkischen Obligationenrechts grundsätzlich in Betracht gezogen. Weil die sui generis Verträge nicht die Bestandteile der gesetzlich geregelten Verträge einschließen, ist direkte Anwendung der besonderen Bestimmungen des türkischen Obligationenrechts unmöglich. Diese Bestimmungen lassen sich aber im Wege einer Analogie umsetzen, soweit sie den Merkmalen der sui generis Verträge ähnlich und für das Vertragsparteieninterresse geeignet und ihrem Wesen nach möglich sind[14]. Der Auftragsvertrag ist jedoch ein Sammelbecken für die Geschäftsbesorgungsverträge[15]. Die Bestimmungen des Auftrags sind auch auf die Geschäftsbesorgungsverträge gemischter oder sui generis Art anzuwenden (Art. 502 Abs. 2 TOR). Doch muss hier in Betracht gezogen werden, ob die Anwendung der Auftragsbestimmungen auf diese Innominatverträge mit eigener Art ihrer Natur passt. Denn die Zusammensetzung einiger Innominatverträge eignet sich zu der Anwendung der Bestimmungen zum Auftragsvertrag auch dann nicht, selbst wenn diese Innominatverträge die Geschäftsbesorgungstätigkeit enthalten.

II. DIE ZU BERÜCKSICHTIGENDEN VORSTELLUNGEN BEI DER REGELUNG EINSEITIGEN BEENDIGUNGSRECHTS

Im Vertragsrecht überwiegt das Prinzip der Vertragstreue (pacta sunt servanda). Gemäß diesem Prinzip ist es Regel, die Verträge aufrechtzuerhalten. Aus diesem Grund ist die Vertragsbeendigung an den Eintritt einiger Fälle wie Mangel, Verzug und wichtiger Grund gebunden. Nur im Falle des Eintritts der im Gesetz oder im Vertrag vorgeschriebenen Voraussetzungen kann ein Vertrag beendet werden. Daher ist es grundsätzlich nicht möglich, einen Vertrag mit einer Willenserklärung einseitig zu beenden, ohne dass diese Gründe vorliegen. Den Vertragsparteien wird das Beendigungsrecht jedoch im türkischen Obligationenrecht nur für zwei Vertragstype eingeräumt, ohne irgendeinen Grund zu nennen. Diese sind Werkvertrag (Art. 484 TOR) und Auftragsvertrag (Art. 512 TOR). Selbst wenn andere Vertragsseite ihre Vertragspflichten gewissenhaft erfüllt, kann Beendigungsrecht kraft einseitiger Willenserklärung ausgeübt werden. Aber nur der Besteller kann im Werkvertrag im Unterschied zu dem Auftragsvertrag vom Vertrag ohne Grund zurücktreten (Art. 484 TOR). Im Auftragsvertrag wird nicht nur der Auftraggeber, sondern auch der Beauftragte den Vertrag mit einseitigem Beendigungsrecht ohne Grund

14 vgl. für umfassende Informationen über das für sui generis Verträge geltende Recht Schönle-ZK OR, Vorb Art. 184-551, Rn. 48 ff.; Amstutz/ Morin-BSK OR I, Einl. vor Art. 184 ff, Rn. 29 ff.; Tandoğan, C. I/1, 13; Huguenin/ Purtschert-CHK OR, Vorb 184 ff, in Innominatkontrakte AT, Rn. 27 ff.; Eren, Özel Hükümler, 965; Yavuz, 16; Aydoğdu/ Kahveci, 23.

15 Huguenin, § 35 Rn. 3223; Eren, Özel Hükümler, 716; Weber-BSK OR I, Art. 394, Rn. 22; Ronald Bühler *OR Kommentar Schweizerisches Obligationenrecht, OFK - Orell Füssli Kommentar (Navigator.ch)*, (Hrsg. Jolanta Kren Kostkiewicz, Stephan Wolf, Marc Amstutz, Roland Fankhauser), (3., überarbeitete Aufl., 2016), Art. 394, Rn. 2; Weber-KUKO OR, Art. 394 Rn. 9; Aydoğdu/ Kahveci, 791.

jederzeit beenden (Art. 512 TOR). Nach einer Ansicht[16] in der Lehre schwächt das im Art. 512 des türkischen Obligationenrechts geregelte Beendigungsrecht, das zu den Vertragsparteien eine Möglichkeit gibt, den Vertrag ohne Grund jederzeit zu beenden, die Gültigkeit des Grundsatzes der Vertragstreue (pacta sund servanda) ab. Um die Tragweite dieser Bestimmung zu determinieren, die die Vertragstreue der Vertragsparteien abschwächt, muss die Vorstellung, die im Auftragsvertrag den Vertragsparteien ein einseitiges Beendigungsrecht zubilligt, vorrangig unter die Lupe genommen werden.

Einseitiges Beendigungsrecht ist ein charakteristischer Beendigungsgrund des Auftragsvertrags. Die Auftragsspezifische Gründe wurden daher bei der Regelung des Art. 512 TOR berücksichtigt. Was damit gemeint ist, ist in der Lehre der Gegenstand unterschiedlicher Bewertungen. Diese Bewertungen nehmen Rücksicht auf den Art. 404 des schweizerischen Obligationenrechts und den Art. 512 des türkischen Obligationenrechts. Dass es ein besonderes Vertrauensverhältnis zwischen den Parteien des Auftragsvertrags gibt, wird in der Lehre[17] am häufigsten ausgedrückt. Der türkische Kassationshof[18] stellt in seinen Entscheidungen fest, dass das wichtigste Merkmal bei dem Auftragsverhältnis das Vertrauensverhältnis zwischen den Vertragsparteien ist. Demnach rechtfertigt das Ende des Vertrauensverhältnisses ein Beendigungsrecht[19]. Gemäß der Rechtsprechung des schweizerischen Bundesgerichts[20] wird auch der Grund, warum im Auftragsvertrag den Vertragsparteien ein Recht zuerkannt wird, den Vertrag jederzeit ohne Grund zu beenden, darauf beruht, dass der Beauftragte grundsätzlich ein hohes Vertrauen genießt. Denn nach schweizerischem Bundesgerichtshof[21] hat es keinen Sinn mehr, den Vertrag

16 Sarı, 64; Mustafa Alper Gümüş *Borçlar Hukuku Özel Hükümler, Cilt II*, (3. Bası, 2014), (C.II), 195; Christof Burri *Tendenzen zur Stabilisierung des Schuldvertrags Regeln und Entwicklungen, die das Zustandekommen, die Gültigkeit und die Fortdauer des Vertrags begünstigen*, AISUF - Arbeiten aus dem Juristischen Seminar der Universität Freiburg Schweiz Bd./Nr. 298, (Hrsg. Peter Gauch), (2010), 198.

17 Haluk Tandoğan *Borçlar Hukuku Özel Borç İlişkileri*, C. II, (1989 yılı Dördüncü Tıpkı Basım'dan Beşinci Tıpkı Basım, 2010), (C.II), 613; Walter Fellmann *Der einfache Auftrag, Art. 394-406 OR Schweizerisches Zivilgesetzbuch, Das Obligationenrecht, Die einzelnen Vertragsverhältnisse, BK- Berner Kommentar Band/Nr. VI/2/4*, (Hrsg. Heinz Hausheer), (1992), Art. 404 Rn. 8; Yavuz, 666; Felix Buff / Hans Caspar von der Crone "Zwingende Natur von Art. 404 OR", (2014) SZW Heft, 3, 332-343, 339; Gümüş, C. II, 197; Eren, Özel Hükümler, 718-719; Peter Gauch "Art. 404 OR- Sein Inhalt, seine Rechtfertigung und die Frage seines zwingenden Charakters", (1992), Recht, 9-22, 13 ff.; Veysel Başpınar *Vekilin (Avukatın, Hekimin, Mimarın, Bankanın) Özen Borcundan Doğan Sorumluluğu*, (2004), 258-259; Frédéric Krauskopf *Präjudizienbuch OR, Die Rechtsprechung des Bundesgerichts (1875-2015)*, (Hrsg. Peter Gauch, Viktor Aepli, Hubert Stöckli), (neunte, nachgeführte und erweiterte Aufl., 2016), Art. 404 Rn. 2; Guhl, 555; Weber-BSK OR I, Art. 404, Rn. 3; Şebnem Akipek *Alt Vekâlet*, (2003), 75.

18 Yarg. 13. HD. T. 12.03.2013, E. 2012/23911, K. 2013/6083 (KBİBB, 1136/m.174; 818/m.396); Yarg. 13. HD. T. 14.01.2008, E. 2007/8188, K. 2008/253 (KBİBB, 818/m. 389, 390, 392, 396/1; 1136/m. 163); Yarg. HGK T. 11.10.2006, E. 2006/13-610, K. 2006/639 (KBİBB, 1136/m. 34, 164, 174; 818/m. 390, 396); Yarg. 13. HD. T. 20.09.2018 E. 2018/3378, K. 2018/8178 (KBİBB, 6098/m.512/1; 818/m.396/1; 1136/m.171/1,173,174/1); Yarg. 13. HD., T. 16.11.2015, E. 2014/15124, K. 2015/33136 (KBİBB, 6098/m. 512); Yarg. HGK T. 29.11.2018, E. 2017/13-568, K. 2018/1811 (KBİBB, 818/m.386/1,396/1; 1136/m.174/2). vgl. Außerdem Yarg. HGK T. 11.05.2016, E. 2015/5-3290, K. 2016/601 (KBİBB, 6098/m.512, 513); Yarg. 4. HD. T. 15.05.1980, E. 1980/1600, K. 1980/6365 (KBİBB, 818/m.161).

19 Yarg. 13. HD. T. 26.12.2008, E. 2008/8962, K. 2008/15715 (KBİBB, 1136/m. 164; 818/m. 386, 396).

20 BGE 115 II 464 vom 19.12.1989 E 2a; 4A_284/2013 vom 13.02.2014 E 3.5.1; BGE 4A_141/2011 vom 06.07.2011 E 2.2; 4A_437/2008 vom 10.02.2009 E 1.4; BGE 4A_213/2008 vom 29.07.2008 E 5.2; BGE 109 II 462 vom 13.12.1983 E 3e; BGE 104 II 108 vom 23.05.1978 E 4; BGE 98 II 305 vom 03.10.1972 E 2a, c.

21 BGE 115 II 464 vom 19.12.1989 E 2a.

aufrechtzuerhalten, wenn das Vertrauensverhältnis zwischen den Vertragsparteien entfällt. Aber diese Aussage von Bundesgerichtshof wird in der Doktrin nicht für überzeugend gehalten. Laut dieser Meinung[22] gibt es viele Auftragsverhältnisse, in denen das Auftraggebersvertrauen nicht über allgemeines Vertrauen hinausgeht. Es ist zweifelhaft, ob die Auftragsvertragen, die das Vertrauensverhältnis enthalten, einen Regelfall darstellt, wie der Bundesgerichtshof rezipiert hat. Außerdem kann das Vorhandensein eines fraglichen Vertrauensverhältnisses nur die Grundlage des Auftraggebersbeendigungsrechts erklären. Deshalb ist der Grund einseitigen Beendigungsrechts des Beauftragten in der Entscheidung des Bundesgerichtshofs nicht klar. Schließlich hält der Bundesgerichtshof daran fest, dass es keinen Sinn mehr hat, den Vertrag aufrechterzuhalten, wenn das Vertrauensverhältnis zwischen den Vertragsparteien gestört ist. Laut Gauch[23] kann dieses Argument doch nicht den Grund erklären, warum das Recht zugebilligt wurde, den Vertrag ohne irgendeine Voraussetzung jederzeit zu beenden, wie es in der Gesetzesbestimmung verankert ist.

In der Doktrin wird angeführt, dass die Geschäftsbersorgungspflicht des Beauftragten persönliche Merkmale[24] hat und mit der Bestimmung der Schutz der Persönlichkeit[25] beabsichtigt wird. In der Tat kann der Umstand, dass das vom Beauftragten zu besorgende Geschäft sich auf die Persönlichkeitsrechte wie Gesundheit und körperliche Unversehrtheit bezieht, die Zubilligung des Rechts im Auftragsvertrag für die Vertragsparteien insbesondere für den Auftraggeber rechtfertigen, mit einseitiger Willenserklärung den Vertrag zu beenden. Dieses enge Verhältnis zwischen dem zu besorgenden Geschäft und dem Persönlichkeitsrecht ist nicht in allen Auftragsverhältnissen der Fall[26]. Zum Beispiel ist eine Geschäftsbesorgung des Beauftragten in Bezug auf das Auftraggebersvermögen in dieser Richtung. Zwar kann diese Ansicht ein Grund des Beendigungsrechts des Auftraggebers[27]sein. Aber sie kann nicht erklären, warum dem Beauftragten ein Kündigungsrecht zugebilligt wird. Dass der Beauftragte einseitiges Beendigungsrecht hat, wird von einigen Autoren darauf zurückgeführt, dass der Auftragsvertrag grundsätzlich unentgeltlich ist[28]. Denn das jederzeitige Kündigungsrecht des Beauftragten für unentgeltlichen Auftrag erscheint prinzipiell gerecht. Dass betreffender Auftrag unentgeltlich ist, schwächt die

22 Gauch, 14. vgl. in die gleiche Richtung. Sarı, 70, 71; Öz Seçer Vekâlet, Sözleşmesinin Vekâlete Özgü Sebeplerle Sona Ermesi", (2015), İnönü Üniversitesi Hukuk Fakültesi Dergisi Özel Sayı C. 2, 877-944, 880; Huguenin, § 35 Rn. 3310; Nil Karabağ Bulut *Medenî Kanunun 23. Maddesi Kapsamında Kişilik Hakkının Sözleşme Özgürlüğüne Etkisi*, (2014), 158; İpek Betül Aldemir Toprak *Anahtar Teslim İnşaat Sözleşmesi*, (2020), 310.

23 Gauch, 14.

24 Tandoğan, C. II, 613; Yavuz, 665-666; Eren, Özel Hükümler, 718-719. Gauch, 13 ff.; Gautschi, Art. 404 Rn. 3a; Weber-BSK OR I, Art. 404, Rn. 3; Jürg Peyer *Die Widerruf im schweizerischen Auftragsrecht*, (1974), 155.

25 Gümüş, C. II, 195; Fellmann-BK OR Art. 404 Rn. 138; Peyer, 155.

26 Peyer, 156; Sarı, 72.

27 Sarı, 72-73; Karabağ Bulut, 159.

28 Fellmann-BK OR Art. 404 Rn. 8; Gauch, 18; Herman Becker *İsviçre Borçlar Kanunu Şerhi, İkinci Bölüm, Çeşitli Sözleşme İlişkileri Madde: 184-551*, (Çeviren: Suat Dura), (1934), Art. 404 Rn. 1.

Vertragsbindung ab. Aus diesem Grund kann es eine akzeptierbare Lösung werden[29]. Heutzutage ist es doch Regel, dass das Auftragsverhältnis entgeltlich ist, und es ist eine Ausnahme, dass es unentgeltlich ist[30].

In der Doktrin wird zusätzlich zu allen oben genannten Bewertungen geäußert, dass das überwiegende Interesse des Beauftragten[31] und ihr vorrangiger Wille[32] während der Schaffung des Art. 512 berücksichtig wurden. Demzufolge ist jederzeitiges Beendigungsrecht des Auftraggebers nur dann gerechtfertigt, wenn der Beauftragte für das Auftraggebersinteresse handelt und sonst im Leistungsfall kein eigenes Interesse hat[33]. Es wird zudem angeführt, dass der Auftraggeber im Auftragsverhältnis der Beauftragte überlegen ist, dass er Position des Arbeitsgebers hat und dass niemand seine Arbeit jemand anderem machen lassen muss[34]. Aber das Interesse des Beauftragten kann im entgeltlichen Auftragsvertrag der Fall sein[35]. Daher sind die Gründe für die freie Kündigung des Beauftragten nicht klar, wenn der unentgeltliche Auftrag entfällt[36]. Danach sollte jederzeit der Auftraggeber den Vertrag beenden können, da er im Auftragsverhältnis überlegen ist. In der Tat zeigt sich die Überlegenheit des Auftraggebers mit dem Recht, Anweisungen zu erteilen[37]. Gegenüber dieser Überlegenheit des Auftraggebers wird es behauptet, dass das Kündigungsrecht zum Beauftragten eingeräumt würde, um ihre Rechte zu beschützen[38]. All diese Anhaltspunkte schließen doch auch nicht alle Auftragsverhältnisse ein. Aber einschließen diese Anhalte auch nicht ganze Auftragsverhältnisse[39]. Denn die Überlegenheit des Auftraggebers gilt für die Auftragsverhältnisse wie Rechtsanwalts- und Ärztevertrag[40]. Dennoch sind die Auftragsverhältnisse nicht darauf beschränkt. Darüber hinaus kann das Recht des Auftraggebers, Anweisungen zu erteilen, begrenzt oder vollständig beseitigt werden[41].

Wie bereits erwähnt, werden die Ideen, die der gesetzlichen Regelung zugrunde liegen, die den Parteien das Recht einräumt, den Auftragsvertrag einseitig zu beenden, in der Lehre unterschiedlich behandelt. Doch erfasst keine der betreffenden Thesen alle heute angewandten Auftragsverhältnisse. Diese Bestimmung, die das

29 Gauch, 15.

30 Sarı, 74; Tandoğan, C. II, 615; Karabağ Bulut, 160.

31 Tandoğan, C. II, 613; Yavuz, 666; Peyer, 154; Gautschi, Art. 404 Rn. 3c.

32 Tandoğan, C. II, 613; Yavuz, 666; Gautschi, Art. 404 Rn. 3a.

33 Gauch, 14.

34 Gauch, 14, 17.

35 Eren, Özel Hükümler, 721.

36 Gauch, 14.

37 Rona Serozan *Sözleşmeden Dönme*, (Gözden Geçirilmiş 2. Bası, 2007), 131-132.

38 Gautschi, Art. 404 Rn. 15a.

39 Peyer, 155; Sarı, 75.

40 Sarı, 75.

41 Tandoğan, C. II, 615.

Recht einräumt, den Auftragsvertrag einseitig zu beendigen, kann im Hinblick auf historische Gegenstände wie Rechtsanwalts- und Ärztevertrag sinnvoll sein[42]. Die heutigen wirtschaftlichen, sozialen und technologischen Entwicklungen bringen den Auftragsvertrag zu vielen Erscheinungen, die sich von dieser historischen Form entfernen. Daher ist es nicht möglich zu akzeptieren, dass es bei der Einräumung des einseitigen Beendigungsrechts für die Parteien nur auf eine dieser Ideen in der Weise abgestellt wird, dass sie alle Auftragsverhältnisse umfassen. Deswegen soll akzeptiert werden, dass Art. 512 das Produkt eines historischen Verständnisses war, welches aus dem römischen Recht stammt und sich bis heute fortwirkt, und soll separat gewürdigt werden, welche dieser Überlegungen es in jeden einzelnen Innominatverträgen gibt.

III. REGELUNG DES EINSEITIGEN BEENDIGUNGSRECHTS

A. Terminologie

Die Bestimmung des Art. 512, die den Parteien ein Recht gibt, das Verhältnis jederzeit ohne Grund im Auftragsvertrag zu beenden, wird im türkischen Obligationenrecht unter der Überschrift "*die einseitige Beendigung*" geregelt. Im türkischen Obligationenrecht Nr. 818 hingegen befinden sich die Ausdrücke "*die Kündigung*" und "*der Widerruf*" (Art. 396 aTOR). Die Überschrift des schweizerischen Art. 404 OR, der Art. 512 TOR entspricht, lautet "*Widerruf*[43]*, Kündigung*". Aus der Terminologie, die sowohl im schweizerischen Obligationenrecht als auch im alten türkischen Obligationenrecht Anwendung findet, ist darauf zu schließen, dass der Auftraggeber ein Widerrufsrecht hat und der Beauftragte ein Kündigungsrecht hat. Mit anderen Worten ist die Ursache für die Verwendung verschiedener Begriffe das Abstellen auf die Erscheinungsformen der Beendigung aus der Sicht des Auftraggebers und des Beauftragten. Doch haben beide auf verschiedene Weise ausgedrückten Begriffe gleiche Bedeutung[44]. Was mit beiden Begriffen gemeint ist, ist ein Beendigungswille, der empfangsbedürftig und darauf gerichtet ist, den Vertrag einseitig aufzulösen[45]. Im deutschen Recht

42 Sarı, 77; Karabağ Bulut, 162.

43 Was aus dem Begriff des Widerruf zu verstehen ist, wird auch im schweizen und türkischen Recht bewertet. Laut Fellmann hat der Widerruf keine besondere Bedeutung im Schuldrecht. vgl. Fellmann-BK OR Art. 404 Rn. 14. Gemäß Başpınar und Serozan ist das Widerrufrecht ein zwischenbegriff, das in einigen Fällen wie Kündigung oder Rücktritt bewirkt. vgl. Başpınar, 256; Serozan, 133. Başpınar stellt jedoch auch fest, dass die Wirkung, die der Auftragsvertrag angemessen ist, die wirksame Kündigung ist. vgl. Başpınar, 256.

44 Carole Gehrer Cordey/ Gion Giger *Vertragsverhältnisse Teil 2: Arbeitsvertrag, Werkvertrag, Auftrag, GoA, Bürgschaft Art. 319-529 OR, CHK- Handkommentar zum Schweizer Privatrecht*, (Hrsg. Markus Müller-Chen, Claire Huguenin), (3. Aufl., 2016), Art. 404 Rn. 2; Fellmann-BK OR Art. 404 Rn. 8, 16; Barbara Graham-Siegenthaler *Haftpflichtkommentar Kommentar zu den schweizerischen Haftpflichtbestimmungen*, (Hrsg. Willi Fischer, Thierry Luterbacher), (2016), Art. 404 Rn. 1; Tandoğan, C. II, 620; Peyer, 124; Sarı, 83; Gümüş, C. II, 196; Frédéric Krauskopf "Die Kündigung von Bauverträgen und die Folgen", Schweizerische Baurechtstagung 2007 ... für alle, die bauen, (Hrsg. Institut für Schweizerisches und Internationales Baurecht), (2007), 29-66, (Kündigung), 55; Weber-KUKO OR, Art. 404 Rn. 2; Gautschi Art. 404 Rn. 14a; Akipek, 75; Aydoğdu/ Kahveci, 803.

45 Krauskopf, Kündigung, 55; Graham-Siegenthaler, Art. 404 Rn. 2; Dieter Medicus/ Stephan Lorenz *Schuldrecht II, Besonderer Teil*, (2014), 303; Peyer, 126; Aydoğdu/ Kahveci, 803.

wird ausgesagt, dass der Auftraggeber den Auftrag widerrufen und der Beauftragte den Vertrag kündigen kann (BGB § 671)[46].

Der Gesetzgeber hat im geltenden türkischen Obligationenrecht Nr. 6098 auf seine ehemalige Auffassung durch Benutzung der Überschrift "*einseitige Beendigung*" verzichtet und das Beendigungsrecht der Parteien nicht genannt. Nach einer Meinung[47] ist der Grund des gesetzgeberischen Ansatzes die Vorstellung, dass Auftragsverhältnisse einmaliger oder dauernder Natur sein könnten. Auf diese Weise wird einseitiges Beendigungsrecht als der Rücktritt oder die Kündigung bezeichnet, je nachdem, ob der Vertrag einmaliger oder dauernder Natur ist[48]. Während dieses Beendigungsrecht in den Auftragsverhältnissen, deren Erfüllung schon begonnen wurde, die Kündigung ist, wird es in den Auftragsverhältnissen als der Rücktritt genannt, deren Erfüllung noch nicht begonnen wurde[49]. Laut anderer Meinung[50] darf das Beendigungsrecht nicht als die Kündigung oder der Rücktritt bezeichnet werden, zumal diese Rechte ausgeübt werden können, falls einige Voraussetzungen eintreten würden. Doch setzte Art. 512 TOR nicht irgendeine Bedingung voraus. Die Vertragsparteien können jederzeit ohne Grund den Vertrag beenden. Auf der anderen Seite würde der Ersatz in der Benutzung des Rücktritts oder der Kündigung je nach Verschulden erworben. Aber der Ersatz könnte gefordert werden, wenn der Vertrag mit einseitigem Beendigungsrechts unzeitig beendet würde (Art. 512 TOR). Insofern sollte nach dieser Meinung einseitiges Beendigungsrecht als eigenartiger Beendigungsgrund beurteilt werden.

B. Der Ausdruck und Inhalt der Bestimmung

1. Im Allgemeinen

Die Bestimmung des Art. 512 des türkischen Obligationenrechts erkennt jeder Vertragspartei des Auftragsvertrags ein Recht zu, den Vertrag jederzeit zu beenden. Die Ausübung dieses Rechts ist nicht an eine Bedingung geknüpft. Für die Vertragsbeendigung ist weder eine Frist gesetzt noch bedarf eines wichtigen Grundes. Es verhält sich jedoch beim Rechtsanwaltsvertrag als ein typisches Beispiel für Auftragsverträge anders. Denn die türkische Rechtsanwaltsordnung (Art. 174) setzt voraus, dass der Widerruf nicht auf wichtigem Grund beruht und dass er von dem Verschulden oder der Fahrlässigkeit des Rechtsanwalts nicht herrührt, damit der Rechtsanwalt wegen des Widerrufes die Vergütung verlangen kann. Manche

46 vgl. Karl Larenz *Lehrbuch des Schuldrechts, Zweiter Band, Besonderer Teil, 1. Halbband*, (13. völlig neubearbeitete Aufl., 1986), 420; Medicus/ Lorenz, 303.

47 Gümüş, C. II, 196.

48 Fellmann-BK OR Art. 404 Rn. 14; Sarı, 81-83; Gümüş, C. II, 196.

49 Sarı, 81-83. vgl. in die entgegengesetzte Richtung Gümüş, C. II, 196.

50 Seçer, 882.

Fälle können den Widerruf des Rechtsanwalts aus wichtigem Grund darstellen, wenn er z.B. die Klage rechtzeitig nicht erhebt[51]; die Frist der Revision versäumt[52]; die Vollstreckungsakte nicht vollstreckt[53]; dem Recht zuwider handelt[54], die Information zu erhalten und die Rechenschaft zu verlangen, oder in der Weise handelt; dass dieses Recht beschränkt wird; dem Mandanten nicht die Kopien der Akte gibt[55]; das Vertrauen des Mandats mit angewendeter Sprache verunsichert[56] sowie wenn er nur unter Vorlage der Gegenerklärung an zwei aufeinanderfolgenden Verhandlungen nicht teilnimmt[57]. Obwohl der Rechtsanwalt alle seine Verpflichtungen erfüllt hat, wird die Mitteilung, dass ihm nicht bezahlt wird und keine Aktion im Namen des Mandats gestartet werden sollte, als wichtiger Grund für die Kündigung des Rechtsanwalts akzeptiert[58].

Die Bestimmung des Art. 512 türkischen Obligationenrechts bringt zum Ausdruck, dass der Auftragsvertrag "*jederzeit*" beendet werden kann. Mit dieser Erklärung sind der Auftraggeber und der Beauftragte berechtigt, den Vertrag in einem beliebigen Zeitpunkt zu beenden. Der Auftragsvertrag endet sofort mit der Mitteilung unabhängig von der für das Erlöschen angegebenen Zeit oder dem angegebenen Datum. Aber das Beendigungsrecht ist nicht mehr verfügbar, wenn der Auftrag gänzlich erfüllt wird[59].

Die Ausübung des Rechts, welches in Art. 512 des türkischen Obligationenrechts geregelt ist, ist formfrei[60]. Die Vertragsparteien können mit ausdrücklicher oder stillschweigender Willenserklärung das Auftragsverhältnis beenden. Einseitiges Beendigungsrecht der Parteien ist ein aufhebendes Gestaltungsrecht[61]. Die Ausübung des einseitigen Beendigungsrechts beendet den Vertrag für die Zukunft (*ex nunc-*

51 Seçer, 906.

52 Seçer, 907.

53 Yarg. 4. HD. T. 15.05.1980, E. 1980/1600, K. 1980/6365 (KBİBB, 818/m.161).

54 Yarg. 13.HD. T. 24.10.2005, E. 2005/6452, K. 2005/15756 (KBİBB, 818/m.390, 392; 1136/m.34, 173, 174).

55 Yarg. 13. HD. T. 26.12.2008, E. 2008/8962, K. 2008/15715 (KBİBB, 1136/m. 164; 818/m. 386, 396).

56 Yarg. HGK T. 11.10.2006, E. 2006/13-610, K. 2006/639 (KBİBB, 1136/m. 34, 164, 174; 818/m. 390, 396).

57 Yarg. 13. HD. T. 12.03.2013, E. 2012/23911, K. 2013/6083 (KBİBB, 1136/m.174; 818/m.396).

58 Yarg. 13. HD., T. 16.11.2015, E. 2014/15124, K. 2015/33136 (KBİBB, 6098/m. 512).

59 Gauch, 10; Weber-BSK OR I, Art. 404, Rn. 7; Weber-KUKO OR, Art. 404 Rn. 3; Becker, Art. 404 Rn. 4; Karabağ Bulut, 154.

60 Weber-BSK OR I, Art. 404, Rn. 6; Cordey/ Giger-CHK OR Art. 404 Rn. 3; Fellmann-BK OR Art. 404 Rn. 33; Bühler-OFK OR Art. 404, Rn. 2; Krauskopf, Kündigung, 55; Graham-Siegenthaler, Art. 404 Rn. 3; Sarı, 86; Walter Alexander Erman *Bürgerliches Gesetzbuch*, (Hrsg. Harm Peter Westermann/ Barbara Grunewald/ Georg Maier-Reimer), (13., neu bearbeitete Aufl., 2011), BGB § 671 Rn. 2; Tandoğan, C. II, 622; Becker, Art. 404 Rn. 2; Gümüş, C. II, 196; Weber-KUKO OR, Art. 404 Rn. 3; Aydoğdu/ Kahveci, 803. vgl. Außerdem. Yarg. HGK T. 29.11.2018, E. 2017/13-568, K. 2018/1811 (KBİBB, 818/m.386/1,396/1; 1136/m.174/2).

61 Cordey/ Giger-CHK OR Art. 404 Rn. 3; Fellmann-BK OR Art. 404 Rn. 21; Bühler-OFK OR Art. 404, Rn. 2; Graham-Siegenthaler, Art. 404 Rn. 2; Sarı, 89; Weber-BSK OR I, Art. 404, Rn 5; Gümüş, C. II, 196; Weber-KUKO OR, Art. 404 Rn. 3; Akipek, 75. vgl. Yarg. 13. HD. T. 20.09.2018 E. 2018/3378, K. 2018/8178 (KBİBB, 6098/m.512/1; 818/m.396/1; 1136/m.171/1,173,174/1); Yarg. 13. HD., T. 01.04.2013, E. 2012/13331, K. 2013/8159 (KBİBB, 1136/m.171,174; 818/m.396); Yarg. 4. HD. T. 15.05.1980, E. 1980/1600, K. 1980/6365 (KBİBB, 818/m.161).

Wirkung)[62]. Die bereits erfüllten Leistungen erhalten daher ihre Gültigkeit[63]. Die noch nicht erbrachten Leistungen erlöschen und ihre Erbringung darf nicht gefordert werden. Jedoch bleiben einige von dem Auftragsvertrag folgenden Leistungen bestehen. Auch wenn der Vertrag endet, haftet der Beauftragte für die Rechenschaftspflicht[64] (Art. 508 TOR) und die Verschwiegenheitspflicht[65] weiterhin, während der Auftraggeber für die Auslagen und Verwendung (Art. 510 TOR) aufkommen, die für zurechtliche Erbringung des Auftrags gemacht werden, oder die Gebühr erfüllter Leistungen im entgeltlichen Auftrag bis zum Zeitpunkt der Beendigung zahlen muss[66]. Diese Pflicht umfasst auch die von dem Beauftragten gezahlten Vorschüsse und die Befreiung von Pflichten, die der Beauftragte übernimmt (Art. 510 TOR)[67].

2. Unzeitige Beendigung des Vertrages

Der Gesetzgeber sanktioniert die unzeitige Beendigung des Auftragsvertrags durch eine einseitige Willenserklärung. Dementsprechend hat die Partei, die den Vertrag unzeitig beendet, den daraus folgenden Schaden des Kündigungsgegners zu beheben (Art. 512 TOR). Selbst wenn die Bestimmung erwähnt, dass die Parteien „jederzeit „ den Vertrag kündigen können, sieht sie für die unzeitige Beendigung die Sanktion des Schadenersatzes vor. Nach einer Meinung[68] resultiert die Pflicht zum Schadenersatz aus dem Vertrag. Aber im Gegensatz dazu wird in der Lehre ausgesagt, dass die Pflicht zum Schadenersatz nicht aus dem Vertrag folgt. Laut dieser Meinung[69] verstößt die Partei, die den Auftragsvertrag mit einseitiger Willenserklärung auflöst, nicht gegen den Vertrag. Deswegen beruht die Pflicht der Partei zum Schadenersatz, nicht auf der Vetragsverletzung, sondern auf dem Gesetz[70].

Laut der Bestimmung Art. 512 muss der Vertrag unzeitig beendet werden, um Schadenersatz geltend zu machen. Was jedoch unter der Unzeit zu verstehen ist,

62 Gauch, 10; Cordey/ Giger-CHK OR Art. 404 Rn.4; Peyer, 127; Başpınar, 257; Fellmann-BK OR Art. 404 Rn. 29; Seçer, 892; Bühler-OFK OR Art. 404, Rn. 2; Krauskopf, Kündigung, 56; Weber-KUKO OR, Art. 404 Rn. 3; Graham-Siegenthaler, Art. 404 Rn. 2; Erman, BGB § 671 Rn. 2; Tandoğan, C. II, 620; Weber-BSK OR I, Art. 404, Rn. 7; Serozan, 132; Becker, Art. 404 Rn. 3; Gümüş, C. II, 196; Burri, 197; Gautschi, Art. 404 Rn. 9a, 14b; Akipek, 75. vgl. Außerdem Yarg. 13. HD., T. 01.04.2013, E. 2012/13331, K. 2013/8159 (KBİBB, 1136/m.171,174; 818/m.396); Yarg. 13. HD. T. 20.09.2018 E. 2018/3378, K. 2018/8178 (KBİBB, 6098/m.512/1; 818/m.396/1; 1136/m.171/1,173,174/1).

63 Erman, BGB § 671 Rn. 2; Gauch, 10; Cordey/ Giger-CHK OR Art. 404 Rn. 4.

64 Cordey/ Giger-CHK OR Art. 404 Rn. 4; Serozan, 132; Weber-KUKO OR, Art. 404 Rn. 1. vgl. Außerdem Yarg. 4. HD. T. 15.05.1980, E. 1980/1600, K. 1980/6365 (KBİBB, 818/m.161).

65 Bühler-OFK OR Art. 404, Rn. 1.

66 Cordey/ Giger-CHK OR Art. 404 Rn. 4; Bühler-OFK OR Art. 404, Rn. 1; Krauskopf, Art. 404 Rn. 5; Krauskopf, Kündigung, 56; Graham-Siegenthaler, Art. 404 Rn. 4; Gauch, 10; Başpınar, 262; Becker, Art. 404 Rn. 3; Akipek, 76; Peyer, 127. Der Beauftragte kann die Gebühr entsprechen, die er verbringt, verlangen. vgl. Yarg. 3. HD. T. 29.12.1997, E. 1997/11339, K. 1997/12497 (KBİBB, 743/m.4; 818/m.396/1); Yarg. 4. HD. T. 15.05.1980, E. 1980/1600, K. 1980/6365 (KBİBB, 818/m.161).

67 Gauch, 10.

68 Cordey/ Giger-CHK OR Art. 404 Rn. 13; Fellmann-BK OR Art. 404 Rn. 52.

69 Gümüş, C. II, 199; Gauch, 12; Huguenin, § 35 Rn. 3305; Weber-BSK OR I, Art. 404, Rn. 16; Weber-KUKO OR, Art. 404 Rn. 9. vgl. Außerdem Yarg. 23. HD., T. 30.05.2013, E. 2013/1342, K. 2013/3623, (KBİBB, 6098/m.512).

70 Weber-BSK OR I, Art. 404, Rn. 16; Gümüş, C. II, 199; Seçer, 898.

ist im Gesetz nicht eindeutig festgelegt. Daher wird die Frage, wann die Unzeit eintritt, in der Doktrin und den Gerichtsentscheidungen unterschiedlich beurteilt. Nach einer Meinung[71] drückt die Kündigungserklärung entgegen dem Vertrauen des Kündigungsgegners auf die Fortsetzung des Vertrags die Unzeit aus. Laut einer anderen Meinung[72] ist der Beauftragte verpflichtet, das Interesse des Auftraggebers zu wahren. Würde der Vertrag daher zu einem Zeitpunkt gekündigt, zu dem es dem Auftraggeber nicht möglich sei, seine Geschäfte selbst zu erledigen oder einen anderen Beauftragten zu ernennen, würde dies die Unzeit genannt. Insoweit sei der Gegenpartei genügende Zeit einzuräumen, um sich auf das Ende des Auftragsvertrags vorzubereiten[73]. Gemäß BGB § 671 tritt auch die Kündigung unzeitig ein, wenn der Arbeitgeber die Arbeit, die das Thema des Vertrags darstellt, selbst nicht verrichten kann oder wenn er sie mithilfe einer dritten Person oder auf einem anderen Weg nicht verwirklichen kann[74]. In der Doktrin wird auch von der Unzeit gesprochen, wenn der Moment, in dem der Vertrag beendet wird, für den Kündigungsgegner zum besonders nachteiligen Ergebnis führt[75]. Dieser Meinung zufolge kann die Zahlung eines Schadenersatzes gefordert werden, wenn nur angesichts des Auftragswiderrufs einem besonderen Nachteil ausgesetzt wird. Weil das Beendigungsrecht ein wichtiges Merkmal des Auftrags sei, müssten die Parteien, besonders der Beauftragte, auf das Widerrufsrisiko berücksichtigen. Obwohl es keinen objektiven Grund gebe, gestatte die Bestimmung die jederzeitige Beendigung des Auftragsvertrags. Aus diesem Grund könne nur das Vorhandensein eines besonderen Nachteils die Anknüpfung der Ausübung des Beendigungsrechts an eine Sanktion rechtfertigen[76]. Auch jede Beendigung sei nicht unzeitig. Dazu müssten die Erwartungen des Kündigungsgegners, dass den Auftrag ordnungsgemäß ausgeführt würde, vereitelt werden[77]. Bei der Feststellung einer unzeitigen Beendigung verlangt das Bundesgericht auch in seiner Entscheidung[78], dass die beendende Partei wegen Beendigung des Auftrags ohne Grund dem Kündigungsgegner besondere Nachteile zufügt. Folglich sollte die Unzeit unter Berücksichtigung der Interessen der Vertragsparteien in jedem Vertragsverhältnis und der Umstände des konkreten Einzelfalls bestimmt werden[79]. Bei dieser Bestimmung sollte der Grundsatz von Treu und Glauben berücksichtigt werden[80].

71 Eren, Özel Hükümler, 726; Gauch, 12.

72 Başpınar, 260; Seçer, 895; Tandoğan, C. II, 638; Gautschi, Art. 404 Rn. 18a.

73 Peyer, 128.

74 Erman, BGB § 671 Rn. 4; Larenz, 420.

75 Bühler-OFK OR Art. 404, Rn. 5; Krauskopf, Art. 404 Rn. 8; Gümüş, C. II, 199; Weber-BSK OR I, Art. 404, Rn. 16; Fellmann-BK OR Art. 404 Rn. 48; KUKO OR-Weber, Art. 404 Rn. 9; Gautschi, Art. 404 Rn. 17d; Krauskopf, Kündigung, 57; Graham-Siegenthaler, Art. 404 Rn. 11; Becker, Art. 404 Rn. 5.

76 Bühler-OFK OR Art. 404, Rn. 5; Krauskopf, Art. 404 Rn. 8.

77 Fellmann-BK OR Art. 404 Rn. 48.

78 BGE 110 II 380, vom 12.06.1984 E 3b.

79 Gauch, 12-13; Peyer, 128.

80 Peyer, 128; Başpınar, 260; Seçer, 896; Gümüş, C. II, 199; Yücer Aktürk, 209.

Nach der Auffassung des Bundesgerichts[81] hat die beendende Partei keinen sachlich vertretbaren Grund, damit die Beendigung des Vertrags für unzeitig gehalten und Schadenersatz erhoben werden kann. Falls die beendende Partei dies aus wichtigem Grund tut, kann er den Vertrag auch unzeitig beenden. In diesem Fall kann keine Unzeit vorliegen[82]. Sofern es außerdem einen wichtigen Grund für die Vertragsbeendigung gibt, kann der Richter die Schadenersatzssumme reduzieren oder entscheiden, dass sie überhaupt nicht bezahlt werden sollte[83]. Der Richter entscheidet nach seinem Ermessen, ob und inwieweit die beendende Vertragspartei Schadenersatz zu leisten hat[84].

Die Partei, die den Vertrag unzeitig beendet, hat negatives Interesse (Vertrauensschaden) des Kündigungsgegners zu ersetzen, das er durch die Kündigung erlitten hat[85]. Denn der Geschädigte rechnet damit nicht, dass der Vertrag vorzeitig oder zumindest zu diesem Zeitpunkt gekündigt wird. Im Gegenteil hat der Kündigungsgegner einen Verlust erlitten, weil er darauf vertraut, dass der Vertrag fortgesetzt wird[86]. Aber der Kündigungsgegner kann nicht verlangen, dass positives Interesse (das Erfüllungsinteresse) ersetzt wird[87]. Negatives Interesse des Beauftragten entsteht durch bestimmte Aufwendungen oder Verwendungen, die für die ordnungsgemäße Erfüllung des Auftrags vollbracht werden, und die nach Beendigung doch nutzlos werden. Die betreffenden Ausgaben sind jedoch Aufwendungen, die der Beauftragte hätte verlangen können, dass vom Auftraggeber gezahlt wird, wenn der Vertrag fortgesetzt worden wäre[88]. Außerdem sind Verluste, denen der Beauftragte durch Kündigung ausgesetzt ist, im Umfang des negativen Schadens enthalten. Denn das gerechtfertigte Vertrauen des Beauftragten auf die Durchführung des Auftrags wurde vereitelt und ist das von ihm erwartete gewinnbringende Geschäft nicht erfolgt[89]. Darüber hinaus kann der Beauftragte Ersatz für den Schaden verlangen, den er erlitten hat, weil er die Gelegenheit verpasst hat, einen anderen Vertrag abzuschließen[90]. Denn er hat vielleicht nicht gewollt oder war nicht in der Lage, einen anderen Vertrag zu schließen, indem er sich auf den Abschluss des beendeten

81 BGE 134 II 297 vom 05.11.2008 E 5.2.

82 Tandoğan, C. II, 638; Weber-BSK OR I, Art. 404, Rn. 16; Becker, Art. 404 Rn 5; Gautschi, Art. 404 Rn. 18a; Peyer, 128.

83 Gauch, 12-13.

84 Gauch, 13.

85 Gauch, 11, 13; Fellmann-BK OR Art. 404 Rn. 72; Seçer, 899; Bühler-OFK OR Art. 404, Rn. 7; Eren, Özel Hükümler, 726; Cordey/ Giger-CHK OR Art. 404 Rn. 16; Weber-BSK OR I, Art. 404, Rn. 17; Atilla Altop *Yönetim Danışmanlığı Sözleşmesi*, (2003), 182; Krauskopf, Art. 404 Rn. 9; Peyer, 129; Graham-Siegenthaler, Art. 404 Rn. 13; Tandoğan, C. II, 640; Gautschi, Art. 404 Rn. 19; Yavuz, 667; Weber-KUKO OR, Art. 404 Rn. 9; Akipek, 76; Guhl, 556; Karabağ Bulut, 155. vgl. Außerdem Yarg. 23. HD., T. 30.05.2013, E. 2013/1342, K. 2013/3623, (KBİBB, 6098/m.512). vgl. für die Bundesgerichtsentscheidung 4A_284/2013 vom 13.02.2014, E 3.6.1.

86 Gauch, 11.

87 Krauskopf, Art. 404 Rn. 9; Graham-Siegenthaler, Art. 404 Rn. 11; Altop, 182; Tandoğan, C. II, 640. vgl. für die Gegenmeinung Gümüş, C. II, 200.

88 Gauch, 11; Buff/ von der Crone, 339; Fellmann-BK OR Art. 404 Rn. 72; Krauskopf, Art. 404 Rn. 9.

89 Gauch, 11; Krauskopf, Art. 404 Rn. 9.

90 Fellmann-BK OR Art. 404 Rn. 73.

Auftragsvertrags verlässt. Es kann jedoch zu Schäden kommen, die nicht verhindert werden können, wenn einseitiges Beendigungsrecht ausgeübt wird. Nach einer Meinung[91] in der Doktrin fallen die betreffenden Schäden nicht in den Bereich des negativen Schadens. Selbst wenn der Vertrag unzeitig beendet würde, könnte er daher nicht beansprucht werden. In diesem Zusammenhang könnten die Kosten für die Vertragsabwicklung nicht übernommen werden. Aufgrund der vorzeitigen Beendigung des Vertrages werden die zu erzielenden Vorteile jedoch auch von dem zu zahlenden Betrag abgezogen[92].

IV. DIE MEINUNGEN ZUR NATUR EINSEITIGEN BEENDIGUNGSRECHTS

A. Die Meinung Zwingender Natur

Die Rechtsnatur des Art. 512 türkischen Obligationenrechts, der den Vertragsparteien einseitiges Beendigungsrecht zuerkennt, wird im Gesetz nicht eindeutig geregelt. In der Doktrin und den Gerichtsentscheidungen gibt es unterschiedliche Beurteilungen hinsichtlich der Rechtsnatur der Bestimmung. Herrschende Ansicht[93] in der Doktrin ist, dass die Bestimmung zwingender Natur ist, da das Vertrauen, das die Parteien zueinander haben, in den Auftragsverträgen im Vordergrund stehe[94]. Es sei vorausgesetzt, dass dieses Vertrauen sich auf den gesamten Vertrag erstrecke. Wenn das Vertrauensverhältnis zwischen den Parteien ende, mache es keinen Sinn, zu versuchen, den Vertrag aufrechtzuerhalten[95]. Der Gesetzgeber erkenne auch unter Berücksichtigung des Vertrauens auf beiden Seiten des Vertrages das jederzeitige und einseitige Beendigungsrecht zu[96].

Die Annahme der zwingenden Natur des einseitigen Beendigungsrechts entfaltet die Unverzichtbarkeit auf das Beendigungsrecht. Deshalb kann der Beauftragte oder der Auftraggeber das Recht, den Vertrag jederzeit zu beenden, nicht beseitigen oder beschränken[97]. Denn die Vereinbarung gegen die Bestimmung

91 Seçer, 900. vgl. für die Gegenmeinung Akipek, 76.

92 Yarg. 23. HD., T. 30.05.2013, E. 2013/1342, K. 2013/3623, (KBİBB, 6098/m.512).

93 Graham-Siegenthaler, Art. 404 Rn. 5; Hans Merz Die Privatrechtliche Rechtsprechung des Bundesgerichts im Jahre 1990 – Obligationenrecht", (Hrsg. Jörg Schmid, Frédéric Krauskopf), (1992), ZBJV, Heft 4, 202-220, 220; Peter Münch "Die jederzeitige Auflösbarkeit des Auftrags bleibt zwingend", (Hrsg. Jörg Schmid, Frédéric Krauskopf), (1997) ZBJV, Heft 5, 333-334, 334; Yavuz, 667; Guhl, 555; Serozan, 130; Altop, 181; Becker, Art. 404 Rn. 8; Yavuz, 667; Gümüş, C. II, 197; Krauskopf, Art. 404 Rn. 2; Krauskopf, Kündigung, 58; Başpınar, 258; Gautschi, Art. 404 Rn. 15a; Yücer Aktürk, 209; Weber-KUKO OR, Art. 404 Rn. 5; Akipek, 75; Aydoğdu/ Kahveci, 803. Laut Becker ist aber einseitiges Beendigungsrecht für sui generis Verträge nicht zwingend. vgl. Becker, Art. 404 Rn. 8.

94 Tandoğan, C. II, 613; Fellmann-BK OR Art. 404 Rn. 8; Yavuz, 666; Buff/ von der Crone, 339; Gümüş, C. II, 197; Eren, Özel Hükümler, 718-719; Gauch, 13 ff.; Gautschi, Art. 404 3a; Başpınar, 258-259; Krauskopf, Art. 404 Rn. 2; Akipek, 75.

95 Krauskopf, Art. 404 Rn. 2.

96 Başpınar, 258-259.

97 Krauskopf, Art. 404 Rn. 2; Krauskopf, Kündigung, 58; Münch, 334; Bühler-OFK OR Art. 404 Rn. 3; Altop, 181; Yavuz, 667; Akipek, 75; Becker, Art. 404 Rn. 8; Gümüş, C. II, 197; Weber-BSK OR I, Art. 404, Rn. 13; Weber-KUKO OR, Art. 404 Rn. 7; Gautschi, Art. 404 Rn. 10a; Guhl, 556; Aydoğdu/ Kahveci, 803.

des Art. 512 widerspricht der Regel, wonach niemand auf seine Rechts- und Handlungsfähigkeit wenn auch teilweise verzichten darf (Art. 23 TZGB), weswegen die gegen die Bestimmung des Art. 512 geschlossenen Vereinbarungen ungültig sind. Denn die Bestimmung dient dazu, die Persönlichkeit, Rechte und Freiheit beider Vertragsparteien zu schützen[98]. Diese Regel ist auf das Merkmal des Vertrags zurückzuführen[99]. Die jederzeitige Beendigung des Auftrags wurde in die allgemeine Ordnung des Auftragsrechts integriert. In dieser Ordnung sind sowohl entgeltliche-, unentgeltliche Auftragsverhältnisse als auch die von der Persönlichkeit abhängigen und anderen Auftragsverhältnisse geregelt. Daher unterliegen all diese den Beendigungsbestimmungen des Auftragsvertrags (Art. 512-514 TOR)[100]. Ein Verwaltungsberatungsvertrag ist zum Beispiel ein typischer Auftragsvertrag. Beide Vertragsparteien können den Vertrag grundsätzlich mit einseitiger Willenserklärung beenden. Das ist ein typisches Merkmal des Vertrags und entspricht den Interessen der Parteien. Denn zwischen den Parteien besteht ein sehr viel enges Vertrauensverhältnis, das die Ausführung des Vertrages unzumutbar machen kann, wenn es verloren geht[101]. Einseitiges Beendigungsrecht des Auftragsvertrags hat für den Fernunterrichtsvertrag auch im Wege einer Analogie die Anwendung zu finden[102].

Wenn angenommen wird, dass einseitiges Beendigungsrecht zwingender Natur ist, lässt sich keine Regelung treffen, die die Ausübung dieses Rechts erschwert[103]. Zum Beispiel darf nicht die Zahlung einer Vertragsstrafe (Konventionalstrafe) vereinbart werden, wenn der Vertrag unzeitig beendet wird[104]. Es soll jedoch angemerkt werden, dass im Falle einer Verletzung des Auftragsvertrags die Entscheidung, die Vertragsstrafe gezahlt zu werden, zulässig ist. Denn einseitiges Beendigungsrecht von Parteien schützt nur die Möglichkeit, den Vertrag jederzeit und ohne Grund aufzulösen. Es ist nicht verboten, dass die Parteien eine Vertragsstrafe wegen der Leistungsverletzung vereinbaren, es sei denn, einseitiges Beendigungsrecht ist eingeschränkt oder beseitigt[105].

Im deutschen Recht wird dem Beauftragten und dem Auftraggeber das jederzeitige Beendigungsrecht zuerkannt (BGB § 671). Wenn kein wesentlicher Grund vorliegt, kann gemäß Absatz 2 der § 671 BGB der Beauftragte den Vertrag dergestalt beenden, dass der Auftraggeber das Geschäft anderweitig besorgen lassen kann. Obwohl es keinen wichtigen Grund gibt, muss der Beauftragte den Schaden ersetzen, der dem

98 Başpınar, 255.

99 Başpınar, 255; Altop, 78.

100 Bühler-OFK OR Art. 404 Rn. 2.

101 Altop, 180.

102 Yücer Aktürk, 209.

103 Seçer, 901; Bühler-OFK OR Art. 404 Rn. 3; Krauskopf, Art. 404 Rn. 3; Becker, Art. 404 Rn. 8; Gautschi, Art. 404 Rn. 10e.

104 Bühler-OFK OR Art. 404 Rn. 3; Krauskopf, Art. 404 Rn. 3; Graham-Siegenthaler, Art. 404 Rn. 7; Weber-KUKO OR, Art. 404 Rn. 7; Seçer, 901; Münch, 334; Becker, Art. 404 Rn. 8; Gümüş, C. II, 197; Weber-BSK OR I, Art. 404, Rn. 13.

105 Krauskopf, Art. 404 Rn. 3.

Auftraggeber daraus erwächst, wenn er unzeitig kündigt. Wenn es aber einen wichtigen Grund i.S.v. Absatz 3 gibt, kann der Beauftragte dieses Recht ausüben, auch wenn er das Kündigungsrecht aufgegeben hat[106]. Nach einer Meinung[107] in der Lehre sind der zweite und dritte Absatz des § 671 BGB zwingender Natur und der erste Absatz ist dispositiver Natur. Daher kann das Beendigungsrecht des Beauftragten beseitigt oder eingeschränkt werden[108]. Falls es aber einen wichtigen Grund gibt, kann er sein Kündigungsrecht weiterhin ausüben (BGB § 671)[109]. Es ist fraglich, ob das Recht des Auftraggebers, es zurückzunehmen, aufgehoben werden kann[110]. Nach anderer Meinung[111] hat § 671 BGB dispositive Natur.

B. Die Meinung Dispositiver Natur

Die Meinung, dass das Recht, den Auftragsvertrag einseitig zu beendigen, zwingender Natur ist, beruht auf einem intensiven Vertrauensverhältnis zwischen den Auftragsvertragsparteien, wie oben erwähnt. Aber das betreffende intensive Vertrauen existiert nicht in allen auftragbasierten Beziehungen[112]. Darum wird in der Doktrin[113] ausgedrückt, dass die Bestimmung des Art. 512 nicht zwingender Natur, sondern dispositiver Natur ist.

Laut Gauch[114] berücksichtigt das Recht des Auftraggebers, den Auftragsvertrag jederzeit zu beenden, die Umstände, in denen der Beauftragte zugunsten des Auftraggebers handelt und in der Ausführung des Auftrags kein eigenes Interesse hat. Zwar rechtfertige dieser Umstand einseitiges Beendigungsrecht, wenn der Auftraggeber den Vertrag beende. Aber dieser Umstand bedeute auch nicht, dass betreffende Bestimmung zwingender Natur sei. Andernfalls müsse jede rechtmäßige Regelung absolute zwingender Natur seien. Der Beauftragte wolle jedoch das jederzeitige Beendigungsrecht des Auftraggebers nicht in allen Situationen annehmen. Denn in der Vertragspraxis sei das Gegenteil der Fall. Der Beauftragte habe eigenes Interesse bei der Durchführung des Auftrags im Einzelfall. Darüber hinaus sei es möglich, dass der Beauftragte sein eigenes Verdienstinteresse im entgeltlichen Auftrag sichern wolle. Aus diesem Grund könne die Frage nicht verstanden werde, warum eine Vereinbarung rechtswidrig sei, die das jederzeitige Beendigungsrecht des Auftraggebers einschränke oder ausschließe[115].

106 vgl. für umfassende Informationen Larenz, 420.

107 Erman, BGB § 671 Rn. 1.

108 Larenz, 420.

109 Medicus/ Lorenz, 304; Larenz, 420; Erman, BGB § 671 Rn. 1.

110 Larenz, 420; Erman, BGB § 671 Rn. 1; Andrea Mondini/ Manuel Liatowitsch "Jederzeitige Kündbarkeit von Aufträgen schadet dem Dienstleistungsstandort Schweiz Zeit für eine Praxisänderung zu Art. 404 OR", (2009), AJP, 294-300, 298.

111 Medicus/ Lorenz, 304.

112 Peyer, 158-159; Gauch, 15-16. vgl. Außerdem Cordey/ Giger-CHK OR Art. 404 Rn. 8.

113 Gauch, 18, 20; Fellmann-BK OR Art. 404 Rn. 132.

114 Gauch, 17.

115 vgl. in die gleiche Richtung Fellmann-BK OR Art. 404 Rn. 118.

Das Recht des Beauftragten, den Auftragsvertrag jederzeit zu beenden, kann nur im unentgeltlichen Auftrag überzeugend sein[116]. Aber es gibt keinen entgegengesetzten zwingenden Grund selbst im unentgeltlichen Auftrag, wenn der Beauftragte auf das jederzeitige Beendigungsrecht verzichten will. Als Ergebnis wird nicht akzeptiert, dass einseitiges Beendigungsrecht zwingender Natur ist und ein unverzichtbares Merkmal des Auftrags ist. Im Gegenteil soll es anerkannt werden, dass die Bestimmung nur dispositiver Natur ist und dass die Parteien anders vereinbaren können[117].

Falls es akzeptiert wird, dass die Bestimmung des Art. 512 dispositiver Natur ist, werden die Vertragsparteien jederzeit den Verzicht auf das Widerruf- und/oder Kündigungsrecht vereinbaren können. Außerdem werden sie die Anwendung dieses Rechts beschränken können[118]. Zum Beispiel werden sie die Anwendung einseitigen Beendigungsrechts an bestimmte Voraussetzungen anknüpfen oder schwieriger machen können[119]. So werden sie den Auftragsvertrag an eine Laufzeit binden oder über eine Kündigungsfrist für ihre Beendigung vereinbaren können[120]. Sie würden darüber hinaus einige Gründe für die Beendigung festlegen können, für die das einseitige Beendigungsrecht ausgeübt wird[121]. Ebenso kann es vereinbart werden, dass die Partei, die ohne Grund das Beendigungsrecht ausübt, dem Kündigungsgegner eine Vertragsstrafe oder das positive Interesse (das Erfüllungsinteresse) zahlt[122].

Nach der Meinung, dass die Bestimmung dispositiver Natur ist, ist es unmöglich, dass die Vertragsparteien von der Bestimmung Art. 512 unbegrenzt abweichen, selbst wenn es angenommen wird, dass sie dispositive Natur hat. Im Gegensatz dazu dürfen die Vereinbarungen, die gegen die Bestimmung des Art. 512 verstoßen, nicht den zwingenden Bestimmungen, der öffentliche Ordnung, Sitten oder Persönlichkeitsrechten widersprechen (Art. 27 TOR)[123]. Diese Vereinbarung sind mit Art. 23 TZGB überprüfbar. Deswegen können die Vertragsparteien mit der Vereinbarung, die sie treffen werden, ihre Freiheit nicht aufgeben oder rechts- oder sittenwidrig einschränken[124]. Selbst wenn die Vertragsparteien die Vereinbarungen entgegen der Bestimmung Art. 512 schließen werden, werden sie aus wichtigem Grund den Vertrag beenden können, wenn die Fortsetzung des Auftragsvertrag unzumutbar ist[125]. Besteht ein wichtiger Grund auch nach BGB § 671, kann der

116 Fellmann-BK OR Art. 404 Rn. 8; Gauch, 18; Peyer, 151; Becker, Art. 404 Rn. 1.

117 Gauch, 18.

118 Gauch, 20; Fellmann-BK OR Art. 404 Rn. 133.

119 Gauch, 20.

120 Fellmann-BK OR Art. 404 Rn. 133; Hubert Stöckli "Art. 404 OR ist zwingend, was sich aber nicht immer auswirkt - Entscheid des Bundesgerichts vom 10. Februar 2009 (4A_437/2008)", (2010), BR, Heft 4, 178-179, 179.

121 Fellmann-BK OR Art. 404 Rn. 133.

122 Gauch, 20.

123 Fellmann-BK OR Art. 404 Rn. 137; Gauch, 18; Karabağ Bulut, 167.

124 Gauch, 18; Karabağ Bulut, 167.

125 Fellmann-BK OR Art. 404 Rn. 133; Peyer, 159, 202.

Beauftragte den Auftragsvertrag beenden, auch wenn er auf sein Beendigungsrecht verzichtet[126].

C. Die Meinung, Die Je nach Merkmalen des Auftragsvertrags Abgrenzt

In der Doktrin wird eine neue Meinung geltend gemacht, indem es gedacht wird, dass einseitiges Beendigungsrecht nicht für alle Auftragsverträge zwingender Natur ist, aber auch nicht als dispositive Natur akzeptiert wird. Nach dieser Meinung ist die Rechtsnatur des Widerrufs und der Kündigung aus dem Auftragsvertrag nicht absolut für die Auftragsverhältnisse zu definieren. Im Gegensatz dazu sollen die Auftragsverträge als typische oder atypische unterteilt werden, damit die Rechtsnatur dieses den Parteien zuerkannten Rechts ermittelt werden kann[127]. Bei dieser Abgrenzung werden eigenartige Gründe für den Auftrag beurteilt, die während der Regelung des einseitigen Beendigungsrechts berücksichtigt werden. Laut dieser Meinung sind die Auftragsverhältnisse zwingender Natur, bei denen ein besonderes Vertrauensverhältnis zwischen den Parteien besteht[128] und die unentgeltlich[129] oder höchstpersönlich[130] sind. Denn diejenigen, die diese Eigenschaften aufweisen, werden als typisches Auftragsverhältnis bezeichnet[131]. Insbesondere werden die Auftragsverhältnisse, in denen eine besondere Vertrauensbeziehung besteht, als typisches Auftragsverhältnis charakterisiert[132]. In diesem Zusammenhang sind der Ärztevertrag, den der Patient mit dem Arzt schließt, und Rechtsanwaltsvertrag zwischen dem Rechtsanwalt und dem Mandanten typische Auftragsverhältnisse, deren Parteien eine Vertrauensbeziehung haben[133]. In diesen Verträgen kann der Beauftragte solche Tätigkeiten durchführen, dass er die Persönlichkeit des Auftraggebers beeinflusst[134]. Natürlich gilt der Spitalaufnahmevertrag auch als Vertrag mit einem besonderen Vertrauensverhältnis. Daher wird angenommen, dass der Patient das Recht auf Kündigung hat[135]. Auch hier sollte der Vertrag mit dem Treuhänder als typisch charakterisiert werden[136].

Der Beauftragte hat den Auftrag im unentgeltlichen Auftrag jederzeit zu beenden[137]. Doch ist einseitiges Beendigungsrecht zwingender Natur, wenn es im unentgeltlichen

126 vgl. für umfassende Informationen Larenz, 420.

127 Cordey/ Giger-CHK OR Art. 404 Rn. 8; Eren, Özel Hükümler, 726; Mondini/ Liatowitsch, 300; Huguenin, § 35 Rn. 3310.

128 Cordey/ Giger-CHK OR Art. 404 Rn. 8; Mondini/ Liatowitsch, 300; Seçer, 891-892; Burri, 199.

129 Cordey/ Giger-CHK OR Art. 404 Rn. 8; Buff/ von der Crone, 336; Mondini/ Liatowitsch, 295, 300; Burri, 199.

130 Buff/ von der Crone, 336; Mondini/ Liatowitsch, 295, 300; Burri, 199.

131 Mondini/ Liatowitsch, 293; Buff/ von der Crone, 336-337. vgl. Außerdem OGer LU vom 17.12.1988, SJZ 85/1989, 215 f.

132 Cordey/ Giger-CHK OR Art. 404 Rn. 8; Eren, Özel Hükümler, 726.

133 Mondini/ Liatowitsch, 300; Buff/ von der Crone, 336-337; Seçer, 891-892; Karabağ Bulut, 157. vgl. Außerdem OGer LU vom 17.12.1988, SJZ 85/1989, 215.

134 Karabağ Bulut, 157.

135 Mondini/ Liatowitsch, 297.

136 Mondini/ Liatowitsch, 300; Buff/ von der Crone, 336-337.

137 Cordey/ Giger-CHK OR Art. 404 Rn. 8; Gauch, 18.

Auftrag ein starkes Vertrauensverhältnis zwischen den Vertragsparteien gibt, während es genommen wird, dass einseitiges Beendigungsrecht wesentlich im entgeltlichen Auftrag dispositiver Natur ist[138]. In einigen Fällen kann der Erfolg des Auftrags jedoch auch von persönlicher Treue und besonderer Sorgfalt abhängen. Das zu besorgende Geschäft kann auch die intellektuelle und moralische Persönlichkeit des Beauftragten tief beeinflussen. In diesem Fall ist anzunehmen, dass das Recht, den Auftragsvertrag jederzeit zu kündigen, zwingender Natur ist[139].

Die Auftragsverhältnisse, die nicht als typisch zu bezeichnen sind, sind atypischer Natur. Einseitiges Beendigungsrecht ist für atypisches Auftragsverhältnis keine zwingender Natur[140]. In diesen Auftragsverhältnissen haben die Vertragsparteien frei zu werden, eine verbindliche Vertragslaufzeit oder Kündigungsfrist festzulegen. In diesen Verträgen kann jedoch die Kündigung aus wichtigem Grund wie bei allen Dauerschuldverhältnissen der Fall sein[141]. Der Alleinvertretungs-, Liegenschaftenverwaltungs-, Unterrichtsvertrag und das Gutachten sind atypische Auftragsverhältnisse[142].

D. Der Status In Gerichtsentscheidungen

Laut den Entscheidungen des schweizerischen Bundesgerichts[143] und türkischen Kassationshofs[144] ist das Recht, den Auftragsvertrag einseitig zu beendigen, zwingender Natur, zumal das Vertrauen, das die Parteien ineinander haben, im Vordergrund steht[145]. Aber wenn das Vertrauensverhältnis zwischen den Parteien verschwunden ist, hat es keinen Sinn, den Vertrag zu aufrechtzuerhalten[146]. Daher

138 Cordey/ Giger-CHK OR Art. 404 Rn. 8.

139 Peyer, 160-161.

140 Eren, Özel Hükümler, 726.

141 Mondini/ Liatowitsch, 300; Karabağ Bulut, 157; Aldemir Toprak, 312.

142 Peyer, 163.

143 BGE 109 II 462 vom 13.12.1983 E 4; BGE 98 II 305 vom 03.10.1972; BGer 4A_141/2011 vom 06.07.2011; BGE 115 II 464 vom 19.12.1989 E 2; 4A_284/2013 vom 13.02.2014, E 3.5.1; 4A_437/2008 vom 10.02.2009 E 1.4; BGE 109 II 462 vom 13.12.1983 E 3e; BGE 104 II 108 vom 23.05.1978 E 4.

144 Yarg. 3. HD., T. 29.12.1997, E. 1997/11339, K. 1997/12497 (YKD 1998/6 832; KBİBB, 743/m.4; 818/m.396/1); Yarg. 13. HD., T. 16.05.2013, E. 2013/8249, K. 2013/12850 (KBİBB, 1136/m.164/4; 818/m.396); Yarg. 13. HD., T. 07.11.1997, E.1997/7395, K.1997/8923 (YKD 1998/2 227; KBİBB, 818/m.325,386,390,396); Yarg. HGK T. 11.05.2016, E. 2015/5-3290, K. 2016/601 (KBİBB, 6098/m.512, 513); Yarg. 4. HD. T. 15.05.1980, E. 1980/1600, K. 1980/6365 (KBİBB, 818/m.161).

145 Yarg. 13. HD. T. 12.03.2013, E. 2012/23911, K. 2013/6083 (KBİBB, 1136/m.174; 818/m.396); Yarg. 13. HD. T. 14.01.2008, E. 2007/8188, K. 2008/253 (KBİBB, 818/m. 389, 390, 392, 396/1; 1136/m. 163); Yarg. HGK T. 11.10.2006, E. 2006/13-610, K. 2006/639 (KBİBB, 1136/m. 34, 164, 174; 818/m. 390, 396); Yarg. 13. HD. T. 20.09.2018 E. 2018/3378, K. 2018/8178 (KBİBB, 6098/m.512/1; 818/m.396/1; 1136/m.171/1,173,174/1); Yarg. 13. HD., T. 16.11.2015, E. 2014/15124, K. 2015/33136 (KBİBB, 6098/m. 512); Yarg. HGK T. 29.11.2018, E. 2017/13-568, K. 2018/1811 (KBİBB, 818/m.386/1,396/1; 1136/m.174/2). vgl. Außerdem Yarg. HGK T. 11.05.2016, E. 2015/5-3290, K. 2016/601 (KBİBB, 6098/m.512, 513); Yarg. 4. HD. T. 15.05.1980, E. 1980/1600, K. 1980/6365 (KBİBB, 818/m.161). vgl. für die Entscheidungen schweizerischen Bundesgericht BGE 115 II 464 vom 19.12.1989 E 2a; 4A_284/2013 vom 13.02.2014, E 3.5.1; BGE 4A_141/2011 vom 06.07.2011 E 2.2; 4A_437/2008 vom 10.02.2009 E 1.4; BGE 4A_213/2008 vom 29.07.2008 E 5.2; BGE 109 II 462 vom 13.12.1983 E 3e; BGE 104 II 108 vom 23.05.1978 E 4; BGE 98 II 305 vom 03.10.1972 E 2a, c.

146 BGE 115 II 464 vom 19.12.1989 E 2a. vgl. Außerdem Yarg. 13. HD. T. 26.12.2008, E. 2008/8962, K. 2008/15715 (KBİBB, 1136/m. 164; 818/m. 386, 396).

kann das Recht, den Auftragsvertrag einseitig zu beendigen, nicht beseitigt oder eingeschränkt werden[147]. Es können keine Vorkehrungen getroffen werden, um die Ausübung einseitigen Beendigungsrechts zu erschweren[148]. So ist die Zahlung der Vertragsstrafe nach den Entscheidungen des schweizerischen Bundesgerichts[149] und türkischen Kassationshofs[150] unzulässig, wenn einseitiges Beendigungsrecht ausgeübt wird. Es gibt aber auch Urteile des schweizerischen Bundesgerichts[151], wonach die Vertragsstrafe als Pauschalierung des Schadenersatzes gilt.

Sowohl der türkische Kassationshof als auch das schweizerische Bundesgericht unterscheiden in ihren Entscheidungen nicht diesbezüglich, sodass nach dem türkischen Kassationshof Art. 512 TOR für alle Arten vom Auftrag zwingender Natur ist[152]. Zum Beispiel kann jede Partei in einem Rechtsberatungsvertrag den Vertrag jederzeit beenden[153]. Schweizerisches Bundesgericht[154] weitet auch den Anwendungsbereich der Bestimmung, die den Vertragsparteien das jederzeitige Beendigungsrecht zubilligt, auf die atypischen Aufträge aus. Das schweizerische Bundesgericht ist der Meinung, dass einseitiges Beendigungsrecht atypische Auftragsverträge sowie typische Auftragsverhältnisse umfasst und für gemischte Verträge gelten sollte. In einigen der Entscheidungen, die das Bundesgericht insbesondere über den Einzelfall trifft, bewertet es doch einseitiges Beendigungsrecht für einige von den Innominatverträgen positiv und für einige von den Innominatverträgen negativ, sodass laut dem Bundesgericht die Ausübung einseitigen Beendigungsrechts im *Architekturvertrag*[155], der die Elemente des Werk- und Auftragsvertrags enthält, obligatorisch ist. Denn das Vertrauensverhältnis zwischen den Vertragsparteien ist in den Phasen Projekt, Bau und Planung so wichtig, dass das Vorhandensein des einseitigen Beendigungrechts obligatorisch ist. Außerdem findet einseitiges Beendigungsrecht in dem *Finanzierungsvereinbarung*[156],

147 vgl. für die Entscheidungen türkisches Kassationshof Yarg. 3. HD., T. 29.12.1997, E. 1997/11339, K. 1997/12497 (YKD 1998/6 832; KBİBB, 743/m.4; 818/m.396/1); Yarg. 13. HD., T. 07.11.1997, E.1997/7395, K.1997/8923 (YKD 1998/2 227; KBİBB, 818/m.325,386,390,396); Yarg. 13. HD., T. 16.05.2013, E. 2013/8249, K. 2013/12850 (KBİBB, 1136/m.164/4; 818/m.396). vgl. für die Entscheidungen schweizerischen Bundesgerichts 4A_284/2013 vom 13.02.2014, E 3.5.1; BGE 4A_141/2011 vom 06.07.2011 E 2.2; 4A_437/2008 vom 10.02.2009 E 1.4; BGE 109 II 462 vom 13.12.1983 E 3e; BGE 104 II 108 vom 23.05.1978 E 4; BGE 98 II 305 vom 03.10.1972 E 2a, c; BGE 115 II 464 vom 19.12.1989 E 2a.

148 BGE 104 II 108 vom 23.05.1978 E 4; BGE 110 II 380 vom 12.06.1984 E 3a.

149 BGE 104 II 108 vom 23.05.1978 E 4; BGE 103 II 129 vom 05.04.1977 E 1; BGE 109 II 462 vom 13.12.1983 E 4.

150 Yarg. 3. HD., T. 29.12.1997, E. 1997/11339, K. 1997/12497 (YKD 1998/6 832; KBİBB, 743/m.4; 818/m.396/1); Yarg. 13. HD., T. 16.05.2013, E. 2013/8249, K. 2013/12850 (KBİBB, 1136/m.164/4; 818/m.396).

151 BGE 109 II 462 vom 13.12.1983; BGE 110 II 380 vom 12.06.1984.

152 Yarg. 3. HD., T. 29.12.1997, E 1997/11339, K. 1997/12497 (YKD 1998/6 832; KBİBB, 743/m.4; 818/m.396/1).

153 Yarg. 13. HD. T. 14.01.2008, E. 2007/8188, K. 2008/253 (KBİBB, 818/m. 389, 390, 392, 396/1; 1136/m. 163).

154 BGE 115 II 464 vom 19.12.1989 E 2; BGE 109 II 462 vom 13.12.1983 E 4; BGer 4A_141/2011 vom 06.07.2011 E 2; BGE 4A_284/2013 vom 13.02.2014, E 3.5.1.

155 BGE 109 II 462 vom 13.12.1983 E 3d; BGE 110 II 380 vom 12.06.1984 E 2; BGE 115 II 464 vom 19.12.1989 E 2a. vgl. für die gegenteilige Einschätzung Stöckli, 179. vgl. Außerdem für die Einschätzung der BGE 110 II 380. Cordey/ Giger-CHK OR Art. 404 Rn. 11; Mondini/ Liatowitsch, 295; Krauskopf, Art. 404, Rn. 1; Graham-Siegenthaler, Art. 404 Rn. 6.

156 BGE 4A_213/2008 vom 29.07.2008 E 5.2. vgl. zur Würdigung Cordey/ Giger-CHK OR Art. 404 Rn. 11.

Managementvertrag[157], *Liegenschaftsverwaltungsvertrag*[158], *Unterrichtsvertrag*[159] Anwendung. Das schweizerische Obergericht[160] hat das Urteil gefällt, demzufolge einseitiges Beendigungsrecht auch auf den Unterrichtsvertrag anzuwenden ist. Das schweizerische Obergericht bezeichnet den Unterrichtsvertrag als Kombinationsverträge. Nach dem schweizerischen Obergericht sind die persönlichen Kompetenze des Unterrichtgebers von großer Bedeutung. Aus diesem Grund ist der Unterrichtsvertrag ein typisches Auftragsverhältnis. Der schweizerische Bundesgerichtshof wies jedoch die Anwendung des einseitigen Beendigungsrechts auf bestimmte Innominatverträge zurück, die die Eigenschaft eines Auftrags besitzen. Einige dieser Verträge sind der *Chartervertrag*[161], *Trainingsvertrag*[162], *Franchisingvertrag*[163] und *Vermarktungsvertrag*[164].

Das schweizerische Obergericht ist durch seine Entscheidungen von der einschlägigen Praxis des Bundesgerichtshofs getrennt. Das schweizerische Obergericht versucht von der Anwendung des schweizerischen Bundesgerichts abzuweichen, die es für einseitiges Beendigungsrecht in einem weiten Umfang vollzieht, indem es die Verträge als gemischte oder sui generis bezeichnet[165]. In seiner Entscheidung[166] dazu gibt es immer an, dass das Beendigungsrecht nicht für alle Auftragsverträge zwingender Natur ist. Demnach sind die Auftragsverträge als typisch und atypisch unterteilt. Typische Auftragsverhältnisse würden das jederzeitige Beendigungsrecht erfordern. Aus diesem Grund werde es für typische Auftragsverhältnisse zwingender Natur sein. Entgeltliche oder höchstpersönliche Auftragsverhältnisse seien typisches Auftragsverhältnis. Beispiele für typische Auftragsverhältnisse könnten Arzt-, Rechtsanwalt- oder Treuhändervertrag sein. In diesen Verträgen abweichende Regelungen in Bezug auf das einseitige Beendigungsrecht verletze die persönliche Freiheit des Betroffenen i.S.v. Art. 23 TZGB und Art. 27 ZGB. Zwar führt die Abweichung des schweizerischen Obergerichts von der Praxis des schweizerischen Bundesgerichtshofs auf diese Weise im Einzelfall zu sachgerechtem Ergebnis, aber

157 BGE 104 II 108 vom 23.05.1978, E 4. vgl. zur Würdigung Cordey/ Giger-CHK OR Art. 404 Rn. 11.

158 BGE 4A_284/2013 vom 13.02.2014, E 3.5.2. vgl. zur Würdigung Cordey/ Giger-CHK OR Art. 404 Rn. 11; Mondini/ Liatowitsch, 295.

159 BGer 4A_141/2011 vom 06.07.2011; 4A_437/2008 vom 10.02.2009 E 1.3, 1.4. vgl. zur Anmerkung Cordey/ Giger-CHK OR Art. 404 Rn. 11; Graham-Siegenthaler, Art. 404 Rn. 6. vgl. zur Bewertung der letztere Entscheidung Stöckli, 179.

160 BezGer Höfe SZ vom 10.8.1994, SJZ 92/1996, 67.

161 BGE 115 II 108 vom 11.04.1989. vgl. zur Anmerkung Cordey/ Giger-CHK OR Art. 404 Rn. 11; Mondini/ Liatowitsch, 295; Krauskopf, Art. 404, Rn. 1. In dieser Entscheidung bezeichnet das schweizerische Bundesgericht den Chartervertrag als sui generis.

162 KassGer NE vom 21.10.1999, SJZ 2000, 396.

163 BGE 4C.228/2000 vom 11.10. 2000 E 4. Weil das schweizerische Bundesgericht den Franchisingvertrag als der Dauerschuldvertrag bezeichnet, schließt es, OR Art. 404 keine Anwendung zu finden. Zur Bewertung dieser Entscheidung vgl. Peter Gauch "Der Auftrag, der Dauervertrag und Art. 404 OR Ein Kurzbeitrag zur Rechtsprechung des Bundesgerichts", (2005), SJZ, 520-525, (Auftrag), 520 ff. vgl. Außerdem Cordey/ Giger-CHK OR Art. 404 Rn. 11; Mondini/ Liatowitsch, 295; Krauskopf, Art. 404, Rn. 1.

164 BGE 4A_401/2009 vom 15.01.2010 E 1.1.2. vgl. zur Anmerkung Cordey/ Giger-CHK OR Art. 404 Rn. 11.

165 Mondini/ Liatowitsch, 295.

166 OGer LU vom 17.12.1988, SJZ 85/1989, 215 f.

sie sichert die Rechtssicherheit nicht, wenn das schweizerische Bundesgericht darauf beharrt, die Bestimmung des Art. 512 sei zwingender Natur[167].

V. BEURTEILUNG DER MEINUNGEN UND MEINE ÜBERZEUGUNG

Die Bestimmungen sind je nach den Qualifikationen als zwingend oder dispositiv in zwei Kategorien unterteilt, insoweit sie durchgesetzt werden können. Diejenigen Bestimmungen, die zwingender Natur sind, sind strenge Regeln, gegen die die Parteien nichts anderes vereinbaren können und die absolut einzuhalten sind. Die Regeln in Bezug auf die öffentliche Ordnung, allgemeine Sitten oder Persönlichkeitsrechte sind zwingender Natur (Art. 27 TOR). Die Parteien müssen sich an diese Regeln halten. Darüber hinaus sind Bestimmungen zum Schutz von Personen aufgrund ihrer wirtschaftlichen, sozialen oder körperlichen Verfassung obligatorisch (z.B. Art. 16 TZGB)[168], während dispositive Regelungen die Anwendung finden, falls die Vertragsparteien nicht anders vereinbaren[169]. Bei der Ermittlung, ob eine Bestimmung zwingend ist oder nicht, kommen Wortlaut und Zweck des Gesetzes in Betracht [170]. Der Gesetzgeber macht deutlich, dass die Regelung in einigen Fällen nicht anders beschlossen werden kann (z.B. Art. 949 TZGB). Solche Bestimmungen sind zwingend. Deshalb sind bei der Feststellung der Natur des Art. 512 vorrangig Wortlaut und Zweck der Bestimmung vor Augen zu halten. Auch wenn der türkische Kassationshof und der schweizerische Bundesgerichtshof behaupten, die Bestimmung des Art. 512 sei zwingender Natur, drücken einige Autoren in der Doktrin unter Berücksichtigung all dieser Überlegungen aus, dass dieses Ergebnis aus dem Wortlaut der Bestimmung nicht zu erreichen ist[171]. Der schweizerische Bundesgerichtshof schließt in ihren Entscheidungen durch richterliche Auslegung darauf, dass die Bestimmung zwingender Natur ist[172]. Zweitens bringt der Grundsatz der Vertragsfreiheit alle Bestimmungen, die nicht zu der öffentlichen Ordnung gezählt werden, näher an dispositive Natur. Aus diesem Grund verstoßen die Entscheidungen des schweizerischen Bundesgerichtshofs, in denen es dem einseitigen Beendigungsrecht in allen Auftragsverhältnissen zwingende Natur beimisst, gegen das Prinzip pacta sund servande[173]. Außerdem kann der in der Bestimmung vorliegende Ausdruck „*jederzeit*" verwendet worden sein, um auszudrücken, dass die Parteien von der Beendigung Gebrauch machen können, ohne an irgendeine

167 Mondini/ Liatowitsch, 300; Weber-BSK OR I, Art. 404, Rn. 10.

168 M. Kemal Oğuzman/ Nami Barlas *Medenî Hukuk Giriş, Kaynaklar, Temel Kavramlar*, (25. Bası, 2019), 91; Sarı, 111; Gökhan Antalya (Editör)/ Murat Topuz *Medenî Hukuk (Giriş, Temel Kavramlar, Başlangıç Hükümleri), C. I*, (Genişletilmiş 3. Baskı, 2019), 419.

169 vgl. für die Beschreibungen Oğuzman/ Barlas, 91; Antalya/ Topuz, 418, 421.

170 Oğuzman/ Barlas, 90; Sarı, 111; Antalya/ Topuz, 418-419.

171 Gauch, 16; Fellmann-BK OR Art. 404 Rn. 118; Sarı, 112; Peyer, 130-131.

172 Gauch, 16.

173 Buff/ von der Crone, 336. vgl. für die Meinung, dass das einseitige Beendigungsrecht die Gültigkeit des Grundsatzes pacta sund servanda aus der Sicht der Auftragsverhältnisse abschwächt, Sarı, 64; Gümüş, C. II, 195; Burri, 198.

Bedingung anzuknüpfen[174]. Wenn der Zweck der Bestimmung betrachtet wird, ist es zu erkennen, dass verschiedene Auffassungen dem Umstand zugrunde liegen, dass einseitiges Beendigungsrecht im Auftragsvertrag seinen Platz einnimmt. Dementsprechend basiert einseitiges Beendigungsrecht auf dem Vertrauensverhältnis zwischen den Vertragsparteien, höchstpersönlicher Geschäftsbesorgung, dem Schutz der Persönlichkeit kraft der Bestimmung, dem übergeordneten Interesse oder überlegenen Willen des Auftraggebers oder der Tatsache, dass das Auftragsverhältnis unentgeltlich ist. Wie oben erwähnt[175], decken all diese Gedanken doch nicht das gesamte Auftragsverhältnis ab und im wesentlichen ist die Bestimmung des Art. 512 das Produkt eines historischen Verständnisses, das vom römischen Recht bis heute reicht. Daher ist es undenkbar, dass der Zweck des Gesetzes auch besagt, dass einseitiges Beendigungsrecht in allen Auftragsverhältnissen geboten sein muss.

Die Meinung, wonach die Bestimmung des Art. 512 zwingender Natur ist, drückt aus, dass es im wesentlichen ein besonderes Vertrauensverhältnis zwischen den Vertragsparteien gibt und dass es sinnlos ist, den Vertrag aufrechtzuerhalten, wenn dieses Vertrauen beseitigt wird. In der Tat wird angenommen, dass das Faktum des Vertrauens beim Dienstvertrag (Art. 393-447 TOR) und Hinterlegungsvertrag (Art. 561-580 TOR) neben dem Auftragsvertrag im türkischen Obligationenrecht vorliegt. Aber der Gesetzgeber verlangt im Dienstvertrag und Hinterlegungsvertrag die Verwirklichung der von ihm festgelegten Bedingungen, um den Vertrag zu beenden, zumal das Faktum des Vertrauens in diesen Verträgen nicht so intensiv ist wie im Auftragsvertrag[176]. Das Faktum des Vertrauens, das in diesen Verträgen nicht so intensiv wie im Auftrag betrachtet wird, ist in allen Auftragsverträgen gleich und reicht nicht aus, um zu rechtfertigen, dass der Vertrag jederzeit oder ohne Grund beendet wird. Es ist nicht möglich zu sagen, dass es bei einem Auftragsvertrag, der die Gesundheit und die körperliche Unversehrtheit des Auftraggebers zum Gegenstand hat, und bei den Auftragsverhältnissen über das Vermögen des Auftraggebers das gleiche Vertrauensverhältnis zwischen den Parteien gibt.

Erweiterte und zwingende Anwendung einseitigen Beendigungsrechts steht dem Missbrauch weitgehend offen. Der Vertrag wird oft nicht beendet, weil das Vertrauensverhältnis geschädigt wird, sondern weil kein wirtschaftliches Interesse mehr besteht[177]. Außerdem führt die Zubilligung des Rechts für die Parteien, das Vertragsverhältnis jederzeit ohne Grund zu beenden, in der Praxis dazu, sich zu weigern, durch einige Methoden das Verhältnis als Auftrag zu bezeichnen und die Bestimmungen des Auftragsvertrags anzuwenden[178]. In diesem Zusammenhang wird

174 Sarı, 112.

175 vgl. B.

176 Başpınar, 258.

177 Mondini/ Liatowitsch, 299.

178 Peyer, 166; Burri, 199-200; Sarı, 110; Tandoğan, C. II, 627-628.

der Umfang des Begriffs Werk im Werkvertrag erweitert, um die Anwendung der Bestimmungen des Auftragsvertrags zu vermeiden. So wird der Begriff das geistige Werk in den Vordergrund gestellt. Diese Innominatverträge, die einen ökonomischen Wert haben, werden daher im Rahmen des Werkvertrags ausgewertet und die Anwendung der Bestimmungen des Auftragsvertrags wird vermieden[179]. Es ist aber nicht möglich, das Vertragsverhältnis als Werkvertrag zu qualifizieren, wenn der Gegenstand des Vertrages keine ergebnisverpflichtung enthält. Bei der Qualifizierung in der Doktrin wird jedoch auch den Dienst- oder Geschäftsbesorgungverträgen eigener Art (sui generis) statt der Auftragsverträge im konkreten Einzelfall Überlegenheit eingeräumt[180]. Es ist anzugeben, dass die Bestimmungen des Auftragsvertrags unter der Berücksichtigung der Merkmale des Einzelfalls auch im Wege einer Analogie anzuwenden sind, wenn ein Vertragsverhältnis anstatt des Auftrags als Innominatvertrag bezeichnet wird[181]. Die Annahme, einseitiges Beendigungsrecht sei bei den Innominatverträgen zwingender Natur, führt dazu, dass die gesamte Beziehung jederzeit beendet wird. Diese Qualifizierung ergibt auch einige Gefahren in der Praxis. Auch in diesem Fall wird beobachtet, dass auf betreffende Beziehungen, die als sui generis Verträge gelten, die Bestimmungen des Auftrags mit Ausnahme von Beendigungsregelungen Anwendung finden[182]. Außerdem ergibt diese Qualifikation des schweizerischen Bundesgerichts ökonomisch unerwünschten Resultaten. In den internationalen Beziehungen können die Parteien unterlassen, ihr eigenes Recht zu wählen, um zu gewährleisten, dass einseitiges Beendigungsrecht für ihre Verträge nicht zur Anwendung kommt[183].

Soweit ersichtlich, bringt die Annahme, dass die Bestimmung des Art. 512 zwingender Natur ist, einige Versuche mit sich, um die Durchsetzung der Bestimmung zu vermeiden. Aber der im Gesetz geregelte Auftragsvertrag ist schon ein Sammelbecken. Deshalb sind die Bestimmungen zum Auftragsvertrag auch auf die innominate Geschäftsbesorgungsverträge anzuwenden, soweit sie mit ihrer Natur übereinstimmen (Art. 502 Abs. 2 TOR). Die Qualifizierung des einseitigen Beendigungsrechts in der Doktrin und in der Rechtsanwendung als ein absolutes zwingendes verhindert jedoch den Anwendungsbereich des Auftragsvertrags in dem durch den Gesetzgeber gewollten Umfang[184]. M.E. ist der Grund für diese Situation die Annahme, dass einseitiges Beendigungsrecht für alle auf dem Auftrag basierenden Verhältnisse zwingender Natur ist, was die Gerechtigkeit des Einzelfalls nicht gewährt. Aus diesem Grund ist es für alle auf dem Auftrag basierenden Verhältnisse nicht zu sagen, dass die Bestimmung des Art. 512 zwingender Natur ist und dass die Parteien

179 Peyer, 166; Tandoğan, C. II, 628; Sarı, 110.

180 Tandoğan, C. II, 627-628; Peyer, 166-167; Sarı, 110.

181 vgl. A.

182 Sarı, 110.

183 Burri, 200.

184 Sarı, 110.

die Ausübung dieses Rechts nicht beschränken oder ganz beseitigen können. Ebenso ist es inakzeptabel, dass einseitiges Beendigungsrecht für alles Auftragsverhältnis dispositive Natur hat. Für einige Auftragsverhältnisse ist das Vorhandensein des Recht, den Vertrag jederzeit und ohne Grund zu beenden, eine Notwendigkeit. Daher sollten bei der Bestimmung der Natur des einseitigen Beendigungsrechts, wie in der Lehre zutreffend ausgeführt wird, die Auftragsbeziehungen nach ihren Eigenschaften unterteilt werden. Typische von diesen, nämlich gewöhnliche Auftragsverträge, sind solche, bei denen ein besonderes Vertrauensverhältnis vorliegt, höchstpersönliche oder unentgeltliche Auftragsbeziehungen. Die Auftragsverhältnisse, die diese Eigenschaften nicht haben, sind atypische Auftragsbeziehungen[185].

Schließlich sind typische, gewöhnliche Auftragsverträge und gemischte oder sui generis Innominatverträge, für die die Bestimmungen zum Auftrag im Wege einer Analogie anzuwenden sind, nicht als gleich angesehen werden[186]. Das erste der Merkmale, die diese Unterscheidung ausmachen, ist Vorhandensein, Bedeutung und Grad des Vertrauens zwischen den Parteien in den Auftragsbeziehungen und ob der Auftrag höchstpersönlich ist[187]. Denn das Vorliegen einer besonderen Vertrauensbeziehung besteht nur in den typischen Auftragsverhältnissen[188]. In vielen modernen Dienstleistungsgesellschaften gibt es allerdings keine besondere Vertrauensbeziehung in den atypischen Auftragsverhältnissen[189]. In den betreffenden Auftragsbeziehungen sind die Leistungen, die normalerweise geschuldet sind, weitgehend standardisiert. Das in diesen Verträgen enthaltene Vertrauensverhältnis ist nicht mehr als das in jedem Vertrag bestehende[190]. Im Gegenteil, in diesen Beziehungen besteht das Vertrauen, dass die andere Partei für die Dauer des Vertrages Dienstleistungen effektiv erbringen wird. Deshalb sind die Leistungserbringer austauschbar[191]. Aber ist das Vertrauensverhältnis zwischen den Parteien und die persönlichen Fähigkeiten und Leistungen des Unterrichtgebers im Unterrichts-[192] oder Fernunterrichtsvertrag[193] von Bedeutung, wie dies in Lehre und Gerichtsentscheidungen zum Ausdruck kommt. Darüber hinaus erfordert die Notwendigkeit deren Bestehens während des Vertrages das Bestehen des einseitigen Beendigungsrechts. Andererseits haben die Parteien in dem Lehr- und Unterrichtsvertrag keinen intensiven Nutzen aus der Fortführung des Vertrages. Deshalb ist die Bestimmung des Art. 512 anzuwenden[194]. Des gleichen sind

185 vgl. D, 3.

186 Eren, Özel Hükümler, 726.

187 BezGer Höfe SZ vom 10.8.1994, SJZ 92/1996, 67.

188 Mondini/ Liatowitsch, 299; Eren, Özel Hükümler, 726; Seçer, 891; Sarı, 70.

189 Eren, Özel Hükümler, 726; Mondini/ Liatowitsch, 299.

190 Eren, Özel Hükümler, 726.

191 Mondini/ Liatowitsch, 299.

192 BGer 4A_141/2011 vom 06.07.2011; 4A_437/2008 vom 10.02.2009 E 1.3, 1.4; BezGer Höfe SZ vom 10.8.1994, SJZ 92/1996, 67.

193 Yücer Aktürk, 209.

194 Peyer, 188-190, 202.

Ärzte-, Rechtsanwalts- oder Treuhänderverträge typische Auftragsverhältnisse, in denen es eine besondere Vertrauensbeziehung zwischen ihren Parteien gibt. In diesen Vertragsverhältnissen müssen die Parteien das Recht haben, das Auftragsverhältnis jederzeit ohne Grund zu beenden. Die Agentur-[195], Alleinvertretungs- und Ligenschaftenverwaltungsvertrag lassen sich dagegen beispielweise atypische Auftragsverhältnisse zur technischen oder kaufmännischen Leitung nennen. Der Hauptzweck dieser Verträge ist der wirtschaftliche und technische. In diesen Verträgen gibt es kein besonderes Vertrauensverhältnis, sondern vom Beauftragten wird die Treue und Sorgfalt eines durchschnittlichen Kaufmannes erwartet[196]. Um eine stabile Beziehung in der Verwaltung einer Immobilie oder in den Auftragsverhältnissen zu erhalten, in denen die Bank ein Beauftragter ist, muss die Bestimmung des Art. 512 eingeschränkt werden. Andernfalls wird es für den Kündigungsgegner sehr schwierig sein, sein Leistungsinteresse zu erhalten[197]. In Verträgen für geistige Tätigkeiten ist die betreffende Geschäftsbesorgung wissenschaftlich; sie bezieht sich auf Technik oder Kunst. Sie hat auch keinen Einfluss auf sein gewissensmäßiges und ideelles Wesen. Beispiele dafür sind die Vorbereitung von Bild, Porträt, Skulptur, Architekturprojekt, einer Stellungnahme und einer Werbekampagne oder Bühnenstück[198].

Ob die Auftragsverhältnisse unentgeltlich oder nicht, ist bei der Feststellung der zwingenden Natur des einseitigen Beendigungsrechts von Belang. Denn die Tatsache, dass der Auftrag unentgeltlich ist, kann die Fähigkeit des Beauftragten rechtfertigen, die Beziehung jederzeit zu beenden. Ob der Beauftragte Interesse an der Ausübung des Auftrags hat, kann auch mit der Tatsache bewertet werden, dass er unentgeltlich ist. Wenn eine Partei den Vertrag im atypischen Auftragsverhältnis beenden will, muss die andere Vertragspartei kein schützenswertes Interesse haben[199]. In einem Vertragsverhältnis besteht das alleinige Interesse des Beauftragten an der Durchführung des Auftrags doch nicht darin, seine Gebühr zu erhalten. Insbesondere in den Innominatverträgen, in denen die Bestimmungen des Auftrags im Wege einer Analogie anzuwenden sind, zielt der Beauftragte nicht darauf ab, eine Gebühr allein durch die Durchführung des Auftrags zu bekommen. Zum Beispiel ist im Schlüsselfertigvertrag[200], der ein gemischter Vertrag ist und die Elemente des Auftragsvertrages enthält, der Auftragnehmer verpflichtet, das Personal des Auftraggebers auszubilden und die Anlage für einen bestimmten Zeitraum nach ihrer Errichtung zu betreiben. Im Gegenzug verdient der Auftragnehmer nicht nur eine pauschale Vergütung zu bekommen, sondern der Auftragnehmer verschafft sich bei

195 vgl. für die Gegenmeinung Becker, Art. 404 Rn. 8.

196 Peyer, 183.

197 Seçer, 892.

198 Peyer, 190-196.

199 Peyer, 170-174, 201.

200 vgl. Turnkey Contract, Turnkey Vertrag. Der Schlüsselfertigvertrag ist hier als im UNIDO-Vertragsmodell und im FIDIC Silver Book überarbeitet zu verstehen.

erfolgreichem Vertragsabschluss einen Wettbewerbsvorteil und bewährt sich, dass er zu solchen Projekten fähig ist[201]. Die Existenz eines Auftragnehmers in schlechten wirtschaftlichen Bedingungen kann von der Beendigung des Projekts abhängen[202]. Aus diesem Grund sollte gesondert bewertet werden, ob der Beauftragte im konkreten Einzelfall Interesse an der Durchführung des Auftrags hat.

Die Vertragsparteien können in den Auftragsverhältnissen, in denen man zu dem Schluss kommt, dass die Bestimmung des Art. 512 TOR keine zwingende Natur hat, einseitiges Beendigungsrecht beschränken; beseitigen oder vereinbaren, dass eine Vertragsstrafe zu leisten ist. Aber in den Innominatverträgen, in denen das einseitige Beendigungsrecht nicht zwingender Natur ist, kann der Schutz, den die Parteien benötigen, mit der Bestimmung Art. 27 TOR gewährleistet werden. Denn die Vereinbarungen gegen die öffentliche Ordnung, allgemeine Sitten oder Persönlichkeitsrechte sind unwirksam. Damit die Parteien auf diese Weise geschützt werden, ist die Annahme, dass die Bestimmung zwingender Natur ist, nicht erforderlich[203]. Außerdem ist der Auftragsvertrag vor dem Verzicht der Parteien auf das Persönlichkeitsrecht oder der übermäßigen Beschränkung des Persönlichkeitsrechts durch Vereinbarungen geschützt (Art. 23 TZGB)[204]. Nach dieser Bestimmung dürfen die Parteien des Auftragsvertrags ihre Freiheit nicht aufgeben oder sie rechtswidrig oder sittenwidrig einschränken. Die Tatsache, dass einseitiges Beendigungsrecht in einem Innominatvertrag nicht ausgeübt wird, bedeutet nicht, dass sich im Vertrag eine Lücke befindet. Denn in diesem Fall kann der Vertrag immer aus wichtigem Grund beendet werden. Selbst wenn die Vertragsparteien jederzeitiges Beendigungsrecht unter Ausschluss der Bestimmung Art. 512 einschränken oder beseitigen, haben sie das Beendigungsrecht, falls ein wichtiger Grund vorliegt[205]. Die Vereinbarungen sind nichtig, die das Beendigungsrecht aus wichtigem Grund einschränken oder beeinträchtigen[206]. Auch wenn die Parteien in einem Innominatvertrag auf das Beendigungsrecht einseitig und aus wichtigem Grund verzichtet haben, kann die Partei, für die die Fortsetzung des Vertrages unerträglich wird, den Auftragsvertrag aus wichtigem Grund kündigen.

SCHLUSSFOLGERUNG

Im Auftragsvertrag wird einseitiges Beendigungsrecht auf das Vertrauensverhältnis zwischen den Vertragsparteien, höchstpersönliche Eigenschaft der

201 Michael Martinek, Moderne Vertragstypen Bd. III: Computerverträge, Kreditkartenverträge sowie sonstige moderne Vertragstypen, (1993), (Bd. III), 246-248; Inge Dünnweber, Vertrag zur Erstellung einer schlüsselfertigen Industrieanlage im internationalen Wirtschaftsverkehr, (1984), 38-86.

202 Dünnweber, 83; Aldemir Toprak, 312.

203 Sarı, 115-116.

204 Gauch, 18; Karabağ Bulut, 167.

205 Gauch, 19; Fellmann-BK OR Art. 404 Rn. 133, 135; Peyer, 159, 202; Mondini/ Liatowitsch, 300; Aldemir Toprak, 312.

206 Gauch, 19.

Geschäftsbesorgungspflicht, den Schutz der Persönlichkeit kraft der Bestimmung, das übergeordnete Interesse oder den überlegenen Willen des Auftraggebers oder die Tatsache zurückgeführt, dass das Auftragsverhältnis unentgeltlich ist. Aber all diese Gedanken decken nicht das gesamte Auftragsverhältnis ab. Um festzustellen, ob einseitiges Beendigungsrecht in den Innominatverträgen zwingender Natur ist, muss man daher vornehmlich auf das Bestehen eines Vertrauensverhältnisses zwischen den Parteien, ihren Umfang, ihre Bedeutung und darauf Rücksicht nehmen, ob Geschäft persönlich zu besorgen ist. Auch hier ist es wichtig zu prüfen, ob der Auftrag unentgeltlich ausgeführt werden sollte oder ob der Auftragnehmer Interesse an der Durchführung des Auftrags hat. All diese Fragen müssen ausgewertet und festgestellt werden, ob diese Fragen rechtfertigen, dass der Innominatvertrag jederzeit ohne Grund kündigt. Mit einer solchen Bewertung sollte jedoch zu dem Schluss kommen lassen, dass einseitiges Beendigungsrecht zwingender oder dispositiver Natur ist.

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ABKUERZUNGSVERZEICHNIS

Abs.	: Absatz
AJP	: Allgemeine Juristische Praxis
Art.	: Artikel
art.	: articles
aTOR	: Altes türkisches Obligationenrecht
Aufl.	: Auflage
Bd.	: Band
BGB	: Bürgerliches Gesetzbuch
BGE	: Bundesgerichts-Entscheidungen
BK	: Berner Kommentar
C.	: Cilt
CRT	: Constitution of the Republic of Turkey
d.h.	: das heißt
Einl.	: Einleitung
EÜHFD	: Erzincan Üniversitesi Hukuk Fakültesi Dergisi
ff.	: folgende
GoA	: Geschäftsführung ohne Auftrag
Hrsg.	: Herausgeber

İÜHFM : İstanbul Üniversitesi Hukuk Fakültesi Mecmuası
KUKO : Kurzkommentar
Nr. : Nummer
OFK : Orell Füssli Kommentar
OR : Obligationenrecht
Rn. : Randnummer
Sa. : Sayı
SJZ : Schweizerische Juristen-Zeitung
SZW : Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht
TBK : Türk Borçlar Kanunu
TCO : Turkish Code of Obligations
TGG : Türkisches Grundgesetz
TOR : Türkisches Obligationenrecht
TZGB : Türkisches Zivilgesetzbuch
u.a. : und andere
vgl. : vergleiche
Yarg. : Yargıtay
ZBJV : Zeitschrift des Bernischen Juristenvereins
ZGB : Schweizerisches Zivilgesetzbuch
ZK : Zürcher Kommentar

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Function and Features of the Modification Permit in Turkish Zoning and Building Law

Türk İmar Hukukunda Tadilat Ruhsatının İşlevi ve Özellikleri

Taner Ayanoğlu[1]

Abstract
Construction of buildings, which has a special place in social life, and the changes made to them in the form of repair, alteration and addition are not only subjects of engineering, but also subjects of legal regulations. There may be modification requirements such as repairs, alterations or additions for various reasons in the buildings whose construction process is ongoing or for which the use permit has been obtained after the construction process has been completed. Building modifications are generally subject to a modification permit. Modification permits have an extremely important function in Turkish zoning and building law in terms of their relationship with the main building permit. Some modifications are not subject to a permit. A functional criterion is needed to distinguish between modifications that are subject to a permit and those that are not. For example, in buildings with permits (especially for pergolas and porches) there have been disputes about whether additions or the closing of balconies should be subject to a permit. A criterion can be drawn from the general philosophy of the Zoning and Building Act. This criterion can be defined as: among the repairs, changes, and additions to buildings with a permit, those in accordance with the building permit and its annexes will not require a modification permit; whereas those contrary to the building permit and its annexes will.

Keywords
The Zoning and Building Law, Building Permit, Modification Permit, Construction, Architectural Project

Öz
Toplumsal yaşam içinde özel bir konumu olan binaların yapımı ve bunlarda onarım, değişiklik ve ekleme şeklinde tadilat yapılması, sadece tekniğin konusu olmayıp, aynı zamanda hukuksal düzenlemelerin de konusudur. Yapım süreci devam eden ya da yapım süreci bitirilerek yapı kullanma izni alınmış olan yapılarda çeşitli sebeplerle tamirat, değişiklik ve ilave yapma gibi tadilat gereksinimleri söz konusu olabilir. Ruhsatlı yapılardaki tadilatlar, kural olarak tadilat ruhsatına tabidir. İdari işlem kimliği taşıyan tadilat ruhsatları özellikleri ve yapı ruhsatıyla ilişkisi bakımından İmar Hukukunda son derece önemli bir işleve sahiptir. Öte yandan, ruhsatlı yapılarda gerçekleştirilecek bir kısım tadilat ise ruhsata tabi değildir. Bu noktada ruhsata tabi olan ve olmayan tadilatı birbirinden ayırmaya yarayacak işlevsel bir ölçüte ihtiyaç vardır. Örneğin yapı ruhsatı bulunan yapılarda özellikle pergola, sundurma vb. eklemeler yapmak ya da balkon kapatmak gibi işlerin ruhsata tabi olup olmadığı konusunda uygulamada çok sayıda uyuşmazlık çıkmaktadır. Ancak, İmar Kanunu'ndaki düzenlemelerin genel felsefesi ve ruhundan, ruhsatlı yapılarda yapılacak tamirat, değişiklik ve ilavelerden yapı ruhsatı ve eklerine uygun olanların tadilat ruhsatına tabi olmayacağı, fakat yapı ruhsatı ve eklerine aykırı olanların ise tadilat ruhsatına tabi olacağı yönünde bir kriter çıkarılabilir.

Anahtar Kelimeler
İmar Hukuku, Yapı Ruhsatı, Tadilat Ruhsatı, İnşaat, Mimari Proje

1 **Corresponding Author:** Taner Ayanoğlu (Assoc. Prof. Dr.), İstanbul Bilgi University, Law School, Department of Administrative Law, Istanbul, Turkey. E-mail: taner.ayanoglu@bilgi.edu.tr ORCID: 0000-0001-7768-2378

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Function and Features of the Modification Permit in Turkish Zoning and Building Law

Introduction

Buildings have always occupied a special place in the social order of society[1].The construction of buildings is not only a matter of engineering, but is also a subject to legal regulations. Zoning and building law set the minimum requirements for safe, healthy, energy efficient, and accessible buildings.[2] Zoning and building laws require buildings to be constructed in accordance with relevant licenses and annexes, and they must be preserved and maintained in accordance with these licenses and annexes after permission is obtained to use the building following the construction process. However, due to the personal wishes of the building owner or to ameliorate as wear, aging, and deterioration over time, "*additions, alterations, and repairs"* may be required to buildings under construction or those that have been granted a building use permit following completion of the construction process. Construction works, such as "*repairs, alterations, and additions*" to buildings can be carried out without being subject to a permit if it does not contravene the existing building permit and its annexes. However, if the "*additions, alterations, and repairs*" are not in accordance with the existing building permit and its annexes, then it will be necessary to obtain a new permit to cover them, otherwise it will not be possible to carry out the work within the framework of the existing permit and its annexes.

Building permits that need to be issued for "*additions, alterations, and repairs*" to be made to a building with an existing building permit are called modification permits. We use the term modification in a broad sense to cover all kinds of changes in the structure, including "*repairs, alterations, and additions*". Modification permits that have an administrative decision nature have an extremely important function in terms of their features and their relationship with the main building permit. However, to eliminate the uncertainties regarding whether or not specific construction works are subject to a modification permit, there is a need to establish a theoretical framework and set out the general principles by using the provisions in available legislation and the precedent judicial decisions. Therefore, studies in which modification permits are handled in a holistic way will contribute to the development of Turkish zoning and building law by guiding administrative and judicial practices. This article, which was written within this framework, will examine the source, scope, and features of the requirement of modification permits in Turkish law.

1 R. Sprunt, "Building Knowledge and Building Law" (1975) JAR, Vol. 4, Iss. 3, 10.

2 T. Jovanović, A. Aristovnik, and T. Rogić Lugarić "A Comparative Analysis of Building Permits Procedures in Slovenia and Croatia: Development of a Simplification Model" (2016) TERUM, Vol. 11 Iss. 2, 6.

I. Source of the Requirement for A Modification Permit

The necessity of a modification permit is based on the provision that "*any changes in buildings with building permits are subject to re-permitting*" in article 21/2 of the Zoning and Building Act (ZBA). For any changes to be made in permitted buildings, the type of permit that must be issued is called a modification permit.

It should be noted that the modification permit necessity is essentially a continuation of the rule of building permit necessity. According to article 21/1 of ZBA, "*It is obligatory to obtain a building permit (...) for all buildings covered by this act*." This arrangement clearly shows that the obligation for all buildings to have building permits is a fundamental rule of building law.[3] A building permit is not just an administrative decision that gives the building owner the right and authority to build, but it must also continue to exist as long as the building is in existence. The obligation for buildings to have a building permit covers not only buildings under construction, but also those for which the construction process has been completed and a building use permit has been granted. On the one hand, the building permit obligation includes a ruling that a building without a permit cannot be built. On the other hand it includes an obligation to ensure that the building is in compliance with its permit and annexes during the construction process, as well as a requirement to keep the building in accordance with its permit and annexes after the construction process. Therefore, as long as any building exists on the land, the existence of a legally valid building permit is also mandatory. This necessity manifests itself in several ways. The first is the requirement to obtain a building permit for the construction of a structure that has the nature of a building. The second is the obligation to obtain a building permit for the "*additions, alterations, and repairs*" of the building, the construction of which has been completed and for which a building use permit has been obtained. For this reason, structures constructed once a building permit is obtained cannot contravene the existing building permit by means of "*additions, alterations, and repairs*".

The obligation not to make the owner's building contrary to the permit clearly shows that the building permit provisions do not cease to exist after obtaining permission to use the building, but on the contrary, continues to be in force. In this context, it can be said that in terms of public order regarding buildings, all buildings should always have permits and must always comply with such permits and annexes. Therefore, after a building that has a building permit is constructed and permission to use the building is obtained, the building must be protected in accordance with the building permit and its annexed projects. The obligation to protect the building according to its permit and annexes aims to prevent changes in the building that are

3 Any construction is subject to building permits, See, Yar.15HD, E.2005/6882, K.2007/312, T.24.1.2007; Yar.15HD, E.2002/1577, K.2002/4036, T.19.09.2002.

contrary to its permits and annexes.[4] However, this obligation makes it mandatory to obtain further permission so that changes to the building do not violate the permit and its annexes. Thus, not only building on a piece of land, but also modifying an existing structure is subject to a permit. In short, there is also an obligation to be granted permission for "*changes*" to be made to buildings with a building permit. According to the second paragraph of the 21st article of the ZBA, any changes in permitted buildings are expected to be subject to further permission. This ruling in this legal regulation is considered to be an obligation to acquire a modification permit.

The rule that requires any changes in buildings that have a building permit to be subject to re-permitting results in the requirement for a modification permit, and is essentially a mandatory outcome of the building permit obligation. The building permit obligation also requires the building to be constructed in accordance with the building permit and its annexes. The necessity to protect the building according to the building permit and its annexes is the primary reason for the prohibition of changes to the building. Because "*any change*" to be made in a permitted building refers to construction work that is not based on the current building permit and is not included in the scope of the existing building permit, it is likely to constitute a violation of this permit. Therefore, the legislation stipulates that any changes to be made to buildings that have been permitted usually also depend on a further building permit being obtained. Otherwise, if the changes to be made in the building would not be subject to a modification permit, the ruling of the building permit obligation would have been negated because it would not be possible to protect the building in accordance with the original permit and its annexes.

In the Zoning and Building Law, actions that violate the building permit and its annexes are considered as actions that violate the public order, and preventive and punitive administrative decisions are envisaged for these. In the case of constructing a building that is unpermitted or against the permit and its annexes, it is necessary to either make the building in compliance with the permit or obtain a permit for the existing building within the framework of the procedure regulated in article 32 of the Zoning and Building Act.

In the ZBA, actions that violate the building permit and its annexes are considered to be actions that violate public order, and preventive and punitive administrative decisions are made to prevent this occurrence. In the case of constructing a building that is unpermitted or constructed in a manner that violates the permit and its annexes, it is necessary to either make the building comply with the permit or obtain a permit for the existing building within the framework of the procedure in article 32 of the ZBA. It is not legally possible for such structures to continue to exist in this way,

4 For example, the building cannot be renovated against the architectural project. See, Dan.8D, E.2003/5647, K.2004/2571, T.02.06.2004

because buildings that are unpermitted or that are constructed in violation of the permit and its annexes disrupt the zoning and building order. According to article 32/3 of the ZBA, in the case of a violation of the building permit and its annexes, the zoning and building order should be re-established by making the building conform to the current permit or by obtaining a new building permit in accordance with the existing building. Article 32 of the ZBA is applied not only if the building is in violation of its building permit and annexes during the construction phase, but is also applied where completed modifications to buildings are made contrary to the existing building permits and annexes. When a building is constructed contrary to the permit and its annexes, the rule for obtaining a new permit for modifications to the building is violated. In the case of a violation of the obligation to re-permit, the modifications made to the building are described as construction work that is contrary to the building permit and its annexes. In accordance with article 32 of the ZBA, administrative acts and actions such as sealing the construction, stopping construction, and demolition can therefore be carried out, and according to article 42 administrative sanctions can be applied to the responsible persons. It can be clearly seen that these administrative acts, actions, and sanctions are the result of a violation of the obligation to re-permit in order to make modifications to the building. In other words, acting in accordance with the requirement to obtain a modification permit for the modifications in the structure prevents negative legal consequences arising from the fact that modifications are made against the building permit and its annexes.

II. Scope of the Requirement for A Modification Permit

In the 21/2 article of the ZBA, the subject of the modification permit is determined as "*making any changes to buildings with building permits*". The use of the term "*buildings with building permits*" as mentioned here refers to all kinds of permitted buildings. In other words, in terms of the implementation of this provision, it does not make any difference whether the construction process is continuing or whether the building's usage permit has been obtained after construction is completed. During the construction process, buildings should be constructed in accordance with building permits and annexes, and buildings that have been granted permission to be used after completion of the construction process should be preserved in accordance with building permits and annexes. Therefore, in both cases, making any "*additions, alterations, and repairs"* against the existing permit and annexes will require a modification permit to be obtained. At first glance, the phrase in article 32 of the ZBA that "*the relevant administration determines that the construction has started without obtaining a permit or the building is made in violation of the permit and its annexes*" gives the impression that any issue related to "*the absence of a permit for the building under construction"* and "*construction of the building under the construction process in violation of its permit and annexes"* are regulated. However, considering the

provision of article 21/2 of the ZBA that "*any changes to buildings which have a building permit are subject to re-permitting*", it is clear that "*modifications made without obtaining a permit in an existing building that has been granted a building use permit*" should be deemed to be *"contrary to the permit and its annexes*" within the scope of article 32.

As a result it seems that article 32 of the ZBA is applied not only if the building is constructed in violation of a permit and its annexes during the construction phase, but is also applied if modifications to the buildings that are permitted for use after the construction phase are completed are made in violation of the building permit and its annexes.

III. Modifications That Are Contrary to The Existing Building Permit and Its Annexes Require A Modification Permit

There is no clear criterion in the ZBA as to which changes in the building constitute a significant alteration to the original project and its documentation. However, it should be noted that the legality of "*additions, alterations, and repairs"* in a permitted building is primarily related to whether they comply with building permits and annexes. As we have explained above, the requirement that any "*additions, alterations, and repairs*" in a building that has been issued a building permit is subject to a modification permit is due to the fact that the building will contravene the existing permit and its annexes after the modifications. In other words, it is necessary to obtain a new permit, i.e., a modification permit, so that the building does not violate the existing permit and its annexes as a result of the changes to be made. On the other hand, it is not logically possible to describe the works performed without contradicting the original project details and documents attached to the building permit when requesting permission for a modification. Therefore, if the "*additions, alterations, and repairs"* to the building are in the form of an element that is not included in the existing building permit and its annexes and does not cause the building to come into conflict with the existing permit and its annexes, then there will be no obligation to obtain a new permit for them. For example, alterations such as installing a cabinet on a wall, installing an air conditioner, or making a small niche in a non-bearing wall, will not be in conflict with the building permit and its annexes, and therefore it will not be necessary to obtain a modification permit.

Conceptually, the modifications that will require obtaining a modification permit in the building are changes that contain elements different from the designations indicated in the existing building permit and attached projects and documents. In other words, they are changes that will cause the building to come into conflict with the permit and its annexes. Such changes are realized by removing or replacing

the building elements in the existing building permit and its annexes or by making additions that contain elements that are not included in the existing building permit and associated project work, but should be included. Changes that will cause a building to be in violation of the building permit and its annexes appear as modifications that require a modification permit to be obtained.[5] The buildings referred to here are "*buildings with building permits"*.

The building permit and its annexes for buildings for which a building permit has been obtained consists of details of the project work and other documents attached to the application submitted by the building owners when applying for a building permit. Details of the project work and documents covering "architectural projects, static projects, electrical and installation projects, drawings and calculations, and sketches used as a surveying benchmark or dimensional sketches" must be attached to the application that is submitted to the competent authority to obtain a building permit.[6] The building must be made in accordance with the building permit and the attached documentation, and it must be ensured that this conformity is maintained. If, as a result of a proposed modification, the building loses its conformity with the elements included in the permit and its annexes and hence comes into conflict with the existing permit, then there is an obligation to obtain a new building permit, i.e., a modification permit. In this context, it can be said that the construction work will differ from the designations in the project details and documents that were attached to the building permit, and the required changes to the attached documentation will be necessary to warrant the issuing of a new building permit.

The modifications that require a new permit in a building may take many different forms, such as making changes in the physical elements of the building specified in the project details and documents (*for example, making an iron staircase instead of a wooden interior staircase, closing a window on the exterior by building a wall, or opening a new window or door on the wall*), removing an existing physical element (*for example the demolition of an interior wall*), making a physical addition to the internal volume of the building (*for example, dividing a room in two by building a wall*), making a physical addition to the outer surface of the building (*for example, adding a room above or below the building, or adding a floor above the building*), or additional construction (*for example, building a hut, garage, or swimming pool*) on the property on which the building is located even if it is not adjacent to the building. At this point, it is apparent that the changes that will be subject to the modification permit are determined according to which elements are included in the project details and documents as well as which elements should be included in the project details and documents. It should be noted that the project details and documents annexed

5 Modifications that are contrary to the architectural project details that were attached to the building permit are subject to the modification permit. See, Dan.8D, E.2003/5647, K.2004/2571, T.02.06.2004.

6 See, article 22/1 of the ZBA.

to the building permit are prepared by members of the profession who are legally authorized to prepare these materials according to their respective areas of expertise.[7] Therefore, the elements that must be included and shown in these project details and documents are determined within the framework of the legislation[8] and are based on the knowledge of the relevant professionals.[9]

It is not necessary to obtain a modification permit in cases where there is a change in certain elements that are not included in the building permit and its annexes and that do not need to be included or there is an addition that do not need to be included in the building permit and its annex projects. However, it is compulsory to obtain a modification permit in cases where changes are made to the elements included in the building permit and its annexes or if additions that should be included in the building permit and its annex projects are made to the building. To change building elements in the existing project details and documents annexed to the building permit or to add elements that must be shown in the project details and documents attached to the building permit, the elements should be changed in the project details and documents annexed to the building permit, and/or new elements should be added to these elements.[10]

A modification of the building permit in terms of the annexed project details and documents requires a building permit to be obtained again, i.e., a modification permit. To obtain the modification permit there must be modifications to the project details and documents attached to the building permit. The changes in project details to be made for the modification permit must be made by individuals with the relevant areas of expertise.[11] According to article 58/2 of the Planned Areas Zoning and Building By-law (PAZBB), for new constructions, additions, and substantial alterations, for which building permits have been obtained, the architectural project must be re-arranged when a change is requested later. If this change requires a change in the static and

7 It is necessary for the individuals involved to have a level of scientific competence in the fields of expertise required by the building permit and its annexes, and this scientific competency should be demonstrated by their membership of a professional body with the expertise to prepare the relevant construction projects. In a decision of the Council of State, it was decided that the case contrary to the reconstruction project is not related to the field of expertise of the mechanical installation project author. See, Dan.14D, E.2015/6006, K.2017/6759, T.06.12.2017.

8 For example see, article 57/2 of the Planned Areas Zoning and Building By-law (PAZBB): "*Architectural project; a) it is prepared by the architects in accordance with the implementation development plan, parceling plan, and the principles of this regulation. It consists of: 1) a layout plan, 2) a table showing the share of the floor easement and floor ownership, 3) the gross construction area of the independent sections and common areas and a chart showing the square meterage of the total building construction area and its accessory structures, 4) all floor plans, including basement floors, 5) roof plan, 6) at least two sections and a sufficient number of building views, one of which should pass through the common staircase for the floor and roof plans, 7) soil excavation calculations, 8) preliminary and application projects, with system sections and point details when necessary, 9) parking, shelter, and tree calculations."*

9 See article 28 of the ZBA: *"According to the class, characteristics, and size of the area, settlement center, and building to be applied, it is obligatory to arrange the maps, plans, studies, projects, and their annexes related to architecture, engineering, and planning services within the scope of this law according to the areas of specialization of the members of the profession specified in Article 38. (...)"*

10 See, article 58 of the PAZBB.

11 See, Dan.8D, E.2003/5647, K.2004/2571, T.02.06.2004.

installation principles of the building, the necessary changes should be made clear in the requested documents. In other words, changes that require modification permit conflict with existing permit and its annexes. If exceptions to legal regulations are excluded, any changes to be made to the elements included in the project details and documents, and all kinds of additions that are not included but must be included in the project details and documents, also require changes to be made to the project details and documents attached to the building permit. This process is obligatory when a new permit is required (modification permit).

Making changes to a building that are contrary to the building permit and its annexes is a violation of the obligation to obtain a modification permit. If a change is made against the building permit and its annexes without obtaining a modification permit for the building, the procedure in article 32 of the ZBA and the administrative sanctions in Article 42 must be applied due to the need for construction activity contrary to the building permit and its annexes. This indicates that any violation of the building permit and its annexes is a result of modifications being made to the building without a modification permit being obtained. In other words, the modifications subject to the modification permit are determined according to which changes are considered to be a violation of the building permit and its annexes. Therefore, it is correct to say that the changes that require a modification permit are changes that are violations of the building permit and its annexes.

IV. Are "*Any Changes In Buildings With A Building Permit*" Still A "*Building*"?

When the Council of State decides whether various construction works, such as a pergola,[12] porch,[13] garden wall,[14] siege wall,[15] and base station[16] are subject to a modification permit, it takes into account whether these works have a building characteristic according to Article 5 of ZBA. The Constitutional Court, which is affected by this jurisprudence of the Council of State, uses the definition of a building in the ZBA, "*whether fixed or mobile, not only the main building but the structures added to the main building (additions), changes made to the main building, and repairs are also accepted as a building*".[17] In the doctrine, it is asserted that an ornamental pool built in an immovable location where a building with a building permit is located has the nature of a building rather than a repair and renovation.[18]

12 Dan. 14D, E.2011/9232, K.2012/5970, T.21.09.2012; Dan.IDDK, E.2005/400, K.2008/1801, T.17.10.2008.

13 Dan.6D, E.1992/1991, K.1993/1112, T.17.03.1993; Dan.14D, E.2014/2429, K.2017/786, T.15.02.2017.

14 Dan.14D, E.2011/8559, K.2012/5400, T.13.09.2012.

15 Dan.6D, E.1967/1407, K.1968/8, T.08.01.1968, Sadık Artukmaç, *Türk İmar Hukuku* (3rd edn, Ayyıldız 1972) 56; D6D, E.1959/5965, K.1960/95, T.20.01.1960, Artukmaç (n 15) 243.

16 Dan.6D, E.2002/2998, K.2003/3204, T.21.05.2003, DKD.3; Dan.6D, E.2011/15099, K.2013/986, T.14.02.2013.

17 AYM, E.2012/93, K.2013/8, T.10.01.2013, R.G.28.03.2013-28601.

18 See, Melikşah Yasin, *İmar Hukukunda İdarenin Yıkma Yetkisinin Kullanımının Usul ve Esasları*, (XII Levha, 2009) 82-83.

At this point, it is of great benefit to consider the approach of determining whether construction works such as "*additions, alterations, and repairs*" carried out in a building with a permit are subject to a building permit or not, according to whether they have "*building*" characteristics.

Buildings are artificial artefacts that are positioned by humans on land to fulfill certain functions and have construction characteristics. Therefore, the concept of a "*building"* expresses a "*wholeness"* that is composed of physical and functional elements. According to definition in Article 5 of the ZBA, a "*building"* consists of "*construction"* on the land and "*facilities"* that cover "*additions, alterations, and repairs"* carried out on this construction. The "*facilities"* create a functional integrity with the construction, according to the characteristics of the building.[19] Accordingly, for any work on a land or plot to be considered a building, it must first have a "*construction"* feature. Facilities in the form of "*additions, alterations, and repairs"* are only secondary elements that are realized during construction and integrated within the process.[20]

Naturally, it may be necessary or even mandatory to make use of the building definition in article 5 of the ZBA when determining whether construction works on any land are subject to permission. Despite this, it is not appropriate to consider "*additions, alterations, and repairs"* carried out in any construction as an independent building on their own. This is because "*additions, alterations, and repairs"* are not the main element within the definition of a building, but are rather elements of a secondary nature that are dependent on the "*construction*", which is the main element. Even if they require construction work, it is not possible to evaluate facilities that are not in the form of "*additions, alterations, and repairs*" in any construction project as a building. Similarly, it is also not correct to define "*any changes*" that are made in the form of "*additions, alterations, and repairs*" in a building with a building permit as a "*building*". Therefore, "*additions, alterations, and repairs*" in a construction or a building with a building permit should not be evaluated by considering their physical properties, but rather by evaluating their functional relationship with the main building. For this reason, although works such as "*additions, alterations, and repairs"* are physical constructions, they do not qualitatively constitute a building independently of the overall construction project

19 The most important result of defining the concept of "building" as an object consisting of both "*construction*" and "*facility*" in the ZBA is that the building permit obtained for a building covers both the construction of the building and the construction of the facilities. According to the feature of the building permit, any lack of facilities that should have been built in the construction process may lead to the denial of a building use permit due to reasons such as an unfinished building or scientific inconvenience regarding its use.

20 For the elements of a building definition, see Taner Ayanoğlu, *Yapı Hukukunun Genel Esasları (*Vedat, 2014) 6-28. According to the author, two fundamental elements are stipulated in the concept of building in the ZBA No. 3194. The first of these is "*construction*" and the second is "*facilities*". There is a conceptual relationship between these two essential elements of the definition of a building. Construction is the primary element; the facilities are dependent on the construction element and therefore have a secondary position.

or the building on which they are performed, because they are always performed in a construction or building.[21]

At first glance, to benefit from the "*construction*" element and the definition of "*fixed and mobile facilities covering additions, alterations and repairs*" in the building definition in article 5 of ZBA can be seen as an appropriate method. However, it should be noted that, neither a "*construction*" element nor the "*fixed and mobile facilities covering additions, alterations, and repairs*" element in the definition of a building in article 5 of the ZBA are any more clear and determinative than the "*any change"* phrase in article 21/2 of the ZBA. The definition of a building in Article 5 of the ZBA is far from sufficient in terms of determining whether a construction work is a building or not. The concept of "*construction"*, which is the essential element of the building definition in this article, does not have any legal definition and criteria. The Council of State is content with only giving a definition of a building in the justification of many of its decisions. When concluding whether a work is a building or not, the Higher Court refrains from making any assessment or examination, especially for elements of the building description. .

To consider "*any changes*" that will take place in the form of "*additions, alterations, and repairs"* subject to a modification permit, there must first be a building with a building permit that has been constructed, or such a building must be under construction. A modification permit cannot be issued for an unpermitted building, and the fact that such a building could be modified by obtaining a modification permit would not make it compatible with the zoning and building legislation.[22] The construction of works such as a swimming pool, garden wall, or hut on an empty plot may be subject to a building permit, depending on whether or not such structures have the characteristics of a building, but they cannot be subject to a modification permit. However, if the same construction works are carried out on land that contains a building with a building permit, it may be considered as "*any change in the building"* and would therefore be subject to a modification permit. A functional relationship is therefore established between the aforementioned construction works and the existing building with a building permit.

The concept of the "*fixed and mobile facilities covering additions, alterations, and repairs*" in the definition of a building and the concept of "*any changes in the*

21 For a contrasting opinion, see Aydın Zevkliler, *İmar Kurallarına Aykırı ve Zarar Verici İnşaat* (Olgaç Matbaası 1982) 207. According to the author, in the ZBA not only the main building, but also the structures built in addition to the main building, alterations made to the main building, repairs, and fixed or mobile facilities connected to the main building are also considered as structures per se. See also Ramazan Yıldırım, *İmar Hukuku'na Aykırı Yapılar Üzerinde İdarenin Yetki ve Yaptırımları* (IUSBE Master thesis 1990) 54.

22 See, Dan.IDDK, E.2016/2405, K.2017/4157, T.06.12.2017: *"To examine and evaluate the provisions of the said Act together; because it is clear that making changes in a building constructed with or without permission by obtaining a modification permit will not make that building compatible with the zoning and building legislation, it has been concluded that a fine may be imposed due to the unpermitted building."*

buildings with building permits" included in article 21/2 of the ZBA are qualitatively different. In the ZBA, the secondary and dependent element of the definition of a "*building"*, which constitutes the main subject of the building permit, i.e., "*fixed and mobile facilities covering additions, alterations, and repairs"* is included. Works such as "*additions, alterations, and repairs*" in this definition are construction activities to be carried out on the basis of the main building permit. It is not necessary to obtain a separate building permit for "*fixed and mobile facilities covering additions, alterations, and repairs on construction*" that are included in the building definition. These are construction works to be completed within the scope of the building permit, and this is the reason why they are included in the definition of the building.[23] However, whether the "*changes*" that are mentioned in article 21/2 of the ZBA may also be made in the form of additions or repairs depends on whether or not the construction works are within the scope of the current building permit of the building. These construction works may also contradict the current building permit. Because the construction works referred to here include construction work related to "*additions, alterations, and repairs*" to be carried out not in accordance with the permit and annexes of a building with a building permit, these works can only be carried out by obtaining a new permit, i.e., a modification permit. The criterion of whether a change in a building with a building permit in the ZBA is subject to permission is not based on whether it is a building or not. This criterion has been determined by the provision of article 21/2 of the ZBA, with no room for further discussion. Construction works such as "*additions, alterations, and repairs*" in a building with a permit are subject to a modification permit because they will be deemed to be contrary to the existing building permit and its annexes. It is not possible to undertake these works with the building permit obtained when starting construction.[24]

According to article 21/2 of the ZBA "*any changes to be made in buildings with building permits*" are neither in the nature of construction, which is the main element of the building definition in article 5 of the ZBA, nor are they a fixed and mobile facility that includes "*additions, alterations, and repairs*", which are secondary and relative elements of the building definition in article 5 of the ZBA. For this reason, because the "*additions, alterations, and repairs*" in a building with a permit do not have the nature of a building, it is wrong to determine whether these works are subject to a permit or not, according to whether they have building characteristics. Moreover, the building definition in article 5 of the ZBA does not include any suitable element for determining which changes to a building will be subject to a permit.

23 Ayanoğlu (n 20) 27.

24 Celal Karavelioğlu, *Açıklamalı – Uygulamalı – İçtihatlı İmar Kanunu* (2nd edn 2007) vol 1, 966.

V. Construction Works That Represent "*Any Changes*"

As we explained above, it is not correct and is not a problem-solving approach to define the changes subject to the modification permit to be made in buildings with a permit as a "*building*". Construction works requiring re-permitting (i.e., a modification permit) are determined as "*making any changes in the buildings with building permits*" in article 21/2 of the ZBA. When considering the issuance of a modification permit, is of great importance to determine what the term "*any change"* means and what the works that fall within its scope are.

The changes to be made in a building subject to a modification permit must be physical construction works. Works performed by changing the functions and usage patterns of the building without any physical construction work on the building do not fall within the concept of changes subject to a modification permit. The use of the whole or some areas of the building contrary to the functions foreseen in the original architectural project, as a result of functional changes without any construction activity or manufacturing work, is not subject to a modification permit. In many cases, such as the use of a farm building as a workshop,[25] use of a warehouse in the basement of a building as a workplace,[26] operating the building as a bird coop, gin factory, or olive oil factory,[27] use of the independent residential section as a workplace,[28] and the use of real estate contrary to the permit and its annexed architectural project;[29] the Council of State has decided that there was no violation of the building permit and its annexes in the sense of article 32 of the ZBA. In these cases, no modification permit was required due to the lack of construction activity and physical construction work.

The changes that are subject to a modification permit are construction activities and alterations carried out by undertaking work that interferes with the physical existence and elements of the building. Physical changes to a building can occur in many different forms, including renewal, replacement, and repair of building elements and materials, changing the dimensions of the building by making various additions[30] decreases in the outer or inner volume of the building, or changing the appearance of building elements and materials. Under this framework, work such as building a wall, removing a wall, creating a window in a wall, inserting a window into a wall, opening a door in the wall, closing a door with a wall, relocating walls and doors, column cutting or insertion, balcony closure, closing a balcony and including it in a room, creating a balcony from part of the closed area of an independent section such as a

25 Dan.6D, E.1991/3137, K.1992/5040, K.21.12.1992.

26 Dan.6D, E.1998/3254, K.1999/3159, T.09.06.1999, DD. 102.

27 Dan.6D, E.2002/4170, K.2004/883, T.18.08.20004, DKD. 5.

28 Dan.6D, E.1995/4733, K.1996/4650, T.25.10.1996.

29 Dan.14D, E.2015/8519, K.2018/5673, T.25.09.2018.

30 For any add-on to be classed as building work, it must be physically connected to the main structure and form part of it in terms of its function. Nevzat Koç, *Bina ve Yapı Eseri Maliklerinin Hukuki Sorumluluğu (BK.m.58)* (Ankara University Press 1990) 66.

room or hall, and the addition of rooms, living rooms, kitchens or a detached floor or flat to the building.[31] All of these works can be can be considered to be construction activities within a building.

While some of the physical changes made to buildings do not cause changes in volume, appearance, and function, some of them can cause a change in the volume of the building, while some change the appearance of building elements, and some change the function of the building area and its elements. Buildings are not only physical structures but also have functional characteristics as they are built to meet certain needs. It is impossible to consider buildings separately from their functions. For this reason, buildings are the result of construction work undertaken by combining various building materials for the creation of places, spaces, areas, and empty and filled volumes that have a certain function. Therefore, the qualities and properties of the buildings are evaluated not only by considering the material elements that make up the building, but also by considering the usage functions created by these material elements. In this context, the physical changes made to buildings should be evaluated by considering the physical properties and dimensions of the building elements and areas, as well as the functional changes to the usage patterns. For example, the difference between a porch built to protect the usage area of an independent section on a garden from sun and rain, and a porch built to transform the common area in front of an independent section of a garden to an independent section of floor is fully functional. Building a porch adjacent to a building for protection from sun and rain does not result in any functional change in the use of the building and the immovable areas in which it is located, and therefore it is not subject to a modification permit.[32] Likewise, covering the top of the terrace with corrugation in the form of an open eave to prevent water leakage is not subject to a modification permit because it does not cause a change of function in the terrace.[33] However, if making a porch will result in the allocation of a part of the garden to an independent section of the building, or if the closing of a terrace will create a closed area, then such modifications will naturally be subject to a modification permit. For this reason, it is necessary to consider all construction works that affect the usage functions of a building following changes made to the material elements of the building, as "*any change*" within the scope of article 21/3 of the ZBA. As a result, it becomes necessary to accept that such construction works are subject to a modification permit.

Physical construction works in buildings can be carried out in three ways: repair, alteration, or addition. These concepts are included in the definition of a "*building*"

31 Artukmaç (n 15)162.

32 Dan.14D, E.2014/2429, K.2017/786, T.15.02.2017: *"To accept that the porch should be subject to a license in accordance with the above-mentioned regulations; it must be built within the scope of the structure definition regulated in the ZBA. In other words, it must be made of a material that will create a closed area and affect the carrier system of building that it is associated with, except for the purpose of protection from sun and rain."*

33 Dan.6D, E.1990/2078, K.1992/1469, T.10.04.1992.

in article 5 of the ZBA as "*fixed and mobile facilities covering additions, alterations, and repairs*". The subject of a modification permit is determined as "*any change in buildings"* in article 21/2 of the ZBA, but the concepts of repair and addition are not included in this article. This does not mean that construction works such as repairs and additions cannot be subject to a modification permit. Although it is called "*change*" in article 21/3 of the ZBA, this concept is used widely and comprehensively to cover all "*additions, alterations, and repairs"* in a building because these concepts are often intertwined with each other. For example, when the repair of a defect in a building is performed by replacing damaged parts with new ones it occurs in the form of a change, and when it is performed by adding some new parts and elements to the structure it occurs as an addition. In other words, changes such as the removal of a wall in an independent section, repairs such as the replacement of roof material or the engine of a deteriorated elevator, and building additions such as porches or pergolas or the closure of a balcony are all changes made to a building in a broad sense.

On the other hand, the modification project in article 4/dddd of the PAZBB as "*the whole of the necessary implementation projects related to the alterations or additions required to be made in the approved projects of the permit annexes of the buildings"*. In the PAZBB, it is accepted that additions will also be subject to a modification permit. Accordingly, it is accepted that additions to a building with a permit also fall under the classification of "*any change in the building*" in the framework of article 21/3 of the ZBA and will also be subject to a re-permit requirement. We mentioned above that additions to a building with a permit should be evaluated within the scope of the changes to the building with a permit, not within the scope of the building definition. Additional construction can include creating a closed area in the attic,[34] building a new floor in the building, and making additions that create a closed area such as a room, living room, or kitchen.[35] Constructing a porch,[36] veranda, or ground terrace[37] adjacent to a building is a change that has features of an addition. The additional construction need not be an additional construction of the same nature as the original construction, for example the building of a Global System for Mobile Communications (GSM) base station[38] on the roof of a building. Also, the addition does not have to be adjacent to the building. Various additions that are not adjacent to the building but are immovable and located on the land which the building is located are also considered to be an additional construction, regardless of whether they are in a functional relationship

34 Dan.14D, E.2011/16568, K.2012/5725, T.19.09.2012.

35 Dan.14D, E.2012/7442, K.2014/2175, T 13.02.2014; Dan.14D, E.2018/2032, K.2019/25, T.15.01.2019.

36 Dan.6D, E.1991/1831, K.1992/2034, K.06.05.1992; Dan.6D, E.1992/1991, K.1993/1112, T.17.03.1993; Dan.14D, E.2014/2429, K.2017/786, T.15.02.2017.

37 Dan.14D, E.2011/16568, K.2012/5725, T.19.09.2012; Dan.14D, E.2012/7442, K.2014/2175, T.13.02.2014.

38 Dan.6D, E.2002/2998, K.2003/3204, T.21.05.2003, DKD, 3.

with the main building. Accordingly, constructions such as a hut, outbuilding, gazebo, bower, pergola, garage,[39] swimming pool,[40] garden wall,[41] siege wall,[42] and fence built in the garden of a building are not classed as buildings but are additional constructions that are not adjacent to the main building.

"*Other modifications and repairs*" are mentioned when determining construction works that will not be subject to a modification permit in article 21/3 of the ZBA. This shows that the legislator also accepts the concept of repairs within the scope of any changes that can be made to a building. The concept of "*repair*" is different from the concepts of alteration and addition. Repair activity is any work undertaken to make a damaged part of a building usable and operational. Therefore, activities performed for repairs, such as replacing broken glass in a window or repairing a broken faucet, are carried out by replacing the damaged parts of the building and bringing the building into conformity with its previous shape. Repair work in the building is generally carried out to ensure the conformity of the building with the license and its annexes, and does not contain any elements contrary to the permits and its annexes. Therefore, repairs are usually not subject to a permit requirement. On the other hand, if the repair is to be carried out by making an alteration to the building, it will be necessary to class such action as a change. During the repair work, if changes are made to the building as a result of an inconsistency in the building permit and its annexes, then the repair work will be counted as "*any changes in the buildings*" and will be subject to the obligation to obtain a modification permit.

It should be noted that if the changes, including additions and repairs, to be made to the building occur in the form of changes made to the elements that are not included in or do not need to be included in the building permit and its annexes (i.e., if the building does not come into conflict with the building permit and its annexes as a result of the changes made or to be made), the works in question will naturally not be subject to a modification permit. Under such circumstances work would not have the characteristics of making any change to the building in terms of scale, volume, and size within the meaning of article 21/2 of the ZBA. For example, when a cabinet is installed on a wall, an air conditioner is installed, or a small niche is made on a non-bearing wall in a residence, a new permit will not be required because these works will not violate the building permit and its annexes.

39 Dan.6D, E.1959/5965, K.1960/95, T.20.01.1960, Artukmaç (n 15) 243.

40 Dan.6D, E.2004/1834, K.2004/6658, T.15.12.2004; Dan.14D, E.2012/7442, K.2014/2175, T 13.02.2014.

41 Bkz. Dan.14D, E.2011/8559, K.2012/5400, T.13.09.2012, DD 132, 189-191.

42 Dan.6D, E.1967/1407, K.1968/8, T.08.01.1968, Artukmaç (n 15) 56.

VI. Changes Subject to Building Permits Must Be Permissible According to the Zoning And Building Legislation

If the changes to be made to a building with a permit are made without obtaining a modification permit, although they are subject to a permit, then the act of building contrary to the permit and its annexes will occur. However, it should be noted that whether the changes to be made in a building with a permit are qualitatively subject to a permit differs conceptually from whether they can be permissible according to the zoning and building legislation. A change may be qualitatively subject to a modification permit, but if making a modification constitutes a violation of the zoning and building legislation, then it is not possible to issue the modification permit. For example, building an additional floor on a two-storey building is subject to a modification permit, but if a two-storey building condition is stipulated in the relevant zoning plan, then it is not possible to issue a modification permit due to the conflict with the zoning plan.

Repairs and modifications that are subject to a modification permit can only be made in accordance with the zoning plan, administrative regulations, and other legislative provisions.[43] For this reason, when a modification permit is requested for a change that is subject to a permit, it is necessary to investigate whether this change is permissible.[44] Changes subject to a modification permit in a building with a permit that affect the base area coefficient (TAKS), floor area coefficient (KAKS), building height, front line, approach distance, and skylights must comply with the zoning plan, and zoning and building legislation principles. Therefore, if the modifications that require a permit are contrary to these principles, a building modification permit cannot be issued for these modifications. For example, the Council of State decided that adding ventilation shafts to lower floors that pass through an apartment by closing rooms[45] and adding illumination to the kitchen of a ground floor flat[46] would violate the scientific principles of health and safety rules. Adding a restaurant by closing an area of 109.04 m,[47] closing an open cantilever balcony,[48] and constructing a coal storage facility in a garden[49] were considered to be zoning violations that would intrude on neighbors. Creating a closed volume in a common garden, exclusively for use as an independent section[50] would constitute an infringement of the right of all

43 Halil Kalabalık, *İmar Hukuku Dersleri* (2nd edn, Seçkin 2009) 367.

44 Bkz. Dan.14D, E.2011/14915, K.2013/2058, T.21.03.2013: *"In this case, to determine whether the additions found to be made later were subject to the permit according to the provisions of the existing zoning plan, it was necessary to make a new decision regarding the dispute by conducting an on-site investigation and expert examination by the Administrative Court."*

45 Dan.6D, E.1987/415, K.1987/1049, T.12.11.1987.

46 Dan.6D, E.1989/3211, K.1990/37, T.29.01.1990.

47 Dan.IDDK, E.2004/2156, K.2007/2334, T.22.11.2007.

48 Dan.6D, E.1993/2362, K.1993/5151, T.06.12.1993; Dan.6D, E.2004/1411, K.2006/1358, T.22.03.2006.

49 Dan.6D, E.2009/7078, K.2012/7731, T.17.12.2012.

50 Dan.6D, E.1996/5807, K.1997/5378, T.27.11.1997.

property owners to use the common space, and constructing a swimming pool[51] would violate the building conditions in the zoning plan. Therefore, no modification license can be issued for these modifications. Similarly, if the exterior color and appearance of a building are included in the architectural project details, changing this color or adding cladding for thermal insulation is subject to a modification permit, which will require changes to the project details. However, in accordance with article 21/4 of the ZBA, if a determination has been made by the municipality to harmonize the exterior of buildings with the characteristics of the location and the environment, and to achieve a beautiful appearance (for example, the whitewash rule for houses in Bodrum), no modification permit can be granted to any exterior coating that is contrary to this determination.

It should be noted that the right of building owners to make modifications to their buildings with a permit is one of the rights arising from the building permit. However, the right to make modifications to the building is in some cases limited by zoning and building legislation. It is extremely important to strike a fair balance between the right to make modifications and the restrictions arising from the zoning and building legislation. As a rule, as long as the modifications to be made do not contradict the scientific principles that are used to establish the health and safety conditions and the building conditions set by the zoning and building legislation,[52] permit requests for modifications such as "*additions, alterations, and repairs*" should be met. In this context, even if a construction ban is imposed on real estate where the building with a permit is located, it is necessary to issue a modification permit for repairs and modifications other than major renovations. For example, a modification permit requested for repairs in an old building cannot be rejected on the grounds that the property is allocated as a garage and parking lot in the new zoning plan.[53] Whereas, a modification permit requested for the addition of an attic to a building on the parcel of land within a zone where all kinds of construction, repair, and modification are prohibited by the Ministry of Reconstruction and Settlement will not be granted.[54]

VII. Relationship Between the Modification Permit and Main Building Permit

According to article 21/1 of the ZBA, it is necessary to obtain a permit again to make changes to a building with a permit. As explained above, this modification permit is required for construction works that comprise "*additions, alterations, and repairs*" that would contradict the existing permit and its annexes. It is not a renewal of the existing building permit and its annexes. For example, in accordance

51 Dan.6D, E.2004/1834, K.2004/6658, T.15.12.2004.

52 Jovanović, Aristovnik, and Rogić Lugarić (n 2) 6.

53 Dan.6D, E.1966/4304, K.1970/1490, T.06.06.1970, DKD 1971, 221.

54 Dan.6D, E.1979/95, K.1982/760, T.29.03.1982.

with article 29 of the ZBA, if the building permit is invalid due to the expiration of the permit period, it is necessary to obtain a new building permit. As a rule, the situation covered by article 29 of the ZBA is the renewal of the previous building permit. However, because the building to be modified already has a building permit, essentially the permit required to make changes and its annexes is a change to the existing building permit and its annexes. In accordance with article 21/2 of the ZBA, the building permit acquired by making changes to the project details annexed to the existing building permit is not a renewal of the previous building permit, but a different permit that changes the previous permit and its annexes.[55] For this reason, the permit required to make any changes to a building with a permit is called a modification permit.

It is compulsory to obtain a modification permit to carry out works such as "*additions, alterations, and repairs*" in a building that has a building permit in the Turkish zoning and building law. To obtain a modification permit, the architectural project must be rearranged and other projects must be changed where necessary.[56] It is necessary to have a scientific responsible person in every field of expertise required by the permit and annexes of the buildings, and the preparation of the project details for the buildings should be carried out by members of a professional body with the necessary expertise.[57] In this context, for the modification permit, changes to the project details should also be made by professionals in the relevant field of expertise.[58]

The validity of the modification permit depends on the continuation of the effectivity and validity of the main building permit. In a lawsuit filed to request the cancellation of a modification project, the Council of State stated that the first permit and the annexed project details were not valid because the construction was not completed within the permission period, and it was decided that a modification project for an invalid project was not a decision that should be subject to an administrative lawsuit.[59] In another decision of the Higher Court, it was concluded that *"upon the court decision on the cancellation of the first building permit, the modification permits*

55 See, art. 4/dddd of the PAZBB.

56 See, art. 58 of the PAZBB: *"(...) (2) In new construction, additions and substantial alterations, for which a building permit has been obtained, the architectural project must be re-arranged when later changes are requested. If this change requires a change in the building's static and facility principles, the necessary changes are made in the requested documents also. (...)"*

57 Dan.14D, E.2015/6006, K.2017/6759, T.06.12.2017.

58 Dan.6D, E.2014/5795, K.2019/1265, T.11.03.2019: *"(...) without obtaining the approval of the architectural project author upon the request of the new owner, and as a result of the application made for the project approved by the civil engineer, a building modification permit dated 08/06/2012 and numbered 8763 was issued. It was stated by the defendant administration that the project modification was requested from the civil engineer on the grounds that there was a change in the carrier system of the building in question. (...) In this case, after the modification permit was examined by the Administrative Court and the scope of the modification was determined, there was a need to determine whether there was a need for changes in the architectural project and whether the signature of the civil engineer in the modification permit was sufficient; but there was no legal propriety in the decision because it was based on an incomplete examination."*

59 Dan.6D, E. 1993/4593, K.1994/1594, T.25.04.1994.

obtained after this building permit should also lose their legal basis".[60] Again, the Council of State, in another decision, did not find it unlawful to suspend construction due to the withdrawal of a modification permit that was issued incorrectly by the administration.[61] Within the framework of these judicial decisions a modification permit is a second permit that changes, but does not completely eliminate the main building permit. If a modification permit is canceled, the changes made in the main building permit and its annex will also be canceled.

VIII. Changes Not Subject to A Modification Permit

The absolute application of the rule that any change to be made to a building is subject to a modification permit is incompatible with natural patterns of human activity. There is often a need to make changes that are not subject to a modification permit in buildings with a permit. Legislators have taken this into consideration and made exceptions to the ruling requiring a modification permit, and proclaimed that various "*additions, alterations, and repairs*" will not be subject to a modification permit. As a rule, all types of modifications are subject to permission, but some limited and simple operations are excluded from this obligation.[62]

While a new permit is required for any changes to be made in buildings with a permit, changes that are not subject to permission are exceptions. For this reason, it is important not to determine what the changes subject to permission are, but rather what changes are not subject to permission. Construction works that are not subject to a modification permit are classified into two categories in article 21/3 of the ZBA:

> *a) Joints, interior and exterior plastering, painting, whitewashes, gutters and, streams, joinery, floor and ceiling coverings, electrical and plumbing repairs, roof repairs, and tile transfers.*
>
> *b) In accordance with the by-laws according to the characteristics of the location, modifications and repairs that do not affect the carrier element specified in the zoning and building by-laws as prepared by the municipalities.*

In the Unplanned Areas Zoning and Building By-law,[63] which was issued to ensure the implementation of the ZBA in unplanned areas, a distinction has been made regarding "*essential repair and modification - ordinary repair*". It has been proclaimed that "*repairs to joints, interior and exterior plastering, whitewashes, painting, gutters and streams, joinery, floor and ceiling coverings, electricity, sanitary installation, balustrades, lightning rods, pergolas and similar structures; as well as repairs to partitioning walls, garden walls, and chimneys, eaves, and similar*

60 Dan.6D, E.2007/1012, K.2008/2047, T.01.04.2008, DD 120.

61 Dan.6D, E.1992/3289, K.1993/1969, T.20.05.1993.

62 Artukmaç (n 15) 63.

63 R.G.02.11.1985-18916 Duplicate.

elements; and the construction of small and simple coops that are not visible from the road", which are defined as ordinary repairs in this by-law are not subject to a permit.

In the PAZBB,[64] which was enacted to ensure the implementation of the ZBA in planned areas, a distinction is made between "*essential modification - simple repair and modification*". Accordingly, in article of 4/y of the PAZBB, essential modification works are defined as "*operations affecting the bearing element in the buildings; changing the building construction area, the area included in the precedent (floor area coefficient) account, the building base area, the number of independent sections, the area and purpose of use of common places, the area and purpose of use of independent sections, or changing the permit annex projects"*. Such modifications are likely to be subject to a permit (art. of 4/y and 58/1 of the PAZBB).

On the other hand, "*simple repair and modification*" works, which are defined as "*all kinds of repair and modification operations in buildings, such as joints, interior and exterior plastering, painting, whitewashes, gutters and streams, joinery, floor and ceiling coverings, electrical and plumbing repairs, garden walls, wall coverings, chimneys, eaves, roof repairs and tile transfer, all of which are outside the scope of essential modification and do not change the carrier system, exterior of the independent section of the building, the location, and the number of wet floor*" are not subject to a modification permit (art. 4/i of the PAZBB). In addition to simple repairs and modifications, it is also prescribed in the PAZBB that the construction of folding glass panel applications in balconies, balustrades, pergolas, and gazebos/arbors and similar features; the repair of partition walls, garden walls, wall coverings, chimneys, eaves, roofs, and similar features, and window replacement works (art. 59/1 of the PAZBB); thermal insulation applications that do not affect the carrier system and the establishment of solar-based renewable energy systems for the building's own needs (art. 59/ of the PAZBB 59/2); and certain electronic communication stations and equipment (art. 62 of the PAZBB 62) installed in buildings and the land are not subject to a permit.

Conclusion

A functional criterion is needed to distinguish which "*additions, alterations, and repairs*" to buildings with a permit are subject to a modification permit and which are not. However, in the ZBA, there is no definite criterion in this regard. For this reason, the issue of which "*additions, alterations, and repairs*" to buildings are subject to a building permit is still an ongoing issue in the field of zoning and building law. For example, in buildings with building permits, especially pergolas and porches, there have been disputes about whether works such as building additions or the closing of balconies are subject to permits in practice.

64 R.G.03.07.2017-30113.

The resolution of such disputes is dependent on the determination of the changes made or to be made in buildings with a permit during or after the construction phase, with clear and precise criteria required to determine which are subject to a modification permit and which are not. However, it has been observed that despite the existence of the provisions of the ZBA and related regulations, as well as numerous judicial decisions, the uncertainties about the distinction whether any construction works in buildings are subject to a permit have not been resolved satisfactorily. The reason for this is that the Council of State determines whether the "*additions, alterations, and repairs*" in buildings with building permits are subject to a modification permit by considering whether the construction works have the quality of a "*building*". Unfortunately, the elements of the building definition in the ZBA are not sufficient. In addition, the Council of State's opinion and approach does not meet the need for clear, precise, and specific criteria.

However, it is possible that a criterion can be drawn from the general philosophy and spirit of the regulations in the ZBA. This criterion can be defined as: among the repairs, changes, and additions to buildings with a permit, those in accordance with the building permit and its annexes will not require a modification permit; whereas those contrary to the building permit and its annexes will. At this point, there is a problem of how to determine compliance and non-compliance with the permit and its annexes and how to distinguish them from each other in a clear, specific, and precise way. There is no clear criterion in the ZBA for this issue and reference has therefore been made to the by-laws. Therefore, the distinction between modifications subject to a modification permit and those that are not should be made according to the principles determined by analyzing and systematically interpreting the regulations in the ZBA and related zoning and building by-laws.

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IHL's Remedies for the Legal Status Problem of the "Corporate Warriors"

"Şirket Savaşçılarının" Statü Sorununa İlişkin Uluslararası İnsancıl Hukukun Getirdiği Çözümler

Deniz Baran[1]

Abstract
The use of private military and security companies by states, particularly by those in the Middle East and Africa (MENA) region, has remarkably increased in the last decade. With the exponentially increasing use of private military and security companies, an important question arises: Why have many states started to prefer outsourcing one of their essential functions which is the monopoly on the use of force? Apparently, they have some good reasons such as cost efficiency, political non-liability or quicker and more qualified military service procurement. However, with the exponential proliferation of the private military and security companies (PMSCs) as the new actors of the "battlefield", the accustomed rules of war have been changing, and still there are some uncertainties about how to regulate these new actors' status and activities, which may often not be in compliance with the principles and norms of the international humanitarian law. To address these uncertainties, in this paper, the legal framework regarding the PMSCs will be examined. However, the examination will specifically be through the prism of international humanitarian law (IHL). By doing so, it is aimed to identify some remedies for the legal status problem of the PMSCs in this field of international law.

Keywords
Private military and security companies, Modern mercenaries, Privatization of war, Corporate warriors

Öz
Geçtiğimiz on yıl içerisinde özel askeri ve güvenlik şirketlerinin, Orta Doğu ve Kuzey Afrika bölgesindeki devletler başta olmak üzere, devletler tarafından kullanımı kaydadeğer derecede artmıştır. Bu şirketlerin gitgide daha fazla kullanılmasıyla birlikte önemli bir soru ortaya çıkmaktadır: Neden birçok devlet, sahip oldukları meşru kuvvet kullanımı tekeline rağmen böylesi temel bir işlevlerini dışarıya aktarmaktadır? Açıktır ki maliyet verimliliği, siyasi sorumsuzluk, daha hızlı ve nitelikli askeri hizmet temini gibi bazı iyi sebepler bulunmaktadır. Fakat "savaş alanının" gitgide daha yaygın hâle gelen bu yeni aktörleriyle birlikte savaşa ilişkin geleneksel kurallar değişmekte, ayrıca bu yeni aktörlerin statülerinin ve sıklıkla uluslararası insancıl hukukun ilke ve kurallarına uyum göstermeyebilen faaliyetlerinin nasıl düzenleneceğine ilişkin bazı belirsizlikler hâlâ sürmektedir. Bu makalede, söz konusu belirsizliklere bir çözüm bulabilmek amacıyla özel askeri ve askeri şirketlerine ilişkin yasal çerçeve incelenecektir. Ancak bu inceleme özel olarak uluslararası insancıl hukuk perspektifinden yapılacaktır. Böylelikle, uluslararası hukukun bu alanının özel askeri ve güvenlik şirketlerinin hukuk statü sorununa ilişkin ortaya koyduğu çözümler tespit edilmeye çalışılacaktır.

Anahtar Kelimeler
Özel askeri ve güvenlik şirketleri, Modern paralı askerler, Savaşların özelleşmesi, Şirket savaşçıları

1 **Corresponding Author:** Deniz Baran (Res. Asst.), Istanbul University, Faculty of Law, Department of International Law, Istanbul University, Istanbul, Turkey E-mail: denizbaran@istanbul.edu.tr ORCID: 0000-0002-9761-1910

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IHL's Remedies for the Legal Status Problem of the "Corporate Warriors"

I. The Rise of PMSCS and Their Status Problem

In today's world, the use of the private military and security companies (PMSCs) by states[1] has remarkably increased.[2] Particularly in the last two decades, in many regions of the world from Africa to Asia, the PMSCs have started to take a very active role in the different stages of armed conflicts or security affairs.[3] The PMSCs' extensive services are widely used even by the most developed states such as the United States, United Kingdom, France and some other NATO countries.[4] It is widely known that some powerful American[5] or Russian PMSCs[6] have recently been engaged in many military operations in the Middle East. Also, many PMSCs are used by governments for internal matters such as suppressing the rebellion activities[7] or eliminating the competitors within the ruling elites.[8] In several cases, the PMSCs have become the prominent components of the security apparatus and could even act like the *de facto* primary armed forces of the states, which had hired them.[9] As mentioned above, the most major clients of the PMSCs are not confined to the failed or weak states, which cannot depend on their own security forces, also the most developed states often benefit from the PMSCs' services.[10] Moreover, not only the states resort to the use of the PMSCs but also the international organizations, primarily the United Nations. Since the mid-1990s, some PMSCs have taken an active role in providing

1 The potential employers comprise not only governments but also business enterprises, humanitarian agencies and militia groups.

2 UN ECOSOC 'Report of the Third Meeting of Experts on traditional and new forms of mercenary activity' (18 January 2005) UN Doc. E/CN.4/2005/23.

3 Nathaniel Reynolds, 'Putin's Not-So-Secret Mercenaries: Patronage, Geopolitics, and the Wagner Group' (*Carnegie Endowment for International Peace*, 8 July 2019) 3 <https://carnegieendowment.org/2019/07/08/putin-s-not-so-secret-mercenaries-patronage-geopolitics-and-wagner-group-pub-79442> accessed 8 December 2019 ; Halit Gülşen, 'Rusya'nın Suriye Müdahalesinde Özel Askeri Şirketlerin Rolü' (*ORSAM*, July 2017), <http://orsam.org.tr/d_hbanaliz/64TR.pdf> accessed 13 December ; Angela McIntyre and Taya Weiss, 'Weak Governments in Search of Strength: Africa's Experience of Mercenaries and Private Military Companies' in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP 2007) 67-81.

4 E.L. Galston, 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications For International Humanitarian Law Enforcement' (2008) 49(1) Harvard International Law Journal 221,225.

5 Editorial, 'Accountability on the Battlefield' *The New York Times* (New York 8 October 2007) <http://www.nytimes.com/2007/10/08/opinion/08mon2.html> accessed 17 December 2019.

6 Neil Hauer, 'Russia's Mercenary Debacle in Syria' (2018) Foreign Affairs <https://www.foreignaffairs.com/articles/syria/2018-02-26/russias-mercenary-debacle-syria?cid=nlc-fa_fatoday-20180226> accessed 1 January 2020.

7 Marika Josephides, 'Sierra Leone then and now: The case of private military companies' (*Polity* October 1 2014) <https://www.polity.org.za/article/sierra-leone-then-and-now-the-case-of-private-military-companies-2014-10-01> accessed 2 January 2020.

8 Ryan Parry and Josh Boswell 'American Mercenaries are torturing Saudi elite rounded up by new crown prince' *Daily Mail* (London 24 November 2017) <http://www.dailymail.co.uk/news/article-5108651/American-mercenaries-torturing-Saudi-princes.html> accessed 23 November 2019.

9 Mark Calaguas, 'Military Privatization: Efficiency or Anarchy?' (2006) 6(1) Chicago-Kent Journal of International and Comparative Law 58, 59-60; "In Angola, the government hired Executive Outcomes (EO), a South African private security firm, to retrain their armed forces and lead them into battle. In the course of the conflict, EO employees piloted Angolan Air Force planes and participated in commando raids" Peter Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press 2003) 9.

10 S. Yelda Kaya, 'Private contractors in war from the 1990s to the present: A review essay' in Erik-Jan Zürcher (eds) *Fighting for a Living: A Comparative Study of Military Labour 1500-2000* (Amsterdam University Press 2013) 613.

security services under the control of the United Nations (UN) in its peacekeeping operations.[11] Therefore, the advent of the global private military industry –in other words, non-state violence- might be one of the most important developments in the modern international security architecture.

To define it simply, the PMSCs are corporate business entities providing professional services that are pertinent to warfare. However, the role of modern PMSCs is not confined to providing combat forces for the armed conflicts. They also provide a wide array of services ranging from advisory roles for strategic planning to providing security, logistical support, military training, facility management, intelligence service and military capacity building. Therefore, it is possible to categorize the PMSCs broadly in three main categories:[12]

1. Supply Firms
2. Private Military Companies (PMCs)
3. Private Security Companies (PSCs)

To define them loosely, supply firms do not engage in direct combat on the battlefield; rather provide logistics, information, infrastructural services and/or technical or operational support for the militaries. Private military companies (PMCs) offer direct military support in armed conflicts. Private security companies (PSCs), as is evident from its name, are mainly responsible for providing security services for their clients without having a direct role in the military attacks. Within the scope of such security services there are a wide range of activities such as monitoring activities, law enforcement, and protection of a government or political leader.

It would be accurate to state that modern PMSCs have emerged after the Cold War had come to the end.[13] Following the end of the Cold War, the military downsizing of the great military powers paved the way for the rise of the PMSCs, with the expectation for them to fill the vacuums that such military downsizing was leaving behind.[14] Another important factor fostering the emergence of the PMSCs was the traditional global military powers' disengagement from their influence zones in many

11 Galston (n 4) 226.

12 ibid 224; Singer, *Corporate Warriors* (n 9); Some other authors divide the companies into five categories: (i) private security companies; (ii) defence producers; (iii) private military companies; (iv) non-statutory forces; and (v) mercenaries. The category (iii) further divided into PMCs which provide consulting; logistics and support; technical services; training; peacekeeping and humanitarian assistance; and combat forces, Herbert Wulf, *Internationalizing and Privatizing War and Peace* (Palgrave Macmillan 2005) 2.

13 Christopher Kinsey, *Corporate Soldiers And International Security: The Rise Of Private Military Companies* (Routledge 2006), 50-51; David Shearer, *Private Armies And Military Intervention Adelphi Paper* (Routledge 1998) 13; Singer, *Corporate Warriors* (n 9) 66-70.

14 Singer, *Corporate Warriors* (n 9) 53; As the same author, Singer, says in his different article: "While they are deployed on a range of global missions and now enmeshed in Iraq, the U.S. military is actually 35% smaller than it was at the height of the Cold War and the British military is as small as it has been since the Napoleonic wars" Peter W Singer, 'The Private Military Industry and Iraq: What Have We Learned and Where to Next?' (2004) Geneva Center For the Democratic Control of Armed Forces Policy Paper, 15<https://gsdrc.org/document-library/the-private-military-industry-and-iraq-what-have-we-learned-and-where-to-next/> accessed 14 November 2019.

regions such as Africa or the Middle East, which were mainly created under to the circumstances of the Cold War. The power vacuum and reshuffle of the security establishment which emerged after such a disengagement has prompted the states in those regions to the use of the PMSCs in order to survive the conflicts they were undergoing.[15]

As some experts and authors suggest, the flood of former/veteran/unemployed soldiers to the military market after the Cold War has provided the required human and expertise resources which also laid the basis for the proliferation of the PMSCs.[16] The PMSCs basically offer the opportunity for many soldiers to have a second career that still keeps them on the ground. In addition to the influx of new soldiers, an enormous release of weaponry including both light weapons and high-ticket items like missile systems and tanks into the global market at much lower costs has been experienced after the Cold War. The main reason behind this was the need of the governments to quickly sell off their arms to raise desperately needed funds.[17] This development facilitated the access of the PMSCs to the required ammunition.

Some commentators suggest that the following factors are also relevant to the increasing demand for the PMSCs: The changing nature of armed conflicts, the increase in expeditionary operations of armed forces, development of military technology and the loss of military expertise due to layoffs.[18]

In addition, the rapid globalization process and the neo-liberal trends of the 1990's created opportunities for the development of the private security and military industry on an international scale.[19] Due to the global privatization trend, states have been encouraged or, at least, become more inclined to outsource their military and security functions which previously had been seen as the exclusive province of the state in accordance with the principle of the state's monopoly on the legitimate use of force.[20] The economic rationalization of the use of the PMSCs by states has enabled the erosion of such an essential principle of the traditional international law. Of course, the description of "rationalization" here is made in accordance with the

15 Deborah D. Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge University Press 2005) 36,159.

16 Joanna Spear, 'Market Forces the Political Economy of Private Military Companies Economies of Conflict: Private Sector Activity in Armed Conflict' (2006) FAFO-Report 531, 14–16 <https://www.fafo.no/index.php/zoo-publikasjoner/fafo-rapporter/item/market-forces > accessed 21 December 2019.

17 Singer, Corporate Warriors (n 9) 54.

18 Sam Perlo-Freeman and Elisabeth Sköns, 'The Private Military Service Industry' (2008) SIPRI Insights on Peace and Security No 1, 3 < https://www.sipri.org/sites/default/files/files/insight/SIPRIInsight0801.pdf > accessed 22 December 2019.

19 Singer, 'The Private Military Industry and Iraq' (n 14) 2.

20 Bleda R Kurtarcan, *Muharebe Alanının Yeni Aktörleri: Askeri Yükleniciler* (Beta 2017) 119-128; "It seems that Western governments are increasingly keen to move towards this model of the ultra-minimal State and to allow even the provision of force to be assumed by private enterprise on a contractual model in which the rich or the desperate may choose to avail themselves of fortifications at the going rate while the rest take their chances in life." Clive Walker and Dave Whyte, 'Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom'(2005) 54(3) The International and Comparative Law Quarterly 651.

neo-liberal approach, which recommends for states to seek the most cost-efficient options in public services.[21] With the endorsed neo-liberal approach, the governments have become more like-minded to private corporate entities in their assessments of the costs of the public services. They started focusing on the fact that outsourcing of public services would enable them to have the same work done in a shorter duration and/or in a cheaper and/or more qualified way in the private market. As Singer said, such an approach has led the "privatization revolution" even in the exclusive sectors like the military sector,[22] and as Walker and Whyte successfully stated, "it appears that nothing is sacrosanct in the onward march of the principles of neo-liberalism."[23]

Another important factor for the rapid growth of the PMSCs all around the world is that the PMSCs over time have gained a great amount of wealth and influence on "decision-makers" (government members, parliament members, high ranked officials, diplomats and bureaucrats etc.), and thanks to their great financial power, they could create their lobbying networks in order to convince or enforce decision-makers to accept to hire their services.[24] It is also true that the PMSCs are bringing billions of dollars from international markets to their home countries, which makes them valuable export merchants. While the estimated value of the PMSC sector is more than 200 billion USD,[25] the financial dimension of the PMSC phenomenon cannot be ignored. For instance, even taking a quick look at the rapidly growing financial capacities and profits of some American PMSCs such as DynCorp, Hulliburton or Blackwater would be illuminating to understand this reality.

The last but not the least factor for the rise of the PMSCs is the vague status of the PMSCs in international law, thus their utility as "ghost armed forces."[26] The issue of the vagueness of the PMSCs' status in international law will be elaborated below, so we will not go into details here. We can just say, in short, the vague status of the PMSCs in international law sometimes allow governments to turn the norms and principles of international law around and overcome the problem of the legal liability, transparency and accountability for their actions. In addition, the use of the PMSCs furnishes governments with a "flexible" foreign policy tool which can avoid the internal oversight mechanisms and deflect criticism of the international community. This is what Avant calls "foreign policy by proxy."[27]

21 Singer, *Corporate Warriors* (n 9) 53; F Schreier and M Caparini 'Privatising Security: Law, Practice and Governance of Private Military and Security Companies' (2005) Geneva Center For the Democratic Control of Armed Forces Occasional Paper 6 <http://iskran.ru/cd_data/disk2/rr/003.pdf> accessed 17 November 2019.

22 Singer, *Corporate Warrior* (n 9) 66–70.

23 Walker and Whyte (n 20) 651.

24 Freeman and Sköns (n 18) 15.

25 Dyfed Loesche, 'Contracted Security' (*Statista,* 2 March 2016) <https://www.statista.com/chart/4440/private-military-and-security-company-sector/> accessed 27 December 2019.

26 What we mean with this term is that this legal vagueness allows some powerful states to implement their aggresive international political agendas without facing legal troubles.

27 Avant, (n 15) 152-154.

As conclusion, because of the aforementioned reasons, contemporarily, the states have been incentivized to share their monopoly on the legitimate use of force with the PMSCs. It must also be noted that the aforementioned reasons are not exhaustive. Notably, the use of the PMSCs by the states is an outstanding and growing phenomenon and has been rationalized by multiple reasons, mostly the economic ones.

However, the economic motives behind the use of the PMSCs incentivize governments to turn a blind eye to the danger that the vagueness of the status of the PMSCs pose, the biggest of which seems to be the ability to turn the legal responsibilities stemming from international humanitarian law (IHL) around. There is no specific international convention or any other binding international law source neither determining the status of PMSCs nor stipulating clear rules regarding the use of the PMSCs. Therefore, it is vital to discuss this issue and seek more clarity on the status of the PMSCs in international law so as to prevent possible IHL violations such as the incident that happened in September 2007 when 17 Iraqi civilians were shot and killed by the employees of the United States-based PMSC, Blackwater[28] or when the guards working for Unity Resources Group, an Australian-run private security firm registered in Singapore, killed two Iraqi civilians.[29] The overall lack of an international legal framework regulating the conduct of the PMSCs should be of deep concern for maintaining the global law and order because leaving this issue completely to the mercy of domestic jurisdiction does not ensure the realization of justice.[30] A further proof of this reality is the fact that only one PMSC contractor out of many contractors which have served in Iraq and Afghanistan has ever been prosecuted,[31] whereas thousands of the PMSC members have taken direct part in the military operations in Iraq and Afghanistan and too many violations of human rights and war crimes they have committed have been exposed so far.[32]

So as not to solely rely on domestic jurisdiction of the states and for international law to play a part in holding the PMSCs accountable for their violations of human rights and crimes, there must be a nexus between their legal obligations and international law. This nexus can be created in a variety of ways. The first way that comes to mind is to argue their international legal personality (ILP), thus their direct liability in case of breaching the norms of international law. However, the ILP in international law is an

28 The initial US Department of State 'spot report' on the incident 'SAF attack on COM team' (2018) <http://i.a.cnn.net/cnn/2007/images/10/01/blackwater.report.pdf.> accessed 5 April 2019 .

29 Andrew E Kramer and James Glanz, 'U.S. Guards Kill 2 Iraqi Women in New Shooting' *The New York Times* (New York 10 October 2007) < https://www.nytimes.com/2007/10/10/world/middleeast/10iraq.html> accessed 10 March 2018.

30 According to Peter W Singer, not only can such firms take on a new name and corporate structure when they are challenged, but attempts to eliminate the firms through national legislation tend only to drive them and their clients further underground, away from public oversight, see Peter W Singer 'War, profits, and the Vacuum of Law: Privatized Military Firms and International Law' (2004) 42 Col JTL 521, 535.

31 Galston (n 4) 229-230.

32 See Elzbieta Karska, 'Human Rights Violations Committed By Private Military And Security Companies: An International Law Analysis' (2016) 17(3) Espaço Juridico: Journal of Law <http://psm.du.edu/media/documents/reports_and_stats/journal_articles/reports_journal_author_k_karska_human_rights_violations_private_military.pdf> accessed 14 November 2019.

elusive concept in international law. Traditionally, states have been considered to be the only subjects of international law, although it is now acknowledged that they are no longer the exclusive subjects of contemporary international law.[33] Nevertheless, this acknowledgement could not lead to a uniform and general definition of the ILP that encompasses the non-state actors along with states and the discussions around this concept in the doctrine are still highly confusing.[34] In order to accommodate non-state actors to the ILP doctrine accurately, some have argued that the quality of a subject of international law is to have the capacity of being a subject of rights and obligations created and recognized by international law,[35] while some others have depended on the classification of the two different types of ILP, namely original and limited personalities.[36] The ILP discussions about private corporations first started during the 1960s in the context of their rights against the waves of nationalization, however the focus of these discussions shifted to their alleged responsibilities in respect of the human rights in the 1990s.[37] A considerable part of the doctrine does not acknowledge the ILP of corporations.[38] On the other hand, a growing and substantial part of the doctrine considers that at least multinational corporations have acquired a limited ILP.[39] However, even if this "partial ILP" approach is accepted, it should be taken into consideration that such a personality is a functional personality that is attributed to corporations just for the specific purposes required by some particular fields of international law such as international investment law or human rights law. That is to say, the acknowledgement of the partial ILP of corporations does not change the fact that the contemporary international law still does not impose generally accepted obligations on corporations.

33 "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States" *Reparation for Injuries Suffered in The Service of the Nations* (Advisory Opinion) [1949] ICJ Rep 174 178; "The international organizations are subjects of international law which do not, unlike States, possess a general competence. The international organizations . . . are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.", *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 1996, para 25.

34 Vincent Chetail, 'The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward' in Denis Alland and others (eds), *Unity and Diversity of International Law: Essays in Honour of Prof. Pierre-Marie Dupuy*, (Martinus Nijhoff 2014) 107.

35 Hersch Lauterpacht, 'The Subjects of international Law' in E Lauterpacht (ed), *International Law: Being the Collected Papers of Hersch Lauterpacht vol. 1: The General Works*, (Cambridge University Press 1970) 147; A Orakhelashvili, 'The Position Of The Individual in International Law' (2001) 31 California Western International Law Journal 241, 256; PK Menon, 'The Subjects of Modern International Law' (1990) 3 Hague Yearbook of International Law 30,84; C Okeke, *Con- troversial Subjects of Contemporary International Law* (Rotterdam University Press1974) 19.

36 Chetail (n 34) 110.

37 İbid.

38 See F Rigaux, 'Transnational Corporations' in M. Bedjaoui (eds) *International Law: Achievements and Propects* (Martinus Nijhoff Publishers 1991) 129; L Henkin, "international Law: Politics, Values and Functions", *Recueil des cours de l'Académie de droit international*, 126, 1989, 199; Antonio Cassese, *International Law in a Divided World* (Oxford University Press 1986) 103; Hans W. Baade, 'The Legal Effects of Codes of Conduct for Multinational Enterprises' (1979) 22(11) German Yearbook of International Law 11, 16.

39 Pierre M Dupuy, 'Retour Sur La Théorie Des Sujets Du Droit International' in Gaetano Arangio-Ruiz (ed), *Studi Di Diritto Internazionale In Onore Di Gaetano Arangio-Ruiz* (Editoriale Scientifica 2004) 74 and 84; DA Ijalaye, *The Extension of Corporate Personality in International Law* (Oceana, 1978) 221–246; W Friedmann, *The Changing Structure of International Law* (Stevens and Sons 1964) 223.

Of course, the attribution of the ILP is not the only way for corporations, including the PMSCs, to have the capacity to bear some obligations in international law.[40] Some experts could go as far as even arguing that "because the state is responsible for certain acts of private actors, those actors can also be held responsible for that same conduct under international law".[41]

Moreover, in addition to their direct obligations, the state responsibility might also come into play under certain circumstances to provide remedies for the violations of international legal norms by corporations. The 2001, Articles on State Responsibility of the International Law Commission (ILC) confirms this possibility.[42] However, as Clapham stated accurately, counting on the fact that the rules for state responsibility would apply where the PMSCs' activities are controlled by the state fails to capture the full picture about the conduct of the PMSCs.[43]

Another way to address the legal status problem of the PMSCs is the soft law regulations. Although such regulations do not have a binding force and their capability as a source of international law is controversial, one should not underestimate the role of soft law in regulating the conduct of particularly private corporations. Theretofore, many codes of conduct have been produced by the international community having attempted to draw a clear international legal framework for the conduct of corporations.[44] These codes of conducts are particularly useful for promoting a common understanding among the international community and paving the way for future conventional and binding regulations. The Guiding Principles on Business and Human Rights, which was endorsed with a wide consensus among states, is one of the good examples of such soft law instruments.[45] The Guiding Principles acknowledge that "business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[46] It is recognized that the human rights obligations of corporations can exist independently of States' abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations.[47]

More significantly, there are important soft law regulations exclusively for the PMSCs: and The International Code of Conduct for Private Security Providers'

40 A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 68-69.

41 S Ratner, 'Corporations and Human Rights' (2001) 111(3) Yale Law Journal 443, 497; Cristina Baez and others, 'Multinational Enterprises and Human Rights' (2000) 8 U Miami Int'l & Comp L Rev 183, 254.

42 Articles 4, 5 and 8 of the articles on State responsibility: ILC, 'Report of the International Law Commission on the Work of Its Fifty-third Session', (10 August 2001 UN Doc) A/56/10.

43 Clapham (n 40) 302.

44 See Norbert Horn 'International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives' (1981) 30 American University Law Review 923.

45 UNCHR Res (6 July 2011) UN Doc A/HRC/17/4.

46 UNCHR 'Guiding Principles on Business and Human Rights Principle' (6 July 2011) UN Doc A/HRC/17/4 Principle 11.

47 *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 2011, p. 13.

Association (ICOC)[48] and International Committee of the Red Cross's (ICRC) Montreaux Document (On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict).[49] The former is the fruit of a multi-stakeholder initiative launched by Switzerland and sets international law and human rights standards for the PMSCs. Remarkably, ICOC has been signed by 58 PMSCs and hundreds of other companies are committed to operate in accordance with this code.[50] The latter elaborates how international law should apply to the PMSCs and is supported by 55 states. Due to its more intergovernmental characteristic, it would be accurate to claim that the Montreux Document has more significance than the former. With the Montreaux Document, for the first time, an intergovernmental statement clearly articulates the most pertinent international legal obligations with regard to the PMSCs and also proves that the PMSCs do not operate in a complete legal vacuum. Of particular importance, the Montreaux Document underlines that the "PMSCs are obliged to comply with international humanitarian law or human rights law"[51] and clearly states that the status of the PMSCs "is determined by international humanitarian law, on a case-by-case basis, in particular according to the nature and circumstances of the functions in which they are involved."[52]

The determination of the status of the PMSCs by IHL, as the Montreaux Document points out, seems to be the most reasonable way for identifying their international law obligations. In this way, one does not have to wait out a final conclusion of the lengthy ILP discussions or the debates on whether corporations incur general international law obligations. Moreover, one can claim direct and binding international law responsibilities of the PMSCs without solely relying on the state responsibility or soft law instruments. Therefore, we will narrow down our scope of study to the IHL norms, while not neglecting the necessity of a more advanced and general international legal framework for the conduct of the PMSCs.

II. Are PMSCs "Mercenaries 2.0?"[53]

Regarding the status of the PMSCs, the first and foremost question seems to be whether they can be considered as a new kind of mercenaries and their status in international law can be determined in comparison with the status of mercenaries.[54]

48 ICoCA, 'The International Code of Conduct for Private Security Service Providers' (9 November 2010) <www.icoca.ch/en/the_icoc> accessed 12 December 2019.

49 ICRC 'Montreaux Document' (17 September 2008) <www.icrc.org/en/doc/assets/files/other/icrc_002_0996.pdf> accessed 13 December 2019.

50 ICoCA "The Association" <https://www.icoca.ch/en/association> accessed 14 December 2019.

51 ICRC 'Montreaux Document' (n 49) Article 22 and 25.

52 Ibid Article 23.

53 We borrow the term of "Mercenaries 2.0" from E.L. Gaston's article of which title is "Mercenarism 2.0? The Rise of the private Security Industry and Its Implications for International Humanitarian Law Enforcement" first mentioned in supranote 4.

54 Kurtdarcan (n 20) 287-288.

The negative reputation of the PMSCs, which stems from their frequent violations of the IHL norms, leads some commentators to compare the PMSCs with mercenaries, which are also notorious and little respected by the international community.[55]

The use of mercenaries by states had a long history which dates back even to the ancient ages.[56] After they had been used by states in wars and conflicts for centuries,[57] in the modern age, the states finally and widely agreed on the fact that the use of mercenaries must be prohibited. It was realized and acknowledged by the international community that mercenaries were prolonging wars, thus its sufferings, and also, they were conceptually not in compliance with the developments and recently established liability mechanisms in the law of war of the 20th century. Therefore, from the 1950s onwards, the rapidly growing negative reputation of mercenaries -mainly because of their rogue operations particularly in Africa during the decolonization period-[58] have prompted the states to agree on banning the use of mercenaries. The strong will of the international community in this direction has been materialized with a few international agreements, namely the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I),[59] the Convention for the Elimination of Mercenarism in Africa[60] and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (International Convention). [61] Because of their global scope, we prefer to focus on the International Convention and the Additional Protocol I as the main reference points.

The International Convention signed in 1989 is the most comprehensive and latest international agreement which corresponded to the final nail in the mercenaries' coffin in international law, mainly because it clearly outlawed the recruitment, use, financing or training of the mercenaries. The International Convention enabled the prosecution of the persons acting as mercenaries. Prior to the International Convention, Additional Protocol I stipulated in its Article 47 that a mercenary shall not have the right to be a combatant or a prisoner of war without outlawing the conduct or mercenaries thoroughly.

55 Doug Brooks, 'Messiahs or Mercenaries? The Future Of International Private Military Services' (2007) 7(4) International Peacekeeping firs 129, 135.

56 Fred Rosen, *Contract Warriors: How Mercenaries Changed History and the War On Terrorism* (Alpha Books 2005) 143.

57 Janice E Thomson, *Mercenaries, Pirates, And Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton University Press 1994) 31-32.

58 McIntyre and Weiss (n 3) 67; Singer, *Corporate Warriors* (n 9) 37.

59 ICRC 'Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)' (8 June 1977) <https://ihl-databases.icrc.org/ihl/INTRO/470> accessed 18 December 2019.

60 Organization of African Unity, OAU Convention for the Elimination of Mercenarism in Africa (3 July 1977) CM/817 (XXIX) Annex II Rev.1 <https://au.int/sites/default/files/treaties/7768-treaty-0009_-_oau_convention_for_the_elimination_of_mercenarism_in_africa_e.pdf.> accessed 19 December 2019.

61 UNGA 'The International Convention against the Recruitment, Use, Financing and Training of Mercenaries' (4 December 1989) A/RES/44/34.

According to the definition of the Additional Protocol I to the Geneva Conventions, mercenaries are

> *"specially recruited locally or abroad in order to fight in an armed conflict; do, in fact, take a direct part in the hostilities; are motivated to take part in the hostilities essentially by the desire for private gain and, in fact, are promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; are neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; are not members of the armed forces of a Party to the conflict; and have not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces."*

The International Convention retains the main elements of the definition made by the Additional Protocol I, however, adds a moral element (specific purpose of the action) to that. As per the International Convention, mercenary is

> *"someone who is specifically recruited for the purpose of participating in a concerted act of violence aimed at overthrowing a government or undermining the territorial integrity of a state, is motivated by the desire for private gain and material compensation, is neither a national nor a resident of the state against which such [an] act is directed, has not been sent by a state on official duty, and is not a member of the armed forces of the state on whose territory the act is undertaken."*

No doubt, the greatest difference between the abovementioned definitions is that the latter stipulates mercenaries to have the purpose of overthrowing a government or undermining the territorial integrity of a state, while the Additional Protocol I does not set such a condition. In addition, there are some other minor differences such as the fact that the amount of the material gain of mercenaries matters in the first definition while it is not specified in the latter.

Then, upon these definitions, we can sum up the main features of mercenaries. Accordingly, they are:

- Recruited locally or abroad,
- Taking a direct part in the hostilities,
- Motivated by the desire of private and material gain,
- Neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict,
- Not been sent by a state on official duty,
- Not a member of an armed force which is a party to the conflict.

Based on the main features of mercenaries which are common in the International Convention and the Additional Protocol I, it would not be wrong to argue that there are crucial differences between mercenaries and the PMSCs. First of all, many PMSCs have only logistical or security-related roles, hence they do not necessarily meet the

requirement of being specifically recruited to take a direct part in the hostilities. As Avant states accurately, "today's PMSCs do not so much provide the foot soldiers, but more often act as supporters, trainers, and force multipliers for local forces".[62] Therefore, only some PMCs can be covered by this definition.[63]

Second, there is no obstacle for the members of the PMSCs to be the nationals of a party to the conflict or residents of the territory controlled by a party to the conflict. Also, it is possible for them to be considered as a part of the armed forces, which is a party to the conflict as long as they take orders directly from those armed forces.[64]

Some commentators also argue that it would also be difficult to claim that the PMSC contractors' motivation is solely a desire for substantial financial gain. For example, it is argued that it is also possible for some former soldiers to be motivated with the desire for an extensive service to their countries.[65]

In short, it is crystal clear that mercenaries and the PMSCs might differ substantially in many points. It would be far-fetched to argue that the agreements exclusively regulating to the use of mercenaries can apply to the PMSCs. The provisions of those agreements are clearly inadequate for the purpose of regulating to the conduct of the PMSCs.[66] Indeed, the PMSCs have a different nature and dynamics, and thus they cannot be handled like individual mercenaries, since they have evolved into business enterprises.[67]

III. Civilian or Combatant?

Within the current international legal order, many of the constraints on the use of force and conduct of armed conflicts are based on state-centric perceptions. At best, there are some exclusive regulations for some other non-state elements such as mercenaries. The PMSCs are not among those elements yet, in spite of their increasingly advanced military capabilities and power. Therefore, the misconduct of the PMSCs is a great problem to be addressed by international law. Any reductionist approach to see the PMSCs merely as other kinds of corporations hired by the states through private contracts for some services is not plausible anymore. As long as their legal status in international law, thus the boundaries of their military activities are not

62 Avant (n 15) 30.

63 Michael Scheimer, 'Separating Private Military Companies From Illegal Mercenaries in International Law: Proposing an International Convention for Legitimate Military and Security Support the Reflects Customary International Law' (2009) 24(3) American University International Law Review 611, 626.

64 Ibid, 628.

65 Galston (n 4) 233.

66 Lindsey Cameron, 'Private military companies and their status under international humanitarian law and its impact on their regulation' (2006) (863) *International Review of the Red Cross* 573, 578.

67 Simon Chesterman and Chia Lehnardt, 'Introductions' in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP 2007) 7.

clarified through a certain legal framework, the risk of the violation of the international law norms by them will increase. It is apparent that such an ambiguity paves the way for the emergence of critical legal complications. Those legal complications are attempted to be addressed mainly by IHL because the most actual and pathetic problems arising out of the activities of the PMSCs fall within the IHL's scope.[68] The advanced capabilities of the PMSCs may sometimes cause the violation of the IHL norms via state-like violence and mostly, the PMSCs might not be held effectively accountable for those violations, which would not be the case for state agents. That is to say, the PMSCs hired by the states can provide a "corporate shield" against the responsibilities of those states for IHL violations, as it is difficult to attribute the contractors' activities to the states and the prosecution of them is at the domestic jurisdiction's mercy.[69]

However, in the absence of any discrete regulation pertinent to the PMSCs, some of the current rules and concepts of IHL offer us some help for regulating the activities of the PMSCs. In this regard, the most relevant rules are those regarding combatants and civilians. The categorization of combatants and civilians constitutes one of the main pillars of the "law of war," because the combatant status grants armed forces in warfare some prerogatives:

- Those who have the combatant status have the right to participate directly in hostilities while those who have the civilian status do not have the same right. When civilians take part in direct hostilities, they could be subject to criminal jurisdiction.[70]
- On the other hand, civilians cannot be targeted in military attacks while it is legal to target combatants.[71]
- Another important issue is the "prisoner of war (POW)" status. Combatants, in principle, have the right to be treated as the POWs once they are captured by enemy forces, while civilians, in principle, do not have the same right.

The definition of the combatant status is made by the Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex, the Geneva Convention (III) relative to the Treatment of Prisoners of War and Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I). The Article 43

68 For example see Hamida Ghafour, 'Afghans Are Fed Up with Security Firms' (*LA Times,* 27 September 2004) <https://www.latimes.com/archives/la-xpm-2004-sep-27-fg-mercs27-story.html> accessed 18 December 2019; Andrea Weigl, 'Passaro Will Serve 8 Years for Beating' (*News&Observer*, 1 February 2017) <https://www.newsobserver.com/497/story/543038.html.> accessed 13 November 2019.

69 Louise Doswald-Beck, 'Private Military Companies Under International Humanitarian Law' in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP, 2007), Chapter 7.

70 Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (12 August 1949) 75 UNTS 135 art 4(A)(1),(2),(3) and (6); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3 art 43 and44(1).

71 Additional Protocol I (n 70) art 51(4).

(1) of the Additional Protocol I stipulates that members of the armed forces of a party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants and they have the right to participate in direct hostilities. In addition to that, whenever a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces, it shall notify the other parties to the conflict.[72] In other words, to fall within the category of combatants, there are five main features: Being an armed group, being an organized group, operating in compliance with the rules of international law applicable in armed conflicts, being under a command chain of a party to the conflict and being responsible for the conduct of its subordinates.

The Third Convention, in its Article 4, further elaborates the definition of the combatant status and expands its boundaries with stating who can be granted to the POW status. According to the relevant provisions, combatants are not limited to the armed forces of the states. Even some militia groups or volunteer forces are granted the POW status under some specific circumstances, as it can be seen in Article 4 (A) (4).

In conclusion, the combatant status is linked either to the membership in the armed forces of a party to the conflict or to the membership of a militia or volunteer force that belongs to a party to the conflict and fulfills some specific criteria shown in the Third Convention.

It is important to note that there is no certain rule about who can be considered as members of the regular armed forces of the states, so it is determined by states and purely a matter of domestic laws. It is generally recognized that the combatant status can be acquired *de jure* or *de facto* for the armed groups which are not officially a part of the armed forces of a state. However, regarding the acquirement of the combatant status, there is a substantial divergence between Article 4(A)(2) of the Third Convention and Article 43 of the Additional Protocol I: The former suggests that being formally incorporated into the armed forces of a state is necessary, while the latter suggests that it is enough to be under the command chain of the armed forces of a state without being formally incorporated. Literally, the Third Convention sets a higher threshold.[73]

In most cases, it is impossible to claim that the PMSCs are formally incorporated into the armed forces of a state, even though members of some PMSCs may be carrying out conventional military functions or in practice, seem to act in intensive coordination with the armed forces of a state. Indeed, it is not very frequent to see the PMSCs which are incorporated into the armed forces. There are only some instances

72 Ibid art 43.

73 Ahmet Hamdi Topal, 'Uluslararası Hukuk Açısından Özel Askerî Şirketler ve Şirket Çalışanlarının Statüsü' (2011) 60(4) AUHFD 963, 994.

such as the members of the South African Executive Outcome who were officially incorporated into the armed forces of Sierra Leone during its operations.[74] After all, if the PMSCs were incorporated to the armed forces of a state, then that would solve all of the legal issues and their activities would be considered as the activities of the armed forces to which they are incorporated. However, in most cases, the states deliberately would rather not incorporate the PMSCs into their armed forces in order to avoid any potential responsibility for the illegal activities of the PMSCs or the covert operations that they would perform.

The second possibility presented by the Third Convention in its Article 4(A) is that the PMSCs might be considered as militia or volunteer corps fighting on behalf of the armed forces of a party to conflict. Nevertheless, this option is problematic too. The PMSCs often do not meet the criteria put by Article 4A (2): They do not necessarily carry arms openly and wear a fixed distinctive sign recognizable at a distance.[75] Also, some commentators argue that the teleological interpretation of Article 4A (2) would be an obstacle for justifying the use of this provision and granting the PMSCs the combatant status.[76] Therefore, it is unlikely to claim that the PMSCs can be fully covered by this category of combatants.

In short, just because the PMSCs make contracts with states, and thereby reinforce their armed forces' military activities, they cannot be granted the combatant status by default. To acquire this status, the PMSCs need either to be officially incorporated into the armed forces of a state party to conflict or, at least, operate under the command chain of them as a militia group which is being commanded by a person responsible for his subordinates, carrying a fixed distinctive sign recognizable at a distance, carrying arms openly and conducting its operations in accordance with the laws and customs of war.

While it must be acknowledged that some PMSCs can meet the abovementioned criteria, such PMSCs would be constituting just a tiny portion of the PMSCs, as supply firms and most PSCs are inherently outside this category and even all of the PMCs would not satisfy the abovementioned requirements to be granted the combatant status. For instance, in most cases, supply firms do not engage in direct hostilities at all. So, case-by-case analysis is required to determine if a PMSC can be granted the combatant status or not.

Hence, it makes sense to argue that most of the PMSCs must be granted civilian status when they are not granted the combatant status because the civilian status is

74 J.C. Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder' (1998) 34(1) Stanford Journal of International Law 75, 124.

75 Michael N Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' (2005) 5(2) Chicago Journal of International Law 511, 527ff.

76 Cameron (n 66) 586.

defined in Article 50(1) of the Additional Protocol I as "all persons who do not belong to the categories of combatant as listed in the Geneva Conventions." However, civilians must be divided into two categories: Civilians accompanying the armed forces and regular civilians.

The former is defined in Article 4(4) of the Geneva Convention (III). According to Article 4(4), civilians accompanying the armed forces carry out some services for the armed forces without being members thereof and do not take part in direct hostilities beyond personal self-defense. Not only is it forbidden for them to take part in direct hostilities, but also they are not allowed to carry arms. In case they participate in direct hostilities, they would be stripped of the protection provided them by IHL.

It must be noted that civilians accompanying the armed forces should not be confused with the non-combatant status which covers the members of the armed forces party to a conflict who do not carry arms or are not authorized to engage in armed confrontations.[77] In other words, non-combatants are the integral parts of the armed forces in order to provide some services such as healthcare, religious services and so on, while civilians accompanying the armed forces are not the official members of the armed forces. Therefore, the non-combatant status is not a matter of discussion for the PMSCs as almost none of them have been incorporated into the armed forces. They usually operate as the private companies which are hired by the states for some certain services and carry out the outsourced tasks on their own capacities.

Obviously, there is no way for the PMCs to be labeled as civilians accompanying the armed forces, because their task is simply to take part in direct hostilities. The same applies for PSCs too, because they must carry weapons in the line of their duties. So, only the supply firms might fall within the realm of this category. The Third Geneva Convention stipulates that civilians may perform tasks such as supplying the armed forces with food and shelter but still retain their civilian status. It means that the services provided by the employees of the supply firms may not be perceived as civilians accompanying the armed forces. However, there is a crucial condition which is that the employees of supply firms must be provided an identity card for that purpose.[78]

On the other hand, it is highly important to define "the direct participation in hostilities," as it is the clincher while determining whether members of the supply firms can be granted the civilians accompanying the armed forces status. Some confusion might arise when some of the tasks that the supply firms carry out are in the grey zone.[79] Article 67 (1)(e) of the Additional Protocol I classifies "direct participation in hostilities" and "acts harmful to the adverse party" as two different

77 First Geneva Convention (22 August 1864) art 2.

78 Emanuela-Chiara Gillard, 'Business Goes to War: Private Military/ Security Companies and International Humanitarian Law' (2006) 88(863) International Review of the Red Cross 525, 539.

79 Cameron (n 66) 589.

concepts. In this respect, it is suggested that the acts harmful to the adverse party include the acts which contribute to the military capacity of a party to a conflict indirectly with the services such as the production and delivery of arms, construction of facilities like airports, docks etc.[80] The International Criminal Tribunal for the former Yugoslavia (ICTY) has also adopted the same approach and elaborated this classification. Accordingly,

> *"carrying or using arms, engaging in military activities, participating assaults against commodities or military equipment of the adverse party, delivering military intelligence for immediate use, delivering arms directly to frontlines; functioning as safeguard, intelligence officer, sentinel or observer for armed forces party to a conflict"*

are considered as the direct participation in hostilities. As it can be seen, the activities perceived as the direct participation in hostilities do not necessarily have to be offensive activities and a wide spectrum of activities could be perceived to fall under this category. As Cameron accurately states that "the problems posed by the lack of distinction between offensive and defensive attacks are best illustrated by the use of private military companies as security guards."[81] Another puzzling instance is that some supply firms gather and deliver intelligence for immediate use, while some do it for general use. Remembering ICTY's classification, the fact whether the intelligence is gathered for immediate use or not could matter while classifying that activity as the direct or indirect participation in hostilities. Such cases have been discussed in detail by some analysts.[82]

Despite all of the confusing points, our conclusion is that at least some activities contributing to the military efforts of a party to a conflict such as selling items to that party, gathering and delivering "general" military intelligence; providing food, drinks and other basic goods; delivering arms and military equipment, being in charge of the selection and training of military staff and maintaining arms cannot be perceived as the direct participation in hostilities.[83] Notably, the International Committee of Red Cross (ICRC) suggests that the direct causation between the military action and the harm to the adverse party is a constitutive element of the direct participation in hostilities.[84] Also, ICRC's admonition that ''there should be a clear distinction between the direct participation in hostilities and participation in the war effort'' must be kept in mind with respect to this issue.[85]

80 Topal (n 73) 1007.

81 Cameron (n 66) 589.

82 Alexandre Faite, 'Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law' (2004) 4(2) 1, 7.

83 Doswald-Beck (n 69) 130.

84 Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (*ICRC,* December 2009) 51 <www.icrc.org/en/war-and-law/contemporary-challenges-for-ihl/participation-hostilities.> accessed 12 November 2019.

85 ICRC Commentary on P I Article 51.3 (1987) para 1944.

In conclusion, many supply firms do not have direct participation in hostilities even if in some cases, it is difficult to decide if their activities fall within the realm of the direct participation in hostilities or not. Then, they can be labeled as civilians accompanying the armed forces. When they are considered as civilians, they shall enjoy the general protection for civilians against the dangers arising out of the military operations. For instance, the indiscriminate attacks to them would be prohibited and when they are captured by enemy forces, they would be accorded the POW status. In return for these protections, they would not be allowed to take a direct part in hostilities. Such a direct participation would strip them of their protection.

IV. International Criminal Persecution

Since World War II, especially the Nuremberg Trials, it has been accepted that the individual criminal responsibility for international crimes, primarily war crimes, does exist. The individual criminal responsibility does not depend on a person's status, be it a civilian or combatant. All people are equally capable of committing and being prosecuted for war crimes and grave breaches of the Geneva Conventions.[86] Therefore, the conclusion is simple: Regardless of the debates revolving around the status of the PMSCs, their members would be held responsible for the war crimes they commit and accused of their direct commission of international crimes.

When members of the PMSCs commit war crimes, it would not be confined to the individual responsibility of those members and the command chain as well would be taken into consideration, as the PMSCs can sometimes operate in intensive coordination with the official armed forces. Generally speaking, the *de facto control over the actions of subordinate* test, which was put by the International Criminal Tribunal for the Former Yugoslavia (ICTY)[87] can also apply to the PMSCs. Accordingly, any commander who has *de facto* control over the actions of its subordinate PMSC members could also be held responsible for their actions.

On the other hand, the utility of the International Criminal Court (ICC) would be limited to the responsibilities of natural persons who are members of a PMSC, as Article 25(1) of Rome Statute clearly stipulates that "the Court shall have jurisdiction over natural persons pursuant to this Statute." The corporate liability is nowhere

86 This applies for non-international and international armed conflicts. The most recent affirmation of this principle is given by the ICTR in *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998) para 444.

87 *Prosecutor v Mucic et al* (Appeals Chamber) IT-96-21 (20 February 2001) para 192-194: "Under Article 7(3), a commander or superior is . . . the one who possesses the power or authority in either a de jure or a de facto form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed." "The power or authority to prevent or to punish does not solely arise from de jure authority conferred through official appointment. In many contemporary conflicts, there may be only de facto, self-proclaimed governments and therefore de facto armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment… [W]hereas formal appointment is an important aspect of the exercise of command authority or superior authority, the actual exercise of authority in the absence of a formal appointment is sufficient for the purpose of incurring criminal responsibility. Accordingly, the factor critical to the exercise of command responsibility is the actual possession, or non-possession, of powers of control over the actions of the subordinates.'"

mentioned in the Statute,[88] although it did exist in the draft statute.[89] Moreover, there have been some attempts for the inclusion of a crime of "mercenarism" in the jurisdiction of the ICC and an expansion of the definition of mercenaries in a way to cover the PMSCs as well but those attempts have been met with the response that is inclined to preserve the legitimacy of the PMSCs.[90]

It must be noted that the Montreaux Document emphasizes that the states have a specific obligation to hold members of the PMSCs accountable for their international crimes and grave breaches of the 1949 Geneva Conventions.[91] In fact, aside from this issue, state responsibility for the activities of the PMSCs can be invoked under some other circumstances too. In general, the states are considered to be responsible for the harmful activities of non-state actors which carry out their activities under the auspices of or with the support of those states. Since the states have undertaken certain duties and responsibilities under IHL, these responsibilities cannot be avoided just because of the transfer of some core functions of the states to the PMSCs.[92] ICRC Commentary to Article 91 of Additional Protocol I states that a state will similarly be responsible for the violations of a private actor if a state "has not taken such preventive or repressive measures as could reasonably be expected to have been taken in the circumstances."[93] The "effective control" test set out in the International Court of Justice's (ICJ) decision in the Nicaragua Case[94] or the "overall control" test set out in the Tadic Case[95] are implemented in order to identify the circumstances which would entail state responsibility. However, these concepts will not be elaborated on here, as the purpose of this article is just to focus on the direct international obligations of the PMSCs.[96]

V. Conclusion & Recommendations

The phenomenon of privatization of the military functions by the states is not a new phenomenon and even dates back to the late-seventeenth and early-eighteenth centuries. Piracy is a good example of that. In those centuries, private actors could flourish thanks to their political-economic usefulness for the states.[97] Again for similar reasons, in today's world, many states resort to the assistance of the PMSCs

88 Stephen Kabel, 'Our Business Is People (Even If It Kills Them)' (2004) 12 Tulane Journal of International and Comparative Law 461, 476-480.

89 UNGA 'ICC Draft Statute' (1998) A/Conf.183/2/Add.1 art 23.

90 Clapham (n 40) 301

91 ICRC 'Montreaux Document' (n 49) Explanatory Comments.

92 Doswald-Beck (n 69) 18.

93 Y Sandoz and others (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), 1057.

94 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1984] ICJ Rep 392.

95 For details see Stefan A. G. Talmon, 'The Various Control Tests in the Law of State Responsibility and the Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 International and Comparative Law Quarterly 493.

96 For a detailed study about state responsibility for the activities of the PMSCs, see Hannah Tomkin, *State Control over Private Military and Security Companies in Armed Conflict* (Cambridge University Press 2011) 54-260.

97 Bryan Mabee, 'Pirates, privateers and the political economy of private violence' (2009) 21(2) Global Change, Peace & Security 139, 140.

in many fields even though they have outlawed mercenaries and delegitimized some other forms of non-state violence.[98] Hence, it can be argued that the state practice tends to accept the PMSCs as a part of the international security system. Therefore, from a realistic point of view, it would be unreasonable to suggest a ban of the use of the PMSCs. The most reasonable solution is to address grave concerns regarding the misconduct of the PMSCs and set a clear and effective international legal framework to constrain their harmful activities.

The primary concern is the legal complications arising out of the vague status of the PMSCs in international law. Even though the current IHL rules and concepts are mostly capable of identifying the responsibilities of the PMSCs in warfare, the question of which authority will primarily and more effectively prosecute the PMSCs and their members does not have a clear answer. The historical record of the states in this regard is not promising for securing justice. It seems that the PMSC members often benefit from the uncertainty of "who will investigate, prosecute, and punish crimes committed by the PMSCs and/or their employees; and how, when, where."[99] In fact, in most of the states there are no distinct laws regulating the PMSC activities as of yet.[100] Even when the crimes that the PMSC members commit can be prosecuted by the domestic laws, the states which have jurisdiction over those crimes are usually either unwilling or unable to take any action.

The second concern is that the growing involvement of the PMSCs in the military industry and armed conflicts creates a "class of corporations with a directly vested interest in the perpetuation of such conflicts."[101] Therefore, the PMSCs themselves may sometimes pose a great obstacle to maintaining or establishing peace. The other risks stemming from the corporate nature of PMSCs are listed as "private employees, as opposed to soldiers, can refuse to go into dangerous situations or may simply choose to leave their jobs. Companies may go bankrupt, and profit seeking business practices such as 'just in time' supply may be inappropriate in a war situation, where capacity may be urgently needed."[102]

In order to set a clear and effective international legal framework which might address the abovementioned concerns, the ideal solution seems to be the adoption of a comprehensive international convention regulating the conduct of PMSCs.[103] From

98 Scheimer (n 63) 637.

99 Singer, 'The Private Military Industry and Iraq' (n 14) 11-14.

100 Ibid.

101 Freeman and Sköns (n 18) 14.

102 Ibid.

103 Todd Milliard, 'Overcoming Post-Colonial Myopia: A Call To Recognize And Regulate Private Military Companies' (2003) 176 Military Law Review 1, 1ff; C Holmqvist, 'Private Security Companies: The Case for Regulation'(2005) (9) Stockholm International Peace Research Institute Policy Paper; F Schreier and M Caparini, 'Privatising Security: Law, Practice and Governance of Private Military and Security Companies' (2005) (6) Geneva Centre for the Democratic Control of Armed Forces Occasional Paper; Singer, 'The Private Military Industry and Iraq' (n 14).

a broad perspective, setting up an international legal framework is necessary and plausible for governments in the long-term because that would prevent the PMSCs from undermining the sovereignty of states with their rampantly undisciplined activities.[104] Considering the wide scope of the PMSC activities, apparently, the IHL concepts like civilians, combatants or mercenaries are not sufficient to bring about a complete solution.[105] Such a convention should particularly emphasize the direct international law obligations of the PMSCs[106] and cover all kind of activities of the PMSCs, including the logistical ones. It would also be very effective for such a convention to set up an international registration and licensing system for PMSCs.[107] That kind of a licensing system would be of help for avoiding the recruitment of "some true bad apples who do not best represent the government or the public interest."[108]

Nevertheless, the materialization of such a convention seems very difficult given the current lack of a consensus on this issue among states, even though the UN Human Rights Commission for establishing a Working Group on private military companies at its April 2005 session was a promising step. That Working Group is mandated specifically to address all types of the PMSCs and to ''prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities."[109] However, until the realization of such a general international legal framework, the determination of the status and identification of the international law responsibilities of the PMSCs by IHL seems to be the most likely way of rebuking the presumption that the PMSCs are operating in a complete legal vacuum.

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104 "As it is observed, PMSCs sometimes tend to corporate with rogue actors such as warlords. An outstanding instance of this phenomenon can be observed in some PMSCs' cooperation with local warlords in Afghanistan. Arguably, their cooperation with local warlords has undermined the disarmament progress." Galston (n 4) 239.

105 For opposite view see: Ellen Frye, 'Private Military Firms In The New World Order: How Redefining 'Mercenary' Can Tame The 'Dogs Of War' (2005) 73(6) Fordham Law Review 2607. She proposes to redefine mercenaries so that PMSC operatives fall within the definition of a mercenary and are criminalized under the UN Mercenary Convention.

106 House of Commons *Private Military Companies: Options for Regulations* (Cm 577, 2002) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228598/0577.pdf> accessed 21 November 2019; Singer, *Corporate Warriors* (n 9) 241; Cameron (n 66) 597.

107 Scheimer (n 63) 643.

108 Singer, 'The Private Military Industry and Iraq' (n 14) 8.

109 'The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination" UNCHR (7 April 2005) E/CN_4/RES/2005/2.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Private Military Companies and the Outsourcing of War: A Spark of Destabilisation to the Global Security

Leila Bijos[1], **Renan de Souza**[2]

Abstract

Private Military Companies (PMCs) are a relatively new actor in worldwide warfare. They are part of a multi-billionaire industry profiting over US$ 100 billion in revenue per year. Present in 50 different countries and boosted by significant world's events such as the advent of new wars, post-Cold War order, and 11th September attacks, the PMCs became an extension and an outsourced state-capacity of act coercively. These companies have grown in ability, capability, tactical and technical skills enabling them to fight wars in the name of states. Nevertheless, this growth also represents a great risk for security destabilisation, human security, and even small changes in the international order. Although PMCs cannot yet wage wars by themselves, the lack of regulation and accountability under international laws enable them to cause isolated but powerful damage, which can destabilise – even momentarily – the global security system, mainly when those companies are used by statemen to overcome political and public costs in democracies. Also, PMCs can be used by rogue or failed states. Blackwater case, in Iraq, taught the world how human security can be under threat when a profit-oriented company incorporates an influential military culture. Researchers and scholars are still assessing the lessons from Iraq and the operation of further coming companies in order to classify the position of PMCs in a future where national armies are reduced.

Keywords

International security system, PMCs, Blackwater, International order, Democratic Peace Theory

1 **Corresponding Author:** Leila Bijos (Prof.), University of Brasilia, Department of Development Sociology, Brazil. E-mail: leilabijos@gmail.com ORCID: 0000-0002-9268-8871

2 Renan de Souza (MA Master), University of London, Politics and International Relations, London, UK. E-mail: renan.azuos@gmail.com ORCID: 0000-0003-4746-2766

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Private Military Companies and the Outsourcing of War: A Spark of Destabilisation to the Global Security

I. Introduction

The Private Military Companies (PMCs) have become a highly profitable multi-billionaire business by outsourcing some state's capabilities and functionalities in terms of warfare, logistics, and its ramifications. The PMCs are present in 50 different countries (Singer, 2008) in all the continents. Studies have shown that, in 2003, the industry revenue was over US$ 100 billion a year[1]. Some analysts argue in favour of the privatisation of war, whereas others have been raising concerns on PMCs operations worldwide. These concerning factors can range from lack of transparency, accountability, failing in compliance with international law and treaties, threatening of state's sovereignty and undermining democracies around the world and, ultimately, shifting security stability within states and regional conflicts.

Due to this lack of regulation on Private Military Companies and gap where they operate, this paper will focus on whether those factors (but not limited to them) embodied with PMCs can generate any spark of destabilisation within the international security system (global security). It will study the perspective of the PMCs conflicting with the basic principle of the state's monopoly on violence since these companies are business-oriented and are not a state entity and may lead to some non-conformity when they are deployed generating threats to security.

Having outlined the main claim, this research will be divided into three topics. The first one is dedicated to explaining the changing character of war and discussing the nuances between the old and new conflicts in the literature, creating a fertile terrain for the PMCs. Furthermore, it will be addressing the privatisation and the outsourcing of war and show the most recent figures of this industry, offering a clear picture of the actual scenario in the world that will be analysed. Following, the sub-item will be tackling the international security system. The idea is to explore the contested concept of security in Critical Security Studies, the state's role, international order, emancipation, and human security in order to introduce the environment proposed by this academic paper. Also, this topic will distinguish with a different lens of analysis the possibility of looking in different layers to the referent object posing tow possibilities of security: to the states or individuals. Here, the idea is also to explore the post-1945 international order.

The second topic will discuss and present the conceptual framework of crucial terms worked on this paper that will lead to the actual stage of analysis. The first

1 Yeoman B 'Soldiers of Good Fortune' [Online] Mother Jones 2019. Available at: Https://Www.Motherjones.Com/Politics/2003/05/Soldiers-Good-Fortune/ [Accessed 28 Jan. 2020].

term to be introduced is the security, followed by Private Military Companies, the "tooth-to-tail ratio" in the military operation and the discussion of the chain supply in compounds, logistics and warfare environment and its relation to third parties, to the countries and contractors. This topic will also discuss the concepts of democratic peace and the asocial war.

The last part will be dedicated to produce in-depth analysis of the Private Military Companies using the Blackwater case study as reference. American released documents on that case, media coverage, reports, books, and international analysts' interpretations were used to explore the emblematic case of Blackwater operation in Iraq as a source of destabilisation in a conflict.

Finally, the article will be concluded by trying to answer whether Private Military Companies - having Blackwater as the main case - can be a source of destabilisation to global security.

II. Literature Review: The Transformation of War as a Fertile Terrain for PMCs

Private Military Companies (PMCs) are the result of the changing dynamics and characteristics of war throughout history. Understanding their operations encompasses also comprehending the old and new wars. Although their causes, origins, motives, or goals are a source of contestation and discussions among the scholars, there is no consensus on those topics.

Nevertheless, numerous scholars shed light at the end of the Cold War as a game-changer in terms of war, represented by the decline of interstate war and the rise of civil wars focus on ethnic competition, criminal or illegal activities. This new war is fundamentally different from its predecessor characterised as more criminal, private, and predatory[2]. Whereas the old wars, which occurred in the pre-Cold War era, are generally stressed as more ideological, political, and collective[3], it is important to highlight the differences, keeping in mind that there are also some key terms to set apart the differences between the wars. In the old civil war, the causes were centred in collective grievances with comprehensive popular support and controlled violence. On the other hand, the new civil wars are focused on private loot, gain, greed with a lack of popular support and marked by gratuitous violence spread by militias, private armies, and independent warlords. For these actors, winning may not be the primary goal of a conflict[4].

2 S Kalyvas "New" And "Old" Civil Wars: A Valid Distinction?' (2001) 54(1) World Politics 99.

3 Kalyvas (n 2) 99 et. seq.

4 Kalyvas (n 2) 99 et. seq.

As Kaldor[5] wrote the differences are in actors: old war was fought by regular states armies and new are confronted by a combination of state and non-state actors, such as regular armed forces, private security contractors, mercenaries, jihadist, warlords, and paramilitaries. Emphasis is put on goals: the old war was fought for geo-political interests or ideology, and new wars are fought for ethical, religious, or tribal identities. We should also mention methods: in old war the battles were decisive resulting in territories conquering yet in new wars the battles are rare and territory is captured by political means or control of the population. This is the case of Crimea, annexed by Russia, in March 2014 and claimed as part of the Federation, with its institutions and administration already embedded in this Ukrainian peninsula[6].

Questions are put to the fore concerning the forms of finance: while states widely financed the old wars, the new wars are funded by loot and pillage, taxation of humanitarian aid, kidnapping, oil, diamonds, drugs and people smuggling[7].

However, some scholars argue that the dichotomy between new and old civil wars tend to be ideologized, biased, or based on incomplete information[8]). Moreover, there is no piece of evidence that the recent conflicts are more violent or present a high level of atrocity leading to human causalities[9]. After offering the widespread adoption of characteristics used to define and describe the pre- and post-Cold War civil conflicts, Kalyvas[10] points out his criticism towards analysts of contemporary civil wars. According to him, this keeps relying on misrepresentation produced during the period of old civil wars. To Kalyvas[11] those theories of new and old wars should be done based on in-depth research, long-term observation, and ethnographic reconstruction.

On the other hand, defending the concept of a new war, Kaldor[12] expresses that the term "new" has to be interpreted as a research strategy and a guide for policymaking providing a framework for analysis. This paper sheds light on Kaldor's view of describing the 1990s conflicts as "new", offering a change on how to investigate these conflicts and the way policymakers and policy-shapers perceive them. Thus, understanding PMCs operations also involve contextualising within the new war's environment. In defining new wars, she likewise suggests that they occur in a place where authoritarian regimes are on the weakening. In those places, the discernment between state and non-state, public and private, external and internal, economic and

5 M Kaldor 'In Defence of New Wars. (Stability: International Journal of Security and Development, 2(1), 2013).

6 General Assembly Resolution 68/262, Territorial Integrity Of Ukraine, A/Res/68/262, March 2014, Https://Undocs.Org/A/Res/68/262

7 M Kaldor 'In Defence of New Wars. (Stability: International Journal of Security and Development, 2(1), 2013).

8 Kalyvas (n 2) 99 et seq.

9 S Malešević 'The Sociology of New Wars? Assessing the Causes and Objectives of Contemporary Violent Conflicts' (2008) 2(2) International Political Sociology 99.

10 Kalyvas (n 2) 99 et seq.

11 Kalyvas (n 2) 99 et seq.

12 M Kaldor 'In Defence of New Wars. (Stability: International Journal of Security and Development, 2(1), 2013).

political and even war and peace are melting and, concomitantly, are the cause and consequence of violence in an environment of globalisation and technology. Hence, the exclusion of certain actors in competing at global level weakens the state's economy and its ability to produce revenue, leading up to a systematic corruption, criminality and ultimately resulting in the privatisation of violence[13].

Starting from this perspective, Malešević[14] focuses on an essential topic to asses structural causes about the changing purpose and origins of contemporary warfare. Critically engaging with the theory of new wars, Malešević[15] claims that both civil and inter-state conflicts are in decline since the early 1990s. Hence, claiming the new wars as a proliferation may not be accurate from this thought, but it is precise to say that the new wars emerge as the logic of nuclear proliferation is weakened.

According to Malešević[16], alongside with new wars also emerged its confidence in technology and the cycle of transferring risks from elected politicians to military personal, from them to the enemy fighter and their civilians. The belligerence brought by new wars does not require popular mobilisation. Instead, it relies on media indirectly to achieve passive support to neutralise electoral surveillance. However, this tool is almost entirely played out by the United States, an authentic military empire present in 153 countries around the world. It has technical capabilities to impose its military wills throughout the globe and coercive pressure on uncooperative governments, as the government of Iran and Venezuela. Even so, this revolution in military affairs changed the causes and objectives of warfare[17].

Malešević's analysis leads us to a key-debate: the transformation of war. As Heng[18] states, the war has changed substantially. Not only due to globalisation, end of Cold War or societal changes themselves, but complex issues have been added to the security agenda and gained new dimension boosted by globalisation. War is a dynamic movement and involves different manifestations and forms. Comprehending war phenomena, encompasses understanding the increasing idea of risk management, reduction, or control of global risks. By the definition of risk, it is not only about the concept of a potentially dangerous situation, but also a proactive calculation anticipating scenarios. Thus, globalisation exaggerates the pre-existing risks and heightens the awareness of the vulnerability of impact in distant events and, ultimately, influencing policymakers' decisions[19].

13 Malešević (n 9) 100.

14 Malešević (n 9) 99.

15 Malešević (n 9) 99.

16 Malešević (n 9) 102.

17 Malešević (n 9) 109.

18 Y Heng 'The 'Transformation of War' Debate: Through the Looking Glass Of Ulrich Beck's World Risk Society' (2006) 20(1) International Relations 70 et seq.

19 Heng (n 18) 75.

In this scenario, the war can reach new levels and possibilities unexplored before. One of these plausibility's is the privatisation of war, through the simple extension of a hegemonic system. By its very simplicity, such a process could, in fact, seem the most probable hypothesis in light of the omnipresence of American Law[20]. Likewise, in the Cold War, the 11th September attacks also raised the bar for a new form of threats, autonomy, resistance, and organised violence. In opposition, there is an international security regime that operates supported by various forms of public-private networking trying to provide humanitarian assistance, reduce vulnerabilities, resolving conflicts and strengthening capacities of civil actors[21].

Therefore, network war, as conceptualised by Duffield[22], is linked to the contemporary shifts in the ethos of social life. In this particular case, the changes are in the organisational structure of capitalism, the new phase of globalisation, and the architecture of states. Hence, as a result in this context, the organised violence, once the monopoly of states, has expanded into a complex networked system of states and non-states actors. Moreover, the modalities of organised violence have been privatised[23].

Gaining momentum since the 1990s, the privatisation of war in military affairs is described by scholars as an example of the victorious progress of neo-liberal strategies of privatisation against the previous logic of states monopolising responsibilities without generating cost-effective results. Thus, the services provided by private actors have become indispensable to some states' abilities to act military globally, for instance, the case of a superpower as the United States of America[24].

As far as 2003, the private companies were the second most prominent contributors to coalition forces in the Iraq war after the Pentagon, with 10,000 private military contractors on the ground, overpassing around 9,900 British troops. In the same year, it is believed that the United State spent US$ 30 billion on contracts to private companies. Moreover, half out of the dozens of these private companies in Iraq were UK's enterprises[25]. The intrinsic context has led to a current stage in which the US Army could not retain its ability to act without the support and services of private military companies[26]. Reports also suggest that there are up to 10,000 PMCs soldiers

20 Mireille Delmas-Marty (translated by Naomi Norberg), Ordering Pluralism: A Conceptual Framework for Understanding The Transnational Legal World (Oxford, and Portland, Oregon: Hart Publishing, 2009) 17.

21 M Duffield, 'War as A Network Enterprise: The New Security Terrain And Its Implications' (2002) 6(1-2) Cultural Values 153 et seq.

22 Duffield (n 21)154.

23 Duffield (n 21) 158.

24 H Strachan, A Herberg-Rothe and H Münkler, *Clausewitz In The Twenty-First Century* (Oxford: Oxford University Press 2007) 220.

25 Traynor, I. Special Investigation: The Privatisation of War. [Online] The Guardian, 2019. Available At: Https://Www.Theguardian.Com/World/2003/Dec/10/Politics.Iraq [Accessed 3 Jan. 2020].

26 Strachan, Herberg-Rothe and Münkler (n 24) 220.

across Africa. The total global spending on private security has reached £200 billion, five times the UK's defence budget - the country is one of the major players in the private military industry[27].

The actual scenario challenges even the classical Clausewitz's theories on war due to the fundamental changes of conflicts in recent years. War no longer follows the symmetric confrontation between states. Instead, there are sub-states and private actors fighting no longer to achieve political order, but to secure profitable incomes[28].

Arguing that the well-known Clausewitz's quoted phrase of war as "a mere continuation of policy by other means"[29] has become obsolete, Strachan, Herberg-Rothe, and Münkler[30] state that wars mutate from within societies to trans-national conflicts, that is a hybrid of inter-state and civil war, in which the political will of the involved parties is hard to establish. Nonetheless, it is possible to affirm that Clausewitz's original theory of "war, therefore, is an act of violence intended to compel our opponent to fulfil our will"[31] is still applicable, even if some battle of symmetric confrontation among two equally equipped adversaries has been replaced by the massacre and asymmetric use of violence of complete different new actors[32]. One example of this is the 11th September episode, when terrorists used violence to fulfil their will of forcing their adversary, the United States of America, to remove its military, economic and cultural presence from Arab-Islamic countries. Knowing that the military superiority of the United States would make impossible an asymmetric confrontation, the al-Qaeda combatants relied on symmetric fight using a passenger aircraft as weapons.

Looking to the past, Strachan, Herberg-Rothe, and Münkler[33] point out that the total control of military affairs and monopolisation of warfare marked the beginning of rising states. On the other hand, the loss of the monopoly and the increasing privatisation of war could lead not to the state's decline, but to possibly to their end. In the past, the control of military affairs and warfare was the core element of order in Europe after the Thirty Years War (1618-1648). Up to nowadays, the monopoly of legitime violence is the core of state order.

This thought comes across to the investigation line in this paper on whether the PMCs could affect the actual international security system and, hence, the order.

27 T Tahir, 'How World's Next Global Power Could Be A Private Army Of Mercenaries'. [Online] (The Sun, 2019). Available At: Https://Www.Thesun.Co.Uk/News/8479911/How-Worlds-Next-Global-Power-Could-Be-A-Private-Army-Amid-Fears-Russia-Is-About-To-Unleash-Mercenary-Battalions-In-Venezuela/ [Accessed 17 Jan. 2020].

28 Strachan, Herberg-Rothe and Münkler (n 24) 229.

29 C. Clausewitz. On War. (London: K. Paul, Trench, Trubner, 1918).

30 Strachan, Herberg-Rothe and Münkler (n 24) 229.

31 C Clausewitz, *On War* (London: K. Paul, Trench, Trubner, 1918).

32 Strachan, Herberg-Rothe and Münkler (n 24) 229.

33 Strachan, Herberg-Rothe and Münkler (n 24) 229.

Therefore, the next topic will explore the nuances of the international order and the global security system.

A. International Security: a look into the referent object. States or individuals?

The concept of war has been changing throughout history to actual terrain defined by some scholar as "new war". Therefore, it is necessary to expand the understating of the system in which the named "new wars" operate.

This research intends to shed light on the concept of security as contested, although there are many interpretations, disagreements and intense debate in the academia surrounding this topic among those who want to broaden or deepening the idea of security. However, as the terrorist attacks of 11th September were a game-changer in terms of war, the same new paradigm is applied to the concept of security. This is due, because the fact that most of the classical theories concerning security failed or offered a limited explanation on such event, not characterised in the explanatory patterns of those theories. Therefore, it is necessary to analyse security with different lens.

Buzan[34] wrote that security requires some significant levels of analysis and issue sectors touched upon by international studies. Moreover, the concept of security brings those levels and sectors closer creating an integrative perspective of an individual, national, and global security, and of military, political, societal (concept developed in the early 1990s), economic and environmental security. According to Booth and Smith[35], Buzan's represented an improvement in terms of the level of analysis of security, since it discussed the changes in the policy environment faced by states in the early 1980s and also the individuals' role as a degree of analysis. However, still, Buzan focused on the state as the primary referent object of study since it stands between the sub-state level of security and the dynamic of it operating within the international system[36].

While Buzan's account for security fits to explain events raised by the 11th September, it does not match to elucidate the facts after the terrorist attacks. Analysing Buzan's work, Booth and Smith[37] expressed criticism on his focus on state rather than the individuals as the referent object. To the scholars, states are not reliable as the primary reference of analysis since not all of them are involved in the business of security (internal and external). Among the producers of security, it represents the

34 B Buzan, *People, States & Fear: An Agenda for International Security Studies in the Post-Cold War Era* (2nd Ed. Colchester: Ecpr Press 2007) 283.

35 K Booth and S Smith, *Critical Security Studies and World Politics* (Boulder, Colo.: Lynne Rienner Publishers 2005) 32.

36 Booth and Smith (n 35) 32.

37 Booth and Smith (n 35) 33.

means and not an end. Finally, the states are remarkably diverse in their characteristics to serve as the basis for a comprehensive theory of security.

Ayoob[38] splits the degree of analysis into developed and underdeveloped states. In his view, there is a different crucial pattern between the Third World States and the Western developed countries when it comes to understanding security. According to him, there are two distinct variables in this case: the process of formation of the Third World States compared to the Developed States. There are also differences in pattern of elite recruitment, regime establishment and maintenance in the Third World states compared to the developed world. Whereas the security concerns of the developed nations devoted to the international system, Ayoob[39] points out that, in the Third World States, the late development and overdue decolonisation process resulted in lack of legitimacy in those countries. Furthermore, he also enlightens the low level of political and social consensus, which was achieved by European states centuries ago trough revolutions and internal wars. Therefore, those divisions within the social structure of Third World States has exacerbated the level and the intensity of internal threats to state structures.

However, according to Booth and Smith[40], Ayoob's views portrait the state as the least bad option for third world nations. Nonetheless, in such part of the world, the state is the primary source of threat to the security of societies and populations. As emphasized by Posner[41] about Brazil where police combat crime, maintain order, or advance their own interests through extrajudicial killings.

Looking at the critical security studies, it is possible to find a coherent and most sustained critique and alternative to the traditional security studies. Critical security studies are explicitly a rejection of realism without generating an alternative theory. Instead, it poses as an alternative to realism, allowing a broader perspective on security studies[42].

One key issue to the critical approach to security is the emancipation concept. As noted by Booth[43], the world's source of threat to the well-being of individuals and nations interests not only derives from military affairs, but also from economic collapse, political oppression, scarcity, overpopulation, ethnic rivalry, the destruction of nature, terrorism, crime, and disease. Hence, in those situations, people are more threatened by the reckless policies of their government rather than some external

38 Ayoob M, 'Security in The Third World: The Worm About to Turn?' (1983) 60(1) International Affairs 44 et seq.

39 Ayoob (n 38) 45.

40 Booth and Smith (n 35) 45.

41 Eric Posner, *The Twilight of Human Rights Law* (Oxford: Oxford University Press, 2014) 2.

42 Booth and Smith (n 35) 45.

43 K Booth, 'Security and Emancipation' (1991) 17(4) Review of International Studies 318.

force. Booth[44] also offers enlightening thoughts, in such a complex scenario of multiples sources of threat, by saying that order in the world affairs is dependent on at least minimal levels of political and social justice.

Therefore, the concept of emancipation comes in this context. The aim of it is to free people (as individuals and groups) from that physical and human coercion which prevent them from fulfilling what they would freely choose to[45]. To this author, emancipation, theatrically, is security and achievement of stable/true security that can only be found by people and groups if they do not deprive others also from it.

Nevertheless, there is an intense debate on how to approach security. Booth's account on human emancipation was highly criticised due to its focus on individual rather than the state, as proposed before by mainstream theorists on security. However, the work also consists of a powerful critique and an alternative for security studies[46].

Therefore, understanding the debate within the contested concept of security encompasses also passing through a different range of framework of analysis, such as feminist security studies.

The feminist work focusses on security as an intrinsically gendered assumption of traditional international relations. The central claim is that international relations are systematically gendered in its consequences, forms of identities, subjectivity, and the discipline is gender blind. Therefore, if the definitions of security are broadened encompassing economic and environmental issues, as explored before in this research, then women's security agenda must also be addressed[47].

In a critique to International Relations in the United States, Tickner[48] states that the discipline has been deeply influenced by rational choice theory, which shapes the behaviours of individuals in the market. The problem is that practice is more typical of men than women. In this sense, war and national security have been areas deemed that women have little to say.

In comparison with the international theory, perceiving the state as a unitary rational actor within inter-state relations, the feminist theory is sociological. It has its accounts for social ties, especially gender relations, which starts from the individual embedded in hierarchical social, political, and economic structures. This framework of analysis turns it into a normative and emancipatory theory achieving what the feminist called as "practical knowledge", the knowledge coming from every day's

44 Booth (n 43) 319.

45 Booth (n 43) 319.

46 Booth and Smith (n 35) 45.

47 Booth and Smith (n 35) 45.

48 J Tickner, 'Feminist Responses to International Security Studies' (2004) 16(1) Peace Review 44 et seq.

practices of people's lives[49] In this regard, the feminists gather their voices with critical security scholars, as argued by Booth, in pursuing an emancipatory agenda[50].

The feminist critique points towards a different conceptualisation of security. As argued by Booth and Smith[51], only by showing where women fit into international relations, we can understand how the power really operates. They also affirm that looking at security from women's perspective alters the definition of security to such an extent that any traditional forms of security studies can offer analysis[52].

As Booth and Smith explained, the concept of security is genuinely contested, and it also requires the ideas of state, community, emancipation, and the relationship of those themes between the individual, the society, economics, and politics as equally contested. According to them[53], the result of deepening the concept of security leads to a scenario in which the referent objects are focusing on actors rather than states discussions. Furthermore, the massive extension and expansion of security have been provoking questioning on whether this undermines the utility of the concept[54].

Moreover, adding to the debate of security, two more concepts need to be analysed to fulfil a bigger picture of the term: international order and human security.

B. International Order: Rethinking the Post-1945 Order

The international order is one of the central studies of international relations, and it offers us a clear understating on how the international system works. According to Gortzak[55], the international order accounts for the rise and fall of great powers and, consequentially the distribution of capabilities in a struggle within the international system.

Great powers have historically competed for each other for the ability to shape the international system. Those on the rise are expected to impose their influence under this system creating its political order reflecting and promoting its national values and interests. Nevertheless, by doing so, they inevitably destabilise the system opening up a competition with their peers who are also willing to promote their values and interests in the international system[56].

49 Tickner (n 48) 45.

50 Tickner (n 48) 47.

51 Booth and Smith (n 35) 47.

52 Booth and Smith (n 35) 48.

53 Booth and Smith (n 35) 48 et seq.

54 Booth and Smith (n 35) 48 et seq.

55 Y Gortzak, 'How Great Powers Rule: Coercion and Positive Inducements In International Order Enforcement' (2005) 14(4) Security Studies 664.

56 Gortzak (n 55) 665.

However, achieving such order comes also with different challenges embedded. For instance, weaker but rebellious states that do not have the capability or ambition of destroying the order imposed, fail to withstand with some or all the mandatory rules of this order. Gortzak claims that both the historical records and recent events showed how the strong response to those challenges could have significant consequences for international order and stability.

As the concept of security, the understanding of the actual international order can also be contested. To Munro[57] the legitimacy of post-1945 global order, also known as "liberal international order (LIO)" is in decline in the developing and middle-income nations. He argues that the answer to this decline is the result of organisational structures, written and unwritten rules. Institutions of that order have increasingly been failing to address the political and economic realities of the twenty-first century[58].

Munro also points out that some structures, which regulates some rules of international order, such as the United Nations (UN), Security Council, World Bank and International Monetary Fund (IMF) are led by North Atlantic world plus Japan setting the global agenda and have not changed since the 1940s. On the other hand, developed and emerging countries are subjected to those rules, norms, and standards having no role in shaping it. Furthermore, the scholar also claims that marginal changes were made in the international order not reflecting the shifts in global power relations, such as the rise of China and India over the last quarter-century of history[59].

Looking especially into security, to Glaser[60] almost any international interaction qualifies as an international order, so long as its members accept the sovereignty norm. Therefore, all the basic categories of security arrangements, such as hegemony, the balance of power, collective security, concerts, and security communities, are deemed as international security order or partial order. In this sense, the security order may vary depending on the degree of competition and cooperation among the states. Moreover, power and coercion play central roles.

As seen in the contested concept of security, Glaser noted that many scholars have been employing the LIO more broadly, whether it is to promote democracy, combat to terrorism, fight against climate change, protection of human right, commitment to the economic growth of developing countries, curb nuclear proliferation regimes or weapons of mass destruction, trade agreements, or pursuing economic or security

57 L Munro 'Strategies to Shape the International Order: Exit, Voice and Innovation Versus Expulsion, Maintenance and Absorption' (2017) 39(2) Canadian Journal of Development Studies / Revue Canadienne D'études du Développement 310.

58 Munro (n 57) 310.

59 Munro (n 57) 310 et seq.

60 C Glaser, 'A Flawed Framework: Why the Liberal International Order Concept Is Misguided' (2019) 43(4) International Security 55 et seq.

goals (or even both)[61]. These multiple usages of the international debate have led to a discussion among scholars and analysts to whether international order is a mean or an end. Glaser[62] argues that this should be understood as a means, not an end. Therefore, speaking from the U.S. foreign policymaking perspective, he suggests a shift thinking from LIO to grand strategy. According to him, liberal international order provides little analytic leverage, certain arguments are theocratically weak and is a source of significant confusion about the evolution of global politics. On the other hand, as a framework of analysis, it should be applied the grand-strategic lens, defined by him as broad policies – military, diplomatic and economic, improving the study of issues raised by LIO putting in a broader context of current geopolitical challenges[63].

C. Human Security: A New Framework of Analysis

The concept of Human Security may have been changing since its creation in the late 1990s. To Glasius[64], the primary account for understanding human security is a notion as the opposite to state security with an argument that is indivisible. Therefore, the global rich have not just a moral but also a practical interest in the security of the poor. More broadly, human security encompasses elements such as economic security, food security, health security, environmental security, personal security, community security, and political security.

This term has been connected to some shifts of paradigms. Glasius[65] points out that human security introduced a getaway from the state security paradigm emphasising the transnational nature of threats in a global era. Also, it added to the protection of the individual citizens extend it to every human being.

From this perspective, another debate was raised: rights or wrongs of humanitarian interventions and whether or not those interventions may be characterised as a state sovereignty violation. Human security, as stated by Glasius[66], is not a right to intervene but a responsibility to protect, which eventually, if necessary, can extend beyond border.

Although recognising the value given by the human security concept, which highlights particular issues within the international system enabling short-term gains,

61 Glaser (n 60) 56 et seq.

62 Glaser (n 60) 57.

63 Glaser (n 60) 82 et seq.

64 M Glasius, 'Human Security from Paradigm Shift To Operationalization: Job Description For A Human Security Worker' (2008) 39(1) Security Dialogue 32.

65 Glasius (n 64) 36.

66 Glasius (n 64) 36.

Christie[67] presents his criticism of the idea. According to him, human security has lost any true critical potential and has become a new orthodoxy.

Christie[68] recognises that human security offers a framework to communities to talk about security in a manner which was not possible when security was understood as a state-linked capability. However, he notes that, despite its essential accounts, human security has been consistent with a broader international process of global interventionism to alleviate poverty. Moreover, it has been used to justify the expansion of the roles of traditional actors and justify technologies of governance and social control[69].

D. Conceptional Framework Analysis: PMCs as a Potential Threat to the International Order

The term security, as explored by this research in the previous topic, can be highly debatable within academia. For the purpose of analysis of security matters, this research will use Buzan, Waever, and Wilde[70] military-political understanding of security as survival in the international system and it might be conceived whenever an issue is presented as an existential threat to a referent object (traditionally but not limited to state, encompassing government, territory, and society). That is, in this case, a Private Military Company (PMCs), as the initial hypothesis of this research, may also be a threat to the international security system, defined by Buzan, Waever, and Wilde[71] as firmly rooted in the traditions of power politics.

It is noteworthy mentioning that the nature of security threats justifies the use of extraordinary forces opening a way for the state to mobilise or even take special powers to mitigate the existential threat[72]. The authors explain that existential danger can only be understood concerning the character of the referent object in question. In terms of politics, those threats might be translated as constituting principles of sovereignty, recognition, legitimacy, or governing authority[73]. Those points lead us to the original focus of analysis of this paper, since PMCs, hypotactically, could also violate sovereignty, face lack of legitimacy or threat governing authority.

Nevertheless, as discussed in the previous topics, the concept of security itself is quite complex. Therefore, for the analysis purpose, this research shares similar views

67 R Christie, 'Critical Voices and Human Security: To Endure, To Engage Or To Critique?' (2010) 41(2) Security Dialogue 169.

68 Christie (n 67) 170.

69 Christie (n 67) 169 et seq.

70 B Buzan, O Waever and J Wilde, *Security: A New Framework for Analysis* (Boulder, Colo: Lynne Rienner 1998) 21.

71 Buzan, Waever and Wilde (n 70) 21.

72 Buzan, Waever and Wilde (n 70) 21.

73 Buzan, Waever and Wilde (n 70) 22.

as Booth and Smith[74] that there is no doubt that the concept of security needs to be challenged and contested, especially when its traditional definition is linked to the natural philosophy of enquiry presented by the world of international security, as studied by this research. Perhaps, a hybrid combination of the traditional thinking of security combined with contested views of the term is a powerful tool as a framework of analysis looking for answers' trough different perspectives. As Baldwin[75] said, the answers for today's problems are not in the findings of the old generation of security scholars. However, they presented some of the right questions.

Moreover, the emergence of new wars literature, as visited in the previous chapters, indicates the ways of which security was shifting, and how policymakers were paying increasing attention to the internal condition of states[76].

From this perspective, the discussion needs to incorporate the privatisation or the outsourcing of war. Coker[77] classifies the current moment as a postmodern war, where postmodern society can use war as a political instrument and the commercial ethos is challenging the traditional professional purpose of the armed forces. In this context, according to him, war is outsourced to the private sector in form of private mercenary companies. Coker[78] notes that politics are increasingly becoming privatised, and it is no more power shared with business, but the commercial ethos is challenging the philosophy of the public service.

In this scenario, the logic of the markets has been incorporated into the state's ethos and government thinking. Coker[79] highlights Britain's case in this context. In 1996, the British army refrained of intervening in a refugee crisis in Great Lakes, in Africa, due to staying "within budget". In 1999, the country took the same decision concerning the outbreak of the civil war in Sierra Leone. The UK was one of the first countries to adopt the market model of outsourcing activities previously undertaken by states to private companies. In the 1990s, the country hired private companies to perform tasks such as ship refitting, management of non-military stores, the servicing of designated aircraft and engineering support at training stations. The United Kingdom also opened air charter contracts to tender as well as the movement of army equipment by air. Labour Party classified the movement as concerning national security issue.

There is also a discussion surrounding analysts and scholar referring the Tooth-To-Tail Ratio (T3R), the comparative relation between the number of combat arms forces

74 Booth and Smith (n 35) 58.

75 D Baldwin, 'Security Studies and the End of the Cold War' (1995) 48(1) World Politics 141.

76 Christie (n 67) 172 et seq.

77 C Coker, 'Outsourcing War' (1999) 13(1) Cambridge Review of International Affairs 95.

78 Coker (n 77) 102.

79 Coker (n 77) 102.

and the number of supporting troops in a military organisation. The scale is crucial since it increases or decreases the combat power of an army, and it is considered a statics source for justification and allocation of resources[80]. In the case of the United States, the most powerful military force in the world, the downsizing of the army gained momentum after the end of the Cold War. Furthermore, the American national and military strategy changed significantly, for instance, employing civilian contractors in Iraq and Kuwait as part of the force to conduct noncombat operations, assuming many logistical and life support activities[81]. Nowadays, PMCs provide not only combat operations, but also tail military functions such as logistics, transportation, food services, or humanitarian relief operations[82]. To Carter, Jr[83] is highly unlikely that the future will reverse course. Moreover, the nature of warfare and technology has changed, reaching a point that lesser combat troops are needed[84].

The United States Army reduced or even eliminated the second support forces creating an imbalance in the T3R and, according to Carter, Jr, generating threats to the effectiveness of the army[85]. Britain went for the same path privatising the "tail", the logistic support which sustains an army in the field. Afterwards, the British government opened up itself to the so-called "teeth", the weapons used by the military themselves[86].

On the other hand, the United States also gave steps into the privatisation of war. In 1998, it asked DynCorp to supply American troops to an observer mission in Kosovo, to observe the withdrawal of the Serbian forces. The decision was deemed by defence analysts as a first step from the "privatisation of war" to the "privatisation of peacekeeping", since the move avoided political risks of having Americans losing their lives while serving in Balkans. In addition, it was the first time that an American private contractor replaced the national army force in combat where there was no formal cease-fire agreement[87].

The privatisation scenario brought back the mercenaries. They are not exactly new. In the past, mercenaries had fought in Italy in the 14th and 15th centuries and in Napoleonic wars[88]. However, nowadays, they are part of the contemporary developments, amid the logical extension of globalisation, technology, and liberal

80 J Carter Jr, 'The Tooth to Tail Ratio: Considerations for Future Army Force Structure'. [Online](Apps.Dtic.Mil,1997). Available at: Https://Apps.Dtic.Mil/Dtic/Tr/Fulltext/U2/A326318.Pdf. Accessed: 16 February 2020, p. 3.

81 J Mcgrath, 'The Other End of The Spear: The Tooth-To-Tail Ratio (T3r) In Modern Military Operations'. [Online] (Apps. Dtic.Mil.,2007) Available at: Https://Apps.Dtic.Mil/Dtic/Tr/Fulltext/U2/A472467.Pdf [Accessed 16 Jan. 2020] 66.

82 M Fulloon 'Non-State Actor: Defining Private Military Companies' (2015) 37(2) Strategic Review for Southern Africa 29 et seq.

83 Carter (n 80) 27.

84 Mcgrath (n 81) 74.

85 Carter (n 80) 27.

86 Coker (n 77) 103.

87 Coker (n 77) 107.

88 Coker (n 77) 105 et. seq.

economic doctrine and have thrived in the post-Cold War world. Coker highlights that the market for private military assistance is booming. From Azerbaijan to Zaire, they have been disorganising and, sometimes, demoralising military forces helping second-rank dictators to remain in power or Third World countries trying to protect their mineral deposits. Some are going to war business themselves in an apparent intent of transforming it into a business and making profit[89]. In this context, the Private Military Companies can also be divided into four categories: the Combat Offensive PMC, the Combat Defensive PMC, the Non-Combat Offensive PMC, and, ultimately, the Non-Combat Defensive PMC[90].

Also adding to this debate of the creation of a booming space to private military companies, there is the fact that governments are losing their exclusive monopoly of violence. In some countries, the state cannot provide its citizens with even minimum standards of security and, in a deeper context, weak states have been targeting its citizens or removing the protection from them[91].

As stated by Booth[92], in historical terms, there is a steady but uneven acknowledgment that the costs of using military force are rising, while the benefits are declining. This statement comes across with Coker's claim that wars have frequently changed, and they will again[93].

Therefore, it is plausible to predict that governments in continents like Africa will have several reasons to outsource military services to the private sector in the future. Lately, wars have been unprofitable, and private companies can offer better deals at low prices. In the government's handling of military affairs, the cost can be higher, since there is an intensive workforce to manage and governments like the backup system and exorbitant teeth-to-tail ratios. On the other hand, companies tend to keep a minimal number of troops in the field and small backup in reserve to keep costs at a lower level. They also manage to do this by raising insurance premiums[94]. Coker sums up this logic by saying that everything is a factor of the price of labour, which is regulated by the market, not by the governments.

Coker argues that in the West, where such costs cannot be sustained anymore, much of the "tail" has been privatising to preserve the professional "tooth." As an example, there is Brown & Root, hired by the United States to manage everything, from water purification to the process of returning bodies to the American soil[95].

89 Coker (n 77) 96.

90 Fulloon (n 82) 29 et seq.

91 Coker (n 77) 109.

92 Booth (n 43) 324.

93 Coker (n 77) 96.

94 Coker (n 77) 108 et seq.

95 Coker (n 77) 108.

At the same time, the international order established since the post-1945 events also may be on the brink of change from the way it is currently conceived. The global disorder is already a major security concern to the United States, as the USA 2018 National Defence Strategy highlighted:

> Today, we are emerging from a period of strategic atrophy, aware that our competitive military advantage has been eroding. We are facing increased global disorder, characterized by a decline in the long-standing rules-based international order—creating a security environment more complex and volatile than any we have experienced in recent memory. Inter-state strategic competition, not terrorism, is now the primary concern in U.S. national security. (Dod.defense.gov, 2019, p. 1)

This statement comes across with the original analysis of this research as PMCs may act or help destabilise the international security system as it is understood right now, especially when those companies are working in favour of the so-called rogue states. The USA 2018 National Defence Strategy claims that both revisionists powers and rogue regimes have "increased efforts short of armed conflict by expanding coercion to new fronts, violating principles of sovereignty, exploiting ambiguity, and deliberately blurring the lines between civil and military goals"[96]. Furthermore, it also mentions the rapid technological advancements and the changing character of war, as defended in this research, by new technologies and non-states actors with sophisticated capabilities of mass disruption[97].

The miscalculation by the defensors of the liberal order led to overapplication of human security around the globe, especially after the Global War on Terror. As pointed out by Christie[98], at least, it was expected that continuing advocation for human security would ensure the calculations of the impact of subsequent military responses, entailing an assessment of the costs to the lives of people on the ground in Afghanistan an Iraq.

Interestingly enough, the American National Defence Strategy report cites Russia as one of the main concerns to the USA interests translated as keeping the liberal international order post-Cold War. In fact, Russia has been relying heavily on Wagner Group, a so-called PMC (since there are disagreements between analysts due to shadowy Wagner Group's acting protocol) loyal to Kremlin's ambitions, expanding its footprints and influence in Ukraine, Syria, Sudan, the Central African Republic and, according to reports, possibly to Libya and certainly in Venezuela[99]. That is, Wagner Group could, indeed, undermine the American interests as it did in Ukraine. Although,

96 Dod. Defense Government. [Online] Available At: Https://Dod.Defense.Gov/Portals/1/Documents/Pubs/2018-National-Defense-Strategy-Summary.Pdf, 2019. Accessed 10 January 2020 p 4.

97 Dod. Defense Government [Online 2018] (n 96) 4.

98 Christie (n 67) 174.

99 N. Reynolds. Putin's Not-So-Secret Mercenaries: Patronage, Geopolitics, And the Wagner Group (Carnegie Endowment for International Peace, July 2019).

the company has a limited capacity to wage war by itself, it can create enough trouble to impede Western decisionmakers to prevent an appropriate and robust response. Outside the geopolitical spectrum, Wagner Group is likely to worsen problems of corruption, human rights, and the rule of law wherever they operate as stated by Reynolds[100]. Furthermore, numbering between 3,600 and 5,000 fighters in secret locations, the company has been reducing the political risk for Russia's president, Vladimir Putin[101].

Reynolds's[102] accounts lead us to a collision course with the Democratic Peace Theory. Owen[103] explains that the theory speaks about the fact that democracies seldom if ever go to war against each other. Liberal democracy is a state that shares liberal ideas where the liberalism is the dominant ideology, and citizens have power over war decisions through free speech or regular elections of the decisionmakers empowered to declare war. In this sense, Owen states that liberal ideology and institutions work to bring about democratic peace. Also, liberal running governments have harmonious relations with fellow democracies.

The liberal ideology also assumes that individuals are fundamentally pursuing self-preservation and material well-being. Therefore, freedom is essential to achieve this goal, and peace is required to achieve freedom in democracy, which is pacific and trustworthy. On the other hand, coercion and violence are counterproductive. Thus, this assumption concludes that all individuals share an interest in peace, and war should only be a mean to bring that peace. On the contrary, non-democracies may be dangerous since they seek other ends[104].

Having said that, in a case of threat of war with the state that the liberal opposition considers a fellow democracy, liberals take the proper measures to prevent hostilities using the free speech guaranteed by law. Therefore, illiberal leaders are unable to rally the public to fight and fear that an unpopular war would lead to their failure in the next election[105]. That is, liberal societies do not cast their democratic right to vote to wage war. Triggering of unpopular wars represents a political risk to the statemen and decision-makers.

In revision perspective of the Democratic Peace Theory, Owen argues that no one is sure why democracies do not fight one another and do fight non-democracies. Moreover, the causal mechanism behind the democracy is unknown, and there is no certainty whether peace is genuine[106].

100 *İbid.*

101 *İbid.*

102 *Ibid.*

103 J Owen 'How Liberalism Produces Democratic Peace' (1994) 19(2) International Security 87.

104 Owen (n 103) 88.

105 Owen (n 103) 89.

106 Owen (n 103) 88.

However, to overcome the Democratic Peace Theory and waging war, some statesmen use modern solutions, such as the technology to minimize human losses in armed conflicts. Advanced societies must rely on this practice if they want to retain their ability to act. These named post-heroic societies are unable to bear the heavy losses during the war. Hence, the answer to solving this equation is to rely on technological superiority or the deployment of mercenaries, which include those who are not part of the electorate of the warring government[107].

Theoretically to classify the modern industrial societies and the service-based economies as the post-heroic societies, sacrifice and honour are not their central importance, since they are not particularly ready to war as posed by Strachan, Herberg-Rothe, and Münkler[108]. They can feel some short-term excitement caused by the media. However, the deception with the government becomes public knowledge. Suddenly, the fast-paced enthusiasm collapses, and the government needs to worry about his re-election. Therefore, the use of private military companies reduces these problems. There may be political risks, but the pressure on the government's accountability in case of substantial losses is eased, if those wounded or killed are not from its domestic voters. That sort of pressure increases the privatisation of war as specified by Herberg-Rothe and Münkler[109].

Talking about the Age of Asocial War, Merom says that fighting democracies must synchronize two sides: the battleground and at home[110]. Therefore, powerful democracies have failed in counterinsurgency wars because they have been unable to solve the former dilemma. On the one hand, educated middle class expediently opposed sacrifice when they perceive a non-existential war. On the other hand, this class developed an altruistic opposition to the indiscriminate brutality[111].

However, liberal democracies are capable of learning, and they learned what caused their failure in the past. Thus, they managed, even sometimes with flaws, to overcome these obstacles. One of those lessons is that the battlefield should be as far as possible from society at home. Furthermore, liberal democracies were permitted to fight the Asocial Wars. On top of that, the Revolution in Military Affairs (RMA) technology helped to reduce forces on the ground[112].

Outsourcing relying on allies, proxies and PMCs are also pointed out by Merom as a tool used by democracies to keep society at home far from the conflict and, more

107 Strachan, Herberg-Rothe and Münkler (n 24) 222.

108 Strachan, Herberg-Rothe and Münkler (n 24) 228.

109 Strachan, Herberg-Rothe and Münkler (n 24) 229.

110 G Merom 'The Age of Asocial War: Democratic Intervention and Counterinsurgency In The Twenty-First Century' (2012) 66(3) Australian Journal of International Affairs 370.

111 Merom (n 110) 369.

112 Merom (n 110) 366 et seq.

importantly, from its risks and costs[113].

Thinking in a worst-case scenario, the future wars could be pictured as warlords, who have turned war into a lucrative enterprise, fighting from one side. At the same time, PMCs carrying out humanitarian intervention on behalf of some state. This would be the rewinding to the conditions pre-existing in Europe between the fourteenth and seventeenth centuries[114]. However, Coker argues exactly the contrary saying that we are unlikely to return to a neo-mercantilist economic outlook[115]. In his view, transnational companies never sought to challenge the states, since they depend on it to guarantee their quasi-monopoly, which generates the maximisation of profits and rely on governments to contain the outbreak of civil unrest. Coker sees the future of PMCs and states as merely a partnership between public and private sectors and not a replacement of the public by private. Quoting Clausewitz, he states that war is unlikely to become a trade[116].

Nonetheless, the same Coker, when he wrote his article in 1999, said, what was missing, was an international code of practice, regulation of the trade, which was likely to be introduced soon. However, almost 10 years later, the non-binding Montreux Document was launched as part of an international effort by the Government of Switzerland, the International Committee of the Red Cross (ICRC) and the consensus of other 17 states, to promote the respect of international humanitarian law and human rights law whenever PMCs and security companies are present in armed conflicts (International Committee of the Red Cross, 2019).

Sharing worries on the same issue as Coker, the document states that PMSCs[117] have mainly been left without oversight by States, and no specific international regulations are in place for them. The Montreux document also says that International humanitarian law applies to PMSCs. However, there was a clear need to spell out the rules for them and offer practical advice on how to deal with their business. (Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict: Montreux 17 September 2008, 2008).

In this sense, the document, which was endorsed by states, is a clear message that PMCs might be understood as a threat by nations, reversing Coker's claiming that transnational companies never sought to challenge the states. Therefore, why would 17 states, the ICRC and the Government of Switzerland push forward a guide with international obligations to PMCs if the private companies were not perceived as some degree of threat?

113 Merom (n 110) 375.

114 Strachan, Herberg-Rothe and Münkler (n 24) 229.

115 Coker (n 77) 112.

116 Coker (n 77) 112.

117 Acronym for Private Military & Security Companies (PMSCs).

Up to 2019, there are no international regulations on PMCs. Mainly, because under the Geneva Convention, there is just a mention to "mercenaries," a non-applicable term for PMCs and the United Nations Convention against the Recruitment, from 1989, treats about financing and training of mercenaries as the same problem. Moreover, unilateral efforts to manage PMCs face challenges due to the globalised nature of the industry. PMCs are often created, dissolved, merged, branched, moved from one location to another, making it more challenging to track down and regulate[118].

However, noteworthy mentioning, there is the International Code of Conduct for Private Security Service Providers' Association (ICoCA). Nonetheless, this is not a mandatory international treaty or regulatory organism, but an association with multi-stakeholders trying to promote, govern and oversee implementation of an international code for PMCs to respect human rights and international law. In the association, there are seven governments, 91 PSCs[119], 33 civil organizations, and 35 observers[120]. The voluntary code of conduct is not an answer to the culture of impunity that PMCs operate. Instead, it is used by the companies to legitimise existing industry practices and prevent the introduction of legally binding regulation. Furthermore, ICoCA does not have clear sanctions against companies that are against its principles, and the capacity to independently monitor its members in the field is minimal. Also, the ICoCA has no power to decide on a complaint or bestow any reparation. In practical terms, possible victims of PMCs human rights violations are not able to seek redress through ICoCA[121].

Although not agreeing with Coker's diagnoses on the future of PMCs, this research shares a common ground with his concerning of private military operation, that is lack of regulation. Coker[122] pointed out some alarming issues on PMCs operation, such as the international community need of ensuring that the private actors adhere the same standards of international law by which national army must abide. Secondly, since the private armed forces are frequently not part of regular troops and usually lack connection, ethics to the civilian population of countries where they operate in, regulation is essential. After all, some of the PMCs personnel have been discharged from prior military services because of disciplinary problems, therefore, regulation is vital.

PMCs are growing enormously in power. Reports also suggest that some PMCs are even able to wage cyber warfare and could have the ability to collapse countries and

118 Globalpolicy.Org. (2019). Regulation and Oversight Of Pmscs. Available At: Https://Www.Globalpolicy.Org/Pmscs/50211-Regulation-And-Oversight-Of-Pmscs.Html. Accessed 15 Feb. 2020.

119 Acronym for Private Security Company.

120 Icoca.Ch. Membership | Icoca - International Code of Conduct Association, 2019. Available At: Https://Www.Icoca.Ch/En/Membership. Accessed 16 Feb. 2020.

121 Waronwant.Org. Mercenaries Unleashed - The Brave New World of Private Military and Security Companies, 2016. [Online] Available At: Https://Waronwant.Org/Sites/Default/Files/Mercenaries%20unleashed%2c%202016.Pdf [Accessed 20 Jan. 2020].

122 Coker (n 77) 109.

steal their resources[123]. Increasingly, weapons and power are being handled by the private sector, instead of the state. As a result, the state authority can be undermined and trust between government broken[124]. PMCs were even called as "of the biggest security threats of the 21st century" by the Sean McFate, professor of strategy at the National Defence University and Georgetown University in a recent interview[125].

In order to address the threat of PMCs, the next topic will analyse the Blackwater episode trough a case study method. This method was chosen since the case study is appropriate when studying political science, besides, it is valuable at the stage at which candidate theories are tested[126]. Blackwater represents the uniqueness of a case to analyse to whether PMCs can destabilise the international security system.

E. Analysis: Blackwater Portrayed as a Threat to Security

The Blackwater case is one of the most emblematic involving a PMC and presents a vast possibility of analysis to understand whether a PMC can pose a threat to the international security system. This research found analysis, technical reports, and scholars' findings on Blackwater operations in Iraq that helped to produce an in-depth evaluation. Based on these pieces of evidence, reading and comparing it to the previous literature, it is possible to ascertain that, at some degree, PMCs, when operating in a space with lack of regulation, can cause some destabilisation to the international security system. The Iraq war is also a valuable scope of analysis since it was the most massive deployment of PMCs in the history of warfare, including more than 60 firms contracting 20,000 private personnel[127]. Furthermore, the Iraq war worked as an incubator not only for American PMCs but also to the British PMCs[128].

As a Combat Defensive PMC, Blackwater was founded in 1997 by the former US Navy Seal Erik Prince and provided military security for governments, corporations around the world, and personal security detachments to military and diplomatic missions. Blackwater won its first security contract in 2002 for six months for US$ 5.4 million by the CIA[129] to secure the agency assets in Kabul, Afghanistan[130].

In early 2003, Blackwater won even more contracts to act in the Iraq war with a primary mission of providing military security. In the same year, Blackwater won

123 T Tahir, 'How World's Next Global Power Could Be A Private Army of Mercenaries' (The Sun, 2019).

124 O Gafarov, 'Rise of China's Private Armies' Chatham House, 2019. Available At: Https://Www.Chathamhouse.Org/Publications/Twt/Rise-China-S-Private-Armies (Accessed: 17 March 2020).

125 T Tahir 'How World's Next Global Power Could Be A Private Army of Mercenaries' (The Sun, 2019).

126 M Hammersley, P Foster, R Gomm and H Eckstein, *Case Study Method* (London: Sage 2000) 119.

127 M Welch 'Fragmented Power and State-Corporate Killings: A Critique of Blackwater In Iraq' (2008) 51(3-4) Crime, Law and Social Change 354.

128 Waronwant.org. Mercenaries Unleashed - The Brave New World of Private Military and Security Companies (2016).

129 Central Intelligence Agency of the Federal Government of the United States of America.

130 Fulloon (n 82) 29 et seq.

another contract to secure the Coalition Provisional Authority (CPA) at the cost of US$ 27 million proving CPA with a team of 36 protection specialists, two k-9 crew, and three MD-530 Boeing known as "little birds." By the end of 2004, the PMC had won more than US$ 1 billion in federal contracts in Iraq[131].

During the years operating in Iraq, Blackwater was involved in a series of incidents, as when the company personnel was ambushed in coordinated assault in Fallujah in 2004 by Sunni insurgents during the transportation of foodservice equipment. The convoy was shelled with grenades and responded with small arms fire triggering a firefight. In August 2004, Blackwater also involved in combat in Najaf, where the company operatives, peacekeepers and US Marines triggered a four-hour battle against the Shi'a uprising to protect a US army facility. During this battle, contractors made several attempts to contact US Armed Forces for intervention. However, Blackwater "little birds" flew to pick up wounded and drop off more ammunition. In 2015, a company's helicopter also dropped CS gas, a riot-control substance (similar to tear gas) onto civilians gathered. On the ground, Blackwater armoured vehicle also released gas temporally blinding the drivers. Those episodes have raised concern over the use of such gas against civilians, which should have an exclusive prerogative of usage by the US army, although even the corporation refrains from using it once this method is banned as means of warfare by an international convention on chemical weapons. The company alleged that the gas was released by mistake[132].

Fulloon explains that, with Blackwater personnel engaging in combat, the actions of the company increased its credibility and perception that Blackwater could accomplish its security contracts regardless of the physical dangers. However, the most controversial incident, which caused an international outcry, was in 2007, when Blackwater personnel shot dead 17 unarmed Iraqi civilians claiming that these people had fired upon their convoy as they were in a hostile zone of Nisoor Square in Baghdad[133]. The episode, also known as "Baghdad's bloody Sunday"[134], left fourteen other Iraqis seriously wounded. Several eyewitness Kurds and forensic shreds of evidence rejected the Blackwater personnel claim that guns were pointed to them[135].

The former Iraqi prime minister Nouri al-Maliki condemned the Nisoor Square deaths and said that the "incident was nothing short of a direct challenge to his nation's independence. The Iraqi government is responsible for its citizens, and it

131 Fulloon (n 82) 29 et seq.

132 Welch (n 127) 358.

133 Fulloon (n 82) 29 et seq.

134 Scahill, J. Blackwater Founder Remains Free and Rich While His Former Employees Go Down On Murder Charges. [Online] The Intercept, 2014. Available At: Https://Theintercept.Com/2014/10/22/Blackwater-Guilty-Verdicts/ [Accessed 19 Jan. 2020].

135 R Goga, 'Privatization of Security in The 20th Century. From Mercenaries to Private Military Corporations' (2018) 63(1) Studia Universitatis Babeș-Bolyai Studia Europaea 261.

cannot be accepted for a security company to carry out a killing"[136]. This statement can be confronted by the scope of the literature reviewed in this research, especially through the lens of emancipation and human security.

Due to the close ties within the USA government, Blackwater personnel involved in the case were not immediately prosecuted. Later, after public outcry, US Congress pressured the Pentagon to hold the Blackwater employees accountable. The defendants had their trial in the United States in a rare moment of accountability of an outlaw private war industry[137]. The sniper, who triggered the shooting, received the life sentence for murdered. The other members of the company were convicted and jailed for 30 years for voluntary homicide and use of machine guns to produce violent crimes[138]. Despite the condemnations, Scahill says that it does not change the fact that those in power - the CEOs, the senior officials, the war profiteer - will walk freely and will likely do so for their entire life[139].

Welch claims that prosecuting PMCs employees can be difficult looking at the legal side since they are not accountable under the Uniformed Code of Military Justice nor are they even defined by international laws. Moreover, he argues, there is also a lack of political will for it[140].

In Iraq, the Blackwater personnel fired their weapons, killed, and injured far more often than its counterpart in the war, the DynCorp. Between 1st January 2005 and 31st December 2007, Blackwater fired their weapons in, at least, 323 incidents causing 62 deaths and 85 serious injured victims, whereas its counterpart DynCorp fired their weapons in 54 events, killing 11 people and leaving one serious injured[141]. This is because Blackwater maintained a relatively bellicose military culture putting a strong emphasis on norms to encouraging its security crew to exercise personal initiative and proactive use of force motivating its personnel to use the violence quite freely against anyone suspect of posing a threat[142].

Fitzsimmons states that the deployment of a company, such as Blackwater with a strong military culture, is dangerously risky because their personnel is more likely to inflict more deaths and serious injuries[143].

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136 E Prince, *Civilian Warriors: The Inside Story of Blackwater And The Unsung Heroes Of The War On Terror* (1st Ed. New York: Penguin, 2014).

137 J. Scahill. Blackwater Founder Remains Free and Rich While His Former Employees Go Down on Murder Charges (The Intercept, 2014).

138 Goga (n 135) 262.

139 J. Scahill. Blackwater Founder Remains Free and Rich While His Former Employees Go Down on Murder Charges (The Intercept, 2014).

140 Welch (n 127) 359.

141 S Fitzsimmons 'Wheeled Warriors: Explaining Variations in The Use of Violence By Private Security Companies In Iraq' (2013) 22(4) Security Studies 708.

142 Fitzsimmons (n 141) 707.

143 Fitzsimmons (n 141) 738.

Despite this carnage and scratched credibility, the contracts between Blackwater and the CIA have not come to an end[144]. Furthermore, there were accusations against the Blackwater CEO Erick Prince, deemed as a secretive right-wing Christian supremacist, and also for his implications in fraud committed against the federal government for phony billing[145]. Despite the odds, Blackwater became the most powerful army of mercenaries.

After the incident in Iraq, a report of the Office of the Special Inspector General for Iraq Reconstruction (SIGIR) said that the USA State Department and the Department of Defence signed a memorandum agreeing on a joint development, implementation, core standards, policies, procedures, accountability, oversight and discipline for PMCs in Iraq[146]. Furthermore, in 2009, a joint audit of Blackwater contract and task for Worldwide Personal Protective Services in Iraq found some irregularities. The USA Department of State - Bureau of Diplomatic Security (DS) recommended more stringent oversight of Blackwater's cost and performance in Iraq. The report found noncompliance policies such as monthly invoices paid without adequate review and supported documentation; Blackwater property erroneously identified as government assets, and excess of travel costs[147].

Blackwater case also can be analysed by the economic perspective. The company owned two aviation service companies operating over 50 aircraft and helicopters and a ship about 56 meters long for naval training. Blackwater also ran a factory that produced special armoured machines and offered an intelligence service called Total Intelligence Solutions, under the leadership of a former CIA official[148].

Even after the worldwide backlash for its performance in Iraq, the company (rebranded formerly as Xe) won a US$ 100 million contract to secure American bases in Afghanistan, a remarkable achieving for a company worldwide known for its negative image. For the contract itself, Blackwater bid a full US$ 26 million lower than the next bidder, a significant amount since the contract was US$100 million[149]. The low bid was possible because, due to close ties to George W. Bush administration, Blackwater was tremendously benefited with contracts in Iraq building a comparative advantage over its rivals.

144 Goga (n 135) 262.

145 F Pervez, 'Blackwater: Can't Stop, Won't Stop' Foreign Policy In Focus, 2010. [Online] Available at: Https://Gold.Idm.Oclc.Org/Login?Url=Https://Search.Proquest.Com/Docview/746785187?Accountid=1114. Accessed 18 January 2020].

146 Warren, D.; Bianco, M.A. Opportunities to Improve Processes for Reporting, Investigating, And Remediating Serious Incidents Involving Private Security Contractors In Iraq. (Office of the Special Inspector General for Iraq Reconstruction, SIGIR 09-019, April 30, 2009). SIGIR 09-019, Arlington,VA.

147 Joint Audit of Blackwater Contract And Task Orders For Worldwide Personal Protective Services In Iraq. (2009). [Online] Office Of The Special Inspector General For Iraq Reconstruction. Available At: Https://Apps.Dtic.Mil/Dtic/Tr/Fulltext/U2/A508739.Pdf [Accessed 19 Jan. 2020].

148 Goga (n 135) 260.

149 F. Pervez. Blackwater: Can't Stop, Won't Stop (Foreign Policy in Focus, 2010).

The Blackwater growth, even after Iraq scandal, can be justified by the USA grand strategy keeping the presence in more places than before, and maintaining bases and troops in over 100 countries. Companies like Blackwater operate beyond the reach of military laws, allowing them more considerable discretion in inflicting disproportional force to pacify areas and, ultimately, helping the USA military ambitions of keeping troops on the ground, reducing public costs and political risks[150], as examined before in the literature.

Blackwater also represents the concerns in terms of the difficulty to prevent PMCs from committing atrocities since their ability to be rebranded, merged, or branched to avoid tracking down. Since the negative publicity, Blackwater has changed its name to Xe Services and, currently, and since 2011 operates under the name of ACADEMI with a new board of directors[151]. In their website, there is no mention to the former brands. The company poses itself as offering "managed support services that enable our clients to operate successfully in remote locations". ACADEMI is still a huge company operating with four regional offices in Dubai, Lagos, London and Washington D.C, offering four U.S. training facilities, client-based training, scenario-based training, supply chain logistics, construction, life support, and other services. ACADEMI also says it is committed to its Code of Business Ethics and Conduct and is a permanent member of the International Code of Conduct for Private Security Service Providers' Association[152].

Coming across with the response to the posed question by this research, a report by NGO War on Want analysing the rise of PMCs states that these companies are able of acting in different areas, increasing human rights abuses, flourishing weapons trade and causing political destabilisation, once they are operating in a legal vacuum[153].

Furthermore, Fulloon claims that PMCs have the ability to alter the strategic military landscape of a conflict significantly, whether in a combative or non-combative role, as a national defence force would do. Citing Serbians, Croatians, Sierra Leoneans and Angolans[154]. The author also emphasizes that they all learned how the involvement of PMCs in combat or non-combat could shift the balance of the conflict with the right conditions. Also addressing lessons learned in Iraq, Singer[155] explains that the entrance of the profit motive onto the battlefield opens up vast, new possibilities and raises several troubling questions for democracy, ethics, management, laws, human

150 Ibid.

151 Right Web - Institute for Policy Studies. Academi Llc (Formerly Xe And Blackwater Worldwide) - Right Web - Institute for Policy Studies, 2019. [Online] Available At: Http://Rightweb.Irc-Online.Org/Profile/Blackwater_Worldwide/#_Edn16 [Accessed 19 Jan. 2020].

152 Academi.com (2019).

153 Waronwant.org. Mercenaries Unleashed - The Brave New World of Private Military and Security Companies (2016).

154 Fulloon (n 82) 29 et seq.

155 P Singer, *Corporate Warriors - The Rise of The Privatized Military Industry* (Ithaca, N.Y.: Cornell University Press 2008) 260.

rights, and national and international security. According to him, it is time to begin answering these troubling questions.

III. Conclusions

As this research has shown through the three main topics, the PMCs have the potential to destabilise, at some degree, the international security system. It is clear that these companies have a relative capability of causing a disturbance, especially when hired to fight within or to rogue and failed states. A miscalculation or an intentional move may trigger even longer wars or major conflicts. Therefore, looking through the specific lens of security framework, PMCs are posed as a threat to human security, the emancipation and, also can change substantially the course of events, as examined previously in Iraq.

Nevertheless, PMCs do not seem to have reached yet the power and capability themselves to change entirely the current arrangement of the international order and, ultimately, waging interstate war shifting the global security system. However, the actual movement of the state outsourcing some of its functions, following a neoliberal economic doctrine of reducing cost and generating efficiency, may change in the future the current conception of states as it is known nowadays. And, from this perspective, the global order could be shifted. It is clear that PMCs and the outsourcing of war is an ongoing process and, being so, all the outcomes are possible.

The nature of war has changed benefited by the technology advances and the Revolution in Military Affairs (RMA), reducing troops on the ground for instance. The post-1945 order has been challenged lately by the emerge of new great powers, such as China and India. Therefore, the state also may be involved in this process of outsourcing its monopoly on violence with PMCs allied with the statemen's mindset of reducing their political risks whilst pursuing national interests abroad.

Despite this phenomenon, which encompasses a multidisciplinary approach gathering warfare studies, politics, international relations, and economy, there is also the need for change in terms of law to hold accountable unlawful PMCs. It is worth mentioning that not all the PMCs operate in a shadowy manner. There are some exceptions. Nonetheless, a comprehensive regulation to PMCs would certainly compel those companies to follow duties, responsibilities, ethical conduct, and respect international and humanitarian laws. Perhaps due to the lack of political will – since PMCs could benefit the politicians' electoral ambitions – this international regulation may never occur. On the other hand, PMCs can freely exercise their work, undermining states, regions, lives, and operating in an obscure market, which still needs to be understood and analysed in-depth.

Although it is proved that PMCs may cause some sort of destabilisation within the international system, still lacks understanding on the extent of the damage they could produce and should be addressed in future investigations. Mainly since the gaps in the law allow PMCs to operate, the real war power of these companies remains unknown. Scholars and researchers very often rely on estimates of PMCs capabilities and a very few information which comes to light after public scandals, such as the well-armed and equally military dangerous Blackwater.

Since the nature of war has changed throughout the history, further research should incorporate not only the topics of the traditional literature of International Relations, such as military capability, power, and international order, but also the waging of cyberwar and how PMCs will act using these tools not yet addressed in previous studies.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Die urheberrechtliche Praxis in der Türkei*

Copyright Law Practice in Turkey

Türkiye'de Fikri Haklar Uygulaması

Nevhis Deren-Yıldırım[1]

Zusammenfassung
Das Gesetz fuer geistige Schoepfungen und Kunstwerke trat im Jahre 1951 in Kraft. Es bestimmt den Schutzgegenstand des Urheberrechts und stellt verschiedene Kategorien,wie wissenschaftliche und literarische Werke,musikalische Werke, Kunstwerke und Filmwerke auf. Seit der Gesetzesaenderung im Jahre 1995 werden auch verwandte Schutzrechte des ausuebenden Kuenstlers,des Herstellers von Tontraegern und des Sendeunternehmens anerkannt. Der Schutz der Verwertungsrechte und der urheberlichen Persoenlichkeitsrechte bildet den Kernpunkt dieses Rechtsbereiches. Der einstweilige Rechtschutz spielt im Urheberrecht eine kritische Rolle. Die Einfuehrung der Berufungsinstanz ist aus diesem Grund zu begruessen, da die Gerichtspraxis in Vergangenheit zur Abweisung der Antraege tendierte.

Schlüsselwörter
Das tuerkische Urheberrecht, Immaterialgueterrecht, Fachgericht fuer geistiges Eigentum, Werkkategorien, Musikwerke, Filmwerke, literarische und wissenschaftliche Werke, Kunstwerke, verwandte Schutzrechte, Bearbeitungsrecht, Urheberschaft, Verwertungsrechte, urheberpersoenlichkeitliche Befugnisse, der urheberrechtliche Schutz von Werken, einstweilige Verfuegungen

Abstract
The Turkish Copyright Act is from 1951. This Act distinguishes between several classes of works such as linguistic works, musical works, works of arts and cinematographic works. Under the amendment in 1995 the same Act is regulating the related rights: The protection of the rights of exploitation and moral rights is a sensitive subject for legal practice. Furthermore, the protection of copyrights is related with preliminary injunctions. The provisional legal protection of copyrights can be safeguarded by the new built Courts of appeal in Turkey.

Keywords
Copyright law in Turkey, intellectual property law, court for copyrights and intellectual property rights, class of works, musical works, Cinematographic works, linguistic works, works of arts, related rights, editing rights, rights of ownership, rights of exploitation, moral rights, protection of copyrights, preliminary injunctions

Öz
(Türk) Fikir ve Sanat Eserleri Kanunu 1951 tarihlidir. Söz konusu kanun birçok eser kategorisine yer vermektedir; bunlar sırasıyla edebiyat eserleri, müzik eserleri, güzel sanat eserleri ve sinema eserleridir. 1995 değişikliği ile aynı kanun eser ile bağlantılı hakları da koruma altına almıştır. Uygulamada eser üzerindeki mali haklar ile manevi yetkilerin hukuki korunması hassas bir konudur. Bunun yanı sıra telif haklarının korunması ihtiyati tedbirler ile de bağlantılıdır. Fikri hakların geçici korunması yeni kurulan istinaf mahkemeleri ile de garanti altına alınmıştır.

Anahtar Kelimeler
Türk Fikri Hukuku, Sınai mülkiyet hukuku, Fikri ve Sınai Haklar Hukuk Mahkemesi, eser kategorileri, müzik eserleri, sinema eserleri, edebi eserler, güzel sanat eserleri, bağlantılı haklar, işleme hakkı, eser sahipliği, mali haklar, manevi yetkiler, fikri hakların korunması, ihtiyati tedbirler

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1 **Corresponding Author:** Nevhis Deren-Yıldırım (Prof. Dr.) Koç University, Faculty of Law, Department of Civil Procedural Law and Execution and Bankruptcy Law, Istanbul, Turkey E-mail: nyildirim@ku.edu.tr ORCID: 0000-0002-1374-838X

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Extended Summary

Law No. 5846 on Intellectual and Artistic Works (the Turkish Copyright Act) regulates the author's rights. According to Art. 8 the owner of a copyright is the creator of an intellectual or artistic work. Creators' rights, such as exploitation rights and moral rights, are protected by the Law on Intellectual and Artistic Works from 1951. Moral rights are the right of making the work public (Art. 14), the right of determining the indication of the author's name (Art. 15), the right of integrity (to prevent distortion and other alterations of the work; Art. 16), and the right of the author against possessors and owners of the work (Art. 17). Exploitation rights are the right to adapt (Art. 21), the right of reproduction (Art. 22), the right of distribution, the right of exhibition (Art. 24), and the right of broadcasting (Art. 25). There are several types of works protected by the Copyright Act: 1) linguistic and scientific works, 2) works of art, 3) musical works, and 4) cinematographic works.

Since its amendment in 1995, the same act regulates related rights. Third persons have to be granted sub-licences in whole or in part for utilisation rights. In the case of infringement of a right of exploitation or a moral right, the creator can apply to the Court of Copyrights for legal protection, which was established as a specialised court of civil law in 1995.

Authors and related rights holders can request compensation (Art. 70) and make claims for preventing infringement and for restitution, or just bring an action for a declaratory judgment.

Copyright law practice in Turkey is still vibrant. The establishment of a specialised court for copyright law proposals might also be said to contribute to the development of authors' rights. Court-granted preliminary injunctions are the core of the protection of authors and related rights holders. The amendment of the Civil Procedure Act and the newly established Appeal Court must be welcomed.

Copyrights ensure that creators have control over the exploitation of their works. In order to gain an understanding of the origin of copyrights, we have to postulate a theory. Many authors have proposed theories of the origin of copyrights, including the theory of intellectual property, the theory of personality rights, the monistic theory, the theory of publishers' property, and the principle of creativity. The principle of creativity has become dominant with the Law on Intellectual and Artistic Works (Art. 8).

One of the most frequently discussed topics among Turkish copyright lawyers is the definition of creativity as the subject of protection of a work.

The rights of ownership were not known in the early Middle Ages. The human being was accepted as a creation of God, so human creators did not have the right of determining the indication of their own names.

There are certain requirements for triggering sanctions of the Law on Intellectual and Artistic Works by the Turkish courts. The existence of the work is a controversial issue in the doctrine. The authors or related rights holders (or holders of the right of exploitation) have the capacity of litigation according to the Law on Intellectual and Artistic Works.

The Courts of First Instance must obtain expert opinions regarding the existence of a work or the ownership of a moral right or right of exploitation.

Die urheberrechtliche Praxis in der Türkei

I. Die Definition des geistigen Eigentums

Was unter dem Begriff geistiges Eigentum zu verstehen ist, ändert sich von Zeit zu Zeit. Heute werden Urheberrecht, Markenrecht, Patentrecht, Geschmacksmusterrecht, Sortenschutzrecht als Rechte des geistigen Eigentums anerkannt. Halbleiterschutzrecht wird heutzutage auch dazugezählt. Im internationalen Bereich wird vom intellektuellen Eigentum (= intellectual property) gesprochen. In der türkischen Rechtsdogmatik verwenden manche Autoren den Begriff „*intellektuelle Rechte*"[1]. In der schweizerischen Lehre dagegen ist von immaterialgüterlichen Rechten die Rede[2]. Im deutschen Recht werden die gewerblichen Rechte von Urheberrechten deutlich unterschieden[3]. Nach der Inkraftsetzung des Gesetzes für gewerbliches Eigentum(=GWE) muβ man auch in der türkischen Lehre das Urheberecht von gewerblichen Rechten deutlich unterscheiden. Jenes Gesetz wurde am 22.12.2016 vom Parlament verabschiedet und trat am 10.1.2017 in Kraft. Das Ziel des Gesetzes für gewerbliches Eigentum mit der Nummer 6769 ist der Schutz von Marken, geographischen Herkunftsangaben, Geschmacksmustern, Patenten, Gebrauchsmustern und traditionellen Produktsnamen (Art. 1). Mit dem neuen Gesetz für gewerbliches Eigentum wurden vier Rechtsverordnungen mit Gesetzeskraft auβer Kraft gesetzt; z.B die Rechtsverordnung mit der Nummer 551 über den Schutz der Patentrechte, die Rechtsverordnung mit der Nummer 556 über Markenrechte, die Rechtsverordnung mit der Nummer 554 über Geschmacksmustern, die Rechtsverordnung mit der Nummer 555 über geographische Herkunftsbezeichnungen. Die Verfassung von 1982 erlaubte zu jener Zeit dem Kabinett im Rahmen eines vom Parlament verabschiedeten Ermächtigungsgesetzes Rechtsverordnungen mit Gesetzeskraft zu erlassen. Die Çiller Regierung wollte zügig handeln. Nach dem Beitritt in die Zollunion der EU wollte man die gewerblichen Rechte im Wege des Erlasses von Rechtsverordnungen mit Gesetzeskraft schnell geregelt haben, deshalb wurden sie im Jahre 1995 nacheinander erlassen.

Das Gesetz für geistige Schöpfungen und Kunstwerke trat im Jahre 1951 in Kraft, doch im Jahre 1995, hat man auch in diesem Gesetz mehrere Änderungen herbeigeführt.

II. Der gesetzliche Werkbegriff und gesetzliche Werkgattungen

Nicht jedes geschaffene Werk genieβt den urheberrechtlichen Schutz. Das Gesetz für geistige Schöpfungen und Kunstwerke mit der Nummer 5846 vom Jahre 1951

1 G Güneş, *Türk Hukukunda Entelektüel Sınai Haklar ve Vergilendirilmesi* (Istanbul 1997) § 1.

2 Siehe: R von Büren and L David, *Schweizerisches Immaterialgüter-und Wettbewerbsrecht, Allgemeiner Teil,* (Basel 1995) 1 ff; A Troller, *Immaterialgüterrecht, B.I* (3. Auflage, Basel/Frankfurt a.M. 1983).3 ff.

3 Siehe z.B.: H Hubmann, *Gewerblicher Rechtsschutz (Patent-, Gebrauchsmuster-, Geschmacksmuster-, Warenzeichen-und Wettbewerbsrecht)* (5. Auflage, München 1988) 1 ff.

bestimmt den Schutzgegenstand des Urheberrechts und stellt verschiedene Kategorien auf. Nach Art. 1 des kurz Urhebergesetz (URG) genannten Gesetzes muβ das Werk, vor allem, einer im Gesetz aufgezählten Werkgattungen zugehören;

I. Wissenschaftliche und literarische Werke

II. Musikalische Werke

III. Kunstwerke

IV. Filmwerke

Das Werk muβ auch individuelle Züge haben, mit anderen Worten, eine geistige Schöpfung darstellen, es muss von einer natürlichen Person geschaffen sein und der geistige Inhalt muss in einer bestimmten Form Ausdruck gefunden haben (Art. 1b URG)[4]. Das deutsche Urheberrechtsgesetz (= Gesetz über Urheberrecht und verwandte Schutzrechte) definiert Werke als persönliche geistige Schöpfungen (§ 2 II).

Unter diesen Grundwerkkategorien fallen verschiedene Werkarten. Als **Werke der Wissenschaft und Literatur sind Sprachwerke** einschlieβlich Computerprogramme, choreographische und pandomimische Werke, zu verstehen. Der türkische Gesetzgeber zählt technische Photos, allerlei Karten, Bebauungspläne, Stadtpläne, Entwürfe usw. auch zu den wissenschaftlichen und literarischen Werken, falls diese keinen ästetischen Gehalt haben[5].

Diese Aufzählung erweist Fehler, man müβte eigentlich die choreographischen und pandomimischen Werke zu den Werken der Tonkunst und der Bewegungskunst zählen. Darstellungen wissenschaftlicher und technischer Art sollten zur Kategorie der Kunstwerke angehören, obgleich sie ästetischen Inhalt besitzen oder nicht.

Nach Art. 3 sind Kompositionen mit oder ohne Text **musikalische Werke**. Diese Definition kann auch als mangelhaft angesehen werden. Der Gesetzgeber behandelt die Tonkunst und Komposition als gleichwertige Sachen[6] Lieder, Opern, Operetten, Symphonien, Kammermusik, Popmusik, Jazzmusik, Messen usw. werden als Werke

4 M Rehbinder and A Peukert, *Urheberrecht* (17. Auflage, München 2015) Rdnr 210. Vergl.: Rehbinder and Peukert (n 4) Rdnr 212: "… Allerdings erfasst der urheberrechtliche Werkbegriff nicht jedes Ergebnis menschlicher Tätigkeit. …" Der geistige Inhalt muss zum Ausdruck gebracht werden.

5 t URG Art.2 Obwohl die Stadtplaene unter die Kategorie der wissenschaftlichen und literarischen Werke fallen, unterscheiden sie sich z.B. von Romanen, wo die individuelle Kreativitaet als qualitative Anforderung leicht nachweisbar ist. In der türkischen Literatur macht *Kaya* darauf aufmerksam, dass die persönliche Leistung des Urhebers bei der angewandten wissenschaftlichen Technik (wie bei Landkarten, Wörterbüchern, Stadtplaenen etc.) schwer zu feststellen sei. (Arslan Kaya, 'Sind Staedtplaene als Werke im Sinne von UrhG anzusehen?' 2001 (33) 50 Annales de la Faculte de Droit d'Istanbul 253 ff, derselbe Arslan Kaya, Şehir Planları (Rehberleri) Fikir ve Sanat Eserleri Kanunun Kapsamında Eser midir? (Festschrift Tekinalp, B. II, 2003) 321-331, insb. S. 326 f.

6 Gleicher Ansicht: F Öztan, *Fikir ve Sanat Eserleri Hukuku* (Ankara 2008) 128. Siehe für die Werkkategorien auch: Tekinalp Ü, *Fikri Mülkiyet Hukuku* (3. Auflage, Istanbul 2004) § 10.

der Musik geschützt, falls sie als Ganzes ein individuelles Tongefüge bilden. Dieses individuelles Tongefüge kann durch Instrumente oder Menschenstimme, erzeugt werden. Im Gegensatz zum deutschen Urheberrecht fallen unter die Kategorie „*Musikwerke*" nur Werke der Tonkunst, nicht aber Werke der Bewegungskunst[7].

In der türkischen Praxis werden oft Klagen über die Urheberschaft der jeweiligen Komposition geführt[8]. Es muß erst festgestellt werden, ob der Beklagte als Komponist sich von einem anderen Komponisten insprieren lassen hat. Die Verwertungsgesellschaften klagen auch in der Praxis öfter gegen die Sendeunternehmen zum Schutz der musikalischen Werke[9]. Sie klagen aber auch gegen die Hotelunternehmer, und Geschäftsinhaber, wenn jene die Unterzeichnung eines Lizenzvertrags mit der Verwertungsgesellschaft verweigert und trotzdem die Kompositionen aufgeführt haben[10].

Art. 4 des türkischen Urhebergesetzes definiert die **Kunstwerke;** Gemälde, Zeichnungen, Mustern, Gravueren, Ornamente, Holzschnitte, Metallstiche, Kaligraphien, Seriengraphien, Statuen, Werke der Baukunst, Handwerkliche Erzeugnisse, Werke der angewandten Kunst, Miniaturen, Textilmuster, Modemuster sind als Kunstwerke geschützt, falls sie einen ästetischen Gehalt ausdrücken.

Auch Photographien, graphische Werke, Karikaturen und Comicfiguren werden, im Gesetz, als Kunstwerke erwähnt.

In der türkischen Rechtspraxis kommen urheberrechtliche Klagen, dessen Streitgegenstand eine Photographie ist, oft vor[11]. Sind es einfache Handyaufnahmen, wo der Kläger aber im Prozess von einem Kunstwerk ausgeht, muss die Klage abgewiesen werden. Im Sachverständigengutachten muß geklärt werden, ob das Photo einen anschaulichen (ästetischen) Gehalt hat. Der türkische Gerichtshof hebte öftermals das Urteil auf, wenn der erstinstanzliche Richter den ästetischen

Gehalt selbst, bewertet und die Klage abgewiesen hat. Allerdings muss nicht jedes Photo ästetischen Gehalt haben, um urheberrechtlichen Schutz zu genießen. Technische Aufnahmen z.B. Luftaufnahmen von einem Ort können als literarisches Werk geschützt werden.

7 Rehbinder and Peukert (n 4) Rdnr 265 f.

8 11. Zivilkammer des türkischen Gerichtshofs, 4.5.2004, 981/4942, in: C Suluk and A Orhan, *Uygulamalı Fikri Mülkiyet Hukuku, B.II* (Istanbul 2005) 192, 11. Zivilkammer, 12.1.2004, 5101/97, in: Suluk and Orhan (n 8) 278-279; Zivilkammer 23.2.2004, 7036/1652, in: Suluk and Orhan (n 8) 282-283.

9 11. Zivilkammer des türkischen Gerichtshofs, 30.9.1996, 5873/6286, in: Suluk and Orhan (n 8) 196, 11. Zivilkammer, 12.1.2004, 5273/85, in: Suluk and Orhan (n 8) 197, 11. Zivilkammer, 10.12.2004, 2426/12189, in: Legal Fikri ve Sınai Haklar Dergisi, 2005/1, S.188 ff.

10 11. Zivilkammer des türkischen Gerichtshofs, 6.12.2001, 10388/9622, in: Suluk and Orhan (n 8) 580.

11 11. Zivilkammer des türkischen Gerichtshofs, 1.11.2004 1463/10641, Legal Fikri ve Sınai Haklar Dergisi, 2005/1, S.198 ff,

Filmwerke werden im Art. 5 als selbständige Kunstgattung geschützt. Die Klagen über Filmwerke bilden eine der wichtigsten Klagegruppen an Sondergerichten für geistiges Eigentum. Bei einigen Klagen muß die Frage der Urheberschaft geklärt werden, was dem Sachverständigen nicht immer leicht fällt, denn ein Film stellt ein Gesamtkunstwerk dar und je nach der Epoche wurden bestimmte Personen gesetzlich als Urheber anerkannt. Bis zur Gesetzesänderung im Jahre 1995 war der Filmproduzent der Urheber[12]. Nach 1995 waren nach Art. 8 der Filmregiesseur, der Komponist und der Drehbuchautor als Miturheber an Filmwerken anerkannt. Die Miturheber hatten das Recht, ihre Verwertungsrechte mit Lizenzvertrag an den Produzenten zu vertreten.

Im Jahre 2001 wurde Art. 8 wieder geändert, danach waren der Filmregisseur, der Komponist, der Drehbuchautor, Dialogautor und der Animateur die Miturheber des Filmwerks. Bei einer Klage über ein Filmwerk, ist es deshalb wichtig, wann genau der Film produziert worden ist. Bei Filmwerken muß auch darauf geachtet werden, ob der Urheber seine Verwertungsrechte mit einem schriftlichen Vertrag übergeben hat. Manchmal kommt es vor, daß eine Firma behauptet, die Verwertungsrechte an einem Film von den Erben rechtsmäßig erworben und sie an Sendeunternehmen übergeben zu haben[13]. Danach wird im Prozess aber festgestellt, daß z.B. der Filmproduzent als Urheber seine Verwertungsrechte an Dritte schon zu seinen Lebzeiten übergeben hatte. In der türkischen Rechtspraxis erlangen die Klagen über Fernsehprogramme immer mehr an Bedeutung. Ein Sendeunternehmen verklagt z.B. gegen ein anderes Sendeunternehmen, um die Sendung eines Quizprogramms oder eines Heiratvermittlungsprogramms zu unterlassen, wo auch eine Analogie mit Filmwerken hergestellt werden muß[14]. Nicht jedes Fernsehprogrammformat genießt urheberrechtlichen Schutz, es muss eine persönliche geistige Schöpfung sein.

Art. 6 des türkischen Urhebergesetz schützt Bearbeitungen[15] und Sammelwerke. Zu den Bearbeitungen gehören Übersetzungen, Umformungen z.B. Dramatisierung eines Romans, einer Geschichte, eines Gedichts oder Verfilmung eines literarischen Werks, Umformung eines Kunstwerks in ein anderes Kunstwerk, Druckfertigstellung einer noch nicht veröffentlichten wissenschaftlichen Arbeit, Kommentare etc.

Unter einer Bearbeitung ist die Umgestaltung eines vorhandenen Werkes zu verstehen; einerseits muß der Bearbeiter die wesentlichen individuellen Züge

12 Yalçın Tosun, *Sinema Eserleri ve Eser Sahibinin Hakları* (Istanbul 2009) 248 ff.

13 11. Zivilkammer des türkischen Gerichtshofs, 30.5.2002, 2401/5405, in: Suluk and Orhan (n 8) 226.

14 11 Zivilkammer, 31.10.2000, 6049/8439, in: Suluk and Orhan (n 8) 280-281.

15 "Eine Bearbeitung ist bei allen Werkarten denkbar" (So wörtlich: W Erdmann, *Das Bearbeitungsrecht* (FS W. Büscher, Köln 2018) 174. Siehe die Entscheidung der 11, Zivilkammer des türkischen Gerichtshofs vom 20.12.2004 mit der Nr. 3174/12602, In der Entscheidung geht es um die Verletzung des Bearbeitungsrechts. Der Beklagte hatte ohne Lizenzgebühren zu zahlen, eine Neuauflage gemacht und das Original vom Osmanischen ins Neutürkische übersetzt (Legal, Fikri ve Sınai Haklar Dergisi, 2005/1, S,187 ff.). Für weitere Nachweise: A Arkan, *Eser Sahibinin Haklarına Bağlantılı Haklar* (Istanbul 2005).

des Originalwerkes beibehalten, andererseits muβ die Bearbeitung selbst eine schöpferische Leistung darstellen[16]. Eine blosse Kürzung eines Romans verdient keinen Rechtsschutz, aber die Instrumentierung eines Melodie kann als eine schöpferische Leistung bewertet werden[17]. Auch die Übersetzung eines Menues oder Fahrplans, Wiedergaben sind keine Bearbeitungen.

Das türkische Gesetzgeber räumt dem Urheber als Verwertungsrecht auch das Recht ein, sein Werk zu bearbeiten. Er kann es dem Dritten übertragen. Wird ein Werk, ohne das Bearbeitungsrecht schriftlich vom Urheber übernommen zu haben, bearbeitet, kann eine Klage erhoben werden. Viele Romanautoren, Drehbuchautoren verklagen die Filmproduzenten oder Filmregisseure in der türkischen Praxis. Bei diesen Faellen kann der Beklagte einen schriftlichen Lizenzvertrag oft nicht darlegen, sodass mit einem Schadensersatz zu rechnen ist. Werke, die für einen bestimmten Zweck und im Rahmen eines Plans gesammelt werden, können auch als Geisteswerk geschützt werden. Enzyklopädien Anthologien, Liederbücher, Sammelbände, Festschriften bilden verschiedene Arten der Sammelwerke. Bei einem Sammelwerk muβ darauf geachtet werden, ob die Auswahl oder die Anordnung der Elemente eine persönliche geistige Schöpfung des Sammlers darstellen. Werden aber die Gedichte eines Dichters ohne Übertragung des Bearbeitungsrechts in einer Anthologie zusammengefaβt, kann der Herausgeber, wegen Verstoss gegen das Verwertungsrecht verklagt werden.

III. Verwandte Schutzrechte

Seit der Gesetzesänderung im Jahre 1995 werden auch im türkischen Urheberrecht verwandte Schutzrechte des ausübenden Künstlers, des Herstellers von Tonträgern und des Sendeunternehmens anerkannt (Art. 80, 81, 82).

Ausübender Künstler ist nach Art. 80, wer ohne die Verwertungsrechte und die Persönlichkeitsrechte des Urhebers an ihm zu beeinträchtigen[18] und mit der Zustimmung des Urhebers ein Werk vorträgt, aufführt oder bei dem Vortrag oder der Aufführung eines Werks künstlerisch mitwirkt (Vergl: § 73 deutsches Urheberrechtsgesetz). Ausübende Künstler sind z.B. Sänger, Schauspieler, Musiker, Tänzer und andere natürliche Personen die Werke der Literatur oder der Kunst aufführen, singen, vortragenvorlesen, spielen oder auf eine andere Weise darbieten.

An seiner Darbietung hat der ausübende Künstler Verwertungsrechte, d.h. ohne seine Einwilligung darf die Darbietung nicht vervielfältigt, verbreitet und weitergesendet werden. Als ausübende Künstler können Sänger gegen die CD-Hersteller Klagen

16 M Rehbinder, *Urheberrecht* (9. Auflage München 1996) § 16; Rehbinder and Peukert (n 4) Rdnr 312 ff.

17 Fromm and Nordemann, *Urheberrecht, Kommentar* (9. Auflage, Stuttgart 1998) § 3

18 In der ersten Gesetzesänderung hatte der Gesetzgeber, den Terminus "Nachbarrechte" (1995), dann aber "verwandte Schutzrechte" (2001) verwendet.

wegen unerlaubter Verbreitung und Vervielfältigung erheben[19]. In der Praxis kommt es auch vor, daβ z.B. die Verwertungsgesellschaft der Tonträgerhersteller gegen ein Sendeunternehmen wegen unerlaubter Sendung eines Tonträgers klagt[20]. Die Verwertungsgesellschaft beruht auf sein verwandtes Schutzrecht.

Die Sendeunternehmen haben ein ausschlieβliches Recht an ihren Funksendungen. Vor etwa zehn Jahren hatte ein Sendeunternehmen, das das ausschlieβliche Recht an der Live-übertragung der Fuβballspiele von Fuβballmannschaften rechtsmäβig erworben hatte, mehrere Klagen gegen verschiedene Schwarzsender geführt, wo ich selbst als Sachverständige mitwirkte. Sogar die Sekunden der Schwarzsendungen wurden bei der Berechnung des Schadenersatzes mitberücksichtigt. Die gerichtlich bestellten Sachverständigen muβten sich mit Stoppuhren die Videos der Schwarzsendungen anschauen. Man muβte aktuelle Kenntnisse über die Mannschaftsspieler und Mannschaftsfarben haben. Es kam nämlich vor, daβ das klagende Sendenternehmen das Video des vorherigen Jahres als Beweismittel zuschob, um Schadenersatz zu bekommen. Jene Stoβklagen kann man als Instrumentalisierung der Schadenersatzklagen seitens der Lizenznehmer und als rechtswidrige Parteiprozesshandlung bezeichnen. Selbstverstaendlich haben die Sendeunternehmen ein ausschliessliches Verwertungsrecht an ihren Live-übertragungen.

IV. Die Verletzung der Verwertungsrechte und der urheberpersönlichkeitsrechtlichen Befugnisse

Die Berechnung des Schadenersatzes bei den urheberrechtlichen Klagen kann manchmal für den Richter Probleme aufbereiten, weil öftermals in dem Schriftsatz des Klägers zwar der Streitwert genannt, aber kaum konkrete Angaben über die Fakten des Schadens wiedergegeben werden. Der durchschnittliche Kläger überläβt es dem gerichtlich bestellten Sachverständigen. Wird eines der **Verwertungsrechte,** wie **das Bearbeitungsrecht** (Art. 21), **das Vervielfältigungsrecht** (Art. 22)**, das Verbreitungsrecht** (Art. 23)**, das Ausstellungsrecht (**Art. 24) und **das Senderecht** (Art. 25) des Urhebers (oder die des Leistungsschutzberechtigten) verletzt, kann er Schadenersatzanträge geltend machen[21]. Zudem kann die Verletzung **einzelner urheberpersönlichkeitsrechtlicher Befugnisse** den Verletzer schadenersatzpflichtig machen. Allerdings sind die im Gesetz genau beschriebenen urheberpersönlichkeitsrechtlichen Befugnisse von allgemeinen persönlichkeitsrechtlichen zu unterscheiden. **Das Veröffentlichungsrecht** (Art.14), **das Recht auf, Anerkennung der Urheberschaft** (Art. 15), **das**

19 11. Zivilkammer, 16.6.1997, 4216/4738, in: Suluk and Orhan (n 8) 191

20 11. Zivilkammer, 10.12.2004, 2426/12189, in: Legal Fikri ve Sınai Haklar Dergisi, 2005/1, S.188 ff.

21 11. Zivilkammer des türkischen Gerichtshofs, 20.12.2004, 3174/12602, in: Legal Fikri ve Sınai Haklar Dergisi, 2005/1, S. 187 ff.

Recht auf Verbietung der Veränderung des Werks (Art. 16)[22] gehören zu den urheberpersönlichkeitsrechtlichen Befugnissen.

Bei der Berechnung des Schadenersatzes muβ beachtet werden, wieviele von Verwertungsrechten und urheberpersönlichkeitsrechtlichen Befugnissen konkret verletzt worden sind.

Werden neben den Schadenersatzansprüchen Unterlassungsansprüche und Restitutionsansprüche in der selben Klageschrift geltend gemacht, hat der Richter seiner Fragepflicht nachzugehen (Art. 31 tZPO; vergl.: Art. 139 dZPO) und den Anspruch aufzuklären. Es muβ herausgefunden werden, ob der Urheber einen Restitutionsanspruch oder Schadenersatzanspruch geltend machen möchte. Nach Art.68 kann der Urheber, das dreifache von dem Betrag, den er als Lizenzgeber bekommen hätte, verlangen. Der Schadenersatz hingegen wird nicht so berechnet.

V. Das Gericht für geistiges Eigentum.

Die mit dem Gesetz für gewerbliches Eigentum (= GGE; Sınai Mülkiyet Kanunu) am 10.1.2017 auβer Kraft gesetzten Rechtsverordnungen mit Gesetzeskraft sahen die Gründung eines Sondergerichts (Fachgerichts) für geistiges Eigentum vor. Nach Art.156 GGE gibt es neben den Sonderzivilgerichten für geistiges Eigentum, auch Sonderstrafgerichte für geistiges Eigentum. Da nach der Verfassung ein Gericht nur mit einem Gesetz gegründet werden konnte, wurde in der türkischen Lehre die Verfassungswidrigkeit dieser Sondergerichte (Fachgerichte) in Frage gestellt. Jener Mangel wurde mit einer Änderung im Urheberechtsschutzgesetz aufgehoben. Nach Art.76 URG konnten Zivil-und Strafgerichte für geistiges Eigentum gegründet werden.

Seit 1995 haben wir diese Fachgerichte, deren erst ernannte Richter in der Anfangszeit eine Sonderausbildung hinterlegen muβten. In den Groβstädten gibt es nunmehr mehrere Sondergerichte dieser Art. In den Städten, wo das Justizministerium keine Sondergerichte für geistiges Eigentum gegründet hat, wird auf Vorschlag des Richter-und Staatsanwälterats vom Justizministerium ein Landgericht beauftragt, die Klagen zum geistigen Eigentum zu verhandeln. Dabei bereiten die ständigen Versetzungen der Richter groβe Probleme auf. Es ist nicht angebracht, einen für geistiges Eigentum spezialisierten Richter, an ein Arbeitsgericht bzw. ein Vollstreckungsgericht etc. zu versetzen.

22 Vergleiche: Art. 14 des deutschen Urheberrechtsgesetzes: „der Urheber hat das Recht, eine Entstellung oder eine andere Beeinträchtigung seines Werkes zu verbieten, die geeignet ist, seine berechtigten geistigen oder persönlichen Interessen am Werk zu gefährden". Das Persönlichkeitsrecht im geistigen Eigentum ist beim Urheberrecht am stärksten, während im Markenrecht strikt ein Markenpersönlichkeitsrecht verneint wird (O Sosnitza, 'Das Persönlichkeitsrecht als allgemeines Element der geistigen Eigentumsrechte' (FS Ahrens, Köln 2016) 305 ff.). Siehe für türkisches Markenrecht: Arslan Kaya**,** *Marka Hukuku* (Istanbul 2006).

VI. Die einstweiligen Verfügungen im Urheberrecht

Das Gesetz für geistige Schöpfungen und Kunstwerke regelt im Art. 77 die einstweiligen Verfügungen, Der Urheber kann vor oder nach Erhebung einer Klage einen Antrag auf einstweiligen Rechtsschutz beim örtlich und sachlich zuständigen Gericht stellen Art. 77 beinhaltet eine reichhaltige Palette von einstweiligen Verfügungen, darunter fallen Leistungsverfügungen, wie Unterlassungsverfügungen und Vornahme von Handlungen und so wie Sicherungsverfügungen[23].

Die einstweiligen Verfügungen haben drei Arten;

1. Sicherungsverfügungen
2. Regelungsverfügungen
3. Leistungsverfügungen.

In den schon außer Kraft gesetzten Rechtsverordnungen mit Gesetzeskraft über verschiedene gewerbliche Schutzrechte und im alten Handelsgesetzbuch waren neben den Unterlassungsverfügungen sogar die Restitutionsverfügungen geregelt. Die Restitutionsverfügungen stoßen in der Lehre aber insbesonders wegen ihrer Irreversibilität auf Kritik[24].

Die Gerichtspraxis war aber sehr zurückhaltend und tendierte meistens zur Abweisung der Anträge auf einstweiligen Rechtschutz. Man könnte sogar von einer Willkür, die nicht mit Rechtsstaatlichkeit zu vereinbaren war, reden. Die neue türkische ZPO ermöglicht die rechtliche Kontrolle der abgewiesenen Anträge auf einstweiligen Rechtsschutz beim Berufungsgericht. Nach der Gründung der Berufungsgerichte am 20.7.2016 sind diesen fehlerhaften gerichtlichen Prozeßhandlungen Schranken gesetzt.

In der türkischen Lehre haben manche Zivilprozessualisten[25] haben den urheberrechtlichen, immaterialgüterrechtlichen-und wettbewerbsrechtlichen Rechtsschutz erschwert, in dem sie den Schwerpunkt zu sehr auf das Vorwegnahmeverbot verlegt haben, was den Richtern zu gute kam. Sie wiesen die Anträge auf einstweiligen Rechtsschutz mit dem Argument des Vorwegnahmeverbots ab, ohne die Verfügungensvoraussetzungen zu prüfen. Zu guter Letzt, in einem demokratischen Rechtsstaat, ist für Willkür kein Platz![26] Die Bestimmungen der neuen türkischen Zivilprozeßordnung über die berufungsinstanzliche Kontrolle werden zur Gewährleistung dienen.

23 Nevhis Deren-Yildirim, *Haksız Rekabet Hukuku İle Fikri ve Sınai Mülkiyet Hukukunda İhtiyati Tedbirler* (2. Baskı Istanbul 2002) 80 ff.

24 Für mehr Hinweise Deren-Yildirim (n 23) 90 ff.; F Baur, *Studien zum einstweiligen Rechtsschutz* (Tübingen 1967) 58-59; R Ernst, *Die vorsorglichen Maßnahmen im Wettbewerbs- und Immaterielgüterrecht* (Zürich 1992); H J Ahrens, *Wettbewerbsverfahrensrecht* (Köln\Bonn\München 1983) 257.

25 Baki Kuru, Ramazan Arslan and Ejder Yılmaz, *Medeni Usul Hukuku* (12. Bası, Ankara 2000) 706,

26 Deren-Yildirim (n 23) 175 ff.

VII. Schlussfolgerungen

Nicht alle Schöpfungen geniessen urheberrechtlichen Schutz. Der Urheberrechtsgesetzgeber stellt verschiedene Anforderungen an den Werkbegriff und bezeichnet Werke als persönliche geistige Schöpfungen. In unserem Zeitalter werden die persönlichen geistigen Schöpfungen, die die gesetzlichen Vorausetzungen erfüllen, als Werke definiert, aber im Mittelalter wurde der Mensch als "*Werkzeug Gottes*" angesehen, die Nennung des Namens eines Künstlers war aus diesem Grund nicht nötig, ab dem Hochmittelalter wurden sich die Menschen der Individualität des Einzelnen bewusst, ihr Werk wurde als eigene Tat empfunden[27]. Um die Rechtsnatur des Urheberrechts zu definieren, wurden verschiedene Theorien[28] aufgeworfen, wie die Theorie vom geistigen Eigentum, die Theorie vom Persönlichkeitsrecht, die Theorie vom Immaterialgüterrecht, die monistische Theorie[29], die Theorie vom Verlagseigentum. Die von **Ernst Hirsch**[30] abstammende Theorie der Urheberschaft hat das türkische Urhebergesetz formiert[31].

Auch das schweizerische Bundesgesetz über das Urheberrecht und verwandte Schutzrechte geht vom Schöpferprinzip aus. Danach ist Urheber eines Werks die natürliche Person, die es geschaffen hat[32] Das heisst, das die Personen, die nicht schöpferisch tätig sind, können Urheberrecht nicht originär erwerben[33].

Die türkische Urheberrechtspraxis hat eine lange Tradition und ist äusserst rege. In diesem Beitrag wurde versucht, auf verschiedene besonderheiten der Rechtspraxis hinzuweisen. Den Brennpunkt des Urheberrechts aus der Sicht der Lehre bildet die Diskussion um die Qualifizierung des Begriffs der persönlichen geistigen Schöpfung und der Individualität. Waehrend nach **Hirsch**[34] und **Ayiter**[35] von originellen Einfällen, die der Allgemeinheit nicht zugänglich sind, ausgehen, haelt **Arslanlı**[36] die relative Selbständigkeit für nötig. Es muss eine selbständige Arbeit vorliegen, die von persönlichen Zügen ihres Urhebers geprägt ist[37]. **Yarsuvat** sucht die Originalität als Schutzvoraussetzung[38]. **Erel**[39] setzt die Reflexion des schöpferischen Geistes voraus und lehnt bei Werken eine absolute Originalität und Neuheit ab.

27 Für weitere Hinweise: B Hösly, *Der urheberrechtlich schützbare Rechtssubjekt* (Bern 1987) 8 ff.

28 Für weitere Nachweise: Rehbinder and Peukert (n 4) S 11, Rdnr 32 ff.; Tekinalp (n 6) § 8; Öztan (n 6) 23 ff.

29 Von Ulmer als Baumtheorie genannt. So: Ulmer, *Urheber-und Verlagsrecht* (3. Auflage, 1980) 116

30 Ernst E, 'Hirsch, Das neue Urheberrechtsgesetz der Türkei' (1954) 1 UFİTA 24 ff.

31 So Şafak N Erel, *Türk Fikir ve Sanat Hukuku* (3. Aufl., Ankara 2009) 34-35.

32 URG Art.6

33 Rehbinder (n 16) § 8 S 83.

34 Ernst E Hirsch, *Fikri Say* (B II İstanbul 1943) 12

35 N Ayiter**,** *Hukukta Fikir ve Sanat Ürünleri* (2. Bası Ankara 1981) 44 (Dieser Autor geht von der Leistungshöhe aus).

36 Halil Arslanlı, *Fikri Hukuk Dersleri II* (İstanbul 1954), 5-7.

37 Kaya, Annales 2001 (n 5) 253 ff.

38 D Yarsuvat, *Türk Hukukunda Eser Sahibi ve Hakları* (3. Auflage İstanbul 1984) 53; Tekinalp (n 6) § 10, Rdnr 8.

39 Erel (n 31) 53

An verschiedenen Beispielen sieht man, dass man bei Erzeugnissen, verschiedene Massstäbe für die Erfüllung der Individualitätsvoraussetzung anwenden kann, selbst innerhalb der selben Werkkategorie gibt es Nuancen[40].

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Abkürzungsverzeichnis/List of abbreviations

Abs.	Absatz
Art.	Artikel
Aufl.	Auflage
dZPO	Zivilprozessordnung der Bundesrepublik Deutschland
EU	European Union
etc.	et cetera
f.	folgende (Seite, Note usw.)
ff.	fortfolgende (Seiten, Noten usw.)
Fn.	Fußnote
FS	Festschrift; Festgabe
GGE	Gesetz für gewerbliches Eigentum
insb.	insbesondere
Nr.	Nummer
Rdnr.	Randnummer
S.	Satz / Seite
s.	siehe
tZPO	türkische Zivilprozessordnung
tURG	türkische Urheberrechtsgesetz
UFİTA	Archiv fuer Urheber-, Film, Funk, -und Theaterrrecht
URG	Urhebergesetz(= Gesetz über Urheberrecht und verwandte Schutzrechte)
usw.	und so weiter
vergl.	Vergleiche
z.B.	zum Beispiel

40 Siehe den obigen Vergleich zwischen einem Roman und einem Stadtplan (n 5) und die dort zitierter Autor: Kaya, Annales 2001 (n 5) 253-254.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Reconsidering the Issues Regarding Validity of Arbitration Agreements Referring to Non-Existing Arbitral Institutions or Including Uncertain References to Arbitral Institutions and the Turkish Experience

Yetkili Kılınan Tahkim Kurumunun Mevcut veya Belirli Olmadığı Tahkim Anlaşmalarının Geçerliliğinin Yeniden Ele Alınması ve Türkiye'deki Deneyim

Emre Esen[1]

Abstract

Arbitration agreements referring to non-existing arbitral institutions or including undefined references to arbitral institutions are significantly observed in international arbitration practice. Validity of such arbitration agreements becomes debatable due to the pathological intent thereof. If the pathology may be resolved by way of interpretation in the manner that leaves no room for doubt, the ideal solution is resolution of such problems by way of interpretation by means of supporting parties' common intent towards arbitration and of protecting legitimate expectations of parties in compliance with *bona fides* principle. However, if interpretation of an undefined reference in an arbitration agreement leads to uncertainty about competence of certain arbitral institutions, such agreement aimed at institutional arbitration either may be accepted to be turned into an agreement aimed at *ad hoc* arbitration or may be held null-and-void, depending on position of law of seat of arbitration. If seat of arbitration is also undefined or non-existing, arbitration agreement shall be held incapable of being performed and null-and-void. Attitude of Turkish courts seems in conformity with the three approaches to a large extent and may be qualified as satisfactory but determining validity of such arbitration agreements without reference to any law applicable and disregarding the right of *access to justice* should be criticized.

Keywords

Arbitration agreement, pathological arbitration agreement, reference to non-existing arbitral institutions, undefined references to arbitral institutions, institutional arbitration, *ad hoc* arbitration, seat of arbitration, interpretation of arbitration agreement

Öz

Milletlerarası tahkim tatbikatında, mevcut olmayan bir tahkim kurumunun yetkili kılındığı veya yetkilendirilen tahkim kurumunun belli olmadığı tahkim anlaşmalarına sıklıkla rastlanmaktadır. İçerdiği bu sorunlu hükümler, bu tür patolojik tahkim anlaşmalarının geçerliliğini tartışmaya açmaktadır. Tahkim anlaşmasında yapılan hatanın herhangi bir tereddüde yer vermeyecek şekilde yorum yoluyla giderilmesinin mümkün olduğu hallerde, tarafların tahkim iradesini mümkün mertebe ayakta tutacak ve tarafların meşru beklentilerini koruyacak biçimde, iyiniyet ilkesine uygun olarak yorum yapmak suretiyle problemin giderilmesi ideal bir çözümdür. Buna karşılık, tahkim anlaşmasında yer verilen tabirlerin yorumlanması sonucunda birden fazla tahkim kurumunun yetkili sayılabileceği görüldüğü takdirde, tahkim yeri hukukunun müsaade etmesi kaydıyla, ya kurumsal tahkime yönelik olan tahkim anlaşmasının *ad hoc* tahkime yönelik bir

1 **Corresponding Author:** Emre Esen (Prof.Dr.), Istanbul University Law School, Private International Law Department, İstanbul, Turkey. E-mail: emreesen@istanbul.edu.tr ORCID: 0000-0003-2411-4144

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tahkim anlaşmasına dönüştüğü kabul edilmeli ya da tahkim anlaşmasının geçersiz olduğuna karar verilmelidir. Tahkim anlaşmasında, yetkilendirilen tahkim kurumuna ilişkin patolojiye ek olarak, tahkim yeri de belli değilse, tahkim anlaşması icra kabiliyetinden yoksun ve geçersiz kabul edilmelidir. Türk mahkemelerinin yaklaşımı, bu üç anlayışa büyük ölçüde uygun görünmektedir ve tatmin edici olarak nitelendirilebilir, ancak bu tür tahkim anlaşmalarının geçerliliğinin uygulanacak hukuk belirlenmeksizin tayin edilmesi ve adalete erişim hakkının göz ardı edilmesi eleştirilmesi gereken yönlerdir.

Anahtar Kelimeler
Tahkim anlaşması, patolojik tahkim anlaşması, mevcut olmayan bir tahkim kurumunun yetkili kılınması, yetkili kılınan tahkim kurumunun belirli olmaması, kurumsal tahkim, *ad hoc* tahkim, tahkim yeri, tahkim anlaşmasının yorumu

Reconsidering the Issues Regarding Validity of Arbitration Agreements Referring to Non-Existing Arbitral Institutions or Including Uncertain References to Arbitral Institutions and the Turkish Experience

Introduction

In international arbitration practice, institutional arbitration is preferred, rather than *ad hoc* arbitration, by parties who have the intention to opt for arbitration but do not desire to bring forward and to discuss, during negotiations of a contract, any potential conflicts and resolution mechanisms thereof, whereas arbitral institutions have detailed and foreseeable rules regulating all aspects of arbitral procedure and also technical and administrative organisation to carry out an arbitral proceeding.[1] Parties, having the intention to opt for arbitration, have the opportunity to authorise, in just a few words, an arbitral institution which has a set of rules regulating procedural issues such as number and appointment of arbitrators, duration of arbitration, language of arbitration, collection and assessment of evidence, hearings, experts and costs, instead of drawing up all those issues.

However, it is understood from decisions of courts of certain states that, this opportunity regarding institutional arbitration is not always used thoroughly in practice while it has become ordinary to observe arbitration agreements referring to non-existing arbitral institutions[2] or including uncertain references to arbitral institutions[3] which might be caused by haste, clumsiness or ignorance of the drafter.[4] In other words, the reasons might be the insertion of arbitration agreements into a

1 Cemal Şanlı, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları* **[***Drafting International Commercial Agreements and Settlement of Disputes]*(6th edn. Beta 2016) 353

2 In arbitration agreements referring to non-existing arbitral institutions, parties make a description of an arbitral institution by using an exact wording and clear terms but there exists no such arbitral institution all over the world. Arbitration agreements referring to *"International Commercial Arbitration Court of the Chamber of Commerce and Industry of European Community"* or to *"International Arbitration Court of the Hague"* may be cited for example.

3 In arbitration agreements including uncertain references to arbitral institutions, along with the fact that parties have the intention to prefer institutional arbitration, wording and terms used in arbitration agreement are not available to make a certain and clear determination about which arbitral institution is authorised by parties. Arbitration agreements referring to *"International Court of Arbitration in England"* or to *"Arbitration Commission in Switzerland"* may be cited for example.

4 *See* Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell2007) 128

contract at the last minute or focusing of parties on other contract terms such as price, quality or liability or drafting of arbitration agreements by staff who is not aware of its content and nature or clerical or translation errors destroying arbitration agreements or, in exceptional cases, intentional destroying of arbitration agreements by any party who has the intention to make a trouble in the future with regard to contract.[5]

Whatever the reason might be, such arbitration agreements constitute a kind of *pathological arbitration agreements*[6], a very broad concept of international commercial arbitration, which denotes arbitration agreements that contain any defect liable to disrupt the smooth progress of arbitration. However, it should be noted that *pathological arbitration agreements* are not limited to "arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions". Beside such arbitration agreements, an arbitration agreement might become pathological when parties provide for arbitration as an option or authorise both arbitration and state courts at the same time or do not define seat of arbitration or draft arbitration agreement in multiple languages where differences exist between certain versions or provide for definite arbitrators who have already died.[7] In this paper, *pathological arbitration agreements* will not be studied in all aspects but only validity of arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions will be examined. And this examination will especially be focused on the decisions of Turkish courts.

Such arbitration agreements might cause various problems in practice. It is argued in the literature that such problems will, at best, give rise to associated litigation, fueling the arguments of the party attempting to avoid arbitration and make the process more time-consuming and more expensive; at worst, prevent arbitration from taking place at all.[8] However, Turkish Supreme Court [Yargıtay] 15th Circuit's decision of 15.10.2015 indicated another possibility far worse than the one mentioned as the worst above: restriction of the right of *access to justice*.

I. Approaches Adopted for Resolution of the Problem

A. In General

Arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions are significantly observed in international

5 *See* Pierre A. Karrer, *Pathological Arbitration Clauses - Malpractice, Diagnosis and Theraphy, in The International Practice of Law – Liber Amicorum for Thomas Bär and Robert Karrer*, 109, 110-11 (Nedim Peter Vogt 1997); Milo Molfa, 'Pathological Arbitration Clauses and the Conflict of Laws' 37 (2007) Hong Kong Law Journal 161, 163

6 *See* Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, 'International Commercial Arbitration', in Emmanuel Gaillard and John Savage (eds) (Kluwer Law International 1999) 262; Benjamin G Davis, 'Pathological Clauses: Eisemann's Still Vital Criteria' 7(4) (1991) Arb. Int'l 365; Frédéric Eisemann, 'La clause d'arbitrage pathologique' in Eugenio Minoli (ed), *Commercial Arbitration Essays in Memoriam* 129 ff (1974); Karrer (n 5)109 ff; Molfa (n 5) 62.

7 Fouchard, Gaillard and Goldman (n 6) 262-263.

8 *ibid* 263

arbitration practice. Validity of such arbitration agreements becomes debatable due to the pathological intent thereof. Depending upon a comparative law analysis, the approaches adopted for resolution of the problem might be classified under three groups.

The ideal approach is resolution of such problems by way of interpretation in the manner that leaves no room for doubt, by means of supporting parties' common intent towards arbitration and of protecting legitimate expectations of parties in compliance with *bona fides* principle. However, if interpretation of a pathological reference in an arbitration agreement leads to uncertainty and confusion about competence of certain arbitral institutions, such arbitration agreement aimed at institutional arbitration might either be accepted to be turned into an arbitration agreement aimed at *ad hoc* arbitration or be held null-and-void, depending on position of law of seat of arbitration. In addition to the pathology about arbitral institution referred to in arbitration agreement, if seat of arbitration is also uncertain or non-existing, arbitration agreement should be held incapable of being performed and accordingly null-and-void.

B. Holding Such Arbitration Agreements Valid by way of Interpretation

The ideal solution for resolving the problems regarding validity of arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions is holding such arbitration agreements valid by way of interpretation, if the pathology might be resolved by way of interpretation in the manner that leaves no room for doubt, without reference to any law applicable.

In significant amount of decisions holding such arbitration agreements valid, courts ruled that parties referring to non-existing arbitral institutions or inserting uncertain references to arbitral institutions had in fact desired to authorise an existing and definite arbitral institution. In these decisions[9], arbitration agreements are held

9 In *Tennessee Imports, Inc. v. Pier Paulo Filippi and Prix Italia S.R.L.*, 745 F. Supp. 1314 (M.D. Tenn. 1990), defendant raised an arbitration objection upon arbitration clause referring to the *"Arbitration Court of the Chamber of Commerce in Venice (Italy)"* in the case brought before U.S. courts by claimant. Claimant argued that arbitration clause is null-and-void since arbitral institution referred to in the arbitration clause is non-existing where defendant in return argued that arbitral institution referred to in the arbitration clause was in fact the *"International Chamber of Commerce Court of International Arbitration"* which was founded on the purpose of settlement of international disputes as in the case and Venice was determined as seat of arbitration. U.S. court, accepted the arbitration clause referring to the "*Arbitration Court of the Chamber of Commerce in Venice, Italy"* as a valid arbitration clause referring to the *"International Chamber of Commerce Court of International Arbitration"* and opting for Venice as the seat of arbitration, by way of interpretation.
French Cour de Cassation [Supreme Court for judicial matters] accepted the arbitration clause referring to the *"Yugoslavian Chamber of Commerce in Belgrade"* as a valid arbitration clause referring to the *"Foreign Trade Arbitration Court at the Economic Chamber of Yugoslavia"* by way of interpretation in *Epoux Convert v. Droga* decision of 14.12.1983: Rev. Arb. 483-84, (1984); *see* Gary Born, *International Commercial Arbitration* (2nd edn, Wolters Kluwer 2014) 779
In a decision of 27.09.2005 of the Hamm Court of Appeals (Ger.) [Oberlandesgericht (OLG) Hamm] (XXXI Y.B.C.A. 685 ff) where claimant initiated arbitration proceeding in 1998 before the *"Chamber of Commerce and Industry of Geneva"* about a dispute arising from a contract providing for settlement of disputes *"in accordance with the laws of conciliation and arbitration of the Geneva Chamber of Commerce"*. Arbitral tribunal held, in the interim award regarding jurisdiction, that incorrect typing of arbitral institution referred to in arbitration clause does not invalidate such arbitration clause, where common intent of parties to authorise the leading arbitral institution in Geneva is express and clear. Hamm Court

valid by way of interpretation and references to non-existing arbitral institutions or uncertain references to arbitral institutions are accepted to be designated to an existing and definite arbitral institution, when there exists no similar arbitral institution in relevant state or city by contract date and/or when incorrect typing of arbitration agreement does not result in any equidistance to two or more different arbitral institutions and does not cause uncertainty and dilemma about the competent arbitral institution.

On the other hand, if reference to arbitral institution is equidistant to two or more different arbitral institutions and has the nature to cause uncertainty and dilemma about the competent arbitral institution, directing parties to one of these arbitral institutions by way of interpretation shall connote to designation of competent arbitral institution by state courts upon a presumptional intent of parties and shall result in a legal conclusion exceeding genuine intent of parties. It seems impossible to satisfactorily explain why state court did not find the other arbitral institution competent when it finds an arbitral institution competent.[10] Besides, any decision of

of Appeals, where claimant asked for enforcement of final award, rejected objections of defendant based on invalidity of arbitration clause on the grounds that the only arbitral institution by the contract date was the *"Chamber of Commerce and Industry of Geneva"* and that arbitration objection was *mala fide* since defendant had admitted jurisdiction of arbitral tribunal by joining to constitution thereof and to arbitral proceeding without raising any objection upon invalidity of arbitration clause and by cooperating with arbitral tribunal during pre-arbitral conciliation process.
In a decision of 15.10.1999 of the Berlin Court of Appeals (Ger.) [Oberlandesgericht (OLG) Berlin] (XXVI Y.B.C.A. 328), parties provided for arbitration at *"German Central Chamber of Commerce",* but claimant initiated arbitration at the *"Deutsches Institut für Schiedsgerichtsbarkeit"* on the ground that arbitral institution referred to in the arbitration clause was non-existing. Upon objection of defendant on jurisdiction, arbitral tribunal rendered an interim award denying the objection and defendant resorted to Berlin Court of Appeals for annulment of the interim award. The Court held that the arbitration clause was valid on the ground that it is possible to specify an arbitral institution by way of interpretation where parties had referred to a non-existing arbitral institution. According to the Court, considering the fact that parties had agreed upon German law as the applicable law to contractual obligations and upon settlement of disputes under the auspices of an arbitral institution located in Germany, parties had in fact intended to authorise the *"Deutsches Institut für Schiedsgerichtsbarkeit"* while referring to *"German Central Chamber of Commerce"* in the arbitration clause.
In an arbitration proceeding conducted under the auspices of Zurich Chamber of Commerce (Switz.) (ZHK 249/1994), arbitration clause providing settlement of disputes by *"arbitration court in Zurich"* and *"in accordance with the rules of this court"* held valid on the ground that parties had obviously opted for arbitration under an arbitral institution located in Zurich which have arbitral rules in force, whereas there exists no arbitral institution having such characteristics other than arbitration court of the Zurich Chamber of Commerce. *See* Karrer (n. 5) 1 ff

10 In *Kwasny Company v. Acrylicon International Ltd.*, 2010 WL 2474788 (E.D. Mich.), parties provided for settlement of disputes by arbitration in accordance with the Rules of the Conciliation and Arbitration of the ICC and the appointing and administrating body will be the *"English Centre for International Commercial Arbitration".* But if an appointment is not made within the time periods set forth, such appointment shall be made in accordance with the rules of the Conciliation and Arbitration of the ICC. Furthermore, parties had agreed upon that arbitral proceeding shall be conducted in the State of Michigan if it is initiated by defendant, and in London if it is initiated by claimant. Defendant alleged that since *"English Centre for International Commercial Arbitration"*, identified by parties as "appointing and administrating body", evidently does not exist, parties failed to reach a meeting of the minds on a material aspect of the arbitration clause and that the arbitration clause therefore is null-and-void and unenforceable. The Court concluded that the reference to a non-existing arbitral institution is severable from, and does not render unenforceable, the parties' broad and overarching agreement to arbitrate, on the grounds that a mutual mistake voids a contractual provision only if mistake is material however defendant has failed to identify any basis for court to conclude that parties' mistaken reference to a non-existening arbitral institution should be viewed as integral to, and not severable from, parties' expressly stated intent to arbitrate; that arbitration clause itself mitigates, to a significant extent, the parties' mistaken reference to a non-existing administrative entity, by virtue of the parties' stipulation to arbitrate in accordance with the ICC Rules of Arbitration; that such rules expressly identify the International Court of Arbitration as the arbitration body attached to the ICC responsible for administering the rules; that parties' conduct and e-mail correspondence after their dispute arose do not suggest that their mistaken belief in the existence of *"English Centre for International Commercial Arbitration"* was material to their willingness to arbitrate disputes. However, determination of arbitration court of the ICC as the competent arbitral institution just upon choice of ICC rules by the parties, by disregarding the fact that the parties -who provided for settlement of disputes by

arbitration in accordance with the ICC rules but agreed upon *"English Centre for International Commercial Arbitration"* as the appointing and administrating body- were well aware of arbitration court of the ICC but they did not choose it as appointing and administrating body knowingly and willfully, is expressly contrary to the clear intent of the parties. In this respect, directing the parties to an *ad hoc* arbitration seated in the U.S.A. according to ICC rules by turning this arbitration clause aimed at institutional arbitration to an arbitration clause aimed at *ad hoc* arbitration could be a more legitimate and reasonable solution.

In re HZI Research Center v. Sun Instrument Japan, (1995) WL 562181 (SDNY 1995), XXI YBCA 829 ff, is an interesting case decided by U.S. courts where parties agreed upon that all arbitrators shall be members of *"American or Japanese Arbitrator Society"*. When a dispute arose, claimant initiated arbitration at the *"American Arbitration Association"*. Defendant, on the other hand, raised an objection on the ground that parties had not agreed upon arbitration at the *"American Arbitration Association"*. Thereupon, claimant resorted to U.S. courts in order to compel defendant to arbitration. The Court accepted this request on the grounds that non-existence of *"American or Japanese Arbitrator Society"* does not obstruct enforcement of the arbitration clause since genuine intent of parties is settlement of disputes by arbitration as stated in the arbitration clause, that courts shall enforce arbitration clauses by making a proper designation when parties had made a devoid or incorrect designation about arbitral proceeding and that the *"American Arbitration Association"* was totally a proper arbitral institution for the dispute. However, while non-existence of *"American or Japanese Arbitrator Society"* does not invalidate the arbitration clause despite the condition providing that all arbitrators shall be members of such society, acceptance of the *"American Arbitration Association"*, that was not authorised by parties, as a proper arbitral institution and ruling continuance of arbitral proceeding initiated there result in a legal conclusion exceeding genuine intent of parties. Moreover, although the arbitration clause was aimed at *ad hoc* arbitration, court's decision turning it into an arbitration clause aimed at institutional arbitration results in disregard of parties' common intent. In my opinion, after determining that the provision regarding qualification of arbitrators is incapable of being performed, the court should have directed the parties to an *ad hoc* arbitration under the Federal Arbitration Act, which would be more in conformity with common intent of the parties.

In *Circus Productions, Inc. v. Rosgoscirc*, 1993 U.S. Dist. LEXIS 9797 (SDNY1993), parties provided for settlement of disputes before the *"American Arbitration Association"*first, but then renounced and inserted an arbitration clause referring to *"International Arbitration in the Hague (the Netherlands)"*. When a dispute arose, defendant initiated arbitration at the *"American Arbitration Association"* against claimant. Claimant resorted to U.S. courts in order to stay the arbitral proceeding initiated at the *"American Arbitration Association"* alleging that the parties had agreed upon arbitration in the Hague and even if the arbitral institution mentioned in the arbitration clause is non-existing, arbitral proceeding should be conducted at the Permanent Court of Arbitration of the Hague in Netherlands, which is the most similar arbitral institution. U.S. court held that the intent of the parties would best be approximated by designating the *"American Arbitration Association"* on the grounds that, as conceded by parties, there was neither an arbitral institution entitled *"International Arbitration in the Hague"* in the Netherlands nor any similar arbitral institution in that region, that courts may not compel arbitration at another arbitral institution as a rule if parties had agreed upon a specific arbitral institution but in this case the arbitral institution referred to by parties was non-existing and that parties previously agreed to arbitrate at the *"American Arbitration Association"* in New York but then renounced this choice as a result of defendant's concern over neutrality and then the defendant intented to arbitrate at the *"American Arbitration Association"*. In my opinion, the approach adopted in this decision results in a legal conclusion exceeding genuine intent of parties. The decision of the U.S. court directing the parties to the arbitral institution which was first authorised but then consciously renounced by the mutual intent of the parties is expressly contrary to the clear intent of the parties. Moreover, despite the fact that the arbitration clause was already aimed at *ad hoc* arbitration, first turning it into an arbitration agreement aimed at institutional arbitration and then directing the parties to an institutional arbitration seated in the U.S.A. despite the fact that the parties had clearly agreed upon the Hague as the seat of arbitration, are also contrary to the mutual intent of the parties. In this respect, directing the parties to an *ad hoc* arbitration seated in the Hague could be a more legitimate and reasonable solution which would be more compatible with the wording of the arbitration clause and with the mutual intent of the parties who drafted this arbitration clause.

The most remarkable decisions on this point belong to French courts. Paris Cour d'appel [Regional Court of Appeals] accepted the arbitration clause referring to the *"Paris Chamber of Commerce"* as a valid arbitration clause referring to the *"Arbitration Chamber of Paris"* in *Tovomon v. Amatex* decision of 14.02.1985, Rev. Arb. 325-27, (1987); *see* Born (n 9) 779. However, Paris Cour d'appel [Regional Court of Appeals] accepted the arbitration clause referring to the *"Paris Chamber of Commerce"* as a valid arbitration clause referring to the *"International Chamber of Commerce"* in *Deko v. Dingler* decision of 24.03.1994, Rev. Arb. 515, (1994); *see* Born, (n 9) 779. Similarly, Paris Cour d'appel [Regional Court of Appeals] accepted the arbitration clause providing for settlement of disputes *"before the official Chamber of Commerce in Paris, France"* as a valid arbitration clause referring to the *"International Chamber of Commerce"* on the grounds that there existed no *"official Chamber of Commerce"* in Paris but *"International Chamber of Commerce"* is a private institution located in Paris and recognized either in France or in other states as an institution in point of organising settlement of disputes by arbitration arising from international relations regardless of nature of dispute or of nationality of parties or of applicable law, and that parties referring to *"official Chamber of Commerce in Paris"* had in fact desired to authorise *"International Chamber of Commerce"* in Paris, in *Société Asland c/ Société European Energy Corporation* decision, Rev. Arb. No.2, (1990); *see* Davis (n 6) 369-70.

Completely dissimilar interpretation of the references to the *"Paris Chamber of Commerce"* in different arbitration clauses concluded in different decades by the Paris Cour d'appel [regional court of appeals] in different cases, reveals that it is impossible to make an interpretation which satisfies both of the parties when reference is equidistant to two or more different arbitral institutions and has the nature to cause uncertainty and dilemma about the competent arbitral institution.

In a case concluded by the Swiss Bundesgericht [Federal Supreme Court] on 05.12.2008 (DFT 4A_376/2008, 7.4; *see* Born, *supra* (n 9) 779) arbitration clause providing for settlement of disputes before the *"Arbitration Court of the*

state courts directing parties to enforce such an arbitration clause as it stands might cause deprivation of *"access to justice"* in terms of parties. Furthermore, the arbitral tribunal, that parties are directed to by state court, might lack jurisdiction[11] or even if arbitral tribunal finds itself competent, courts of the arbitral seat might annul the arbitral award or courts of another states where parties shall ask for enforcement of the arbitral award might deny enforcement on the ground that the arbitral award was made by an arbitral tribunal lacking jurisdiction. In this respect, state courts should, depending on certainty of seat of arbitration and according to law of such seat of arbitration, either direct parties to *ad hoc* arbitration by accepting that arbitration agreement aimed at institutional arbitration is turned into an arbitration agreement aimed at *ad hoc* arbitration or hold that the arbitration clause is incapable of being performed and accordingly null-and-void.

C. Holding Such Arbitration Agreements Valid by Turning Them into Arbitration Agreements Aimed at Ad Hoc Arbitration

According to the second approach, if problems regarding validity of arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions may not be resolved by way of interpretation in the manner that leaves no room for doubt, only such reference should be held null-and-void but the rest of arbitration agreement should remain valid. In other words, even if parties of an arbitration agreement refer to a non-existing arbitral institution or insert an uncertain reference to arbitral institutions, the parties are accepted to have a mutual intent to arbitrate which is neither invalidated nor dissolved due to such pathology, on the ground that essential and *sine qua non* component of an arbitration agreement is not the reference to an arbitral institution but the mutual intent of parties to arbitrate.[12]

International Chamber of Commerce of Zurich in Lugano" was interpreted as providing an arbitration to be conducted before arbitration court at the *"International Chamber of Commerce in Paris"* seated in Lugano on the ground that there existed no *"International Chamber of Commerce of Zurich"* and the arbitration clause was held valid. However, interpretation of the arbitration clause as referring to the *"Zurich Chamber of Commerce"* which is located in Zurich and stands out for settlement of international commercial disputes by arbitration was also an admissable option according with the wording used in the arbitration clause. In this respect, Swiss Federal Court may be criticised because of designation of competent arbitral jurisdiction upon a presumptional intent of parties and of the legal conclusion exceeding genuine intent of parties. Instead of this, parties could be directed to an *ad hoc* arbitration seated in Lugano by accepting that the arbitration clause aimed at institutional arbitration is turned into an arbitration clause aimed at *ad hoc* arbitration because of uncertainty and dilemma therein, depending on position of law of seat of arbitration.

11 In arbitration proceeding conducted under the auspices of Zurich Chamber of Commerce (Switz.) (ZHK 287/1995), arbitral tribunal righteously lacked jurisdiction upon the arbitration clause referring to *"Arbitration Commission in Switzerland"*. In the case, claimant resorted to the *"Zurich Chamber of Commerce"* whereas parties had referred to *"Arbitration Commission in Switzerland"* for settlement of disputes and the Chamber appointed an arbitral tribunal. Arbitral tribunal lacked jurisdiction on the ground that the parties did not refer to the *"Zurich Chamber of Commerce"* in the arbitration clause. There is no arbitral institution in Switzerland titled exactly as *"Arbitration Commission in Switzerland"* and there is no evidence indicating which of the arbitral institutions operating in Switzerland was intended by the parties in fact. In this way arbitral tribunal ensured save of time, money and effort which might be wasted in case the arbitral award that would be rendered upon such arbitration clause is annulled or enforcement thereof is rejected: 14 ASA Bull. 290 (1996); *see* Karrer, (n 5)123.

12 This approach has been adopted especially by U.S. Courts. *See e.g.*, Control Screening L.L.C. v. Tech. Application & Prod. Co., 687 F.3d 163 (3d Cir. 2012); Raheel Ahmad Khan v. Dell, Inc., 669 F.3d 350 (3d Cir. 2012); Travelport Global Distrib.

Therefore, if such reference is detachable from the rest of arbitration agreement without damaging enforceability of arbitration agreement, such pathology does not invalidate arbitration agreement but it is no longer possible to resort to institutional arbitration. Thus, an arbitration agreement aimed at institutional arbitration is, since the arbitral institution referred to in arbitration agreement is non-existing or uncertain, transformed into an arbitration agreement aimed at *ad hoc* arbitration.

This approach, based on the understanding that basic component of arbitration agreement is parties' mutual intent to arbitrate, *prima facie* seems to disregard significant differences between institutional arbitration and *ad hoc* arbitration that could be considered by parties while opting for arbitration. Parties opting for arbitration are not obliged to prefer institutional arbitration while legal systems enable parties to prefer *ad hoc* arbitration. However, there are significant differences between institutional arbitration and *ad hoc* arbitration. Whereas in institutional arbitration almost all procedural problems regarding arbitral proceedings are resolved within arbitral institutions without application to state courts and this facility provides a significant advantage for parties with regard to saving of time; significant part of procedural problems arising in *ad hoc* arbitration may require application to state courts and obtaining results of such applications may likely take a long time. For instance, disputes regarding appointment or rejection of arbitrator(s), extension of duration of arbitration, arbitration costs and arbitrators' fees etc. are usually resolved by arbitral institutions in institutional arbitration but may require application to state courts in *ad hoc* arbitration. Beyond these differences, certain arbitration courts exist within the structure of sectoral or professional organisations which provide arbitration as a service to their members promising proficiency at small costs. Certain arbitral institutions are preferred due to their experience and reputation. Compelling parties, who concluded an arbitration agreement aimed at institutional arbitration considering any of the reasons mentioned above, to *ad hoc* arbitration on the ground that the arbitral institution referred to in arbitration agreement is non-existing or uncertain, is the weakest point of this approach.

However, this weakness does not undermine this approach totally. Because, accepting that parties, who were not aware of non-existence of arbitral institution that they referred to or who were not able to type the title of arbitral institution that they referred to, absolutely preferred institutional arbitration by considering reasonable and desirable reasons mentioned above shall be significantly contradictory. Parties, who pretend to act with high level of conscious while preferring institutional arbitration, are not expected to authorise a non-existing arbitral institution or to type the title of arbitral institution that they referred to incorrectly. In this respect,

Systems BV v. Bellview Airlines, Ltd., 2012 WL 3925856 (SDNY); Gar Energy & Associates v. Ivanhoe Energy, Inc., 2011 WL 6780927 (ED Cal); *In re* Brock Specialty Services, Ltd., 286 S.W. 3d 649 (Texas Ct App 2009); Astra Footwear Indus. v. Harwyn Int'l, Inc., 442 F.Supp. 907 (S.D.N.Y. 1978)

a reference to a non-existing arbitral institution or an uncertain reference to arbitral institutions does not invalidate arbitration agreement totally while the provision regarding such reference is null-and-void but parties' mutual intent to arbitrate remains valid. Therefore, in such circumstances, state courts should direct parties to *ad hoc* arbitration by accepting that arbitration agreement aimed at institutional arbitration is transformed into an arbitration agreement aimed at *ad hoc* arbitration to be conducted according to arbitration rules agreed upon by parties if available, or to law of arbitral seat designated by parties.

It should be underlined that this approach is not strange to Turkish law. For instance, subject of the Turkish Supreme Court 15th Circuit's decision of 15.11.1984[13] was an arbitration clause where parties agreed that each party shall appoint an arbitrator but if one of the parties does not appoint an arbitrator duly, such arbitrator shall be appointed by chief judge of the Istanbul Commercial Court of First Instance; and that if these two arbitrators may not be able to settle the dispute and may not be able to appoint third arbitrator, third arbitrator shall be appointed by chief judge of the Istanbul Commercial Court of First Instance. Pursuant to this provision, two arbitrators appointed by the parties could not be able to settle the dispute but appointed the third arbitrator and the arbitral tribunal rendered an arbitral award. When the defendant appealed[14] the award before the Supreme Court, validity of the arbitration clause became controversial on the ground that the parties assigned chief judge of the Istanbul Commercial Court of First Instance with regard to appointment of arbitrators in the arbitration clause. Moreover, it was stated in the dissenting opinion drafted by two members of 15th Circuit that assignment of chief judge of the Istanbul Commercial Court of First Instance by the parties for appointment of arbitrators was contrary to Art.140(5) of the Constitution of the Republic of Turkey [Türkiye Cumhuriyeti Anayasası] (1982) which provides that judges shall not assume any official or private occupation other than those prescribed by law and that the arbitration clause is invalid because it is incapable of being performed. However 15th Circuit held that: *"...while arbitration agreement is a procedural law contract, conclusion thereof is subject to Code of Obligations like other contracts. According to Art.20(2), invalidity of certain provisions of a contract does not result in dissolution of whole contract but only those provisions are dissolved"*. This conclusion, also supported in the literature[15], seems in conformity with legal nature of arbitration agreements.

13 Turkish Supreme Court 15th Circuit [Yargıtay 15. Hukuk Dairesi], File nr. [Esas No] 1984/1685, Decision nr. [Karar No] 1984/3521, Date [Tarih] 15.11.1984, 6 Yasa Hukuk Dergisi [Yasa Law Journal] 849 ff. (1986)

14 Under the 1086 Code of Civil Procedure [Hukuk Usulü Muhakemeleri Kanunu] (1927) (repealed 2011), which regulated international arbitration in addition to domestic arbitration until the 4686 Code of International Arbitration [Milletlerarası Tahkim Kanunu] (2001) came into force on 05.07.2001, arbitral awards were subject to appellate review carried out by the Turkish Supreme Court. The 4686 Code of International Arbitration (2001) provides annulment of arbitral awards in parallel with UNCITRAL Model Law. The 1086 Code of Civil Procedure (1927) was repealed by the 6100 Code of Civil Procedure [Hukuk Muhakemeleri Kanunu] (2011) on 01.10.2011

15 İzzet Karadaş, *Ulusal (İç) Tahkim [National (Domestic) Arbitration]* (Adalet 2013) 78

In my opinion, adoption of this approach should depend on certainty of seat of arbitration and on toleration of law of such arbitral seat. Rather than a geographic venue, seat of arbitration serves as a connection point indicating the law which governs arbitral proceeding as a whole[16] and also as a connection point indicating the applicable law to validity of arbitration agreements in almost all legal instruments regarding international arbitration and in the UNCITRAL Model Law, unless applicable law is determined by parties. As required by these two functions, seat of arbitration should necessarily be taken into consideration while determining the validity of arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions.

It should also be noted that state courts adopting this approach upon an arbitration objection should not confine themselves to rejecting the case on the ground that arbitration agreement is not null-and-void but should explicitly direct parties to *ad hoc* arbitration. Otherwise adoption of this approach might result in undesired legal consequences that may be up to deprivation of access to justice.

D. Holding Such Arbitration Agreements Null-and-Void

Dominating opinion and practise about validity of arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions are inclined to hold such arbitration agreements valid by adopting one of the two approaches mentioned above.

However, if problems regarding validity of such arbitration agreements may not be resolved by way of interpretation in the manner that leaves no room for doubt, and if such an arbitration agreement aimed at institutional arbitration may not be transformed into an arbitration agreement aimed at *ad hoc* arbitration since the seat of arbitration is also uncertain or law of arbitral seat does not allow, it is not possible to held such arbitration agreements valid.

Arbitral institution and seat of arbitration are components of a definitive intent to arbitrate each of which shall overcome any problems that may arise because of the other one's deficiency. When arbitral institution is existing and certain, deficiency of seat of arbitration shall most probably not invalidate arbitration agreement, since seat of arbitration is already determined by rules of arbitral institution or since arbitral institution or arbitrator(s) appointed shall almost in any event have the authority to determine seat of arbitration according to rules of such institution.[17] On the other hand, when seat of arbitration is existing and certain, non-existence or uncertainty

16 Ergin Nomer, Nuray Ekşi and Günseli Öztekin-Gelgel, *Milletlerarası Tahkim Hukuku [Law of International Arbitration]* (3rd edn, Beta 2008) 29

17 *See, e.g.*, AAA International Dispute Resolution Procedures Art 17; ICC Rules of Arbitration Art 18; LCIA Arbitration Rules Art 16; ISTAC Arbitration and Mediation Rules Art 11; SCC Arbitration Institute Arbitration Rules Art 25

of arbitral institution shall not invalidate arbitration agreement, since it is possible to direct parties to *ad hoc* arbitration to be conducted according to law of such arbitral seat. But when neither arbitral institution nor seat of arbitration is existing and certain, there will be neither an entity having the authority to determine seat of arbitration other than parties nor a legal basis for an arbitral proceeding.

Most of the state courts shall not have the authority to determine seat of arbitration, since UNCITRAL Model Law on International Commercial Arbitration, which is adopted in many states, provides that state courts do not have the authority to determine seat of arbitration whereas determination thereof belongs to parties, and failing such agreement, to arbitral tribunal (Art.20) and whereas extent of state court intervention is limited to matters governed by the Model Law and no state court shall intervene except where so provided in this Law (Art.5). The 4686 Code of International Arbitration (2001) [Milletlerarası Tahkim Kanunu], as adapted from the Model Law, contains the same provisions in Art.9 and in Art.3. Therefore, when neither arbitral institution nor seat of arbitration is existing and certain, Turkish Courts shall not have the authority to determine seat of arbitration in case the 4686 Code of International Arbitration (2001) shall apply. Nevertheless, the position will be opposite in the states where codes of international arbitration grant state courts the authority to determine seat of arbitration.

Besides, when neither arbitral institution nor seat of arbitration is existing and certain, most probably there will not be a legal basis for an arbitral proceeding in international commercial arbitration. For instance, the 4686 Code of International Arbitration (2001) shall apply in cases where seat of arbitration is in the territory of Turkey or where the provisions thereof are chosen by parties or by arbitrators (Art.1). Considering that the Model Law contains the same provision in Art.1, uncertainty of seat of arbitration shall result in nonapplication of codes on international arbitration adapted from the Model Law. Nevertheless, the position will be opposite in the states where application of codes of international arbitration is not limited to cases where seat of arbitration is in the territory of such state. It should be underlined that this issue is far apart from the debate on seat theory and delocalisation theory, because here parties' mutual intent is not aimed at delocalised arbitration but at institutional arbitration. Therefore, their arbitration agreement shall not contain sufficient provisions to conduct a delocalised arbitration when neither arbitral institution nor seat of arbitration is existing and certain. Hence, when neither arbitral institution nor seat of arbitration is existing and certain, there will be neither an arbitration agreement solely adequate to constitute the legal basis of an arbitral procedure nor rules of an arbitral institution and nor law of an arbitral seat that might constitute the legal basis of an arbitral procedure.

In conclusion, in addition to non-existence or uncertainty of arbitral institution, if seat of arbitration is also uncertain, arbitration agreement shall become incapable of being performed and accordingly null-and-void.[18]

In such circumtances, state courts should neither rewrite or change the arbitration agreement by putting themselves in parties' place[19] nor compel arbitration since parties may not find an arbitration court to resort and may be deprived of access to justice.

Considering all these reasons indicated above, arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions should be held incapable of being performed and accordingly null-and-void if neither interpretation method works[20] nor such arbitration agreement may be transformed into an arbitration agreement aimed at *ad hoc* arbitration[21].

18 However, it is crucial to state that legal position is totally different for domestic arbitration under Turkish law where the 6100 Code of Civil Procedure (2011) constitutes the sole legal basis and contains provisions efficient for any kind of deficiency or pathology in an arbitration clause.

19 Born, (n 9) 780.

20 In a case concluded by the Hamm Court of Appeals [Oberlandesgericht (OLG) Hamm] on 15.10.1994 (Ger.) (XXII Y.B.C.A. 707 ff), claimant brought a file before German courts where parties had provided for arbitration as such: *"If [a friendly settlement] is impossible, [all disputes] shall be settled by the arbitral tribunal of the International Chamber of Commerce in Paris, seat in Zurich."* Upon arbitration objection raised by defendant validity of the arbitration clause became disputable. Court of Appeals held the arbitration clause null-and-void on the grounds that an arbitration agreement is null-and-void when the competent arbitral tribunal is neither unambiguously determined nor unambiguously determinable, that the reference to *"the arbitral tribunal of the International Chamber of Commerce in Paris, seat in Zurich"* has more than one meaning -since not only the *"International Chamber of Commerce"* in Paris but also the *"Zurich Chamber of Commerce"* have a permanent arbitration court and their own Rules-, that the clause could be read to mean an arbitral tribunal under the auspices of the *"International Chamber of Commerce"* in Paris with Zurich as the seat of the proceedings, which would be possible according to the Rules of the *"International Chamber of Commerce"* but it was uncertain whether this would be in accordance with the expectations of the parties. However, I do not agree with the conclusion of the Court stating that the reference to *"the arbitral tribunal of the International Chamber of Commerce in Paris, seat in Zurich"* has more than one meaning. Because the parties evidently agreed upon the competence of arbitration court of the "*International Chamber of Commerce*" and the arbitration court in Zurich is not within "*International Chamber of Commerce*" but within "*Zurich Chamber of Commerce*". In other words, there exists no "*International Chamber of Commerce*" located in Zurich. In addition to this, the phrase *"seat in Zurich"* used in the arbitration clause does not indicate where the arbitral institution is located but serves a function as a connection point indicating the law which governs arbitral proceeding as a whole in international arbitration literature. In this respect, this arbitration clause, among the other ones referred to in this paper, is one of the most evident arbitration agreements which may easily be held valid by way of interpretation. In my opinion, the arbitration clause clearly provides for settlement of disputes via arbitration to be conducted under the auspices of the *"International Chamber of Commerce in Paris"* with Zurich as the seat of arbitration.

21 In *National Material Trading v. M/V Kaptan Cebi et al*, American Maritime Cases 201 ff (1998) parties had agreed upon settlement of disputes under *"Chamber of Commerce and Industry of Switzerland"* with London as seat of arbitration. The claimant objected that the arbitration clause is unenforceable because of the reference to court of arbitration at the *"Chamber of Commerce and Industry of Switzerland"*, when such a forum does not exist. The defendant conceded that arbitration centers in Switzerland are set up by regions or cantons and prayed that the *"Chamber of Commerce and Industry of Lugano"* be substituted to reform a mutual mistake in the arbitration clause misnaming arbitral institution. The Court declared the arbitration clause null-and-void on the grounds that construing validity of arbitration clauses, it must be determined whether essential terms are sufficiently definite so as to enable the Court to give them an exact meaning, that parties had named an arbitral institution which simply does not exist, that the Court can give no meaning to the arbitration terms so as to validate this clause, that it is undisputed that there are numerous chambers of commerce in Switzerland presumably each of which has its own rules of evidence and procedure, that the Court has no authority to rewrite the contract by choosing which of those courts was intended by the arbitration clause, that if the Court were to compel the parties to arbitration at the forum specified in the contract, the parties could not implement such an order because recourse cannot be had to a non-existing forum, and that consequently no meaningful effect may be given to this clause.
However, seat of arbitration was existing and certain, whereas the arbitral institution referred to in the arbitration clause was uncertain. If one of these components are existing and certain, arbitration clause may be held valid and enforceable. When seat of arbitration is existing and certain, as in the case, non-existence or uncertainty of arbitral institution should not invalidate the arbitration clause, since it is possible to direct parties to *ad hoc* arbitration to be conducted according to law

E. The Turkish Supreme Court [Yargıtay] Decisions on Validity of Arbitration Agreements Referring to Non-Existing Arbitral Institutions or Including Uncertain References to Arbitral Institutions

A. In General

Turkish courts have dealt with problems arising from arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions in four different cases.

In the first case, the Supreme Court had to make a decision on validity of an arbitration clause where the institution referred to in arbitration clause was not engaged in arbitration activity and had to discuss whether it is possible to assume that parties had in fact desired to authorise an existing arbitral institution which accords with wording used in arbitration clause, by way of interpretation of parties' genuine intent.

In the second case, claimant brought a case before a Turkish court alleging that there existed no arbitral institution matching up completely with the wording and description used in arbitration clause in order to authorise two different arbitral institutions optionally; upon raising of arbitration objection by defendant, court had to make a decision on validity of the arbitration clause and finally the case was rejected upon acceptance of arbitration objection.

In the third case, reference in arbitration clause to arbitral institution was so indefinite and so broad that it was impossible to assume, by way of interpretation of parties' genuine intent that parties had in fact desired to authorise an existing arbitral institution which accords with wording used in arbitration clause. Nevertheless, claimant initiated arbitration proceedings at an arbitral institution and then brought an action before Turkish courts in order to enforce the arbitral award rendered. The Supreme Court rejected the enforcement claim on the ground that the award was rendered by an arbitral tribunal which had no jurisdiction.

In the last case, parties authorised a non-existing arbitral institution in arbitration clause and when the dispute arose, claimant, who could not find any judicial authority to resort to, brought an action before the Turkish court located at the place where defendant is resident. Upon arbitration objection of defendant, validity of the arbitration clause became debatable and court of first instance decided on the problem, this decision was approved by the Supreme Court and then claimant carried the problem before the Turkish Constitutional Court by an individual application.

of such arbitral seat. In this respect, I disagree with the decision of the Court holding the arbitration clause null-and-void disregarding the fact that the parties had determined London as the seat of arbitration. The ideal solution is to determine the validity of the arbitration clause according to English law. If the arbitration clause was accepted valid and enforceable under English law, the U.S. Court could have rejected the case upon the arbitration objection. If the arbitration clause was accepted null-and-void under English law, the U.S. Court could have rejected arbitration objection and found herself competent.

B. The Turkish Supreme Court 11th Circuit's Decision of 07.07.1981 on Validity of an Arbitration Clause Referring to an Arbitral Institution Which Is Not Engaged in Arbitration Activity

In the case concluded by the 11th Circuit on 07.07.1981, even though the parties provided for settlement of disputes via arbitration under the auspices of *"Paris Chamber of Commerce"* in cement sales contract, defendant initiated arbitration at the *"International Chamber of Commerce in Paris"* about the dispute on the quality of cement.[22]

Thereupon, claimant brought an action before the Ankara 2nd Commercial Court of First Instance and asked for a decision that holds arbitration clause incapable of being performed and accordingly null-and-void on the grounds that the defendant -despite objection of the claimant- initiated arbitration at the *"International Chamber of Commerce in Paris"* instead of *"Paris Chamber of Commerce"* referred to in the arbitration clause and that the arbitration procedure was not conducted and the arbitral award was not made under the auspices of *"Paris Chamber of Commerce"* referred to in the arbitration clause.

In response, the defendant requested for rejection of the case on the grounds that they had agreed with the claimant to resort to arbitration in general, that the arbitral institution which the parties in fact intended to authorise is not *"Paris Chamber of Commerce"* but *"International Chamber of Commerce in Paris"* as the *"Paris Chamber of Commerce"* is not engaged in arbitration activity, that the claimant had admitted jurisdiction of the *"International Chamber of Commerce in Paris"* by joining the constitution of the arbitral tribunal and that the objection of the claimant had been rejected by the arbitral tribunal.

The Court, by using the power of interpretation granted by the 818 Turkish Code of Obligations [Türk Borçlar Kanunu] (1926) (repealed 2011) Art.18(1) [6098 Turkish Code of Obligations (2011) Art.19(1)], rejected the case on the ground that the genuine intent of the parties was the settlement of disputes arising from the cement sales contract via arbitration at the *"International Chamber of Commerce in Paris"*.

This decision was approved by the Turkish Supreme Court 11th Circuit by a majority vote.

According to the dissenting opinion of two members of the 11th Circuit; the dispute between the parties arose from the arbitration clause of the cement sales contract which provided that disputes would be resolved by mutual agreement and amicably, failing this Paris Chamber of Commerce arbitration would be competent; "arbitration

22 Turkish Supreme Court 11th Circuit [Yargıtay 11. Hukuk Dairesi], File nr. [Esas No] 1981/2726, Decision nr. [Karar No] 1981/3508, Date [Tarih] 07.07.1981: 11 Yargıtay Kararları Dergisi [Journal of Supreme Court Decisions] 1449 ff. (1981)

agreements" and "agreements between parties and arbitrators" should be dissociated and as required by the nature of agreement between parties and arbitrators, if the arbitrator appointed by parties refuses to act as arbitrator or resigns or dies or loses the qualities required, arbitration agreement shall become null-and-void; the dispute did not arise from the arbitration agreement but from the agreement between the parties and the arbitrator where there exists no possibility to make a broad interpretation; the *"Paris Chamber of Commerce"* and the *"International Chamber of Commerce"* are both in Paris; the parties authorised the *"Paris Chamber of Commerce"* as arbitrator in the arbitration clause but it is clear that the *"Paris Chamber of Commerce"* is not engaged in arbitration activity; since the arbitrator which the parties agreed upon refuses to act as arbitrator, arbitration clause shall become incapable of being performed; since the *"Paris Chamber of Commerce"* does not act as arbitrator, it is not possible to accept, by way of interpretation, that the *"International Chamber of Commerce in Paris"* shall be the arbitrator.

It should be first noted that the conclusion of the dissenting opinion is incorrect since it is based on viewpoint that the *"Paris Chamber of Commerce",* referred to in the arbitration clause, shall not act as an arbitral institution to organise arbitration procedure but as an arbitral tribunal to conduct arbitration procedure and to make an award in propia persona. However, the parties, by referring to the *"Paris Chamber of Commerce"* in the arbitration clause, did not agree upon the fact that *"Paris Chamber of Commerce"* shall act as an arbitrator but upon the fact that the disputes shall be settled via arbitration conducted under the auspices of the *"Paris Chamber of Commerce"*. If the *"Paris Chamber of Commerce"* is not engaged in arbitration activity, the arbitration clause may be held valid by accepting the reference to the *"Paris Chamber of Commerce"* as a reference to an existing and definite arbitral institution engaged in arbitration activity. However, in order to hold an arbitration clause -including a pathological reference- valid by way of interpretation, the arbitration clause should not be equidistant to two or more different arbitral institutions and should not have the nature to cause uncertainty and dilemma about the competent arbitral institution. But, the reference to *"Paris Chamber of Commerce"*, as understood from the decisions of the Paris Court of Appeals cited above, may be accepted as a reference to *"Paris Chamber of Arbitration" (Chambre Arbitrale Internationale de Paris)* founded in 1926 and engaged in both national or international arbitration activity on the one hand, may also be accepted as a reference to the *"International Chamber of Commerce"* in Paris on the other hand. Since the reference to the *"Paris Chamber of Commerce"* in the arbitration clause is equidistant to two different arbitral institutions and have the nature to cause uncertainty and dilemma about the competent arbitral institution, it seems impossible to make an interpretation which satisfies both of the parties. Directing parties to one of these arbitral institutions by way of interpretation of the arbitration clause which is equidistant to two or more different arbitral

institutions connotes designation of the competent arbitral institution by the court upon a presumptional intent of the parties by putting herself in the parties' place and shall result in a legal conclusion exceeding the genuine intent of the parties. It seems impossible to give a satisfactory explanation to the question why the court did not find the *International Chamber of Commerce in Paris"* competent when it finds that *"Paris Chamber of Arbitration"* is competent or vice versa. In this respect, the court should have, depending on certainty of seat of arbitration and according to law of such seat of arbitration, either directed parties to *ad hoc* arbitration by accepting that arbitration agreement aimed at institutional arbitration is transformed into an arbitration agreement aimed at *ad hoc* arbitration or held that the arbitration clause is incapable of being performed and accordingly null-and-void if seat of arbitration is uncertain or if law of arbitral seat does not allow such a transformation.

It should be underlined that attendance of the claimant to the arbitration procedure conducted under the auspices of the "*International Chamber of Commerce"* in Paris, as understood from declarations of both parties, does not abolish the right to raise an objection about validity of arbitration agreement and/or jurisdiction of arbitrators in further stages since the claimant had objected to jurisdiction of arbitral tribunal during arbitration procedure.

C. The Turkish Supreme Court 19th Circuit's Decision of 21.06.1999 on Validity of an Arbitration Agreement Referring to Non-Existing Arbitral Institutions

In the case concluded by the 19th Circuit on 21.06.1999[23], parties concluded in the arbitration clause that disputes would be settled by *"Tashkent Chamber of Commerce and Industry Arbitration Court"* or by *"Geneva International Court of Arbitration"*. Claimant brought an action on a dispute arising from the contract against defendant before Istanbul 6th Commercial Court of First Instance, alleging that the arbitration clause is null-and-void since it refers to a non-existing arbitral institution. Defendant argued that the Court lacks jurisdiction because of the arbitration clause and thereby the Court faced the debate on validity of such arbitration clause.

The Istanbul 6th Commercial Court of First Instance accepted the arbitration objection of the defendant and rejected the case by holding that the claimant argued that the arbitral institution referred to in the arbitration clause was non-existing, but did not provide any satisfactory information and document in this direction and that the defendant argued on the contrary.[24] This decision was approved by the Turkish Supreme Court 19th Circuit.

23 Turkish Supreme Court 19th Circuit [Yargıtay 19. Hukuk Dairesi], File nr. [Esas No] 1999/3348, Decision nr. [Karar No] 1999/4304, Date [Tarih] 1.06.1999: *See* Şanlı, *supra* n. 1, at 438 for the summary of the unreported decision.

24 Istanbul 6th Commercial Court of First Instance [İstanbul 6. Asliye Ticaret Mahkemesi], File nr. [Dosya No] 1997/1220, Decision nr. [Karar No] 1998/1954, Date [Tarih] 24.11.1998: *See* Şanlı (n 1) 438 for the summary of the unreported decision.

It is asserted in the Turkish scholarly literature that the conclusion reached by the Supreme Court in this decision might be accepted as the Supreme Court holds arbitration agreements referring to non-existing arbitral institutions null-and-void. According to this opinion, if claimant had proven with proper evidence that the arbitral institution referred to in the arbitration clause was non-existing, it would have been possible to presume that the arbitration clause would be held null-and-void. Accordingly, it is asserted that arbitration agreements referring to non-existing arbitral institutions shall be held null-and-void by Turkish courts as a conclusion derived from such decision of the Supreme Court.[25]

The *"Tashkent Chamber of Commerce and Industry Arbitration Court",* referred to by the parties in the arbitration clause as one of the two options, has never existed. The *"Uzbekistan Chamber of Commerce and Industry",* which was founded on 7.7.2004, is in Tashkent and there is an arbitration court acting under the auspices thereof. If the *"Uzbekistan Chamber of Commerce and Industry"* had been established by the contract date, the reference to the arbitration court at the *"Tashkent Chamber of Commerce and Industry"* could have been interpreted as the parties in fact intended to authorise the arbitration court of the *"Uzbekistan Chamber of Commerce and Industry"* located in Tashkent but wrote its name incorrectly; depending on whether there is another arbitration court in Tashkent organised under a chamber and engaged in arbitration activity, it could be accepted that such pathology might be cleared up by way interpretation and shall not affect validity of the arbitration clause. However, since there existed no arbitral institution in Tashkent both by the contract date and by the date the Turkish court ruled on validity of the arbitration clause and since the parties did not determine any seat of arbitration, the reference to the arbitration court of the *"Tashkent Chamber of Commerce and Industry"* should be held incapable of being performed and accordingly null-and-void.

The "*Geneva International Court of Arbitration",* referred to by the parties in the arbitration clause as the other option, has never existed either. However, there is an arbitration court at *"The Geneva Chamber of Commerce, Industry and Services",* which was founded in 1865 as *"The Geneva Chamber of Commerce"* and title of which was changed with the addition of the terms "industry" in 1961 and "services" in 2006. The contract date is not mentioned in the decision of the Court, but, by way of estimation with reference to the decision's date, it is possible to declare that the only arbitral institution in Geneva by the contract date was the arbitration court at *"The Geneva Chamber of Commerce and Industry"*. There is no doubt that the parties who referred to *"The Geneva International Court of Arbitration"* in the arbitration clause have the common intention to authorise an arbitral institution located in Geneva and the only arbitral institution in compliance with the description of the parties may be

25 ibid 438

the arbitration court at the *"The Geneva Chamber of Commerce and Industry"*. The arbitration clause involving such an indefinite reference to the arbitral institution is not an arbitration clause which is equidistant to two or more different institutions or which has the nature to cause uncertainty or dilemma about the competent arbitral institution and therefore it is a valid arbitration clause authorising the arbitration court at *"The Geneva Chamber of Commerce and Industry"*.

In this respect, acception of arbitration objection of the defendant by the Court is correct in point of conclusion. However, justification of the Court while coming to this conclusion is incorrect. Because the Court rejected the objection of the claimant, who alleged that the arbitral institutions referred to in the arbitration clause are non-existing, on the ground that the claimant did not provide any satisfactory information or document in this direction and did not perform the burden of proof. Other justification of the Court was that the defendant had argued on the contrary. However, the claimant asserted a negative claim by alleging that the arbitral institutions referred to in the arbitration clause did not exist. By nature of this allegation, burden of proof should move to the defendant who alleged that such arbitral institutions existed. Arbitration objection should have been accepted if the defendant proved that the arbitral institutions referred to in the arbitration clause existed. However, the Court asked the claimant to prove the allegation that the arbitral institutions referred to in the arbitration clause did not exist with information and documents on the one hand, but confined with the allegation of the defendant that the arbitral institutions referred to in the arbitration clause existed on the other hand.

D. The Turkish Supreme Court 19th Circuit's Decision of 07.06.2011 on Validity of an Arbitration Clause Including an Uncertain Reference to Arbitral Institutions

Despite the fact that parties had provided for settlement of disputes arising from the contract of 31.03.2006 at the *"International Court of Arbitration in England",* Australian seller company initiated arbitration against the Turkish buyer company at the *"International Chamber of Commerce International Court of Arbitration"* and then resorted to Kütahya 1st Civil Court of First Instance for enforcement of arbitral award where the Court held that there was no obstacle to enforcement of the award.[26]

Upon the appeal of this decision, the Turkish Supreme Court 19th Circuit reversed this decision on the grounds that the award was not made by the arbitral tribunal determined by the parties, that the parties had referred to *"International Court of Arbitration in England"* but the claimant had initiated arbitration at the *"International Court of Arbitration at the International Chamber of Commerce"* in Paris, and that

26 Kütahya 1st Civil Court of First Instance [Kütahya 1. Asliye Hukuk Mahkemesi], File nr [Dosya No] 2008/384, Decision nr [Karar No] 2009/52, Date [Tarih] 11.03.2009 (unreported)

the Court of First Instance should have checked whether there exists an arbitral institution matching up to *"International Court of Arbitration in England"*.[27]

The Kütahya 1st Civil Court of First Instance reconsidered the case upon the reversal of the Supreme Court and first asked the Directorate General for International Law and Foreign Relations of the Turkish Ministry of Justice whether there exists an *"International Court of Arbitration in England"* and if any, since when it has been engaged in arbitration activity, and then, by taking into consideration the response of the Directorate, rejected the case on the ground that the *"London Court of International Arbitration"* is the competent judicial authority with regard to the arbitration clause.[28]

Upon the appeal of this decision, the Turkish Supreme Court 19th Circuit reached the same conclusion with the court of first instance on the grounds that the *"London Court of International Arbitration"* is an international arbitration institution which is a different entity from the "*International Chamber of Commerce International Court of Arbitration"* in Paris and that the arbitral award was not made by the arbitration court designated by the parties since the "*International Chamber of Commerce International Court of Arbitration"* is not the arbitral institution which the parties had referred to in the arbitration clause.[29]

Parties referred to *"International Court of Arbitration in England"* in the arbitration clause. In England, there is no arbitral institution exactly matching up with *"International Court of Arbitration in England"*. Nevertheless, there are many arbitral institutions in England engaged in international arbitration activity but the most similar arbitral institution to the one described in the arbitration clause seems to be the *"London Court of International Arbitration"* and thus, it might be alleged that genuine intent of the parties is to authorise the *"London Court of International Arbitration"*. Other probability might be the allegation that there are many arbitral institutions in England, any of which might be accepted to be authorised by the parties who referred to *"International Court of Arbitration in England"* in the arbitration clause. Designation of the competent arbitral institution according to such an arbitration clause which is equidistant to two or more different arbitral institutions connotes designation of the competent arbitral jurisdiction upon presumptional intent of the parties and shall result in a legal conclusion exceeding the genuine intent of the parties. Therefore, the relevant part of the arbitration clause referring

27 Turkish Supreme Court 19th Circuit [Yargıtay 19. Hukuk Dairesi], File nr [Dosya No] 2009/5703, Decision nr [Karar No] 2009/8256, Date [Tarih] 15.09.2009, http://www.kazanci.com/kho2/ibb/files/19hd-2009-5703.htm (accessed 21April 2017).

28 Kütahya 1st Civil Court of First Instance [Kütahya 1. Asliye Hukuk Mahkemesi], File nr [Dosya No] 2010/133, Decision nr [Karar No] 2010/344, Date [Tarih] 28.10.2010 (Turk.) (unreported).

29 Turkish Supreme Court 19th Circuit [Yargıtay 19. Hukuk Dairesi], File nr [Dosya No] 2011/4149, Decision nr [Karar No] 2011/7619, Date [Tarih] 07.06.2011, http://www.kazanci.com/kho2/ibb/files/19hd-2011-4149.htm (accessed 21 April 2017).

to *"International Court of Arbitration in England"* might be held incapable of being performed but the remaining part of the arbitration clause stays valid and it means that the parties have a common intent to settle disputes via *ad hoc* arbitration with the seat of arbitration in England. Third probability is, as happened in the case, to accept that the parties, by referring to *"International Court of Arbitration in England"* in the arbitration clause, had indeed intended to arbitrate disputes under the auspices of the *"International Chamber of Commerce International Court of Arbitration"* with seat of arbitration in England.[30]

However, the probabilities mentioned above would have carried a meaning if the parties had resorted to state courts alleging that there existed no definite arbitration court to be resorted to. If the claimant, before initiating arbitration in any arbitral institution, had resorted to English courts, as the seat of arbitration decided by the parties, or to Turkish courts, as the place where the defendant is resident and where enforcement of a prospective award would most likely be sought, such courts could have directed parties to the proper arbitral institution by way of interpretation or could have directed parties to *ad hoc* arbitration to be conducted in England by accepting that the arbitration clause aimed at institutional arbitration was transformed into an arbitration clause aimed at *ad hoc* arbitration or could have held that the arbitration clause was incapable of being performed and accordingly null-and-void. Thus, the problems occured in the enforcement case could have been initially avoided. But, the claimant preferred to initiate an arbitration procedure before the *"International Chamber of Commerce International Court of Arbitration"* and then resorted to Turkish courts in order to enforce the arbitral award rendered.

In my opinion, the *"International Chamber of Commerce International Court of Arbitration",* under the auspices of which the arbitral award was made, does not match up with the arbitral institution that the parties referred to in the arbitration clause. There exists no arbitral institution exactly matching up with the arbitral institution that the parties described in the arbitration clause. The parties used so general terms having broad meaning in the arbitration clause in order to describe the arbitral institution which they intended to authorise that many of the arbitral institutions all over the world might be accepted to be under the scope of this reference. However, the phrase *"in England"* limits the scope of the reference in the arbitration clause with the arbitral institutions located in England. There are many arbitral institutions in England, any of which might be accepted within the scope of the reference to *"International Court of Arbitration in England",* but the most similar

30 It is pointed out in the literature that an arbitration clause referring resolution of disputes to *"London Arbitral Chamber"* may not be cured through interpretation and that although it is clear that parties intended to refer disputes to arbitration, the inaccuracy of arbitration clause is of such a nature so as not to allow determination, with reasonable certainty, of which arbitral institution was chosen by parties to conduct arbitral proceedings. Since the reference to *"London Arbitral Chamber"* may well be construed as referring either to LCIA arbitration to be conducted in London, or to ICC arbitration with a London seat, such arbitration clause should not be upheld. Molfa (n 5) 181-182

arbitral institution to the one described in the arbitration clause is the *"London Court of International Arbitration"*. Therefore, the award was made under the auspices of an arbitral institution located in Paris that was not authorised by the parties in the arbitration clause.

This conclusion might constitute contradiction with certain conditions for enforcement of foreign arbitral awards.

According to Art.V(1)(c) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, enforcement of the award may be refused if the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration. The arbitral award, which was made under the auspices of an arbitral institution that was not authorised by parties in arbitration agreement, shall totally exceed the scope of arbitration agreement which grants jurisdiction to arbitrators and which constitutes the legal basis of the arbitral award.[31] Therefore, enforcement of this arbitral award may be refused according to Art.V(1)(c).

On the other hand, according to article V(1)(d) of the New York Convention, there is an obstacle to enforcement of an award if appointment of arbitrators or arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place. The parties, by referring to *"International Court of Arbitration in England",* also authorised its arbitration rules for appointment of arbitrators and arbitral procedure; if there existed no such arbitral institution, appointment of arbitrators or arbitral procedure would be conducted according to English law since the parties determined England as the seat of arbitration. However, the award was rendered under the auspices of *"International Chamber of Commerce International Court of Arbitration"* and also appointment of arbitrators and arbitral procedure were conducted according to arbitration rules of this arbitral institution. This is contrary to New York Convention Art.V(1)(d) and constitutes an obstacle to enforcement of the award in Turkey.[32]

It should be noted that the decision of the *"International Chamber of Commerce International Court of Arbitration",* one of the most prestigious and important arbitral institutions of the world, accepting jurisdiction upon such an arbitration clause is surprising. At this point, it is remarkable whether the defendant had raised an objection regarding jurisdiction of the *"International Chamber of Commerce International Court of Arbitration"*. However, neither the Turkish Supreme Court

31 *See* Ziya Akıncı, Milletlerarası Tahkim [International Arbitration] (4th edn, Vedat 2016) 378 ff; Fouchard, Gaillard and Goldman (n 6) 988; Şanlı, (n. 1) 442.

32 *See* Şanlı (n 1) 452

19th Circuit's decision nor the Kütahya 1st Civil Court of First Instance's decision is informative on this issue. If the defendant joined the arbitration proceeding, conducted under the auspices of the *"International Chamber of Commerce International Court of Arbitration",* without raising any objection with regard to jurisdiction of arbitrators or to appointment of arbitrators or to arbitral procedure, it is accepted that the defendant gave consent to such issues and accordingly lost the right to raise any objection in the annulment or enforcement procedures regarding jurisdiction of arbitrators or appointment of arbitrators or arbitral procedure.[33] In this respect, if the defendant joined the arbitration procedure conducted under the auspices of *"International Chamber of Commerce International Court of Arbitration"* by raising or by reserving the right to raise any objection with regard to jurisdiction of arbitrators or to appointment of arbitrators or to arbitral procedure, the defendant preserved the right to raise any objection in the annulment or enforcement procedures regarding the above mentioned issues.

In conclusion, rejection of the claim regarding enforcement of the arbitral award made under the auspices of the *"International Chamber of Commerce International Court of Arbitration"* is rightful, save for the exception mentioned in the previous paragraph.

This conclusion seems fatal when expenses and time spent and endeavour made by the claimant are taken into consideration. However the parties, who gave rise to this problem first by drafting such a pathological arbitration clause and then by initiating arbitration at an arbitral institution which is less similar to the arbitral institution described in the arbitration clause, instead of resorting to the courts in the seat of arbitration or in any potential state for enforcement of arbitral award in order to remove the pathology in the arbitration clause or instead of resorting to the arbitral institution which is most similar to the arbitral institution described in arbitration clause, have run the risk of non-enforcement of the arbitral award.

E. The Turkish Supreme Court 15th Circuit's Decision of 01.07.2014 on Validity of an Arbitration Clause Referring to Non-Existing Arbitral Institution

In the case before the Istanbul Anadolu 21st Commercial Court of First Instance about a dispute arising from a sales contract between claimant company resident in the Czech Republic and defendant company resident in the Turkish Republic, the defendant raised an arbitration objection upon the arbitration clause of the contract.

The Court accepted the arbitration objection on the ground that the parties had agreed in the arbitration clause upon settlement of disputes arising from the contract

33 For more information, *see* Emre Esen, *Uluslararası Ticarî Tahkimde Tahkim Anlaşmasının Üçüncü Kişilere Teşmili [Extension of Arbitration Agreements to Non-Signatories in International Commercial Arbitration]* (Beta 2008) 227 ff

by *"International Commercial Arbitration Court of the Chamber of Commerce and Industry of European Community"* and rejected the case, despite the objection of the claimant that the arbitration clause is null-and-void since arbitral institution authorised in the arbitration clause is non-existing and since it is not possible to file a lawsuit before a non-existing judicial authority. According to the Court, both parties were merchants and had to act prudentially since merchant title is subject to liabilities and obligations arising from the 6102 Turkish Commercial Code [Türk Ticaret Kanunu] (2011) provisions. For this reason the Court refused to respect claimant's relevant arguments.[34]

Upon the appeal of the case, the Turkish Supreme Court 15th Circuit approved the decision of the Court of First Instance on the ground that there existed an arbitration clause in the contract concluded by the parties.[35]

Thereupon the claimant made an individual application to the Turkish Constitutional Court claiming that the decisions mentioned above had restricted the right to "access to justice". The Constitutional Court held that: according to the Constitution of Republic of Turkey (1982) Art.148(4), complaints regarding the issues which should be made subject of the means of appeal are not within the scope of rights to individual application and therefore the issues discussed before courts, such as proof of facts or assessment of evidence or interpretation and application of law rules or whether the conclusion reached about the dispute is fair, may not be the subject of individual application but evident fault of discretion or determinations or conclusions involving express arbitrariness which interrupt rights and liberties within the scope of rights to individual application might be the subject of individual application. According to the Constitutional Court, in the present case, the Court of First Instance examined the allegations with regard to the arbitration clause between the parties and rejected the case on the ground that the dispute must be resolved via arbitration and rejected the allegations of the claimant with regard to the arbitration clause since both parties are merchants and have to act prudentially since merchant title is subject to liabilities and obligations arising from the 6098 Turkish Commercial Code (2011) provisions as the claimant did not produce any information or document regarding being given no opportunity to submit any allegation or evidence during the proceeding or regarding disregard of the allegations by the Court of First Instance. The Constitutional Court also considered that the decision of the Court of First Instance was not without justification, that there existed no aspect constituting arbitrariness in the decision and that the alleged violation of the right to a fair trial was without merit.[36]

34 Istanbul Anadolu 21st Commercial Court of First Instance [İstanbul Anadolu 21. Asliye Ticaret Mahkemesi], File nr [Dosya No] 2013/456, Decision nr [Karar No] 2014/191, Date [Tarih] 01.07.2014 (Turk.) (unreported)

35 Turkish Supreme Court 15th Circuit [Yargıtay 15. Hukuk Dairesi], File nr [Dosya No] 2015/3849, Decision nr [Karar No] 2015/4786, Date [Tarih] 15.10.2015 (unreported)

36 Turkish Constitutional Court [Anayasa Mahkemesi], Application nr. [Başvuru No] 2016/1198, Date [Tarih] 30.05.2016 (unreported)

However, I am of the opinion that the decisions of either the Court of First Instance or the Supreme Court, rejecting the case only upon the fact that there existed an arbitration clause in the contract but involving no determination about the allegation that the arbitration clause was null-and-void, are incorrect and that The Constitutional Court could not even comprehend the argument of the claimant.

It is undisputed that the arbitral institution referred to in the arbitration clause by the parties is non-existing. In addition to this, there existed no arbitral institution that is similar to the arbitral institution referred to in the arbitration clause. The parties did not agree upon seat of arbitration as well. Accordingly, the parties concluded an arbitration agreement but neither the arbitral institution where the parties might initiate arbitration in case of dispute nor the seat of arbitration which is the main factor determining legal regime of arbitration proceeding and of arbitration agreement was designated.

At this point, it should be discoursed on whether Turkish courts might hold an arbitration agreement aimed at institutional arbitration valid by transforming it into an arbitration agreement aimed at *ad hoc* arbitration. In the present case, the parties did not agree upon seat of arbitration so seat of arbitration is not in Turkey. Therefore, this arbitration is not subject to the 4686 Code on International Arbitration (2001), which has a scope of application limited with the disputes where seat of arbitration is in Turkey. Only Art.5 and Art.6 of 4686 Code on International Arbitration (2001) might be applied even if seat of arbitration is out of Turkey. Article 5 is about arbitration objection raised before Turkish courts while article 6 is about provisional measures. Thus application of 4686 Code on International Arbitration (2001) in the present case is limited with article 5, which is about raising of arbitration objection and assessment of objections about validity of arbitration agreements and which provides for application of relevant provisions of 6100 Code of Civil Procedure [Hukuk Muhakemeleri Kanunu] (2011) about preliminary objections. Turkish courts, while determining validity of an arbitration agreement under an arbitration objection, may rule that an arbitration agreement aimed at institutional arbitration remains valid by transforming into an arbitration agreement aimed at *ad hoc* arbitration. In other words, Turkish courts may hold that parties' common intent to arbitrate is existing and valid, but reference to a non-existing arbitral institution is incabaple of being performed and accordingly null-and-void.[37] However, in the present case, not only arbitral institution is non-existing but also seat of arbitration is uncertain. If Turkish courts rule in such circumstances that arbitration clause remains valid by transforming into an arbitration clause aimed at *ad hoc* arbitration, parties would be directed to an international arbitration procedure which has an indefinite feature about the law

37 *See* the decision of the Turkish Supreme Court 15th Circuit [Yargıtay 15. Hukuk Dairesi], File nr [Dosya No] 1984/1685, Decision nr [Karar No] 1984/3521, Date [Tarih] 15.11.1984: 6 Yasa Hukuk Dergisi [Yasa Law Journal] 849 ff. (1986)

which it is subject to. Because other provisions of the 4686 Code on International Arbitration (2001) is not applicable. Therefore, conduct of arbitration proceedings may become impossible due to uncertainty about applicable rules of law about appointment or challenge or abdication of arbitrators and about competent judicial authority for settlement of disputes arising from such issues. Likewise, duration of arbitration and competent judicial authority to rule on time extension is unknown as the parties did not need to agree upon such issues separately since they concluded an arbitration agreement aimed at institutional arbitration. After all that, holding that the arbitration clause aimed at institutional arbitration, involving a reference to a non-existing arbitral institution and no seat of arbitration, is transformed into an arbitration clause aimed at *ad hoc* arbitration, means that the law which the arbitration procedure is subject to and the judicial authority which shall provide assistance for conduct of arbitration are unknown or non-existing. Unless parties agree upon seat of arbitration or upon the law which the international arbitration proceeding is subject to, accepting that an arbitration clause aimed at institutional arbitration remains valid by transforming into an arbitration clause aimed at *ad hoc* arbitration is tantamount to create an arbitration clause incapable of being performed. According to 4686 Code on International Arbitration (2001), where parties did not designate any seat of arbitration, Turkish courts have no authority to determine seat of arbitration. In terms of Turkish arbitration law, where seat of arbitration is indefinite, accepting that an arbitration clause aimed at institutional arbitration remains valid by transforming into an arbitration clause aimed at *ad hoc* arbitration, while arbitral institution referred to in arbitration clause is non-existent, is tantamount to a decision of lack of jurisdiction where there is no other judicial authority that might be competent for the dispute.

Due to the reasons mentioned above, there's no choice for the claimant other than state courts. In cross-border disputes, which courts of which state shall have jurisdiction is determined by rules of international jurisdiction.[38] Each state has its own rules of international jurisdiction and international jurisdiction of the courts of a state shall be determined exclusively by international jurisdiction rules of that state. In accordance with the circumstances of the case, all the facts that might be taken into consideration in order to establish jurisdiction of state courts refer to Turkish courts, since the defendant Turkish company is resident in Turkey and its all assets, goods and money are located in Turkey while the place of conclusion or place of performance of the contract is also in Turkey. Correspondingly, there seems no reason in order to establish jurisdiction of courts of another state, other than Turkish courts: in other words, when Turkish courts lack jurisdiction in the present case, there is no other judicial authority that the claimant may resort to all around the world.

38 Aysel Çelikel and B Bahadır Erdem, *Milletlerarası Özel Hukuk [Private International Law]* (14th edn. Beta 2016) 515 ff; Nuray Ekşi, *Türk Mahkemelerinin Milletlerarası Yetkisi [International Jurisdiction of Turkish Courts]*(2nd edn, Beta 2000) 18 ff; Ergin Nomer, *Devletler Hususî Hukuku [Private International Law]* (21st edn, Beta 2015) 445 ff; Cemal Şanlı, Emre Esen and İnci Ataman-Figanmeşe, *Milletlerarası Özel Hukuk [Private International Law]* (5th edn, Vedat 2016) 358 ff

In this respect, if the Court, where the claimant had brought the action before and which is located in Istanbul where the defendant Turkish company is resident, lacks jurisdiction, the claimant may be deprived of "access to justice".

The "access to justice" is defined as the principle that provides concrete and efficient functioning of the "right to legal remedies".[39] The "right to legal remedies" is, as one of the irrevocable elements of state of law and of the "right to a fair trial", prescribed by the Constitution of the Republic of Turkey (1982) Art.36 as everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures. The "access to justice", taking its source from the "right to legal remedies" and from the "right to a fair trial" which is provided in article 6 of the European Convention on Human Rights (ECHR), is accepted as one of the human rights.[40] With reference to article 6 of the ECHR which regulates that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, everyone should *a fortiori* be provided the opportunity to bring forward claims and arguments before a judicial authority.

However, the Court, located in the place where the defendant is resident and that would have jurisdiction according to the 6100 Code of Civil Procedure (2011) Art.6 in case the arbitration clause is held null-and-void, did not take into consideration the objection of the claimant that the arbitral institution referred to in the arbitration clause was non-existing, did not examine the existence of such arbitral institution or validity of the arbitration clause, did not determine whether there was another judicial authority before which the claimant might bring the action in case the Court lacks jurisdiction, although those allegations were insistently raised by the claimant in every stage of the proceeding. The Court rejected the case on the ground that there existed an arbitration clause in the contract concluded by the parties, by taking into consideration that the parties -acting as merchants- should have taken the responsibility of concluding an arbitration clause, but did not consider whether the claimant would be deprived of "access to justice" if the arbitration clause was incapable of being performed and null-and-void.

However, "merchant" title of the parties and/or existence of an invalid arbitration agreement between the parties may never be legitimate reasons that justify any deprivation of "access to justice". The parties may not be deprived of the opportunity

39 *See* Hakan Pekcanıtez, Oğuz Atalay and Muhammet Özekes, *Medeni Usul Hukuku [Law of Civil Procedure]* (14th edn, On İki Levha 2013) 45

40 *See generally* Şeref Gözübüyük and Feyyaz Gölcüklü, *Avrupa İnsan Hakları Sözleşmesi ve Uygulaması [European Convention on Human Rights and Its Application]*(10th edn, Turhan 2013) 276-77; Sibel İnceoğlu, *İnsan Hakları Avrupa Mahkemesi Kararlarında Adil Yargılanma Hakkı [The Right to a Fair Trial in Decisions of European Court of Human Rights]*, 106 (4th edn., Beta 2013); Mustafa Özbek, 'Sosyal Devletin Gereği, Adalete Erişim [Requirement of Social State, Access to Justice]' (2006) (1) Legal Medeni Usul, İcra ve İflas Hukuku Dergisi [Legal Journal of Law of Civil Procedure, Execution and Bankruptcy] 149

to bring forward claims and arguments before a judicial authority even if they are merchants. Despite the arbitration clause between the parties, when one of the parties request for "effective legal protection" before Turkish courts, the "right to legal remedies" and the "access to justice" which are the elements *sine qua non* of the "right to a fair trial" must be taken into consideration by Turkish courts while determining jurisdictional issues and validity of the arbitration clause. Any decision in contrast with this conclusion shall violate article 6 of the ECHR.

It should be underlined that acceptance of an arbitration agreement as null-and-void on the ground that holding it valid shall contradict with the "right to legal remedies", is an approach accepted by the Turkish Supreme Court before. In the decision of 15.02.2011, Supreme Court 11th Circuit ruled, regarding an asymmetrical arbitration agreement where only one of the parties was entitled to initiate arbitration, that if outcome of a decision holding an arbitration agreement valid contradicts with *"the general principles of law regarding the right to legal remedies of interested persons",* such arbitration agreement should be held null-and-void.[41]

Furthermore, because of non-existence of arbitral institution referred to in the arbitration clause and undetermination of seat of arbitration, the arbitration clause became incapable of being performed under 6098 Turkish Code of Obligations (2011).[42] As accurately ruled by the Turkish Supreme Court 13th Circuit in the decision of 25.04.1991, arbitration agreement is a kind of contract under Law of Obligations and general provisions of contract law are also binding for arbitration agreements. By this means, the reasons restricting the freedom of contract under 6098 Turkish Code of Obligations (2011) Art.20 and Art.21 shall be directly taken into consideration while examining validity of arbitration agreements and immoral arbitration agreements shall be held null-and-void.[43] According to Art.27 of the 6098 Turkish Code of Obligations (2011), impossibility is also a ground that invalidates contracts. Thus, non-existence of arbitral institution referred to in the arbitration clause and undetermination of seat of arbitration cause the arbitration clause to become incapable of being performed and dissolve the obligation to arbitrate for both parties.

41 Turkish Supreme Court 11th Circuit [Yargıtay 11. Hukuk Dairesi], File nr [Dosya No] 2009/3257, Decision nr [Karar No] 2011/1675, Date [Tarih] 15.02.2011. For the text and critique of the decision see Emre Esen, **'**Taraflardan Sadece Birine Tahkime Müracaat Hakkı Tanıyan Tahkim Anlaşmalarının ve Özellikle Kıyı Emniyeti Genel Müdürlüğü'nün Kurtarma Yardım Sözleşmesi'nde Yer Alan Tahkim Şartının Geçerliliği [Validity of Arbitration Agreements Where Only One Party Holds The Right to Resort to Arbitration and Especially Validity of The Arbitration Clause of The Turkish Open Form]**'** **(**2010) 9(2) İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi (Journal of Istanbul Kultur Universıty Law Faculty) 145–55 *See* also Nuray Ekşi, *Hukuk Muhakemeleri Kanunu'nda Tahkim [Arbitration under the Code of Civil Procedure]* (Beta 2013) 83 ff; Şanlı, (n 1) 329 ff.

42 It should be noted that, applicable law may not be other than Turkish law whereas the parties determined neither the applicable law to the arbitration clause nor seat of arbitration.

43 Turkish Supreme Court 13th Circuit [Yargıtay 13. Hukuk Dairesi], File nr. [Esas No] 1990/8778, Decision nr. [Karar No] 1991/4492, Date [Tarih] 25.04.1991: 8 Yargıtay Kararları Dergisi [Journal of Supreme Court Decisions] 1222-23 (1991)

At the final point, the claimant may neither initiate arbitration since the arbitral institution authorised by the parties is non-existing nor achieve "effective legal protection" before Turkish courts since the Court of First Instance lacked jurisdiction upon the fact that there existed an arbitration clause between the parties and this decision was approved by the Supreme Court and the Constitutional Court found no violation of the right to "access to justice". The claimant may not bring the action before courts of another state as well, since all the facts that might be taken into consideration in order to establish jurisdiction of state courts refer to Turkish courts. Thus, the claimant became deprived of "access to justice".

The Constitutional Court made an examination limited to compliance of conduct of proceedings by the Turkish court with the right to a fair trial. However, rejection of a case on a procedural ground might solely constitute a violation of "access to justice" and accordingly of the right to a fair trial. Thus, as explained above, since the acceptance of arbitration objection –despite the fact that the arbitral institution referred to in the arbitration clause is non-existing– resulted in restriction of "access to justice", it should have been accepted as one of the determinations and conclusions that constitute violation to the rights and liberties under the individual application.

At this stage, the claimant may apply to European Court of Human Rights against Republic of Turkey on the ground that the right to "access to justice" was restricted by the decisions of Turkish courts.

However, the claimant may seek to bring the same action again before a Turkish court which would have jurisdiction according to Turkish rules of law on jurisdiction in case the arbitration clause is null-and-void. Then the decision of lack of jurisdiction, rendered by the Court of First Instance and approved by the Supreme Court, is a final decision according to Art.294 of the 6100 Code of Civil Procedure (2011) but does not constitute *res judicata* since it contains no determination about merits of the case. According to Art.20 of the 6100 Code of Civil Procedure (2011), unless one of the parties does not apply to the court, which rendered the decision of lack of jurisdiction, in order to transfer the file to the court which has jurisdiction, the case shall be accepted as non-filed. This provision is also applicable for the decision of lack of jurisdiction rendered upon arbitration objection. The claimant may file the case by paying case fee again, which is not a continuation of the case accepted as non-filed, but a new case.[44]

In this respect, if the claimant brings the same action again before a Turkish court which would have jurisdiction according to Turkish rules of law on jurisdiction in case the arbitration clause is null-and-void, the decision of lack of jurisdiction, even if it was approved by the Supreme Court, does not constitute *res judicata* and is not

44 *See* Baki Kuru, *Hukuk Muhakemeleri Usulü [Law of Civil Procedure]*(6th edn, Yetkin 2001) 627, 5038, 5978

binding for the new case and court hearing the new case shall be able to determine its jurisdiction independently. Therefore, the decision of lack of jurisdiction rendered in the previous case shall not prevent courts from discussing and determining validity of the arbitration clause while considering arbitration objection that shall probably be raised by the defendant in the new case. Moreover, in the decision of lack of jurisdiction the sole justification of the Court was the existence of the arbitration clause between the parties and the Court neither discussed nor determined whether the arbitration clause was null-and-void. This aspect of the decision constitutes another basis for courts to rule on validity of the arbitration clause and to determine merits of the dispute in case it finds the arbitration clause null-and-void in the new case.

F. Role of the Competence-Competence Principle

In a case subject to an arbitration agreement and brought before a Turkish court, if defendant duly raises an arbitration objection and if claimant alleges in return that such arbitration agreement is null-and-void on the ground that arbitral institution referred to in the arbitration agreement is non-existing or the arbitration agreement includes an uncertain reference to arbitral institutions, scope and nature of examination that shall be made by Turkish courts should be discussed in terms of *Competence-Competence* principle.

According to Art.II(3) of the New York Convention, the court of a contracting state, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the arbitration agreement is null-and-void, inoperative or incapable of being performed.

On the same matter, the 4686 Code of International Arbitration (2001) Art.5 provides that if a case subject to an arbitration agreement is brought before a court, defendant may raise an arbitration objection and that raising of arbitration objection and settlement of disputes with regard to validity of arbitration agreement are subject to the provisions of the 6100 Code of Civil Procedure (2011) about preliminary objections. In case of acceptance of arbitration objection court shall reject the case on procedural grounds.

However, there is a debate over the interrelation between the Competence-Competence principle and the two prosivions mentioned above.

In terms of Art.II(3) of the New York Convention, scope and nature of examination on validity of arbitration agreements has been subject of contradictory decisions of different state courts and is considered as an open-ended issue in the literature. Certain state courts prefer a *prima facie* examination while others prefer a more extensive

examination. It was argued in the literature that examination on validity of arbitration agreements should be limited with non-existence of an arbitration agreement or with very evident cases of invalidity.[45]

The same issue is also controversial under the 4686 Code of International Arbitration (2001) both in literature and in practice. Article 7(H) of the 4686 Code of International Arbitration (2001) grants competence to arbitrators to rule on their own jurisdiction, while Art.5 mentions "*settlement of disputes with regard to validity of arbitration agreement"* under determination of arbitration objection.

According to first approach, in order to prevent waste of vast sum of money or of long period of time in case an arbitration agreement is null-and-void, courts should make an extensive examination under Art.5 of the 4686 Code of International Arbitration (2001) and render a decision that shall be binding in proceedings for the annulment of arbitral award.[46] According to second approach, which attributes more importance to the *Competence-Competence* principle, such examination should be limited with examining *prima facie* whether there exists an arbitration agreement and whether there is a very evident case of invalidity.[47] In order to prevent *mala fide* objections aimed at detainment and disturbance of proceedings, courts should not make an extensive examination under Art.5 and should not render a decision that shall be binding in proceedings for the annulment of arbitral award.

However, it should be noted that the debate mentioned above makes no difference with regard to the arbitration agreements analysed in this paper. Because the pathology of arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions, does not require an extensive examination and may be understood *prima facie*. In this respect, *Competence-Competence* principle does not prevent determination of validity of the arbitration agreements analysed in this paper.[48]

Conclusion

The three approaches adopted for resolution of the problems arising from validity of arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions constitute a three-step mechanism.

45 Albert Jan Van Den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Wolters Kluwer 1981) 154-61 *See* also Circus Productions, Inc. v. Rosgoscirc, 1993 U.S. Dist. LEXIS 9797 (SDNY 1993)

46 *See* Akıncı, (n. 45) 130 ff; Nuray Ekşi, *Milletlerarası Deniz Ticareti Alanında 'Incorporation' Yoluyla Yapılan Tahkim Anlaşmaları [Arbitration Agreements Concluded by Incorporation in International Maritime Commerce]* (Beta 2004) 65

47 *See* Emre Esen, 'Uluslararası Tahkime Tâbi Bir Uyuşmazlığın Devlet Mahkemelerine Götürülmesi Hâlinde Tahkim Anlaşmasının Geçerliliğine İlişkin İtirazların İncelenmesi ve Kompetenz–Kompetenz Prensibi [Determination of Objections regarding Validity of Arbitration Agreements by National Courts in Cases Subject to International Arbitration and the Principle of Competence–Competence],' 2011(1) Galatasaray Üniversitesi Hukuk Fakültesi Dergisi [Journal of Galatasaray University Law Faculty], Atâ Sakmar Armağanı [Festschrift for Atâ Sakmar] 355 ff

48 *See* Circus Productions, Inc. v. Rosgoscirc, 1993 US DistLEXIS 9797 (SDNY 1993).

In the first step, such problems might be resolved by way of interpretation if possible. If not, depending on position of law of arbitral seat, such an arbitration agreement aimed at institutional arbitration might be accepted to be transformed into an arbitration agreement aimed at *ad hoc* arbitration by holding only such pathological reference null-and-void but the rest of the arbitration agreement valid. However, in addition to the pathology about arbitral institution referred to in arbitration agreement, if seat of arbitration is also uncertain, arbitration agreement should be held incapable of being performed and accordingly null-and-void.

Attitude of the Turkish Supreme Court, as derived from the decisions analysed above, seems in conformity with the three approaches to a large extent and may be qualified as satisfactory. Also certain lessons may be derived from such decisions.

For instance, in the first decision, the Supreme Court adopted the interpretation approach, which –even if I disagree– represents a commonly-held understanding and which is parallel with the decisions of Paris Court of Appeals rendered in similar cases.

The second decision is an incorrect but a didactic precedent regarding burden of proof, which should be on the party who alleges that the arbitral institution referred to in arbitration agreement does exist. Furthermore, the arbitration clause in this case contained two references authorising two different arbitral institutions optionally and the first reference is a good example of pathological references which may not be resolved by way of interpretation, whereas the second reference is a good example of pathological references which may be resolved by way of interpretation.

The third decision is a precedent where the problem came up before Turkish courts at the stage of enforcement of arbitral award and reveals that when such pathological arbitration agreements exist, initiating arbitration before ensuring determination of validity of the arbitration agreement and of competent judicial authority may cause loss of time and money and effort as well.

The fourth decision has resulted in a so unfavourable legal consequence that went beyond all the decisions reported all over the world and that indicated another possibility far worse than the one mentioned as the worst in the literature: restriction of the right of *access to justice*. This precedent reveals that state courts must necessarily take the right of *access to justice* into consideration while determining arbitration objections.

Considering the decisions cited in this paper, except for a few decisions, it might be declared that courts determine validity of such arbitration agreements without reference to any law applicable. This is not surprising for Turkish courts while they disregard applicable law issues not only in this subject but also in any case regarding

validity of arbitration agreements. But it is surprising for the courts of other states which determine the applicable law in many issues regarding validity of arbitration agreements. Nevertheless, it is less surprising in terms of the first approach which comprises of interpretation of arbitration agreements and may be carried out according to general principles of law such as *bona fides* principle. However, in terms of second or third approaches, determination of validity of such arbitration agreements by state courts without reference to any law applicable might be accepted that they consider the issue subject to *lex fori* or consider it as an issue which does not require application of any state law. In my opinion, state courts' attitude in second and third approaches connotes that they consider the issue as an issue of interpretation by means of supporting parties' common intent towards arbitration and of protecting legitimate expectations of parties in compliance with *bona fides* principle[49], which is tantamount to tacit application of *lex mercatoria*.

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49 Molfa, *supra* n. 5, at 161, 175-76.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Complex (Multi-Party and Multi-Contract) Arbitrations in Articles 7-10 of ICC Arbitration Rules

ICC Tahkim Kuralları Madde 7-10 Kapsamında Karmaşık (Çok Taraflı ve Birden Fazla Sözleşmeye Dayanan) Tahkimler

Fatih Işık[1]

Abstract
Complex arbitrations are one of the most complicated issues in the arena of international arbitration. ICC Arbitration Rules adopted in 2012 and 2017 contain detail provisions to resolve several procedural and jurisdictional problems arising from multi-party and multi-contract arbitrations, joinder of parties and consolidation of arbitrations. These provisions need to be evaluated together with the effect of arbitration agreement between all related parties and claims. This article aims to explain the structure of the rules, and the requirements set forth under these provisions.

Keywords
International arbitration, complex arbitrations, ICC Arbitration Rules, multiparty arbitration, arbitration with multiple parties, multi-contract arbitration, arbitration with multiple contracts, joinder of additional parties, consolidation of arbitrations, effect of arbitration agreement, *prima facie* assessment

Öz
Birden fazla tarafın yer aldığı veya birden çok sözleşmeye dayanılan tahkimler, uluslararası ticari tahkimin en karmaşık konularındandır. 2012 ve 2017 yılında yürürlüğe giren ICC Tahkim Kuralları, birden fazla tarafın yer aldığı ve/veya birden fazla sözleşmeye dayanılan tahkimler, üçüncü kişinin davaya dahil edilmesi ve davaların birleştirilmesinden kaynaklanan yetkiye veya usule dair pek çok soruna çözüm getiren detaylı hükümler içerir. Ancak bu düzenlemeler, tahkim anlaşmasının tüm taraflar ve talepler açısından hükümleri ile birlikte değerlendirilmelidir. Bu makalenin amacı, ICC Tahkim Kurallarının, karmaşık tahkimlere ilişkin hükümlerinin yapısını ve bu kurallarda aranan şartları açıklamaktır.

Anahtar Kelimeler
Milletlerarası tahkim, karmaşık tahkimler, ICC Tahkim Kuralları, çok taraflı tahkim, birden fazla sözleşmeye dayanan tahkim, üçüncü kişinin davaya dahil edilmesi, davaların birleştirilmesi, tahkim anlaşmasının hükümleri, *prima facie* değerlendirme

1 **Corresponding Author:** Fatih Işık (Attorney at law and Founding Partner), Işık & Partners Law Firm, İstanbul, Turkey.
E-mail: fatihisik@isik-partners.com ORCID: 0000-0003-1473-6126

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Complex (Multi-Party and Multi-Contract) Arbitrations in Articles 7-10 of ICC Arbitration Rules

I. Introduction

Complex arbitrations are one of the most complicated issues in the arena of international arbitration. The need to resolve complex disputes that arise out of commercial transactions with multiple contracts and multiple parties, on the one hand, and the consensual nature of arbitration agreements, on the other hand, raise several procedural and jurisdictional problems.

In 2012, the International Chamber of Commerce ("ICC") updated its arbitration rules ("ICC Rules") to regulate complex arbitrations. The rules adopted in 2017 preserved the perspective that had been adopted in 2012[1].

Prior to entry into force of the 2012 ICC Rules, the ICC International Court of Arbitration ("Court") already had extensive and established practices on these issues. However, these issues were dealt with using the broad interpretation of arbitration agreements, particularly with extensions of arbitration agreements to non-signatories, using the Court's discretion on *prima facie* assessments as to jurisdiction. The 2012 ICC Rules, which codified the existing practices of the Court under the 1998 ICC Rules[2], brought predictability to the arbitration community and also provided the Court, the arbitral tribunals, and the parties with a procedural framework.

The main reason for these complex arbitration provisions is the rise in the number of cases extending beyond the classic model of arbitration with two parties. This is a natural consequence of rapidly increasing complex transactions in which multiple parties are involved and the parties to transactions concluding more than one contract[3]. In such relations, the outcome of these types of arbitrations may affect third parties. Also, there may be direct claims, counterclaims, and cross claims as well as recourse claims between parties.

According to the 2019 dispute resolution statistics of the ICC[4], approximately a third of the cases involved multiple parties (31%), of which the majority (59%) involved several respondents, 24% several claimants, and 17% several claimants and respondents. Although most multiparty cases involved three to five parties (87% of

1 The ICC announced in October 2020 that it revised its arbitration rules. The 2021 ICC Rules are subject to editorial corrections until their official launch in December 2020 and will apply to cases submitted from 1 January 2021 onwards. This article is drafted according to 2017 ICC Rules and relevant revisions in the 2021 ICC Rules are mentioned in the footnote.

2 Jason Fry, Simon Greenberg and Francesca Mazza, The Secretariat's Guide to ICC Arbitration (ICC 2012) para. 3-287. For the Court's practice under the ICC 1998 Rules, please see Simon Greenberg, José Ricardo Feris and Christian Albanesi, "*Consolidation, Joinder, Cross-Claims, Multiparty and Multicontract Arbitrations: Recent ICC Experience*", in Bernard Hanotiau and Eric A. Schwartz (eds), Multiparty Arbitration (ICC 2010).

3 Thomas H. Webster and Michael W. Bühler, Handbook of ICC Arbitration, (4th edn, Sweet & Maxwell 2018) (n 7-3) 157.

4 https://iccwbo.org/publication/icc-dispute-resolution-statistics/ (Access: 25.08.2020).

multiparty cases), cases involving six to ten parties represented a significant 11% of multiparty cases. Three cases involved 10 to 30 parties while in two cases the number of parties exceeded 100.

II. The Structure of the ICC Rules Related to Complex Arbitrations

The ICC Rules cover complex arbitrations that fall into the provisions as (i) Article 7 as to the joinder of additional parties; (ii) Article 8 as to the claims between multiple parties; (iii) Article 9 as to arbitrations that are based on multiple contracts; and (iv) Article 10 concerning the consolidation of arbitrations.

Articles 7 and 8 may be referred to as the basis for multi-party arbitrations whereas Article 9 may be classified as the basis of multi-contract arbitrations. Article 10 may apply to all pending arbitrations.

The provisions of the ICC Rules on complex arbitrations make clear reference to Article 6 of the ICC Rules that regulate the effect of arbitration agreements. Although the ICC Rules regulate provisions on "multi-party arbitrations" and "arbitration with multiple contracts," the alternative dispute resolution nature of arbitrations, based on the consent of the parties, should not be forgotten[5]. Particularly, Article 6(4)(i) relates to multi-party arbitrations whereas Article 6(4)(ii) sets forth the requirements for multi-contract arbitrations if there are multiple arbitration agreements. For this reason, when the rules of complex arbitrations on multi-contract and multi-party arbitrations are examined, Article 6 and its subparagraphs 3 to 7 (more precisely Article 6(4) and its subparagraphs (i) and (ii)) should always be taken into consideration, as well.

Under the provisions of complex arbitrations, Article 10, which regulates the consolidation of arbitrations, stands alone by not making any reference to Article 6(3)-6(7). This is conceivable as Article 10 covers the period after the *prima facie* assessment as to jurisdiction is made by the Court, and the subject matter concerning consolidations concerns arbitrations that are pending.

In addition to Articles 7-10 and 6(3)-(7) of the ICC Rules, Article 4(3) on Request for Arbitration, Article 5(5) on Answer to the Request for Arbitration, Article 12 on Appointment of Arbitrators, and Article 36 on Advance on Costs are also influenced by the provisions on complex arbitrations. However, in this article, only Articles 7-10 and 6(3)-(7) of the ICC Rules will be examined.

III. Articles 6(3)-(7) of the ICC Rules

The consensual nature of arbitration as a dispute resolution mechanism is emphasized again via the references to Article 6(3)-6(7) in Articles 7-10. These

5 Webster / Bühler (n 7-7) 159.

references reiterate two basic principles of arbitration in addition to its consensual nature: *prima facie* assessment of the Court and competence-competence (Article 6(3) and 6(5) set forth that the jurisdictional issues are decided by the Court on a *prima facie* basis and will finally be resolved by the arbitral tribunal)[6].

The provisions of Article 6(3)-(7) follow a specific order. Article 6(3) and Article 6(5) regulate the authorities in assessing matters of jurisdiction. This article grants a gatekeeping role to the Secretary General[7]. Unless the Secretary General refers the matter to the Court, jurisdictional issues do not prevent arbitrations from proceeding, and the arbitral tribunal decides, in its sole discretion, either in the final award or in a separate preliminary award, its findings as to jurisdiction. The Secretary General shall not refer the matter to the Court unless he/she is uncertain as to the *prima facie* jurisdiction of the arbitral tribunal[8]. With this authority, the Secretary General's rendering of a positive decision is the first step as to *prima facie* jurisdiction of the arbitral tribunal. However, the Secretary General is not authorized to render a negative decision with respect to jurisdiction.

Article 6(4) regulates the authority of the Court to decide as to jurisdiction and to what extent the arbitration shall proceed in cases the matter is referred to the Court[9]. If the Court renders a negative decision, the arbitration shall not proceed, and Articles 6(6)-(7) of the ICC Rules will be applicable; otherwise, the arbitration shall proceed. In such case, the Court's decision is only administrative and temporary, and any arguable questions as to jurisdiction are to be dealt with by the arbitral tribunal (Article 6(5)). What is remarkable in Article 6(4) is that unlike the 1998 ICC Rules, the Court may decide to allow arbitrations only for some parties and for some claims rather than declaring a negative jurisdictional decision for all of the parties and claims.

Article 6(4)(i) relates to multi-party arbitrations whereas Article 6(4)(ii) sets forth the requirements for multi-contract arbitrations if there are multiple arbitration agreements. It should be underlined that "multiple contracts" and "multiple arbitration agreements" are separate issues and have different legal effects. Article 6(4)(ii) applies only in cases where there are multiple arbitration agreements. If there are multiple contracts but only one arbitration agreement, only Article 9 applies, and the requirements set forth under Article 6(4)(ii) will not be sought.

As a reflection of the competence-competence principle, Article 6(5) states that the arbitral tribunal is the final authority to decide on jurisdictional issues except in cases where the Court has granted a negative decision that prevents the arbitration

6 2012 Secretariat's Guide, para. 3-196.

7 Webster / Bühler (n 6-22) 112.

8 2012 Secretariat's Guide, para. 3-200.

9 *ibid*, para. 3-210.

from proceeding. As mentioned above, upon the Court's negative decision as to jurisdiction, the arbitration shall not proceed, the proceedings shall be concluded, and the file shall not be transmitted to the arbitral tribunal.

Article 6(6) and Article 6(7) regulate the stages following the Court's negative decision on jurisdiction. Article 6(6) relates to the *parties* that are excluded from the arbitration by the Court's negative decision as to jurisdiction whereas Article 6(7) relates to *claims* excluded by the Court. Pursuant to Article 6(6), where the Court has decided that the arbitration cannot proceed in respect of some or all of them, any party retains the right to ask any court having jurisdiction whether or not and in respect of which of them there is a binding arbitration agreement. Article 6(7) sets forth that where the Court has decided that the arbitration cannot proceed in respect of any of the claims, such a decision shall not prevent a party from reintroducing the same claim at a later date in other proceedings.

IV. Joinder of Additional Parties – ICC Rules Article 7

Article 7 of the ICC Rules regulates the joinder of additional parties to arbitration. While evaluating the joinder of additional parties as per Article 7, three points should be kept in mind. Firstly, the ICC Rules, unlike some other institutional rules, regulate only the joinder and not the intervention[10]. In other words, a third party cannot intervene in an existing arbitration under the ICC Rules on its own discretion[11]. One of the parties to the arbitration must join that additional party to the arbitration. Secondly, the party who seeks to join an additional party must address a claim against the additional party[12]. A party cannot seek to join an additional party without addressing any claim against it, merely to defend or support its position against the counterparty's position. Thirdly, for a joinder to be effective, there must be an existing arbitration. Filing a new arbitration using Article 7 as its basis is not allowed. In light of this information, the provisions of Article 7 are examined, below.

There are four subparagraphs in Article 7. The first subparagraph covers the request for joinder ("RfJ"). It sets out how an additional party may be joined to an existing arbitration. The second subparagraph details the content of the RfJ. The third and fourth subparagraphs deal with the references to the request for arbitration, answer to the request for arbitration, and set out the *mutatis mutandis* application of relevant articles as they have common points with the RfJ and answer thereto.

10 Webster / Bühler (n 7-19) 161.

11 2012 Secretariat's Guide, para. 3-292.

12 *ibid*, para. 3-302.

Firstly, an additional party[13] may be joined by any of the parties (claimant, respondent, or an additional party)[14]. Although it is conceivable that the claimant might address the request for arbitration to all relevant parties from the outset of arbitration and there may be no need to allow the claimant to join an additional party, it is possible that, during the course of the proceedings, the circumstances might give rise to the need for the claimant, as well[15].

The party wishing to join an additional party shall submit its request for arbitration to the Secretariat against the party which it wished to join, and this request is defined as a request for joinder. The legal effects of a RfJ are equivalent to those of a request for arbitration. The date on which the RfJ is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party[16]. Thus, once the RfJ is submitted to the Secretariat, the additional party, immediately and automatically, becomes a party to the arbitration[17]. This rule is different than the ICC 1998 Rules, under which the Court must, firstly, decide whether to join an additional party to the arbitration.

The additional party may be any third party who is not already a party to the arbitration. Although that third party becomes an additional party to the arbitration, immediately and automatically upon submission of the RfJ, this does not mean that it will remain as such[18]. As per the reference to Article 6(3)-6(7) and 9 of the ICC Rules, the additional party must be a third party whom might also be bound by the arbitration agreement. It must be one of the signatories of the arbitration agreement, or the agreement could be extended to it. Otherwise, the additional party may be excluded from the arbitration as a result of the *prima facie* assessment by the Court or by the arbitral tribunal in one of its decisions[19].

Once the RfJ is notified to the additional party, it has the same rights and obligations as any other party. It may submit an answer, raise jurisdictional objections, file claims, and request joinders of additional parties. However, the ICC Rules do not have a provision on an additional party's right to submit counterclaims. The ICC Rules clearly stated that the additional party may make claims as per Article 8, which regulate claims between multiple parties.

Another important point with regard to the joinder of an additional party is its timing. As per Article 7(1), no additional party may be joined after the confirmation

13 The term "additional party" was preferred over the more commonly used term "third party" (Webster / Bühler (n 7-15) 162).

14 2012 Secretariat's Guide, para. 3-200.

15 Webster / Bühler (n 7-9) 160.

16 2012 Secretariat's Guide, para. 3-310.

17 Webster / Bühler (n 7-16) 162.

18 2012 Secretariat's Guide, para. 3-319.

19 Webster / Bühler (n 7-20/24) 163-64.

or appointment of any arbitrator unless all parties, including the additional party, otherwise so agree[20]. This provision is a clear reflection of the ICC Rules' approach to the importance of the parties' participation in the constitution of the arbitral tribunal, which has become a very important topic, particularly following the *Dutco* case[21].

The last phrase of Article 7(1) sets out that the Secretariat may establish a time limit for the submission of a RfJ. It is arguable that the Secretariat may not know if any party is planning to submit a RfJ. This argument would be acceptable. However, the ICC Rules relate to cases where the Secretariat could understand or one of the parties notifies that it is planning to submit a RfJ. With this phrase, the ICC Rules aim to prevent delays that can be caused by one of the parties in submitting a RfJ[22].

V. Claims between Multiple Parties – ICC Rules Article 8

First of all, Article 8 applies if there is a multi-party arbitration. This means that either as respondent or as claimant, or as an additional party, there must be more than two parties involved in the arbitration[23]. If there is only one claimant and only one respondent, Article 8 shall not apply.

There are three subparagraphs in Article 8 of the ICC Rules. The first paragraph sets forth general rules regarding claims between multiple parties. The second paragraph defines the content of the claims, and the third paragraph is related to the procedure for making the claim and answering it.

As seen in the title of Article 8, as well as in Article 8(1), this Article regulates the *claims* between multiple parties. As per Article 2 of the ICC Rules, "claim" or "claims" include any claim by any party against any other party. Considering the use of "may" in the Article, it is understood that raising claims is not an obligation for the parties but rather an authority to do so. It should also be stated that Article 8 does

20 The 2021 ICC Rules adopts more flexible approach as to the timing. Article 7(5), which is added to Article 7 in the 2021 revisions, allows Parties to submit requests seeking the joinder of additional parties once any arbitrator is appointed or confirmed. Such requests are decided by the arbitral tribunal, subject to the joining party accepting the constitution of the arbitral tribunal and the terms of reference. In deciding, the arbitral tribunal will take all relevant circumstances into consideration and in particular (i) whether it has prima facie jurisdiction or not; (ii) the timing of the Request for Joinder; (iii) possible conflicts of interest and (iv) the impact of joinder on the arbitral procedure. The decision to join an additional party will not mean that the arbitral tribunal acknowledges jurisdiction with respect to that party.

21 French Supreme Court's (Cour de Cassation) decision rendered on 7 January 1992 is one of the cornerstone decisions of multiparty arbitration and is known as the Dutco case. In brief, the case was as follows: three companies (Dutco, BKMI and Siemens) entered into a consortium agreement for the construction of a factory on behalf of their common employer in the Middle East. The consortium agreement contained an ICC arbitration clause expressly providing for the settlement of disputes by an arbitral tribunal composed of three arbitrators. The Dutco company as claimant filed a request for arbitration against BKMI and Siemens, and nominated its arbitrator. The two defendants had been requested to agree on a joint arbitrator. They did so under protest and challenged subsequently the proper composition of the tribunal. The Paris Court of Appeal saw no problems with the appointment procedure which had been standard practice at the time and rejected the challenge. The Cour de Cassation by contrast considered the appointment process to be contrary to public policy stating that the "equality of the parties in the appointment of arbitrators is a matter of public policy which can be waived only after the dispute has arisen" and annulled the award.

22 Webster / Bühler (n 7-28) 165.

23 2012 Secretariat's Guide, para. 3-322; *ibid*, (n 8-1) 169.

not seek to make counterclaims between the parties. Any party may make any claim against any party irrespective of whether that party has made a claim against it. One or more claimants, defendants, and additional parties may make claims against each other. However, the party against which a claim is addressed must already be a party to the arbitration; otherwise, the claiming party must refer to Article 7 of the ICC rules and join the additional party to the arbitration by filing its claim against that party.

Although the Article entitles the parties to make claims against each other, there is a time limit in which to do so[24]. According to Article 8(1), no new claims may be made after the terms of reference are signed by the parties and the arbitral tribunal or approved by the Court[25]. As is pointed out, the time to make claims is not limited to the constitution of the arbitral tribunal (unlike Article 7 on the joinder of parties) but to the finalization of the terms of reference. If any party files a claim after the terms of reference is finalized, such claim will be subject to authorization by the arbitral tribunal, and the latter shall rule taking into consideration Article 23(4) of the ICC Rules.

When making a claim between multiple parties, Article 8(3), which clarifies how the claims will be made according to the different stages of the proceedings, should also be taken into consideration. According to this sub-paragraph, if the claims are made prior to the Secretariat transmitting the file to the arbitral tribunal, the provisions related to request for arbitration and answer to the request for arbitration shall apply *mutatis mutandis*. If the claims are to be made after the Secretariat transmits the file to the arbitral tribunal, then the latter shall determine the procedure[26]. There is no restriction or guideline as to how the arbitral tribunal shall make such determination.

Article 8(1) makes reference to the provisions of Articles 6(3)-6(7) and Article 9. As per these references, it should be kept in mind that all parties against which a claim will be made must be a party with respect to which the Court is *prima facie* satisfied that an arbitration agreement under the Rules binds it. Thus, if a claim is made by one of the parties against any of the parties, the Court shall decide whether such claim may be made against that party as per the relevant arbitration agreement. If the claims are based on a different arbitration agreement, then Article 9 shall apply.

VI. Multiple Contracts – ICC Rules Article 9

Article 9 of the ICC Rules regulates arbitrations with multiple contracts. This Article makes clear that claims under different contracts and different arbitration agreements may be brought in the same arbitration. It should not be thought that the claims in a multi-contract arbitration must be made by the same party. For instance,

24 Webster / Bühler (n 8-8) 171.

25 2012 Secretariat's Guide, para. 3-334.

26 Webster / Bühler (n 8-9) 171.

the respondent may make a claim under a different contract or different arbitration agreement. What is important here is that the parties must specify which claim is made under which arbitration agreement (ICC Rules Article 4(3)(e-f)).

At this point, it should be repeated that this provision of Article 9 starts with the references to Articles 6(3)-6(7) and Article 23(4)[27]. These references mean that the claims must be made until the terms of reference are established and the jurisdiction is upheld by the Court as a consequence of its *prima facie* assessment. The second important result of these references is the application of Article 6(4)(ii), which will be elaborated upon, below.

Article 9 clearly specifies that, for a multi-contract arbitration, the claims do not need to be made under the same arbitration agreement. The claims may be made either under one, or more than one, arbitration agreement.

It is also important to note that "multiple contracts" and "multiple arbitration agreements" are separate issues and have different legal effects. More specifically, Article 6(4)(ii) applies only in multi-contract cases where there are multiple arbitration agreements. If there are multiple contracts but only one arbitration agreement, only Article 9 will apply, and the requirements set forth under Article 6(4)(ii) will not be sought; this sub-paragraph does not apply to multiple contracts with only one arbitration agreement.

Accordingly, if the claims are made under more than one contract but with one arbitration agreement, only Article 9 shall apply, and the *prima facie* assessment will be made according to Article 6(3) together with the first sentence of Article 6(4); no examination as to Article 6(4)(ii) will be made. However, if more than one arbitration agreement is at stake, then Article 6(4)(ii) shall also apply.

Article 6(4)(ii) stipulates two conditions for making claims under more than one arbitration agreement. Firstly, the arbitration agreements must be compatible, and secondly, it must be established by the Court that all parties to the arbitrations may have agreed that those claims can be decided together under a single arbitration. For making such evaluation, no guidance is provided. There is no definition or explanation under the ICC Rules provided for "more than one arbitration agreement," "compatibility," and the constructive consent of the parties who "may have agreed" to a single arbitration.

The Court has discretion to decide on these matters. It is generally accepted that the compatibility test, which is also made for consolidation of arbitrations as per Article 10 of the ICC Rules, refers mostly to procedural aspects of the arbitration agreements, such as the place of arbitration, the number of arbitrators, and the language, etc. The

27 2012 Secretariat's Guide, para. 3-343.

law applicable to the merits is not seen as an incompatible matter as the arbitral tribunals may decide on the claims according to different substantive laws[28].

Although the arbitration agreements do not need to be identical for being compatible[29], it is important that the arbitration agreements do not contradict. On the other hand, it is not clear how to decide, if the arbitration agreements do not contradict but one of them is silent on some matters, which matters are regulated under the other one. Having said that, it should not be forgotten that the parties are always free to rectify any incompatibilities of arbitration agreements, if any.

Another challenging requirement in Article 6(4)(ii) is to determine whether all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration. The Article requires establishing that the parties *may have agreed* and not *have agreed*. This is constructive consent. The determination is at the discretion of the Court, and it may take into consideration all elements that might lead to such conclusion[30]. For instance, it is asserted that identical arbitration agreements would be a sign for constructive consent and different arbitration agreements may lead to the opposite. The Court may take into consideration the identity of the parties to different arbitration agreements and their relation, dates of the contracts containing the arbitration agreements, and similarities in the wording of the arbitration agreements. The Court may also take into consideration whether the contracts containing the arbitration agreements relate to the same legal relationship and/or the same economic transaction (as provided for consolidation of arbitrations as per Article 10 of the ICC Rules), whether the relationship between the contracts are horizontal or vertical, etc.

As is seen above, Article 9 appears to be a simple Article with one phrase only, but with the references to Article 6(4)(ii), the evaluation may become more complicated.

In light of the foregoing, it might be helpful to summarize the application of Article 6(4) of the ICC Rules in the case of multi-contract and multi-party arbitrations: (i) if there are two parties and the claims are based on one arbitration agreement only, the first sentence of Article 6(4) applies; (ii) if there are more than two parties and the claims are based on only one arbitration agreement, the requirements of Article 6(4)(i) also apply; (iii) if there are two parties and the claims are based on two or more arbitration agreements, the requirements of Article 6(4)(ii) also apply; (iv) if there are more than two parties and the claims are based on two or more arbitration agreements, the specific requirements under both Article 6(4)(i) and Article 6(4)(ii) apply. As a final note: The Court does not apply the requirements separately; rather, it makes a holistic assessment of the case.

28 Webster / Bühler (n 6-43) 117.

29 2012 Secretariat's Guide, para. 3-243.

30 *ibid*, para. 3-249.

VII. Consolidation of Arbitrations – ICC Rules Article 10

Article 10 of the ICC Rules regulates consolidation of arbitrations. Consolidation, as referred to under the Rules, is a procedural mechanism to merge two or more pending ICC arbitrations. If the arbitrations are consolidated, one single arbitral tribunal decides on all issues. The main purposes of consolidation are, amongst others, providing procedural efficiency, lowering the costs, elimination of risks that may arise from inconsistency between decisions granted in separate proceedings, and enabling arbitral tribunals to have a better understanding and fuller view of the transaction at issue.

The competent authority to consolidate arbitrations is the Court. The decision on consolidation is administrative, not legal. It is not *prima facie*, unlike the Court's decisions as to jurisdiction. Accordingly, the Court's decision on consolidation is final, and arbitral tribunals cannot decide again as to consolidation thereafter[31].

The Court cannot make such a decision on its own initiative[32]; the will of the parties still count[33]. The Court shall decide on consolidation only if one of the parties has submitted a request. However, the Court is entitled to decide on consolidation at its own discretion. With the usage of the word *'may,'* the ICC Rules clarify that the Court is not obliged to consolidate the arbitrations or not even if the conditions have been met[34]. In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different individuals have been confirmed or appointed.

The conditions for consolidation are set out in Article 10 of the ICC Rules. This article does not specify the form and content of the request for consolidation; thus, the request may be made even with a simple letter addressed to the Court. Moreover, this article does not establish a time limit. The Court will consider the phases of the arbitration and will decide on the matter without any time limitation.

As is pointed out in this article, among the provisions on complex arbitrations, Article 10 stands alone by not making any reference to Article 6(3)-6(7). This is conceivable as Article 10 covers the period after the *prima facie* assessment as to jurisdiction is made by the Court, and the subject matter concerning consolidations concerns arbitrations that are already pending.

31 Webster / Bühler (n 10-2) 177.

32 2012 Secretariat's Guide, para. 3-351.

33 Stephen R. Bond, *"Dépeçage or Consolidation of the Disputes Resulting from Connected Agreements: the Role of the Arbitrator"*, in Bernard Hanotiau and Eric A. Schwartz (eds), Multiparty Arbitration (ICC 2010)

34 2012 Secretariat's Guide, para. 3-358.

The first condition for consolidation is the presence of two or more arbitrations. These arbitrations must be conducted according to the ICC Rules. The Court cannot consolidate the arbitrations governed by any rules other than the ICC Rules. Once the arbitrations are consolidated, the dispute shall continue to be discussed in one arbitration proceeding only (in the first one that had been initiated unless the parties agree otherwise)[35]. Three conditions must be met for consolidation. These three conditions are to be evaluated separately, and a holistic assessment is not required. If one of these conditions is met, the Court may proceed with consolidation.

The first condition set out in Article 10 is the parties' consensus as to consolidation. If the parties agree to consolidate, the Court does not need to evaluate any other conditions. However, as stated above, consolidation is at the Court's discretion, and it is not obliged to consolidate the arbitrations despite the parties' agreement to that end.

As a second condition, the Court may consolidate the arbitrations if all of the claims in the arbitrations to be consolidated are based on the same arbitration agreement[36]. As is clear, the provision mentions the existence of the "same arbitration agreement" and not the "same contract." It should be underlined that "same arbitration agreement" and/or "more than one arbitration agreement" are separate issues than the "same contract" and/or "multiple contracts." They all have different legal consequences. For instance, disputes might arise from several contracts but be subject to one arbitration agreement between the parties.

The third condition contains three sub-conditions: If the claims are made under more than one arbitration agreement, *(i)* the arbitrations must be between the same parties, *(ii)* the disputes in the arbitrations have arisen in connection with the same legal relationship, and *(iii)* the Court finds the arbitration agreements to be compatible. Under this third condition, the Court shall make a holistic assessment; meeting just one of the criteria would not suffice to consolidate the arbitrations.

As stated, above, the Court has broad discretion as to consolidation. In parallel, the conditions set out above, under the third condition, state the words *'same legal relationship'* and *'compatibility*,*'* which entitle the Court with broad interpretation[37]. The same legal relationship is interpreted by the Court as the same economic transaction and, as well, may be the same project. For the sake of compatibility, the Court has no restrictions in taking even just procedural issues into consideration when deciding whether or not the arbitrations are compatible. As to the *'same parties'* requirement, it can be said that the Court strictly evaluates whether the parties are the same or not.

35 *ibid*, para. 3-362.

36 According to 2021 ICC Rules, the arbitrations may be consolidated if all of the claims in the arbitrations to be consolidated are based on the same arbitration agreement or agreements.

37 2012 Secretariat's Guide, para. 3-357.

VIII. Conclusion

As has been set forth in this article, complex arbitrations are one of the most complicated issues in the arena of international arbitration. The need to resolve complex disputes that arise out of commercial transactions with multiple contracts and multiple parties, on the one hand, and the consensual nature of arbitration agreements, on the other hand, raises several procedural and jurisdictional problems. However, the ICC Rules contain specific regulations as to these matters that have been adopted as a consequence of long-lasting experiences.

In any event, particularly if the parties will be involved in complex transactions, it might be vital for their success in arbitration to consider the provisions on complex arbitrations not only at the dispute stage but also at the negotiation stages of the contracts and the arbitration agreements.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Privacy Screening of Online Game Platforms: A Case Study of "Gamecell"

Çevrim içi Oyun Platformlarının Gizlilik Taraması: "Gamecell" Analizi

Leyla Keser Berber[1], **Ayça Atabey**[2]

Abstract

Online games and the usage of the Internet are now ubiquitous in the lives of children. From widespread engagement with the Internet through ever changing technologies, children and parents are now faced with a plethora of risks for which they need protection. Despite strong legal instruments in most countries on data protection and privacy, there is still a need to see child privacy on the ground. To that extent, this paper looks into Gamecell - a popular online game platform - by addressing "accountability" of the platforms based on their data protection and privacy obligations under the relevant laws and draw attention to the company's current practices, aiming to show the gaps existing between theory and practice. By urging all the stakeholders of the online gaming ecosystem to take the necessary steps for accountability reasons, and to truly understand the rules set out in the applicable legal framework, we argue that users' rights and freedoms are non-negotiable. Finally, we emphasize that stakeholders of the online gaming ecosystem should acquire a true understanding of the importance of "fairness" and online gaming companies should remember that it should be central to all your processing of children's personal data.

Keywords

Online gaming, privacy, children's rights, data protection, accountability

Öz

Çevrim içi oyunlar çocukların hayatında önemli bir yere sahiptir. Çocuklar, yaygın internet kullanımı ve sürekli değişen teknolojilerin yarattığı riskler nedeniyle korunmaya ihtiyaç duymaktadır. Birçok ülkede mahremetiyet ve veri koruması ile ilgili güçlü yasalar olmasına rağmen, çocuk mahremiyeti konusunda yeterli hasassiyet gösterilmemektedir. Bu makale, bilinen bir çevrim içi oyun platformu olan Gamecell'in uygulamalarını ilgili yasalar ile düzenlenen "hesap verilebilirlik" ilkesi kapsamında incelemekte ve uygulamadaki aksaklıklara dikkat çekmektedir. Bu makale, aynı zamanda, çevrim içi oyun ekosisteminin tüm paydaşlarının hesap verebilirlik ilkesini özümsemeye teşvik etmeyi ve kullanıcılara karşı yükümlülüklerini hatırlatmayı amaçlamaktadır. Son olarak, çevrim içi oyun ekosisteminde yer alan tüm paydaşların veri işleme faaliyetleri kapsamında dürüstlük ilkesini içselleştirmeleri gerektiği savunulmaktadır.

Anahtar Kelimeler

Çevrim içi oyunlar, mahremiyet, çocuk hakları, kişisel verilerin korunması, hesap verilebilirlik

1 **Corresponding Author:** Leyla Keser Berber (Prof.), Istanbul Bilgi University, Faculty of Law, Information Technology Law Institute, Istanbul, Turkey. E-mail: leyla.keser@bilgi.edu.tr ORCID: 0000-0002-2438-768X

2 Ayça Atabey (Researcher/ PhD student), Istanbul Bilgi University, Faculty of Law, Information Technology Law Institute, Istanbul, Turkey/ Edinburgh University, Law School, Edinburgh, UK. E-mail: ayca.atabey@ed.ac.uk ORCID: 0000-0003-3165-6750

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Privacy Screening of Online Game Platforms: A Case Study of "Gamecell"

Introduction

Online games and the usage of the Internet are now ubiquitous and deeply ingrained in the lives of children. It is therefore imperative that stakeholders of the online gaming ecosystem to acquire a detailed understanding of the importance of children's online privacy and the challenges that are relevant in today's digital age in order to take necessary measures to protect children and respect their rights to privacy and data protection - two fundamental and in most countries such as Turkey, even recognized as a constitutional right under national law. Being one of the more vulnerable groups of society, children deserve more protection concerning their personal data. Luckily, there is an increasing awareness about personal data protection of children around the world. For instance, Apple and Google already conduct *privacy screening* for all apps, including games wanting to be on the Appstore and/or Google Play. Website versions of popular games pop up with cookie management tools and updated privacy policies in line with General Data Protection Regulation ("GDPR") and/or other national data protection laws and regulations. Despite strong legal instruments in most countries on data protection and privacy and also positive measures taken in the sector, there is still a need to see child privacy on the ground. To that extent, we chose Gamecell - a popular online game platform, which bring game developers together with children as "users". In this article, we will address the *"accountability"* of the platforms based on their data protection and privacy obligations under the relevant laws and draw attention to these companies' current practices, aiming to show the gaps existing between theory and practice. *"Accountability"* means for the data controller to be responsible for and be able to demonstrate compliance with the core principles relating to the processing of personal data Article 5(2) under the GDPR. Accordingly, in order to assess Gamecell's compliance with the accountability principle, we will first analyse the game platform by referring to the core principles set out under Article 5(1) of the GDPR with a focus on *"lawfulness, fairness and transparency"* principle, which is strongly linked with the notion of *"consent"*. However, as all the principles are interlinked in some way, there will be references to other principles and rules set out under the current data protection regime where necessary. This article underscores the fact that the core principles do complement each other and have a great role in exercising other rules laid out under the GDPR and the Turkish Data Protection Law ("KVKK") as well. In order to assess companies' compliance with the respective laws, this article looks into User Agreement, Terms of Service, Data Privacy Notice (Services), and Cookie and Privacy Policies of the two respective companies. Accordingly, our analysis findings and outcomes show us that there are still crucial problems in practice regarding compliance with personal data processing principles of related data protection laws and regulations, namely, the GDPR and

the KVKK. This article starts by setting the stage before it moves to the privacy screening of Gamecell. In Section II, company's relevant agreements and policies will be assessed to point out the gaps between the expectations arising from the rules set out under data protection regime and the implementation of these rules in practice. Through identifying the existing gaps, we will see whether Gamecell undermine children's rights pursuant to the rules under the GDPR and the KVKK. Lastly, in Section III, we refer to some recent developments and give practical examples from around the world in order to shed light on the steps which online gaming platforms could adopt for protecting children's rights and in the same time comply with the requirements prescribed by law. This article concludes that despite the recent developments in the internet governance ecosystem, online gaming companies are yet to take solid steps and make tangible changes in their terms and policies in order to achieve the purposes of the data protection regimes. In addition, we urge Gamecell as well as other companies to embrace the notion of *'fairness'* and make it their prerequisite for every single step or any decision they may take, particularly if, such actions somehow involve or have a possibility to involve children.

I. Setting the Stage for Privacy Screening: Personal Data Protection and Children

This Section underscores the fact that children merit additional protection and draws attention to their vulnerable place in the society. It then briefly explains the legal framework relevant in this context in order to set the scene and provide an understanding of what the law requires before moving on to the privacy screening of Gamecell. Also, opinions of relevant authorities will be referred to before we delve into the companies' terms and policies.

Importance of Personal Data Protection for Children

It is a widely accepted fact that children should be treated differently than adults in many contexts. For instance, even in the countries where there is no comprehensive law on data protection, there are still rules and laws which protect children in terms of privacy under other laws.[1] This, in itself, shows how universal children's vulnerability and special position are recognised in different societies around the globe even in certain situations, comprehensive data protection laws do not exist. It is no brainer that children need additional protection when a company processes their personal data. This is because, as they form a vulnerable group of the society, they are less likely to be as aware of the risks involved as an adult would with relation to the processing carried out on their personal data. Accordingly, Recital 75 of the GDPR underscores

1 'The Keys to Data Protection A Guide for Policy Engagement on Data Protection' (2018) <https://privacyinternational.org/sites/default/files/2018-09/Data Protection COMPLETE.pdf> accessed 24 February 2020.

that children are *vulnerable natural persons* and that processing activities involving children's data may result in risk of varying likelihood and severity. Accordingly, when online game platforms process children's personal data, the expectations are higher; these expectations require companies to think about the need to protect children from the outset, and design company's systems and processes with this in mind.[2] It is vital to understand how strong online games' impact can be on children to the extent that their health, lives, social relationships, academic success as well as mental disabilities' severity can be dramatically affected.[3] When the processing carried out somehow relates to children, as arguably the most vulnerable group of the society, many rules and principles including the legitimate interests under the GDPR, they become more complex than ever, even when compared to other challenging situations such as processing special categories of data or when the public sector is involved. Similarly, children's data are usually considered to constitute a special category of data as such data require additional care.[4] Speaking of vulnerability, it is noteworthy to state that although all children are vulnerable, some can be more vulnerable than others. Children coming from disadvantaged backgrounds, children with mental health issues, learning disabilities, psychological problems, children who are in a difficult position in their lives and possibly being neglected by their parents can be easily affected by the online gaming industry as much as advertising industry triggering internet addiction or other relevant risks in the internet ecosystem. Although it is not directly relevant in the context of this article, in order to show how much online video games can affect children, and how their design can be crucial, it is important to mention that videogames can even be used by people with malicious intentions who design online video games in order to convince and recruit children for unlawful purposes.[5] The fact that the offenders choose online videogames as a tool is significant since it both shows the vulnerability of children and the impact online games may have on children. Recognising the universality of the risks attached to online games under the umbrella of general terms such as "online threats" or "privacy threats" would help all the stakeholders in the ecosystem to address different types of threats and differentiate harms that stem more from data exploitation, consumer identity and online presence of children in cases such as internet addiction problems and risks attached to exploitation of children's data to be use for online behavioural advertising. As children can be particularly susceptible in the online environment and more easily affected by behavioural advertising[6], online

2 Information Commissioners Office, 'How Does the Right to Be Informed Apply to Children?' (2018) <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/children-and-the-gdpr/how-does-the-right-to-be-informed-apply-to-children/> accessed 18 February 2020.

3 See for example, Healthline, 'What Science Says About Video Games and ADHD' <https://www.healthline.com/health-news/the-link-between-adhd-and-video-games> accessed 24 February 2020.

4 ibid.

5 See for example UNODC, 'The Use of Internet for Terrorist Purposes' (2012).

6 See ICO, 'The General Data Protection Regulation Children and the GDPR' (2018) <https://ico.org.uk/media/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/children-and-the-gdpr-1-0.pdf> accessed 24 February 2020.

gaming companies should demonstrate that they took additional steps to ensure that their priority is children's best interests. These, overall, are the pieces which should be taken into account to achieve the main objective of ensuring online child protection and ultimately enhancing their fundamental rights and freedoms. While a multitude of opportunities arise from the digital environment, so too can the potential for increased exposure to risks such as exposure to age-inappropriate advertising and data misuse.[7] These risks can affect children's well-being and undermine their right to privacy. Overall, it is a fact that with the current speed at which technology is evolving, it is impossible to accurately predict what is to come. Use of online gaming platforms and rapidly changing technologies are more involved in children's lives now more than ever. Protecting children - vulnerable members of the society, the future of tomorrow's society - against online abuse, exploitation of their data or undermining their fundamental rights and freedoms should be prevented and protecting them online should be one of the key goals of not only nations but also the international community and society.

Legal Framework: GDPR and KVKK

After summarising the relevance of children's vulnerability in the online ecosystem in general and online game industry in particular, this subsection delves into the legal framework relating to data protection regimes in question. The GDPR provides specific rules with regards to processing children's data[8]. Although the encompassing term of 'vulnerable' is used in relevant provisions, the main focus remains to be on children under the data protection regime. This vulnerable nature of children is highly interlinked with the application of the rules set out under the data protection regime and their close intersection with the notion of 'fairness'. Accordingly, it is noteworthy to state that the concept of fairness is of utmost importance when carrying out activities involving children's personal data processing despite the fact that compliance with all the core principles and rules is still required under the GDPR. Regarding children's protection, one of the most relevant provisions under the GDPR is Article 6(1), which lays out conditions that determine the "Lawfulness of processing". Article 6(1) is highly interlinked with Article 5(1)(a) of the GDPR. A processing activity can be considered as lawful only if and to the extent that at least one of the conditions provided under Article 6(1) apply. Thus, in order to carry out processing involving children's personal data, there is a need to have and justify a lawful basis under the GDPR. Consent is one possible lawful basis for processing, however as the Information Commissioner's Office ("ICO") notes down, there are

7 See for example Kate Raynes-Goldie and Matthew Allen, 'Gaming Privacy: A Canadian Case Study of a Co-Created Privacy Literacy Game for Children' <http://pdfs.semanticscholar.org/1e30/e92594e9728148b5438be71e51943d0ae9c4.pdf> accessed 24 February 2020.

8 Please note that the term "child" is not defined by the GDPR; therefore, online gaming companies should take an inclusive approach and take into account the needs of teenagers and young people who are below 18, but also young adults; See page 2Bird&Bird, 'Principles | Children' <https://www.twobirds.com/~/media/pdfs/gdpr-pdfs/24--guide-to-the-gdpr--children.pdf?la=en> accessed 24 February 2020. Raynes-Goldie and Allen (n 7).

alternative[9] grounds constituting a lawful basis for processing. According to the ICO, using other options different than 'consent' can occasionally be more appropriate and offer better protection for children.[10] However, it is also crucial to note that reliance on an alternative option should not be abused. The June 2019 Report of the European Commission Multi-stakeholder Expert Group on the GDPR application states that there are concerns about allowing digital platforms to choose other legal bases than depending on the national legislation in the respective Member States.[11] This is especially the case for choosing the contract legal basis under Article 6(1)(b) depending on the age of children for entering into a contract applicable in the respective national laws.[12] The Report highlights warnings of the consumers' organisations working with children's welfare organisations, urging online platforms to be careful and not to abuse the system.[13] They advise that such practices circumvent the obligations under Article 8 and can lead to a fragmentation among Member States and therefore will contradict with the objectives of the GDPR.[14] If consent is chosen over its alternatives, when offering an online service directly to a child, the online gaming company, which operates and provides services in different Member States in the EU (e.g.: Gamecell), is expected to take the minimum age for being able to give consent under the respective jurisdiction to achieve the purposes of the data protection regime. This is because although the GDPR provides parental consent requirement for children under 16 in situations where information society services are offered directly to them, Member States are allowed to opt to depart from and choose to lower this age threshold to 15, 14, or 13 years - cannot be below 13.[15] This flexibility provided to Member States has caused complexities in practice and created confusion among stakeholders of the online ecosystem including parents.[16]

9 See 'Contribution from the Multistakeholder Expert Group to the Stock-Taking Exercise of June 2019 on One Year of the GDPR Application' (2019) <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3537&NewSearch> accessed 24 February 2020. Page 10

10 'Children | ICO' <https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/children/> accessed 24 February 2020.

11 'Contribution from the Multistakeholder Expert Group to the Stock-Taking Exercise of June 2019 on One Year of the GDPR Application' (n 9).

12 ibid. See also 'GDPR Implementation In Respect of Children's Data and Consent Centre for Information Policy Leadership 6 March 2018 2 CIPL's TOP TEN MESSAGES ON GDPR IMPLEMENTATION IN RESPECT OF CHILDREN'S DATA' (2018) <https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_white_paper_-_gdpr_implementation_in_respect_of_childrens_data_and_consent.pdf> accessed 24 February 2020.

13 ibid.

14 ibid.

15 Article 8 "*(1) Where point (a) of Article 6(1) applies, in relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child. Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years; (2) The controller shall make reasonable efforts to verify in such cases that consent is given or authorised by the holder of parental responsibility over the child, taking into consideration available technology; (3) Paragraph 1 shall not affect the general contract law of Member States such as the rules on the validity, formation or effect of a contract in relation to a child."*

16 See 'Contribution from the Multistakeholder Expert Group to the Stock-Taking Exercise of June 2019 on One Year of the GDPR Application' (n 9). Page 10; See also Ingrida Milkaite and Eva Lievens, 'Better Internet for Kids - Status Quo Regarding the Child's Article 8 GDPR Age of Consent for Data Processing across the EU' (2019) <https://www.betterinternetforkids.eu/web/portal/practice/awareness/detail?articleId=3017751> accessed 18 February 2020.

There are many criticisms on the Article 8's age threshold, which is understandable. This is because having different age limits in different countries is not necessarily meaningful in the sense that children's capacity cannot change from country to country.[17] For example, in the UK only children aged 13 or over are able to provide their own consent. On the other hand, in France the age of consent is 15, while in Ireland and Germany the age of consent is 16. The reasoning behind these differences are yet to be understood and unsurprisingly draws much criticism.[18] Accordingly, in practice, if a company wants to rely on consent, in addition to the GDPR, it should also check the national laws in which it operates.[19] The need to make an extra effort to check the consent requirements of the country in which a company operates requires additional efforts and such differences may be challenging and even perplexing for different stakeholders of the ecosystem for practical reasons.

Another debated point in the GDPR involves the rules set out for profiling children and how decisions are to be made with respect to the legal basis for processing such as when the processing should be grounded on consent. Here, it is also crucial to point out that if a company considers profiling children for marketing purposes then there is a need to take into account the Article 29 Data Protection Working Party's comments in its Guidelines on Automated Individual decision-making and Profiling for the purposes of Regulation 2016/679.[20] Going back to consent, as Macenaite and Kosta point out, the GDPR is based on the premise that children can be protected through informed parental consent.[21] Accordingly, other contentious questions arise: how parental consent is to be verified, and when and how risk-based impact assessments should be carried out?[22] Article 8(2) requires the controller to make reasonable efforts to verify in such cases that consent is given or authorised by the holder of parental responsibility over the child, taking into consideration available technology. Therefore, online gaming companies are expected to show that they make an effort to make sure that the person giving consent can give such consent for the purposes of Article 8, of course to the best possible extent, as much as the available technologies

17 See for example Sonia Livingstone, 'Children: A Special Case for Privacy? Article (Published Version) (Refereed)' (2018) <http://eprints.lse.ac.uk/89706/1/Livingstone_Children-a-special-case-for-privacy_Published.pdf> accessed 24 February 2020. Page 20

18 See Ingrida Milkaite and Eva Lievens (n 16).

19 See EDPB, 'Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3)-Version for Public Consultation' (2018) <https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_3_2018_territorial_scope_en.pdf> accessed 24 February 2020. Page 12 "*Controllers and processors must therefore ensure that they are aware of, and comply with, these additional conditions and frameworks which may vary from one Member State to the other. Such variations in the data protection provisions applicable in each Member State are particularly notable in relation to the provisions of Article 8 (providing that the age at which children may give valid consent in relation to the processing of their data by information society services may vary between 13 and 16)...*"

20 See Article29, 'ARTICLE29 Newsroom - Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679 (Wp251rev.01) - European Commission' (2018) <https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=612053> accessed 24 February 2020.

21 Milda Macenaite and Eleni Kosta, 'Consent for Processing Children's Personal Data in the EU: Following in US Footsteps?' (2017) 26 Information and Communications Technology Law 146.

22 ibid.

allow. It is also noteworthy to state that if online game platforms rely on consent, they are expected to ensure that children comprehend what they are consenting to and understand the rights they have including 'right to access'[23]. Informing children about their rights would also help children appreciate or at least trigger them to think about the importance of 'consent'. Such a practice would also give them an idea about their place in this online world, making them understand that they are being recognised as separate individuals who have their rights, and not merely users behind the screen, who are been taken granted for. This is important for transparency and fairness elements both under the GDPR and the KVKK. Similarly, it is crucial to note that consent could provide "illusionary control"[24] in many ways, not only for children but also for parents. Thereby, the doors become more open to abuse and exploitation that results from the imbalance of power between data subjects (both children and adults) and online gaming companies. In addition to providing unambiguous information to children, it is also important that the companies make sure that parents also understand the implications and effects of what they are consenting to. As Article 29 Data Protection Working Party confirms, in the context of such a power imbalance, the agreement to the processing of personal data cannot be considered to be delivered freely.[25] To elaborate, in circumstances where consent is 'bundled up' as a non-negotiable part of terms and conditions in a contract, it would fail to constitute a valid consent for the purposes of the GDPR. This is because the consent that is bundled up as a non-negotiable part of a contract is presumed not to have been freely given.[26] Therefore, online gaming companies' genuine efforts in ensuring that they obtain consent in a fair manner is critical.

Coming back to Article 5(1)(a) GDPR, which provides that personal data must be processed lawfully, fairly and transparently in relation to the data subject, this core principle of fairness includes taking into account the reasonable expectations of the data subjects,[27] bearing in mind possible adverse consequences data processing can have on data subjects, and having regard to the relationship and potential effects of imbalance between them and the controller. Although there is an imbalance between adults and online gaming companies as well, this imbalance and the effect it has on data subjects increase when the data subject is from a vulnerable group of the

23 See 'Right of Access | ICO' <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-of-access/> accessed 24 February 2020. Note that "*Even if a child is too young to understand the implications of subject access rights, it is still the right of the child rather than of anyone else such as a parent or guardian.*"

24 Laura Brandimarte, Alessandro Acquisti and George Loewenstein, 'Misplaced Confidences' (2013) 4 Social Psychological and Personality Science 340 <http://journals.sagepub.com/doi/10.1177/1948550612455931> accessed 24 February 2020.

25 See, for example, Macenaite and Kosta (n 21).

26 ibid.

27 Some personal data are expected to be private or only processed in certain ways, and data processing should not be surprising to the data subject. The concept of 'reasonable expectations' is specifically referenced in recitals 47 and 50 in relation to Article 6(1)(f) and (4) under the GDPR.

society, such as children.[28] Therefore, in our context, the imbalance between the data subjects (children) and the online platform (Gamecell) is imperative for the purposes of ensuring a correct reflection of the notion of 'fairness' in practice.

As a matter of lawfulness, contracts for online services must be valid under the applicable contract law.[29] An example of a relevant factor is whether the data subject is a child, for reasons such as capacity to enter into contractual relations. In such a case (in addition to ensuring compliance with the requirements prescribed by the GDPR including the 'specific protections' available to children, under Recital 38, children merit specific protection with regard to their personal data as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data), the controller must make sure that its practices are compliant with the relevant national laws on these capacity of children to enter into contracts.[30] Moreover, in order to make sure that the reasonable efforts are made for the purposes of Article 5(1)(a), online gaming companies are expected to satisfy other legal requirements under relevant laws and regulations. Looking from a contract law perspective, for instance, for consumer contracts, Directive 93/13/EEC on unfair terms in consumer contracts ("the Unfair Contract Terms Directive"') is highly relevant.[31] This is because a term which has not been separately negotiated on its own, cannot be considered as 'fair' for the purposes of the Unfair Contract Terms Directive.[32] Also, Article 12(1) of the GDPR complements Article 5(1)(a) by providing that the information provided must be concise, transparent, intelligible and easily accessible. With regard to transparency, Article 29 Data Protection Working Party's approach is that "transparency is a free-standing right which applies as much to children as it does to adults".[33] In its report, the Article 29 Data Protection Working Party underscores specifically that obtaining consent by the holder of parental responsibility in a situation that falls under Article 8, does not mean that children can no longer use their rights as data subjects to transparency. This means that online gaming companies cannot hide behind the excuse of 'parental consent' for not making children friendly information available to inform children in a plain language.[34] In other words,

28 See also page 32 ICO, 'The General Data Protection Regulation Children and the GDPR' (n 6).

29 See EDPB, 'Guidelines 2/2019 on the Processing of Personal Data under Article 6(1)(b) GDPR in the Context of the Provision of Online Services to Data Subjects Adopted-Version for Public Consultation' (2019) <https://edpb.europa.eu/sites/edpb/files/consultation/edpb_draft_guidelines-art_6-1-b-final_public_consultation_version_en.pdf> accessed 24 February 2020. Page 5

30 ibid. See also 'ISFE Response to the ICO Public Consultation On Children and the GDPR' (2018) <www.isfe.eu> accessed 24 February 2020.

31 ibid.

32 ibid.

33 Article29, 'ARTICLE29 Newsroom - Guidelines on Transparency under Regulation 2016/679 (Wp260rev.01) - European Commission' <https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=622227> accessed 24 February 2020. page 10

34 See also Natali Helberger, Frederik Zuiderveen Borgesius and Agustin Reyna, 'THE PERFECT MATCH? A CLOSER LOOK AT THE RELATIONSHIP BETWEEN EU CONSUMER LAW AND DATA PROTECTION LAW' (2017) 54 Common Market Law Review <https://www.ivir.nl/publicaties/download/CMLR_2017.pdf> accessed 24 February 2020. Article29 (n 33).

'parental consent' cannot be used as an excuse for prioritising adults, discriminating against children, and assume that they are not required to make additional efforts to be equally transparent to children. Furthermore, making sure that children can enjoy their right to transparency during "the continuum of their engagement"[35] with online gaming companies is also aligned with the Article 13 of the UN Convention on the Rights of the Child.[36] Similar to the transparency obligation in the GDPR, the Unfair Contract Terms Directive requires using unambiguous, clear and intelligible language.[37] Therefore, it can be concluded that an unfair processing of personal data that fails to comply with the notions of fairness, lawfulness, and transparency, would most probably also be regarded as an unfair term under the Unfair Contract Terms Directive.[38] In practice, even if the company relies on parental consent, as the Article 29 Data Protection Working Party clarified in its Transparency Report, children are still expected to be provided with information delivered in clear and plain language.[39] Accordingly, in order to comply with the specific mentions of transparency measures addressed to children in Article 12(1) (also supported by Recitals 38 and 58)[40], online gaming companies should make sure that if they target children or they know that children use their products or services, *"any information and communication should be conveyed in clear and plain language or in a medium that children can easily understand*".[41] Therefore, it can be concluded that under the GDPR, children and adults are clearly separated with regards to the additional care expected to be taken when processing their personal data. On the other hand, unlike the GDPR, there is no specific provision(s) on children in the KVKK. However, according to Article 10 of the Turkish Constitution; "*everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds*". This means there is no distinction between adults or children in terms of having and using fundamental rights including rights to privacy and data protection. Similar to other countries, the age of consent is one of the important discussion topics in Turkey as well. KVKK has no clear guidance on that question. However, Turkish Civil Law answers that important question. Legal capacity is assessed on the criteria of mental competence, maturity and non-restriction in Turkish law. It will be appropriate to consider the legal capacity of non-mature individuals

35 Article29 (n 33).

36 Article 13 of the UN Convention on the Rights of the Child states that: "*The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.*"

37 See 'European E-Justice Portal - Unfair Contract Terms Directive (93/13)' <https://e-justice.europa.eu/content_unfair_contract_terms_directive_9313-627-en.do> accessed 24 February 2020.

38 See also EDPB (n 29). Page 5

39 See Article29 (n 33).

40 Note that Recital 58 explicitly states as follows and emphasizes that the language used should be clear for children to understand *"Given that children merit specific protection, any information and communication, where processing is addressed to a child, should be in such a clear and plain language that the child can easily understand."*

41 Article29 (n 33). Page 11

– children according to their lack of mental competence. However, it should not be forgotten that the concept of mental competence is a relative concept and should be evaluated separately for each separate act in law.

Children who are not mentally competent are considered to fully lack legal competence (they are regarded as fully incompetent) and all of their acts are carried out by their legal representatives (TMK Article 15). Children who are mentally competent are considered as partially incompetent (TMK Article 16/I). As a rule, partially incompetent children, carry out their actions in law with the permission or consent of their legal representative (parent-guardian). Exceptionally gifts and the use of strictly dependent rights do not require the permission or approval of the legal representative. In terms of the aforementioned act in law, children can exercise their rights and can incur liabilities only with their own actions. Therefore, the point to be discussed is whether the right to consent to the processing of personal data is strictly dependent on an individual. Since personal data constitutes one of the personality values that form a part of the personality rights under Turkish law, free from doctrinal debates, we believe that the consent activity for the processing of personal data should also be regarded as the exercise of a right strictly dependent on an individual. This is because the activities of showing consent to the attacks against other personality values in accordance with the law are also defined as the strict use of rights in the doctrine.

Overall, it is clear children are expected to be treated with additional care to ensure that their rights are protected effectively. To do this, first all stakeholders should acquire a detailed understanding of the law relevant in this context. The above discussions provide a summary of the most relevant rules that are prescribed by law, which do not seem to be thoroughly understood as we will emphasize in detail in Section II. After setting the scene from a legal perspective, the next subsection will support the importance of putting the law into practice and making sure that all stakeholders understand the place of online games in children's lives.

Children and Online Gaming Industry

The online gaming industry is one of the fastest growing entertainment industries in the world.[42] Digital games are up three percent year over year having generated $120.1 billion in 2019 and increased by an $11 billion compared to last year.[43] It is a widely accepted fact that the booming online gaming industry is deeply ingrained

42 Amaya Gorostiaga and others, 'Child Rights and Online Gaming: Opportunities & Challenges for Children and the Insdustry' (2019) <https://www.unicef-irc.org/files/upload/documents/UNICEF_CRBDigitalWorldSeriesOnline_Gaming.pdf> accessed 18 February 2020.

43 See '2019 Year In Review — SuperData, a Nielsen Company' <https://www.superdataresearch.com/2019-year-in-review> accessed 24 February 2020.

in the lives of children with the ubiquitous and rapidly changing technologies.[44] It is therefore crucial that all the necessary steps and reasonable measures to be taken as soon as possible without causing any more delay or infringement of children's rights to data protection and privacy in the online gaming ecosystem. In order to do this, the extent to which the online gaming industry can have an effect on children's and parents' lives should be appreciated. Although there may be benefits[45] to include children in the online gaming ecosystem, it can also have negative effects on children's lives.[46] An EU study on the impact of marketing through online services including online games and mobile applications on children's behaviour found that advertising have clear and sometimes subliminal effects on children's behaviour.[47] There are many examples showing how children can be affected negatively from online games, where children's rights can be undermined.[48] One of the examples where the vulnerable nature of children becomes highly relevant in the online gaming ecosystem concerns the processing activities carried out for profiling purposes. This is because profiling can be used to target data subjects that the algorithm considers are more likely to spend money on the services provided or to deliver more personalised ads. The age and maturity of the child may affect their ability to comprehend the reason and purpose behind the ads shown or the consequences of the data processing carried out for profiling purposes. This is why it is extremely important for companies to demonstrate the steps they have taken to protect children and the safeguards they have put in place to prove their the lawfulness of their

44 See 'Creating a Better Internet for Kids | Shaping Europe's Digital Future' <https://ec.europa.eu/digital-single-market/en/policies/better-internet-kids> accessed 24 February 2020.

45 See Daniel Kardefelt-Winther, 'How Does the Time Children Spend Using Digital Technology Impact Their Mental Well-Being, Social Relationships and Physical Activity? An Evidence-Focused Literature Review. I How Does the Time Children Spend Using Digital Technology Impact Their Mental We' (2017) <www.unicef-irc.org> accessed 24 February 2020.

46 See for example 'Internet and Video Game Addictions: A Cognitive Behavioral Approach' <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0101-60832014000300082> accessed 24 February 2020.

47 See 'Study on the Impact of Marketing through Social Media, Online Games and Mobile Applications on Children's Behaviour | European Commission' (2016) <https://ec.europa.eu/info/publications/study-impact-marketing-through-social-media-online-games-and-mobile-applications-childrens-behaviour_en> accessed 24 February 2020.

48 See for example 'Gaming the System | Children's Commissioner for England' <https://www.childrenscommissioner.gov.uk/publication/gaming-the-system/> accessed 26 February 2020.; 'Online Gaming | Childline' <https://www.childline.org.uk/info-advice/bullying-abuse-safety/online-mobile-safety/online-gaming/> accessed 26 February 2020.; 'The Games Industry Shouldn't Be Ripping off Children | Geraldine Bedell | Opinion | The Guardian' <https://www.theguardian.com/commentisfree/2019/sep/15/games-industry-shouldnt-be-ripping-of-children> accessed 26 February 2020. 'Online Games | NSPCC' <https://www.nspcc.org.uk/keeping-children-safe/online-safety/online-games/> accessed 26 February 2020.; see also ibid.; 'Media Moment: So Your Child Wants To Go To A Video Game Convention | Center on Media and Child Health' <https://cmch.tv/media-moment-so-your-child-wants-to-go-to-a-video-game-convention/> accessed 26 February 2020.; 'WHO Gaming Addiction Classification [Video]' <https://finance.yahoo.com/news/world-health-organizations-new-classification-video-game-addiction-good-thing-220236312.html> accessed 26 February 2020. "How the World Health Organization's new classification of video game addiction could be good thing"; Dr. Michael Rich discusses the behavior of teens and children with the popular game.at '"Fortnite" May Be a Virtual Game, but It's Having Real-Life, Dangerous Effects - The Boston Globe' <https://www.bostonglobe.com/metro/2019/03/31/unexplained-weight-loss-children-boston-nutritionist-makes-her-diagnosis-fortnite/eNMmGkK814IOsCwDDk2ZPN/story.html?s_campaign=8315> accessed 26 February 2020.; 'Kids and Smartphones and Video Game Addiction - Consumer Reports' <https://www.consumerreports.org/gaming/kids-glued-to-smartphones-video-games-could-signal-addiction/> accessed 26 February 2020.

practices.[49] The undeniable strong relationship between children's rights and online gaming industry is shown in UNICEF discussion paper, Child Rights and Online Gaming: Opportunities & Challenges for Children and the Industry[50]. The open nature of the Internet and online gaming companies' inclusive approach to their consumers, without effectively separating children from adults can have serious impact on the children's exercise of their fundamental rights and freedoms. It is also noteworthy to note that depending on their age and maturity, children may find it difficult to identify the commercial nature of promotional content; therefore, it is important that all commercial content be clearly identified as such in a way that children can identify and comprehend without any struggle.[51] In order to do this gaming companies need to have policies in place and take measures to make sure that advertising is effectively identified as commercial content.[52] Overall, in the context of data protection and privacy, as children are a key consumer group for online gaming industry[53], to keep up with the laws and regulations, there is an absolute necessity to put additional safeguards in place in order to protect our children in the online gaming ecosystem.

II. Privacy Screening for Gamecell

This Section examines Gamecell's compliance with the core principles under the GDPR and KVKK for the purposes of accountability. To do so, it starts with Gamecell's User Agreement and continues with its Cookie and Privacy Policies to assess whether their content provided in these documents undermine children's rights to data protection and privacy under relevant laws. Although the main focus of this article is children's privacy, practices undermining adults' rights to data protection and privacy will be referred to where necessary. Also, references will be made to other laws and regulations (e.g.: law of obligations, e-commerce laws etc.) where necessary. Only the relevant terms and statements will be quoted in this article, which is then followed by and combined with our comments with regard to these provisions. This Section concludes that there is a big gap between theory and practice, and that Gamecell is far behind the expectations of the current data protection and privacy laws both under KVKK and the GDPR and there are missing steps which should urgently be taken in order to enhance children's rights and meet the expectations and requirements prescribed by law.

49 See ICO, 'The General Data Protection Regulation Children and the GDPR' (n 6).Pages 32-33

50 See Gorostiaga and others (n 42).

51 'CHILDREN'S ONLINE PRIVACY AND FREEDOM OF EXPRESSION' <https://www.unicef.org/csr/files/UNICEF_Childrens_Online_Privacy_and_Freedom_of_Expression(1).pdf> accessed 18 February 2020.Page 24

52 ibid.

53 ibid page 5.

Gamecell's User Agreement

Gamecell.Com "User" Agreement[54]

2. Establishment of the Agreement and Coming Into Effect

2.1: "*Agreement shall deemed to be established in a binding manner for the"User"beginning from the moment on which the"User"accesses to any content through creating or not any account information regardless of the duration of the transaction, visit, membership etc. and shall deemed to have been read, understood and approved by the"User"."*

> According to Turkish Code of Obligations, a contract is established with bilateral and mutual declaration of the will of the parties. However, it is stated here that users' or visitors' mere access to the website is sufficient to form a binding contractual relationship. This proposition in the membership contract is against the Turkish Code of Obligations. If users want to become a member of Gamecell, they should be allowed to see, examine this contract separately and act accordingly in a way that they choose to do so by clicking to accept or not accept. In addition to this, this practice is a complete failure under the rules and principles set out in the GDPR, particularly 'consent'.

2.4: "The"User"accepts that"Gamecell" solely has the right and authority to make partly or wholly changes, amendments, additions, updates on the terms of this Agreement in any time ***without*** *giving prior notice, without having any seasonal or periodic, sectional or timing limitation arising from the reasons such as; the obligations occurred due to the technologies used on"Gamecell", new products and"Content"s to be presented, liabilities arising from the changes in the legislation, updates, partly or wholly changes to be made on the current products, services and"Content"s; and the"User"shall not claim, demand or declare not being notified or that the aforesaid changes are not applicable for him/herself in case"Gamecell"informs the"User"directly or in case the"User"accesses to"Gamecell"at a date later than the occurrence of the amendments or updates. Furthermore, in order to use any service, content, technology on"Gamecell", the"User"may be required to accept certain software or content or other usage terms; the"User"accepts to benefit from the services and contents by knowing such situation."*

> Since the contract expresses mutual declarations of intention to create legal relations and a mutual will, these changes must be brought to the attention of the user and the acceptance/rejection options must be provided accordingly. This practice can be considered to be unfair and regarded as an abuse of imbalance of powers as explained above in Section I.

54 'Gamecell - Oyunlar. Arkadaşlar. Eğlence.' <https://www.gamecell.com/tr/userAgreement.html> accessed 26 February 2020.

3. Liabilities and Responsibilities of the User

3.6: "The"User"accepts, declares and undertakes to deal with the advertisements belonging to third persons or institutions having a content of commercial communication during, before or after the use, benefit or trying to access to the "Content" and services presented by "İnteltek" on "Gamecell" or "Content"s services accessed through"Gamecell"and/or any sort of other services directly or indirectly in relation with them; and that the access to"Content"may be prevented, slowed down or stopped without watching/viewing these advertisements, and that"İnteltek"has the sole right and authority to make partial or total changes, amendments, additions and updates in this process."

This can be done; however, the explicit consent of the user is required for targeted advertising. Also, as it can be seen in ICO's report, legitimate interest is dismissed as a legal basis for processing personal data for the purposes of advertising based on user profiles.[55] It is also noteworthy to recall that profiling requires obtaining consent from data subjects, and the obtained consent must be informed, explicit and freely given for the purposes of the GDPR. With regards to children, if processing activities are likely to result in a high risk to the rights and freedoms of children, then a DPIA is required.[56] As it can be seen in the ICO's guidance, the use of children's personal data for marketing purposes, profiling or other automated decision-making, or if data processing carried out if there is an intention to offer online services directly to children, then it means that a DPIA is required to achieve the purposes of data protection regime.[57]

5. Ownership of Other Accessible Contents

5.1. "By visiting"Gamecell", the"User"accepts that it is possible to access from"Gamecell"to any sort of digital media, website, product or contents including with the advertisements belonging to third persons."

There is no such requirement for hosting service providers set out under the Law No 5651. Obligations of the hosting service provider ARTICLE 5- (1) The hosting provider shall not be responsible for checking the content which it is hosting, or investigating whether or not it constitutes an unlawful activity. (2) (Amended: 6/2/2014-6518/article 88) The hosting provider must remove hosted content which is unlawful when notified in accordance with articles 8 and 9 of this Law. (3) (Annex: 6/2 / 2014-6518/Article 88). The hosting providers are required to retain traffic data (communications data) in relation to their hosting activities from one to two years (Article 5(3)) and access providers for a period of not less than six months and not more than two years and ensure the accuracy, integrity and confidentiality of this information.

55 See 'Examples of Processing "Likely to Result in High Risk" | ICO' <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/data-protection-impact-assessments-dpias/examples-of-processing-likely-to-result-in-high-risk/> accessed 26 February 2020.

56 See 'What Should Our General Approach to Processing Children's Personal Data Be? | ICO' <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/children-and-the-gdpr/what-should-our-general-approach-to-processing-children-s-personal-data-be/> accessed 26 February 2020.

57 See 'Examples of Processing "Likely to Result in High Risk" | ICO' (n 55).

10.6. ""İnteltek"shall not be held liable against the"User"from the consequences of being forbidden to use"Gamecell""Content"and services pursuant to the legislation in force in the country or region where the"User"is located, regardless of the beginning date to benefit from this service and"Content"s."

This provision is unacceptable under the EU data protection law. Gamecell's website is designed in a way that is accessible in both English and Turkish. This means that users (adults and children) residing in Europe as well as other parts of the world can access the website and sign up to become a member. Pursuant to Article 3 (Territorial scope) of the GDPR, the Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.[58] Therefore, it can be concluded that Gamecell is subject to the principles and rules set out under the GDPR since its products and services are accessible in Europe.

11. Cookie Policy, Privacy Policy and Protection of Personal Data

Cookie Policy

11.1 "...Within this scope, the right of sending cookies of the advertisers and the payment system providers of"Gamecell"is reserved and even they are registered or not, the"User"s are deemed to be agreed on the cookie policy/application of"Gamecell"determined in this Agreement."

The Cookie Policy cannot be forced on to be accepted as default in this way. This Policy should provide information about cookies; when the user accesses the Gamecell home page, he/she should be informed about the cookies with the consent management tools and his explicit consent should be obtained. An option to change the preferences about cookies should always be provided on the website and data subjects' rights and their freedom of choice should not be undermined. Again, this provision can be considered as an abuse of the imbalance of power and therefore can be deemed unfair. It is also relevant to note that such an approach will not only be considered as a failure to comply with the relevant rules and principles under data protection and privacy laws, but also will contradict with the purposes of Unfair Contract Terms Directive.[59] This is because although the rest of the agreement remains valid, conditions that are deemed unfair are not binding on consumers under the Unfair Contract Terms Directive.[60]

58 See EDPB (n 19).; note that Article 3 of the GDPR provides as follows: "*Article 3 – Territorial scope (1) This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not. (2) This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or the monitoring of their behaviour as far as their behaviour takes place within the Union. (3) This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law."*

59 'European E-Justice Portal - Unfair Contract Terms Directive (93/13)' (n 37).

60 See ibid.

11.1 "...The right to update the applications regarding cookies by publishing via"Gamecell"is reserved and it's under the"User"'s liability to follow and have knowledge about aforesaid updates."

> No such obligation can be imposed on the user. Changes to the cookies and the policy should be made available to the user, along with the version and update date.

11.2. "*The"User"s may deactivate/passivate "cookie" sections of their web browser in case the"User"s do not want to deal with the cookie applications explained below. (For example, the"User"may reject all of the cookies by clicking "Tools", "Internet Options", "Privacy" sections and marking "Block all cookie*s".)"

> It is necessary to manage this with the privacy management tool to be provided on the homepage of the website and act according to the will of the user. It is not sufficient to include such a provision in the contract. This provision should be put into practice and implemented duly for the purposes of Accountability.

11.3 *"Google, as"Gamecell"advertiser, uses cookies to publish advertisements on"Gamecell"and may present advertisements based on the visits of the"User"to"Gamecell"and to other websites on internet by using"DART"cookies."*

> The platforms that children use should be ad-free. Here, the YouTube decision can set an example for Gamecell to learn lessons from the FTC's statements[61] about ad-free platforms for children as it will be explained more in detail in Section III.

11.4 "*The usage of "Google Analytics" and any similar technology is also possible in order to make the analysis of the visitors"Gamecell"usage. "Google Analytics" enables to acquire statistical and other type of information about the usage of a website via cookies stored in the computers of the visitors and is used to create relevant reports regarding the use of"Gamecell". To receive further information about "Google Analytics" technology, you can visit https://www.google.com/intl/tr/policies/privacy/ The"User"declares and undertakes in advance that any other type of similar technology and/or technological infrastructure which is owned by third parties apart from "Google Analytics" may be used in the future."*

> Making the user declare and undertake in advance that any other type of similar technology which is owned by third parties to be used in the future is unacceptable and is out of the question. The content of this term is unacceptable for many reasons since it contradicts with the essence of the data protection and privacy regimes in general. It is known that analytics cookies are subject to explicit consent, a user cannot be assumed to have accepted by default their usage as it is the case now.

61 See 'Google and YouTube Will Pay Record $170 Million for Alleged Violations of Children's Privacy Law | Federal Trade Commission' <https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations> accessed 26 February 2020.

11.5 *"...by accessing"Gamecell"as subscriber or nonsubscriber can be saved via "cookie" technology in order to be used at the advertisement applications or presentations without any requirement to obtain any of the"User"'s personal data..."*

All cookies collect personal data. For this reason, the owners of cookies and similar technologies and those using these technologies are deemed to be responsible for data collected and are required to comply with the rules set out under the KVKK and the GDPR.

11.5 "*In addition, Internet Protocol (IP) numbers assigned by internet service providers of the"User"s may be used for advertising display purposes or for security reasons (for example, to identify any attacks on"Gamecell", or to be shared with governmental authorities in case of a criminal complaint or a request for official investigation against the"User")."*

Targeted advertising is a crucial topic for the purposes of data protection law. One of the main reasons lies at the heart of the term 'invisible tracking' as it confronts us with vague, ambiguous, non-transparent, and opaque personal data processing activities that is called invisible tracking. It is noteworthy to mention that in the context of advertising; protection of children has become more under the spotlight recently. In the targeted advertising ecosystem, the current practices for implementation of the consent requirements under the GDPR should be applied carefully as failure to meet the requirements can have serious effects on children with regards to data protection and privacy laws. Accordingly, the legal and ethical implications of the advertising ecosystem's practices call for additional care and careful consideration of the potential effects they can create on children.

11.6 *"...while the persistent cookies are used to enable"Gamecell"to remember the"User"and to determine the last games that the"User"had played.."*

Since Gamecell is a platform that users can benefit from, when they make a payment for such services, it can be considered as offering service for the information society and therefore can use cookies for secure login and logout. Strictly necessary cookies are essential for you to browse the website and use its features, such as accessing secure areas of the site.[62] Strictly necessary cookies which are used for the functionality of the website can be placed before the user's affirmative action.[63] The exact scope of "strictly necessary cookies" is not clearly defined; however, it can be said that such cookies are the ones that are essential for the user to receive the service he/she requests.[64] In November 2009, the European Union introduced various amendments to the existing Directive 2002/58/EC (e-Privacy Directive), including to the provisions regulating the use of cookies. Following these changes, the e-Privacy Directive required obtaining

62 'Cookies, the GDPR, and the EPrivacy Directive - GDPR.Eu' <https://gdpr.eu/cookies/> accessed 26 February 2020.

63 See 'Consent on the Internet Means "Opting-in" in Europe' (2019) <www.hoganlovells.com> accessed 26 February 2020.

64 See ICO Guidance 'Privacy and Electronic Communications Regulations Guidance on the Rules on Use of Cookies and Similar Technologies Contents'. *"The term 'strictly necessary' means that such storage of or access to information should be essential, rather than reasonably necessary, for this exemption to apply. However, it will also be restricted to what is essential to provide the service requested by the user, rather than what might be essential for any other uses the service provider might wish to make of that data."*

the consent of users in order to store or access information (typically cookies or similar tracking technologies) on their devices. The only exemptions to this requirement are where this is for the sole purpose of transmitting a communication or where it is strictly necessary to provide an internet service explicitly requested by the user.[65] It is also important to note that if a company categorized a cookie they collect as "strictly necessary" because it fulfils a specified objective like security, it should make sure that cookie is solely used for that specific purpose. This approach is also aligned with the approach of the principle of purpose limitation under Article 5(1) of the GDPR. If any information is used for secondary purposes, the cookie would not be regarded as strictly necessary and therefore such use would require consent.[66]

12. Consent

12.1. *"Unless the"User"uses its right of refusal, The"User"accepts and declares giving an indefinite approval (even this Agreement is terminated) in favor of"İnteltek"and/or in favor of the institutions which are in cooperation with"İnteltek"to send commercial electronic messages(having data, voice and image content and which are sent through telephone, call centers, facsmile, automatic calling machines, smart voice recorder systems, email, small message services for commercial purposes)pursuant to the Law on the Regulation of Electronic Commerce numbered 6563 ("Law") and the Regulation on Commercial Communication and Commercial Electronic Messages for the purposes of declaring general/special possibilities and promoting and marketing various and new products-services in relation to the services and"Content"s provided under"Gamecell"through the contact information provided by the"User"while registering to"Gamecell"."*

This is completely against the e-commerce legislation. The above explained reasons are applicable in this case as well.

12.2. *"By using"Gamecell""Content"and services, the"User"s are deemed to be agreed that the email and SMS notices or advertisements subject to this article are sent within their own consent and will and do not constitute violation or illegal saving of personal data, offensive advertisement, unfair competition or marketing."*

It cannot be claimed that all of the obligations arising from e-commerce and KVKK legislations are fulfilled and the user accepts this merely because the services provided by Gamecell are used. All these processes should be designed in accordance with the relevant legislation.

15.2. *"Any kind of"User"transaction made on"Gamecell"and their transaction costs, if exists, are at the disposal and responsibility of the"User"."*

65 ibid.

66 See 'What Are the Rules on Cookies and Similar Technologies? | ICO' <https://ico.org.uk/for-organisations/guide-to-pecr/guidance-on-the-use-of-cookies-and-similar-technologies/what-are-the-rules-on-cookies-and-similar-technologies/> accessed 26 February 2020.

Taking into account the fact the users can be children, processes and provisions should be designed in accordance with the legislation in terms of transactions that will lead to legal consequences.

16. Content Compatibility

16.1. *"The"User"s are entitled to control and decide on the appropriateness of all kinds of games, publications,"Content"and other elements, especially the appropriateness of the games on"Gamecell"or accessed through"Gamecell"to the age groups."İnteltek"may share with the"User"the evaluations, if exists, made by the competent public authorities regarding the appropriateness of the"Contents"on"Gamecell"to the age groups provided that being non-binding."*

Not providing appropriate content for specific age groups as it is the case in Pan European Game Information ("PEGI") and let the children decide what game to play is unacceptable as it is not fair nor lawful for the purposes of data protection regime. Here, the below explained PEGI standards should be referred to keeping in mind the tangible effects of games that are inappropriate for certain age groups.

16.2. *"If the age of the"User"is below the legal age limit; it is strongly recommended to the"User"to notify the"Content"to its legal representatives before exploiting from these"Contents", to ask the appropriateness of the choosen"Contents"for the"User"s age group and to exploit, use and continue to use the"Content"in connection with the"User"s legal representatives approval."*

The platform is and should be responsible to take the necessary steps in order to provide lawful, transparent and fair processing of data especially when the children are concerned. Also, for the purposes of the data protection regime and the novel principle of accountability under the GDPR, it is a no brainer that Gamecell should demonstrate that the necessary steps are taken in order to provide adequate protection to the most vulnerable group of the society, children. In this regard, Gamecell should make a genuine effort to take solid steps, make tangible changes in its practices to ensure (to the best possible extent) identify that the user is a child and that parental consent is obtained for child's use of its services.

16.3 *"It is recommended for the"User"s who do not fulfill this requirement to be accompanied by permission and supervision of their legal representatives related to the relevant transactions and acquisitions and the related transactions are deemed to be carried out in this way."*

Gamecell should clarify how and with which methods this is going to be controlled.

Gamecell's Cookie Policy and Privacy Policy

Cookie Policy, Privacy Policy and Protection of Personal Data[67]

COOKIE POLICY 1.1: *"... the"User"'s visits on the internet can be observed before, during or after their access to the"Content"s on"Gamecell"and advertising applications can be realized to the "User" accordingly."*

> Considering that most of the users are children, this leads us to the same conclusion with the YouTube decision.[68] Children should not be subject to profiling with cookies and similar technologies and online platforms that are accessible to and used by children such as YouTube Kids should therefore be free from ad-free and tracking tools.

1.1 *"...the right of sending cookies of the advertisers and the payment system providers of"Gamecell"is reserved and even they are registered or not, the"User"s are deemed to be agreed on the cookie policy/application of"Gamecell"determined in this Agreement."*

> In terms of consent, the website works as opt-out. It automatically considers as if children have accepted default cookies and third party cookies without obtaining their prior consent. This practice is unacceptable under the applicable data protection and privacy regimes.

1.1 *"The right to update the applications regarding cookies by publishing via"Gamecell"is reserved and it's under the"User"'s liability to follow and have knowledge about aforesaid updates."*

> It is not fair nor lawful to impose a duty to act on any user including children as well as adults. Obtaining a valid consent and making sure that its practice is in compliance with the relevant rules and principles is the responsibility of the game platform.

1.2: "*The"User"s may deactivate/passivate "cookie" sections of their web browser in case the"User"s do not want to deal with the cookie applications explained below. (For example, the"User"may reject all of the cookies by clicking "Tools", "Internet Options", "Privacy" sections and marking "Block all cookies".)"*

> This practice is also unacceptable as the information about how to opt-out is provided after the user starts using the website. In good practice, consent should be obtained prior to such use. This is because the cookies are already being used before the user (in our case, the child) is informed about rejecting cookies option.

1.3: *"Google, as"Gamecell"advertiser, uses cookies to publish advertisements on"Gamecell"and may present advertisements based on the visits of*

67 'Gamecell - Oyunlar. Arkadaşlar. Eğlence.' <https://www.gamecell.com/tr/privacyPolicy.html> accessed 26 February 2020.

68 'Google Is Fined $170 Million for Violating Children's Privacy on YouTube - The New York Times' <https://www.nytimes.com/2019/09/04/technology/google-youtube-fine-ftc.html> accessed 26 February 2020.

the"User"to"Gamecell"and to other websites on internet by using"DART"cookies. By visiting "Google Privacy Policy" on https://www.google.com/intl/tr/policies/privacy/, the"User"s may block the use of DART cookie."

1.4: *"The usage of "Google Analytics" and any similar technology is also possible in order to make the analysis of the visitors"Gamecell"usage. "Google Analytics" enables to acquire statistical and other type of information about the usage of a website via cookies stored in the computers of the visitors and is used to create relevant reports regarding the use of"Gamecell". To receive further information about "Google Analytics" technology, you can visit https://www.google.com/intl/tr/policies/privacy/."*

Similar concerns arise in 1.3 and 1.4 from the practices explained above.

1.4: *".....The"User"declares and undertakes in advance that any other type of similar technology and/or technological infrastructure which is owned by third parties apart from "Google Analytics" may be used in the future."*

This practice conflicts with the rules relating to consent under KVKK and the GDPR. It is not clear which product will be used in the future; to obtain approval, or so-called "consent" from the users for an uncertain future situation fails to be as a valid consent for many reasons including the lack of elements such as being explicit and specific. Consent means offering individuals real choice and control. Thus, the case at hand contradicts with such an approach as genuine consent should put users in charge, build trust and real engagement.[69] It is noteworthy to state that there is a need to be specific and 'granular' so that separate consent is obtained for separate purposes of processing. In this context, consent taken for unknown (not specific enough) potential use in the future use can be regarded as vague failing to be specific. As provided under the current data protection law regime, vague or blanket consent is not enough.[70] Also, such a practice cannot be considered as fair, lawful nor transparent for the purposes of Article 5(1)(a) under the GDPR. Here, the principles of purpose limitation and data minimization also become highly relevant. This is also important for compliance with the consent rules under the GDPR, which requires consent to be specific and informed in order to be considered valid. Furthermore, it means that the potential consequences of giving consent should be made clear. To elaborate, the user must be presented with any information that is necessary to understand what he/she is consenting to without being pushed into agreeing with a term that fails to specify the details about what is referred to as "any other type" or is made even more ambiguous by the use of "in the future".

1.5: *".....can be saved via "cookie" technology in order to be used at the advertisement applications or presentations without any requirement to obtain any of the"User"s personal data."*

69 'Consent | ICO' <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/consent/> accessed 26 February 2020.

70 ibid.

This statement is misleading and fails to be true since the data collected through the use of cookies constitute personal data.

1.5 *".....The purpose of this technology is to make it easier for the"User"to access to the content of the sections that the"User"s are visiting more frequently from their first visit to"Gamecell"and to provide suitable advertisements for the"User"s."*

If the real purpose of data collection is delivering ads, the data protection and privacy regimes made it clear enough by setting out what steps should be taken in order to comply with the rules and principles laid out under the law.

1.5 *".....In addition, Internet Protocol (IP) numbers assigned by internet service providers of the"User"s may be used for advertising display purposes or for security reasons (for example, to identify any attacks on"Gamecell", or to be shared with governmental authorities in case of a criminal complaint or a request for official investigation against the"User")."*

It has been recognised that IP addresses constitute personal data.[71] According to Law No. 5651, only traffic data can be processed with the obligation to store it for 2 years. However, it cannot be used to show ads.

1.6. *"In case the web browser is closed, then session cookies are deleted, while persistent cookies are stored until the reasons for data processing are removed."*

The details about such data processing including storage durations should be shown in a table.

Security, Privacy Policy and Protection of Personal Data[72]

1.7 "*In case that the"User"wishes to use"Gamecell"by registration, the "User" accepts to give true and complete information while opening an account, doing registration in any way and using"Contents"and services on"Gamecell"and to update these registry informations in order to keep them true and complete. In case that the"User"wishes to use"Gamecell"by registration, the"User"shall be subject to the regulations determined for membership under this Agreement; while being subject to the below stated terms and conditions for his/her personal datas*."

There is a need to specify which personal data is asked for what specific reason. The current practice is not compliant with the GDPR for many reasons including the principles of purpose limitation and 5(1)(a). Accordingly, this also leads to a failure to comply with the accountability principle set out under Article 5 (2).

71 See 'What is personal data?' (*European Commission*) <https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-personal-data_en> accessed 29 January 2020. Also note that The European Court of Justice ("ECJ"), *Breyer*, in its October 2016 verdict, decided that "personal data" *"must be interpreted as meaning that a dynamic IP address registered by an online media services provider when a person accesses a website that the provider makes accessible to the public constitutes personal data within the meaning of that provision, in relation to that provider, where the latter has the legal means which enable it to identify the data subject with additional data which the internet service provider has about that person."* See Case C-582/14, *Patrick Breyer v. Bundesrepublik Deutschland* [2016] ECLI:EU:C:2016:779.

72 'Gamecell - Oyunlar. Arkadaşlar. Eğlence.' (n 67).

1.10 *"İnteltek"only provides the information delivered by the"User"s ownself and their own will. The"User"s may visit"Gamecell"at any frequency without being registered and sharing personal information."*

> Details should be given with regards to the information collected from the users. In other words, the company should clarify what data is being collected. Allowing an option to visit Gamecell as a guest, without creating an account is good practice for the purposes of the rules under the GDPR and respect for data subjects' rights.

1.11 *"Pursuant to the"Law on the Protection of Personal Data","Gamecell"may process the informations conveyed by the"User"basing on the"User"s' approval or express consent conveyed during registration by stating "in case that I become a member of this Website via approving this user agreement, I accept giving authorization to the procession of my data" and"Gamecell"may classify and protect these informations. These informations are used for marketing of the products and services of"Gamecell"and/or companies determined by"Gamecell"and used for the purpose of statistical examination, database enlargement, campaign organization, management of"Gamecell", improvement of the"User"s browsing experience while personalizing"Gamecell", enabling the"User"to use the services which are utilizable on"Gamecell",procurement of statistical informations related with the"User"to third parties in a manner not to be used to identify any"User", dealing with the complaints made by the"User"related to"Gamecell"or dealing with the complaints made against the"User"to"Gamecell"and etc."*

> There is no need to obtain explicit consent with regards to the processing carried out in the context of a contractual relationship and comply with the Articles 5(f) and 2(c) under KVKK.[73] In this context, provision of a privacy notification is sufficient. In addition, it is unlawful to ask for users' consent for the processing carried out in the context of a lawful basis that is recognised under the law. This is because, in a way, such an act would amount to misleading, misdirecting one's free will. Also, it is noteworthy to state that the listed points here, namely, organizing campaigns; marketing of Gamecell products and services; marketing of the products and services of companies to be determined by Gamecell all require explicit consent in accordance with e-Commerce legislation. This is also relevant under Articles 5 and 7/f.5 according to the updated commercial electronic messaging regulation. Also, the wording that is used in the above paragraph, more explicitly the phrase of "in a manner not to be used to identify any User" means that Gamcell anonymizes the data it collects from users. However, as it has been widely recognised in the studies, what usually may seem as anonymous is pseudonymisation. The ICO also confirms and underscores that the entities 'frequently refer to personal data sets as having been "anonymized" when, in fact, this is not the case'.[74] In light of this, it becomes even more crucial for companies to explain how they carry out their anonymization. In other words, the tools used to transform personal data

73 See 'AÇIK RIZA' <https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/66b2e9c4-223a-4230-b745-568f096fd7de.pdf> accessed 26 February 2020. for further detail about explicit consent under the KVKK.

74 ICO, What Is Personal Data? (2019), https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/what-is-personal-data/what-is-personal-data. (Accessed 30 January 2020)

into anonymous data should be clarified for transparency purposes.

1.12: *""Gamecell" is authorized to let"Content"providers and web services users to use personal informations conveyed by the"User"for the purposes of required contact, display, product delivery, advertisement etc. providing that they are not used in a manner which do not violate the"User"s personal rights.In other words, the"User"s accept that the collected datas and informations within the scope of this Agreement may be shared and/or transferred to the employees, service providers, group companies and/or existing and/or potential business partners of"Gamecell"and both of these situations shall not be deemed as a violation within the scope of this article. By registering to"Gamecell", the"User"shall deemed to be agreed and showed his/her express consent pursuant to the"Law on the Protection of Personal Data"basing on the approval in this respect conveyed as "in case that I become a member of this website via approving this user agreement, I accept giving authorization to the procession of my data" while registering to the"Website". Without prejudice to the provisions of this Agreement,"Gamecell"shall not share certainly with third persons the personal informations obtained within the scope of this Agreement, in a manner violating the"Law on the Protection of Personal Data"or apart from the conditions of this Agreement and shall not use for commercial purposes in any non-operating reason."*

According to what is stated in the above paragraph: who are the content providers and web service users?; what are the personal rights of the member/user? Also, obtaining explicit consent from the user is required in order to be able to share data for the purpose of communication, promotion, delivery of goods and advertisements for content providers and web service users. This matter does not comply with the other rules that are deemed lawful under Article 5 of the KVKK. Pursuant to the applicable law, it is not possible to state that the consent covers both domestic or international data transfers, based on the explicit consent that the user gave when signing up to Gamecell; it is also noteworthy to state that the consent in question is not actually obtained in compliance with the law and therefore should not be considered as a valid consent for the purposes of the data protection regime. In particular, it is not possible to accept the following sentence of the paragraph: *"In other words, the"User"s accept that the collected datas and informations within the scope of this Agreement may be shared and/or transferred to the employees, service providers, group companies and/or existing and/or potential business partners of"Gamecell"and both of these situations shall not be deemed as a violation within the scope of this article."* This sentence is contrary to the core elements constituting an explicit consent, being specific, unambiguous, and legitimate. In this case, it is assumed that the user gives consent by default to data processing purposes other (transfer of data) than the main purpose (subscription) for which user's consent is taken, which already fails to meet the requirements set out under the law, and therefore is unlawful. It is a no brainer when the user signs up for the services provided, there is a need to obtain an explicit consent separately for transfer of data which should be regarded as different than the consent given for subscription purposes. In other words, apart from the consent obtained for membership to the site, it will be necessary to obtain

consent for cases where an explicit consent is required for data transfer. However, it is unlawful and unfair to assume that the consent given for membership purposes without this is actually accepted as a consent given for data transfers and that the user will be deemed to have accepted this matter by clicking on the membership agreement. In addition, stating that the company's practice should not be considered as a violation under this Agreement is contrary to the basic principle of "*Lawfulness and conformity with rules of bona fides*"[75] under Article 4(2)(a) of the KVKK.

1.13 *"In order to provide top level security for the"User"s who make shopping on"Gamecell"during their transactions requiring Virtual Pos/Credit Card payment option,....."*

The majority of Gamecell users are children. Taking this into consideration, it is necessary to obtain parental consent for those under the age of 18 for payment. Otherwise, it would mean that a child under the age of 18 will make a legal transaction, an act recognised in law, without the consent of his/her parent(s). This means that, in the future, the cancellation of the transaction may be necessary when the child's parent(s) declares that he/she has not approved this payment.

1.15 *"...data regarding location details may be used with a separate approval of the"User"."*

This is compliant with Article of 51(6) of the Electronic Communication Law[76], without prejudice to the relevant legislative provisions regarding the transfer of personal data abroad, traffic and location data can only be transferred abroad when explicit consent of data subject is obtained.

1.16 *"In case the message is unencrypted during email communications, the"User"is responsible from the security of the emails to be sent, as the security of the message cannot be guaranteed."*

There are questions that need to be addressed in this context such as: How will the necessities be fulfilled for users (including children and adults)? Why is there a need for encryption? Which encryption algorithm should be used to encrypt mails? The answers to these questions are not made clear for users, which is against the transparency principle.

1.17 *"The"User"s accept and undertake that the"User"has got the required permissions from the owners of the personal right related to the personal informations in the"Content"s and informations related to private life of persons and/or in terms of"Content"s and that the"User"shall not use within the scope of"Gamecell"the"Content"s and informations protected by any sort of intellectual and industrial property right including other ownership rights which violates any others personal right, right of privacy or right of publication without taking prior*

75 'Processing of Personal Data General Principles'.

76 See 'ELEKTRONİK HABERLEŞME KANUNU 5809' (2008) <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5809.pdf> accessed 26 February 2020.

written consent from the owner or holder of these rights. Otherwise, the "User" accepts and undertakes to be held liable from any criminal and legal responsibility which will arise."

> What are the situations in which a user using the Gamecell platform should share personal data belonging to someone else and information about and content about someone else's private life? In the first place, these should be explained clearly and then the rule of acting in accordance with this law should be reminded.

1.18 "*The "User" who becomes a member of "Gamecell" by approving this "Agreement", clearly approves the commercial electronic messages to be sent to himself/herself and to the saving, process, transfer and sharing under the "Law on the Protection of Personal Data" of the personal data transmitted for the registration to "Gamecell".*"

> This term contradicts with both e-commerce and data protection legislations. Pursuant to Article 7(f)(5) (Obtaining Approval) of the Regulation on Commercial Communication and Commercial Electronic Messages, if an approval that is included in a contract such as subscription, sales and membership contract, at the end of the contract, before the positive declaration or before the signing takes place, such an approval should be taken under the commercial electronic message title by giving the other party the option to reject, written in at least twelve font size. Accordingly, it can be concluded that this term included in the Gamecell membership agreement is in violation of Article 7(f)(5). In addition, while the personal data processing carried out for the purpose of establishing or executing a contract does not require explicit consent pursuant to Article 5(f)(2) of the KVKK, under Article 5 of the Regulation on Commercial Communication and Commercial Electronic Messages sending a commercial electronic message requires approval.[77] For this reason, it is not lawful to create a presumption the user with a provision to be included in the membership contract, deeming the user to have accepted a matter that requires an explicit consent. The Gamecell membership contract is also a distant contract and is set up by clicking. For this reason, the matters requiring sending of commercial electronic messages and other explicit consent, should be placed under the membership contract in separate boxes, and these boxes should be empty and not presented to the will of the user as pre-checked.

1.20: "*The "User" may transmit any of his/her requests regarding the application of the "Law on the Protection of Personal Data" and any of his questions regarding his/her personal datas in written form (notarized, registered letter with return receipt) to Uniq İstanbul, Huzur Mah. Maslak Ayazağa Cad. No: 4/B – 601 Kat: 5 34396 Sarıyer/İstanbul which is the headquarters address of "İnteltek".*"

> According to Article 5(f)(1) of the Communiqué on the Procedures and Principles of Application to the Data Controller which regulates the application procedure for the data controller; "The data subject concerned uses his/her requests within the scope

77 'TİCARİ İLETİŞİM VE TİCARİ ELEKTRONİK İLETİLER HAKKINDA YÖNETMELİK' (*Resmî Gazete Sayısı: 29417*, 2015) <https://www.mevzuat.gov.tr/Metin.Aspx?MevzuatKod=7.5.20914&MevzuatIliski=0> accessed 26 February 2020.

of his rights specified in Article 11 of the Law, in writing or by registered electronic mail (KEP) address, secure electronic signature, mobile signature or the e-mail address previously reported to the data officer by the person concerned and registered in the system of the data officer. It transmits to the data controller by means of a software or application developed for the purpose of application". Accordingly, since the e-mail addresses of users who are members of Gamecell are already registered in Gamcell, the applications that are sent in scope of Article 13 of the KVKK using this email address will need to be accepted and replied by Gamecell. It is also a requirement of the principle that the data controller should be "accountable" not to direct the user to more severe, difficult and time-consuming methods in order to use the rights on his personal data, especially in distant contracts that are established very easily and quickly by clicking.

16.4. *"Any legal relation or commitment between the"User"and other real person or institution, arising from the"Content"and services presented on the"Gamecell", is not guaranteed and the interpretation of this Agreement in this manner is rejected by"İnteltek"."İnteltek"makes every effort to provide systematic security of any kind of information that the"User"holds in relation to"Gamecell". However, this can not be interpreted under any circumstances as the unlimited liability of"İnteltek"from the"User"accounts, the security of the account access information and other"Gamecell""Content"."*

Under Article 12 (Obligations concerning data security) of the KVKK, it is provided that the controllers are obliged to take all necessary technical and administrative measures to provide a sufficient level of security in order to: a) prevent unlawful processing of personal data, b) prevent unlawful access to personal data, c) ensure the retention of personal data.

21.1 "*The"User"shall not assign any of his rights and authorities that he directly or indirectly holds on the services or"Contents"provided on"Gamecell"or within the scope of this Agreement to any third parties without taking written consent of"İnteltek"."*

Children should be taken into account and this term should be changed and in fact re-written.

22. Applicable Law

22.1. *"Any disputes arising out of the implementation of this Agreement shall be resolved by Istanbul Caglayan Courts and Execution Offices and the books and records of"İnteltek"shall be deemed as exclusive evidence. The laws of Turkish Republic shall be applied for the settlement of disputes arising out of the application of this Agreement, except for the conflict of laws rules."*

As explained above, pursuant to Article 3 (Territorial scope) of the GDPR, the Regulation applies to the processing of personal data in the context of the activities of

an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not. Therefore, it can be concluded that Gamecell is subject to the principles and rules set out under the GDPR since its products and services are accessible in Europe.

22.2 "*In case"İnteltek"has not been able to provide a solution or the offered solution does not found suitable for"Gamecell"then the"User"will reserve its right to appeal to the consumer court or to the consumer arbitration committee located at his residential area or at the place where the purchase is realized by considering the product amount."*

The above comments are also relevant here.

Concluding Remarks

Overall, in light of the above analysis, although privacy policies, cookie policies are usually found to be confusing, in this case, Gamecell's user agreement and policies are not even close to be inconspicuous and difficult to understand. In fact, the choice of words, phrasing and the overall content of certain provisions are shamelessly clear enough enabling one to see straight away that there are unacceptable mistakes and intolerable practices in the context of data protection and privacy regimes. As a result, following our analysis and review of Gamecell's User Agreement and its Cookie and Privacy Policies, we conclude that Gamecell should urgently take steps to ensure that the necessary changes are reflected into their policies and are implemented according to the rules and regulations in their practice. Below we will explain the recent developments and trends in the world which can be helpful not only to Gamecell, but to all online platforms in practice for the purposes of protecting children's rights and ensuring that they take the necessary steps and therefore can demonstrate their compliance with the data protection and privacy laws. A mistake that can be observed in its practices is the misunderstanding or lack of knowledge of Article 3 of the GDPR. Most of the above chosen terms and statements undermine data protection law's aim to protect fairness and fundamental rights when personal data are processed. Again, in many of the above mentioned statement, the goal of protecting people against abuse of information asymmetry[78] seems to be overlooked.[79] It is also important to note that privacy policies and terms of service are generally drafted from the service provider's perspective. An ideal practice would be taking into account the users' perspectives and be more inclusive in the sense that providing explanations for both children and adults, but also more discriminatory in the

78 See De Hert and Gutwirth, "Privacy, data protection and law enforcement: Opacity of the individual and transparency of power" in Claes, Duff and Gutwirth (Eds.), Privacy and the Criminal Law (Intersentia, 2006); Zuiderveen Borgesius, Improving Privacy Protection in the area of Behavioural Targeting (Kluwer Law International, 2015), Ch. 4, section 4, and Ch. 7. Cited in https://www.ivir.nl/publicaties/download/CMLR_2017.pdf

79 See also https://www.isfe.eu/wp-content/uploads/2018/11/ISFE-Response-ICO-Guidance-on-Children-and-the-GDPR-2018.pdf

sense that the language used can be different for children. Also, policies and terms of services are often focused on addressing the legal risks and obligations of the provider, written "*in legalistic language and forcing users to accept terms to access the service*".[80] Such a practice ultimately leaves children with little choice but to provide the information and give consent as asked; therefore, this approach calls for careful consideration and creates concerns as to it amounts to 'forced consent' and thus fails to be valid consent.[81] Additional care is required under the GDPR for the form in which the information should be given to children, namely in "*such a clear and plain language that the child can easily understand.*"[82] It is also important to take the Interactive Software Federation of Europe's (ISFE) concerns into consideration, highlighting that the ICO's Guidelines recommendation of online gaming companies' provision of different versions of the privacy notice when "*the target audience covers a wide age range, even in cases where parental consent is triggered as the lawful basis*" can be problematic in practice and such a recommendation creates confusion on their parts under Article 8 of the GDPR.[83] Therefore, instead of trying to comply with the relevant laws and regulations by adopting a literal interpretation approach of the available provisions, the essence lying at the heart of the data protection regime should be understood. This is where the notion of fairness becomes highly relevant to comprehend. Therefore, in whatever decision the online gaming company takes, the question of whether the decision will involve or has the possibility to involve children should be asked and then the activity or the decision should be considered from looking at the lenses of the notion of 'fairness'. Furthermore, such an approach would enhance the position of children in a society and allow them to exercise their rights and freedoms in this context while such efforts would reduce the risk of children being affected by the advertising industry negatively. It is noteworthy to recall that allowing children to exercise their right to privacy and data protection and ensuring that the data processing activities of a company do not disrespect children's rights as individuals and that children are not discriminated in the sense that they are put in a secondary position in the context of 'consent', will also make sure that such practices are compliant with Article 36 of the Convention, which calls for children

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81 For further considerations on children and privacy, see: United Nations Children's Fund, 'Privacy, Protection of Personal Information and Reputation', Discussion Paper, UNICEF, Geneva, March 2017, available at 'PRIVACY, PROTECTION OF PERSONAL INFORMATION AND REPUTATION'.cited in Gorostiaga and others (n 42). Page 23

82 Recital 40 GDPR. For consumer law, such special requirements regarding the form in which information is communicated to children are most likely to flow from Art. 3(3) of the Unfair Commercial Practices Directive, and here more specifically the provisions about vulnerable consumers. Cited in Natali Helberger, Frederik Zuiderveen Borgesius and Agustin Reyna, 'The Perfect Match? A Closer Look at the Relationship Between EU Consumer Law and Data Protection Law' (2017) 54 Common Market Law Review <https://www.ivir.nl/publicaties/download/CMLR_2017.pdf> accessed 2 March 2020. Page 9

83 "*The Guidance also recommends providing different versions of the privacy notice if the target audience covers a wide age range, even in cases where parental consent is triggered as the lawful basis. It is our understanding however that in cases where Article 8 applies the privacy notice must be directed to the holder of parental responsibility. It should be clarified that this suggestion should be considered as good practice that will help raise the level of protection to children and that it is not mandatory under the GDPR.*" 'ISFE Response to the ICO Public Consultation On Children and the GDPR' (n 30). Page 5

to be protected from all types of exploitation, including commercial exploitation.[84] Overall, in light of the above discussions, it can be concluded that Gamecell has gaps in their practices and definitely failures in implementation of the rules and laws under the applicable law for accountability purposes.

III. Children Privacy on the Ground: Responsibilities of Online Platforms

Children deserve specific protection when online gaming companies use their personal data for marketing purposes or creating personality or user profiles. In addition to drawing attention to the responsibilities of online platforms under the legislation, this Section provides guidance and suggests adoption of some efficient and children focused applications in practice. The UNCRC[85] recognises that children need special safeguards and care in all aspects of their life and requires that these should be guaranteed by appropriate legal protections. Accordingly, it should always be kept in mind that whatever decision online gaming companies are taking, if the processing of personal data involves children, then the primary and ultimate priority should be safeguard the best interests of the children. Online gaming companies should respect children's rights and freedoms and take steps to provide special safeguards by taking their needs and their vulnerability into account. The examples given in this Section aim to lead the way for online gaming companies, helping them in their efforts in compliance with the data protection laws in general independent of any specific applicable law. The below given examples provide a general understanding of the recent developments and good practices which should be internalised in any action or decision taken by the online gaming companies. By doing so, we aim to underscore the importance of the universality of data protection and protection of children, which should not be limited to any specific requirement prescribed by a particular law or regulation and therefore for which the standards should not depend on the country in which the online gaming company operates. If the essence lying at the heart of the approaches taken in the below given sub-sections are internalised then compliance with the relevant rules and regulations in any country would not only be easier, but would also contribute to the enhancement of children's rights globally. To provide this approach, this Section first starts with explaining the recently published Age Appropriate Design Code of Practice, then moves to PEGI and YouTube's current practices with regards to treatment of children's data and concludes by wrapping up the lessons learned for Gamecell for implementing the good practices which can set an example for them.

84 Gorostiaga and others (n 42). Page 10

85 'OHCHR | Convention on the Rights of the Child' <https://ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> accessed 2 March 2020.

The ICO's Age Appropriate Design: A Code of Practice for Online Services

In the UK, recently, the ICO took a concrete step towards protecting children online and published the Age Appropriate Design Code[86], a code of practice to protect children's privacy online and provided 15 standards that online services including online game platforms should meet in order to ensure that children's privacy is protected. These standards are expected of those responsible for designing, developing or providing online services such as online games, social media platforms, connected toys, and apps. In the context of online games, according to this Code, digital services are automatically required to provide children with a 'built-in' baseline of data protection when they download a game.[87] In other words, privacy settings of an online game platform should be set to high by default. Also, under this Code, the nudge techniques used by online game platforms should not be utilized to encourage children to weaken their settings.

In addition to the abovementioned requirements, with regards to location data settings, the Code provides that the data showing where a child is should not be collected and therefore the location settings should automatically be turned off by default without requiring a child to take a positive action, make an effort to switch off the location settings. Also, in line with the core principle of data minimisation provided under Article 5(1)(c) of the GDPR and the Data Protection Act ("DPA") 2018, data collection and sharing should be minimised, profiling which enables children to receive targeted content is required to be switched off by default. These rules are set for the ultimate purpose of safeguarding the best interests of the child which should be a primary and ultimate consideration in taking any step, for example, designing or developing an online game platform. In this context, the Code provides guidance on data protection safeguards that is directly applicable in practice, aiming to make sure that online services, in our context, online games are appropriate for children's usage. The 15 standards[88] are listed below and should be interpreted in the context of online gaming services for the purposes of this article and lead the way in their practices.

1 – "**Best interests of the child**[89]**:** As mentioned before, the Code values the best interests of the child and puts it as a primary consideration when designing and developing online services that are likely to be accessed by a child."

86 See Elizabeth Denham, 'Age Appropriate Design: A Code of Practice for Online Services | ICO' (*ICO*) <https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/age-appropriate-design-a-code-of-practice-for-online-services/> accessed 2 March 2020.

87 See ICO, 'ICO Publishes Code of Practice to Protect Children's Privacy Online | ICO' (2020) <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2020/01/ico-publishes-code-of-practice-to-protect-children-s-privacy-online/> accessed 2 March 2020.

88 See ICO, 'Code Standards | ICO' <https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/age-appropriate-design-a-code-of-practice-for-online-services/code-standards/> accessed 2 March 2020.

89 See also recommendations in the context of COPPA where Livingstone suggests that a similar approach to be taken in to US. Eleonora Mazzoli and Sonia Livingstone, 'Problematic Data Practices and Children's Online Privacy: Reviewing the COPPA Rule | Media@LSE' (February 2020) <https://blogs.lse.ac.uk/medialse/2020/02/04/problematic-data-practices-and-childrens-online-privacy-reviewing-the-coppa-rule/> accessed 2 March 2020.

2 - "**Data protection impact assessments ("DPIA"):** The Code brings this standard and urges online service providers to assess and mitigate risks resulting from data processing activities, which may affect children's rights and freedoms and put them at risk. This standard further underscores the importance of taking different ages of children into account as well as considering capacities, development needs in order to ensure that the DPIA builds in compliance with this Code. It is noteworthy to state that this standard is also highly relevant for the purposes of Article 35 of the GDPR."

3 – "**Age appropriate application:** This standard underlines taking a risk-based approach to recognise users' age and ensuring that the standards set out under this Code are applied to child users effectively. This standard further elaborates by giving two options. The first one is establishing users' age with a level of certainty that is appropriate to the risks to the rights and freedoms of children that arising from online services' data processing activities. Alternatively, the second option provided under this standard is to apply all the standards provided in this Code to all the users."

4 – "**Transparency:** This standard ensures that the community standards, any published terms, policies and the privacy information online services give to users are concise, prominent and unambiguously written with a clear language that is appropriate to the age of the child. Furthermore, this standard urges online services to provide additional specific 'bite-sized' explanations about how users' personal data is used when that use is activated."

5 – "**Detrimental use of data:** Aligned with the first standard, this standard urges online services not to use children's personal data in ways that have been shown to be detrimental to their wellbeing, or that go against industry codes of practice, other regulatory provisions or Government advice."

6 – "**Policies and community standards:** This standard aims to ensure that online service companies uphold their own published terms, policies and community standards such as privacy and content policies."

7 – "**Default settings:** The Code ensures that the standard for settings is 'high privacy' by default except in very limited circumstances where the best interests of the child is made priority and the company is required to demonstrate a compelling reason for a different default setting."

8 – "**Data minimisation:** This standard basically ensures that data collection and retainment is limited to the minimum amount of personal data the company needs to provide the elements of its service in which a child is actively and knowingly engaged. This standard further provides that children separate should be given different choices over which elements they wish to activate."

9 – "**Data sharing:** This standard requires companies not to disclose children's data unless there is a compelling reason that can be demonstrated in light of the best interests of the child."

10 – "**Geolocation:** Unless there is a compelling reason that can be demonstrated, taking into account the first standard, namely, the best interests of the child, the Code urges companies to switch geolocation options off by default. In addition, this standard requires companies to provide a clear sign for children when location tracking is active and adds that options that make children's visible to others must default back to 'off' at the end of each particular session."

11 – "**Parental controls:** This standard aims to ensure that children are given age appropriate information about the parental controls the company provides. Similarly, it requires online services to show an obvious sign to children when they are monitored, if parents or carers are provided with the option to monitor their child's online activity or track their location. This standard is important not only for children's protection, but also for the relationship that is built on trust and transparency between the parents and their children."

12 – "**Profiling:** Unless there is a compelling reason that can be demonstrated, taking into account the first standard, namely, the best interests of the child, this standard urges online services to switch options that use profiling off by default. Furthermore, this standard aims to ensure that online services allow profiling only if the appropriate measures are in place in order to protect children from any harmful effects such as being fed content that is detrimental to their health or wellbeing."

13 – "**Nudge techniques:** This standard requires online services not to use nudge techniques to lead or in any way encourage children to turn off their privacy protections, to provide unnecessary personal data or weaken their protection in any possible way."

14 – "**Connected toys and devices:** If an online service provides a connected toy or device, this standard urges the company to ensure it includes effective tools and takes the necessary measures to enable conformance to this Code."

15 – "**Online tools:** The last standard of the Code asks online services to provide prominent and accessible tools in order to help children exercise their right to data protection and report concerns."

One of the main problems that is aimed to be addressed in this Code is the fact that the Internet was not built for children.[90] Similar to the laws that exist in the offline environments, there should be laws and regulations that set rules to ensure

90 See ICO, 'ICO Publishes Code of Practice to Protect Children's Privacy Online | ICO' (n 87).

that our children are protected online environments as well. Internalising the above mentioned standards are crucial for GDPR compliance reasons as well. This is because age appropriate design and protecting children from companies' exploitation of their data is strongly linked with the notion of fairness provided under Article 5(1)(a) of the GDPR. This Code provides practical measures and safeguards to ensure processing under the GDPR can be considered 'fair' in the context of online risks to children, and will help companies comply with the following provisions: Article 5(1)(a): the fairness, lawfulness and transparency principle; Article 5(1)(b): the purpose limitation principle; Article 5(1)(c): the data minimisation principle; Article 5(1)(e): the storage limitation principle; Article 5(2): the accountability principle; Article 6: lawfulness of processing; Articles 12, 13 and 14: the right to be informed; Articles 15 to 20: the rights of data subjects; Article 22: profiling and automated decision-making; Article 25: data protection by design and by default; and Article 35: DPIAs. Although this Code was not an obligation under the GDPR, it is a fact that it provided solid standards that would help companies in their compliance with the relevant rules touching children's lives under the GDPR. The approach taken in this Code and the priority of 'best interests of the child' should set an example not only for the online gaming companies, but also for the DPAs globally.

PEGI

For online gaming companies, another recommendation can be to truly understand and internalise PEGI, which can be a great example that is recognised throughout Europe and is used with the support of the European Commission; PEGI is considered as a model of European harmonisation in the field of the protection of children.[91] It uses age ratings which can be described as the systems used to make sure that entertainment content, including games or mobile apps, is clearly labelled with a minimum age recommendation based on the content they have. This system helps users and parents to make informed decisions by providing guidance to them particularly in order to help them decide whether or not to buy a particular product for a child.[92] PEGI also values parental control tools that are beneficial for all members of a family since they enable parents to safeguard their children's privacy, their protection and online safety according to various parameters. PEGI allows parents to select the games that children can play (based on the PEGI age ratings), limit and monitor their online spending while allowing parents to control access to internet browsing, chat and the amount of time their children spend playing games.[93] Although most games are generally suitable for individuals of all ages, some games are only suitable for older children, some for adults and others are for younger children.

91 'Pegi Age Ratings | Gaming Nerds' <https://www.gamingnerds.co.uk/pegi-age-ratings> accessed 2 March 2020.

92 See 'PEGI Age Ratings | Pegi Public Site' <https://pegi.info/page/pegi-age-ratings> accessed 2 March 2020.

93 See 'Parental Control Tools | Pegi Public Site' <https://pegi.info/index.php/parental-controls> accessed 2 March 2020.

The PEGI rating addresses this difference of suitability for different ages and considers the age suitability of a game. It is noteworthy to mention that PEGI's age suitability does not consider the level of difficulty in terms of 'suitability' of a game for a specific age. For example, a PEGI 3 game can be considerably difficult to master for young children, however it would not contain any inappropriate content. On the other hand, PEGI 18 games can be very easy to play, however, they may have inappropriate elements for younger children.

It is noteworthy to state that "Güvenli Oyna"[94] draws attention to the PEGI labels on its website by putting the mini versions of PEGI rates on both sides of the page. These labels which show PEGI rates do not disappear when one navigates on the website. It is clear that such rating is expected from online game platforms to be used as a minimum standard. Using PEGI labels would not only help parents, protect children but also would help companies to demonstrate their efforts for compliance with Article 5(1)(a) and therefore contributing to their obligations in terms of accountability. PEGI is regarded as a model of European harmonisation in the field of child protection.[95] Adopting such an approach in every country the company operates would also contribute to the idea that protecting children in the online ecosystem is a global concern. It is important to note that failure to comply with rules set out in the Code of Conduct can give rise to sanctions.[96] The above given content descriptors are of use for labels are black and white icons that are illustrations in a way depicting the content of the game with black and white figures.[97] These content descriptors require the game provider to check the set age rules for the content in question and therefore in a way puts responsibility on it with regards to the target audience. Although there was disagreement when deciding the symbols that are used in the content descriptors[98], in the end the current figures and symbols seem to appeal to children residing in different countries. Therefore, it is suggested for companies to stick to recognised and acceptable symbols and figures as in PEGI, which would also promote and support a harmonized language globally.

YouTube and YouTube Kids Before and After FTC Decision

In November 2019, YouTube announced its plan to have creators label any videos of theirs that may appeal to children. As from January 2020, if a content creator marks its content to be targeted to children, then it should act accordingly in order to comply

94 'TİCARİ İLETİŞİM VE TİCARİ ELEKTRONİK İLETİLER HAKKINDA YÖNETMELİK' (n 77).

95 Children in the Online World: Risk, Regulation, Rights By Elisabeth Staksrud page 102, 103

96 See 'The PEGI Code of Conduct | Pegi Public Site' <https://pegi.info/pegi-code-of-conduct> accessed 26 February 2020.

97 'What Do the Labels Mean? | Pegi Public Site' <https://pegi.info/what-do-the-labels-mean> accessed 26 February 2020.

98 'Children in the Online World: Risk, Regulation, Rights - Elisabeth Staksrud - Google Books' <https://books.google.co.uk/books?id=TWs3DAAAQBAJ&pg=PT114&lpg=PT114&dq=PEGI+considered+as+a+model+of+European+harmonisation+in+the+field+of+the+protection+of+children&source=bl&ots=B6fqeDE_JM&sig=ACfU3U0LpZUMYL-0palrr5pLKgOGtFuKMPQ&hl=en&sa=X&ved=2ahUKEwjg> accessed 26 February 2020. Page 102

with the rules and laws applicable in the data protection regime. Thus, YouTube made changes in their data collection and usage activities involving children. To elaborate, the recent changes involve YouTube's data processing activities relating to children's content on YouTube.com. These changes address concerns raised by the US Federal Trade Commission (FTC) regarding the company's compliance under the COPPA. As a result of these concerns, the changes made by YouTube requires a creator to inform YouTube if the content is made for children. Furthermore, YouTube announced that it will use machine learning which will help to identify videos that clearly target children or young audiences.[99] Following the FTC's decision in 2019, it was decided that all creators should be required to designate their content as made for kids or not made for kids in YouTube Studio.[100] Accordingly, as a rule, data from anyone watching the content which is designated as made for children will be treated as coming from a child, regardless of the age of the user.[101] On its recent post on YouTube official blog dated January 6, 2020, it was underscored that a video is made for kids if it is intended for kids, taking into consideration a variety of factors. These factors include the subject matter of the video, whether the video has an emphasis on kids characters, themes, toys or games, and more."[102] Also, it was announced that Another important change concerns personalised ads, YouTube announced that its practices involving delivering ads to children will be compliant with the rules under the COPPA. This means that it will no longer serve personalised ads (ads that are targeted to users based on their past usage of Google products and services) to child audiences. However, it also added that YouTube will continue to serve non-personalised ads (ads that are shown based on context rather than on user data) on content that is made for kids. Moreover, some features such as comments will no longer be available on the content that is made for children. Similarly, the ability to comment will no longer be available on the watch page and likes/dislikes as well as subscriptions on this content will not appear on public lists. Overall, to be able to protect children , viewers will have minimum engagement options with 'made for kids' content on YouTube.com.[103]

99 See 'Upcoming Changes to Children's Content on YouTube.Com - YouTube Help' <https://support.google.com/youtube/answer/9383587?hl=en-GB> accessed 26 February 2020.

100 See 'Official YouTube Blog: Better Protecting Kids' Privacy on YouTube' <https://youtube.googleblog.com/2020/01/better-protecting-kids-privacy-on-YouTube.html> accessed 26 February 2020.

101 See 'Google and YouTube Will Pay Record $170 Million for Alleged Violations of Children's Privacy Law | Federal Trade Commission' (n 61). and 'YouTube's COPPA Changes Begin Today, Possibly Affecting Creator Revenue - Search Engine Journal' <https://www.searchenginejournal.com/youtubes-coppa-changes-begin-today-possibly-affecting-creator-revenue/342433/#close> accessed 26 February 2020.

102 'Official YouTube Blog: Better Protecting Kids' Privacy on YouTube' (n 100).; See also 'YouTube Channel Owners: Is Your Content Directed to Children? | Page 27 | Federal Trade Commission' <https://www.ftc.gov/news-events/blogs/business-blog/2019/11/youtube-channel-owners-your-content-directed-children?page=26> accessed 26 February 2020.

103 'Upcoming Changes to Kids Content on YouTube.Com - YouTube Help' <https://support.google.com/youtube/answer/9383587?hl=en> accessed 26 February 2020.; See also 'YouTube Channel Owners: Is Your Content Directed to Children? | Federal Trade Commission' <https://www.ftc.gov/news-events/blogs/business-blog/2019/11/youtube-channel-owners-your-content-directed-children> accessed 26 February 2020.

Lessons Learned for Gamecell

The ICO's suggestions as to the legal basis to process children's data can be helpful for online gaming companies including Gamecell. Firstly, if the company is going to rely on consent to process children's data, then it should be as transparent and as clear as possible to ensure that children can comprehend what they are consenting to.[104] Also, as discussed above in Section I, companies should make sure that they do not exploit any imbalance of power in the relationship between us. In Gamecell's case, it is clear that Gamecell bundles consent in certain provisions and in a way that leaves no choice to data subjects but to agree or not to use its services. This is an example for abuse of the imbalance of powers which is a self-destruction method for the obtained consent, deeming it invalid. Therefore, it can be concluded that the consent obtained in the above mentioned provisions in Section II can be seen as invalid for the reasons explained in the above Sections. Secondly, if a company chooses to rely on 'necessary for the performance of a contract'; the company should carefully consider the children's competence to comprehend what they are agreeing to, and to enter into a contract and create legal relations. Lastly, if the company opts to rely upon 'legitimate interests', it should take responsibility for identifying the risks and consequences of the processing, and put age appropriate safeguards in place. As stated before, unfortunately, the processing of children's personal data carried out by Gamecell does not meet the requirements set out under the GDPR, nor the check list given by the ICO.[105] It is a no brainer to say that the standards established in the ICO's Age Appropriate Design Code deserve careful consideration. Especially, for transparency and fairness purposes, as discussed above, there is a need to use child friendly language[106] also for compliance with Article 12(1) and Article 5(1)(a) and therefore Article 5(2) purposes. Gamecell lacks this approach and the approach taken in the above summarised recent developments cannot be seen in their terms and policies. With regard to Privacy Policies, it is crucial that the above explained standards of the Age Appropriate Code are taken into account and privacy notices are clear, and unlike Gamecell's policies, the privacy notices should be presented in plain, age-appropriate language. It is also crucial that the companies use child friendly ways of presenting privacy information. Some examples can be diagrams, cartoons, graphics, icons and symbols as used in PEGI examples.[107] Using clear language or icons, symbols etc. would not only help companies to comply with the relevant rules set out under data protection law for accountability reasons, but also satisfy the expectations derived from the

104 See 'Children | ICO' (n 10).

105 See ibid.

106 See for example 'UN Convention on the Rights of the Child in Child Friendly Language' <https://static.unicef.org/rightsite/files/uncrcchilldfriendlylanguage.pdf> accessed 26 February 2020.

107 Another example can be just in time notices; See also 'ICO Endorses Use of "Just-in-Time" Notices' <https://iapp.org/news/a/ico-endorses-use-of-just-in-time-notices/> accessed 26 February 2020.

absolute need to respect children's freewill and their capacity by recognising them as data subject. This can be done by being transparent and for example explaining why the company requires the personal data that is asked for, and for what purposes this data will be used for, in a way which is reasonably expected for a child to understand. As the ICO notes down, as a matter of good practice, there is a need to make clear the risks inherent in the processing, and how the company intends to prevent them or protect children against them.[108] This explanation should be made in a child friendly way, so that children and their parents comprehend the implications of sharing their personal data.[109] In addition to these, the companies should inform children about their rights[110], again in a clear, plain, and child friendly language. When Gamecell's terms and policies are examined, these efforts seem to be lacking in the wording they used or even for some provisions there were contradicting statements with the above discussed approach. Therefore, it is highly recommended for different stakeholders of the online gaming ecosystem including online gaming companies to employ the reasoning, purposes adopted in PEGI, Age Appropriate Design Code as well as the YouTube's recent changes in its practices to safeguard children and also help parents build trust in the system, in a way, by sharing their burden to make sure that their children and their rights are protected online. The comments provided in Section II should be re-considered in light of the above given examples and recent developments summarised in this Section in order to grasp a better understanding of the needs of children and to be able to keep up with practical trends prioritized to achieve a fair application of the laws and rules for the best interest of the children globally.

Conclusion

Online games and the usage of the Internet are now omnipresent and deeply ingrained in the lives of children. From widespread engagement with the Internet through mobile devices, search engines, laptops social media to interactive TVs, children and parents are now faced with a plethora of new challenges and risks for which they need protection. Currently, there is a gap that exists among the essences lying at the heart of fundamental rights to privacy and data protection, other fundamental rights protected by international instruments concerning children, the legal and practical implications of the rules relating to 'consent' as well as 'fairness'. Lack of practical guidance explaining how to implement the rules under the data protection laws is not an excuse for online gaming companies since the best interests of children is beyond obvious to us all. Although there may be challenges in applying the above mentioned

108 See 'Children | ICO' <https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/children/?q=privacy+noticeshttps%3A%2F%2Fico.org.uk%2Ffor-organisations%2Fguide-to-the-general-data-protection-regulation-gdpr%2Findividual-rights%2Fright-to-be-infor> accessed 26 February 2020.

109 ibid.

110 See also ibid.

rules in general, these challenges and some minor gaps possibly existing due to clarity of the laws and rules should have only be limited to minor details in companies' terms and policies. However, Gamecell's unacceptable practices that can be seen in the statements chosen in Section II are intolerable and by no means acceptable practices. Therefore, this article urges all the stakeholders of the online gaming ecosystem to take the necessary steps for accountability reasons, truly understand the rules set out in the applicable legal framework, and most importantly, remember that the users are individuals whose rights and freedoms are non-negotiable. It is therefore imperative that stakeholders of the online gaming ecosystem to acquire a detailed understanding of the importance of children's online privacy and the challenges that are relevant in today's digital age in order to take necessary measures to protect children and respect their rights. Even though the issues rotating around data protection and privacy have become soaring topics in recent years, it is still obvious that unacceptable practices exist in real life. Finally, it is critical to underscore the importance of "fairness" and remind online gaming companies that it should be central to all your processing of children's personal data.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Modèles économiques de la politique sportive : pour valoriser le sport politiquement, juridiquement et financièrement, faut-il cibler les entités ou les activités ?[1]

Economic models of sports policy : to promote sports politically, legally and financially, should funding be directed towards entities or activities ?

Jacob Kornbeck[2]

Résumé

Pour comparer les modèles économiques de la politique sportive, quelles options permettent au mieux de valoriser le sport politiquement, juridiquement et financièrement ? Dans cette optique, la présente contribution propose une grille analytique basée sur deux options, ciblant les entités sportives ou les activités respectivement. Elle identifiera une approche « traditionnelle » à la politique sportive (ciblant les ONG sportives, souvent pré-qualifiées pour recevoir des financements publics), laquelle elle comparera à une approche « alternative » basée sur des appels à propositions ouvertes, des évaluations inopinées et des évaluations continues, sans distinguer entre les différentes parties prenantes de la société civile. La même trame de lecture analytique sera appliquée d'abord aux questions liées à la reconnaissance du sport, puis à celles qui relèvent de son financement par les pouvoirs publics. L'analyse combinée des deux approches politiques aboutira sur quelques réflexions d'ordre politique, y compris sur le rôle joué par le « droit mou » (soft law).

Mots-clés

Droit européen, Union européenne, droit du sport, financements publics, critères d'attribution, article 165 TFUE, droit mou (soft law), promotion transversale de l'activité physique bienfaisante pour la santé (health-enhancing physical activity) (HEPA)

Abstract

In comparing economic models of sport policy, which options are most apt to further sport politically, legally and financially? Against the backdrop of the question set, an analytical tool will be proposed involving the cross-tabulation of two options, one targeting sporting entitities, the other sporting activities. A 'traditional' sport policy approach will be identified (targeting sports NGOs which may often have been prequalified to receive public funding) and compared with an 'alternative' approach based on open calls for proposals, neutral evaluations and continuous evaluation exercises with no distinction made between different civil society stakeholders. The same analytical framework will be applied, subsequently, to questions linked to the recognition of sport, then to questions pertaining to the funding of sport by public authorities. The combined analysis of these two policy approaches will lead to policy reflections including on the role played by 'soft law'.

Keywords

European law, European Union, Sports law, Public funding, Attribution criteria, Article 165 TFEU, Soft law, Cross-sectoral (health-enhancing physical activity) (HEPA)

1 Version retravaillée d'une intervention invitée faite dans le cadre de la 37ème Université Sportive d'Été (USE) de l'Union nationale des clubs universitaires (UNCU) organisée par le Toulouse Université Club (TUC) à Toulouse, du 10-12 octobre 2019.

2 **Corresponding Author:** Jacob Kornbeck (Policy Officer), European Commission, Brussels, Belgium/(External Lecturer), German Sport University, Cologne, Germany. E-mail: klausjacob.kornbeck@gmail.com

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Extended Summary

When public authorities aim to promote sport, they may decide to direct funding either towards specific entities or rather towards specific activities. This paper will discuss the concepts underpinning these two policy options, as well as some of their implications. The choice is one between the 'traditional' policy style, where public funds follow specific legal entities, and an 'alternative' style where funding is made available contingent upon compliance with a set of policy-related objectives, such as public health, participation, etc. While the 'traditional' approach allows funds to be distributed using simplified, largely discretionary procedures, the 'alternative' policy style requires open, transparent calls for proposals and evidence-based decision-making. In its English Bridge Union ruling, the CJEU held that, for the purpose of VAT exoneration, a sporting activity must present a high degree of physical activity. In ruling thus, the Court had chosen to set aside the opinion of AG Szpunar, who had recommended making exoneration contingent upon recognition of the sports organisations concerned by worldwide sports governing bodies (SGBs) such as the International Olympic Committee (IOC) SportAccord. That the Court chose the 'physical activity' criterion instead, is evocative of an approach closer to the 'alternative' policy option proposed in this paper, while the AG's recommendation was far more in line with the 'traditional' sports policy style, where certain sporting NGOs typically enjoy a privileged, pre-qualitified status, in many cases based on a decades-long legacy. The national legal framework of France is another illustrative example of this regulatory approach, including because it effectively enshrines the monopolistic 'one federation principle', of territorial exclusivity, which SGBs have enounced and with which they expect their national members (SGBs organising their sport within their own country) to comply, including by enforcing it vis-à-vis their members (clubs, athletes). As part of a European Commission antitrust investigation, this principle was recently found incompatible with Art. 101 TFEU. The 'alternative' approach to public funding of sports does not present such compliance challenges, though it requires solid administrative practice. Such practice, in turn, requires standards which can be applied across the board, such as the 2008 EU Pysical Activity Guidelines. This document has formed the basis for an EU soft-law process, aimed at providing Health-Enhancing Physical Activity (HEPA), including, but not limited to, organised, competitive sports, to the entire population. The national sports policies of EU Member States are not always HEPA-based, as illustrated by the national legal framework of Denmark, which provides for the automatic channelling of important amounts of funding, generated mainly by sports lotteries, towards pre-determined heritage NGOs. Other examples of a non-HEPA sports policy style include the organisation of the Olympic Summer Games in Athens (2004) and London (2012), the FIFA World Cup in Germany (2006) or the UEFA Euro in Portugal (2004). These practices have come under criticism for draining public funds, which explains why the

Sport Ministers of the UNESCO Member States (MINEPS V) (Berlin 2013) adopted a number of commitments aimed at limiting the negative effects of the bidding systems organised by international SGBs for awarding the right to host such events. Little evidence has been found, so far, which would suggest that the UNESCO text has had much impact. The fact the IOC recently decided (2017), to simultaneously award the 2024 Summer Games to Paris and the 2028 edition to Los Angeles appears to owe more to the withdrawal of three other candidates from their bids. Yet while explicit HEPA policies may not appear very effective prima facie, implicit HEPA effects can be deduced from recent competition law decisions, such as the General Court's Hamr Sport and Magic Mountain rulings (both state aid). Still, the soft-law approach continues within the EU Council and has produced two follow-up reports of Member States' progress. However, as these reports are based on Member States' self-reporting, the exact effects of the reported measures may be questioned. The 'traditional' versus 'alternative' sports policy style thus remain a useful heuristic tool for analysing national legal frameworks, policies and practices alike. They may also be helpful in informing decisions taken under competition law.

Modèles économiques de la politique sportive : pour valoriser le sport politiquement, juridiquement et financièrement, faut-il cibler les entités ou les activités

I. Introduction

Pour reconnaître et subventionner le sport, vaut-il mieux cibler les entités ou les activités ? Sa valorisation entend-elle répliquer les concepts créés par les entités sportives elles-mêmes, ou bien les autorités publiques devraient-elles plutôt cibler les ressources vers certaines activités répondant à des critères politiques ? Le but de cette intervention est d'examiner les options qui s'offrent aux pouvoirs publics, en commençant par le choix entre des subventions ciblant les structures fédératives/associatives ou les activités respectivement. En examinant la politique sportive « traditionnelle » focalisant sur les palmarès de médailles et les opprtunités d'organiser des événements internationaux, l'analyse mènera vers une considération d'un modèle « alternatif », d'abord au niveau de la reconnaissance du sport, ensuite de son financement.

Il y une question fondamentale à laquelle les autorités publiques désirant soutenir sport ne sauraient échapper : quel sport ? Faut-il soutenir ce que les instances sportives définissent comme sport (sans prendre en compte les préférences de la population) ou plutôt soutenir les activités que les citoyens choisissent ? Faudrait-il même aller plus loin, peut-être, en réservant les ressources du trésor public auxa activités jugées politiquement désirables, par exemple dans le cadre d'un référentiel politique lié à la promotion de la santé ? Faut-il réserver les ressources publiques à des entités nommées nommément, ou plutôt les distribuer dans le cadre d'appels à propositions ouvertes, à travers des évalutions et des classements ?

Dans la doctrine juridique, le sport n'applique qu'une place limitée au sein de certains ouvrages consacrés au droit européen ; une anthologie francophone[1] et une anglophone[2] étant les exceptions qui confirment la règle à côté, bien sûr, d'articles parus de part et d'autre. La conception sur laquelle repose l'analyse menée ici, repose sur un article publié précédemment par le présent auteur[3]. Cette conception ne semble pas, à ce jour avoir été proposée par d'autres auteurs.

II. Reconnaissance

A. Approche « traditionelle »

Les pouvoirs publics doivent tout d'abord décider quoi entendre par « sport ». Le sport doit-il être physique pour bénéficier de leur soutien ? Ce qu'a décidé, le

1 C Miège, *Sport et droit européen* (L'Harmattan 2017), 202-203.

2 S Weatherill, *Principles and Practice in EU Sports Law* (Oxford University Press 2017), 356.

3 J Kornbeck, 'Health-friendly sport policy: an emerging soft law doctrine?' dans R Parrish, B Garcia & J Anderson (dir.) *Research Handbook on EU Sports Law*. (Edward Elgar 2018) 49, 73-75.

26 octobre 2017, la Cour de Justice de l'Union européenne (CJUE) dans son arrêt « English Bridge Union »[4]. Dans cette affaire liée à la directive « TVA » n° 2006/112/CE[5], un tribunal anglais lui avait demandé « les caractéristiques essentielles que doit présenter une activité pour être un "sport" au sens de l'article 132, paragraphe 1, sous m) ». Etant donné le caractère plutôt intellectuel du bridge – un sport dont les pratiquants souhaitaient pourtant voir exempts de TVA leurs droits d'entrée – l'Upper Tribunal (Tax and Chancery Chamber) avait posé la question suivante : La reconnaissance du bridge en duplicate comme sport, aux fins de l'exonération de la TVA, dépendrait-elle d'une « composante physique significative (ou non négligeable) qui soit déterminante dans son enjeu », voire d'une « composante mentale significative » ? La Cour l'a affirmé sans équivoque, tout en décidant de ne pas suivre l'avis d'un de ses avocats généraux (ce qu'en ne fait que dans une minorité des cas). M. Szpunar[6] avait cependant choisi une approche assez différente, en suggérant de laisser dépendre la reconnaissance d'un sport, par les autorités publiques, de sa reconnaissance par le CIO et SportAccord. En d'autres termes, si une discipline avait déjà été reconnue par ces instances privées, elle le serait également mécaniquement par l'Union européenne et ses États membres. Il nous paraît peu surprenant que la Cour ait privilégié une autre approche – malgré la grande facilité offerte par la solution recommandée par M. Szpunar, elle aurait lié le libre arbitre des pouvoirs publics à la simple volonté de deux ONG, ce qui peut paraît problématique dans un État de droit – et pourtant, nous concédons volontiers que l'avocat général avait touché une corde sensible.

En effet, la logique de l'avis « Szpunar » n'est pas très éloignée de la volonté du législateur français qui, depuis 1984, prévoit que

> « Dans chaque discipline sportive et pour une durée déterminée, une seule fédération agréée reçoit délégation du ministre chargé des sports pour organiser les compétitions sportives à l'issue desquelles sont délivrés les titres internationaux, nationaux, régionaux ou départementaux, procéder aux sélections correspondantes et proposer l'inscription sur les listes de sportifs, d'entraîneurs, d'arbitres et de juges de haut niveau, sur la liste des sportifs Espoirs et sur la liste des partenaires d'entraînement. »[7]

Certes, la loi n° 84-610 du 16 juillet 1984 « relative à l'organisation et à la promotion des activités physiques et sportives » ne lie pas l'État français directement aux décisions du CIO et de SportAccord. Or elle le fait peut-être indirectement, de

4 Affaire C-90/16 *English Bridge Union Limited contre Commissioners for Her Majesty's Revenue & Customs* [2017] ECLI:EU:C:2017:814.

5 Directive 2006/112/CE du Conseil du 28 novembre 2006 relative au système commun de taxe sur la valeur ajoutée. OJ L 347, 11.12.2006, p. 1–118.

6 Affaire C-90/16 *English Bridge Union* (n 5), Conclusions AG Szpunar [2017] ECLI:EU:C:2017:464.

7 Article 17, Loi n°84-610 du 16 juillet 1984 relative à l'organisation et à la promotion des activités physiques et sportives (Modifié par Ordonnance n°2000-916 du 19 septembre 2000 - art. 3 (V) JORF 22 septembre 2000 en vigueur le 1er janvier 2002. Abrogé par Ordonnance 2006-596 2006-05-23 art. 7 3° JORF 25 mai 2006 sous réserve art. 8 IV en vigueur le 25 juillet 2007) (https://www.legifrance.gouv.fr).

façon sous-jacente, puisque les ONG qu'elle reconnaît ainsi s'inscrivent dans la pyramide sportive mondiale. Il n'est pas exclu que cette loi soit incompatible avec le droit européen et français de la concurrence, car elle consacre carrément des cartels, expressis verbis, qu'elle dote d'un pouvoir régulatoire délégue : pouvoir qui peut être redoutable dans la pratique.

Nous ne savons que trop peu sur la possible existence de normes comparables dans d'autres pays. Si l'Allemagne et le Royaume-Uni ont toujours préféré des arrangements de fait – qui sans s'exposer comme l'a fait le législateur français, peuvent pourtant avoir les mêmes effets dans la pratique – la juriste allemande Gießelmann-Goetze[8], il y a plus que 30 ans, avait pointé de tels cadres juridiques français, espagnol et italien. Nous pourrons d'ailleurs questionner les motifs du législateur français car des documents parlementaires sont aptes à élucider ses motifs, notamment à travers les délibérations d'une commission du Sénat[9], mais tel n'est pas notre objectif. Pour la présente contribution, il s'agit uniquement de constater l'existence d'une option, pour les pouvoirs publics, afin de reconnaître le sport via des procédures faciles à gérer. L'agrément en dépend, et les subventions de l'agrément, car les « fédérations sportives sont placées sous la tutelle du ministre chargé des sports, à l'exception des fédérations et unions sportives scolaires et universitaires qui sont placées sous la tutelle du ministre chargé de l'éducation nationale » [10].

> « Il convient de rappeler que les fédérations françaises disposent d'un monopole de droit, s'agissant de l'organisation des manifestations sportives, ce monopole leur étant conféré par l'article 17 de la loi du 16 juillet 1984. Les fédérations internationales, pour leur part, disposent généralement de la même façon d'un monopole, même si ce monopole n'est pas de droit. Force est en effet de constater que, en principe, il existe une seule fédération européenne et/ou une seule fédération internationale par discipline, à l'exception de certaines disciplines, telles que la boxe. En fonction des pratiques et du marché en cause, une fédération, nationale ou internationale, peut donc se trouver en position dominante. »[11]

Ce caractère monopolistique ne peut qu'entrer en collision avec le droit et la politique antitrust, ce qu'a récemment illustré le dossier « ISU » de la Commission européenne. Dans sa décision du 8 décembre 2017[12], la Commission a trouvé les clauses de l'ISU (Union internationale de patinage) incompatible avec le droit de

8 G Gießelmann-Goetze, 'Das Ein-Platz-Prinzip', dans MR Will (dir.) *Sport und Recht in Europa* (Europa-Institut Saarbrücken 1987), 15-26.

9 Loi relative à l'organisation et a la promotion des activités physiques et sportives : Loi n° 84-610 du 16 juillet 1984 parue au JO du 17 juillet 1984, http://www.senat.fr/dossier-legislatif/s82830226.html ; Texte n° 226 (1982-1983) de Mme Edwige Avice, Ministre déléguée au temps libre, à la jeunesse et aux sports, déposé au Sénat le 12 avril 1983, http://www.senat.fr/leg/1982-1983/i1982_1983_0226.pdf.

10 Code du sport, Article R131-1.

11 F Berthaud, 'Le droit de la concurrence appliqué au secteur sportif' (2000) 23 LEGICOM 47.

12 Commission Decision C(2017) 8240 final. Case AT.40208 – International Skating Union's Eligibility rules (Only the English text is authentic). http://ec.europa.eu/competition/antitrust/cases/dec_docs/40208/40208_1384_5.pdf

l'UE car aptes à exclure des organisateurs alternatifs d'événements sportifs des compétitions organisées sous l'autorité de l'ISU[13].

Les clauses d'exclusivité territoriale sont omniprésentes dans la normative sportive ; les autorités publiques peuvent décider de les ignorer, de les défendre ou des les intégrer dans la normative du droit ordinaire, comme l'a fait la France. Or l'exclusivité territoriale pose de sérieux problèmes par rapport au droit de la concurrence et à la politique antitrust, pour autant que les cartellistes combinent un rôle normatif avec un commercial ; malheureusement, dans le sport, ce cas de figure est plutôt la règle que l'exception. Si les autorités de la concurrence peuvent en principe accepter que les entités privées édictent des normes, il faut s'efforcer d'éviter les conflits d'intérêt. Créer, appliquer et faire appliquer les règles de son sport, tout en organisant les compétitions en signant des contrats commerciaux avec divers partenaires, cela ne peut que créer des conflits d'intérêt, comme l'a souligné l'avocate générale, en 2008, dans l'affaire « MOTOE »[14]. Citons dans ce contexte la décision « ISU » de la Commmision du 8 décembre 2017[15]. Sans méconnaître l'article 165 TFUE, 1ier alinéa (« tout en tenant compte de ses spécificités, de ses structures fondées sur le volontariat ainsi que de sa fonction sociale et éducative »), la Commission rappelle que la spécificité du sport – nécessairement conditionnelle[16] – est reconnue depuis longtemps, que ce soit dans ses décisions ou encore dans la jurisprudence de la Cour[17], alors que les règlements sportifs entrent encore et toujours dans le champ d'application du droit de l'UE. Si La Commission n'a pas décidé d'imposer d'office des amendes conformément au Règlement 1/2003[18], elle a permis à l'ISU de lui soumettre pour approbation, une version révisée de la règlementation litigieuse, des astreintes étant annoncées en cas de non-respect de consignes. Si le dossier concerne des clauses d'exclusivité territoriale aptes à barrer l'accès au marché contrôlé par l'ISU, l'ISU avait valoir ses mécanismes de solidarité, étant « une fédération sportive internationale dont l'action, à côté de son implication dans les activités commerciales, promeut également le sport du patinage de vitesse au niveau mondial, y compris en partageant une partie de ses revenus au profit du développement du sport »[19] : belle ambition, mais qui n'est pas soutenue par des preuves. La défense invoquée demeure donc théorique, voire hypothétique et la

13 J Kornbeck, 'Retour sur le dossier ISU' (2018) 128 LOJS 6; J Kornbeck, 'Un monopole peut en cacher un autre' (2018) 124 LOJS 4; J Kornbeck, 'Clauses d'exclusivité et droit antitrust' (2019) 139 LOJS 6; J Kornbeck, 'Specificity, Monopoly and Solidarity in the European Commission's ISU decision' (2019) 10:2 JECLAP 71.

14 Affaire C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) contre Elliniko Dimosio*, Conclusions AG Kokott [2008] ECLI:EU:C:2008:376, §§ 97-99.

15 Commission Decision C(2017) 8240 final (n 13).

16 Weatherill, *Principles and Practice* (2017) (n 3), 356.

17 Commission Decision C(2017) 8240 final (n 13), § 24.

18 Règlement (CE) n° 1/2003 du Conseil du 16 décembre 2002 relatif à la mise en œuvre des règles de concurrence prévues aux articles 81 et 82 du traité (Texte présentant de l'intérêt pour l'EEE), JO L 1, 04/01/2003, pp. 1-25.

19 Commission Decision C(2017) 8240 final (n 13), § 348.

décision de la Commission affirme deux principes : primo, l'examen au cas par cas (par opposition à une exemption d'office basée sur la seule entité légale, s'appuyant plutôt sur une analyse empirique des réalités commerciales) ; secundo, le principe que la spécificité est nécessairement conditionnelle[20].

B. Approche « alternative »

L'approche à la reconnaissance (et donc indirectement aussi au subventionnement) du sport que nous venons d'identifier qui mérite bien d'être appelée « traditionnelle ». Répandue dans beaucoup de systèmes politiques (sinon la plupart), elle consiste à réserver un statut « privilégié » à certaines ONG sportives, statut leur garantissant l'accès aux ressources financières, aux services en nature (à travers l'utilisation économique voire même gratuite des installations sportives dont l'existence a été rendue possible grâce au trésor public) et parfois aussi à d'autres facilités. Cette approche implique souvent une absence, voire un minimum d'exigences formelles, en comparaison avec des appels ouverts : modèle « concours », comme procédures d'attribution utilisées généralement, par les pouvoirs publics afin de garantir à toutes les entités de la société civile un accès égal et équitable aux ressources publiques. L'approche « alternative », bien moins répandue, consiste par contre à cibler les activités plutôt que les entités : ainsi, aucune entité ne jouit d'office d'un statut « privilégié », et les décisions prises en matière de financement doivent être basées sur des données objectives, inopinées et, de préférence, chiffrées. Si l'approche « traditionnelle » a le mérite d'assurer, aux responsables politiques, l'accès à des partenariats intéressants avec des ONG dont le pouvoir sportif, culturel et commercial se traduit régulièrement en pouvoir quasi-politique, l'approche « alternative », par contre, se distingue par son caractère objectif (« evidence-based »), citoyen et fiscalement responsable. L'adoption de l'approche « alternative » n'exclut aucunement que des ONG actuellement reconnues et « privilégiées » postulent pour obtenir des subventions publiques. Or, contrairement à l'approche « traditionnelle », sous un régime « alternatif » tous les demandeurs sont égaux ; les demandes seront évaluées sur base de leurs mérites matérielles et sans prise en compte du statut des demandeurs. Les autorités octroyant les subventions sont tenues à respecter les critères publiés dans l'appel en question, critères suspectibles de changer régulièrement afin de correspondre au consensus politique en pleine évolution. Un exemple d'une telle politique serait celui des financements européens, dans le cadre du programme Erasmus+, dans le cadre duquel l'éligibilité des ONG ne dépend pas d'une reconnaissance préalable comme « sportive »[21] (*infra*, § 3.2).

Or un exemple encore plus instructif provient du mouvement sportif lui-même et concerne le principe « une fédération par pays » (*supra*, § 2.1). Si l'ISU a connu

20 S Weatherill, *Principles and Practice* (2017) (n 3), 356.

21 Erasmus+ Programme Guide. Version 2 [2017] http://ec.europa.eu/programmes/erasmus-plus/sites/erasmusplus/files/files/resources/erasmus-plus-programme-guide_en.pdf ; cf. Kornbeck 'Health-friendly sport policy' (2018) (n 4).

des difficultés en lien avec son application intransigeante du principe, la Fédération Internationale de Natation (FINA) a, par contre, donné un exemple remarquable de courage avec sa décision du 15 janvier 2019. Ce jour-là, la FINA (certes sous l'impression menaçante d'un procès antitrust en Californie) a annoncé qu'elle permettrait désormais aux nageurs affiliés à ses membres (les fédérations nationales et les clubs qui leur sont affiliés) de participer aux événements organisés par des organisateurs non affiliés à la FINA, sans risque de poursuites. Plus aucun athlète ne serait disqualifié pour les JO ou les championnats du monde de la FINA pour motif d'avoir assisté à des compétitions étrangères à la famille FINA[22]. La FINA a donc dépénalisé justement le genre de comportement que l'ISU s'obstinait à pénaliser, même avec des exclusions à vie. L'observateur non averti pourrait présumer que les questions de reconnaissance internes aux fédérations ne concernent que le sport lui-même ; or ce serait méconnaître le rôle de tels arrangements pour les financements publics si, par extension, les autorités permettent aux instances sportives de prédéfinir quelles ONG seront éligibles ou non. C'est l'approche préconisée par l'Avocat Général Szpunar dans l'affaire « English Bridge Union » (*supra*, § 2.1) et c'est également celle choisie par le législateur français en 1984 (*supra*, § 2.1) ; ce qui permet d'expliquer des litiges comme celui qui est en cours devant le Tribunal fédéral suisse, entre « l'International Mixed Martial Arts Federation » (IMMAF) et l'Agence mondiale antidopage (AMA)[23] : une reconnaissance en vaut parfois une autre, voire plusieurs autres.

III. Financement

A. Approche « traditionelle »

Les pouvoirs publics peuvent choisir de soutenir le sport, sport à travers des subventions de fonctionnement, soit par le biais de subventions « de performance »[24]. Cette distinction relève d'une importance toute particulière eu égard aux coûts générés par l'organisation d'événements internationaux dont certains se sont avéré risqués pour les budgets publics[25] ; ce qui explique pourquoi les électeurs hambourgeois, dans le cadre d'un référendum organisé le 29 novembre 2015, ont interdit à leurs représentants politiques de procéder avec l'offre de l'État-cité hanséatique pour les JO d'été 2024 (édition qui sera finalement assurée par Paris). Dans les sociétés démocratiques, la résistance s'organise de plus en plus contre les candidatures

22 FINA meets with NFs on Athlete participation in international competitions. 15 Jan 2019. http://www.fina.org/news/pr-1-fina-meets-nfs-athlete-participation-international-competitions.

23 L Morgan, Swiss court hearing between IMMAF and WADA postponed. Tuesday, 3 September 2019. https://web3.insidethegames.biz/articles/1084296/immaf-wada-swiss-court-hearing-delay

24 B Ibsen, 'Grundstøtte eller præstationsstøtte' dans K Eskelund & T Skovgaard (dir.) *Samfundets idræt* (Syddansk Universitetsforlag 2014), 13-54. J Kornbeck, 'HEPA as "le geste sportif"? Structures versus activities in public policies' dans C Scheuer & D Dreiskämper (dir.) *Schola Ludens Europaeus* (Meyer & Meyer 2019), 183, 186.

25 J Kornbeck, 'Lisbonisation without Regulation' (2015) 15:1-2 ISLJ 112.

olympiques. Alternativement, les pouvoirs publics peuvent, par contre, choisir une approche moins cartellistique en suivant, par exemples, les consignes contenues dans les « Lignes d'action » de l'Union européenne « en matière d'activité physique »[26] : document sans effet juridique contraignant, mais fondé sur l'avis de 22 éminents savants européens et qui a été intégrée, en partie, dans la recommandation du Conseil [des ministres] de l'Union européenne, en date du 26 novembre 2013, « sur la promotion transversale de l'activité physique bienfaisante pour la santé »[27]. Les consignes sont formelles quant aux financements publics, qui devraient cibler « en particulier sur les projets et organisations permettant à un maximum de personnes d'exercer une activité physique, quel que soit leur niveau ('sport pour tous', sport de loisir) »[28] : ceci par opposition aux projets valorisant la haute performance par les élites au détriment d'une participation plus large. Là où des financements publics sont octroyés, « il convient de mettre en place des mécanismes appropriés de gestion et d'évaluation afin d'assurer un suivi cohérent avec les objectifs de promotion du 'sport pour tous' »[29] : ceci par opposition aux pratiques par lesquelles des subventions sont payées, d'année en année, aux mêmes ONG pour le simple fait d'en avoir reçu antérieurement. Car la « politique des sports doit se fonder sur des faits avérés et les financements publics accordés aux sciences du sport doivent encourager la recherche de nouvelles connaissances sur les activités permettant à une large part de la population d'être active physiquement »[30]. Ainsi, les ONG sportives « sont invitées à proposer des activités et des événements susceptibles d'attirer le plus grand nombre de personnes possible et encourager les contacts humains entre personnes issues de classes sociales différentes et présentant des capacités diverses, quels que soient leur couleur de peau, groupe ethnique, religion, âge, sexe, nationalité et santé physique et psychologique »[31]. Or, la consigne la plus radicale est sans doute la suivante :

> « Lorsque des fonds publics sont débloqués pour des activités physiques, l'éligibilité et les critères d'allocation doivent se fonder sur les activités prévues ainsi que sur l'ensemble des activités proposées par les organisations candidates à l'attribution des fonds. Aucun statut légal, statut historique d'organisation ou appartenance à des structures fédératrices de plus grande ampleur ne doit constituer un pré-requis. Les fonds doivent être alloués à des activités de « sport pour tous » tout en gardant à l'esprit que les organisations comportant une dimension de sport de haut niveau peuvent également apporter une contribution significative au programme 'sport pour tous'. Les acteurs publics comme privés doivent être en concurrence sur un pied d'égalité. »[32]

26 Lignes d'action recommandées par l'UE en matière d'activité physique [2018] http://ec.europa.eu/sport/library/policy_documents/eu-physical-activity-guidelines-2008_fr.pdf.

27 Recommandation du Conseil du 26 novembre 2013 sur la promotion transversale de l'activité physique bienfaisante pour la santé. JO C 354, 4.12.2013, pp. 1–5.

28 *Ibid.,* Recommandation 6.

29 *Ibid.,* Recommandation 7.

30 *Ibid.,* Recommandation 9.

31 *Ibid.,* Recommandation 10.

32 *Ibid.,* Recommandation 8.

Sans être contraignantes en ce qui concerne les politiques des États membres, nous pensons néanmoins pouvoir détecter une certaine influence des « Lignes d'action »[33] dans le développement réception des politiques européennes, ou encore dans le droit européen appliqué au sport. Depuis le lancement du programme « Érasmus+ » (2014-20), le cadre européen a résisté la tentation de répliquer les habitudes nationales en réservant des subventions importantes à certaines entités déjà bien établies ; au contraire, les fonds « sports » ont dès le début (en sachant qu'avant Érasmus+, il n'y en avait guère) été ouverts à toute NGO et toute administration publique établie en Union européenne[34]. Dans le droit sur les aides d'État, nous observons l'arrêt « Magic Mountain »[35] (parfois connu sous le nom « Alpenverein »)[36] dans lequel le Tribunal, dans le cadre d'une question liée aux subventions publiques avait donné une préférence claire aux exploitants non commerciaux de centres de fitness. Si les installations sportives sont dépourvues de finalité lucrative, et si les subventions d'exploitation ou d'investissement que ce soit pour couvrir les frais de construction, d'exploitation ou d'entretien) permettent véritablement de compender une défaillance du marché (question qui peut être soumise, le cas échéant, à un test économique empirique), les aides d'État en question peuvent très bien être jusitifiées car répondant à des priorités légitimes de politique publique. Cependant, l'intérêt public des mesures en question ne peut s'affirmer que si les installations sont accessibles au public ; cela par opposition aux subventions bénéciant exclusivement des clubs sportifs professionnels et dont l'action s'inscrit dans une logique commerciale.

Une tendance générale semble se dessiner selon laquelle les aides accordées aux clubs professionnels ne sont pas reconnues par la Commission, contrairement aux aides accordées aux stades multifonctionnels et utilisables par les amateurs et la population générale[37]. En décembre 2017, une analyse des dossiers « sport » de la DG COMP (Concurrence) de la Commission, dans les trois domaines aides d'État, antitrust et contrôle des fusions, a révélé que la majeure partie des dossiers « aides d'État » avait été résolus favorablement[38]. Ainsi une doctrine de « droit mou » (*soft law*) européen, édictant l'accès au sport comme un objectif politique valant exemption de certaines contraintes légales, nous paraît reconnaissable et identifiable[39]. En contrepartie – et c'en est bien l'exception confirmant la règle – dans la récente décision « ISU » de la Commission, les règles de sélection de l'Union internationale de patinage (ISU) – basées sur le principe d'exclusivité territoriale et

33 Lignes d'action [2018] (n 27).

34 Erasmus+ Programme Guide [2017] (n 22) ; Kornbeck, 'Health-friendly sport policy' (2018) (n 4), 73-75.

35 Affaire T-162/13 *Magic Mountain Kletterhallen GmbH e.a. contre Commission européenne* [2016] ECLI:EU:T:2016:341.

36 Affaire T-693/14 *Hamr Sport a.s. contre Commission européenne* [2016] ECLI:EU:T:2016:292.

37 B García, A Vermeersch & S Weatherill, 'A new horizon in European sports law' (2017) 13:1 ECJ 28 ; J Kornbeck, 'State Aid and Access to Sport' (2019) 18:2 EStAL 138.

38 *Ibid.*

39 Kornbeck, 'Health-friendly sport policy' (2018) (n 4).

banissant les athlètes affiliés à l'ISU, ses fédérations et ses clubs de participer, sans autorisation préalable, aux compétitions non affiliés à, et non autorisées par l'ISU – ont été connues incompatibles avec le Traité[40], comme l'avait d'ailleurs fort bien soupçonné un auteur français, dans un manuel paru peu de temps avant la publication de cette décision[41].

Comme exemple d'un cadre légal qui se trouve en contradiction avec les consignes des « Lignes d'action » européennees[42], évoquons l'exemple du Danemark, un pays nordique autrement réputé avoir développé des politiques éclairés dans différents domaines politiques. Si l'arrêt « Gambelli » de la Cour de Justice UE, en 2003[43], a engendré une libéralisation tardive des paris sportifs, à travers des loi votés en 2010 et en 2014 respectivement, ainsi qu'un arrêté ministériel de 2015, le cadre pré-Gambelli datant de l'année 1948 avait permis le maintien d'un monopole géré par l'homologue de la Française des Jeux[44]. Des structures monopolistiques pourraient éventuellement s'avérer justifiables par rapport au droit européen à condition de correspondre à un objectif important de politique publique, comme la lutte contre la ludomanie ou encore l'accès au sport par la population toute entière ; or, ni l'ancien cadre légal, ni encore le cadre réformé ne sauraient satisfaire à de telles exigences. En effet, même l'arrêté ministériel de 2015 prévoit le transfert, selon une clef de répartition spécifique, vers les comptes d'organisations nommées nommément, de la part du lion des revenus générés par les paris sportifs, tant pour les sports humains qu'équestres et canins, ainsi que de certaines lotteries publiques. Ainsi, après déduction d'impôts, de frais administratifs et de fonctionnement, de prix pour les gagnants, de dépréciations et de dispositions budgétaires, 81,24% seront administrés par les services du ministre de la Culture, en charge notamment du sport[45] ; sur ces fonds, 63,83% sont réservés au sport[46]. À lire ces dispositions, on pourrait être pardonné pour attendre une distribution des fonds à travers des appels ouverts à toutes les ONG sportives, voire même à la totalité de la société civile, sur base de procédures transparentes avec des évaluations et des sélections dont l'intégrité serait assurée par les garanties habituelles du droit administratif. Cependant, sur les 63,83% prénommés, 81,24% sont déjà destinés à des bénéficiaires nommés sans qu'aucune candidature ne doive être introduite (ibid, p. 191). La clef de répartition sert entre autre à pérenniser le binôme historique entre un mouvement sportif de centre-droite, organisé par la DIF (30,83%) avec le comité olympique national en son sein, en parallèle avec son homologue de tradition centre-gauche, gravitant autour des associations locales de gymnastique d'origine germano-

40 Kornbeck, 'HEPA as "le geste sportif"?' (2019) (n 25).

41 Miège *Sport et droit européeen* (2017) (n 2), 202-203.

42 Lignes d'action [2018] (n 24).

43 Affaire C-243/01 *Procédure pénale contre Piergiorgio Gambelli e.a.* [2003] Rec. 2003 I-13031. ECLI:EU:C:2003:597.

44 Kornbeck, 'HEPA as "le geste sportif"?' (2019) (n 25), 190.

45 *Ibid.,* p. 190.

46 *Ibid.,* p. 191.

nordique et de la DGI (28.63%) : clivage historique d'intérêt inconstestable[47], et non sans rappeler les trajectoires historique de nombre de clubs et d'associations anglaises, au XIXème siécle, en lien avec les lieux de travail, les Églises, les partis politiques, les producteurs de boissons alcolisées, etc.[48], mais dont la pertinence pour nos jeunes contemporains pourrait être remise en cause. L'aspect véritablement surprenant des arrangements danois c'est leur survie acharnée dans un pays autrement associé avec des politiques fondées sur des données objectives et probantes (« evidence-based policy making »). Selon le narratif dominant, ces arrangements financiers seraient l'expression visible d'une relation État-sport ancrée dans la confiance mutuelle et l'attente d'une volonté généralisée à inclure tous les membres de la société[49]. Or, seuls 11,94% des financements (« d'autres objetifs politiques liés au sport ») sont réservés pour être distribués à travers des appels à propositions ouverts, alors que les fonds affectés représentent 88,06%[50]. Bien que les bénéficiaires privilégiés puissent parfois redistribuer une partie de fonds reçus, l'application des garanties procédurales habituelles du droit administratif est expressément exclue[51].

Cet exemple de légalité sans légitimité pourrait inspirer des recherches plus approfondies comparant les cadres politiques, juridiques et administratifs de plusieurs pays en même temps. Retenons-en que le législateur n'éxige nullement que les moyens financiers redistribués parviennent effectivement à permettre à la population de participer aux activités physiques et sportives, alors que ces activités sont régulièrement assurées par les budgets communaux (y compris par la mise à disposition plus ou moins gratuite d'installations communales) et par les ménages eux-mêmes : ce qui semble être la constellation normale à travers l'Union européenne[52]). Les clubs affiliés aux fédérations déjà subventionnées par le ministère, peuvent toujours postuler pour des subventions communales[53]. Ainsi, plutôt que d'assurer l'autonomie du sport au bénéfice de la population, ce système semble avoir mis les fédérations à l'abri, et de la population, de la société de proximité et de ses clubs locaux, si bien que les subventions nationales sont pratiquement dépourvues d'exigences politiques quant à leur utilisation, y compris le mandat théorique des fédérations qui consisterait à défendre les intérêts – et besoins – des clubs de proximité qui leur sont affiliés[54].

47 B Ibsen, 'Denmark: The Dissenting Sport System in Europe' dans J Scheerder, A Willem & E Claes (dir.) *Sport Policy Systems and Sport Federations* (Palgrave 2017), 89, 95.

48 W Vamplew, 'Theories and Typologies: A Historical Exploration of the Sports Club in Britain' (2013) 30:14 IJHS 1569.

49 B Ibsen & K Elmose-Østerlund, 'Denmark', dans B Ibsen, G Nichols & K Elmose-Østerlund (dir.) *Sports club policies in Europe* (Odense Centre for Sports, Health and Civil Society 2016), 55, 56 ; cf. Kornbeck, 'HEPA as "le geste sportif"?' (2019) (n 25), 193.

50 Kornbeck, 'HEPA as "le geste sportif"?' (2019) (n 25), 193.

51 *Ibid.*, p. 193.

52 Eurostratégies, Amnyos, CDES & DSHS, *Study on the funding of grassroots sports in the EU. Vol. I.* (Eurostratégies 2011) http://ec.europa.eu/internal_market/top_layer/docs/FinalReportVol1_en.pdf, pp. 46, 80.

53 Ibsen & Elmose-Østerlund, 'Denmark' (2016) (n 50), 56; cf. Kornbeck, 'HEPA as "le geste sportif"?' (2019) (n 25), 193.

54 Ibsen, 'Denmark: The Dissenting Sport System' (2017) (n 48), 107; cf. Kornbeck, 'HEPA as "le geste sportif"?' (2019) (n 25), 195.

L'exemple danois ne concerne pas que le Danemark ; au contraire, faute de données pertinentes, il nous paraît justifié de partir de l'hypothèse que beaucoup de politiques (sinon la plupart). Des débats importants ont été suscités par les investissements publics réalisés en connexion avec les JO d'Athènes (2004) ou de Londres (2012), ou encore par la coupe du monde de la FIFA en Allemagne (2006) ou du championnat européen de l'UEFA au Portugal (2004) ; débats qui ont régulièrement focalisé sur les coûts ainsi générés pour les trésors publics[55]. Les gouvernements du monde se sont bien rendu compte que les procédures de candidature pour l'organisation de tels événements pourraient être blâmées pour l'état des choses peu enviable pour les budgets publics. Car le système actuel, suivant la logique d'une vente aux enchères, aurait régulièrement amené les pouvoirs publics à assumer des responsabilités dépassant leurs capacités budgétaires ainsi que les principes d'une bonne gouvernance publique. Aussi, la conférence des ministres en charge du Sport d'UNESCO, réunie à Berlin (2013) (MINEPS V), a adopté une déclaration[56] contenant des engagements importants pour éviter que les grands événements ne draînent les budgets publics au détriment du « sport pour tous » :

> « 2.27 Considérer les grands événements sportifs comme un élément à part entière de la planification nationale de l'éducation physique et du sport, en veillant à ce que d'autres programmes ne souffrent pas des transferts budgétaires en faveur de l'organisation de grands événements sportifs ou du sport de haut niveau ; » [57]
>
> « 2.28 S'attacher, lors de l'accueil de grands événements sportifs, à assurer la durabilité des équipements sportifs pour l'éducation physique, le sport pour tous, le sport de haut niveau et autres activités communautaires, de manière que toutes les parties prenantes puissent participer à de tels événements et en bénéficier ; » [58]
>
> « 2.29 Concevoir une politique cohérente précisant les conditions de la planification et de la mise en œuvre des grands et méga-événements sportifs, ainsi que de la participation aux procédures d'appel d'offres en la matière ; » [59]

Adoptées par 121 États largement, sans controverse et dans une atmosphère largement sereine, les effets réels de ces prises de position ne semblent pas avoir établis, ni par des chercheurs ni même par des journalistes. Étant donné que les États utilisent les grands événements pour obtenir un avantage comparatif au sens politique, économique et même géopolitique, la serenité vécue à Berlin (le soussigné y a assisté) devrait surprendre ; on n'abandonne pas facilement les bijoux de famille. Sauf si la déclaration était considérée comme déjà assez timorée pour ne pas mettre en péril des modèles de « nation-branding » qui ont bien démontré leur valeur ; loin de jeter

55 Kornbeck, 'Lisbonisation without Regulation' (2015) (n 26).

56 Déclaration de Berlin [2013] https://unesdoc.unesco.org/ark:/48223/pf0000221114_fre.

57 *Ibid.*

58 *Ibid.*

59 *Ibid.*

une pierre dans le jardin des États, la déclaration a peut-être été considérée comme inoffensive. Si les déclarations adoptées par les éditions précédentes de MINEPS, dès 1979, ont rarement provoqué de changements majeurs[60], il faut cependant reconnaître que le langage utilisé par les auteurs de la déclaration de MINEPS V capte avec aptitude les défis politiques. Si une rupture avec les pratiques établies interviendra, nous présumons qu'il aura été voulu par le mouvement sportif (peu importe si lui-même ou les pouvoirs publics en sera l'acteur principal le plus directement visible). Car si les attentes des organisations sportives octroyant le droit d'organiser les plus grands événements ont grandi continuellement depuis les années 1980, ce développement avait été compréhensible pour autant que de nombreux États et villes avaient la déterminant – et le courage – de s'engager coûte que coûte ; tendance que la crise économique a rompu dès 2008. L'embarras allemand suivant le « non » au référendum hambourgeois de 2015 n'était pas le premier signe d'un changement d'état d'âme ; déjà en 2014, la Ville de Rome avait dû retirer sa candidature pour le JO d'été de 2024, faute de garanties publiques (garanties illimitées pour les pertes possibles). Lorsque le 13 septembre 2017, le CIO a annoncé sa décision d'accorder à Paris le privilège d'organiser les JO 2024 et à Los Angeles l'équivalent pour les JO 2028, s'efforçant à un enthousiasme bien médiatisé, le caractère un tantinet maladroit de l'arrangement ne saurait être dissimulé. En effet, sur les cinq candidatures initiales (Paris, Hamburg, Budapest, Rome, Los Angeles), trois avaient été retirées pour n'en laisser que deux ; et au lieu d'ouvrir une procédure séparée pour les JO 2028 (ce qui eût été normal et habituel), le CIO a décidé, séance tenante, de couronner les deux villes candidates restantes avec une édition des Jeux chacune. L'enthousiasme un peu trop débordant de Thomas Bach, le président du CIO – « Difficile d'imaginer mieux. Assurer la stabilité des Jeux Olympiques pour les athlètes du monde pour les onze prochaines années est quelque chose d'extraordinaire »[61] – ne saurait cacher une réalité plus inquiétante pour son organisation.

B. Approche « alternative »

Pour les gouvernements et les villes, cependant, la position de négociation dorénavant s'avérer plus comfortable. Or, dans un climat ainsi amélioré pour mieux permettre de cibler les ressources publiques vers les besoins de leurs populations, les dirigeants politiques devraient aussi avoir le courage de rompre avec les pratiques établies : non seulement en marchandant âprement leurs candidatures pour les grands événements, mais aussi en relâchant des stratégies politiques d'une autre ère. Le Danemark pourrait arrêter de réserver autant de financements aux ONG sportives

60 I Henry, 'Sports development and adult mass participation', dans B Houlihan & M Green (dir.) *Routledge Handbook of Sports Development* (Routledge 2010), 267, 276.

61 Le CIO prend la décision historique d'attribuer simultanément les JO de 2024 à Paris et de 2028 à Los Angeles. 13 sept. 2017. https://www.olympic.org/fr/news/le-cio-prend-la-decision-historique-d-attribuer-simultanement-les-jeux-olympiques-de-2024-a-paris-et-de-2028-a-los-angeles

pré-reconnues, alors que l'Allemagne pourrait abandonner l'idée que les subventions fédérales doivent mener à X médailles. En 2015, Thomas de Maizière, ministre de l'Intérieur en charge du Sport, avait annoncé son attente d'une augmentation de 30% de médailles en contrepartie d'une augmentation des subventions accordées. Le ministre a insisté que dans le sport, les médailles étaient « la monnaie », faisant valoir que « les contribuables allemands ont droit à un rendement de leurs investissements » [62] (traduction : J.K.)[63]. Si les ONG sportives se montrent prêtes à relâcher quelques exigences devenues exorbitantes dans un climat pré-crise, les pouvoirs publics devraient alors saisir le moment pour recalibrer leurs stratégies. L'Union européenne, elle, dispose d'un instrument politique formidable : l'accès à son vasté marché intégré, que certains chercheurs n'hésitent pas à caractériser de « marché normatif »[64].

Parmi les choix disponibles aux pouvoirs publics est celui d'une plus grande flexibilité dans l'application des règles de financement régissant l'octroi de subventions à la société civile. L'Union européenne, par exemple, dans la récente refonte de son Règlement financier n° 2018/1046[65], a décidé de reconnaître la contrevaleur du travail bénévole pour entrer dans le volet « auto-financement » des budgets annexés aux demandes : flexibilité ouverte à toutes le ONG, mais qui aide certainement les ONG sportuives, pour qui le travail bénévole représente régulièrement une ressource cruciale[66]. Des tels changements législatifs représentent des innovations substantielles et pratiques, alors que le « prise en compte » annoncée à l'article 165 TFUE n'a pas encore influencé grandement la jurisprudence de la Court : car dans les affaires » « Murphy » [67] et « Bernard» [68] l'on voit mal comment cette disposition ait produit un résultat différent de celui qu'aurait apporté une lecture du droit primaire et secondaire sans référence à la « spécificité ». Peut-être convient-il de rappeler que ces affaires-là étaient strictement liées au sport professionnel, alors que les décisions de la Commission en matière d'aides d'Etat montrent une tendance[69] – aussi pragmatique et pratique que la refonte du règlement financier

62 E Simeoni, Innenminister de Maizière: „Mindestens ein Drittel mehr Medaillen". 17.07.2015-13:08. http://www.faz.net/aktuell/sport/sportpolitik/thomas-de-maiziere-im-interview-ueber-den-deutschen-sport-13707649.html?printPagedArticle=true#pageIndex_0.

63 Kornbeck, 'HEPA as "le geste sportif"?' (2019) (n 25), 198.

64 A Geeraert & E Drieskens, 'Normative Market Europe: the EU as a force for good in international sports governance?' (2017) 39:1 JEI 79.

65 Règlement (UE, Euratom) 2018/1046 du Parlement européen et du Conseil du 18 juillet 2018 relatif aux règles financières applicables au budget général de l'Union, modifiant les règlements […] et abrogeant le règlement (UE, Euratom) no 966/2012. OJ L 193, 30.7.2018, p. 1-222.

66 J Kornbeck, 'Le nouveau règlement financier UE permet la prise en compte de la contrevaleur du travail bénévole' (2019) 137 LOJS 4.

67 Affaires jointes C-403/08 et C-429/08 *Football Association Premier League Ltd et autres contre QC Leisure et autres (C-403/08) et Karen Murphy contre Media Protection Services Ltd (C-429/08)* [2011] Rec. 2011 I-09083. ECLI:EU:C:2011:631.

68 Affaire C-325/08 *Olympique Lyonnais SASP contre Olivier Bernard et Newcastle UFC* [2010] Rec. 2010 I-02177. ECLI:EU:C:2010:143.

69 Kornbeck, 'State Aid and Access to Sport' (2019) (n 38).

n° 966/2012[70] – qui consiste à autoriser les aides au « sport pour tous » mais pas pour les clubs professionnels. Car les aides réparant des défaillances du marché sont permises, comme la jurisprudence récente dans les affaires « Hamr Sport »[71] et « Magic Mountain »[72] le confirme avec toute clarté. Derrière cette tendance l'on peut même soupçonner l'émergence d'une doctrine sous-jacente en « droit mou » (*soft law*) en faveur du « sport pour tous »[73].

IV. Conclusions

Comme la présente contribution a fait ressortir, à côté d'une approche « traditionnelle » à la politique sportive existe – parfois en pratique mais plus souvent seulement en théorie – une autre, laquelle nous avons appelée « alternative ». Si l'approche « traditionnelle » valorise les entités, son homologue « alternative » vise par contre les activités. Nous avons démontré comment les deux approches peuvent se manifester, d'abord au niveau de la reconnaissance formelle (politique, législative, administrative), ensuite au niveau financier. L'intervention n'a pu mettre en exergue que quelques exemples des deux approches, sous chacun des deux aspects, en sachant qu'une tâche de rercherche valorisante consisterait définitivement à cartographier les arrangements en place dans différents pays. Etant donné le rôle joué, dans les exemples cités, par le « droit mou » (soft law), nous devons cependant garder à l'esprit ses limitations et faiblesses. L'actuel processus politique mené au sein du Conseil UE a abouti sur deux rapports élaborés par la Commission, en 2016[74] ainsi qu'en 2019[75]. Présentés de manière synoptique à travers des tableaux comparatifs juxtaposant les pays et les recommandations, avec chaque cellule marquée en rouge ou en vert, le rapport le plus récent ne comporte que peu de rouge et une abondance de vert. Conformément aux auto-déclarations des Etats membres, une nette amélioration a donc pu être constatée, si bien que les recommandations ne sont pas juridiquement contraignantes. Le lecteur averti se demandera peut-être si un exercice semblable, mené dans le cadre d'une règlementation contraignante, aurait produit autant de cellules vertes. Selon un universitaire et ancien député européen, bien qu'il permette de dépasser les contraintes imposées par la souveraineté nationale[76], le droit « mou »

70 Règlement 2018/1046 (n 66).

71 *Hamr Sport* [2016] (n 37).

72 *Magic Mountain* [2016] (n 36)

73 Kornbeck, 'Health-friendly sport policy' (2018) (n 4).

74 Rapport sur la mise en œuvre de la recommandation du Conseil sur la promotion transversale de l'activité physique bienfaisante pour la santé. 5.12.2016. COM(2016) 768 final.

75 Rapport sur la mise en œuvre de la recommandation du Conseil sur la promotion transversale de l'activité physique bienfaisante pour la santé. 6.11.2019. COM(2019) 565 final.

76 M Medina Ortega, 'Soft law et principes démocratiques' dans F Peraldi Leneuf, et al. (dir) *La légistique dans le système de l'Union européenne : quelle nouvelle approche ?* (Bruylant 2012), pp. 191-204, cf. pp. 193-194 : « En effet, en droit international, un État ne peut pas être obligé contre sa volonté. »

(*soft law*) ne serait tout bonnement pas du droit[77]. Et pourtant, comme le montre le processus de Bologne (enseignement supérieur), si la volonté y est, un tel processus peut très bien transformer un domaine politique.

En même temps, il convient de mieux connaître les circuits financiers du secteur sportif[78]. Nous venons d'évoquer les sommes considérables transférés, au Danemark, vers les grandes fédérations sportives nationales (*supra,* §3.1). Or, bien que 122 millions d'euros puisse paraître beaucoup dans un pays de 5 millions d'habitants (en 2013), les subventions communales de l'ordre de 425 millions d'euros ont permis (également en 2013) aux ménages de participer au sport, y compris grâce à l'utilisation des installations communales, ces dernières étant ouverte à toute la société civile[79]. Depuis la crise éonomique de 2008, une literature scientifique grandissante a misé sur les implications de la politique de l'austérité pour l'offre sportive disponible à la population[80]. Aux chercheurs intéressés, cette thématique propose du fil à retordre, par exemple en liant les données empiriques sur les coûts encourus par différentes autorités publiques en construisant des stades requis pour l'organisation d'un grand événement international mais superflus dans la vie sportive quotidienne, engendrant par contre des frais importants d'amortissement et d'entretien[81], avec les pensées récentes de Thomas Piketty retraçant les liens entre des modèles économiques concrets et des idéologies concomitantes[82]. Voilà l'ébauche d'un discours possible sur les bases d'une politique publique en faveur du sport, véritablement citoyenne, fiscalement responsable, scientifiquement fondée et équitable dans ses relations avec la société civile.

77 Cf. ibid., pp. 195-196 : « Surtout, l'expression 'soft law' ou 'droit doux' est maladroite. Elle semble attribuer aux actes juridiques en question une valeur normative qu'ils ne peuvent pas avoir. »

78 Kornbeck, 'Lisbonisation without Regulation' (2015) (n 26).

79 B Ibsen, K Elmose-Østerlund & T Laub, 'Sport Clubs in Denmark' dans C Breuer, R Hoekman, S Nagel & H vd Werff (dir) *Sport Clubs in Europe* (Springer 2015), 85, 94.

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81 J Alm, *World Stadium Index* (Play the Game 2012).

82 Thomas Piketty, *Capital et idéologie* (Seuil 2019).

Modèle traditionnel	**Modèle alternatif**
Cible les entités	Cible les activités
Finance les ONG prédéfinies (ex : agrément)	Finance toutes les ONG si : • les demandes ont été introduites dans le cadre d'une procédure d'appel à propositions ouvert ; • les activités proposées répondent aux critères publiés (contraignants pour l'administration) ; • qualité des demandes évaluées supérieure dans le classement de toutes les demandes introduites.
Principe de continuité historique	Principe de traitement équitable de toute la société civile

Comité de lecture: Revue par les pairs à l'extérieur
Conflit d'intérêts: L'auteur n'a pas de conflit d'intérêts à déclarer
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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Die begrenzte Offenlegung des Abhängigkeitsberichts (§ 312 AktG) im deutschen Recht

The Limited Publicity of the Dependency Report (§ 312 AktG) in German Law

Alman Hukukunda Bağlılık Raporunun (§ 312 AktG) Kısmen Açıklanması

Funda Özdin[1]

Zusammenfassung
Im Rahmen des Schutzsystems des deutschen faktischen Konzernrechts (§§ 311 ff. AktG) werden besondere Vorschriften (§§ 312 - 315 AktG) geregelt, welche spezielle Instrumenten bzw. Mechanismen zur Überprüfung der Einhaltung des Benachteiligungsverbots der Grundnorm § 311 AktG vorsehen. In diesem Zusammenhang schreibt das Gesetz vor, dass alle Rechtsgeschäfte und Maßnahmen, die durch die Abhängigkeit beeinflusst sein können, in einem Abhängigkeitsbericht (§ 312 AktG) dokumentiert und der Bericht selbst dann durch den Abschlussprüfer (§ 313 AktG) sowie den Aufsichtsrat der abhängigen Gesellschaft (§ 314 AktG) und ggf. durch Sonderprüfer (§ 315 AktG) überprüft werden müssen. Der Bericht wird de lege lata nicht offengelegt und er ist grundsätzlich für die Abschlussprüfer, Aufsichtsrat und Sonderprüfer bestimmt. Die außenstehenden Aktionäre und Gläubiger der abhängigen Gesellschaft haben aus Gründen der Vertraulichkeit auch kein Einsichtsrecht in den Abhängigkeitsbericht. Aber der Bericht gewinnt trotzdem bis zu einem gewissen Grad Publizität und verbessert die Informationsmöglichkeiten der außenstehenden Aktionäre bzw. Gläubiger dadurch, dass die Schlusserklärung des Vorstands in dem Lagebericht, die Prüfungsergebnisse des Aufsichtsrats in dem Aufsichtsratsbericht sowie ggf. der Sonderprüfungsbericht offengelegt werden. Man kann daher von einer "begrenzten Offenlegung„ des Abhängigkeitsberichts im deutschen Recht sprechen, auch wenn der Bericht selbst nicht vollständig offengelegt werden darf.

Schlüsselwörter
Faktisches Konzern, Abhängigkeitsbericht, Offenlegung

Abstract
As a part of the protection system of the de facto group law in Germany (§§ 311 ff. AktG), some regulations are provided which regulate special instruments or mechanisms for checking compliance with the basic rule of the prohibition of disadvantage (§ 311 AktG). In this context, the law stipulates that all legal transactions and measures that may be influenced by the dependency must be documented in a dependency report (§ 312 AktG) and that the report must then be checked by the auditor (§ 313 AktG) and the supervisory board of the dependent company (§ 314 AktG) and by special auditors (§ 315 AktG). The report is not published de lege lata and is generally intended for the auditors, the supervisory board and special auditors. For reasons of confidentiality, the shareholders and creditors of the dependent company also have no right to inspect the dependency report. However, the report still gains a certain degree of publicity and improves the information available to outside shareholders and creditors by disclosing the final declaration of the board in the management report, the audit results of the supervisory board in the supervisory board report and the special audit report. Therefore, one can therefore speak of "limited publicity" of the dependency report in German law, even if it can not be fully disclosed.

Keywords
De facto group, Dependency report, Disclosure

1 **Corresponding Author:** Funda Özdin (Res. Asst. Dr.), Marmara University, Faculty of Law, Commercial Law Department, Istanbul, Turkey
E-mail: funda.ozdin@marmara.edu.tr ORCID: 0000-0002-4071-1814

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Öz

Alman hukukunda fiili topluluklar için öngörülmüş olan sistem kapsamında (§§ 311 ff. AktG), bağlı şirketlerin hakimiyetin uygulanması suretiyle kayba uğratılmasını yasaklayan temel normun (§ 311 AktG) gereği gibi uygulanabilmesini sağlamak amacıyla özel düzenlemeler yapılmış (§§ 312 - 315 AktG); bu amaca yönelik birtakım özel araçlar ve mekanizmalar öngörülmüştür. Bu bağlamda hakimiyet etkisi altında yapılan tüm hukuki işlemlerin ve alınan önlemlerin bir "bağlılık raporu" kapsamında bildirilmesi; bu raporun kapanış denetçileri (§ 313 AktG), bağlı şirketin denetim kurulu (§ 314 AktG) ve -atanmış olmaları halinde- özel denetçiler (§ 315 AktG) tarafından kontrol edilmesi/değerlendirilmesi öngörülmüştür. Kanun gereği söz konusu bağlılık raporunun kamuya açıklanması söz konusu olmayıp; rapor esasen gerekli kontrollerin yapılması amacına yönelik olarak söz konusu kapanış denetçileri, denetim kurulu ve özel denetçiler için öngörülmüştür. Bağlı şirketin azınlıkta kalan pay sahipleri ve alacaklıları ise bağlılık raporunun gizliliği ilkesi gereğince (raporu) inceleme yetkisine sahip değildirler. Ancak raporun sonuç kısmının yönetim kurulunun faaliyet raporuna konulması, denetim kurulunun rapora ilişkin değerlendirmesinin denetim kurulu raporunda yer alması ve -varsa- özel denetçi raporunun açıklanması sebebiyle, bağlılık raporunun belli bir dereceye kadar aleniyet kazanması ve böylelikle bağlı şirketin azınlık pay sahipleri ile alacaklılarının -kısmen de olsa- raporda yer alan bilgilere ulaşması söz konusu olmaktadır. Dolayısıyla bağlılık raporu her ne kadar bütünüyle açıklanmasa/aleniyet kazanmasa da, gerek raporun sonuç kısmının yıllık faaliyet raporunda yer alacak olması, gerekse raporu inceleme yetkisi olan kişilerin rapora ilişkin değerlendirmelerinin açıklanacak olması sebebiyle, Alman hukukunda bağlılık raporunun "kısmen" de olsa aleniyet kazandığından bahsedilebilecektir.

Anahtar Kelimeler

Fiili konzern, Bağlılık raporu, Yayınlama/Açıklama

Extended Summary

The provisions of German group law are based on the basic idea that the control possibility of a de facto dominant company creates the risk that it will not use its potential for influence in the common interest of the group, but will pursue another business interest to the detriment of the dependent company ("Group conflict"). The German legislator wants to prevent this with the basic norm of § 311 AktG in such a way that on the one hand it establishes an absolute ban on disadvantage, but on the other hand it allows compensation for disadvantages in the event of a violation. In order to ensure compliance with this basic standard, he regulates claims for damages in the event of a violation of this regulation (§§ 317, 318 AktG).

Furthermore, as a part of the protection system of the de facto group law in Germany (§§ 311 ff. AktG), special regulations are provided which regulate special instruments or mechanisms for checking compliance with the basic rule of the prohibition of disadvantage (§ 311 AktG).

In this context, the law stipulates that all legal transactions and measures that may be influenced by dependency must be documented in a dependency report (§ 312 AktG) and that the report must then be checked by the auditor (§ 313 AktG) and the supervisory board of the dependent company (§ 314 AktG) and by special auditors (§ 315 AktG). The report is not published de lege lata and is generally intended for the auditors, the supervisory board and special auditors. The Articles of Association cannot order the disclosure of the dependent company report either, as this is

mandatory law within the meaning of § 23/5 AktG. For reasons of confidentiality, the shareholders and creditors of the dependent company also have no right to inspect the dependency report. However, the shareholders' right to information according to § 131 AktG remains unaffected by the confidentiality of the dependency report, so that the shareholders can also request information at the annual general meeting about individual events explained in the dependency report. But, this does not mean that shareholders can request the content of the dependency report at the general meeting. They can ask specific questions about certain business transactions (e.g. about contractual terms for significant transactions with affiliated companies) insofar as these are important for the assessment of the agenda and do not require confidentiality.

The confidentiality of the dependency report is based on a legislative weighing up of conflicting interests of the parties involved (companies, shareholders, creditors) and thus on the conscious decision of the legislator. According to the legislator, the dependency report must be concrete and provide detailed information so that it can fulfil its purpose. The report has to discuss and evaluate the internal processes of the group. According to the legislator, the outsiders would be better protected if the report were available to them. This would enable them to better assess whether there is evidence of discrimination. But such a report, which is replete with many managerial details, could not be made public. The confidentiality interests of the companies concerned argue against disclosure. In the opinion of the legislator, it must be possible for it to remain confidential, else it would prohibit reporting with necessary openness on transactions whose disclosure could be detrimental to the company.

In principle, the report is confidential, but it nevertheless gains a certain degree of publicity. Firstly, this is done by the management board of the dependent company issuing a summary final declaration at the end of the dependent company report on the specific points and including this in the management report, which must be disclosed in accordance with § 325 HGB. Secondly, the dependency report is examined by the supervisory board and the audit report of the supervisory board is disclosed in the same way as the management report (§ 175/2 AktG; § 325 HGB). Thirdly, the report of the special auditors is disclosed and submitted to the commercial register (§ 145/6 AktG). The report will also be announced by the management board as an item on the agenda when the next annual general meeting is convened (§ 145/6 AktG). In this way, the special audit report gains extensive disclosure and thus plays an important role in the protection system of §§ 311 ff. AktG. On the basis of these disclosure requirements, one can finally speak of "limited publicity" of the dependency report in German law, even if the report itself cannot be fully disclosed.

I. Abhängigkeitsbericht (§ 312 AktG)

A. Allgemein

Der "Abhängigkeitsbericht" ist eine Besonderheit des deutschen faktischen Konzernrechts,[1] welchem im Schutzsystem der §§ 311 ff. AktG eine wichtige Bedeutung zukommt. In § 312 Abs. 1 AktG verpflichtet der Gesetzgeber den Vorstand einer faktisch abhängigen Aktiengesellschaft (oder einer KGaA)[2] innerhalb der ersten drei Monate des Geschäftsjahres einen Bericht, den sogenannten Abhängigkeitsbericht, über Beziehungen zu verbundenen Unternehmen aufzustellen, in dem alle benachteiligungsverdächtigen Vorgänge und Umstände aufzunehmen sind.[3] Damit wird bei faktischen Konzernierungen der Schutz der abhängigen Gesellschaft selbst und somit ihrer außenstehenden Aktionäre bzw. Gläubiger vor den unausgeglichenen Nachteilen bezweckt.[4] Dies wird mit einer Reihe von Vorschriften (§§ 312 bis 315 AktG) so gestaltet: Die Beziehungen zwischen dem herrschenden Unternehmen und der abhängigen Gesellschaft werden von dem Vorstand der abhängigen Gesellschaft in dem *Abhängigkeitsbericht* dokumentiert (§ 312 AktG) und der Bericht selbst wird dann durch den *Abschlussprüfer* (§ 313 AktG) und den *Aufsichtsrat* (§ 314 AktG) der abhängigen Gesellschaft geprüft. In bestimmten Fällen kann auch ein *Sonderprüfer* zum Prüfen der Beziehungen angeordnet werden (§ 315 AktG).

B. Schutzsystem der §§ 311, 317 AktG

Das deutsche Konzernrecht liefert mit den §§ 311 ff. AktG ein spezielles Regelungssystem für faktische Konzernierungen, in denen es um den Fall der Abhängigkeit einer AG (oder KGaA) von einem Unternehmen geht. Diesen Regelungen liegt der Grundgedanke zugrunde, dass schon die Möglichkeit der beherrschenden Einflussnahme des faktisch herrschenden Unternehmens die Gefahr begründet, dass es sein Einwirkungspotenzial nicht im Sinne des gemeinsamen Gesellschaftsinteresses nutzt, sondern ein anderweitiges unternehmerisches Interesse zum Nachteil der abhängigen Gesellschaft verfolgt („Konzernkonflikt").[5] Dieser Gefahr begegnet der deutsche Gesetzgeber mit der Grundnorm des § 311 AktG in der Weise, dass er damit einerseits ein absolutes **Benachteiligungsverbot** aufstellt, andererseits aber für den Fall des Verstoßes einen zeitlich verzögerten

1 Altmeppen, in: *Münchener Kommentar zum Aktiengesetz*, (5. Auflage, C.H.BECK 2019), § 312, Rn. 1; zum Stellenwert des Berichts siehe insb. BGHZ 135, 107, Rn. 111 ff.

2 § 312 Abs. 1, S. 1 AktG spricht zwar von abhängiger AG, aber nach herrschender Meinung wird da auch KGaA erfasst. Siehe OLG Stuttgart 14.05.2003, AG 2003, S. 530; Altmeppen, (n 1), § 312, Rn. 23; Fleischer, in: *Großkommentar, Aktiengesetz*, (5. Auflage, De Gruyter 2016), § 312, Rn. 40: Koch, in: *Hüffer/Koch, Aktiengesetz: AktG* (14. Auflage, C.H.BECK 2020), § 312, Rn. 5 m.w.N.

3 Müller, in: *Spindler/Stilz, Kommentar zum Aktiengesetz* (4. Auflage, C.H.BECK 2019), § 312, Rn. 1.

4 Schiessl, 'Abhängigkeitsbericht bei Beteiligungen der öffentlichen Hand – Besprechung des Beschlusses BGHZ 135, 107 – VW/Niedersachsen –', (1998) ZGR 841, 872.

5 Altmeppen (n 1) Vor § 311, Rn. 2 und § 311, Rn. 4; Müller, (n 3), Vor § 311, Rn. 1; Habersack, in: *Emmerich/Habersack, Aktien- und GmbH-Konzernrecht, Kommentar*, (9. Auflage, C.H.BECK 2019), § 311, Rn. 1.

Nachteilsausgleich zulässt.[6] Demnach darf ein herrschendes Unternehmen seinen Einfluss nicht dazu nutzen, eine abhängige Aktiengesellschaft zu veranlassen, ein für sie nachteiliges Rechtsgeschäft oder Maßnahmen zu ihrem Nachteil zu treffen oder zu unterlassen (*Benachteiligungsverbot*, § 311 Abs. 1 AktG). Es sei denn, die Nachteile werden bis zum Ende des Geschäftsjahrs durch das herrschende Unternehmen ausgeglichen (*Nachteilsausgleich*, § 311 Abs. 2 AktG). So gelten die nachteiligen Einflussnahmen des herrschenden Unternehmens auf eine abhängige Gesellschaft als zulässig, solange die Nachteile rechtmäßig ausgeglichen werden.[7]

Zur Sicherstellung der Einhaltung dieser Grundnorm (§ 311 AktG) werden außerdem **Schadensersatzansprüche** an Verstoß gegen diese Regelung angeknüpft (§§ 317, 318 AktG). Demnach haften das herrschende Unternehmen, seine Geschäftsleiter und die verantwortlichen Verwaltungsmitglieder der abhängigen Gesellschaft auf Schadensersatz, falls die veranlassten Nachteile durch das herrschende Unternehmen nicht ausgeglichen werden. Das Benachteiligungsverbot sowie das Nachteilsausgleichssystem des § 311 AktG und die daran anknüpfenden Haftungsfolgen (§§ 317, 318 AktG) sollen die abhängige Gesellschaft und damit deren aussenstehenden Aktionäre bzw. Gläubiger gegen Schädigungen schützen. Diese Regelungen (§§ 311, 317 und 318 AktG) werden daher als die „**Schutzfunktion**“ der §§ 311 ff. AktG angesehen.[8,9]

C. Die Funktion des Abhängigkeitsberichts

Im Rahmen des Schutzsystems des faktischen Konzernrechts werden -neben den **Schadensersatzansprüchen** - auch besondere Vorschriften (§§ 312 ff. AktG) geregelt, welche spezielle Instrumenten bzw. Mechanismen zur Überprüfung der Einhaltung der Grundnorm § 311 AktG vorsehen.[10] Das Gesetz schreibt vor, dass alle Rechtsgeschäfte und Maßnahmen, die durch die Abhängigkeit beeinflusst sein können, in einem Abhängigkeitsbericht dokumentiert und von Abschlussprüfer bzw. Aufsichtsrat auf ihre Angemessenheit hin überprüft werden müssen. Mit diesem besonderen System von Berichts- und Prüfungspflichten zielt der Gesetzgeber ab, das Benachteiligungsverbot des § 311 Abs. 1 AktG abzusichern. Deswegen steht die Pflicht zur Erstellung eines Abhängigkeitsberichts in unmittelbarem Zusammenhang mit dem **Schutzsystem** der §§ 311, 317 AktG.[11]

6 Vetter, in: *Schmidt/Lutter, Aktiengesetz, Kommentar*, (3 Auflage, ottoschmidt 2015), § 311, Rn. 1; Müller, (n 3), Vor § 311, Rn. 2.

7 Habersack, (n 5), § 311, Rn. 1 ff.

8 Vetter, (n 6), § 311, Rn. 3; Habersack, (n 5), § 311, Rn. 1 f.; Müller, (n 3), Vor § 311, Rn. 2; Altmeppen (n 1), § 311, Rn. 3; Habersack/Schürnbrand, ‘Cash Management und Sicherheitenbestellung bei AG und GmbH im Lichte des richterlichen Verbots der Kreditvergabe an Gesellschafter‘, 2004 NZG 689, 691 f.; vgl. Koch, (n 2), § 311, Rn. 2.

9 Dass allerdings das Gesetz bei faktischen Konzernierungen die Ausübung der Leitungsmacht des herrschenden Unternehmens und damit die nachteilige Einflussübernahme ermöglicht bzw. zulässt, sofern der Nachteil nach Maßgabe des § 311 Abs. 2 erfüllt wird, wird andererseits als die „*Privilegierungsfunktion*“ der §§ 311 ff. AktG – im Vergleich zu den für konzernfreie Gesellschaften geltenden Vorschriften – bewertet. Habersack, (n 5), § 311, Rn. 2, 5; Müller, (n 3), Vor § 311, Rn. 2; Habersack/Schürnbrand, (n 8), 692; Koch, (n 2), § 311, Rn. 4; Vetter, (n 6), § 311, Rn. 4, 6, jeweils m.w.N.

10 Vetter, (n 6), § 311, Rn. 2.

11 Habersack, (n 5), § 311, Rn. 2.

Wie oben angeführt, hat der deutsche Gesetzgeber mit §§ 311, 317 AktG für faktische Konzernierungen so ein Schutzsystem konzipiert, dass es die abhängige Gesellschaft selbst gegen eine Benachteiligung durch das herrschende Unternehmen sichern soll.[12] Allerdings hat das System eine gravierende Schwäche, so dass die Mitglieder von Vorstand und Aufsichtsrat der abhängigen Gesellschaft unter dem Einfluss des herrschenden Unternehmens, von dem sie oft auch persönlich abhängig sind, nicht immer gewillt oder geeignet sind, beim Vorliegen von Benachteiligungen Ansprüche gegen das herrschende Unternehmen geltend zu machen.[13] Aus diesem Grund hat der Gesetzgeber auch den Aktionären und Gläubigern der abhängigen Gesellschaft das Recht eingeräumt, die Schadensersatzansprüche der abhängigen Gesellschaft geltend zu machen (§ 317 Abs. 4 i.V.m. § 309 Abs. 4 AktG). Dies setzt allerdings voraus, dass die Aktionäre und Gläubiger der abhängigen Gesellschaft von der Benachteiligung, also von nachteiligen Rechtsgeschäften und/oder Maßnahmen ohne Ausgleich Kenntnis haben.[14] Sie mögen zwar Benachteiligungen vermuten, aber sie werden sie kaum konkret benennen und beweisen können, weil sie die Interna des Unternehmens nicht kennen.[15] Nach den Gesetzesmaterialien soll dieser Schwierigkeit der Abhängigkeitsbericht Rechnung tragen, in dem der Vorstand über die nachteiligen konzerninternen oder konzernveranlassten Rechtsgeschäfte und Maßnahmen der Gesellschaft berichtet (§ 312 AktG).[16] Der Gesetzgeber hat sich zwar dagegen entschieden, den Gläubigern und den außenstehenden Aktionären der abhängigen Gesellschaft den Bericht unmittelbar zugänglich zu machen;[17] aber er gewinnt trotzdem eine gewisse Publizität dadurch, dass die Schlusserklärung des Vorstands in dem Lagebericht, die Prüfungsergebnisse des Aufsichtsrats in dem Aufsichtsratsbericht sowie ggf. der Sonderprüfungsbericht offengelegt werden.[18] Dadurch können die außenstehenden Aktionäre und Gläubiger -wenn auch begrenzt- über die nachteiligen konzernrelevanten Geschäfte und Maßnahmen, also die Benachteiligungen zur Kenntnis nehmen und von ihren Klagerechten i.S.v. §§ 317 Abs. 4, 318 Abs. 4 i.V.m. § 309 Abs. 4 AktG) Gebrauch machen.

Darüber hinaus sorgt der Abhängigkeitsbericht für eine vollständige **Dokumentation** aller benachteiligungsverdächtigen Rechtsgeschäfte und Maßnahmen mit den zur Beurteilung ihrer Angemessenheit erforderlichen Angaben.[19] Damit wird eine

12 Altmeppen, (n 1), § 312 Rn. 1

13 Altmeppen, (n 1), § 312, Rn. 1.

14 Altmeppen, (n 1), § 312, Rn. 1.

15 Altmeppen, (n 1), § 312, Rn. 1.

16 Kropff, *Aktiengesetz Textausgabe des Aktiengesetzes vom 6.9.1965 (Bundesgesetzbl. I S. 1089) und des Einführungsgesetzes zum Aktiengesetz vom 6.9.1965 (Bundesgesetzbl. I S. 1185) mit Begründung des Regierungsentwurfs, Bericht des Rechtsausschusses des Deutschen Bundestags, Verweisungen und Sachverzeichnis*, 411; Koch, (n 2), § 312, Rn. 1; Müller, (n 3), § 312, Rn. 3 m.w.N.

17 Ausführlich dazu nachstehend: II.

18 Ausführlich dazu nachstehend: III.

19 Fleischer (n. 2), § 312, Rn. 3; Altmeppen, (n 1), § 312, Rn. 3.

wesentliche Unterlage für die Überprüfung durch den Abschlussprüfer und den Aufsichtsrat geschafft, welche sich darauf bezieht, ob das Benachteiligungsverbot der Grundnorm § 311 AktG tatsächlich eingehalten wurde.[20] Diese Dokumentationspflicht soll zugleich auch die **Selbstkontrolle des Vorstands** verstärken, der sich auch selbst Rechenschaft über die Erfüllung seiner organschaftlichen Pflichten zum Schutz der abhängigen AG ablegen soll.[21] Außerdem vermag die Pflicht der Erstellung eines solchen Berichts die **Stellung des Vorstands** der abhängigen Gesellschaft gegenüber dem herrschenden Unternehmen zu stärken.[22] Denn die gesetzliche Verpflichtung relevante Vorgänge in den Abhängigkeitsbericht aufnehmen zu müssen, erleichtert ihm, sich den Plänen des herrschenden Unternehmens zum Nachteil der abhängigen Gesellschaft zu widersetzen.[23] Der Abhängigkeitsbericht erfüllt damit zudem eine wichtige **präventive Funktion**, so dass die Entscheidungsträger bereits im Vorfeld darauf achten, dass nachteilige Rechtsgeschäfte und Maßnahmen unterbleiben oder rechtgemäß kompensiert werden.[24]

II. Grundsatz: Vertraulichkeit des Abhängigkeitsberichts

Der Abhängigkeitsbericht selbst ist nicht in seiner Gesamtheit zu veröffentlichen.[25] Auch die Satzung kann keine Offenlegung des Abhängigkeitsberichts anordnen,[26] da es sich insoweit um zwingendes Recht i.S.d. § 23 Abs. 5, S. 2 AktG handelt.[27] Er ist nur dem Abschlussprüfer (§ 313 AktG), dem Aufsichtsrat (§ 314 AktG) und auch ggf. dem Schlussprüfer (§ 315 AktG) zugänglich, welche jeweils eine Prüfung vornehmen.[28] Die außenstehenden Aktionäre und Gläubiger der abhängigen Gesellschaft haben dagegen kein Recht auf Einblick in den Abhängigkeitsbericht.[29] Sie können ihn also weder direkt einsehen noch herausverlangen.[30] Dies gilt auch dann, wenn die außenstehenden Aktionäre und Gläubiger nach §§ 317 Abs. 4, 318 Abs. 4 i.V.m. 309 Abs. 4 AktG Ansprüche geltend machen. Der Bericht bleibt also vielmehr vertraulich und ein internes Dokument.[31]

20 Fleischer (n. 2), § 312, Rn. 3; Altmeppen, (n 1), § 312 Rn. 3.

21 Koch, (n 2), § 312, Rn. 1; Fleischer (n. 2) § 312, Rn. 4.

22 Habersack, (n 5), § 312, Rn. 3; Fleischer (n. 2) § 312, Rn. 7.

23 Fleischer (n. 2), § 312, Rn. 7.

24 Müller, (n 3), § 312, Rn. 3

25 Wohl einheitliche Meinung: siehe OLG Frankfurt a.M. 06.01.2003, 20 W 449/93, AG 2003, S. 335 f.; Altmeppen, (n 1), § 312, Rn. 7 ff.; Habersack, (n 5), § 312, Rn. 4; Fleischer (n. 2) § 312, Rn. 10; Krieger, in: *Münchener Handbuch des Gesellschaftsrechts: Aktiengesellschaft* (4. Auflage, C.H.BECK 2015), § 70, Rn. 96; Koch, (n 2) § 312, Rn. 38; Vetter, (n 6), § 312, Rn. 7; Müller, (n 3), § 312, Rn. 2; Schiessl, (n 4), 873.

26 Altmeppen, (n 1), § 312, Rn. 11; Habersack, (n 5), § 312, Rn. 4.

27 Krieger, (n 25), § 70, Rn. 96; Habersack, (n 5), § 312, Rn. 4; Fleischer (n. 2) § 312, Rn. 10; Altmeppen, (n 1), § 312, Rn. 11; Grigoleit, in: *Grigoleit, Aktiengesetz, Kommentar* (1. Auflage, C.H.BECK 2013), § 312, Rn. 31.

28 Fleischer (n. 2) § 312, Rn. 10.

29 Fleischer (n. 2) § 312, Rn. 10.

30 Fleischer (n. 2) § 312, Rn. 10.

31 Koch, (n 2) § 312, Rn. 38.

Die Vertraulichkeit des Abhängigkeitsberichts beruht auf einer gesetzgeberischen Abwägung widerstreitender Interessen der Beteiligten (Unternehmen, Aktionäre, Gläubiger) und somit auf der bewußten Entscheidung des Gesetzgebers.[32] Nach dem Gesetzesgeber müsse der Abhängigkeitsbericht konkret sein und über das Abhängigkeitsverhältnis ausführliche Informationen geben, damit er seinen Zweck erfüllen kann. Der Bericht müsse also interne Vorgänge des Konzerns erörtern und bewerten. Es würden zwar die Außenseiter besser geschützt, wenn ihnen der Bericht zugänglich wäre. Denn sie würden somit besser beurteilen, ob Anhaltspunkte für eine Benachteiligung bestehen. Aber ein solcher Bericht, der mit vielen Einzelheiten der Geschäftsführung erfüllt ist, könne man nicht der Öffentlichkeit unterbreiten. Gegen eine Offenlegung sprechen nämlich die **Geheimhaltungsinteressen** der beteiligten Unternehmen. Nach Meinung des Gesetzgebers "muss er vertraulich bleiben können, weil sonst nicht mit der erforderlichen Offenheit über Geschäfte berichtet würde, deren Bekanntwerden geeignet ist, der Gesellschaft einen Nachteil zuzufügen."[33] Unter diesem Gesichtspunkt sprechen daher auch Interessen der Außenseiter gegen die Offenlegung. So entscheidet sich also der deutsche Gesetzgeber des AktG/1965[34] gegen die Offenlegung des Abhängigkeitsberichts.[35]

An dieser Stelle stellt sich die Frage, wie sich die Vertraulichkeit des Abhängigkeitsberichts auf das allgemeine **Auskunftsrecht der Aktionäre** nach **§ 131 AktG** auswirkt. Mit anderen Worten, ob das allgemeine Auskunftsrecht der Aktionäre der abhängigen Gesellschaft gem. § 131 AktG durch § 312 AktG verdrängt wird? Nach herrschender Meinung bleibt das Auskunftsrecht der Aktionäre von der Vertraulichkeit des Abhängigkeitsberichts unberührt, so dass die Aktionäre in der Hauptversammlung auch Auskunft über einzelne im Abhängigkeitsbericht erläuterte Vorgänge verlangen können.[36] Dies soll aber nicht heißen, dass die Aktionäre den Inhalt des Abhängigkeitsberichts in der Hauptversammlung verlangen können.[37] Sie können konkrete Fragen zu bestimmten Geschäftsvorgängen (z.B. zu Vertragsbedingungen bei wesentlichen Geschäften mit verbundenen Unternehmen) stellen, soweit diese zur Beurteilung der Tagesordnung wichtig und nicht geheimhaltungsbedürftig sind.[38]

32 Altmeppen, (n 1), § 312 Rn. 9; Fleischer (n. 2) § 312, Rn. 11

33 Kropff, (n 16), 411.

34 BGBl.I 1965, S. 1089

35 Kropff, (n 16), 411; Altmeppen, (n 1), § 312, Rn. 7 ff.; Habersack, (n 5), § 312, Rn. 4; Koch, (n 2), § 312, Rn. 38; Schiessl, (n 4), 873; OLG Frankfurt a. M., NZG 2003, 224 ff.

36 OLG Düsseldorf DB 1991, S. 2533; OLG Stuttgart NZG 2004, S. 968; OLG Stuttgart, 11.08.2004, 20 U 3/04, AG 2005, S. 94,95; Habersack, (n 5), § 312, Rn. 5; Altmeppen, (n 1), § 312, Rn. 16; Fleischer, (n. 2), § 312, Rn. 13; Krieger, (n 25), § 70, Rn. 96; Koch, (n 2) § 312, Rn. 39; Grigoleit, (n 27), § 312, Rn. 32; Müller, (n 3), § 312, Rn. 4; Vetter, (n 6), § 312, Rn. 8; näher dazu siehe noch Habersack/Verse, 'Zum Auskunftsrecht des Aktionärs im faktischen Konzern', (2003) AG 300, 302 ff.

37 Fleischer (n. 2), § 312, Rn. 13.

38 Fleischer (n. 2), § 312, Rn. 13.

Nach der vereinzelt gebliebenen Gegenmeinung darf jedoch die Vertraulichkeit des Abhängigkeitsberichts durch das Auskunftsrecht der außenstehenden Aktionäre in der Hauptversammlung nicht unterlaufen werden.[39] Demnach bestehe kein Auskunftsrecht hinsichtlich solcher Vorgänge, über die im Abhängigkeitsbericht zu berichten ist. Dem wird im Schrifttum zu Recht entgegenhalten, dass der Vorstand die Auskunft über geheimhaltungsbedürftige Umstände nach Maßgabe des § 131 Abs. 3 AktG verweigern könne, so dass die Vertraulichkeit im Einzelfall durchaus vertraut bleiben könne. In Ermangelung einer Sperrwirkung des § 312 AktG könne daher ein Aktionär unter den weiteren Voraussetzungen des § 131 Abs. 1 AktG auch Auskunft über konzerninterne Vorgänge verlangen, die im Abhängigkeitsbericht enthalten sind.[40]

III. Begrenzte Offenlegung des Abhängigkeitsberichts

A. Allgemein

Wie oben ausgeführt, liegt der Abhängigkeitsbericht im Interesse der Gesellschaft und auch der Außenseiter nicht zur öffentlichen Einsicht aus. Mangels der Offenlegung des Berichts sind zwar die außenstehenden Aktionäre und Gläubiger der abhängigen Gesellschaft nicht in der Lage, von dem genaueren Inhalt des Berichts unmittelbare Kenntnis zu erhalten. Aber er gewinnt trotzdem bis zu einem gewissen Grad Publizität dadurch, dass die Schlusserklärung des Vorstands in dem Lagebericht, die Prüfungsergebnisse des Aufsichtsrats in dem Aufsichtsratsbericht sowie ggf. der Sonderprüfungsbericht offengelegt werden.

B. Offenlegung der Schlusserklärung durch den Lagebericht

Der Vorstand der abhängigen Gesellschaft muss gemäß § 312 Abs. 3 AktG am Schluss des Abhängigkeitsberichts eine zusammenfassende Erklärung über die bestimmten Punkten des Berichts abgeben.[41] In dieser **Schlusserklärung** hat der Vorstand zu erklären, ob die Gesellschaft nach den Umständen, die ihm in dem Zeitpunkt bekannt waren, in dem das Rechtsgeschäft vorgenommen oder die Maßnahme getroffen oder unterlassen wurde, bei jedem Rechtsgeschäft eine angemessene Gegenleistung erhielt und dadurch, dass die Maßnahme getroffen oder unterlassen wurde, nicht benachteiligt wurde (§ 312 Abs. 3, S. 1 AktG). Falls die Gesellschaft benachteiligt wurde, hat der Vorstand außerdem zu erklären, ob die Nachteile ausgeglichen worden sind (§ 312 Abs. 3, S. 2 AktG). Diese Schlusserklärung des Vorstands ist auch in den nach § 264 Abs. 1 HGB und § 289 HGB aufzustellenden **Lagebericht** aufzunehmen (§ 312 Abs. 3, S. 3 AktG).

39 Siehe dazu: KG 11.02.1972, 1 W 1672/71, AG 1973, S. 25, 27 f. OLG Frankfurt a. M. 06.01.2003, AG 2003, S. 335 f. Zur umfassenden Kritik der letzten Entscheidung s. Habersack/Verse, (n 36), 303 f.

40 Fleischer, (n. 2), § 312, Rn. 13; Grigoleit, (n 27), § 312, Rn. 31.

41 Altmeppen, (n 1), § 312, Rn. 140; Habersack, (n 5), § 312, Rn. 47.

Da der Lagebericht nach § 325 HGB offenzulegen ist, gewinnt das wesentliche Ergebnis des Abhängigkeitsberichts, also die **Schlusserklärung** des Vorstands dadurch **Publizität**.[42] Obwohl der Abhängigkeitsbericht nicht insgesamt offengelegt wird, verschafft die durch Lagebericht offengelegten Erklärungen des Vorstands den außenstehenden Aktionären und den Gläubigern Informationen über die wesentlichen Punkte des Abhängigkeitsberichts. Er wird nämlich nach § 175 Abs. 2, S. 1 AktG von der Einberufung an in dem Geschäftsraum der Gesellschaft ausgelegt und jeder Aktionär kann eine Abschrift davon verlangen (§ 175 Abs. 2 S. 2 AktG). Hierdurch wird die Schlusserklärung den **Aktionären** offengelegt. Außerdem ist der Lagebericht auch beim **Handelsregister** einzureichen (§ 325 Abs. 1 HGB).[43] Da die im Handelsregister eingetragenen Dokumente jedem zugänglich sind (§ 9 Abs. 1 HGB), wird die Schlusserklärung dadurch auch den Dritten, also den **Gläubigern** offengelegt. Schließlich erlangt der wesentliche Teil des Abhängigkeitsberichts damit Publizität (nach Maßgaben der §§ 325 ff. HGB) und bildet die Grundlage für einen Antrag auf Sonderprüfung gemäß § 315 S. 1, Nr. 3 AktG.

C. Offenlegung des Prüfungsberichts des Aufsichtsrats

Der Abhängigkeitsbericht unterliegt sowohl der Prüfung durch den **Abschlussprüfer** (§ 313 AktG) als auch der Prüfung durch den **Aufsichtsrat** (§ 314 AktG). Das Ergebnis der Prüfung durch Abschlussprüfer wird dem Aufsichtsrat vorgelegt (§ 313 Abs. 1, S. 2 AktG). Der Aufsichtsrat hat allerdings -in seinem aufzustellenden Bericht- zu diesem Bericht nur "Stellung zu nehmen" (§ 314 Abs. 2, S. 2 AktG). Wenn er mit dem Prüfungsbericht des Abschlussprüfers einverstanden ist, hat er nur das Ergebnis des Abschlussprüfers anzugeben; aber wenn er damit nicht einverstanden ist, hat er auch seine Gründe dafür anzugeben. Er hat auch einen Bestätigungsvermerk und eine Versagung des Bestätigungsvermerks von dem Abschlussprüfer in den Bericht aufzunehmen (§ 314 Abs. 2, S. 3 AktG).

Darüber hinaus wird der Abhängigkeitsbericht auch von dem Aufsichtsrat geprüft (§ 314 Abs. 2, S. 1 AktG) und der Prüfungsbericht des Aufsichtsrats -mit seiner Stellungnahme zum Prüfungsbericht des Abschlussprüfers und mit oben genannter Vermerke- wird in gleicher Weise wie der Lagerbericht **offengelegt** (§ 175 Abs. 2 AktG; § 325 HGB). Am Schluss seines Berichts hat der Aufsichtsrat zu erklären, ob nach dem abschließenden Ergebnis seiner Prüfung Einwendungen gegen die Schlusserklärung des Vorstands zu erheben sind. Erklärt der Aufsichtsrat Einwendungen gegen die Schlusserklärung des Vorstands, dann gibt das jedem Aktionär die Möglichkeit, eine Sonderprüfung zu beantragen (§ 315 Abs. 1, S. 2 AktG).

42 Kropff, (n 16), 412; Habersack, (n 5), § 312, Rn. 44; Koch, (n 2), § 312, Rn. 37; Hommelhoff, 'Praktische Erfahrungen mit dem Abhängigkeitsbericht – Ergebnisse einer rechtstatsächlichen Umfrage', (1992) 156 ZHR 295, 311.

43 Bei großen Gesellschaften i.S.v. § 267 HGB muss der Lagebericht gem. § 325 Abs. 2 HGB auch im elektronischen Bundesanzeiger bekannt gemacht werden.

D. Offenlegung des Sonderprüfungsberichts

§ 315 AktG gibt den Aktionären der abhängigen Gesellschaft die Gelegenheit, unter bestimmten Voraussetzungen Sonderprüfer zur Prüfung der geschäftlichen Beziehungen der Gesellschaft zu dem herrschenden Unternehmen oder einem mit ihm verbundenen Unternehmen bestellen zu lassen, damit die Aktionäre ihre Rechte wirksam wahren können. Nach § 315 Abs. 1 AktG ist eine Sonderprüfung zu beantragen, wenn (Nr. 1) der **Abschlussprüfer** den Bestätigungsvermerk zum Bericht über die Beziehungen zu verbundenen Unternehmen eingeschränkt oder versagt hat; (Nr. 2) der **Aufsichtsrat** erklärt hat, dass Einwendungen gegen die Erklärung des Vorstands am Schluss des Berichts über die Beziehungen zu verbundenen Unternehmen zu erheben sind; (Nr. 3) der **Vorstand** selbst erklärt hat, dass die Gesellschaft durch bestimmte Rechtsgeschäfte oder Maßnahmen benachteiligt worden ist, ohne dass die Nachteile ausgeglichen worden sind.

Den Sonderprüfern ist der Abhängigkeitsbericht zugänglich (§ 145 Abs. 1 und 2 AktG). Nach der Auswertung stellen die Prüfer einen Bericht auf und dieser "**Sonderprüfungsbericht**" wird im Gegensatz zu Abhängigkeitsbericht gemäß § 145 Abs. 6 AktG **offengelegt**. Der Sonderprüfer hat das Ergebnis der Prüfung schriftlich zu berichten (§ 145 Abs. 6, S. 1 AktG) und den Bericht dem Vorstand einzureichen (§ 145 Abs. 6, S. 3 AktG). Der Bericht wird dann vom Vorstand bei der Einberufung der nächsten Hauptversammlung als Gegenstand der Tagesordnung bekannt gemacht (§ 145 Abs. 6, S. 5 AktG). Außerdem ist der Bericht vom Sonderprüfer beim **Handelsregister** einzureichen[44] (§ 145 Abs. 6, S. 3 AktG). Auf diese Weise gewinnt der Sonderprüfungsbericht eine weitgehende **Offenlegung** und somit spielt eine wichtige Rolle im Schutzsystem der §§ 311 ff. AktG. Er verschafft nämlich den Aktionären und den Gläubigern die nötigen Informationen, die zur Geltendmachung der Ersatzansprüche nach §§ 317, 318 AktG erforderlich sind.

IV. Tendenz im Schrifttum *de lege ferenda* zur vollständigen Offenlegung des Abhängigkeitsberichts

Wie schon oben ausgeführt, gilt im deutschen Konzernrecht *de lege lata* die Vertraulichkeit des Abhängigkeitsberichts. Sowohl der Gesetzgeber als auch die Befürworter des Vertraulichkeitsprinzips gehen davon aus, dass die Interessen aller Beteiligten (Unternehmen, Aktionäre und Gläubiger) erfordern, dass der Bericht intern und vertraulich bleibt.[45] Schon seit Jahren wird allerdings die Vertraulichkeit des Abhängigkeitsberichts in Frage gestellt und heftig darüber diskutiert, ob *de lege ferenda* daran festzuhalten ist, dass der Abhängigkeitsbericht

44 Da das Handelsregister jedem gestattet ist (§ 9 Abs. 1 HGB), können die Gläubiger auch in den Bericht Einsicht nehmen.

45 Kropff, (n 16), 411; Decher, Das Konzernrecht des Aktiengesetzes — Bestand und Bewährung, (2007) 171 ZHR 126 138; Hommelhoff, *Empfiehlt es sich, das Recht faktischer Unternehmensverbindungen – auch im Hinblick auf das Recht anderer EG-Staaten – neu zu regeln? Gutachten G für den 59. DJT* 1992, 59. Ausführlich dazu siehe auch vorstehend: II.

nicht vollständig offenzulegen ist.[46] Den Ausgangspunkt dieser Diskussion bildet hauptsächlich die Behauptung, dass die sich aus §§ 317, 318 AktG ergebenden Rechtsverfolgungsmöglichkeiten der außenstehenden Aktionäre und der Gläubiger der abhängigen Gesellschaft eingeschränkt oder kaum in Betracht kommen würden, weil sie mangels der vollständigen Offenlegung des Abhängigkeitsberichts keinen unmittelbaren Einblick in den Bericht hätten und damit keine ausreichende Informationsgrundlage erhalten würden.[47] Mit dieser Begründung wurde im deutschen Recht schon immer für die vollständige Offenlegung des Abhängigkeitsberichts plädiert. Den Offenlegungsvorschlägen wurde jedoch wiederholt mit der Begründung widersprochen, dass dann die Geheimhaltungsinteressen der Unternehmen benachteiligt würden.[48] In den neunziger Jahren nahmen die Vorschläge zur Veröffentlichung des Abhängigkeitsberichts weiter zu.[49] Insbesondere in letzter Zeit, in der die Regelungstendenzen zu mehr Publizität, z.B. im Kapitalmarktrecht immer wieder zunehmen, wird auch die Forderung des Schrifttums nach der Offenlegung des Abhängigkeitsberichts wieder lauter.[50]

Fazit und Würdigung

Zusammenfassend ist festzustellen, dass im deutschen Recht der Abhängigkeitsbericht selbst *de lege lata* nicht in seiner Gesamtheit zu veröffentlichen ist und daher er vielmehr ein interner und vertraulicher Bericht bleibt. Auch durch die Satzung kann keine Offenlegung des Abhängigkeitsberichts angeordnet werden, weil es sich insoweit um zwingendes Recht i.S.d. § 23 Abs. 5, S. 2 AktG handelt. Er ist nur dem Abschlussprüfer (§ 313 AktG), dem Aufsichtsrat der abhängigen Gesellschaft (§ 314 AktG) und auch ggf. den Sonderprüfern (§ 315 AktG) zugänglich, welche jeweils eine Prüfung vornehmen. Die außenstehenden Aktionäre und Gläubiger der abhängigen Gesellschaft haben dagegen kein Recht auf Einblick in den Abhängigkeitsbericht. Sie können ihn also weder direkt einsehen noch herausverlangen. Aber der Bericht gewinnt trotzdem bis zu einem gewissen Grad Publizität und verbessert die Informationsmöglichkeiten der außenstehenden Aktionäre bzw. Gläubiger dadurch, dass die Schlusserklärung des Vorstands in dem

46 Ausführlich dazu siehe nur: Fleischer (n. 2) § 312, Rn. 15 ff.

47 Hommelhoff, 'Praktische Erfahrungen mit dem Abhängigkeitsbericht' (n 43), 295 ff. und insb. 311.

48 Die Offenlegung des Abhängigkeitsberichts ist auch auf dem 59. DJT im Anschluss an das Gutachten von *Hommelhof* (*Hommelhoff,* Gutachten G für den 59. DJT 1992, 59) in der Diskussion auf Widerspruch gestoßen. Ausführlich dazu statt vieler: Fleischer (n. 2) § 312, Rn. 15 ff.

49 U.a. Koppensteiner, 'Abhängige Aktiengesellschaften aus rechtpolitischer Sicht', FS Steindorff 1990, 79, 109; Krause, 'Der revidierte Vorschlag einer Take-over-Richtlinie', (1996), AG 209, 212; Hommelhoff, 'Praktische Erfahrungen mit dem Abhängigkeitsbericht' (n 43), 311; Doralt, 'Zur Entwicklung eines österreichischen Konzernrechts', (1991), ZGR 252 280 f.

50 Habersack, 'Aktienkonzernrecht – Bestandsaufnahme und Perspektiven', 2016 AG 691, 694 f.; J. Vetter, '50 Jahre Aktienkonzernrecht', in: 50 Jahre Aktiengesetz (2016) 19/Sonderheft ZGR 231, 253 ff.; Koch, (n 2), § 312, Rn. 38; Fleischer, 'Geheime Kommandosache: Ist die Vertraulichkeit des Abhängigkeitsberichts (§ 312 AktG) noch zeitgemäß?', 2014 69 BB 835, 837 ff.; E. Vetter, 'Interessenkonflikte im Konzern – vergleichende Betrachtungen zum faktischen Konzern und zum Vertragskonzern', (2007) 171 ZHR 342, 365 ff.; Fleischer, (n. 2), § 312, Rn. 18 ff. jeweils m.w.N.

Lagebericht, die Prüfungsergebnisse des Aufsichtsrats in dem Aufsichtsratsbericht sowie ggf. der Sonderprüfungsbericht offengelegt werden. Deswegen besteht im deutschen Recht eine begrenzte Publizität des Abhängigkeitsberichts. Allerdings findet die Lehre eine begrenzte Publizität nicht ausreichend und insbesondere wird in jüngster Zeit *de lege ferenda* immer mehr für die vollständige Offenlegung plädiert.

Auch m.E. sprechen gute Gründe für die Offenlegung des Abhängigkeitsberichts. Bei einem Vergleich der Vor- und Nachteile der Offenlegung des Abhängigkeitsberichts mit Rücksicht auf die Interessen von Beteiligten geht nämlich die Offenlegung des Berichts mit überwiegenden Vorteilen einher. Denn die vollständige Offenlegung des Abhängigkeitsberichts würde die Wirksamkeit der Schutzfunktion des Berichts innerhalb des aktienkonzernrechtlichen Schutzsystems in vielerlei Hinsicht verbessern: Zum einen würden alle relevanten Informationen über die nachteiligen Rechtsgeschäfte bzw. Veranlassungen den außenstehenden Aktionären sowie den Gläubigern zur Verfügung stehen und damit hätten sie bessere Anhaltspunkte für die Geltendmachung von Schadensersatzansprüchen (§§ 317, 318 i.V.m. 309 Abs. 4 AktG). Zum anderen würde dies einerseits die Vorstandsmitglieder der abhängigen Gesellschaft dazu zwingen, beim Abschluss konzerninterner Rechtsgeschäfte mit größter Sorgfalt zu agieren.[51] Andererseits würde dies auch die Geschäftsleiter des herrschenden Unternehmens dazu veranlassen, bei der Machtausübung nachteilige Rechtsgeschäfte und Maßnahmen zu vermeiden oder rechtgemäß zu kompensieren.

Die gegen die Offenlegung des Abhängigkeitsberichts vorgebrachte Kritik, dass die Offenlegung zum Schaden der Gesellschaft und auch der Aktionäre bzw. Gläubiger wäre, weil in dem Bericht alle Geschäfts- und Betriebsgeheimnisse der Unternehmen und des Konzerns dargestellt werden, ist zwar nicht unbegründet. Diese Gefahr könnte aber dadurch vermieden werden, dass eine Schutzklausel für die Geschäfts- und Betriebsgeheimnisse nach dem Muster des § 131 Abs. 3, S. 1, Nr. 1 AktG vorgesehen wird,[52] wonach der Vorstand die Auskunft verweigern darf, soweit die Erteilung der Auskunft nach vernünftiger kaufmännischer Beurteilung geeignet ist, der Gesellschaft oder einem verbundenen Unternehmen einen nicht unerheblichen Nachteil zuzufügen.

51 Fleischer (n. 2) § 312, Rn. 21.

52 Fleischer (n. 2) § 312, Rn. 22.

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Abkürzungsverzeichnis/List of abbreviations

A.A./a.A.	Anderer Auffassung
Abs.	Absatz
AG	Aktiengesellschaft
AktG	Aktiengesetz
BB	Betriebsberater
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen
DB	Der Betrieb
f.	folgende (Seite)
ff.	fortfolgende (Seiten)
Fn.	Fußnote
FS.	Festschrift
gem.	gemäß
ggf.	gegebenenfalls
HGB	Handelsgesetzbuch
insb.	insbesondere
i.S.d./i.S.v.	im Sinne des / im Sinne von
i.V.m.	in Verbindung mit
KGaA	Kommanditgesellschaft auf Aktien
KM	Kammergericht
Nr.	Nummer
NZG	Neue Zeitschrift für Gesellschaftsrecht
OLG	Oberlandesgericht
Rn.	Randnummer
S.	Satz / Seite
s.	siehe
sog.	Sogenannte/r
u.a.	unter anderem
vgl.	vergleiche
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Parteifähigkeit der Gesellschaft bürgerlichen Rechts: Eine vergleichende Studie zum deutschen, schweizerischen und türkischen Recht

Capacity to Become Party of Unregistered (Ordinary) Partnerships: A Comparative Study of German, Swiss and Turkish Law

Adi Ortaklığın Taraf Ehliyeti: Alman, İsviçre ve Türk Hukuku Bakımından Karşılaştırmalı Bir Çalışma

Vildan Peksöz[1]

Zusammenfassung
Im türkischen und schweizerischen Recht hat die einfache Gesellschaft keine Rechtspersönlichkeit. Deswegen ist diese Gesellschaft nicht rechts-und parteifähig. Aber in Deutschland gibt es diesbezüglich wichtige Entwicklungen. In Deutschland, in der Schweiz und in der Türkei hat die Gesellschaft bürgerlichen Rechts die gleichen Wurzeln. In diesem Beitrag wird die Frage nach dem Stand der Lehre und Rechtsprechung in der Schweiz und in der Türkei beantwortet. Dann gilt es zu entscheiden, ob die deutsche Lehre und die Entscheidung des BGH auf die türkische Gesellschaft bürgerlichen Rechts übertragen werden kann und soll. Am Ende wird eine Übertragung des Modells, wie es in Deutschland und der Schweiz existiert, auf das türkische Recht vorgeschlagen.

Schlüsselwörter
Gesellschaft bürgerlichen Rechts, Juristische Person, Partiefähigkeit

Abstract
Unregistered (ordinary) partnerships do not have legal status under Turkish law. That's why these partnerships are not entitled to undoubtedly have the capacity to be a party at court; however, there are some developments in Germany related to the legal capacity of unregistered partnerships. According to the German Supreme Court, these partnerships are able to have rights and obligations, and these partnerships can be parties at courts. It means that they can implement the action of suing another party, or in turn be brought an action against. In this article, the question needs to be answered if it is at all possible to accept the decision of the German Supreme Court in Turkey or not. To typically acquire elucidation to this question, Turkish and German doctrine and court decisions compared and the reasons for the Court's decision are assessed. Furthermore, fundamental doctrine, as well as court decisions in Switzerland, is analyzed to decide Turkish Law. At the ultimate end of this informative article, a new model is conclusively suggested for Turkey.

Keywords
Unregistered Partnerships, Legal Person, Legal Capacity

Öz
Türk hukukunda ve İsviçre hukukunda adi ortaklıkların taraf ehliyeti yoktur. Bu yüzden adi ortaklıklar davacı ve davalı olamaz. Buna karşın Alman hukukunda adi ortaklıkların taraf ehliyetiyle ilgili birtakım gelişmeler yaşanmıştır. Alman

1 **Corresponding Author:** Vildan Peksöz (Ress. Asst. Dr.), Istanbul University, Faculty of Law, Private Law Department, Department of Civil Procedure and Enforcement – Bankruptcy Law, Istanbul, Turkey. E-mail: vildan.peksoz@istanbul.edu.tr ORCID: 0000-0001-5903-6209

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Federal Mahkemesinin 29.01.2001 tarihinde verdiği karara göre adi ortaklıklar haklara ve borçlara sahip olabilir. Ayrıca söz konusu kararda adi ortaklıkların taraf ehliyetine sahip olduğu kabul edilmiştir. Bu makalede Alman Federal Mahkemesinin kararının Türk hukukunda kabul edilmesinin mümkün olup olmadığı tartışılmaktadır. Bu anlamda Türk hukuku ve Alman hukuku karşılaştırılmış; Alman Federal Mahkemesinin kararındaki gerekçeler değerlendirilmiştir. İsviçre öğretisi ve mahkeme kararları, Türk hukukuna ilişkin değerlendirme yapılırken ele alınmıştır. Çalışmanın sonunda Türkiye için yeni bir model önerilmiştir.

Anahtar Kelimeler
Adi Ortaklık, Tüzel Kişilik, Taraf Ehliyeti

Extended Summary

A partnership established under private law is a relationship set up by contract between two or more persons to meet a common goal by mutual efforts and means. These partnerships do not have legal status and can not be a party in courts under Turkish law. It typically means that these partnerships are not able to file a suit. Moreover, it is not possible to file a suit against them.

The capacity to have rights and obligations of unregistered partnerships is not accepted under Swiss Law. So they are not able to be parties in judicial courts.

The German Supreme Court accepted on 29.01.2001 that unregistered partnerships can have rights and obligations although they retain no legal personality. Also, the Court accepted standing to sue of the unregistered partnerships without having legal personality. That's why in German Courts unregistered partnerships have an active and passive capacity of being subject to a lawsuit.

The question of whether unregistered partnerships that have the legal capacity to have rights, obligations, and to be a party under Turkish law system are possible or not is answered in this article. To answer this question, the reasons for the decision of the German Supreme Court are analysed. Although there are many similarities between German and Turkish law we cannot easily accept the possible reasons for the German Supreme Court's judicial decision. Because we should pay attention to the specific situation, of the doctrine and the court decisions in Turkey.

The German Supreme Court promptly decided that there is a gap in German law related to unregistered partnerships and the judge has to address this gap. However, according to the opinion which is defended in this article, there is not a gap in the Turkish Civil Code and Civil Procedure Code about the legal nature of these partnerships. Under Turkish codes, the generating capacity of unregistered partnerships is not regulated. However, by being quiet, lawmakers regulate that these partnerships do not possess a legal capacity. That is why it really is not the duty of the judge to regulate the capacity of unregistered partnerships, but it is the duty of lawmakers. *De lege ferenda*, the partnerships may be promptly accepted as utilising

the capacity to possess rights, obligations, and standing to sue under Turkish law. Due to this, in this article, an innovative model is suggested, related to these partnerships. According to this model, unregistered partnerships can sue and be sued in some aspects.

Under German and Swiss law a Partnership that uses a common firm-name and business corporation becomes automatically a general/registered partnership (*Kollektivgesellschaft*) and is ruled by the special provisions of the Code. These partnerships undoubtedly have to be properly registered. They are allowed to use a firm-name. But different from Turkish law, in Germany and Switzerland, they are not recognised as legal personalities. In Turkey, a considerable number of registered partnerships are very small because of the standard procedure to intentionally set up such a beneficial partnership. In addition, just real persons are able to be partners of these partnerships. It means that legal persons are not able to be partners of these partnerships. Different from registered partnerships, it is easy to establish unregistered partnerships. Because there is not an official procedure for the establishment, also for legal persons, there are not any limitations to being partners of unregistered partnerships. Therefore, these responsible persons typically choose to establish unregistered partnerships and this situation makes unregistered partnerships very popular in Turkey. The Turkish Supreme Court however rejects many specific cases concerning unregistered partnerships because of not having the legal capacity. Taking the example of registered partnerships, this article suggests an alternative model of unregistered partnerships under Turkish law which has the legal capacity to sue and be sued. This model should be capable of retaining a firm name and being registered.

Parteifähigkeit der Gesellschaft bürgerlichen Rechts: Eine vergleichende Studie zum deutschen, schweizerischen und türkischen Recht

I. Einleitung

Eine Gesellschaft bürgerlichen Rechts (GbR) besitzt im türkischen, schweizerischen und deutschen Recht keine eigene Rechtspersönlichkeit. Aber es gibt diesbezüglich einige Entwicklungen im deutschen Recht. Der deutsche Bundesgerichtshof hat die (Aussen-) Gesellschaft bürgerlichen Rechts für rechts-und parteifähig erklärt. Dieser Artikel beschreibt den Stand der Lehre und Rechtsprechung in Deutschland, in der Schweiz und in der Türkei. Dann wird die Frage beantwortet, ob die Entscheidung des BGH sich auf das türkische Recht auswirken kann oder nicht. Das eigentliche Hauptthema des folgenden Artikels soll sein, ob eine Gesellschaft bürgerlichen Rechts (türkisches Schuldgesetz Art. 620-645) Partei des türkischen Zivilprozess sein kann, d.h., ob sie Parteifähigkeit besitzt.

II. Stand der Lehre und Rechtsprechung

A. In Deutschland

Eine Gesellschaft bürgerlichen Rechts ist vom Gesetzgeber als Gesamthandsgemeinschaft im deutschen Recht kodifiziert (BGB § 719) und steht im Feld der Gesamthandsdiskussion. In Deutschland gibt es zwei Modelle, um die Rechtsnatur der GbR einzuordnen: Die traditionelle Gesamthandslehre und die Gruppenlehre. Die traditionelle Lehre geht davon aus, dass nicht die GbR als von den Gesellschaftern unabhängiges Gebilde Träger von Rechten und Pflichten sein kann, sondern nur die Gesellschafter in ihrer gesamthänderischen Verbundenheit[1]. Nach der Gruppenlehre hingegen kann die GbR selbst Träger von Rechten und Pflichten sein, nicht nur ihre Gesellschafter[2]. Der berühmteste Vertreter der Gruppenlehre ist *Flume*[3]. Er hat die These aufgestellt, dass die Gesamthandsgruppe als solche ein Rechtssubjekt ist, ohne aber selbst Juristische Person zu werden[4].

1 Jürgen Blomeyer, 'Die Rechtsnatur der Gesamthand' (1971) 10 Juristische Rundschau 401; Wolfgang Zöllner, 'Rechtssubjektivität von Personengesellschaften' (1993) Festschrift für Joachim Gernhuber zum 70. Geburtstag 570; Albrecht Cordes, 'Die Gesellschaft bürgerlichen Rechts auf dem Weg zur juristischen Person?' (1998) 11 JZ 551; Robert Heller, *Der Zivilprozess der Gesellschaft bürgerlichen Recht* (Carl Heymann 1989) 15, 16; Stephan Göckeler, *Die Stellung der Gesellschaft des bürgerlichen Rechts im Erkenntnis-, Vollstreckungs und Konkursverfahren* (Duncker&Humboldt 1992) 30-31; Eleonore Reichert, *Die BGB-Gesellschaft im Zivilprozess* (Peter Lang 1988) 16; Mathias Morawietz, *Die rechts-und parteifähige Gesellschaft bürgerlichen Rechts im Zivilprozess* (Nomos 2011) 15-16; Sibylle Seiferlein, *Die Rechtsfähigkeit der BGB-Aussengesellschaft unter Betrachtung ausgewählter Folgeprobleme* (Josef Eul 2004) 25.

2 Otto von Gierke, *Deutsches Privatrecht* (Duncker&Humblot 1936) 664, 682; Werner Flume, 'Gesellschaft und Gesamthand' (1972) 136 ZHR 189 ff, 192; Fritz Fabricius, *Relativität der Rechtsfähigkeit* (C.H.Beck'sche 1963) 158; Johannes Wertenbruch, *Die Haftung von Gesellschaften und Gesellschaftsanteilen in der Zwangsvollstreckung* (Dr. Otto Schmidt 2000) 194-195; Wolfram Timm, 'Die Rechtsfähigkeit der Gesellschaft bürgerlichen Rechts und ihre Haftungsverfassung' (1995) NJW 3214; Nicole Raster, *Die Verselbständigung der Gesellschaft des bürgerlichen Rechts* (S. Roderer 2001) 60; Seiferlein (n1) 68-69; Morawietz (n1) 16.

3 Flume (n2) 177 ff.

4 Flume (n2) 191.

Der BGH hat in seinem Urteil die Gruppenlehre angeschlossen und hat am 29.01.2001, die Gesellschaft bürgerlichen Rechts für rechts-und parteifähig erklärt[5]. Er unterscheidet die GbR von der Juristischen Person. Denn der BGH hat die Rechtspersönlichkeit der GbR nicht akzeptiert.

In der deutschen Literatur haben manche Autoren die Anerkennung der Parteifähigkeit kritisiert[6]. Aber Einige haben die Entscheidung des BGH zur Anerkennung der Rechts- und Parteifähigkeit begrüsst[7].

B. In Der Schweiz

In der Schweizer Lehre wird die Frage gestellt, ob die neue deutsche Lehre auf die GbR übertragen werden kann[8]. Vor der Entscheidung des BGH war Übernahme der deutschen Gesamthandslehre nach *Müller* mit vielen Schwierigkeiten verbunden[9]. Im Gegensatz dazu exisitiert im schweizerischen Recht diesbezüglich die Auffassung, dass die GbR rechtsfähig ist[10]; z.B. nach *Vonzun* ist die atypische kaufmännische GbR anders als die typische GbR fähig, eigene Rechte zu erwerben und Verbindlichkeiten einzugehen[11]. Aber diese Ansicht hat sich nicht auf die Lehre ausgewirkt.

Die schweizerischen Autoren, die die Entscheidung des BGH eingeschätzt haben, haben die Übernahme der neueren deutschen Lehre nicht akzeptiert[12]. Aber hinsichtlich dieser Entscheidung wird die Ansicht vertreten, dass die Gesamthand mit Rechtsfähigkeit ausgestattet ist[13].

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5 BGH, II ZR 331/00. Für die Entscheidung siehe: https://beck-online.beck.de/Home; NJW 2001, Heft 14, 1056-1061.

6 Hanns Prütting, 'Die Parteifähigkeit der Gesellschaft bürgerlichen Rechts als Methodenproblem' (2002) Festschrift für Herbert Wiedemann zum 70. Geburtstag, 1186, 1192 ff; Karl-Nikolaus Peifer, 'Rechtsfähigkeit und Rechtssubjektivität der Gesamthand -die GbR als OHG?' (2001) NZG 299; Burkhard Hess, 'Grundfragen und Entwicklungen der Parteifähigkeit' (2004) 117/3 ZZP 276.

7 Johannes Wertenbruch, 'Die Parteifähigkeit der GbR-die Änderungen für die Gerichts-und Vollstreckungspraxis' (2002) NJW 329; Barbara Dauner-Lieb, 'Ein neues Fundament für die BGB-Gesellschaft' (2001) DStR 357, 358; Petra Pohlmann, 'Anmerkung zu BGH, Urt. v. 21. 9. 2001 – II ZR 331/00, (Rechts- und Parteifähigkeit der Gesellschaft bürgerlichen Rechts)' (2002) ZZP 109; Markus K. Weiss, *Rechtsfähigkeit, Parteifähigkeit und Haftungsordnung der BGB-Gesellschaft nach dem Grundlagenurteil des Bundesgerichtshofs vom 29.01.2001* (Ergon 2005) 122 ff, 127; Peter Ulmer, 'Die höchstrichterlich 'enträtselte Gesellschaft bürgerlichen Rechts' (2001) ZIP 591, 599; Peter Derleder, 'Die Aufgabe der monistischen Struktur der Gesellschaft bürgerlichen Rechts durch Verleihung der Rechtsfähigkeit' (2001) 49 BB 2487.

8 Karin Müller, *Die Übertragung der Mitgliedschaft bei der einfachen Gesellschaft* (Schulthess Juristische Medien 2003) 61.

9 Müller (n8) 81.

10 Reto Vonzun, *Rechtsnatur und Haftung der Personengesellschaften* (Helbing&Lichtenhahn 2000) 231, 280. Andere Stimmen fordern, dass der GbR partielle Rechtsfähigkeit und beschränkte Parteifähigkeit zuerkannt wird, soweit die GbR als Gesamthand organisiert ist (Ruth Häfliger, *Die Parteifähigkeit im Zivilprozess* (Schulthess Polygraphischer 1987) 145).

11 Vonzun (n10) 231.

12 Walter Fellmann/Karin Müller, *Berner Kommentar, Kommentar zum schweizerischen Privatrecht, das Obligationenrecht*, Bd. VI, 2 Abteilung, Die Einzelnen Vertragsverhältnisse, Die Einfache Gesellschaft, 8. Teilband, Art 530-544 OR (Stämpfli 2006) 59, Nr 153, 62, Nr 157; Wolfgang Wiegand, ' 'Weisses Ross' –Ein trojanisches Pferd vor Schweizer Mauern?', (2003) Neuere Tendenzen im Gesellschaftsrecht, Festschrift für Peter Forstmoser zum 60. Geburtstag 44 ff, 49.

13 Andrea Taormina, *Innenansprüche in der einfachen Gesellschaft und deren Durchsetzung* (Universitätsverlag 2003) 39 ff.

Trotz widersprüchlicher Auffassungen für das schweizerische Recht ist mit der dortigen Lehre und Rechtsprechung daran festzuhalten, dass die Gesellschaft bürgerlichen Rechts nicht rechts-und parteifähig ist[14].

C. In Der Türkei

Im türkischen Recht ist die Rechtsnatur der GbR an sich nicht umstritten, die Lehre und Rechtsprechung gehen in die gleiche Richtung wie in der Schweiz. Nach fast übereinstimmender Meinung in der türkischen Literatur fehlt einer GbR sowohl die Rechts- als auch die Parteifähigkeit[15]. Es gibt allerdings einige Stimmen in der Literatur, die die GbR als selbständiges Rechtssubjekt am Rechtsverkehr teilnehmen lassen wollen[16]. Die bisherigen Entscheidungen von dem Kassationshof der Türkei gingen davon aus, dass die GbR keine Rechtsfähigkeit und Parteifähigkeit besitzt[17]. Deswegen müsste im Prozess um Rechte oder Verbindlichkeiten der Gesamthand die Gesellschafter selbst Partei als einfache oder notwendige Streitgenossen sein.

III. Möglichkeit der Parteifähige Gesellschaft bürgerlichen Rechts im türkischen Recht

A. Die Gesellschaft bürgerlichen Rechts als Gesamthandsgemeinschaft

In drei Ländern (Schweiz, Deutschland und Türkei) besteht bezüglich der gesamthänderischen Struktur der GbR Übereinstimmung. Denn eine GbR ist vom Gesetzgeber als Gesamthandsgemeinschaft im deutschen (BGB § 719), schweizerischen (OR Art. 544) und türkischen Recht (tSG Art. 638) kodifiziert. Wegen des gleichen Gesamthandsprinzips kann man sagen, dass es eine Strukturverwandtheit mit dem deutschen Recht gibt und die Struktur der türkischen GbR dem Urteil des BGH nicht entgegensteht[18]. Eigentlich entsprechen sich die

14 Fellmann/Müller (n12) 27, Nr 69; 62, Nr 158; Müller (n8) 76; Werner von Steiger, *Schweizerisches Privatrecht*, Handelsrecht, Band VIII/1 (1976) 446; Häfliger (n10) 146; Alfred Siegwart, *Das Obligationenrecht*, 4. Teil Die Personengesellschaften, Art 530-619 (Schulthess&Co. 1938) 65-66, Nr 119-120; Thomas Sutter-Somm/Franz Hasenböhler/Christoph Leuenberger, *Kommentar zur Schweizerischen Zivilprozessordnung* (ZPO) (Schulthess 2016) Art 59, 527, Nr 23. Zürich Obergericht 30.09.2015, PF150052 (Swisslex). BGE 96 III 103, 84 II 382, 78 I 184, 41 II 188; BGE 100 I a 394, 96 III 103, 88 II 230 (Müller (n8) 69, Fn 356).

15 Baki Kuru, *Hukuk Muhakemeleri Usulü*, C. I (Demir Demir 2001) 965; Saim Üstündağ, *Medeni Yargılama Hukuku* (Nesil 2000) 291; Hakan Pekcanıtez/Hülya Taş Korkmaz, *Pekcanıtez Usûl Medeni Usûl Hukuku* (On İki Levha 2017) 568; Süha Tanrıver, *Medeni Usul Hukuku* (Yetkin 2020) 507; Ramazan Arslan/Ejder Yılmaz/Sema Taşpınar Ayvaz/Emel Hanağası, *Medenî Usul Hukuku* (Yetkin 2020) 259; Murat Atalı/İbrahim Ermenek/Ersin Erdoğan, *Medenî Usûl Hukuku* (Yetkin 2020) 215; Nami Barlas, *Adi Ortaklık Temeline Dayalı Sözleşme İlişkileri* (Vedat 2016) 95; Oruç Hami Şener, *Adi Ortaklık* (Yetkin 2008) 155; Serdar Kale, *Medeni Yargılamada Taraf Ehliyeti* (On İki Levha 2010) 173; Evrim Erişir, *Medeni Usûl Hukukunda Taraf Ehliyeti* (Güncel 2007) 225-226.

16 Tuğrul Ansay, *Adi Şirket Dernek ve Ticaret Şirketleri* (Banka ve Ticaret Hukuku Araştırma Enstitüsü 1967) 153; Tuğrul Ansay, 'Adi Şirket Bir Tüzel Kişi Midir?' (2001) Prof. Dr. Erdoğan Moroğlu'na 65. Yaş Günü Armağanı 9.

17 22. HD, 23.9.2019, E 2016/28280, K 2019/17018; 3. HD, 17.5.2018, E 2016/18641, K 2018/5375; 12. HD, 5.6.2018, E 2017/2568, K 2018/5815; 10. HD, 15.5.2018, E 2016/6847, K 2018/4797; 15. HD, 29.3.2018, E 2016/4464, K 2018/1243 (Kazancı).

18 Für die Schweiz siehe Wiegand (n12) 44-45.

gesetzlichen Bestimmungen der GbR im schweizerischen, deutschen und türkischen Recht[19]. Nicht nur die Legaldefinition, sondern auch deren Ursprung und Entwicklung sind vergleichbar[20]. Die Gesamthandsdiskussion wie in der deutschen Lehre gibt es hingegen nicht in der türkischen Lehre, auch nicht in der schweizerischen Lehre. In der Türkischen und Schweizer Lehre herrscht die traditionelle Lehre vor, d.h. die Gesellschafter können Träger von Rechten und Pflichten sein und die Gesellschaft wird nicht als rechtsfähiges Gebilde angesehen. Deswegen kann man nicht einfach die Ansichten der Gruppenlehre, auf die der BGH seine Entscheidung gestützt hat, auf die türkische GbR übertragen.

B. Diskussion der Gründe der Entscheidung vom Bundesgerichtshof

Der BGH hat sich mit seiner Entscheidung vom 29.01.2001 erstmals zur grundsätzlichen Rechtsfähigkeit der GbR bekannt. Danach sieht der BGH die Anerkennung der Parteifähigkeit der GbR als notwendige prozessrechtliche Konsequenz aus der Anerkennung ihrer Rechtsfähigkeit[21]. Denn es steht in der ZPO § 50: "*Parteifähig ist, wer rechtsfähig ist*."

Der BGH begründet die Fähigkeit der GbR mit Praktikabilitätsargumenten[22]. Nach dem BGH kann die traditionelle Lehre nicht davon ausgehen, dass die Gesellschafter für die gemeinschaftlichen Verbindlichkeiten mit ihrem Gesamthandsvermögen haften. Die Haftung der Gesellschafter mit Gesamthandsvermögen und Privatvermögen führt zu einer Verwischung der Grenzen zwischen Schuld und Haftung[23]. Die Haftungsproblem ist in der Türkei die gleichen wie in Deutschland. Deswegen gibt es im türkischen Recht eine entsprechende Verwischung.

Argumente für die Rechtsfähigkeit der GbR sind unter anderem die Bewältigung des Gesellschafterwechsels oder die Haftung neu eintretender Gesellschafter mit dem Gesellschaftsvermögen gegenüber Altgläubigern nach BGH[24]. Wenn die Mitgliedschaft einer Gesellschafters unklar und strittig ist, gibt es ein Problem im Verfahren. Die Veränderungen im Gesellschafterbestand haben einen Einfluss auf die Rechtsverhältnisse und den Prozess, weil die Parteien die Gesellschafter sind, nicht die Gesellschaft[25]. Im türkischen Recht führt der Gesellschafterwechsel und Zweifelsfälle im Hinblick auf die Mitgliedschaft auch zu Problemen. Man braucht

19 Martin Furrer, *Der gemeinsame Zweck als Grundbegriff und Abgrenzungskriterium im Recht der einfachen Gesellschaft* (Schulthess 1996) 37.

20 Furrer (n19) 37.

21 BGH, A, II-1.

22 Diskussion über die Entscheidung des BGH in der Schweiz siehe Wiegand (n12) 45 ff. Für die Türkei siehe Erişir (n15) 219 ff; Kale (n15) 154 ff; Vildan Peksöz, *Medenî Usûl Hukuku Açısından Adi Ortaklık İlişkileri* (On İki Levha 2020) 88 ff.

23 BGH, A, I, 2, a.

24 BGH, A, I, 2, b.

25 BGH, A, II, 2, b-c.

den Parteiwechsel, um die Rechtsverhältnisse mit neuen Gesellschaftern fortzusetzen. Im Prozess kann § 125 ZPO in einigen Fällen angewendet werden und mithilfe dieser Norm kann der Prozess mit neuen Gesellschaftern weiterlaufen[26].

Daneben beeinflussen auch die gesetzlichen Regelungen, wie § 191 UmwG und § 105 HGB, den BGH bei dieser Entscheidung[27]. Nach § 191 Abs 2 Nr 1 UmwG ist die identitätswahrende Umwandlung einer Kapitallgesellschaft in eine GbR möglich. Wenn der Zweck von einer GbR auf den Betrieb eines Handelsgewerbes unter gemeinschaftlicher Firma gerichtet ist, wird die GbR nach § 105 HGB in eine offene Handelsgesellschaft umgewandelt. Wenn man die GbR nach aussen unrechtsfähig akzeptiert hat, kann im Falle dieses Formwechsels eine identitätswahrende Umwandlung kaum erklärt werden. Deswegen waren diese Normen die anderen Gründe bei der Entscheidung des BGH.

Nach § 11 Abs. 2 Nr. 1 InsO ist die GbR insolvenzfähig und kann auch Konkursmasse haben. Deswegen sollte das Vermögen der GbR und das ihrer Gesellschafter gesondert betrachtet werden. Diese Regelungen zeigen, dass die GbR Rechtssubjekt ist[28].

Im türkischen Recht gibt es keine vergleichbaren Regelungen[29]: keine identitätswahrende Umwandlung und auch keine Insolvenzfähigkeit der GbR. Aber die Praktikabilitätsprobleme sind in der Türkei die gleichen wie in Deutschland.

Es steht in § 736 ZPO: "*Zur Zwangsvollstreckung in das Gesellschaftsvermögen einer nach § 705 des Bürgerlichen Gesetzbuchs eingegangenen Gesellschaft ist ein gegen alle Gesellschafter ergangenes Urteil erforderlich*." Nach Ansicht des BGH verhindert diese Norm allein die Zwangsvollstreckung privater Gläubiger in das Privatvermögen einzelner Gesellschafter. Deswegen kann es nicht festgestellt werden, dass § 736 ZPO zum Ziel hat, die Parteifähigkeit der GbR auszuschliessen[30]. Im türkischen Gesetz gibt es keine solche Norm und man braucht keine Diskussion über die Parteifähigkeit im Bezug auf § 736 ZPO.

Nach Ansicht des BGH stimmen die notwendige Streitgenossenschaft und die Gesamthandgemeinschaft (auch die Regelungen über die Vertretung) nicht miteinander überein. Denn bei der notwendigen Streitgenossenschaft gibt es keine Verpflichtung der Gesellschafter, Prozesshandlungen nur gemeintschatlich vorzunehmen. Es bedeutet, dass jeder Streitgenosse seinen eigenen Prozess betreiben kann (ZPO § 63)[31]. Im türkischen Recht hingegen können die Streitgenossen nicht

26 Peksöz (n22) 278 ff.

27 BGH, A, I, 2, c.

28 BGH, A, I, 2, d.

29 Şener (n15) 155; Kale (n15) 176.

30 BGH, A, II, 3.

31 BGH, A, II, 2, a.

einzeln für sich handeln. Sie müssen prozessuale Handlungen immer zusammen vornehmen.

C. Gesetzlücke im Bezug auf Gesellschaft bürgerlichen Rechts

Der BGH stützt sich in seiner Entscheidung auf eine Analyse der Gesetzgebungsgeschichte und hat entschieden, dass die gesetzliche Regelung nicht abschließend die Rechtsnatur der GbR bestimmt und es daher einer Rechtsfortbildung bedarf[32]. Während man im ersten Entwurf des BGB noch von einem rein schuldrechtlichen Rechtsverhältnis ausgegangen ist, hat die zweite Kommission das Gesellschaftsvermögen der GbR zum Gesamthandsvermögen gemacht[33]. Aber die aus dem Gesamthandsprinzip folgenden Konsequenzen wurden nicht im Einzelnen geregelt. Deshalb sind die gesetzlichen Regelungen über die GbR nach BGH unvollständig.

Eine Gesetzlücke ist eine planwidrige Unvollständigkeit einer Regelung. Man braucht zwei Elemente dafür, nämlich die Unvollständigkeit und die Planwidrigkeit[34]. Wenn etwas nicht geregelt ist, bedeutet es nicht, dass es eine Lücke gibt. Denn der Gesetzgeber kann eine Nichtregelung bewusst gewollt haben[35]. In diesem Fall, gibt es eine Regelung durch Nichtregelung -im negativen Sinn/stillschweigend- und es besteht keine ausfüllungsbedürftige Lücke[36].

In diesem Artikel soll die Frage beantwortet werden, ob es solche Regelungslücken im türkischen Recht gibt oder nicht. Obwohl die GbR im türkischen Recht durch den Einfluss des deutschen Rechts geregelt wird und die Vorschriften dieselben Wurzeln haben, kann man deutsche Gerichtsentscheidungen, Rechtsentwicklungen und Gesetzesänderungen nicht direkt auf das türkische Recht übertragen[37]. Denn das Ziel des Gesetzgebers und die Praxis der Justiz und der Entscheidungen im türkischen Recht müssen bei einer solchen Übertragung berücksichtigt werden[38]. Nach einem Blick in diese Richtung dürfen deutsche Ansichten nicht unbesehen auf schweizerische und türkische Verhältnisse übertragen werden[39].

Der türkische Gesetzgeber hat im türkischen Handelsgesetzbuch (tHGB Art. 125) die offenen Handelsgesellschaften (OHG) und die Kommanditgesellschaften (KG) als Juristische Personen geregelt. Anderseits wurde die GbR in tSG als Vertragsverhältnis

32 BGH, A, I, 1-2.

33 Siehe Weiss (n7) 99.

34 Heinrich Honsell, *Basler Kommentar* (Helbing Lichtenhahn 2014) 28; Susan Emmenegger/Axel Tschentscher, *Berner Kommentar, Kommentar zum schweizerischen Privatrecht*, Einleitung und Personenrecht (Stämpfli 2012) 338-339, Nr 344.

35 Emmenegger/Tschentscher (n34) Art 1, 342, Nr 348.

36 Honsell (n34) 29; Emmenegger/Tschentscher (n34) Art 1, 342, Nr 348.

37 Für schweizerisches Recht siehe Furrer (n19) 37.

38 Ebenso Furrer (n19) 37.

39 Furrer (n19) 34.

akzeptiert, ohne eine Juristische Person zu sein. Daher kann man verstehen, dass der türkische Gesetzgeber die Rechtsnatur dieser Gesellschaften unterscheiden möchte.

Nach tSG Art. 638, I sind die Gesellschafter Rechtsträger in der Gesamthandsgemeinschaft[40] und nach tSG Art. 638, III sind die Gesellschafter Gesamtschuldner[41]. Mithilfe dieser Normen kann man verstehen, dass der Gesetzgeber die Gesellschafter als Subjekte in Rechtsverhältnissen akzeptiert, nicht die Gesellschaft[42]. Die Gruppenlehre hatte also keine Auswirkungen auf das türkische Recht, deswegen ist es sehr schwierig die Gesamthandsgemeinschaft als Rechtsubjekt zu bezeichnen. Auch sind es die Gesellschafter und nicht die Gesellschaft, die vertreten werden (tSG Art. 637, II). Zusätzlich fällt mit dem Ausscheiden eines Gesellschafters aus der Gesellschaft sein Anteil am Gesellschaftsvermögen den übrigen Gesellschaftern zu (tSG Art. 634, I). Diese Regelungen verdeutlichen, dass der türkische Gesetzgeber sie auf der Grundlage der unrechtsfähigen Gesellschaft geregelt hat.

Aus diesen Gründen liegt der Hauptgrund für die Bereitstellung dieser Möglichkeit nicht im türkischen Recht, obgleich einige Argumente des BGH für die Anerkennung der Rechts- und Parteifähigkeit der GbR ins türkische Recht übertragen werden können. Deswegen denke ich, dass die Rechts- und Parteifähigkeit der GbR im türkischen Recht nicht allein aufgrund der Argumentation des BGH anerkannt werden kann[43]. Der Hauptgrund ist, dass es keine planwidrige Gesetzlücke hinsichtlich der Rechtsnatur der GbR im türkischen Recht gibt, obwohl deren Rechtsnatur nicht in den die GbR betreffenden Normen geregelt ist. Denn der türkische Gesetzgeber hat die GbR als nicht rechtsfähiges und nicht parteifähiges Gebilde durch sein Schweigen akzeptiert. In solchen Fällen ist die Richterfortbildung unzulässig[44].

Im deutschen Recht wurde die Rechtsfähigkeit der GbR zunächst Schritt für Schritt erweitert[45]. Der BGH hat entschieden, dass die GbR Gründerin und Mitglied Juristischer Personen sein kann[46] und als GbR Rechtspositionen in Rechtsverhältnissen einnehmen kann[47]. Auch der BGH hat zur Scheckfähigkeit der GbR bekennt[48]. Solche Entscheidungen gibt es im türkischen Recht nicht. Deswegen kann man denken, die türkische Praxis sei nicht bereit für die Rechtsfähigkeit oder Parteifähigkeit der GbR[49].

40 Şener (n15) 155.

41 Erişir (n15) 226.

42 Erişir (n15) 226.

43 Barlas (n15) 86-87; Şener (n15) 155; Kale (n15) 176-177; Erişir (n15) 225-226.

44 Peksöz (n22) 153 ff.

45 Derleder (n7) 2485.

46 BGHZ 78, 311, 312 (BB, 1981, 450 ff); BGHZ 116, 86, 88 (BB 1992, 162 ff); BGH, NJW, 1992, 2222, 2226.

47 BGHZ 79, 374, 378 (BB, 1981, 629).

48 BGHZ 136, 254, 257 (BB 1997, 1861). Siehe Ulmer (n7) 586; Pohlmann (n7) 103; Derleder (n7) 2485; Weiss (n7) 56-59.

49 Für das schweizerische Recht siehe Wiegand (n12) 47.

D. Paradigmenwechsel im türkischen Recht[50]

Die Gesellschaft bürgerlichen Rechts weist trotz der Gruppenlehre im türkischen Recht strukturell wichtige Ähnlichkeiten zur deutschen GbR auf. Aber es gibt bedeutsame Unterschiede zwischen der Türkei und Deutschland und auch der Schweiz im Hinblick auf OHG und KG und deren Stellungen als Juristische Person. In Deutschland und in der Schweiz sind OHG und KG parteifähig obwohl sie keine Juristischen Personen sind. In der Türkei gibt es nur sehr wenige OHG und KG, dafür viele GbR. Denn die Gründung der GbR ist einfach und man braucht keine Registrierung.

Wenn Juristische Personen die Gesellschafter von Personengesellschaften werden möchten, können sie nur eine GbR gründen. Denn Juristische Personen können nicht die Gesellschafter einer OHG sein, sondern nur natürliche Personen (tHGB Art. 221). Es gibt diesbezüglich keine Beschränkungen für die GbR, was natürlich ein Grund ist, sich für die GbR zu entscheiden.

In der Praxis nehmen die Gesellschaften bürgerlichen Rechts an den Rechtsverhältnissen teil, als ob sie rechtsfähig wären. Daneben gründen die Gesellschafter in der Türkei sehr wichtige Gesellschaften bürgerlichen Rechts; z.B. Die dritte Brücke über den Bosporus wurde von einer GbR gebaut[51]. Basierend darauf klagen die Gesellschaften oder werden auch häufig verklagt. Denn die Kläger denken, dass die GbR aufgrund derart wichtiger Rechtsverhältnisse parteifähig ist. Solche Klagen werden jedoch regelmäßig abgelehnt; denn im Prozess ist die GbR nicht parteifähig.

Wenn das Gesetz erkennbar eine Regelung enthält, die nur im Ergebnis sachlich nicht befriedigt, ist das der Fall der rechtspolitischen Lücke[52]. In diesem Fall ist die Ausfüllung der Lücke nicht die Aufgabe des Richters, sondern der Gesetzgeber muss diese durch eine erforderliche Norm regeln[53]. In diesem Sinne gibt es im türkischen Recht rechtspolitische Lücken bei der GbR, die allenfalls vom Gesetzgeber auszufüllen sind.

Ich schlage für eine rechts -und parteifähige GbR anhand der deutschen und schweizerischen OHG und KG ein neues Modell vor. *De lege ferenda* bedarf es in der

50 Der Deutsche Bundesgerichtshof kann für Österreich aufgrund der Struktuverwandheit für einen Paradigmenwechsel ein Vorbild sein. Siehe zu dieser Ansicht Oliver Maass/Mathias Siems, 'Die Rechtsfähigkeit der Gesellschaft bürgerlichen Rechts in Deutschland -Ein Vorbild für Österreich?' (2002) 4 wbl 152-153. Die Rechstprechung des Bundesgerichtshofs kann nicht auf österreichische Verhältnisse übertragen werden. Gesellschaft bürgerlichen Rechts in der österreichischen Lehre ist weder Juristische Person noch teilrechtsfähiges Gebilde. Deswegen ist GbR nicht parteifähig in Österrecih (Dieter Duursma/Henriette-Christine Duursma-Keeplinger/Marianne Roth, *Handbuch zum Gesellschaftsrecht* (LexisNexis 2007) Nr 14-15,10, Nr 18).

51 9. HD, 15.3.2018, E 2017/25844, K 2018/5333 (Kazancı).

52 Emmenegger/Tschentscher (n34) Art 1, 350, Nr 366; Çiğdem Kırca 'Örtülü (Gizli) Boşluk Ve Bu Boşluğun Doldurulması Yöntemi Olarak Amaca Uygun Sınırlama (Teleologische Reduktion)' (2001) Ankara Üniversitesi Hukuk Fakültesi Dergisi 92.

53 Emmenegger/Tschentscher (n34) Art 1, 353-354, Nr 372; 347, Nr 361; Kırca (n52) 93.

Türkei einer neuen gesetzlichen Regelung[54]. Als Gesamthandsgesellschaft sollte die GbR eine Firma haben, Rechte und Pflichten haben, klagen und verklagt werden. Auf diese Weise sollte die GbR, wenn sie eine Firma benutzt und ein Handelsgewerbe betreibt, rechts-und parteifähig sein[55].

Dieses Modell beseitigt das Zweifel hinsichtlich der Registerpublizität von GbR wegen der Handelsregister[56]. Auch die Umwandlung in eine OHG oder KG ist für die GbR im türkischen Recht wegen der Persönlichkeit nicht möglich. Deswegen hat der Vorschlag keinerlei Nachteil für den Zivilprozess.

Fazit

Im türkischen und schweizerischen Recht ist die Gesellschaft bürgerlichen Rechts nicht rechts-und parteifähig. Aber in Deutschland gibt es wichtige Entwicklungen. Der deutsche Bundesgerichtshof hat die (Aussen-) Gesellschaft bürgerlichen Rechts für rechts-und parteifähig am 29.01.2001 erklärt. In diesem Beitrag wird die Frage gestellt, ob die Entscheidung des BGH auf die türkische GbR übertragen werden kann und soll. Es ist entschieden, dass die deutsche Lehre und Entscheidung des BGH nicht auf die türkische Gesellschaft bürgerlichen Rechts übertragen werden kann. Denn es gibt kein Rechtslücke über die Rechtsnatur der Gesellschaft bürgerlichen Rechts im türkischen Recht. Aber *de lege ferenda* bedarf es in der Türkei einer neuen gesetzlichen Regelung. In diesem Beitrag wurde eine Übertragung des Modells, wie es in Deutschland und der Schweiz existiert, auf das türkische Recht vorgeschlagen.

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54 Vgl Erişir (n15) 145.

55 Peksöz (n22) 162 ff.

56 Vgl Kale (n15) 176-177.

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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Can the Rome Statute of the International Criminal Court be Considered as the Relevant Human Rights Instrument in the Context of the Advisory Jurisdiction of the African Court on Human and Peoples' Rights?

Uluslararası Ceza Mahkemesi Roma Statüsü Afrika İnsan ve Halkların Hakları Mahkemesinin Danışma Görüşü Verme Yetkisi Bağlamında İlgili İnsan Hakları Belgesi Olarak Değerlendirilebilir Mi?

Ali Saçar[1]

Abstract
Paragraph 1 of article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights authorizes the African Court to give an advisory opinion within the broad scope of material jurisdiction. Although that is true in a textual sense, the African Court has preferred to the strict construction on the material jurisdiction and refused to give an opinion relating to the Rome Statute of the International Criminal Court. According to the author of this study, the African Court's advisory jurisdiction contains any subject, relating to the international human rights obligations of the African states, including instruments on the most serious crimes of international concern that have an impact on human rights.

Keywords
African Court on Human and Peoples' Rights, Rome Statute of the International Criminal Court, advisory jurisdiction, advisory opinion, human rights instruments

Öz
Afrika İnsan ve Halkların Hakları Şartı'nın Afrika İnsan ve Halkların Hakları Mahkemesi Kurulmasına İlişkin Protokolü'nün 4. maddesinin 1. fıkrası, Afrika Mahkemesi'nin danışma görüşü verme yetkisinin konu bakımından kapsamını oldukça geniş düzenlemektedir. Buna rağmen, Afrika Mahkemesi yetkisini dar yorumlayarak Uluslararası Ceza Mahkemesi Roma Statüsü'ne ilişkin danışma görüşü vermekten çekinmiştir. Bu çalışmanın yazarına göre, Afrika Mahkemesi'nin danışma görüşü verme yetkisi, insan haklarını da etkileyen en ağır suçların düzenlendiği belgeler dahil Afrikalı devletlerin uluslararası insan hakları yükümlülükleriyle ilgili her konuyu kapsamaktadır.

Anahtar Kelimeler
Afrika İnsan ve Halkların Hakları Mahkemesi, Uluslararası Ceza Mahkemesi Roma Statüsü, danışma görüşü verme yetkisi, danışma görüşü, insan hakları belgeleri

1 **Corresponding Author:** Ali Saçar (Ress. Asst./PhD.), Tekirdağ Namık Kemal University, Faculty of Law, General Public Law Department, Tekirdağ, Turkey. E-mail: ali.sacar01@gmail.com ORCID: 0000-0002-2984-0543

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Can the Rome Statute of the International Criminal Court be Considered as the Relevant Human Rights Instrument in the Context of the Advisory Jurisdiction of the African Court on Human and Peoples' Rights?

I. Introduction

In human rights law, all regional human rights courts have the advisory jurisdiction.[1] The African Court on Human and Peoples' Rights (African Court) is one of them. Paragraph 1 of article 4 of the Protocol to the African Charter on Human and Peoples' Rights (African Charter)[2] on the Establishment of an African Court on Human and Peoples' Rights (African Protocol)[3] states that "At the request of a Member State of the OAU,[4] the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.[5]" However, the advisory jurisdiction of the African Court is not effective because of the strict construction of this court within the scope of the advisory jurisdiction. Mostly, requests for an advisory opinion have been rejected, so the advisory jurisdiction of the African Court has become nonfunctional.[6] In this study, the orders of the African Court, which have requested an advisory opinion on international obligations of the African states related to the cooperation with the International Criminal Court (ICC) were examined.

Inter-American Court of Human Rights (Inter-American Court) has the most effective implementation of the advisory jurisdiction among human rights courts. It has given 25 advisory opinions to date. In this study, the advisory case law of the Inter-American Court will be used as a guide due to the similarity between the advisory jurisdiction of the Inter-American Court and the African Court. Both of them can give an advisory opinion on human rights instruments other than the instrument

1 Article 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), which was adopted on 4 November 1950 and entered into force on 3 September 1953, authorizes the European Court of Human Rights (European Court) to give an advisory opinion. The advisory jurisdiction of the European Court was first recognized by Protocol No. 2, which had been adopted on 6 May 1963 and had entered into force on 21 September 1970, then it was inserted to the European Convention by Protocol No. 11, which was adopted on 11 May 1994 and entered into force on 1 November 1998. Lastly, Protocol No. 16 to the European Convention, which was adopted on 2 October 2013 and entered into force on 1 August 2018, extended the advisory jurisdiction of the European Court. Article 64 of the American Convention on Human Rights (American Convention), which was adopted on 22 November 1969 and entered into force on 18 July 1978, authorizes The Inter-American Court of Human Rights (Inter-American Court) to give an advisory opinion.

2 The Charter was adopted on 1 June 1981 and entered into force on 21 October 1986.

3 The Protocol was adopted on 10 June 1998 and entered into force on 25 January 2004.

4 The OAU means the Organization of African Unity. After the Constitutive Act of the African Union, which was adopted on 7 November 2000 and entered into force on 26 May 2001, the Organization of African Unity was replaced by the African Union.

5 The Commission means the African Commission on Human and Peoples' Rights (African Commission). For the request which was rejected on the ground of this criteria, see *Request for Advisory Opinion No. 002/2012 by Pan African Lawyers' Union and Southern African Litigation Centre* Order of 15 March 2013, 4, para 8.

6 For the first and last advisory opinion given by the African Court, see *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child Before the African Court on Human and Peoples' Rights* Request No. 002/2013 Advisory Opinion of 5 December 2014.

which authorizes it. Paragraph 1 of article 64 of the American Convention on Human Rights (American Convention) states that "The member states of the Organization[7] may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States,[8] as amended by the Protocol of Buenos Aires,[9] may in like manner consult the Court."

II. The Meaning of "Relevant Human Rights Instruments"

According to paragraph 2 of Rule 82 of the Rules of Court of the African Court,[10] any request for an advisory opinion has to contain a concrete provision of the relevant instrument that is a subject of the advisory opinion, and circumstances lying behind the request. The sole advisory opinion given by the African Court was related to the African Protocol.[11] There has been no advisory opinion about human rights instruments other than the African Charter and the African Protocol. Therefore, it is not clear which instruments will be considered relevant,[12] and qualify as a human rights instrument. The advisory case law of the Inter-American Court can give an opinion on this matter.[13]

The first advisory opinion of the Inter-American Court has been about interpreting the phrase "other treaties concerning the protection of human rights in the American states" of article 64 of the American Convention.[14] The Inter-American Court has stated that its advisory jurisdiction has not been limited to international instruments adopted within the Organization of American States (American States) system.[15] On the other hand, a relevant instrument that might be a subject of an advisory opinion has had to be directly related to the protection of human rights in a member state of the American States.[16] Because of the text in article 64 of the American Convention has not contained

7 The Organization means the Organization of American States.

8 The Charter was adopted on 30 April 1948 and entered into force on 13 December 1951.

9 The Protocol of Buenos Aires was adopted on 27 February 1967 and had entered into force on 27 February 1970. After the amendment to the Charter of the Organization of American States with the Protocol of Cartagena de Indias, which was adopted on 5 December 1985 and entered into force on 16 November 1988, competent organs are listed in Chapter VIII.

10 The Rules were adopted on 1 September 2020 and entered into force on 25 September 2020.

11 *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child* (n 6) 5, para 8.

12 Frans Viljoen, *International Human Rights Law in Africa* (2nd ed, Oxford University Press 2012) 448.

13 AP van der Mei, "The Advisory Jurisdiction of the African Court on Human and Peoples' Rights" (2005) 5/1 *African Human Rights Law Journal* 27, 38. Paragraph 1 of article 31 of the Vienna Convention on the Law of Treaties, which was adopted on 23 May 1969 and entered into force on 27 January 1980, states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." So, the existence of similar texts in the same field requires a similar interpretation in line with the purpose of the effective protection of human rights.

14 *"Other Treaties" Subject to the Consultative Jurisdiction of the Court* Advisory Opinion OC-1/82 of 24 September 1982, 2, para 8.

15 Id 5, para 20.

16 Id 5, para 21.

any other restriction, the advisory jurisdiction cannot be interpreted restrictively.[17] The Inter-American Court has stated that "… the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto."[18] However, the advisory jurisdiction of the Inter-American Court has not included any matter concerning international obligations of a state that is not a member of the American States and the structure or operation of an international organization other than the American States.[19]

In the advisory case law of the Inter-American Court, there has been an example of interpreting international instruments, which has not been adopted for the protection of human rights but has contained a provision relating to human rights.[20] The Inter-American Court has stated that "… Article 36 of the Vienna Convention on Consular Relations[21] concerns the protection of the rights of a national of the sending State and is part of the body of international human rights law."[22]

When interpreting the phrase "relevant human rights instruments" in article 4 of the African Protocol, the aforesaid advisory case law of the Inter-American Court must be kept in mind. So, the advisory jurisdiction of the African Court shall be interpreted broadly.[23] However, the African Court has preferred the strict construction of the material jurisdiction already.

Coalition on the International Criminal Court, Legal Defence & Assistance Project, Civil Resource Development & Documentation Center and Women Advocates Documentation Center, which have been "… registered non-governmental organizations based in Nigeria and undertake work for the promotion and protection of human rights and the fight against impunity across Africa, especially in West Africa …",[24] requested an advisory opinion related to the interpretation of some provisions of the Rome Statute of the International Criminal Court (Rome Statute)[25], the Vienna Convention on the Law of Treaties and the Constitutive Act of the African Union.[26] Resolutions of the African Union that had been calling on member states to

17 Id 8, para 37.

18 Id 12, para 52.

19 Ibid.

20 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* Advisory Opinion OC-16/99 of 1 October 1999, 47, para 76.

21 The Convention was adopted on 22 April 1963 and entered into force on 19 March 1967.

22 *The Right to Information on Consular Assistance* (n 20) 64, para 141(2).

23 Mei, "The Advisory Jurisdiction of the African Court" (n 13) 39-40.

24 *Request for Advisory Opinion 001 of 2014*, 1-2, para 1.

25 The Statute was adopted on 17 July 1998 and entered into force on 1 July 2002.

26 *Request for Advisory Opinion 001 of 2014*, (n 24) 4-5, para 11.

refuse to cooperate with the Office of the Trial Prosecutor of the ICC to the arrest and surrender of president Omar al Bashir of Sudan were lying behind the request.[27] In conclusion, the applicants asked these questions:

> "**a.** Whether the Treaty obligation of an African state party to the Rome Statute of the ICC to cooperate with the court is superior to the obligation of that state to comply with the AU resolution calling for non-cooperation of its members with the ICC?
>
> **b.** If the answer to question (a) above is in the affirmative, whether all Africa State parties to the ICC have overriding legal obligation above all other legal or diplomatic obligations arising from resolutions or decisions of the African Union to arrest and surrender President Omah Al Bashir any time he enters into the territory of any of the African State parties to ICC?"[28]

The African Court received the request on 28 March 2014.[29] The African Commission confirmed that the request had not related to any case before itself.[30] However, the African Court refused to give an opinion upon the request on the grounds that "… it raises issues of general Public International Law and not human rights law, and does not specify any provisions of the Charter" and the lack of interest of the applicants to pursue the case.[31]

Applicants claimed the African Court re-listed the request because of the document showing interest in them to pursue the case, which had been transmitted to the Court before the order on inadmissibility was adopted.[32] The African Court refused to give an opinion because the applicants had not supplied any evidence about their assertion.[33] Also, it reiterated that "… the Authors have not specified the provisions of the Charter or any other international human rights instrument in respect of which the advisory opinion is being sought. The issues raised by the Authors are rather of general public international law and not of human rights. Indeed, the issues raised have to do with the hierarchy of norms in Public International Law".[34]

Former judge Fatsah Ouguergouz from Algeria dissented from the order of the African Court.[35] In addition to his dissenting view about the procedure followed in

27 Id 3-4, paras 8-9.

28 Id 5, para 12.

29 *Request for Advisory Opinion No. 001 of 2014 by the Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC)* Order of 5 June 2015, 5, para 6.

30 Id 5, para 8.

31 Id 6, para 13.

32 *Request for Advisory Opinion No. 001 of 2015 by the Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC)* Order of 29 November 2015, 5, para 15.

33 Id 6, para 16.

34 Id 6, para 18.

35 *Request for Advisory Opinion No. 001 of 2015 by the Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC)* Dissenting Opinion of Judge Fatsah Ouguergouz 1, para 1.

the treatment of the request,[36] he argued that the request was within the material jurisdiction of the African Court.[37] Judge Ouguergouz stated that "… the Authors indicated their reliance in particular on Articles 1, 4, 5, 12, 13 and 86 of the Rome Statute of the International Criminal Court; they also specified the circumstances giving rise to their request."[38] So, the matter of debate was whether the Rome Statute could be considered within the "relevant human rights instruments".[39]

According to judge Ouguergouz, the protection of human rights is based on international law, so matters that relate to the law of treaties or the hierarchy of norms in international law may also be a concern with human rights.[40] The author of this study shares this opinion but it must be extended. Firstly, the phrase "relevant human rights instruments" can be interpreted as any human rights instrument or provision of another kind of international instrument relating to the protection of human rights, which deal with international human rights obligations of the member states of the African Union. There is an argument that the material jurisdiction of the African Court contains all human rights matters including ones which are not related to legal obligations arising from the signature or ratification of relevant instruments by any African state.[41] The author of this study does not agree with this argument because the word "relevant" requires the existence of necessity among the member states of the African Union to make international human rights obligations clear. Secondly, if a question in the request for an advisory opinion is formulated imperfectly, the African Court may reformulate the question and give an advisory opinion. The latter argument can be deduced from the practice of the Inter-American Court.[42]

36 Id 1-2, paras 2-8.

37 Id 2-5, paras 9-24.

38 Id 3, para 16.

39 Id 3, para 17.

40 Id 4, para 19.

41 Frans Viljoen, "Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights" (2018) 67/1 *International and Comparative Law Quarterly* 63, 91-92.

42 For more information, see *Enforceability of the Right to Reply or Correction* Advisory Opinion OC-7/85 of 29 August 1986, 3-4, paras 12-17. It can also be deduced from the advisory practices of the Permanent Court of International Justice and the International Court of Justice. For more information about former, see *Interpretation of the Greco-Turkish Agreement of December 1st, 1926* Advisory Opinion of 28 August 1928 Series B. – No. 16, 15; Georg Schwarzenberger, *International Law*, vol I (2nd ed, Stevens & Sons Limited 1949) 485–86. For more information about latter, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion of 9 July 2004 ICJ Reports 2004, 136, 153–54, para 38; Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, vol I (4th ed, Martinus Nijhoff Publishers 2006) 345–46; Jochen Abr. Frowein and Karin Oellers-Frahm, "Article 65" in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2006) 1401, 1409, para 23; Mahasen M. Aljaghoub, *The Advisory Function of the International Court of Justice 1946-2005* (Springer 2006) 133–34. Because of not resulting with binding judgment on a specific dispute between applicant and respondent, international courts generally have not refused a request unless there have been compelling reasons to find an application inadmissible. There has been no concrete example of what have been the compelling reasons. International courts have used this phrase for interpreting advisory jurisdiction broadly. For the practice of the African Court, see *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child*, (n 6) 11, para 40.

III. Why the Rome Statute May be Considered as a Relevant Human Rights Instrument?

The Security Council of the United Nations decided to refer the situation in Darfur since 1 July 2002, which was the date the Rome Statute entered into force, to the Prosecutor of the ICC.[43] In this resolution,[44] there was a reference to a report adopted by the International Commission of Inquiry (Commission of Inquiry) and related to violations of international humanitarian law and human rights law in Darfur.[45]

According to the Commission of Inquiry, the killing of civilians in the armed conflict has violated human rights obligations regarding the right to life in addition to other international obligations.[46] Also, the wanton destruction of villages or devastation not justified by military necessity has violated the rights of everyone to adequate food, clothing and housing.[47] The forcible transfer of civilian populations has violated the freedom of movement, the right not to be displaced arbitrarily and the right to adequate housing.[48] In addition to the use of torture generally,[49] the rape and other forms of sexual violence have contravened the prohibition of torture and cruel, inhuman or degrading treatment or punishment and the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[50] The unlawful confinement, incommunicado detentions and enforced disappearances have violated the right to liberty and security of person and the requirement of humane treatment and respect for the dignity of all persons deprived of their liberty.[51]

The Commission of Inquiry stated that "… the Government of the Sudan and the Janjaweed are responsible for a number of violations of international human rights and humanitarian law. Some of those violations are very likely to amount to war crimes, and given the systematic and widespread pattern of many of the violations, they would also amount to crimes against humanity. The Commission further finds that the rebel movements are responsible for violations that would amount to war crimes."[52] Although it recognized that some individuals, as well as government

43 Resolution 1593 (2005) adopted by the Security Council at its 5158th meeting, on 31 March 2005 S/RES/1593 (2005) 1, para 1.

44 Id 1, preamble.

45 *Report of the International Commission of Inquiry on Darfur to the Secretary-General* adopted on 25 January 2005 (S/2005/60), pursuant to the Security Council resolution 1564 (2004) of 18 September 2004.

46 Id 84, para 291. It referred to paragraph 1 of article 6 of the International Covenant on Civil and Political Rights (ICCPR), which was adopted on 16 December 1966 and entered into force on 23 March 1976, and article 4 of the African Charter.

47 Id 89, para 318. It referred to article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which was adopted on 16 December 1966 and entered into force on 3 January 1976.

48 Id 92, para 330. It referred to article 12 of the ICCPR and article 11 of the ICESCR.

49 Id 106, para 375.

50 Id 101, para 356. It referred to article 7 of the ICCPR and article 5 of the African Charter. Article 37 of the Convention on the Rights of the Child, which was adopted on 20 November 1989 and entered into force on 2 September 1990, has been referred for the protection of the child against from all forms of sexual exploitation and sexual abuse.

51 Id 111, para 403. It referred to articles 7, 9 and 10 of the ICCPR.

52 Id 170, para 630.

officials, might have committed acts with genocidal intent,[53] it found the government of Sudan had no genocidal policy.[54]

The Pre-Trial Chamber I of the ICC issued the warrant of arrest for the president Omar al Bashir of Sudan based upon the reasonable grounds to believe that he was responsible for some war crimes and crimes against humanity perpetrated in Darfur.[55] After that, another warrant of arrest, which contained the accusation of genocide, was issued[56] because the Appeals Chamber of the ICC had stated that the application of the erroneous standard of proof had caused the Pre-Trial Chamber to reject issue warrant of arrest in respect of genocide.[57]

The Assembly of the African Union (Assembly) expressed its concern about the indictment against Omar al Bashir of Sudan[58] and stated that it would impair the peace processes underway in Sudan.[59] At the same time, the Assembly condemned "the gross violations of human rights in Darfur" and urged, "the perpetrators be apprehended and brought to justice".[60] That means that the situation in Darfur has been considered by the African Union as a human rights matter, similar to the view of the Commission of Inquiry, since the very beginning. After the first arrest warrant, the Assembly decided that the member states of the African Union should not implement it.[61] Chad made a reservation on this decision.[62] The Assembly reiterated its decision on not cooperating with the ICC in the 30th session.[63] It also requested the "African Group in New York to immediately place on the agenda of the United Nations General Assembly a request to seek an advisory opinion from the International Court of Justice on the question of immunities of a Head of State and Government and

53 Id 173, para 641.

54 Id 172–73, para 640.

55 *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Situation in Dafur, Sudan) Warrant of Arrest for Omar Hassan Ahmad Al Bashir of 4 March 2009 No ICC-02/05-01/09-1, 7–8.

56 *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Situation in Darfur, Sudan) Second Decision on the Prosecution's Application for a Warrant of Arrest of 12 July 2010 No ICC-02/05-01/09-94, 28.

57 *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Situation in Darfur, Sudan) Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" of 3 February 2010 No ICC-02/05-01/09-73, 18, para 41.

58 *Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan* Adopted by the 12th Ordinary Session of the Assembly of the African Union in Addis Ababa, Ethiopia on 1–3 February 2009 Assembly/AU/Dec.221(XII) 1, para 1.

59 Id 1, para 2.

60 Id 1, para 7.

61 *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)* Adopted by the 13th Ordinary Session of the Assembly of the African Union in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009 Assembly/AU/Dec.245(XIII) Rev.1, 2, para 10. For more information about the manner of the African states on this matter, see Elise Keppler, "Managing Setbacks for the International Criminal Court in Africa" (2012) 56/1 *Journal of African Law* 1; Ottilia Anna Maunganidze and Anton du Plessis, "The ICC and the AU" in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 65, 67–68, 76–77; and especially for the situation in South Africa, see Johan D van der Vyver, "The Al Bashir Debacle" (2015) 15/2 *African Human Rights Law Journal* 559.

62 *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court*, (n 61).

63 *Decision on the International Criminal Court* Adopted by the 30th Ordinary Session of the Assembly of the African Union in Addis Ababa, Ethiopia on 28–29 January 2018 Assembly/AU/Dec.672(XXX) Doc EX.CL/1068(XXXII) 1, para 2(iii).

other Senior Officials as it relates to the relationship between Articles 27 and 98 and the obligations of States Parties under International Law".[64] With reference to this decision,[65] The African States Members of the United Nations demanded the United Nations General Assembly (General Assembly) request an advisory opinion on the conflicting obligations of states relating to immunity of head of states and government or other senior officials.[66]

Although the African Court interprets the debate as the conflict of international obligations that are not related to human rights, the aforementioned historical background proves that since the very beginning, serious human rights violations have been taken into consideration by both the United Nations and the African Union. Nobody has claimed that there has been a matter not relating to human rights.

Article 1 of the Rome Statute authorizes the ICC to "… exercise its jurisdiction over persons for the most serious crimes of international concern …". According to article 5 of the Statute, these crimes are the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Perpetrators of these crimes may also violate the human rights of victims. For example, if a person kills many people, who are members of the same religious group, with intent to destroy all of them, there will be both the crime of genocide and widespread violation of the right to life. Therefore, the most serious crimes of international concern may also be considered the most serious human rights violations.[67]

In a contentious case, the African Court considered two instruments as relevant human rights instruments because they relate to international obligations ensuring

64 Id 2, para 5(ii). There is a debate about the obligation to cooperate with the ICC on the implementation of an arrest warrant which is related to a head of state and government not a party to the Rome Statute. In this situation, the obligation to cooperate with the ICC is based on the Security Council resolution. For more information about this matter, see Annalisa Ciampi, "The Obligation to Cooperate" in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol II (Oxford University Press 2002) 1607; Dapo Akande, "International Law Immunities and the International Criminal Court" (2004) 98/3 *American Journal of International Law* 407 in William A Schabas (ed), *International Criminal Law*, vol II (An Elgar Research Collection 2012) 252, 264–78; Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (4th ed, Cambridge University Press 2009) 439–41; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 1036–46.

65 *Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials* Request for the inclusion of an item in the provisional agenda of the seventy-third session 18 July 2018 A/73/144, 3, para 8.

66 Id 1. Meanwhile, paragraph 1 of article 3 of the Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which was adopted on 27 June 2014 and not entered into force, recognizes the international criminal jurisdiction of the new African Court. Also, article 46A bis of the Statute annexed to it gives immunity against the criminal jurisdiction of the Court to head of states and government or other senior officials, during their tenure of office. For more information, see Viljoen, *International Human Rights Law in Africa* (n 12) 450–51; Manisuli Ssenyonjo and Saidat Nakitto, "The African Court of Justice and Human and Peoples' Rights 'International Criminal Law Section': Promoting Impunity for African Union Heads of State and Senior State Officials?" (2016) 16/1 *International Criminal Law Review* 71; Dire Tladi, "Article 46A Bis: Beyond the Rhetoric" in Charles C. Jalloh, Kamari M. Clarke and Vincent O. Nmehielle (eds), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (Cambridge University Press 2019) 850.

67 Viljoen, "Accessing the African Court on Human and Peoples' Rights" (n 41) 92. Also, the African Commission has found various human rights violations in the matter of Darfur. For more information about this decision, see Frans Viljoen, "Introductory Note to African Commission on Human and Peoples' Rights: Sudan Human Rights Org. v. Sudan; Ctr. For Hous. Rights & Evictions v. Sudan" (2010) 49/6 *International Legal Materials* 1569, 1569–72.

the implementation of article 13 of the African Charter, which has prescribed the right to participate freely in the government.[68] In the terms of paragraph 1 of article 3 of the African Protocol, the material jurisdiction of the African Court in the context of the contentious jurisdiction contains the African Charter, the African Protocol, and any other relevant human rights instrument ratified by the relevant state. The African Court stated, "… In determining whether a Convention is a human rights instrument, it is necessary to refer in particular to the purposes of such Convention. Such purposes are reflected either by an express enunciation of the subjective rights of individuals or groups of individuals, or by mandatory obligations on State Parties for the consequent enjoyment of the said rights."[69] So, if an instrument contains specific human rights or obligations on the implementation of human rights, it shall be considered as a relevant human rights instrument. This determination is also valid for the advisory jurisdiction.

In another contentious case, the African Court found violation of latter part of the obligation to adopt legislative or other measures to give effect to human rights enshrined in the African Charter, which has been determined in article 1 of the Charter, in conjunction with paragraph 1 of article 7 of the Charter on the right to have one's cause heard by competent national courts.[70] Because, the respondent state "… had not acted with due diligence in seeking out, prosecuting and placing on trial those responsible for the murder …" of four victims.[71] Although, the applicants had alleged that there had been a violation of the right to life,[72] the African Court did not examine this matter on the grounds that the murder of the victims had occurred on the date outside the jurisdiction of the Court.[73] So, it must not mean that any other right cannot be violated in conjunction with the general obligation to adopt all kinds of measures to ensure the implementation of it.

According to the basic principles and guidelines adopted by the General Assembly, if gross violations of international human rights law also constitute an international crime, "… States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations." [74] This principle contains, "… extradition or

68 Viljoen, "Accessing the African Court on Human and Peoples' Rights" (n 41) 93.

69 *Actions pour la Protection des Droits de l'Homme (APDH) v. The Republic of Cote d'Ivoire* Application 001/2014 Judgment of 18 November 2016, 15, para 57.

70 *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabe Human and Peoples' Rights Movement v. Burkina Faso* Application 013/2011 Judgment of 28 March 2014, 54, paras 199, 203(3).

71 Id 44, para 156.

72 Id 5, paras 12-14.

73 Id 11, para 32(1)

74 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* Resolution adopted by the General Assembly on 16 December 2005 A/RES/60/147, 5, para 4.

surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice …".[75]

The Rome Statute determines international criminal responsibility for the most serious crimes of international concern, which may also be serious human rights violations.[76] If a perpetrator of these crimes is not investigated, tried or sentenced, the protection of human rights shall heavily be harmed. Any state, which prevents the process of criminal responsibility or refrains from cooperating with it, may be responsible for human rights violations because, there are international obligations ensuring criminal responsibility for widespread human rights violations, in the Rome Statute.[77] Therefore, it should be considered as a relevant human rights instrument which includes obligations on the implementation of human rights such as criminal responsibility for the perpetrators of the human rights violations.

The African Court may give an advisory opinion about whether procedural obligations to the investigation of human rights violations include such an international obligation to cooperate with ICC contrary to the manner of the African Union. It could be possible to give an advisory opinion on this matter after the reformulation of questions of the aforementioned request. For example, the question (a) may be understood as "in the context of the obligation on criminal responsibility for the perpetrators of the human rights violations arising from articles 1 and 7 of the African Charter, whether the obligation of an African state party to the Rome Statute to cooperate with the ICC is superior to the obligation of that state to comply with the African Union resolution calling for non-cooperation of its members with the ICC". [78]

IV. Conclusion

The advisory jurisdiction of the African Court is recognized so broadly in the text of the African Protocol. However, the strict construction of the African Court on the material jurisdiction makes the effective implementation of the advisory procedure difficult.

75 Id 5, para. 5.

76 Cryer and others, *An Introduction to International Criminal Law and Procedure* (n 64) 10; Thomas Margueritte, "International Criminal Law and Human Rights" in William A Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011) 435, 436–38.

77 Annalisa Ciampi, "State Cooperation with the ICC and Human Rights" in Mauro Politi and Federica Gioia (eds), *The International Criminal Court and National Jurisdictions* (Ashgate 2008) 103, 108–09; Margueritte, "International Criminal Law and Human Rights" (n 76) 438–39. An early example of the criminal responsibility for widespread human rights violations was the Nuremberg prosecutions. Diane F Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1991) 100/8 *Yale Law Journal* 2537 in William A Schabas (ed), *International Criminal Law*, vol II (An Elgar Research Collection 2012) 693, 697–700.

78 It is not the matter of this study whether the African Court must give an affirmative or negative response to this question.

According to the African Protocol, the African Court may give an advisory opinion relating to any human rights instrument on the international human rights obligations of the member states of the African Union. Relevant instruments may be adopted for the purpose other than the protection of human rights or may not contain any specific human rights provision. If it includes any provision ensuring the implementation of human rights and deals with human rights obligations of the African states, the African Court shall find itself competent to interpret such an instrument.

When the request to give an advisory opinion about conflicting international obligations of the African states on the Omar al Bashir debate had been received by the African Court, there arose a chance to interpret the Rome Statute as a relevant human rights instrument after reformulation of questions. However, in the decision of the African Court, there was not any discussion on the nature of the Rome Statute[79] or circumstances lying behind the request. The only reason was that the subject of the request was about international law matters but not related to human rights. The formulation of questions within the request was not enough to assert that the case was about international human rights obligations. Nevertheless, the author of this study reiterates that a request should not be refused if it is possible to reformulate questions. International obligations on the criminal responsibility for widespread human rights violations are related to human rights, therefore the African Court may interpret the Rome Statute as a relevant human rights instrument.

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Corr v IBC Vehicles Ltd [2008] UKHL 13, [2008] 1 AC 884.

R (Roberts) v Parole Board [2004] EWCA Civ 1031, [2005] QB 410.

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Callery v Gray [2001] EWCA Civ 1117, [2001] 1 WLR 2112 [42], [45].

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R v Leeds County Court, ex p Morris [1990] QB 523 (QB) 530–31.

If citing a particular judge:

Arscott v The Coal Authority [2004] EWCA Civ 892, [2005] Env LR 6 [27] (Laws LJ).

Statutes and statutory instruments

Act of Supremacy 1558.

Human Rights Act 1998, s 15(1)(b).

Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166.

EU legislation and cases

Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1, art 5.

Case C–176/03 *Commission v Council* [2005] ECR I–7879, paras 47–48.

European Court of Human Rights

Omojudi v UK (2009) 51 EHRR 10.

Osman v UK ECHR 1998–VIII 3124.

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Simpson v UK (1989) 64 DR 188.

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Gareth Jones, *Goff and Jones: The Law of Restitution* (1st supp, 7th edn, Sweet & Maxwell 2009).

K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998).

Contributions to edited books

Francis Rose, 'The Evolution of the Species' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks (OUP 2006).*

Encyclopedias

Halsbury's Laws (5th edn, 2010) vol 57, para 53.

Journal articles

Paul Craig, 'Theory, "Pure Theory" and Values in Public Law' [2005] PL 440.

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Online journals

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Command papers and Law Commission reports

Department for International Development, *Eliminating World Poverty: Building our Common Future* (White Paper, Cm 7656, 2009) ch 5.

Law Commission, *Reforming Bribery* (Law Com No 313, 2008) paras 3.12–3.17.

Websites and blogs

Sarah Cole, 'Virtual Friend Fires Employee' (*Naked Law*, 1 May 2009)
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